Continued support to the criminal justice reform in Ukraine

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OPINION

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

ON THE DRAFT LAW OF UKRAINE No.7279 *ON AMENDING CERTAIN LEGISLATIVE ACTS CONCERNING SIMPLIFICATION OF PRE-TRIAL INVESTIGATION OF CERTAIN CATEGORIES OF CRIMINAL OFFENCES*

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Executive summary

This Opinion is concerned with proposed amendments to the Code of Administrative Offences of Ukraine, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine. The objectives of these proposed amendments are stated as being to establish four categories of criminal offences – including a much-anticipated concept of criminal misdemeanour – and to simplify the procedure applicable to the investigation and trial of cases involving criminal misdemeanours. The first goal is partly met but is also undermined by the absence of any rationale for which the existing minor crimes are categorised as criminal misdemeanours, the enhancement of the penalties for other minor crimes, the lack of respect for the principles of equality and proportionality in the way penalties are prescribed and the continued possibility of loss of liberty being imposed for the commission of administrative offences. Although every legal system has to adopt measures to deal with overloaded criminal justice systems and thus introduce some shortcuts in the way proceedings are to be conducted, the need to handle mass criminality regarding minor infringements efficiently should not allow for the disregard of fundamental procedural safeguards. Unfortunately, such a disregard would be the consequence of the proposed procedure to be followed, which would allow procedural actions to be taken before any entry of information in the Integrated Register both in circumstances that have led to abuse in the past and in others where there is no provision for new and adequate safeguards against such abuse, would leave unclear the limits as to the duration of investigations , would create the possibility for suspects to be put under pressure to plead guilty and would deprive the defence of crucial rights. At the same time the proposed amendments – with the creation of separate investigative structures for criminal misdemeanours and crimes – are likely to produce unnecessary complexity and confusion in the operation of the criminal justice system. The recommendations in the Opinion would undoubtedly mitigate the way in which the proposed amendments run counter to European standards. However, apart from implementing them, it would be worth giving further consideration as to how the bringing into operation of the concept of criminal misdemeanour could lead to a much greater humanization and efficiency of the criminal justice system.

A. Introduction

1. This Opinion is concerned with the amendments which would be made ("the proposed amendments") to the Code of Administrative Offences of Ukraine ("the Code of Administrative Offences", the Criminal Code of Ukraine ("the Criminal Code") and the Criminal Procedure Code of Ukraine ("the Criminal Procedure Code") by the Draft Law of Ukraine no.7279 *On amending certain legislative acts concerning simplification of pre-trial investigation of certain categories of criminal offences* ("the Draft Law"), which is currently under consideration by the Verkhovna Rada of Ukraine.

2. The present comments review the compliance of the proposed amendments 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').

3. Also relevant for the purpose of these comments is the need for legal certainty - the ability to act within a settled framework without fear of arbitrary or unforeseeable State interference – and the extent to which the proposed amendments satisfy the requirements of clarity and foreseeability.

4. Remarks will not be made with respect to those proposed amendments that are considered appropriate or unproblematic unless this is relevant to an appreciation either of the impact of other changes being proposed or of the overall effect that the Draft Law will have on the character of a specific Code.

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

6. The Opinion first addresses some general issues relating to the proposed amendments. Thereafter, it considers in turn the amendments that would be made to the Code of Administrative Offences, the Criminal Code and the Criminal Procedure Code. The Opinion concludes with an overall assessment of the compatibility of the proposed amendments with European standards.

7. The Opinion has taken account of the Explanatory Note that accompanies the Draft Law ("the Explanatory Note") and has been based on English translations of the Draft Law and of the Codes to be amended, provided by the Council of Europe.

8. The Opinion has been prepared by Lorena Bachmaier Winter[1] and Jeremy McBride[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.

B. General comments

9. This section is concerned with the nature of the reform being proposed. It first gives an overall impression of the approach followed in the Draft Law to meeting the assumption at the time of adopting the Criminal Procedure Code that special provisions would be made for offences that could be categorised as criminal misdemeanours. It then considers the proposed re-classification of certain offences – comprised of some of the existing minor crimes and one administrative offence – as criminal misdemeanours. Thereafter, it examines the procedure

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proposed for investigating criminal misdemeanours before dealing with certain other aspects of the proposed amendments. It concludes with an overall assessment of the compliance of the proposed amendments in the Draft Law with European standards and a summary of recommendations.

10. The Explanatory Note states that the Draft Law:

> was developed with a view to the need to govern the application of the provisions of the new Criminal Procedure Code of Ukraine (further referred to as the CPC of Ukraine) with regard to special features of investigating criminal misdemeanors and their judicial review on the legislative level.[3]

11. Furthermore it correctly recognises that

> Enforcement of the provisions of the CPC of Ukraine related to criminal misdemeanors was made directly dependent on the adoption of the relevant law on criminal misdemeanors in item 1 of Final Provisions of the CPC of Ukraine.[4]

12. As a result, one of the principal reason given in the Explanatory Note for adopting the Draft Law is:

> to introduce a simplified procedure of pre-trial investigation in the form of inquiry of all minor criminal offences that will undoubtfully contribute to lessening the workload of pre-trial investigation agencies.[5]

13. Thus, unlike a previous proposal to address the need envisaged in the Criminal Procedure Code when adopted in 2012 for a category of offences termed "criminal misdemeanours[6], the proposed amendments in the Draft Law are not particularly motivated by a concern for increased humanization of the criminal law, even if the offences concerned are regarded as ones having a lower level of social danger.

14. The proposed minor offences are to be termed criminal misdemeanours as a consequence of the reclassification proposed in Article 12 for the existing four categories of crimes[7] into two types of criminal offence, namely, criminal misdemeanours and crimes. The latter would itself be comprised of three sub-categories, non-grave, grave and special grave. The Criminal Code would thus continue to be comprised of four categories of offences, albeit with some changes to the penalties applicable to them.

15. The proposed re-classification and the consequent retention of the category of criminal misdemeanours within the Criminal Code rather than being the subject of a separate law – as

[3] Page 1.
[4] *Ibid*.
[5] *Ibid*.
[6] See Opinion of the Directorate General Human Rights and Rule of Law on the Draft Law of Ukraine No. 2897 *On Amendments to the Legislative Acts of Ukraine introducing the Provisions on Criminal Misdemeanor Offences* (DGI(2016)16).
[7] I.e., minor offences, medium grave offences, grave offences and special grave offences.

was envisaged in the Criminal Procedure Code – is not at all problematic as the object of establishing the concept of a criminal misdemeanour is more concerned with the nature of the penalties and the procedure for establishing liability than any other fundamental difference with criminal offences seen as having a more serious nature.[8]

16. The criminal misdemeanour category would be comprised of some of the former minor crimes and one offence taken out of the Code of Administrative Offences, namely, driving vehicles in a state of alcoholic, drug or other intoxication or under the influence of pharmaceutical drugs that reduce attention and reaction speed. According to the Explanatory Note, the latter proposed change has been influenced by the high death rate in Ukraine resulting from traffic accidents.

17. In contrast to the current possibility of imprisonment for minor crimes, those re-classified as criminal misdemeanours would only be punishable by a fine not higher than three thousand tax-free minimum incomes of citizens or "any other punishment different from imprisonment".

