

HUMAN RIGHTS COMPLIANT CRIMINAL
JUSTICE SYSTEM IN UKRAINE

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**Expert assessment of selected provisions of the draft law no. 4049 amending Code of
Administrative Offences, Criminal Code and Criminal Procedure Code of Ukraine in view of
implementation of the ECtHR judgments**

*These expert comments prepared
under the auspices of the Council of Europe Project
“Human Rights Compliant Criminal Justice System in Ukraine”*

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INTRODUCTION

The Council of Europe Project “*Human Rights Compliant Criminal Justice System in Ukraine*” (“the Project”) supports the Ukrainian authorities in implementation of measures aiming at ensuring effective functioning of the criminal justice system in Ukraine. Among its components, it provides expertise to criminal legislation in view of its alignment with European human rights requirements, as well as with the Council of Europe standards and best practices. In this framework, the Project commissioned an expert opinion on the draft legislation amending the Ukrainian Code of Administrative Offences (“the CAO”) and the Code of Criminal Procedure (“the CCP”). The present Report reflects this opinion and it expresses solely the views of its author¹. It reflects neither an official position of the Council of Europe nor any of its entities that it might be attributed to. The Assessment Report was prepared under the auspices of the Project and it does not bind the Ukrainian authorities as its purpose is only to provide recommendations for the benefit of the legislative drafting process.

According to the terms of references, the scope of the present assessment is to evaluate draft legislative proposals amending certain parts of the CAO and the CCP in view of their compatibility with the relevant case-law of the European Court of human Rights (“the ECtHR”) in the judgments delivered against Ukraine. Thus, the Report assessed only some parts of the draft Law no. 4049 “*On Amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine for the Execution of Judgments and Decisions of the European Court of Human Rights.*” (“the Draft Law”), as it was limited in scope according to the areas of the Project’s activities.

The assessment was undertaken on the basis of the English translation of the drafting proposals compiled in a comparative table. It illustrates the current legislative provisions, the proposed amendments and their justification as proposed by the drafters. In addition, the Report took into consideration the relevant parts of the Draft Law’s Explanatory Note, also in English translation, which describes the justification for the proposed amendments in more detailed fashion.²

Thus, the assessment starts by an overall evaluation of the draft law provisions, from their feasibility and quality perspectives. Then, the Draft Law will be assessed on an article-by-article and paragraph-by-paragraph basis.

GENERAL ASSESSMENT

As it transpires from the Draft Law’s Comparative Table and its Explanatory Note, the drafting authorities propose the amendments in the context of their obligations to execute the ECtHR judgments quoted therein. Thus, the proposed draft texts must be primarily assessed in view of their **feasibility** and, then, their **compatibility** with the human rights requirements derived from these judgments. In other words, it is being primarily assessed whether the implementation of the relevant ECtHR judgments would imply in general certain legislative improvements or, conversely, lifting incompatible provisions as a matter of executorial measures. Then, the draft texts are being measured in relation with the substantive

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² The opinions expressed in this work are the responsibility of the author and do not necessarily reflect the official position/policy of the Council of Europe

requirements and standards of human rights protection reflected by the ECtHR in the respective judgements.

From the first point of view - **the feasibility of the amendments** – the general commentary is affirmative. All proposed changes in the legislation stem from the need to implement the ECtHR judgments that the Draft Law refers to. Thus, the amendments are feasible and necessary as a whole. Only one small clarification is required in this sense.

Some of the proposed amendments were drawn from the judgments which supervision was closed by the Committee of Ministers of the Council of Europe (“the Committee of Ministers”). This in particular concerns the judgments in the cases of *Kushch* and *Kharchenko* that are no longer in the lists of pending cases³. Yet, these are quoted as a reference for justification of some amendments, mostly those pertaining to extension of remand detention at later stages of criminal proceedings after pre-trial investigation.

In general, it is not precluded to quote closed cases as the basis for the legislative amendments; indeed, some of the ECtHR judgments remain narrative and authoritative long after their closure. Still, in the legislative drafting proceedings, the justification of proposals should be based on the pressing need and with the reference, as far as possible, to the current situation.

The lack of regulatory basis in Ukraine to legitimise the gap of detention during the preliminary hearings remains a recurring problem for Ukraine, even after the closure of the *Kushch* and *Kharchenko* cases. It is the *Chanyev* case (examined together with *Ignatov* group of cases) that actually puts emphasis on the problem as being structural and, thus, requiring legislative amendments in the new CCP⁴. The same was the reason behind the Committee of Ministers’ Decisions to shift the supervision of this problem into the *Chanyev* and *Ignatov* groups of cases⁵. While it is true that the *Kushch* and *Kharchenko* cases remain relevant, the *Chanyev* case explicitly requires amendments in the current CCP. Thus, it is recommended to quote the later case as primary authority for the current amendments. It could be added to this that the problem of pre-trial detention legality during the stage of preliminary hearings is long-standing since the older cases of *Kushch* and *Kharchenko*.

