

**HUMAN RIGHTS COMPLIANT CRIMINAL
JUSTICE SYSTEM IN UKRAINE**

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**Expert assessment of the Draft law 3009a “On amendments to the
Criminal procedural code of Ukraine at the part of securing the
implementation of the functions of the prosecutor's office”**

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“Human rights compliant criminal justice system in Ukraine”

*on the basis of expertise by Prof. Dr. Lorena Bachmaier and Mr. James
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Introduction

1. In May 2015, the required reform of the public prosecution service (hereinafter - PPS) was finally launched, seeking to align the PPS with European standards, and limiting its functions on the criminal justice system, leaving thus the existing functions of general oversight of the former PPS aside. The new Law on PPS provided for a new model of PPS, aligning with European standards, based on the autonomy and professionalism of the PPS.
2. To complete the full adjustment of the Law on the PPS also in the Criminal Procedure Code of Ukraine (hereinafter - CPC), a new draft law has been presented, which seeks to amend several rules of the CPC, mainly those related to the powers of the PPS. However, as will be seen, the proposed amendments are not limited to such objective, as several of the proposed amendments go beyond what is the role and functions of the PPS.
3. The aim of the current assessment is to support the process of the drafting of the amendments to the CPC in order to adapt it, where necessary, to the new role of the Public Prosecution Service, and ensure that the proposed amendments are in line with CoE standards. This assessment will therefore analyse the “Draft Law on Amending the Criminal Procedure Code of Ukraine as regards securing the implementation of the functions of the public prosecutor’s office”, registered as Draft Law 3900a (the “Draft Law”) *vis a vis* the European and international standards.
4. The standards on the role and functions of the PPS are to be found mainly in: the European Convention on Human Rights ('the European Convention') and the related case law of the European Court of Human Rights ('the European Court'); the United Nations Guidelines on the Role of Prosecutors;¹ Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system;² Recommendation 1604 (2003) on the Role of the Public Prosecutor’s Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe;³ the Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service by the European Commission for Democracy through Law ('the Venice Commission');⁴ “Judges and prosecutors in a democratic society” ('the Bordeaux Declaration');⁵ the International Association of Prosecutors Standards of Professional

¹ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

² Adopted on 6 October 2000.

³ Adopted on 27 May 2003.

⁴ CDL-AD(2010)040, 3 January 2011.

⁵ Opinion No.12 of the Consultative Council of European Judges ('CCJE') and Opinion No.4 (2009) of the Consultative Council of European Prosecutors ('CCPE').

Responsibility and Statement of the Essential Duties and Rights of Prosecutors;⁶ and the Opinions of the Consultative Council of European Prosecutors (CCPE)⁷. Best practices on the safeguards of the criminal procedure as identified in national systems shall also be taken into account to the extent they could be applicable to the Ukrainian context and the proposed legislative amendments.

5. This document is to be viewed as a preliminary assessment to be further discussed with the Ukrainian authorities.
6. This expert opinion has been written by Prof. Dr. Lorena Bachmaier⁸ with further comments of Mr. James Hamilton.⁹ The experts were provided with an English translation of the Articles of the CPC which would be affected by the Draft Law 3009a, presented in a comparative table, showing the present text and the provisions which would be amended.

General Comments

7. Any legislative reform should explain the reasons of the proposed amendments, its scope and its aims. This expert has not been provided with the Explanatory Memorandum of this Draft Law, and it is unknown to her if such a document has been prepared or not. The lack of this document does not allow us to question the justification of the proposed amendments, and may answer some of the questions that several of the proposed amendments might raise. As it is to be assumed that such document has been drafted, because otherwise the proper legislative procedure would not be complied with, a further discussion having such explanatory memorandum in sight, could aid in understanding some of the proposed amendments.
8. The amendments to many of the provisions of the CPC have only a terminological character, in its vast majority improving the text or introducing more precision with regard to conceptual issues.
9. In this sense, the expression “state prosecution” or “state prosecutor” is correctly changed for the more accurate expression “public prosecution” or “public prosecutor”. These reforms are to be found in Articles 3, 2, 26, 56.3, 337, 340 and 341 CPC. The change of expression is to be welcome as it reflects much better the

⁶ Adopted on 23 April 1999 and subsequently endorsed by the United Nations Commission on Crime Prevention and Criminal Justice (Resolution 17/2, 14-18 April 2008. Also of relevance by analogy are certain standards specifically concerned with judges, namely, the Basic Principles on the Independence of the Judiciary (adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) and OSCE 2010 Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (adopted by the OSCE Office for Democratic Institutions and Human Rights and the Max Planck Minerva Research Group on Judicial Independence, 23-25 June 2010).

⁷ All the CCPE Opinions are accessible at <https://www.coe.int/en/web/ccpe/opinions/adopted-opinions>.

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position and role of the public prosecution in a democratic society and also aligning with the functions of the PPS as envisaged in the Ukrainian Constitution.

10. Another change in terminology is to be found in Articles 295-1, 216.10 or 552.6 CPC, where the expression “supervising prosecutor” is to be changed by the reference to the prosecutor who carries out “the procedural guidance in a pre-trial investigation”. This is in line with the definition of the functions “organization of pre-trial investigation” and “procedural guidance” introduced respectively under paras. 13-1 and 15-1 of Article 3 CPC. The emphasis on “guidance” rather than supervision and the implication that this refers to procedural matters rather than substance is a welcome assertion of the autonomy of the individual prosecutor. It will be important to ensure that this is reflected in practice. All in all these amendments do not pose any problems and in general are welcome as they improve the quality of the law.
11. Other amendments, which are only terminological or do not have a significant impact on the content of the norm, but simply provide for more precision or clarify the meaning, will not be commented here. They are to be welcomed in so far as they improve the quality of the legislative text. Some of those amendments are, for example, to be found under:
 - **Article 3.3 CPC** introduces the word “unavoidability” of the criminal liability;
 - **Article 36.2.21) CPC** clarifying that the powers of the PPS are those stipulated in the Code and also in other “laws of Ukraine, whose provisions apply to the criminal proceedings”;
 - **Article 36.5 CPC**, when regulating the powers set out under this paragraph –the power to delegate the pre-trial investigation to another agency– when the pre-trial investigation is ineffective, the proposed amendment adds at the beginning of this provision another ground for exercising such powers: “in order to ensure a comprehensive and impartial investigation”. This addition does not impact the previous meaning of the rule, only clarifies its justification.
 - The same can be affirmed with regard to the precisions introduced in **Article 37.3 CPC**, which clarifies under which circumstances can a specific prosecutor be removed from a case;
 - Adding to **Article 39.3 CPC** the word resolutions, to assignments and instructions of the PP that the head of the pre-trial investigation shall carry out, when issued in writing.

