Continued support to the criminal justice reform in Ukraine

DGI (2017)04

Strasbourg, 17 March 2017

OPINION

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

on the Draft Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine (regarding improvements of mechanisms for achieving the objectives of criminal proceedings)"

(Draft Law of Ukraine No. 5610)

Prepared on the basis of expertise by:

Mr Jeremy McBride and Mr Peter Pavlin

This Opinion examines proposed amendments to the Criminal Procedure Code of Ukraine that would allow for deeming of notification of the content of a summons to persons outside Ukraine, an increase in the possible length of custody during the pre-trial investigation in certain cases, the possible duration of such an investigation in certain cases (as well as the possibility of prolonging this), an addition to the grounds for suspending a pre-trial investigation, various changes to the arrangements governing the use of special pre-trial investigation (in absentia), the conduct of trials of persons who are both present and absent, the conclusion of plea agreements in certain cases where the suspect implicates another person's involvement in the commission of offences and the elaboration of a number of transitional provisions. Although the objectives of most of the proposed amendments are compatible with European standards, many aspects of them need to undergo some modification in order to prevent breaches of those standards from occurring. In addition, a condition that certain persons concluding plea agreements should "turn in" other possible offenders should not be retained because of the risk of thereby prejudicing the fair trial of those persons. Furthermore, the actual application of certain others have the potential to lead to violations of Article 6(1) of the European Convention and it will, therefore, be very important to guard against this occurring wherever they are relied upon.

A. INTRODUCTION

1. This Opinion is concerned with the Draft Law of Ukraine no.5610 "On Amendments to the Criminal Procedure Code of Ukraine (regarding improvements of mechanisms for achieving the objectives of criminal proceedings)" ("the Draft Law"). The Opinion analyses the version of the Draft Law adopted by the Verkhovna Rada of Ukraine in the first reading, and does not take into account the subsequent changes to the Draft Law.

2. The present Opinion reviews the compliance of the amendments proposed to be made to the Criminal Procedure Code of Ukraine ("the Code") by the Draft Law with European standards, particularly the European Convention on Human Rights ('the European Convention') and the case law of the European Court of Human Rights ("the European Court"). It also makes suggestions as to how the Draft Law could be brought in to compliance with these standards.

3. The argumentation of the need to adopt the Draft Law specified in the Explanatory Note prepared by its drafters focuses on three issues, namely,

   - addressing problems arising from the inclusion of the time for examination of pre-trial investigation materials in the overall time limit for pre-trial investigation;
   - improving the provisions regarding time limits of detention and pre-trial investigation and the grounds and procedure for their extension; and
   - adding further rules defining the sequence of actions for courts in the event that indictments, motions for application of compulsory or educational

measures are received before the expiry of the two-year term after Article 216.4 comes into force.

4. However, the Explanatory Memorandum's listing of the key provisions in the Draft Law also deals with a number of other issues, namely,

   - arrangements for holding special court proceedings, where other accused are involved in such proceedings;
   - the summoning of a person staying outside Ukraine;
   - the effect on a ruling to grant permission for apprehension with a view to compelled appearance following a voluntary appearance by a suspect before an investigative judge or by an accused before a court;
   - the conclusion of a plea agreement in proceedings relating to especially grave crimes committed by an organised group or a criminal organisation, or by a terrorist group or a terrorist organisation; and
   - certain amendments to the Code's transitional provisions.

   No argumentation is provided in support of the proposed amendments concerning these issues.

5. The Opinion provides an article by article examination of the effect of the proposed amendments to the Code before concluding with an overall assessment of the compatibility of the Draft Law with European standards.

6. Remarks will not be made with respect to provisions in the Draft Law that are considered appropriate or unproblematic unless this might not seem to be so at a first glance or is otherwise necessary for the overall assessment of their compatibility with European standards.

7. *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.*

8. The Opinion has been based on an unofficial English translation of the Draft Law and its Explanatory Note, which has been provided by the Council of Europe's secretariat.

9. The Opinion has been prepared on the basis of expertise by Jeremy McBride[1] and Peter Pavlin[2] under the auspices of the Council of Europe's Project "Continued Support to the Criminal Justice Reform in Ukraine" funded by the Danish government.

[1] Barrister, Monckton Chambers, London and Visiting Professor, Central European University, Budapest.
[2] Senior Secretary, the Ministry of Justice of the Republic of Slovenia – the Directorate for Legislation on the Justice System, Republic of Slovenia.