18. However, such a penalty range will still be far from insignificant for those likely to be subjected to it. Indeed, despite the so-called monetarisation of criminal law in modern society and the idea that the special and general prevention aims of the criminal law shall be achieved in case of petty offences primarily with penalties that do not entail imprisonment, the system of pecuniary penalties also needs to observe the principle of equality. In this regard, imposing the same monetary sanction to persons with different economic status and incomes, at the end can result in establishing a different level of sanctioning to rich and poor people. As a result, pecuniary penalties should, as far as possible, be linked to the actual income of the offender and/or his or her economic status. Otherwise, certain sanctions will only produce the prevention effect on those who have lower incomes, with more wealthy persons either not being affected in the same way or not at all.

19. *There is thus a need to reconsider the approach to penalties in the Draft Law and, in particular, to modify the determination of fines that can be imposed so that scheme adopted observes the principles of equality and proportionality.*

20. Moreover, not all minor crimes will be re-classified as criminal misdemeanours since the draft amendments also increase the penalties for some of them so that they would henceforth fall into the category of non-grave crimes.

21. The range of penalties that would be prescribed for non-grave, grave and special grave crimes would generally remain the same as those currently applicable for respectively medium grave, grave and special grave crimes. However, in the case of certain offences there would be an

[8] The change in approach is reflected in the proposed deletion from the Criminal Procedure Code of reference to "the law of Ukraine on criminal misdemeanours in Article 3.1(7), although no change is proposed for the reference to such a law in Section X. Transitional Provisions.

addition to the penalties prescribed[9] and for others the level of the possible fines that could be imposed would be substantially increased[10]. For only some there would also be potentially lighter penalties.[11]

22. The choice of penalty is generally a matter within discretion of State, subject to the principle of proportionality and respect for the substantive rights guaranteed under the European Convention.

23. Nonetheless, the overall impression is that the Draft Law does not embody any substantive change in the level of sanctions for many minor crimes but there are significant increases in the sanctions that can be imposed both on others and on those that will be treated as non-grave crimes. The reason for this – which is contrary to the trend in Europe to impose lighter penalties for offences of a less serious nature - is not addressed in the Explanatory Note.

24. Furthermore, it is difficult to understand how the proposed increase in the penalties for many offences will contribute to reducing workload of investigators at the pre-trial stage since this will mean that the offences concerned will be dealt with under the existing arrangements.

25. *There is thus a need for the rationale behind the proposed enhancement of penalties for many criminal offences to be explained.*

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[9] Thus, imprisonment for up to two years would be added to the existing possible penalties for the offences in Articles 128 (negligent grievous bodily injury or negligent bodily injury of medium gravity), 134 (illegal abortion), 136 (failure to provide help to a person who is in a condition dangerous to life), 175 (failure to pay salary, scholarship, pension or any other statutory payments) and 180 (preclusion of religious ceremonies). In addition, imprisonment for up to three years would be added to the existing penalties for the offences in Articles 142 (illegal experimentation on a human being), 143 (violation of procedures prescribed by law with regard to human organs or tissue transplantation), 158^1(illegal usage of ballot, referendum ballot, voting by voter, referendum participant more than once), 161 (violation of equality of citizens depending upon their race, nationality, religion, physical disability and on other grounds), 180.2 (preclusion of religious ceremonies), 270 (violation of fire safety requirements established by law), 325 (violation of sanitary rules and norms aimed at preventing communicable diseases and mass poisoning) and 365^2(abuse of authority by persons who render public services).

[10] See Articles 137 and 145 (criminal offences against life and health of a person), 159^1, 167, 168 and 178--180 (criminal offences against electoral, labour and other personal rights and freedoms of the human being and the citizen), 185, 186, 190, 191, 194, 194^1 and 197^1 (criminal offences against property), 204, 205, 209^1, 210- 212, 212^1, 219, 220^1, 220^1, 222, 223^1, 224 , 227, 229, 229^1, 232^1 and 232^2 (economic criminal offences), 238-254 (crimes against environment), 263, 267, 269 and 270 (crimes against public safety), 271-273 (criminal offences against occupational safety), 281-283, 286-288, 291 and 292 (criminal offences against traffic safety or safety of transport operations), 293, 296, 297-302 (criminal offences against public order and morality), 309, 313, 318, 321 and 325-327 (criminal offences related to the circulation of narcotics, psychotropic substances, their analogues or precursors, and other crimes against public health), 333, 338, 342, 347, 3471 and 351(criminal offences related to the protection of state secrets, inviolability of state borders, conscription and mobilization), 361^1, 361^2, 362, 363 and 363^1 (criminal offences in the field of electronic computers, systems, and computer and telecommunication networks), 364^1, 365^2, 366, 367, 368, 368^3, 368^4, 369, 369^2 and 369^3 (criminal offences in the realm of service activities and professional activities involving the rendering of public services), 374, 376 and 388 (crimes against justice) and 407 and 426 (criminal offences against the established procedure of military service (military criminal offences)).

[11] In the case of Article 185 (theft) the possibility of imprisonment for up to three years would be replaced by restraint of liberty for up to five years and of Article 350 (threats or violence against an official or a citizen who performs his/her public duty) imprisonment for up to two years would be replaced by restraint of liberty for up to three years.

26. Moreover, given that a consequence of the proposed amendments would be the elimination of the possibility of subjecting those who commit criminal misdemeanours to imprisonment, it seems somewhat inconsistent with this approach to retain the possibility of the commission of certain administrative offences attracting a penalty of arrest for 15 days. Certainly, if conduct is considered so grave as to warrant a loss of liberty, this should be dealt with in proceedings that benefit from the safeguards applicable to criminal offences.

27. Although the Explanatory Note stated that the introduction of a simplified procedure of pre-trial investigation for this reclassified category of criminal misdemeanours was one of the reasons for adopting the Draft Law so that the investigation apparatus could then "get focused on the investigation of grave and especially grave crimes", the only elaboration of what this would entail is found not in its "General description and main provisions of the draft law" but in its "Forecast of social and economic, legal and other consequences of the adoption of the draft law".

28. Thus, the latter stipulates that

> Practical application of the institute of criminal misdemeanors will facilitate the ensuring of prompt investigation of minor criminal offences and diminishing the workload of pre-trial investigation agencies as:
> paragraph 3 of Article 38 of the CPC the exercise of powers of pre-trial investigation will be enabled for staff of other divisions, in particular bodies of the National Police, security authorities, tax authorities;
> investigation of misdemeanors will be conducted in the form of inquiry with respective simplification of the procedure including shorted terms (not to exceed one month starting from the date of the notice of suspicion), simplified judicial procedure (under certain conditions) etc.[12]

29. This fails to provide much indication as to what this simplified procedure would entail, particularly having regard to the existence already of certain provisions in the Criminal Procedure Code concerned with the concept of "inquiry" to be used when investigating criminal misdemeanours.[13]

30. In substance the proposed reform would seem to add unnecessary complexity to the investigative structures and to envisage a rushed court procedure without sufficient measures to ensure a fair hearing. Furthermore, although steps taken before the entry of information into the Integrated Register, there is an inappropriate proposal to conduct medical examinations at this point and insufficient safeguards against undue pressure to provide explanations or to prevent tampering with evidence obtained through recording measures.

31. There is also an inappropriate proposal to revert to practice before the adoption of the Criminal Procedure Code by allowing inspection to take place for all offences before the entry of information into the Integrated Register.

[12] Page 4.
[13] Namely, Articles 3.1(4), 38, 215, 294, 298 and 301 and paragraphs 3, 5 and 9 of Section C. Transitional Provisions.

32. Finally, it should be noted that the formulation of a number of the proposed amendments to in the Criminal Procedure Code often uses the term "committed" rather than "suspected" so that guilt seems to be being assumed.[14] This follows the approach in the current text but it runs the risk of affecting attitudes to the presumption of innocence.