Comments on specific Articles

Article 3 CPC. Definitions of key terms in the Code

Article 3.1 3) CPC and Article 3.1.15) CPC

12. As already mentioned, the proposed amendment to Article 3.1 3) CPC changes the terminology of “state prosecution” by “public prosecution”, and under Article 3.1.15 CPC defines the concept of “prosecutor”, by referring to any of the positions listed

under Article 15 of the Law on the PPS a public prosecutor can hold. The change of the term “state prosecution/prosecutor” by “public prosecution/prosecutor” along the whole CPC is to be welcome, as it is in line with the role and position of a PPS in a democratic society. However, while correcting this concept, in accordance to the role and functions of the public prosecutor, the definition under 3.1.3) CPC has not been amended. The new para.3 reads:

“public prosecution is a procedural activity of a public prosecutor on behalf of the state and in the interests of society, that consists in proving the accusation before court with the purpose of ensuring the **unavoidability of criminal liability of a person who committed a criminal offence;”**

13. The reform could consider improving this definition in accordance with the CoE Recommendation Rec(2000) 19 “On the Role of the Public Prosecution in the Criminal Justice System”, where the functions of the public prosecutor are defined as with regard to the definition of a public prosecutor in the following way:

“Public prosecutors” are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

14. Within the CPC, in accordance with the Ukrainian Constitution and also with the PPS Law, it would be better to start underlining that the public prosecution is an action on behalf of the society and the public interest, albeit its role may also be to act representing the interests of the state. Further, it should also be underscored that the main role is to ensure the application of the law in the criminal proceedings, thus prosecuting when there are enough grounds and elements for it, but also to prevent innocents to be prosecuted, when there are no suspicions or enough evidence to take them to court.
15. As to the definition of “prosecutor” under 3.1.15) CPC, it would be advisable to add “public” before “prosecutor”, in coherence with the reference made to Article 15 Law on the PPS made in the same paragraph. However this may be a translation issue with no further relevance.
16. As to adding, that the prosecutor acts “in order to ensure the application of the Law of Ukraine On Criminal Liability and fulfilment of the tasks in the criminal proceedings”, it is correct and does not seem to be problematic.

Recommendation

17. *To follow the text as in the Rec(2000) 19 for defining criminal prosecution/prosecutor and also the wording Article 131 of the Ukrainian Constitution, recognizing the role of a public prosecutor in ensuring effectiveness of prosecution, but also that this is done in compliance with the fundamental rights.*

Article 3.1. 7-2) CPC

18. This paragraph introduces following definition of a criminal report:

“notification about a criminal offence is a verbal or written appeal of individuals or legal entities, officers (officials) from public authorities and local self-government bodies, enterprises, institutions and organizations, which contains sufficient data on the circumstances that can testify to the commission of a criminal offence.”

19. While this definition is mainly correct, on the one hand it lacks elements, as it does not mention to whom is the report to be submitted or by which channels it can be presented; and on the other hand it is unnecessarily detailed, listing all the persons/bodies/entities who can file a report and the data the report shall contain. It would suffice to state that the criminal report is a verbal or written notification of the *notitia criminis* made by anyone duly identified. First, this would avoid the unnecessary long list of persons/bodies who can report a crime; and second, avoid that the definition contains elements that need to be further defined. What shall be understood under *“sufficient data on the circumstances that testify the commission of a crime”*? The report, in most European CPCs has to refer to acts that possibly could constitute a crime, but often the person reporting does not have the precise data, or does not even know if the facts that he/she is reporting can constitute a criminal offence. Report, should be any notification of the commission of a possible crime, and whether there are sufficient data that justify an investigation, should not be an element of the definition of a criminal report. Obviously, intentionally false reporting should entail criminal liability.
20. This precise definition of what the report shall be and elements that it should include, as will be seen below, has also an impact upon the obligation to enter the report into the Registry, which is to be criticised (see below under Article 214 CPC comments). In any event, independently of its impact upon the registering obligations set out under Article 214 CPC, the definition included in this proposed Article 3.1. 7-2) CPC of a criminal report is too narrow and thus is not logical with the aim of a criminal report, which is mainly to offer a channel to convey the *notitia criminis* to the authorities.

Recommendation

21. *Consider the opportunity and convenience of redefining the concept of “criminal report”, and the consequent increase the risks of arbitrariness in the access of criminal reports to the Unified Registry of Pre-trial Investigations. It is recommended to keep the access of all reports and institute an effective filtering afterwards. By keeping the access to the Registry as it is now, there is the possibility of checking if there have been any arbitrariness in opening/closing investigations, and thus more safeguards against abuses and corruption.*

Article 3.1.10) CPC

22. This paragraph as it stands now defines the concept “criminal proceedings”, stating that these are “pre-trial investigation and court proceedings, procedural actions” in connection to the commission of a crime. The proposed amendment adds to this definition the “enforcement of court decisions”. This apparently little amendment has a huge impact upon the criminal justice system, meaning that the enforcement of sentences and any other judicial decision is to be governed by the rules and principles of the criminal procedure, becoming a judicial procedure, rather than an administrative procedure.
23. While any option in theory would be compliant with the ECHR –which does not impose a precise (administrative or judicial) model on the enforcement of criminal judgments–, the justification and viability of this amendment is to be analysed. First, if the intention of the legislator is to make the enforcement stage part of the criminal procedure and thus grant more control upon the enforcement of sentences to the courts, this is positive, but needs to be accompanied with major reforms in the “Criminal Execution Code”. Second, keeping the stage of the enforcement of sentences as part of the criminal procedure, has also direct impact upon the statistics (closed or resolved cases), international cooperation in criminal matters, remedies against decisions adopted during the enforcement phase, competent court, rights of the convicted person, etc.
24. If Ukrainian authorities make a choice for expanding the definition of criminal proceedings to the enforcement stage, then a more comprehensive legislative adjustment and justification might be needed to assess the convenience and impact of such reform.

Recommendation

25. *It is recommended to add clarity to the scope and aims of this amendment, and if it seeks to change the proceedings on enforcement of judgments, then a deeper analysis and adjustment might be necessary.*

Article 3.1.13-1) and 3.1.15-1) CPC

26. The proposed amendment adds the definition of “organization of pre-trial investigation” and “procedural guidance” as tasks of the public prosecutors within the criminal proceedings. The definition added under para.13-1) of Article 3.1 CPC if read alone does not seem to add nothing relevant, as it simply refers to the powers specified in the Code. And the definition of “procedural guidance” is equally general by stating that it is an activity “connected with the powers of procedural supervisor” aimed at ensuring efficiency of the pre-trial investigation.
27. Both of these definitions do not appear to change anything, and they do not add precision, as they are both very general. However, they seem to limit the possibilities to exercise the “pre-trial organization” and the “procedural guidance” to the head of the office and the position of senior PP, and thus it reinforces the powers of the heads

of office and senior PP. While this is not necessarily negative, and it is also accepted in a hierarchical structure, it reduces the autonomy and independence of the individual public prosecutors, who will have very reduced powers, and will act by delegation of the head of the office or the senior PP. The impact of this “definition” needs to be analysed together with the powers set out under Article 36 CPC, as it seems it is not a mere definition, but a weakening of the individual PP by reinforcing the hierarchical structure, which runs against the strengthening of the independence of the individual prosecutors.