B. ARTICLE BY ARTICLE ANALYSIS

Articles 135 and 136

10. The effect of these two provisions would be to provide that a person staying outside Ukraine can be deemed to have been properly informed about the content of a summons from the moment of its publication in nationwide mass media where this summons has been sent to his or her last known address and it has been published in the official printed media and on the official website of the agency conducting pre-trial investigation. Thus, the proposed provisions would allow summonses to be sent directly to addresses abroad without any intermediary activity by an authority of the State concerned.

11. The direct sending of a summons to a person's last known address is likely to be regarded by the European Court as sufficient (as a legal fiction) to satisfy the requirement to make diligent efforts to notify an accused person of a hearing and to allow it to be concluded that he or she has waived the right to appear and to defend him or herself or that person was actually attempting to evade trial[3]. However, reliance on its publication "in nationwide mass media" for the timing of the notification to become effective does not provide any certainty that he or she would be aware of the proceedings since the mass media are in Ukraine and, by definition, the person concerned is not.

12. Furthermore, it is unclear what is the real value of the proposed reliance on the mass media publication as it should be possible to get a confirmation that a summons has in fact been delivered to the last known address of the person concerned within a matter of days of it being sent. The proposed reliance on the mass media publication could mean that no such confirmation would be sought and lead the European Court to conclude that the necessary diligence regarding notification had not been undertaken.

13. *Compliance with the requirements of the European Court would be achieved by replacing the present deeming provision with one that specifies that notification is deemed to be effective upon confirmation of the summons's delivery to the last known address of the person concerned.*

14. It should also be noted that only 34 of the 47 Council of Europe member states have ratified the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters[4], Article 16, which allows the competent judicial authorities of any Party to directly address, by post, procedural documents and judicial decisions, to persons who are in the territory of any other Party. Moreover, it should be noted that paragraph 2 of this provision requires procedural documents and judicial decisions to be accompanied by a report stating that the addressee may obtain

[3] See *Colozza v. Italy*, no. 9024/80, 12 February 1985, para. 28 and *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, paras. 87-88.
[4] Ukraine did so on 14 September 2011.

information from the authority identified in the report, regarding his or her rights and obligations concerning the service of the papers[5].

15. It is known how detailed the contents of the summonses would be but it should be borne in mind that, if this is substantial, their publication in nationwide mass media could lead to a failure to respect the right to private life not only of the suspect but also of others including the victims[6]. Furthermore, it will be important that any statements accompanying the summons by officials should not give the impression that the person sought is guilty as otherwise there will be a violation of the presumption of innocence guaranteed by Article 6(2) of the European Convention[7].

16. *The proposed service arrangements, subject to the modification suggestion, should not be used in respect of persons in States that have not ratified the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters. Also, there is a need to guard against any publication violating the right to respect for private life and the presumption of innocence.*

Article 190

17. The proposed amendment would render "ineffective" a ruling that grants permission for the apprehension with a view to compelled appearance where the suspect voluntarily appears before the court concerned.

18. In doing so, it replaces the provision in sub-paragraph 3(2) that renders a permission for the apprehension ineffective, once the time limit set in it has expired or, if there is none, six months have elapsed. It is not evident that the existing provision needs to be replaced by the proposed amendment as they deal with quite different situations and there should be no doubt that a permission is no longer effective once the time limit prescribed has expired. Moreover, the existing six months' time limit where none is prescribed is a useful guarantee against a possible apprehension being arbitrary.

19. The proposed amendment is certainly desirable as the court before the person voluntarily appears should be the one to decide whether it is appropriate for him or her to be remanded in custody. However, although a duty would be placed on the investigative judge or the court to notify the public prosecutor about such a voluntary appearance, this does not guarantee that there might still be some reliance on such a ruling to apprehend a suspect who has so appeared since the transmission of information to all concerned might not happen speedily or indeed be noticed.

20. *It would, therefore, be appropriate to retain the existing provision and make the proposed amendment an additional one in this Article. At the same time the*

[5] Pursuant to Article 15.3, where the authority that issued the papers knows or has reasons to believe that the addressee understands only some other language, the papers, or at least the most important passages thereof, must be accompanied by a translation into that other language.

[6] See such a problem arising in slightly different contexts in *Z v. Finland*, no. 22009/93, 25 February 1997 and *Craxi v. Italy (No. 2)*, no. 25337/94, 17 July 2003.

[7] See, e.g., *Khuzhin and Others v. Russia*, no. 13470/02, 23 October 2008.

requirement in the proposed amendment should be strengthened by specifying that the ruling has to be formally annulled where there is a voluntary appearance.