33. *Consideration should thus be given to modifying the use of the term "committed" in a manner that reflects the presumption of innocence*.

C. Comments on the Code of Administrative Offences

34. The proposed amendments to the Code of Administrative Offences are threefold.

35. Firstly, the deletion of a part of Article 130, namely, that concerning the offence of driving vehicles in a state of alcoholic, drug or other intoxication or under the influence of pharmaceutical drugs that reduce attention and reaction speed.

36. As already noted, this deletion would be consequent upon the introduction of a similar offence into the Criminal Code as a criminal misdemeanour by the proposed new Article 286^{1}. This would be entail a somewhat higher fine for a first offence, the replacement of separate penalties for the repetition of the offence once or twice in the same year by one penalty for doing so "repeatedly" and the absence of any provision for penalties for persons other than the driver. None of these changes would be problematic. However, there is reason to be concerned about the retention in this Code of an offence of refusing to undergo a test for driving a vehicle while intoxicated, etc. and this is discussed further in the sub-section dealing with the Criminal Code.

37. Secondly, an entirely new Article 164^{19} would be introduced into the Code, in order to create the offence of fictitious business. This offence would be defined in terms of the "creation or acquisition of business entities (legal entities) aimed at covering illegal activities or engaging in the activities that are prohibited".

38. Such a definition is essentially the same as that for the offence in Article 205 of the Criminal Code, with the only real difference being that there is no requirement that the conduct concerned has "caused significant pecuniary damage to the state, bank, lending institution, other legal entities or citizens".

39. The penalty would also be slightly less than that for the Criminal Code offence – three to five thousand as opposed to five to ten thousand tax-free minimum incomes of citizens - but its creation seems an unnecessary duplication, which could run the risk of proceedings being brought contrary to the prohibition on double jeopardy in Article 4 of Protocol No. 4 to the European Convention.

[14] See, e.g., the proposed amendments to Articles 214, 219, 284 and 301 the proposed new Article 298^{2}.

40. In addition, since there is no requirement in the proposed offence for any damage actually to have been caused, a better course of action might simply be to shut down the business concerned.

41. Furthermore, the level of the proposed penalty would be comparable to one that could be imposed for a grave crime without the procedural guarantees applicable under the Criminal Procedure Code.

42. *The introduction of this offence thus seems inappropriate and it should not be retained in the Draft Law.*

43. Thirdly, Article 255 would be amended to include a reference to the proposed Article 164[19] in the provision dealing with persons having the right to draw up reports on administrative offences.

44. *Although not problematic in itself, the proposed amendment should not be retained on account of the inappropriateness of the substantive offence*.

D. Comments on the Criminal Code

45. The proposed changes would not affect the current understanding of what constitutes a crime (henceforth criminal offence) nor the basis for liability for committing one be changed[15] and the other provisions of general application in the Criminal Code.

46. There are two substantive changes in the General Part of the Criminal Code consequent upon the reclassification of minor crimes as criminal misdemeanours.

47. The first is that persons convicted for having committed them would, after their sentence has been served, then be considered to be without conviction.[16] This is a positive reform as it has the potential to reduce any stigma attaching to the offences concerned.

48. The second relates to the period for which the statute of limitation will be "saved", i.e., not apply where a person has evaded pre-trial investigation or trial and only resume running once he or she surrenders or is apprehended. Currently, this period is fifteen years for all crimes but it would be limited to just five years in the case of criminal misdemeanours.[17] This is, however, a matter within the discretion of States and does not raise any issue of compliance with European standards.

[15] The Explanatory Note states that preparation to commit a criminal misdemeanour would not incur criminal responsibility but that is the position at present under Article 14.2 of the Criminal Code for preparation to commit minor crimes.
[16] As a consequence of the introduction of an entirely new paragraph 2^1 into Article 89.
[17] Article 49.2.

49. In fact, the majority of the changes being proposed are merely of a terminological character.

50. Thus very many of them are consequent upon the proposed introduction of the ways in which criminal offences would be classified, leading to the replacement of "crimes" by "criminal offences".

51. In addition, there are certain other linguistic changes linked to that reclassification, such as the replacement of the terms "criminal" by "criminally unlawful"[18], "criminality" by "criminal unlawfulness"[19], "decriminalizes" by "cancels criminal unlawfulness"[20], "criminal attempt" by "attempt of a criminal offence"[21] and "subject of a crime" by "offender".[22] None of these changes are substantive in character and they are not, as such, problematic.

52. However, unless it is a matter of translation, it seems inapt in paragraph 1 of Article 14 to use "criminal offence" rather than "crime" in specifying an offence related to "preparation" since the second paragraph of that provision specifically provides that preparation to commit a criminal misdemeanour will not give rise to criminal liability. The latter stipulation is entirely in keeping with the distinction that should be made between criminal misdemeanours and crimes, but this would not be required at all if paragraph 1 referred only to "crimes". This comment is also applicable to the use of "criminal offence" when reference is made in Article 16 to Article 14.

53. *There is thus a need to review and possibly revise the formulation used in these two provisions.*

54. This is also partly a concern about the formulation of the entirely new paragraph 7 in Article 12, which provides for the degree of gravity for a "criminal offence" where it is punishable by both a fine and imprisonment "simultaneously". Such a use of "criminal offence" is again inapt as it is only "crimes" that have degrees of gravity. Moreover, the need for this provision is questionable given that the penalties being prescribed in the Draft Law do not seem to entail the simultaneous imposition of fines and imprisonment.

55. *There is thus a need also to review and possibly revise the formulation used in this provision, as well as to reconsider the necessity for its proposed adoption*.

56. As has already been noted, it is proposed to extract the existing offence of driving vehicles in a state of alcoholic, drug or other intoxication, etc. from the Code of Administrative Offences to create an offence in the Criminal Code in the entirely new Article 286[1]. However, it seems strange that the refusal to undergo a test for intoxication, etc. would still remain in the Code of

[18] E.g., in Articles 1 and 25.
[19] E.g., in Articles 3-5
[20] E.g., in Article 5.4
[21] E.g., in Article 13.
[22] E.g., in Articles 11 and 18.

Administrative Offences, with this only entailing the imposition of a fine of six hundred tax-free minimum incomes and deprivation of the right to drive for a year. This is likely to undermine the efficacy of the proposed new offence since refusing to undergo a test would preclude establishing that the person concerned was intoxicated, etc. and thus liable to a possible fine of two thousand tax-free minimum incomes and loss of the right to drive for three years.

57. *There is thus a need for some reflection as to whether there is sufficient coherence in the way the proposed provisions in the two Codes address the problem of driving while intoxicated, etc., which the Explanatory Note stated to be in need of attention*.

58. The only other change proposed in the substantive criminal law is in Article 309.2. In this provision the enhanced penalties that could be imposed for the illegal production, making, purchasing, storage, transportation or sending of narcotics, psychotropic substances or their analogues not for selling purposes would cease to become applicable on account of the person concerned having previously committed the crimes created by Articles 307, 308, 310 and 317. This lightening of penalties is not problematic.

E. Comments on the Criminal Procedure Code

59. A good number of the proposed changes to provisions in the Criminal Procedure Code are of a terminological nature, adjusting them to take account of the reclassification of crimes as criminal misdemeanours and criminal offences, including the latter's three sub-categories. Such changes are, of course, unproblematic.

60. The majority of the proposed changes relate to those made to the provisions with a view to introducing what the Explanatory Note has termed a "simplified procedure of pre-trial investigation"[23] but there are certain other provisions which have no connection with the introduction of such a procedure in respect of the criminal offences to be classified as criminal misdemeanours. The provisions relating to the procedure for dealing with criminal misdemeanours will be considered before turning to certain provisions concerned with other matters.