28. In addition it seems unclear how this new provision on organisation of a pre-trial investigation ties in with existing Article 3.1.13) CPC, which deals with accusation (which in accordance with existing Articles 42 and 291 means the process of indictment). Nothing appears to indicate a repeal of existing Article 3.1.13) CPC, which presumably is to be retained although the two paragraphs which will now appear together do not seem to be closely related.

Recommendation

29. *While these new paragraphs do not seem to be necessary –because the functions of the public prosecutor and thus the precise scope of the concepts of “pre-trial organisation” and “procedural guidance” are regulated under Article 36 CPC–, they may raise problems as to the scope of autonomy of every individual public prosecutor who is not the head of a PPO or has a senior level.*

Article 36 CPC. Prosecutor

Article 36.1 CPC

30. This first paragraph sets out the general functions of a “prosecutor”, reiterating that those functions are mainly to “ensure the organization and procedural guidance of the pre-trial investigation”. This is adequate, but since these functions have been linked under Article 3.1 CPC to the head of the PPO or a senior PP, in practice it reduces the autonomy of single PPs.
31. Further, this paragraph also states that the prosecutor “deals with other issues during criminal proceedings in accordance with the law”, a phrase that does not add anything being so general that it is unnecessary. It goes without saying that all the activities shall be carried out in accordance with the law and the CPC, thus it seems strange to underline this twice in the same paragraph, and again in the next sentence (“in compliance with the requirements of this Code”).
32. Finally, the sentence taken from the Constitution is expressly mentioned when addressing the functions of the PP, as the supervision of “covert and other investigative and search activities of the law enforcement bodies”. Within the supervisory functions the oversight of any investigative measures are already

encompassed, thus it is not necessary to mention here specifically covert investigative measures and searches, together with a general reference to “other investigative measures”, even if the former ones are mentioned in the Constitution.

Recommendation

33. *Redraft the first paragraph of Article 36.1 to make clear what is the aim and scope of the proposed amendment relating the functions of the PP. While the first paragraph of Article 36.1 refers to the procedural guidance and organization (presumably by the head of the PPO according to Article 3), the next paragraph seems to contradict the previous one, by reassuring that each PP shall be independent “in his procedural activity.”*

Article 36.2.2) CPC

34. While providing procedural guidance the public prosecution shall have direct access to public registers and other automated public databases in order to access data necessary for the pre-trial investigation it is organizing/guiding. This power shall be exercised in compliance with the personal data protection laws.
35. The amendment is positive, as the current provision does grant too broad powers to the PP to access “materials, documents and other information”. The new text limits the full access to those databases that are public, and underlines that this should be done in compliance with the data protection laws. This is a positive amendment.
36. This provision seems to be adequate, although it is unknown how the respect to the personal data protection laws will be ensured. It should be underlined that the data to be accessed are only those strictly related to the current investigation, thus compliant with the limited scope of such access and the proportionality principle. While these principles are surely set out in the data protection laws, it would be adequate to underline it also when enumerating the powers and functions of the PP in the criminal proceedings. As it stands, this provision does not seem to be problematic, but it still can be improved.

Recommendation

37. *The amendment is welcomed, however it could be considered introducing specific reference to the data protection rules in this provision, in order to ensure that such rules are respected when direct access to the databases is carried out by any PP, in particular the specificity principle and the purpose limitation.*

Article 36.2.8) and 36.2. 8-1) CPC

38. The proposed amendments to **paragraph 8) of Article 36.2** are two: 1) first it adds expressly that the pre-trial investigator suspension can be initiated “if she/he has violated the law when conducting a pre-trial investigation”. This amendment does not pose any problematic issues, although it is to be assumed that at present there are already mechanisms to suspend an investigator who infringes the law during a pre-

trial investigation. Nevertheless, the mentioning of this ground together with the inefficiency in carrying out the investigation, is appropriate; 2) the second amendment is more debatable, as it grants the PP powers to suspend the investigator in case the pre-trial investigation agency does not proceed to the suspension of the officer who does not fulfil the investigation efficiently or has infringed the law.

39. Giving the prosecutor the power to suspend an investigator and order its substitution, when the superior investigating officer does not act in that sense, may be justified in the Ukrainian context. While this measure reinforces a hierarchical relationship between investigators and PPs, it may also be necessary to prevent dysfunctional attitudes of the pre-trial investigation bodies.
40. In any event, the proposed amendment, not being against European standards, should be further discussed to understand its justification, as it can also affect negatively the cooperative relationship that should exist between LEAs and PPO.
41. It would be interesting to know what has prompted the proposed introduction of a power for the prosecutor to suspend an investigator when the investigator's superior fails to intervene. Presumably the power is to suspend the investigator from the particular investigation and not generally and if the text is ambiguous on this point this should be clarified. Furthermore, while the proposed amendment would allow the prosecutor to suspend in a case where the superior investigator fails to do so, what happens if the superior investigator fails to appoint a new investigator? Article 36.5 CPC could probably then be brought into play.
42. The same is to be affirmed with regard to the proposed new **Article 36.2 8-1) CPC**, introducing the powers of the PP "to initiate with the head of the pre-trial investigation agency the issue of bringing disciplinary actions against the investigator". While the text is unclear –at least in the English version– whether the initiation of the disciplinary action shall be done jointly by the head of the pre-trial investigation agency and the PP; or rather that in addition to the head of the LEA, the PP has powers to do so, in any event, this possibility strengthens the position of the PP in the pre-trial stage, and reinforces his capacities to organize and supervise (guide) the whole pre-trial investigation.
43. Giving the PP powers to react when the investigators are not fulfilling adequately their tasks and their superior does not take any action, may serve to improve the efficiency of the pre-trial investigation, and in that sense it is to be welcome. However, this possibility already exists according to Article 14 of the Law on the Disciplinary Statute of the National Police. The risks of creating additional tensions between PPO and LEA if the PP makes use of these powers cannot be overlooked.

Recommendation

44. *The reasons for amending this provision should be explained. Otherwise, no recommendation.*

Article 36.2.17) and 19) CPC

45. These paragraphs are to be removed according to draft law 3009a. They provide for the power of the PP to coordinate requests for international mutual legal assistance in criminal matters, either upon the initiative of the pre-trial investigator or on its own initiative. These functions are to be removed from the current Article 36, but it is unclear where the coordination of the MLA requests are to be regulated according the draft law.

Recommendation

46. *Explain the removal of these provisions from the present Article 36.2 CPC.*

Article 36.2. 21) CPC

47. This paragraph is amended including two different provisions. First it adds:

“If the powers are exercised as part of a group of prosecutors, prior to any procedural actions or procedural decisions the prosecutor shall coordinate them in writing with the leader of the group of prosecutors, whose decision is final.”