Article 197

21. The proposed amendment would allow the total possible duration of keeping a suspect in custody in the course of a pre-trial investigation to be eighteen months where the proceedings are particularly complex ones in respect of especially grave crimes committed by an organised group, a criminal organisation, a terrorist group or a terrorist organisation. This would extend the present maximum duration by six months and, in principle, the new period would not be incompatible with Article 5(3)[8] of the European Convention so long as there continues to be regular review by a court as to whether remand in custody of the person concerned is still justified.

22. However, the fact that a specific case concerns the sort of especially grave crimes specified does not necessarily mean that it is particularly complex and so warrants a possible longer period of remand in custody than for especially grave crimes that are not particularly complex. Nonetheless, there is a risk of the proposed longer duration being automatically applied in such cases since there is no indication in the proposed amendment as to the factors that would make a case "particularly complex"[9].

23. *The proposed provision should thus be modified so that they indicate the relevant considerations for finding that a case is particularly complex*.

Article 219

24. The proposed amendments to this provision involve the introduction of a total possible duration of a pre-trial investigation of eighteen months from the date the person concerned is notified of suspicion in committing an especially grave crime or is under a special pre-trial investigation and changes to the method of calculating the specified time limits.

25. The change in the duration relating to especially grave crimes would entail an extension of the existing period by six months but, as there is no proposal to modify sub-paragraph 2(3), the addition of this longer duration would result in two different (and conflicting) durations for pre-trial investigations involving especially grave crimes.

26. *There will be a need to remove the reference to especially grave crimes in sub-paragraph 2(3) should the proposed amendment be retained*.

27. The possibility of the pre-trial investigation lasting up to eighteen months is not in itself problematic as far as the European Convention is concerned since it is possible

[8] See, e.g. *Chraidi v. Germany*, no. 65655/01, 26 October 2006, in which remand in custody lasting 5 years and nearly 6 months in a complex terrorist case was not held to be in violation of Article 5(3).

[9] It should also be borne in mind that even if the case is a particularly complex one, there will still be a need to establish that at least one of the grounds recognised by the European Court as justifying the use of remand in custody – risk of flight, interference with the administration of justice and commission of further offences – and specified in Article 183 exists.

for such a period to elapse without the right to be tried within a reasonable time being violated[10]. However, whether such a period will be regarded as reasonable will depend upon whether the proceedings have been conducted diligently. At present there seems to be no safeguard against the possibility of the proposed duration occurring where the prosecution is not being pursued with the diligence required since the continuation of a pre-trial investigation in such circumstances is not open to challenge by the person affected under Article 303 of the Code during pre-trial proceedings but only during preparatory proceedings in court in accordance with Articles 314–316 of the Code.

28. *There should thus be included a possibility of challenging in court a failure to pursue a prosecution with due diligence so that the proposed duration of eighteen months is not abused*.

29. The proposed amendment to paragraph 3 would involve the exclusion of the time for the examination by the parties of pre-trial investigation materials from the calculation of whether or not the time limit for pre-trial investigation has been reached. This being proposed because, according to Explanatory Note, of abuses by defence counsel which lead to a need to submit motions to extend the time for pre-trial investigation even though that has in fact been completed. There is no indication in the Explanatory Note as to how extensive such abuses are but the proposed remedy – which runs the risk of the criminal proceedings lasting for longer than is reasonable – seems inappropriate as it does not actually do anything to address the supposed abuse.

30. *Insofar as this is actually a problem, it would be more appropriate for use to be made of the ability, pursuant to paragraph 10 of Article 290 of the Code, to set a time limit for reviewing materials.*

Articles 280 and 281

31. The proposed amendments to these provisions would change one of the grounds for suspending an investigation and add to the circumstances in which a search for someone is to be announced. The latter would now apply not only to cases where the whereabouts of a suspect are unknown but also those where the person is outside Ukraine and has failed to appear before an investigator following a summons whereas the former would provide for the possibility of suspension in both cases rather than, as at present, where the person has absconded with the view of avoiding criminal liability and his or her whereabouts are unknown. The revised provisions are more coherent and are not problematic.

32. However, it is appropriate for any suspension to be subject to the requirement in paragraph 2 of Article 280 to carry out all possible procedural actions, as well as the proposed addition of conducting a search, delay in carrying out a pre-trial investigation might undermine the gathering of evidence and could also impact on other measures, such as the freezing of improperly obtained assets.