1) Provisions relating to criminal misdemeanours

Article 3

61. The proposed amendment would introduce two new sub-paragraphs – (8^1), (17^1) - into paragraph 1 to provide for the head of an inquiry agency and the inquirer who will be involved in the process of inquiry already envisaged by paragraph 1(4) as the "form of pre-trial

[23] Page 1.

investigation where criminal misdemeanours are investigated" and amend sub-paragraph (9) to specify that such persons are also parties to criminal proceedings.

62. There is no substantive difference between these provisions and the ones dealing with the head of the pre-trial investigation agency and the investigator in the existing sub-paragraphs (8) and (17), which would then only be concerned with criminal offences other than criminal misdemeanours.

63. As such these provisions are not formally problematic but, as has already been noted, the creation of formalised distinctions between the bodies responsible for investigating possible offences has the potential to complicate rather than simplify investigations into possible offences.

64. *There is thus a need to reconsider whether the proposed creation of separate structures at the legislative level for investigating criminal misdemeanours and crimes is really calculated as the most efficient means of tackling the suspected commission of criminal offences.*

Article 38

65. The proposed addition of a sub-paragraph (3) to paragraph 2 is essentially repeating the provision that would be introduced into subparagraph 17^{1} of paragraph 1 of Article 3 and thus refers to slightly different set of bodies than the existing paragraph 3, which would be deleted. Nonetheless, subject to the general concern already expressed about the unnecessary complication of the investigative structures, such changes are not problematic.

66. *The recommendation in paragraph 64 is thus also applicable to this provision*.

Article 39[1]

67. The proposed introduction of this new provision similarly replicates in many respects the powers of the head of the pre-trial investigation agency under Article 39 for the person who would be the head of the inquiry agency but there are two notable differences.

68. Thus, the power of the head of the inquiry agency to set an inquirer aside from conducting the inquiry in sub-paragraph 2(2) does not require a "substantiated resolution" even though this must be done on grounds envisaged by the Criminal Procedure Code and the head of the inquiry agency is not authorised in this provision to conduct investigatory (search) actions.

69. The latter difference is probably not significant given that there should be no need for the head of an inquiry agency him or herself to conduct investigatory searches but the former could be problematic as there will not necessarily be a proper record as to why an inquirer has been set aside. This might lead to suspicions – substantiated or otherwise – that the action was taken for improper reasons, notwithstanding that this is supposed to be done on grounds specified in the Code.

70. *Thus, in the event of the bifurcated approach to investigation being retained, there should be a modification of this provision to require that any setting aside of an investigator be reasoned*.

Article 40[1]

71. The proposed introduction of this new provision also replicates in many respects the powers of investigators under Article 40 for an inquirer but again there are some notable differences.

72. Thus, the inquirer does not have the power to appoint audits and examinations in accordance with the procedure established by law or to draw up proposals in respect of application of compulsory educational measures.
73. On the other hand, an inquirer would have, in addition to the power to conduct investigative (search) and covert investigative (search) actions, the power "to examine the site of the event, inquire persons, seize tools and means of the offence, items and documents that are a direct object of the criminal misdemeanour or are identified in the course of arrest, personal search or inspection of item" and would also be able to notify a person of suspicion with the approval of the head of the inquiry agency rather than the prosecutor.

74. There are reasons to be concerned about these proposed powers which are discussed further below.

Article 71

75. The proposed change to paragraphs 2 and 4 of this provision would enable specialists to provide conclusions on:

> the issues related to his/her expertise during pre-trial investigation of criminal misdemeanours, including in cases provided for by paragraph three of Article 214 of this Code

76. There are also reasons to be concerned about these proposed powers in view of discussion of the need for safeguards regarding some of the powers proposed in Article 214. In particular, allowing a specialist to provide conclusions in respect of such actions before the entry of information in the Integrated Register seems inconsistent with the need for a suspect to have the opportunity to participate in procedural actions concerning an investigation.

77. *These provisions should thus be modified so as to limit the possibility of providing conclusions only in respect of actions conducted after the entry of information in the Integrated Register*.

Article 83

78. The proposed changes to paragraph 1 of this provision would add inquirers to investigators and prosecutors to those for whom the prompt appointment of a replacement is required where there is a successful challenge to them. As such the proposed changes are unproblematic.

79. However, it should be noted that there is no proposed change to Articles 77 and 80 which respectively specify the grounds for challenging the participation in criminal proceedings of public prosecutors and investigators and deals with proposals for challenging them.

80. *There is thus a need to rectify the omission of "inquirers" from Articles 77 and 80 as otherwise the proposed change to Article 83 would be of no effect.*

Article 168

81. The proposed change to this provision would ensure that persons arresting someone suspected of committing a criminal misdemeanour under the entirely new Article 298^2 had the possibility of provisional seizure of property when doing this.

82. However, this is not a real extension of power – other than as regards the proposed new offence to be introduced as proposed new Article 286^1 – as this possibility already existed in respect of minor crimes.

Article 169

83. The proposed change would require property that has been provisionally seized to be returned to the person concerned "by a court verdict in a proceeding with regard to criminal misdemeanour".

84. It is unclear whether this is intended to be the exclusive basis for the return of provisionally seized property in cases involving criminal misdemeanours or if the existing sub-paragraph 1(1) – including the possibility of obtaining a judicial ruling to dismiss a prosecutor's motion to attach the property concerned - could also be relied upon. This is important as the need to obtain a court verdict on the criminal misdemeanour itself has clearly the potential to take longer than a prosecutor finding that the seizure was ill-grounded. Moreover, the uncertainty regarding the effect of the proposed addition to this provision is exacerbated by the fact that third clause of paragraph 1 of the proposed new Article 298^3 states that it would be possible in an "exceptional case" to return seized items and documents before the case is heard in court on the merits.

85. *There is thus a need to clarify the effect of the proposed change in this provision and of the relevant clause in Article 298^3 and, if necessary, provide for the possibility to obtain judicial review of the provisional seizure of property before any trial*.

Article 214

86. The proposed changes would introduce provisions dealing with the appointment of an inquirer and specifying various actions that can be taken before information is entered into the Integrated Register of Pre-Trial Investigations ("the Integrated Register").

87. The former change would entail the inquirer being appointed by the head of the inquiry agency or, in his or her absence, the head of pre-trial investigative agency.

88. This provision partly repeats what is already covered by the proposed new Article 39^1 with regard to appointment by the head of the inquiry agency. However, the possibility of appointment by the head of pre-trial investigative agency in the absence of the head of the inquiry agency is not mentioned in the latter provision.

89. This not only points to some incoherence in the drafting of the proposed amendments but, more importantly, the conferment of this role on the head of pre-trial investigative agency underlines the convoluted nature of the arrangements which are being proposed by the specification of ostensibly different actors when all that is necessary is potentially some change in the procedure followed by those with current responsibilities for investigating alleged offences.

90. *The recommendation in paragraph 64 is thus also applicable to this provision.*

91. The second set of changes would – before entering information in the Integrated Register - allow firstly, in respect of all criminal offences, inspection of the place of crime to be carried out in urgent cases and secondly, in order to clarify the circumstances of a criminal misdemeanour, the obtaining of explanations, the carrying out of medical examinations, the obtaining of expert's conclusions, the taking and making of various forms of records and the seizure of tools and other means of committing an offence.