48. This provision shall clarify how a single prosecutor, acting within a group of prosecutors shall ensure the coordination prior to taking any actions or decision, by communicating in writing with the leader of the group. It is to be deduced that the leader has a higher position in the hierarchical structure, as this provision states that his decision “is final”. In practice this means that the PP who has been appointed as group leader, can give orders to any other members of the PP within the group, for the aim of coordinating their actions.
49. While this coordination is necessary when acting within a group of several members of the PP, this rule does not seem to promote a dialogued coordination, but a hierarchical one.
50. Under paragraph 21) another set of rules is added which regulate the functions of the PP in the context of the enforcement of court decisions. These functions, as already mentioned when commenting Article 3.1.10) CPC, are listed under 7 paragraphs, providing the different actions a PP can carry out with regard to the enforcement of a sentence. The involvement of the PP at this stage does not seem to pose any specific questions, as it consists mainly in challenging court decisions and participating in hearings related to any measure linked to the enforcement of the sentence. It can only be reiterated here, what was already stated under Article 3.1.10) CPC comments: if the criminal proceedings shall encompass the enforcement stage, it is reasonable that the PP shall also have a say in such proceedings. The justification for this change should be further explored.
51. From a legislative technical point of view, the powers of the PP in the enforcement stage should be regulated in a separate paragraph, and not together with the rules on the coordination of a group of prosecutors.

Recommendation

52. *Ensure that the new definition of criminal proceedings to include the execution of the sentence, and thus the rules on the involvement of the PP at the enforcement stage are coherent with the rest of legal provisions on execution of sentences.*

Article 36.3 CPC

53. The current Article 36.3 CPC only states that the participation of the PP shall be mandatory unless provided otherwise in this Code. This short provision is to be extended, to specify that the participation of the PP shall not be mandatory “when proceedings are done in writing”. The impact of this provision should be further explored, although it does not seem problematic from the point of view of European standards. However, it should be checked if the rights of the victim and her adequate protection could be affected by this new provision.
54. The proposed amendment adds also other powers of the PP in court proceedings. It is unclear if such a list of procedural actions during the court proceedings is necessary, because it should be already clear that the PP can carry out all the procedural actions as party to the proceedings. Whilst the need of this amendment is not clear, it does not seem to be problematic.
55. The amendments to 36.3.2 CPC providing that a regional level prosecutor participates in the appeal proceedings and a GPO prosecutor participates in the cassation proceedings also seem to go against the initial idea of the CPC in 2012. Both for the independence and effectiveness, one prosecutor was expected to be responsible for the case from the beginning to the end. The need to decrease the procedural roles of the regional offices and the PGO has also been discussed. These amendments, especially taken together with other amendments in this draft law, seem to further limit procedural autonomy of local-level prosecutors.

Article 36.5 CPC

56. The amendment to this paragraph 5 of Article 36 is very limited, as it only adds at the beginning of this provision another grounds for delegating the criminal investigation to another pre-trial investigation agency: “in order to ensure a comprehensive and impartial investigation”. At present the Prosecutor General and the Head of a Regional PPO can change the pre-trial investigation agency when the pre-trial investigation is being ineffective. The proposed reform should extend also this possibility when such change is considered necessary for ensuring “a comprehensive and impartial” pre-trial investigation.
57. While the mere possibility that the PP can change upon grounds of inefficiency the competent investigation agency, can be criticised, this is a problem that is not created by the proposed reform of the draft law 3009a, as this reform only introduces two additional grounds to the existing provision. It could be considered to cut this possibility all in all, and leave without effect Article 36.5 CPC, but it has to be underscored that the possibility of changing the investigation agency by the PP is a

power that is current in force, and thus is not created by the Draft Law under consideration.

58. Taking into account the proposal to add new grounds for allowing the PP to change the investigation agency, it could be considered to subject such change to more precise requirements, and only upon the request of the acting PP –who is the only one who can really assess if the investigation is inefficient or risks lack of impartiality or is not carried out comprehensively–.

Recommendation

59. *Taking into account the abuses it may entail that the investigation agency is changed during a pre-trial investigation, and at the view of the broad grounds set out in Article 36.5 CPC, it should be considered requesting for such decision a more substantiated basis –precise facts and information–. Moreover, such decision should only be taken upon the request of the acting PP in the case.*

Article 36.7 CPC

60. This newly added paragraph 7 to Article 36, which is divided into 6 subparagraphs, would allow the head of a prosecutor's office or a senior prosecutor to practically exercise any kind of control over the activities of the acting PP in the criminal proceedings (subpara.1). It would permit not only to “check compliance with the requirements of the law regarding receipt of, registration and dealing with reports and notifications about the committed or planned criminal offences” (subparagraph 3), but also to interrogate persons who reported a crime, assign a unit for responding to a request of MLA (subpara. 4), or give orders regarding the detention of a person who committed a crime outside the country and intervene in the extradition request (subpara. 5).
61. At his point it is worth quoting the CCPE Opinion num. 13(2018) on **Independence, accountability and ethics of prosecutors**,
- “40. A hierarchical structure is a common aspect of most prosecution services. Internal independence does not prevent a hierarchical organisation of the service and the issuing of general recommendations or guidelines/directives on the application of the law to ensure consistency of law and jurisprudence or priorities for prosecutorial action. This is especially necessary in member States in which the “opportunity/discretionary principle” applies. All internal instructions within the prosecution service should be provided in writing, be transparent and aim at seeking the truth and to ensure the proper administration of justice.”
62. While the control on the lower PP by the head of the PPO or a prosecutor of senior level, may be justified within a hierarchical structure and not necessarily impinge the internal independence of the individual PP handling a case, Article 36.7 CPC seems to go further: it does not envisage certain instructions, but a clear inspection upon the fulfilment of the duties and the exercise of the powers of the individual PP.

63. Such inspection, unless there are initial grounds that indicate that there is some infringement of the law or abuse in the exercise of its powers by a PP in carrying out its functions, should not be as a rule allowed. This is not made clear in the wording of this paragraph 7 of Article 37, which opens the door to interferences in the work of a lower PP without any previous reason.
64. The provisions in the draft have the potential for abuse and could be used to harass or intimidate junior prosecutors. Taking into account the Ukrainian context of the previous functioning of the PPS and the history of senior prosecutors exercising undue control over the work of juniors who in turn have often been unwilling or unable to take decisions without the prior approval of senior prosecutors this would be a major step in the wrong direction.
65. It would be more advisable not to permit these types of interferences, unless there is a prior indication of malfunction or abuse. In such cases the control of the activities of a lower PP should be done within an inspection procedure. Otherwise, knowing that the superior PP may any time interfere in his/her work, the feeling of autonomy and independence will never be rooted in the individual PPs.
66. In any event issues that refer to the internal structure and functioning of the PPs do not usually belong to the CPC, as its regulation for systematic grounds, should be the Law on the PPS.