[10] See, e.g., *Punzelt v. Czech Republic*, no. 31315/96, 25 April 2000.

Article 294

33. The proposed amendments to this provision would allow for the extension of the time limit for a pre-trial investigation to be extended by the Prosecutor General of Ukraine by up to eighteen months "in view of the exceptional complexity of proceedings and subject to extraordinary circumstances".

34. No definition is provided for the term "exceptional complexity" – this is an undefined term in the existing provision governing the grant of an extension of duration by up to twelve months – but one for "extraordinary circumstances" would be introduced by the proposed amendments. However, that definition seems less to do with such circumstances than with the factors that make an investigation complex, namely, ones concerned with the examinations to be conducted, the witnesses to be interviewed and other connected offences, as well as the activity in question relating to an organised group, a criminal organisation, a terrorist group or a terrorist organisation. While all of these considerations would be capable of justifying a longer pre-trial investigation in a particular case, the use of the two potentially overlapping terms – with one left undefined - as a basis for extending duration means that there will be undesirable uncertainty as to when an extended pre-trial investigation is warranted.

35. *There is thus a need for distinct definitions for the terms "exceptional complexity" and "extraordinary circumstances".*

36. *It would also be desirable to clarify what is the difference between the terms "particular complexity" (also used in the proposed amendments to Article 197) and "exceptional complexity".*

Article 297-1

37. The proposed amendments to this provision would clarify in respect of whom "special pre-trial investigation (in absentia)" shall be conducted, would extend the offences for which such investigation is possible and would allow such an investigation to be undertaken in respect of only certain of the persons who have been notified of suspicion.

38. The first amendment would make it clear that this form of pre-trial investigation can be conducted "in respect of one or more suspects" and the second one would allow this to occur where the suspected offences concern the creation of a criminal organization, the giving of assistance to members of criminal organizations and covering up of their criminal activity, gangsterism and acts of terrorism. The former one may already have been implicit and the latter one adds offences of sufficient gravity to warrant an in absentia procedure. Neither are thus problematic.

39. The conducting of special pre-trial investigation in respect of only some of the persons who have been notified of suspicion which would be introduced in an entirely new paragraph 3 for this provision is not, in principle problematic. However, there is a risk that the absence of the persons concerned during the regular pre-trial

investigation of the other persons who have been notified of suspicion might result in potential prejudice to them as a result of them not being able to ask questions, submit comments and objections in respect of the manner in which procedural actions are undertaken.

40. *It will, therefore, be important for this to be taken into account in the course of any trial proceedings that might ultimately be heard*[11].

Article 323

41. The proposed amendment would provide for the trial of accused persons other than any accused who has not appeared to be tried together with him or her, i.e., the trial will concern both those suspects who are physically present and the non-appearing one(s), with the latter being tried in absentia[12]. This is not, in principle, problematic but - as with the separate trials of co-accused - the actual absence of someone being tried in absentia (even if legally represented) could result in prejudice on account of the inability to challenge effectively what the co-accused who are present might claim.

42. *Once again, it will be important for this to be taken into account in the course of both the trial conducted in absentia and any subsequent opportunity to reopen the proceedings - in respect of both matters of law and fact – where these have led to a conviction*[13].

Article 469

43. The proposed amendment would add to the proceedings in respect of which plea agreements can be concluded those concerned with especially grave crimes committed by an organised group, a criminal organisation, a terrorist group or a terrorist organisation. However, this possibility is subjected to the condition that the suspect must not be an organiser of such group or organisation and must turn "in another group member's criminal actions or other crimes committed by a group or an organisation". In addition, the conclusion of a plea agreement will in these cases only be allowed in criminal proceedings in which the victim has participated so long as the victim has given written consent to the public prosecutor for its conclusion.

44. Expanding the scope of circumstances in which plea agreements can be reached is not problematic but the requirement that the person with whom one is concluded must "turn in" someone else has now, as the European Court recognised, the potential to render unfair the proceedings against the person "turned in". Thus, it has observed in respect of such a case

> that the separation of the cases, particularly X's conviction with the use of plea-bargaining and accelerated proceedings, compromised his competence as a witness in the applicants' case. As

[11] *Cf.* the situation in *Navalnyy and Ofitserov v. Russia*, no. 46632/13, 23 February 2016, in which separate trials were the source of prejudice to the defendants who were tried second.
[12] This is subject to the conditions governing the permissibility of the use of trial in absentia set out in paragraph 3 of the present provision.
[13] As required by *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006.