Moreover, the way of justification, both in the Comparative Table and in the Explanatory Note appears to be too technical. It refers to the ECtHR judgments and the Convention texts, sometimes quoting them in full, without clarity and coherence of the argument. Each of the proposed amendments pursue resolving

³ *KUSHCH v Ukraine* | Application N°: 53865/11 | Date(s) of Judgment: 03/12/2015 | Judgment(s) became final: 03/03/2016 | Final Resolution: CM/ResDH(2018)110 (2016); *KHARCHENKO v Ukraine* | Application N°: 40107/02 | Date(s) of Judgment: 10/02/2011 | Judgment(s) became final: 10/05/2011 | Final Resolution: CM/ResDH(2017)296 (2011).

⁴ ‘...In the case of *Kharchenko v. Ukraine* the Court had noted that the recurrent violations of Article 5 § 1 against Ukraine stemmed from legislative lacunae and invited the respondent State to take urgent action on order to bring its legislation and administrative practice into line with Article 5. As the applicant’s case showed, the new legislation contained a similar shortcoming leading to like violations of Article 5 of the Convention. The most appropriate way to address this situation was thus to amend the relevant legislation in order to ensure compliance of domestic criminal procedure with the requirements of Article 5.’ *Chanyev v Ukraine (Legal summary)* No. 46193/13 (9 October 2014).

⁵ ‘para. 5 the Deputies ... encouraged the authorities to accelerate the adoption of the law prepared in response to the *Chanyev* judgment concerning automatic extension of detention between the end of the investigation and the beginning of the trial;...’ Committee of Ministers, ‘DECISION CM/Del/Dec(2019)1348/H46-33, 1348 Meeting (DH) June 2019 - H46-33 *Ignatov* Group, *Korneykova* and *Chanyev v. Ukraine* (Application No. 40583/15, 39884/05, 46193/13)’ (6 June 2019).

one or at least two legislative incompatibilities stemming from one pattern of violation mentioned in the relevant judgments. The patterns of violations could be drawn from the ECtHR judgments and the Committee of Ministers' Decisions. Instead of just quoting the title of judgments and the provisions of Article 5 of the Convention, the drafters might consider actually to explain the very essence of the legislative problem identified by the ECtHR and the Committee of Ministers. It could be added the way to change legislation as proposed by the Committee of Ministers or according to an *erga omnes* Convention standard. The model of justification, as well as the relevant Convention standards for the reference, could be inspired from the present Report.

From the second point of view – a general **substantive compatibility** of the proposed amendments – it must be noted that the amendments seem to be a bit defragmented. They are indeed welcomed in general. Still, the amendments are focused to solve one selected problem and they are strictly confined to the findings of the ECtHR. It is not a wrong approach but it is definitely not the best either. The drafters in general concentrated themselves to introduce changes without actually checking the compatibility of these amendments with other correlative provisions, that might run counter the proposed amendments. As a result, the amended text might become confusing and unforeseeable. Some examples of such rather narrow drafting techniques will be illustrated below, in the chapter dedicated to *per article* analysis. In the present chapter, it is enough to note that the drafters should review the relevant legislation holistically, not only what is needed to introduce but what legal branches might be changed and whether their amendments follow the general spirit of the rules as a whole they intended to change. This type of drafting legislative technique – a holistic overview of the compatibility – would save the legislative resources and might avoid other potential violations in the future. The systemic or structural legislative changes, such as those required by the present amendments must look deeper into the legislative branch as a whole (for example a review of appellate proceedings in administrative cases or the change of detention on remand status in criminal proceedings).

The Report, in some parts, covered larger areas of questions than those confined to particular judgments of the ECtHR quoted in the Explanatory Note and in the Comparative Table. References to other relevant jurisprudence of the ECtHR is implicit while making a compatibility assessment of any draft legislation. Some changes of legislation cannot be strictly limited to the findings of the ECtHR in a particular judgment. Implementation of general measures, as a matter of execution of the ECtHR judgments, thus implies *erga omnes* effects. These effects pursue a preventive purpose, that is to avert any potential violation of the Convention in the future, which other States had already encountered. From this perspective, although the draft legislation should be primarily connected with the ECtHR judgments against Ukraine, other human rights standards enshrined in the Convention could be also crucial for the compatibility exercise. Thus, the general recommendation for the drafters is to see the amendments holistically, in view of other practices of the states that faced similar problems with pre-trial detention and to wonder how they resolved the problems (for example Poland⁶ or the Republic of Moldova⁷, Lithuania⁸, etc.)

Any piece of legislation would normally require a viewpoint from its quality requirement. A domestic law, in order to comply with the Convention, needs to be clear, foreseeable and accessible. Draft legislative

⁶ *Włoch v Poland* No. 27785/95 (19 October 2000); *Baranowski v Poland* No. 28358/95 (28 March 2000); *Kauczor v Poland* No. 45219/06 (3 February 2009).