Recommendation

67. *Consider removing these powers to interfere in the work of the lower PP by checking the action taken in single criminal proceedings and checking compliance with the registering procedure, without any previous suspicion, and apply checks and controls upon individual PPs by way of inspection procedures.*
68. *Questions relating to the internal functioning of the public prosecutors' office would be better placed in the Law on the Public Prosecution Service, thus consider removing them from the CPC.*

Article 37 CPC. Appointment and replacement of a prosecutor

Article 37.1 CPC

69. The new part added to paragraph 1 of Article 37 CPC includes rules relating to the powers and tasks of the leader of a group of prosecutors. In general it is possible to provide for the coordinated work of several PPs, which is necessary in certain complex cases, specifically if the crime involves several jurisdictions and it relates to organised criminality.
70. While the coordination of different PPs acting under a group leader is positive, it is unclear who decides on the constitution of a group, what are the criteria for assessing the need of a group and who appoints the group leader. As this is not regulated under the proposed new paragraph 1 of Article 37, it should be included, either in the CPC or in the Law On the PPS. If the rules on establishing such a group and the decision for appointing the leader are not foreseen –neither in the CPC nor in the Law on the

PPS–, this provision entails risks of interference in the work of the assigned PP, and thus, it also increases the abuses against the autonomy of the individual PP. In other words, the good work of an honest PP could be “neutralised” by imposing upon him/her a group leader upon a discretionary decision.

71. Therefore, as a rule, the assigned PP should be consulted, and the conditions and circumstances that would justify establishing a group of PPs should be set out in the law. Moreover, if this provision seeks to gain efficiency and support the actual investigation under an individual PP, it would be logical that such PP would also be appointed as leader of the group, as he/she would be the one who is more familiarised with the pre-trial investigation.
72. With regard to the powers of the group leader, the proposed paragraphs determine that he/she would assume the whole pre-trial organization and distribution of tasks among the members of the group and in general “ensure the general planning, distribution of duties and workload between the members of the group, etc.” (Article 37.1.2) CPC). But the leader of the group will not only have coordination powers, but also decide who will present the case in court (Article 37.1.4) and 5) CPC), and will conclude himself/herself the plea agreement or authorise to conclude it, authorise the change of the charges or press new charges, etc. (Article 37.1. 6) CPC). In sum, the group leader is accorded full powers over the rest of the PPs members of the group, will take full decisions on the pre-trial investigation, organised the tasks of each member of the group as well as take the relevant decisions as to the closing of the case, or the charges to be pressed in court, reinforcing a strict hierarchical structure of the PPs within such groups. The law does provide that the leader “takes into account reasoned positions of the prosecutors in the group” and this should be taken account.
73. As a rule the way the distribution of workload among PPs is carried out, should prevent abusive situations that occurred in the past, where individual PPs were deprived of their autonomy and risked being disciplined through an overload of work, they could hardly comply with. The recent comparative study of the Council of Europe presented to the Ukrainian authorities “The Workload of Public Prosecutors in Selected Council of Europe Member States,¹⁰ shows the significance of adopting clear and objective systems on workload distribution to ensure both efficiency and autonomy of each of the members of the PP. One of the conclusions of that study is that in the six countries analysed –which are representative of different European criminal justice systems and prosecutorial models–, is:

“As to the distribution of cases/workload within each PP unit, most countries refer to pre-established rules that ensure a fair and equal distribution of workload. Such rules although for internal management are usually public. Poland seems to be the only country where the allocation of cases is decided by the managing or superior PP, but there is no mentioning of pre-established rules.”¹¹

¹⁰ Accessible at: <https://rm.coe.int/comparative-study-workload-eng/16809f0001>.

¹¹ See paragraph 13.

74. A good practice of these transparent system of distributing the workload is represented by the Spanish system, where:

“The distribution of work among prosecutors within each provincial unit, it is carried out by the provincial chief prosecutor on the basis of objective and fair criteria that are published. This is precisely regulated in art. 18.2.3) PPL. These criteria are submitted to the consideration of the provincial board of public prosecutors, who shall be heard, before its approval. The criteria are transparent and public. Three elements are taken into account in the distribution of the work among the serving PPS in the provincial units: 1) the existing courts in the province; 2) the on-call service needs; and 3) the specialisation.”¹²

75. A fair, transparent, dialogued and approved system of distribution of workload is one of the safeguards for individual PPs against pressure and illegal influences, to ensure the independence that is set out under Article 16 of the Ukrainian Law on the PPS.

76. The proposed Article 37.1 CPC when regulating the powers of the leader of a group of PPs does not explain how this fair distribution of workload will be kept, which might entail risks of arbitrariness, as seen in the past in the Ukrainian context.

Recommendation

77. *Consider regulating the procedure and requirements for the establishment of the group of PPs and the appointment of the leader in such a way as to prevent possible arbitrariness and abuses that would circumvent the guarantees for the PPs independence, as set out under Article 16 Law PPS. The law should take into account the opinions of the PPs forming the group, both on the convenience on its establishment as well as on its organization and distribution of tasks.*

Article 37.3 CPC

78. The amendment introduced to this provision is merely terminological, changing the expression “supervision” by the new wording “procedural guidance in pre-trial investigation”, in accordance with the definitions introduced in Article 3 CPC. The possibility to change the prosecutor “in exceptional circumstances” by the head of the PPO for ineffectiveness in performing his/her supervision/guidance duties, is to be criticised, for being too broad, and giving wide margin of discretion to the head of the PP office to remove a PP from a precise case. In certain cases, it can be agreed that there is a need for a mechanism to remove a demonstrably incompetent prosecutor from a case provided that necessary safeguards against abuse are put in place and the decision is motivated.

79. However, it has to be taken into account that this possibility to remove the PP for reasons of ineffective performance of his duties at the pre-trial investigation, has not been introduced by the proposed amendments, as such powers existed already in

¹² See para. 76 of the comparative study.

article 37.3 of the CPC. The amendment affects only the terminology, although the powers accorded to the head of the PPs in such “exceptional” circumstances” remains problematic, if the necessary safeguards are not put in place.

Recommendation

80. *Consider extending the reform of this provision, not only to an update of the terminology, but also to the content, so that the powers for handing over a case to another PP for reasons of ineffectiveness in the pre-trial guidance/supervision, is more limited and those circumstances are set out in more detail.*

Article 39 CPC. Head of a pre-trial investigation body

Article 39.2.1-1) CPC

81. The amendment to this paragraph of Article 39.2 CPC consists merely in allowing to hand the case over to another investigator, when there are reasons of ineffectiveness “affecting the fast, complete and unbiased investigation”. The amendment is not substantial, as the present text of the CPC already allows for appointing another investigator in case the acting investigator has been suspended for reasons of “ineffective pre-trial investigation or other grounds specified in this Code”. This amendment does not introduce new powers to change the investigator for reasons of ineffectiveness; as such possibility already exists under the current CPC. This may be criticised, for in any event the breath of the expression “ineffectiveness” leaves much discretionary powers to the head of the pre-trial investigation to remove on of the acting investigators. However the present CPC also requires that such decision is motivated.