> noted above, his conviction was based on the version of events formulated by the prosecution and the accused in the plea-bargaining process, and it was not required that that account be verified or corroborated by other evidence. Standing later as a witness, X was compelled to repeat his statements made as an accused during plea-bargaining. Indeed, if during the applicants' trial X's earlier statement had been exposed as false, the judgment issued on the basis of his plea-bargaining agreement could have been reversed, thus depriving him of the negotiated reduction of his sentence. Moreover, by allowing X's earlier statements to be read out at the trial before the defence could cross-examine him as a witness, the court could give an independent observer the impression that it had encouraged the witness to maintain a particular version of events. Everything above confirms the applicants' argument that the procedure in which evidence had been obtained from X and used in their trial had been suggestive of manipulation incompatible with the notion of a fair hearing[14].

45. The proposed amendment – as well as the existing reference to turning in in sub-paragraph 4(2) - could be seen as enhancing the risk of such prejudice by the explicit requirement of "turning in" someone as a condition of concluding the plea agreement. Although the requirement that the information provided by the person concluding the agreement "is proved by evidence" should mean that there is an additional basis for convicting the person "turned in", this does not seem to be an adequate safeguard. This is because such information need not be conclusive evidence.

46. It also seems strange that the "other crimes" concerned is not qualified by a term such as "related" since quite trivial matters could otherwise be included.

47. *The "turning in" condition should thus be deleted from the proposed amendment – and the existing sub-paragraph 4(2) - in view of the likelihood that it will lead to the sort of prejudicial situations which are of concern to the European Court.*

48. The offences in respect of which the proposed amendment envisages plea agreements being concluded are likely to be ones having implications for the right to life and the prohibition on ill-treatment under Articles 2 and 3 of the European Convention. It should, therefore, be borne in mind that the European Court will find such rights to be violated where the penalty imposed is not considered to amount to an adequate response to the conduct affecting[15].

49. *Although this concern does not prevent the conclusion of plea agreements in such cases, there is a need for appropriate guidance to be provided as to sentencing in such cases.*

50. The possibility of a victim agreeing to the conclusion of a plea agreement – which is also included in the proposed amendment - is not, however, problematic.

Transitional Provisions

51. The proposed amendment would have the effect of deleting the rule regulating transfer of cases initiated by the investigators of the prosecutor's offices to the

[14] *Navalnyy and Ofitserov v. Russia*, no. 46632/13, 23 February 2016, at para. 180.
[15] See, e.g., *Okkali v. Turkey*, no. 52067/99, 17 October 2006 and *Gäfgen v. Germany* [GC], no. 22978/05, 1 June 2010.

investigators of the State Bureau of Investigations, after the latter begins its operations. The rationale behind deleting this provision does not seem to be clear[16]. *For the purpose of clarity of procedures and clear delineation of the investigative powers, it would thus be advisable to maintain the above-mentioned rule regulating the transfer of cases in the context of the State Bureau of Investigations.*

52. The other proposed amendments would provide for an extension of the temporary arrangements already introduced for special pre-trial investigation to apply to persons in temporarily occupied territory and the anti-terrorist operation area, while reflecting the addition to the list of offences to which this can apply[17], and elaborates on the criminal proceedings to which these arrangements apply. They are not inappropriate given the continuing difficult situation in parts of the country.

C. CONCLUSION

53. The objectives which most of the provisions in the Draft Law seek to achieve are not incompatible with European standards. However, many aspects of them need to undergo some modification in order to prevent breaches of those standards from occurring.

54. This is the case with the provisions concerned with notification about the content of a summons (Articles 135 and 136), the possible duration of custody during the pre-trial investigation (Article 197), the actual duration of a pre-trial investigation in certain types of cases (Article 219) and the ability to extend the time limit for a pre-trial investigation (Article 294).

55. Furthermore, the actual application of the amendments proposed in respect of Articles 297-1 and 323 have the potential to lead to violations of Article 6(1) of the European Convention and it will, therefore, be very important to guard against this occurring wherever they are relied upon.

56. Finally, under the proposed amendment to Article 469 the "turning in" condition should thus be deleted from the proposed amendment in view of the likelihood that it will lead to the sort of prejudicial situations which are of concern to the European Court.

[16] It should be also noted that the Code contains similar regulations pertinent to transfer of cases from the prosecutor's offices to other investigative authorities (paragraph 1.4 of the transitional provisions).
[17] See para. 38 above.