92. It is recalled that the mode of initiating criminal procedures (pre-trial investigations) by entering all notifications of "circumstances which are likely to indicate that a criminal offence has been committed" into the Integrated Register was one of the most important conceptual changes introduced by the Criminal Procedure Code when adopted in 2012.

93. Thus, by providing for a direct ban on allowing any refusals to accept and enter relevant statements or information into the Integrated Register - together with other norms such as the inadmissibility of evidence obtained prior to registration of a notification that make this automatic and mandatory - the Criminal Procedure Code was seeking to do away with the 'grey zone' of pre-investigative inquiry or verifications that was extensively and improperly exploited under the previous framework.

94. This former 'grey zone' was conducive to various abuses, including many entailing violations of the European Convention established by the European Court, including the widespread use of unregistered detention[24], deficiencies affecting investigations into serious human rights violations (including the failure to institute criminal proceedings or delays in doing so)[25] and the impossibility for alleged victims or their relatives to be involved in the procedures to the extent necessary to protect their legitimate interests[26]. The pre-investigative inquiry stage was also known for generating favourable conditions for corruption.

95. The proposed changes would seek to reverse this reform for all offences as regards inspection and for criminal misdemeanours as regards the other actions mentioned above but without any corresponding safeguards.

96. No specific reason is given in the Explanatory Note as to why such a reversal of the approach adopted in the Criminal Procedure Code in 2012 is now considered necessary, which is surprising given the significance of the proposed reversal of an important change made when adopting the Criminal Procedure Code. Furthermore, apart from a wish to revert to old practices, it is not possible to imagine any objectively valid reason for the proposed reintroduction of a power of inspection given the problems that led to it not being included in that Code. In the case of the proposed actions relating to criminal misdemeanours, it might be supposed that these are connected with the intended simplification of proceedings in respect of them.

[24] E.g., *Osypenko v. Ukraine*, no. 4634/04, 9 November 2011.
[25] E.g., *Myronenko v. Ukraine*, no. 15938/02, 18 February 2010.
[26] E.g., *Kucheruk v. Ukraine*, no.2570/04, 6 September 2006.

97. However, as regards inspection, it is proposed that this would be done only in urgent cases – whatever the nature of the offence involved - and yet there are already powers under Article 23.3 for the investigator or public prosecutor, before an investigating judge's ruling, to enter home or any other possession of a person in circumstances related to saving human life and property or in a hot pursuit of persons suspected of committing a crime. It is difficult to conceive of any urgent cases that would not be satisfactorily covered by the possibility afforded by this provision, which also has the appropriate safeguard required by the European Convention of subsequent judicial control.[27]

98. *There is thus no justification for this proposed addition to Article 214 and it should not be retained.*

99. As regards the actions specifically relating to criminal misdemeanours other than the conducting of medical examinations, the authorisation for these to be carried out at the actual scene of an alleged criminal misdemeanour at the time of its occurrence or shortly afterwards might not be problematic if the information gathered was then entered without delay into the Integrated Register.

100. Nonetheless, this would only be so if there were also some safeguards to ensure that (a) the obtaining of explanations was not subject to any pressure (such as by requirements to give the person concerned an opportunity to seek legal advice and to make clear that there is a right to refuse to provide any explanations without first having obtained legal advice) and (b) there was no possibility of tampering with any of the recordings made since the proposed new Article 298^1 would allow these to be sources of evidence in proceedings with respect to criminal misdemeanours..

101. However, as regards medical examinations, there does not seem to be any necessity for these to be carried out immediately after the occurrence of an alleged criminal misdemeanour or even shortly afterwards. Indeed, the fact that it has not been possible since the adoption of the Criminal Procedure Code to employ such examinations at this stage of the proceedings has not been shown to have had an adverse effect on their ultimate outcome. Moreover, the observance of the rights to a right to a fair trial and to respect for private life would be better safeguarded by medical examinations only taking place after the entry is made in the Integrated Register.

102. *This aspect of the proposed change should thus be modified accordingly*.

Article 216

103. The proposed changes to these provisions are primarily ones concerned with the change of terminology from crimes to criminal offences in the context of the allocation of competence over their investigation. As such the provisions are not problematic but the detail of the provisions themselves underlines the existing complexity of the organisation of investigation in the criminal justice system, to which the proposed arrangements for criminal misdemeanours would add.

104. There would, however, be introduced an entirely new paragraph – 11 – that would require the existing rules of jurisdiction to be applicable for the purpose of determining the authority that should conduct a pre-trial investigation in the form of inquiry, i.e., for criminal

[27] See, e.g., *Mastepan v. Russia*, no. 3708/03, 14 January 2010 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013.

misdemeanours. This provision is not problematic in itself but, as previously noted, its inclusion in the Draft Law only confirms the unnecessary convolutions likely to ensue from what is supposed to be a simplified procedure.

105. *The recommendation in paragraph 64 is thus also applicable to this provision*

Article 217

106. The proposed addition to paragraph 2 of this provision would create an exception to its existing bar on joining materials of pre-trial investigations in respect of a criminal misdemeanour and in respect of a crime. It would do so where such a bar might otherwise adversely affect the completeness of the pre-trial investigation and judicial examination. In such a case the investigation into both categories of offence would then be conducted according to the rules of pre-trial investigation.

107. On the assumption that "completeness" is understood to be aimed at ensuring that related offences would be investigated and tried together and that unrelated offences would still be dealt with separately, this is an entirely appropriate proposal. However, the need for it also underlines the undesirability of creating separate investigative structures for criminal misdemeanours and crimes.

108. *The recommendation in paragraph 64 is thus also applicable to this provision*

Article 218

109. The proposed addition to paragraph 4 of this provision would allow for the transfer of materials from an investigator to the head of an inquiry agency or from the inquire to the head of a pre-trial investigation agency where it is found that there was respectively no element of a crime or a crime had been committed.

110. This is not, of course, at all inappropriate but once again underlines the undesirability of creating separate investigative structures for criminal misdemeanours and crimes. Indeed, the need for a transfer process runs the risk of the proceedings failing to observe the requirement under Article 6(1) of the European Convention for a criminal charge to be determined within a reasonable time.

111. *The recommendation in paragraph 64 is thus also applicable to this provision*

Article 219

112. The proposed change to this provision would remove from paragraph 1 the current six-month limit on the term allowed for a pre-trial investigation in criminal proceedings concerning a criminal misdemeanour, modify the separate clause in this paragraph specifying when the pre-trial investigation in the case of criminal misdemeanours is to be completed and also modifies paragraph 2 as regards the extension of the latter time-limit.

113. The first two changes remove a possible incoherence in the present provision as this would seem to arise from the specification of both one term allowed for a pre-trial investigation and a different time-limit set for its completion, particularly as only the latter is probably required.

114. The proposed time-limit would be 72 hours from the moment that the notice of suspicion is served on the person concerned or from moment of his or her arrest, subject to some significant exceptions. Thus, the time-limit becomes 20 days if the person does not

acknowledge his or her guilt, additional investigative and search actions are needed and "the criminal misdemeanour was committed by a minor". In addition, the time-limit would be 30 days where the person concerned requests an expert examination under the proposed new Article 298[4].

115. These proposed additions are problematic in several respects.

116. Firstly, the language used in respect of minors when allowing a longer time-limit is inconsistent with the presumption of innocence and is in marked contrast to the use of "suspect" or "person" in other parts of this text.

117. Secondly, it is not clear why there should be a need for a longer time-limit simply because the suspected offender is a minor.

118. Thirdly, while a goal of completing cases within 3 days is impressive, there is no indication in the Explanatory Note as to the feasibility of achieving this and nothing in the proposed procedural changes suggesting that this would be definitely achievable in all cases where suspects do not plead guilty or do not ask for expert examinations.