Recommendation

82. *As the proposed amendment does not significantly change the present regulation, no recommendation with regard to such proposed amendment is to be done. However, it should be considered to keep the requirement that any decision to remove an acting investigator shall be motivated and factually substantiated in writing. Only upon clear reasons of removal, another investigator should take the case over.*

Article 39.2.2-1) CPC

83. The addition of this subparagraph 2-1) to Article 39.2. CPC, only specifies that in case the previous investigator has been suspended, the head of the pre-trial investigation can proceed to appoint another investigator. If we are not mistaken, the possibility for the head of the pre-trial investigation to suspend an investigator is already provided in the present Code, Article 39.2.2) CPC, thus the reform has a very limited impact. As long as the need for motivation of the suspension decision is required and the reasons for considering the actions of the investigator as ineffective are adequately explained in the decision to suspend, as it stands now in the CPC, the

proposed amendment does not pose any problem: it only provides for the handing over of the case to another investigator when the previous one has been suspended, but leaves the grounds for such suspension unaltered.

84. The other amendment introduced to this provision takes into account the reform made on the powers of the public prosecutor under Article 36.1. 8) CPC, namely the power to remove the PP an investigator directly. The amendment here is thus only an adjustment to the new powers accorded to the PP, thus we refer to the relevant provision.¹³

Recommendation

85. *Confirm that the newly added text does not alter the reasons for suspending an investigator, and the need for motivate the decision on removing an investigator for ineffectiveness of the investigation.*

Article 39.2.3) CPC

86. The draft law amends this paragraph by adding the word “binding”. This clarifies that the instructions of the head of the pre-trial investigation body, in so far as they do not contradict the decisions and instructions of the public prosecutor, have binding effect for the lower investigators. This reform does not seem to be problematic.

Recommendation

87. *No recommendation.*

Article 42 CPC

88. This article contains the definition of a “suspect”, and links the situation/position of the suspect to the apprehension of the person suspected of committing a crime or the “serving of the notice of suspicion” to a person. It provides also for the possibility that the suspect cannot be served with such notification, because “his whereabouts are unknown”. The proposed amendment seeks to introduce another situation where the suspect cannot be notified: “due to the death of such person”.
89. This amendment might be necessary in the Ukrainian context, so to make clear that as long as the notification of a suspicion has been made correctly, the reason that it did not reached the suspect, because he was already dead, does not affect to his/her condition of suspect. It is unclear why this is relevant, as the criminal liability ends with the death and thus there should not be any criminal investigation/procedure when the suspect/accused is dead. In any event, it does not seem to pose significant problems, although it would be positive to understand why this amendment is being introduced.

Recommendation

¹³ For the comments on this proposed amendment, see above under Article 36.1.8) CPC.

90. *Consider assessing the need for the proposed amendment, as it does not seem to be necessary to define a suspect also as the person to whom the notification of suspicion has not been served, due to his/her death.*

Article 60 CPC

91. This provision defines who is an “applicant”: mainly a person who files a criminal report not being the victim. The proposed amendment adds a new sentence, stating that an applicant shall also be the person who files a statement “expressing disagreement with the closure of the criminal proceedings”. It is unclear what is the impact of this amendment, if it seeks to broaden the powers of the person who, not being party to the proceedings, filed a criminal report; or if it seeks to give legal status to a person who can challenge the decision of closing the proceedings, without being a party. Whatever the meaning of this amendment shall be, it does not seem to be problematic from the European standards perspective, nor contradict or be against any of the standards of CoE.

Recommendation

92. *No recommendation.*

Article 128 CPC. Civil claim in criminal proceedings

93. The amendment to this provision consists in eliminating the part of the text which provides for the PP to file the civil claim *ex delicto* on behalf and in the interest of a minor, or incapacitated person, when they are not able to protect their rights. The amendment includes a reference to Article 23 Law PPS, which provides for such functions.
94. Article 23.2. Law PPS provides for: “A prosecutor represents the interests of a citizen (a citizen of Ukraine, foreigner or stateless person) in court when such a person is incapable of protecting his/her infringed or contested rights or is incapable of exercising procedural competences because of his/her minor age, incapacity or limited capacity, and if legal representatives or bodies which are legally entitled to protect the rights, freedoms and interests of such persons do not perform or improperly perform such protection.”
95. Therefore this amendment seems to be only based on systematic/style reasons, not changing the scope of the functions of the PP with regard to the filing a civil claim.

Recommendation

96. *No recommendation.*

Article 174 CPC. Discharge of a restraint order

97. The draft law provides for the mandatory participation of the public prosecutor in the hearing to decide upon a motion for revoking a restraint order, and therefore for the need to notify the public prosecutor of the date and place of such hearing.
98. This amendment seems unproblematic, since the PP may have an interest in being heard on the lifting of the adopted restraint order.

Recommendation

99. *No recommendation.*

Articles 176, 183-1 and 186 CPC On guarded conveyance¹⁴

100. These provisions regulate a new measure of restraint, which could be applied in a very limited context. Article 176.2 CPC when listing the measures of restraint says that temporary measures are apprehension of a person and **“guarded conveyance of a defendant to a respective court if a court of cassation has quashed a court decision with regards to this defendant and appointed a new hearing of the case.”**
101. This definition is reiterated in almost the same terms under 183-1.1) CPC, repetition that might not be necessary.
102. This “guarded conveyance” might be necessary to respond to the need to avoid a defendant from fleeing when the conviction sentence has been quashed, but the Court of Cassation has remanded the case to the lower court for a retrial. According to the general principles set out in the case law of the European Court of Human Rights, any measure restrictive of fundamental rights shall comply with the requirement of a sufficient and clear legal provision, to grant foreseeability.
103. The principle of procedural legality requires regulating in the law –ordinary law– any measure that restricts the freedom of a person. Ukrainian legislator has considered that there is a gap when a defendant finds himself in the situation where his conviction sentence has been quashed, but his trial is pending again, because a new trial has been ordered by the cassation court. Technically this defendant is not finally convicted, but the previous restraint measures, if justified, could be “reactivated”. However, it may occur that such “reactivation” of the remand in custody or the bail, or any other of those regulated under Article 176 CPC, cannot be adopted by the Cassation Court.
104. The proposed amendment appears to seek to overcome such a loophole and allow adopting a new temporary restraint measure in the form of “guarded transfer to the competent court”.
105. Whether this new rule is necessary or not, is not for us to assess. Technically it is not a police arrest or an apprehension, as it would be ordered by the Cassation court, thus it would not run counter Article 29 of the Ukrainian Constitution.
106. The Draft Law could have provided for the automatic “reactivation” of the previously existing restraint measures already adopted against the not finally convicted

¹⁴ I use here the exact wording that appears in the English text of the draft law 3009^a, although this expression may not be completely adequate, as it appears to refer to a guarded transfer to another court, or a specific conditioned liberty.

defendant, if the grounds that justified their adoption are still present, subject to its confirmation by the trial court within 72 hours, instead of introducing a “new” restraint measure.

107. Regardless of our opinion that other mechanisms or legal measures would be more appropriate to overcome the detected problem in the CPC, the solution proposed in the Draft Law for an apparently existing need or problem, is not against European standards: as long as the measure is strictly necessary, adequate and complies with the proportionality principle, and these elements and reasons are sufficiently motivated in the decision adopting the restraint measure, it would be in compliance with Article 5 ECHR and its case law.

108. It is to be assumed that the reference to 60 days provided under Article 183-1.2) CPC days is to the period *within* which the conveyance under guard is to take place rather than the period *for* which the person may be detained. However, this does not seem consistent with the provisions of Articles 186.2 and 439, which require applications for preventive measures within 48 hours of annulment of a conviction. If there is any ambiguity in the text it should be amended to make this clear. However, The way it is formulated it looks that the actual detention can be applied for 60 days, but no longer than 48 hours once the case files are registered in a respective lower court.

109. There needs to be an alignment of content and terminology between the applicable provisions in Articles 436, 439, 442 and 443 and those contained in Articles 183, 184 and 186 CPC.

Recommendation

110. *Reconsider whether this measure is necessary or the “reactivation” of the previously adopted restraint measure could be an easier solution without having to create a “new” restraint measure solely for preventing the risk of absconding or committing new crimes while the retrial takes place. The duration of this measure, if finally kept, should be redrafted to align with other provisions of the law. Furthermore, it seems undesirable that the same matter should be regulated in two different parts of the Code.*

Article 208 CPC. Lawful apprehension by a competent official

Article 208.1.1) CPC

111. The Draft Law introduces minor changes into subparagraph 1 of Article 208.1 CPC so that the officer can detain a person when caught “*immediately after* committing a criminal offence or making an attempt to commit it”. It is unclear what is the reason for introducing the words “immediately after”, as such situation is already contemplated under the next subparagraph 2, but it may be an error of translation, The possibility to arrest a person that is committing a crime red handed, is provided in most CPCs, and police laws, and does not seem problematic. However, the proposed amendment creates a certain overlap with the next subparagraph, which can cause

also interpretative problems, because if both rules state the same, one of them should be eliminated; and if it has not been eliminated, the interpreter will be confused, trying to understand what is the reason for an additional almost equal rule.

Recommendation

112. *It should be considered eliminating the words “immediately after” to be introduced in Article 208.1.1) CPC.*

Article 208.1.2) CPC

113. The present CPC allows for the detention without court order under this paragraph “if immediately after the commission of crime, an eye-witness, including the victim, or totality of obvious signs on the body, cloth or the scene indicates that this individual has just committed the crime”. The proposed amendment simplifies this provision by the appropriate expression “established objective data”. As the existing list of data is just exemplificative, in general it might be adequate to substitute it for a broader term that may also encompass other objective reasons that justify a lawful detention.

114. However, taking into account systematic reports of abuse of this article, as was recognised, for example, by the ECtHR in the recent *Korban v. Ukraine*¹⁵ judgment as a violation of Article 5 of the Convention, it may be better to leave the exemplificative list and add also the expression and other “established objective data”, so to ensure an adequate motivation of the decision on detention.

115.

Recommendation

116. *No recommendation*

Article 208.1.5) CPC

117. The English in the draft is rather odd. It is not clear what is meant by “drawing up the person a suspicion”. It may be an issue of translation. It would be better in English to say “where there are reasonable grounds for suspicion that a person has committed a serious crime and that the person is likely to attempt to avoid criminal liability etc.” However, as in the Ukrainian CPC this is directly linked to the act of officially notifying a person of suspicion. It could be contested whether it is indeed necessary to apply Article 208 in this case and the repeated abuses in applying in practice Article 208 CPC should be taken into account.

118. Nevertheless, the proposed amendment is not contrary to the ECHR, as long as this detention is aimed at bringing the suspect to the competent authority, that is the PP or

¹⁵ *Korban v. Ukraine*, Appl. no. 267/44, of 4 July 2019.

the judge. Specifically Article 5 c) ECHR provides for the lawful arrest or detention of a person for the purpose of “bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.”

119. It is to be welcome that precise rules are included in the CPC regarding the lawfulness of the pre-trial detention as it is essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application. Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. The standard of “*lawfulness*” set by the ECHR requires that all law be sufficiently precise to allow the person to foresee in a reasonable way the actions of the authorities and their limits. However, this provision needs to specify that the risk of absconding is a reason to detain a person who has committed a crime, but the aim is to bring that person to the competent criminal investigation authorities.

120. The existence of the purpose to bring a suspect before a court has to be considered independently of the achievement of that purpose. The standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest or while the applicant was in custody.¹⁶

Recommendation

121. *Article 208.1.5) CPC is adequate, as long it is made clear that the detention is for the purpose of bringing the suspect immediately to the competent judicial authority.*

Article 214 CPC. Initiating pre-trial investigative action

122. The amendment to this provision is in line with the definition introduced in Article 3.1 7-2 CPC on the content of the criminal report. It requires that the report “contains sufficient data about the circumstances that may indicate the commission of a criminal offense”. While this is in principle not problematic, it leaves much more discretionary powers to the authority who receives the report to assess if such report will qualify to be registered in the Unified Register of Pre-Trial Investigations. While it is logical that declarations or statements which are absurd or do not refer to any possible criminal action, should not be registered as a criminal report to access the Register and initiate a pre-trial investigation, the new wording of this Article 214.1 CPC allowing only those reports that “contain sufficient data” to be registered, entails risks for abuses.

123. It is also true that allowing any report whatever its credibility and substantiation to be registered will create a false impression on the number of crimes and a statistical

¹⁶ See in this regard ECtHR *Erdagöz v. Turkey*, of 22 October 1997, Appl. no. 12/1996/954/746, § 51.

wrong image. It should be balanced, taking into account the context in Ukraine and the abuses detected in the past, whether the entries into the Registry shall always be carried out, even if it is to close afterwards the case, for lack of criminal elements. Both systems are in general acceptable, but in preventing possible situation of corruption or abuse of discretionary powers, it might be better to register any criminal report, and not only those that “contain sufficient data”: the term “sufficient” is subject to broad interpretations, and thus also entails risks of abuses. In terms of control –and all criminal procedure code is essentially a law of controls, safeguards and efficiency–, it is advisable to keep the present wording of Article 214.1 CPC.

124. If every report is to be registered, it would be possible to add to the register, in appropriate cases, a note to the effect that there was insufficient information to enable the complaint to be investigated.