119. Fourthly, the specification of the longer time-limits where persons do not plead guilty or request expert examinations could have the effect of putting them under pressure to plead guilty or not to make such requests. This would clearly be undesirable.

120. Finally, as noted below, there appears to be an unlimited possibility of obtaining one-month extensions to an inquiry pursuant to the proposed new Article 298[5] which could potentially put those being investigated in respect of criminal misdemeanours in a worse position than those being investigated for non-grave crimes, for which the overall twelve-month limit remains.

121. A more appropriate approach – and one consistent with the supposed objective of simplifying the procedure - would be to specify just a time-limit that is realistic for most types of cases - such as 20 days - and then rely on the power to seek an extension - which ought to be available on only one occasion - should this prove necessary in a given case. Such an approach would not preclude pre-trial investigations being concluded prior to the specified time-limit.

122. *The proposed additions to this provision should thus be modified accordingly, with account being taken of the approach in the proposed new Article 298[5].*[28]

Article 290

123. The proposed change - involving the introduction of an entirely new paragraph 11 - would make the disclosure of inquiry materials subject to the rules in Articles 301 and 314, as modified by the proposed amendments and not to those in the present provision. However, those rules lack the specificity of the general requirements of disclosure in the existing provision and are thus likely to lead to situations in which the preparation of a suspect's defence could be hampered. Moreover, they could result in the trial judge seeing the case files before the trial and thus undermine the adversarial nature of the proceedings.

[28] See paragraphs 153-154 below.

124. *There is thus a need to modify the rules in the proposed amendments to Articles 301 and 314 so that the requirements of the right to a fair trial under Article 6 of the European Convention are respected*.

Article 294

125. The proposed change would delete the existing possibility for a prosecutor to grant an extension of the time-limit for the completion of a pre-trial investigation and is a necessary consequence of the proposed amendments to Article 219.

126. This deletion is not problematic but the approach of allowing extension by reference to the complicated nature of the proceedings is a more appropriate one than by reference to the nature of the suspect, a failure to plead guilty or the making of a request for expert examination.

Article 298

127. The proposed change to this provision would insert two new paragraphs on either side of the existing general statement as to how inquiries are to be conducted, in which there are stipulations about the appointment of an inquirer and the possibility of conducting separate actions – including medical examinations - before entering information into the Integrated Register.

128. *These two additional paragraphs are unnecessary repetitions of proposed changes already discussed and they should thus be deleted. In addition, the observations previously made about the excessive scope of the power to conduct investigative actions before the entry of information into the Integrated Register are equally applicable to the second of the proposed additional paragraphs.*

Article 298[1]

129. The proposed entirely new provision would enable the material obtained through the actions taken pursuant to the proposed changes to paragraph 3 of Article 214 to be additional sources of evidence to those defined in Article 84.This would have the effect of making inapplicable the current bar in Article 95.4 on the use of testimonies given to an investigator or prosecutor during the pre-trial stage where criminal misdemeanours are concerned, which could only be consistent with the right to a fair trial under Article 6 of the European Convention if there were adequate safeguards in place to preclude the obtaining of evidence through improper pressure.

130. As already indicated, it would not be appropriate for medical examinations to be conducted before the entry of information in the Integrated Register.

131. *This possibility should thus also not be retained in the present proposed provision*.

132. In addition, the possibility of using the other actions as sources should be subject to their inadmissibility where any explanation was obtained in circumstances that would be regarded as having infringed the right not to incriminate oneself[29] or where there are doubts as to the

[29] See, e.g., *Aleksandr Zaichenko v. Russia*, 39660/02, 18 February 2010.

authenticity of any recordings adduced[30]. This might be covered by Article 87 but this qualification on the use of such evidence should still be included in this provision

133. *This provision should thus be amended accordingly*.

Article 298[2]

134. The proposed entirely new provision would limit the circumstances in which a person can be arrested in respect of a criminal misdemeanour, namely, refusal to comply with lawful requirements (including when in pursuit), showing resistance, trying to leave the site of the event and being in a state of alcoholic, drug or other intoxication.

135. These reasons go to the necessity of an arrest which might preclude it from being considered as arbitrary and thus contrary to Article 5(1)(c) of the European Convention.

136. However, this provision is still potentially incompatible with this provision as it authorises arrest in connection with suspected offences where it has "the purpose of bringing him before the competent legal authority", which the European Court's case law has established as being a court. This does not mean that the person must be brought before the competent legal authority as, following the arrest, this may not be considered necessary.

137. The scheme of the new provision is the arrest should last for a maximum of six hours and, as such would probably not be seen as problematic by the European Court if the object was the processing of the case and release automatically followed.[31]

138. However, paragraph 4 then provides for the possibility of continuing the loss of liberty by allowing for detention (a) for up to 72 hours in the case of a person who has not complied with the lawful requirements, showed resistance or tried to leave the site of the event and (b) for up to 24 hours where the person was in a state of alcoholic, drug or other intoxication.

139. The first possibility is problematic in several respects.

140. Firstly, its formulation suggests that it is additional to the period specified in paragraph 2 whereas the proposed new paragraph 3 of Article 301 states that it is the maximum allowed from the moment of arrest.

141. Secondly, and more importantly, the period really seems to have nothing to do with bringing the person before the competent legal authority – even if this might occur at the end of the period concerned - and indeed it actually seems punitive rather than seeking to fulfil an obligation at the time of this detention's imposition because it relates to what has occurred and not a present necessity. As a result, it would not only be incompatible with Article 5(1)(c) but also could not be justified under Article 5(1)(b).

142. The second possibility might be justifiable in the particular circumstances of a case but only if there was no better way of handling the situation.[32]

[30] See, e.g., *Lisica v. Croatia*, no. 20100/06, 25 February 2010.
[31] See, e.g., *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994.
[32] See, e.g., *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000.

143. *There is thus a need to delete the first possibility of detention envisaged in the proposed paragraph 4(1).*

Article 298[3]

144. This proposed new provision dealing with seizure is not generally problematic but, as already noted, the effect of the third clause of paragraph 1 is unclear when taken with the proposed amendment to Article 169.

145. *There is thus a need to clarify the effect of this provision and, if necessary, ensure that there is a possibility to challenge a provisional seizure of property before the trial stage of proceedings*.

146. It should also be noted that the list of relevant agencies in the first clause of paragraph 1 is incomplete as the State Penitentiary Service is not included.

147. *There is thus a need to correct the list accordingly*.

Article 298[4]

148. Paragraph 1 of the proposed new provision would deal with the procedure of notification of supervision of a criminal misdemeanour. It would require such a notification to be approved by the head of the inquiry agency or of a prosecutor in contrast to the general position under the current Article 278 in respect of non-grave crimes whereby the necessary approval can only be given by a prosecutor. This not only weakens the arrangements for ensuring that criminal proceedings are justifiably initiated but also seems inconsistent with the responsibility that the prosecutor would have for taking the actions prescribed in the proposed new paragraph 2 of Article 301.

149. *There is thus a need to delete the possibility of approval being given by the head of the inquiry agency*.

150. Paragraph 2 of the proposed new provision only provides for the possibility of the defence requesting an expert examination in the event of a disagreement with the results of a medical examination. As formulated this paragraph leaves it unclear whether or not the rights of the defence under Article 42.3(8) to collect and produce evidence to investigator, public prosecutor, investigating judge and under Article 101.2 to produce to court expert's findings, which are based on expert's scientific, technical, or other special knowledge remains available in the case of misdemeanours, It also underlines the inappropriateness of the proposal to conduct medical examinations before the entry of information in the Integrated Register as this runs counter to the right of the defence in Article 42,3(9) to participate in procedural actions.