Recommendation

125. *Reconsider the opportunity and convenience of this amendment, as explained under the recommendation to Article 3.1. 7-2 CPC above. Reconsider adding in the register the note as indicated above.*

Article 282 CPC. Reopening of the pre-trial investigative action

126. The Draft Law extends the possibility to reopen a suspended pre-trial investigation also to the head of the higher-level prosecutor’s office, his first deputy and deputy, in addition to the current persons. These are under the present CPC, the public prosecutor and the investigator. In a system organised under the principle of hierarchy, a model that is not contrary to the European standards and it is to be found in most European countries, the possibility that the superior PP orders the reopening of a suspended case “when the reasons for its suspension no longer exist”, does seem to be reasonable.
127. It should be questioned why this is necessary, because the competent PP unit or office should reopen the case under those circumstances without the intervention of the higher-level PP. However, as long as this action is grounded and justified, and the lifting of the suspension is lawful, it does not amount to a risk of interference into the autonomy of the PP, but an ordinary check in a hierarchical prosecutorial system.

Recommendation

128. *The need for this amendment should be explained, but it is not contrary to the European standards, and does not seem to be problematic.*

Article 284 CPC. Closing of Criminal Proceedings

Article 284.1 CPC

129. Article 284.1 CPC aims at supporting that the pre-trial investigation is carried out within reasonable time, and thus prevent excessive length of proceedings that would run against Article 6 ECHR. The maximum duration of the pre-trial investigation is prescribed under Article 219 CPC, depending on the gravity of the criminal offence. In cases where such time limit has expired, Article 284.1 CPC mandates the closing of the case. This rule, which might be adequate to promote a speedy and efficient pre-trial investigation. However, when it comes to complex cases and even after the most efficient working of the teams and units, the perpetrator could not be identified within the prescribed time, it is reasonable that the time limit does not apply. The time limit in Article 219 CPC for grave and especially grave crimes is 18 months. The Draft Law proposes to make an exception for the mandatory closing after these 18 months with regard to grave or especially grave crimes against the person's life and health, and no person has been notified as suspect within that time.
130. The exception seems reasonable and balanced taking into account the gravity of these crimes and the difficulties that might appear in certain cases for identifying the perpetrator. As no person is suffering any restrictive measures –because no suspect has been identified– and the crime is very grave, it seems completely balanced that the closing of the case has not to be mandatory closed after the expiry of 18 months in order to prevent impunity of such crimes.

Recommendation

131. *No recommendation*

Article 284.5 CPC

132. The Draft Law adds to Article 284.5 CPC a new part relating to the closing of the criminal proceedings when the suspect is dead. The grounds for closing the criminal case are set out under the lengthy Article 284.1 CPC. Subparagraph 5 of Article 284.1 CPC states that the criminal proceedings shall be closed when:
- “the suspect, accused died, except when proceedings are necessary to vindicate the deceased;”
133. The amendment establishes that the case shall be closed unless any of the close relatives or family members within a prescribed time, appear to oppose the closing of the case. This provision might be explained within the Ukrainian context, but it is not necessary if the criminal procedure is understood in accordance with the principles of the ECHR on the presumption of innocence. A person whose criminal liability has not been proofed is innocent, thus it has no sense to continue a procedure to “vindicate the deceased”. These type of rules respond to a cultural tradition in which a person that has been suspected or accused, is to be considered by the society already guilty. In such a context it might be explained that the family seeks to proof the innocence of such a person, even if he/she is died, and thus could never be held criminally liable.

134. Nevertheless, this provision is consistent with the definition of suspect under Article 42 CPC, which also considers a possible suspect a dead person.

Recommendation

135. *It is commended to eliminate the references to a dead person as suspect and also the possibility to continue a criminal procedure against a dead suspect to “vindicate” his honour.*

Article 314 CPC. Preparatory court session

136. Amendment to paragraph 6 of this provision, in accordance with this same Article 314 3.3) CPC is adequate: it establishes that after the return of the indictment by the courts indicating the shortcomings that should be eliminated, once those shortcomings have been corrected, a renewed return of the indictment is not acceptable.
137. The whole model that allows a court to return an indictment to be corrected should be questionable, as it may indicate lack of professionalism or technical preparation of the PP filing the indictment. However, if this is the case, it seems reasonable that once the PP has corrected shortcomings pointed out, the indictment should not be further returned.

Recommendation

138. *The amendment does not seem to be problematic, albeit the system of the court correcting a flawed indictment and returning it to the PP, does not seem to be adequate for ensuring the autonomy of the PP and the necessary trust in the prosecution the society should have being an institution that represents the society and their interests.*

Article 394 CPC. Specific features of appellate challenge of certain court decisions

Articles 394.3 and 394.4 CPC

139. Two paragraphs of Article 394 CPC are amended by the Draft Law, both to add as a ground for appealing the agreement (394.3 the conciliation and 394.4 the guilty plea or plea agreement) “the incorrect application of the law of Ukraine on criminal liability”. This would prevent that a conciliation agreement or a plea agreement may become final, with respect a defendant that could not be held criminally liable.
140. The addition of this new ground does not seem problematic, although it is unclear why it is necessary. While it provides for more control on the negotiated justice forms, it would mean that the PP has offered a plea agreement contrary to the criminal code, the first instance court has validated such an agreement, and the defence lawyer has not acted correctly opposing to it. That the sentence given upon such unlawful agreement can be challenged by way of appeal, is positive and might be necessary in the Ukrainian context, but it may show failures in the adoption of the conciliation and the plea agreement procedure.

Recommendation

141. *The amendment seems unproblematic, although it runs counter the speedy resolution of cases upon negotiated justice. It is recommended to revise why this new grounds for appellate review of a sentence based on a conciliation or agreement is necessary.*

Article 436 Powers of the Court of Cassation after a cassation complaint has been considered

142. Amendment of Article 436.2 CPC providing for the Court to notify the public prosecutor who filed the indictment does not seem to pose problems from the European standards perspective.
143. *The amendment to Article 439.1 provides for the court of first instance to select a preventive measure within 48 hours of receiving the prosecutor's motion. Where no such motion is received the new Article 439-1 provides for the accused's release from custody.*
144. An addition to Article 442.3 provides that where the court of cassation annuls the decision of the court of first instance and orders a new hearing the court of cassation is to decide in a motivated decision whether to order the accused to be brought in custody to the court of first instance as a preventive measure.
145. An addition to Article 443.1 provides for the immediate return of court records by the cassation court to the court of first instance where the accused is subject to the preventive measure of being returned in custody to that court. The principal reason for the lack of clarity in these provisions is that they do not follow the chronological order of proceedings, i.e., firstly to state what the court of cassation should do and then to say what the court of first instance may do after the case is remitted to it.
146. There needs to be an alignment of content and terminology between the applicable provisions in Articles 436, 439, 442 and 443 and those contained in Articles 183-1, 184 and 186 CPC. The comments made to those amendments above, are applicable here, but it is unclear why other terminology is used in this provision, and not the same as in the said Articles 183-1, 184 and 186 CPC. Furthermore, it seems undesirable that the same matter should be regulated in two different parts of the Code. The substantive provisions should be contained in one place and that place can then be referenced elsewhere as appropriate.

Recommendation

147. *See above under Articles 183-1, 184 and 186 CPC. Consider unifying the provisions in order to prevent unnecessary and confusing reiterations.*