151. *There is thus a need to clarify the relationship of the proposed paragraph 2 to the rights under Articles 42.3(8) and 101.2 and, if necessary, to provide that these remain applicable. In addition, the recommendation that medical examinations should not be conducted before the entry of information in the Integrated Register is equally applicable to the present proposal*.

Article 298[5]

152. The proposed new provision deals with aspects of prolonging the term of an inquiry.

153. Paragraph 1 deals with the possibility of prolongation where there is a need for additional investigative and search actions. This would be for a month but it is unclear whether this may only be done on one occasion or can happen repeatedly, which could result in the prolongation becoming excessive.

154. *There is thus a need - as already noted in respect of Article 219 - for it to be explicit that only one prolongation should be possible*.

155. Paragraph 2 provides that a person should be released within 48 hours if it is not possible to complete the inquiry within the term provided in Article 291. It is assumed that this relates only to the first term - i.e., 72 hours - despite this proposed provision also specifying terms of 20 days and one month as there is no basis for detaining a person for either period.

156. However, this provision is problematic as it has already been seen that detention beyond 6 hours from arrest would not be compatible with Article 5 of the European Convention. It is also problematic since, as formulated, it would allow detention for virtually 5 days, which would also not be compatible with Article 5 of the European Convention.

157. *This provision should thus be deleted*.

158. Paragraphs 3 and 4 regarding suspension of an inquiry are not problematic.

Article 299

159. The proposed replacement of paragraph 1 of this provision rightly specifies that arrest is a temporary preventive measure. However, as has been noted, there seem to be proposals that would result in a person suspected of a criminal misdemeanour being deprived of his or her liberty for a considerable period.

160. There is thus a need not only to delete or modify those provisions but also to clarify in this provision its understanding of the term "temporary".

161. The proposed new paragraph 2 - by its specification of a duty to respond to a first call - rightly seems to envisage that not every person suspected of committing a criminal misdemeanour will be arrested. However, the manner in which other proposed procedural provisions are formulated does appear to be on the assumption that there will, in fact, have been an arrest when in fact this should not always be necessary.

162. *There is thus a need to ensure that the proposed amendments take account of this possibility.*

Article 300

163. The proposed amendment to this provision restates the possibility of being able to undertake the investigative actions stipulated in Articles 264.2 and 268. It is unclear whether this provision is concerned with conducting such actions before as well as after the entry of information in the Integrated Register but, if the intention is for them to be applicable to the former, the concerns previously expressed with respect to the proposed amendments to Article 214 would equally apply to the present provision.

164. *There is thus a need to ensure that this provision is made subject to all the modifications recommended in respect of the proposed amendments to Article 214.*

165. Moreover, given that only minor offences are involved, it is important to recall the European Court's concern about the range of offences covered by covert powers being excessive and being insufficiently defined.[33]

166. *There is thus a need to reconsider the making of covert investigative (search) actions applicable to all criminal misdemeanours.*

Article 301

167. The proposed new paragraph 1 deals with the notification of suspicion to the suspect and the victim but there is a certain vagueness about the phrase "whereupon the suspect … shall be informed" that is used in it, which could allow for inappropriate delay.

168. *There is thus a need to be more precise as to the time-line and it would thus be appropriate to insert the word "immediately" after "whereupon.*

169. The timeline for decision-making in paragraph 2 is predicated upon certain assumptions about the length of the detention to which suspects may be subjected. However, as has been seen in the discussion concerning the proposed Article 298^2, those assumptions conflict with obligations under Article 5 of the European Convention.

170. *There is thus a need to revise this provision in the light of the revisions required for Article 298^2.*

171. As has been noted, there is an inconsistency between the formulation of paragraph 3 of this provision and paragraph 4 of Article 298^2 but the greater problem is the undue length of detention envisaged following arrest on suspicion of committing a criminal misdemeanour.

172. *There is thus a need to revise this provision so that it is compatible with Article 5(1)(c) of the European Convention.*

Articles 381 and 382

173. The proposed amendments to these two provisions would require the appointment of a court hearing and the adoption of a judgment within 5 days of receiving the indictment or immediately if the person concerned has been arrested. In addition, it provides for the possibility of this hearing being in the absence of the participants where the accused has accepted his guilt, does not challenge the circumstances established in the inquiry and agrees with the examination of the indictment.

174. The proposed amendments are problematic in several respects.

175. Firstly, the supposed object of the reform is a simplified procedure and not a rushed one. Yet the formulation of the proposed amendments clearly seems designed for speed, as well as potentially putting pressure on someone to plead guilty without time for reflection and obtaining and acting upon legal advice.

[33] See *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 44.

176. Secondly, the proposed amendments do not show the need for caution about the readiness of an accused to plead guilty. As the European Court has made clear, a trial court has a duty to ensure that someone pleading guilty does so of his or her own free will and with the befit of legal advice beforehand.[34] There is no such requirement governing the proposed procedure in the amendments.

177. Thirdly, the possibility envisaged in the proposed new paragraph 2 of Article 381 to conduct the proceedings in the absence of the parties potentially conflicts with a court's duty of impartiality, at least where - as in this sort of situation – there could be doubts as to the validity of any waiver purportedly given in this regard by the accused.[35] Furthermore, there is no provision requiring it to be established that the accused has consented to the proposed approach to the proceedings where he or she did so of his or her own free will and in a manner that is unequivocal, requirements that are essential for any waiver of the right to be present at a hearing.[36]

178. Fourthly, the proposed amendment to paragraph 1 of Article 282 would result in the trial court considering the indictment and attachments without any direct examination of the evidence in the case. This would clearly be in violation of the obligation under Article 6 of the European Convention that the procedure be adversarial and that the case should be properly examined.[37]

179. *There is thus a need for the proposed amendments to these two provisions to be substantially recast so as to ensure that the accused is afforded a hearing that fully complies with the requirements of Article 6 of the European Convention*.

2) Other provisions

Article 167

180. The proposed change to this provision would add property for which the law envisages special confiscation to that which is defined as coming within the concept of provisional seizure prior to the issue of attachment or return of the property is decided.

181. As provisional attachment is a preliminary to attachment of property pursuant to the procedure in Article 170 and that provision already authorises such attachment with the aim of securing special confiscation, the proposed amendment would seem to be only remedying an omission in the existing Code of Criminal Procedure and thus not problematic.

Article 182

182. The proposed change would result in levels of bail only being set for non-grave, grave and special grave crimes so that there is no amount specified in the case of criminal misdemeanours. This is consistent with the fact that there would be no provision for remand in custody in the case of persons who have been arrested for a criminal misdemeanour. The proposed change is thus appropriate.

[34] See, e.g., *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014.
[35] See, e.g., *Mikhaylova v. Ukraine*, no. 10644/08, 6 March 2018.
[36] See, e.g., *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006.
[37] See, e.g., *Kuznetsov and Others v. Russia*, no. 184/02, 11 January 2007.

Article 214

183. As has already been noted, the proposal to grant a power of inspection before entering information about possible crimes into the Integrated Register is inappropriate.

184. *This aspect of the proposed addition to this provision should thus be deleted*.

Article 284

185. The proposed change would add a new ground to paragraph 1 for the closing of criminal proceedings, introduce a new sub-paragraph into paragraph 2 to provide that closure on this ground is to be a court and supplement paragraph 4 so that the closure on this ground is to be performed upon the prosecutor's request.

186. The new ground for closure is that the identity of a person who committed the criminal offence has not been established upon expiration of the limitation period for criminal prosecution. This new ground would not, however, be applicable in cases of a special grave crime against life or health of a person or of a crime which, according to the law, could be punishable by a life sentence.

187. The ground being proposed is in general appropriate but it is not clear why there is an exception since either a limitation period is applicable or it is not. It may be that the intention is to make a link with Article 49.2 of the Criminal Code – under which there is a period for which the statute of limitation will be "saved", i.e., not apply, namely, where a person has evaded pre-trial investigation or trial and only resume running once he or she surrenders or is apprehended – but even the limitation period will ultimately operate.

188. *There is thus a need to clarify the rationale for this exception and also its effect in practice.*

Section X. Transitional Provisions

189. It should be noted that there is no proposal shown in the comparative table to amend paragraph 1 relating to the exception to the entry into force for

> provisions that refer to criminal proceedings concerning criminal offences, which shall enter into force simultaneously with the entry into force of the Law of Ukraine on criminal misdemeanours.

190. *There is thus a need to remedy this omission unless it has just not been included in the comparative table*.

F. CONCLUSION

191. The proposed amendments are directed to two principal considerations, fulfilling a longstanding expectations that certain offences should be treated as criminal misdemeanours without a penalty involving imprisonment and that the procedure for dealing with should be less exacting than that for offences of a more serious nature.

192. The first goal is partly met by the absence of any rationale for which minor crimes are categorised as criminal misdemeanours, the enhancement of the penalties for other minor crimes, the lack of respect for the principles of equality and proportionality in the way penalties are prescribed and the continued possibility of loss of liberty being imposed for the commission of administrative offences. Furthermore, there is a lack of clarity in the reasoning for the retention of a lower penalty for refusing to be tested when suspected of driving under intoxication, etc. than that for actually so driving, thereby undermining the suggestion that an aim of the Draft Law is to treat the latter conduct more seriously.

193. It is appreciated that every legal system has to adopt measures to deal with overloaded criminal justice systems and thus introduce some shortcuts in the way proceedings are to be conducted. However, the need to handle mass criminality regarding minor infringements efficiently should not allow for the disregard of fundamental procedural safeguards.

194. Unfortunately, such a disregard would be the consequence of procedure which is being proposed, with the amendments that would allow procedural actions to be taken before any entry of information in the Integrated Register both in circumstances that have led to abuse in the past and in others where there is no provision for adequate safeguards against such abuse, would leave unclear the limits as to the duration of investigation, would create the possibility for suspects to be put under pressure to plead guilty and would deprive the defence of crucial rights.

195. At the same time the proposed amendments – with the creation of separate investigative structures for criminal misdemeanours and crimes – are likely to produce unnecessary complexity and confusion in the operation of the criminal justice system.

196. The recommendations in the Opinion would undoubtedly mitigate the ways in which the proposed amendments run counter to European standards. However, apart from implementing them, it would be worth giving further consideration as to how the bringing into operation of the concept of criminal misdemeanour could lead to a much greater humanization and efficiency of the criminal justice system.

ANNEX: SUMMARY OF RECOMMENDATIONS

A. General

- reconsider the approach to penalties and, in particular, modify the determination of fines that can be imposed so that scheme adopted observes the principles of equality and proportionality
- explain the rationale behind the proposed enhancement of penalties for many criminal offences
- give consideration to modifying the use of the term "committed" in a manner that reflects the presumption of innocence

B. Amendments to the Code of Administrative Offences

- *Article 130* - reflect on whether there is sufficient coherence between this provision and the proposed Article 286^{1} of the Criminal Code in the way they address the problem of driving while intoxicated, etc.
- *Article* 164^{19} - delete the proposed offence of fictitious business
- *Article 255* - delete the proposed reference to Article 164^{19}

C. Amendments to the Criminal Code

- *Articles 12.7, 14 and* 16 - review and possibly revise the use of "criminal offence" in these provisions
- *Article* 286^{1} - reflect on whether there is sufficient coherence between this provision and the proposed amendment to Article 130 of the Code of Administrative Offences in the way they address the problem of driving while intoxicated, etc.

D. Amendments to the Criminal Procedure Code

- *Articles 3, 38, 214, 216, 217 and 218* - reconsider whether the proposed creation of separate structures at the legislative level for investigating criminal misdemeanours and crimes is really calculated as the most efficient means of tackling the suspected commission of criminal offences
- *Article* 39^{1} - (in the event of the bifurcated approach to investigation being retained) require that any setting aside of an investigator be reasoned
- *Articles* 40^{1} *and 214* – do not retain the proposed possibility of conducting inspections and medical examinations before entry of information in the Integrated Register and, with respect to the criminal misdemeanours, introduce safeguards for the other actions proposed to be conducted before entry of information into the Integrated Register
- *Articles* 40^{1} *and 300* - reconsider the making of covert investigative (search) actions applicable to all criminal misdemeanours
- *Article 71* - modify paragraphs 2 and 4 so as to limit the possibility of providing conclusions only in respect of actions conducted after the entry of information in the Integrated Register
- *Articles 77 and 80* - rectify the omission of "inquirers" from these provisions
- *Articles 169 and* 298^{3} - clarify the effect of the proposed changes Article $298^{3}$and, if necessary, provide for the possibility to obtain judicial review of the provisional seizure of property before any trial

- *Article 214, Articles 219 and 294*[5] – provide a time-limit that is realistic for most types of cases – such as 20 days - and allow for an extension to it just once
- *Article 284* - clarify the rationale for the exception to the proposed new ground for closure of criminal proceedings – applicable in cases involving a special grave crime against life or health of a person or a crime which could be punishable by a life sentence - and also its effect in practice.
- *Articles 290, 301 and 314* - ensure that the rules of disclosure so that the requirements of the right to a fair trial under Article 6 of the European Convention are respected
- *Article 298* – delete the proposed two additional paragraphs
- *Article 298*[1] – delete the reference to the possibility of conducting medical examinations before entry of information in the Integrated Register and introduce safeguards for the other actions proposed to be conducted before such entry
- *Articles 298*[2] *and 299* - ensure that the proposed amendments take account of the fact that an arrest should not always be necessary
- *Article 298*[2] - delete the first possibility of detention envisaged in the proposed paragraph 4(1)
- *Article 298*[3] - clarify the effect of this provision and, if necessary, ensure that there is a possibility to challenge a provisional seizure of property before the trial stage of proceeding. In addition correct the list of relevant agencies in paragraph 1
- *Article 298*[4] - delete the possibility of approval being given by the head of the inquiry agency, clarify the relationship of the proposed paragraph 2 to the rights under Articles 42.3(8) and 101.2 and, if necessary, provide that these remain applicable. In addition, delete the reference to the possibility of conducting medical examinations before entry of information in the Integrated Register
- *Article 298*[5] – delete paragraph 2
- *Article 300* - ensure that this provision is made subject to all the modifications recommended in respect of the proposed amendments to Article 214
- *Article 301* - be more precise as to the time-line for notification of suspicion by inserting the word "immediately" after "whereupon and revise paragraph 3so that it is compatible with Article 5(1)(c) of the European Convention
- *Articles 381 and 382* - substantially recast these provisions so as to ensure that the accused is afforded a hearing that fully complies with the requirements of Article 6 of the European Convention
- *Section X. Transitional Provisions* – remedy the omission of a proposal relating to the exception to the entry into force for provisions that refer to criminal proceedings concerning criminal offences, which shall enter into force simultaneously with the entry into force of the Law of Ukraine on criminal misdemeanours.