⁷ *SARBAN v the Republic of Moldova* | Application N°: 3456/05 | Date(s) of Judgment: 04/10/2005 | Judgment(s) became final: 04/01/2006 | Latest Decision: CM/Del/Dec(2020)1377/H46-22 No. 3456/05 (4 January 2006).

⁸ *Jėčius v Lithuania* No. 34578/97 (31 July 2000).

texts also call for such an evaluation from the perspective of the legal terminology, coherency or appropriate use of specific legislative drafting techniques. It could be inquired whether the draft text is compatible with substantive or procedural standards in a given field of regulation. In particular, this is true when the legislation regulates legality of deprivation of liberty in the context of criminal proceedings, as the present Draft Law intends to:

It is well established in the Court's case-law on Article 5 § 1 that all deprivation of liberty must not only be based on one of the exceptions listed in sub-paragraphs (a) to (f) but must also be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (...). The "quality of the law" implies that where a national law authorises a deprivation of liberty, it must be sufficiently accessible, precise and foreseeable in its application to avoid all risk of arbitrariness (...). The standard of "lawfulness" set by the Convention requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (... Oshurko v. Ukraine, no. 33108/05, § 98, 8 September 2011). Where deprivation of liberty is concerned, it is essential that the domestic law define clearly the conditions for detention (...).⁹

However, it is difficult to perform such an evaluation of the quality of law basing on the translation. Language barriers could influence legal assessment of the drafting legislation. Some specific legal terminology may be found only an approximate comparable meaning in English, others could have no resembled equivalent. The risk to misread the draft text is thus a contributing factor to be taken into account as they are able to influence legal conclusions. All these aspects were carefully filtered in the Report. It employed the specific autonomous ECtHR terminology to examine the Draft Law foreseeability.

Thus, the "preventive or administrative arrest" as it is usually translated from the systems of law of the East-European states, is understood in the present Report as "detention on remand" and "administrative detention", respectively. The remand detention was separated into pre-trial detention and detention pending trial, for the purposes of the present draft law, despite of the irrelevance of such distinction in the ECtHR case-law. The preliminary hearings (called "preparatory court sessions", as in the Ch. 27, Articles 314 *et seq.* CCP), i.e. between the end of pre-trial investigation and commencement of the trial on the merits, are alien to the autonomous concept of trial under Article 6 of the Convention. Thus this stage is should be called preliminary hearing as it better reflects the semantic meaning of such a pre-trial stage.

The accessibility of the future amendments is not disputed in the present Report; both the CAO and the CCP are accessible legislation. The assessment of the "clarity" criterion is precluded by the said language barriers, yet no issues were found in that regard, apart from the fact that some of the proposed amendments are written in long sentences difficult to comprehend from the first reading (e.g. the proposed amendment to § 3 of Article 331 of the CCP that actually re-drafts the older provision).

This is the feature of all legal systems where the *lex scripta* is the sole source of law (in the contrary to the systems of judicial precedent), when the legislation describes in very detailed fashion each element of the relations it regulates. As a result, the legal texts might appear too technical or difficult to read. It is thus

⁹ See among many authorities *Del Río Prada v Spain* [GC] No. 42750/09, para 125 (21 October 2013).

recommended to the drafters to review the coherence of the texts before adoption. The standards of clarity vary depending on the language, legal traditions and cultural particularities, yet it presupposes that any reasonable person would be able to understand the meaning of the legal text in question¹⁰. Moreover, the standard of clarity, according to the ECtHR requires that a given text would not create confusion and concurrent judicial interpretation¹¹.

The last requirement of legislative quality is the “foreseeability test”. It literally means that the subject of the law knows what behaviour he or she should follow. Again, this is a relative criterion, which can be evaluated in particular circumstances of a given case and it depends on the subjective assessment of the evaluator. The ECtHR defined it with the reference to the “reasonable” possibility and “appropriate advice” to ascertain the consequences that a given legal text implies. In other words, the legal text should not be drafted in abstract terms so as to confuse its subjects; it should clearly state what is actually expected from them. However, at the level of legal drafting, this criterion could be assessed in relation with the scopes of the law. In the present assessment, once the declared scope of the draft legislation is to bring the CAO and the CCP provisions in line with the Convention, their quality will be reviewed in line with its standards. This is a detailed analysis of each particular Draft provision and it cannot be subjected to an *in globo* assessment. Thus, the test of foreseeability is performed on Article-by-Article basis below.

DETAILED ASSESSMENT

Code of administrative offences

Article 294 paras. 4 and 5

As declared by the drafters, the amendment pursues to increase efficiency of appeal in administrative cases, following the *Shvydka* case. It uses a legislative technique of inserting an exception from the general rule and thereby provides a special legal regime. It reduces the time-limit of appeal in administrative cases that have ended by administrative detention sentence (with the reference to Article 32 CAO (administrative detention)). In other words, as a rule the appeals in ordinary administrative cases imposing non-custodial sentences can be examined in 20 days, while the drafters propose that the appealed decisions ordering administrative detentions should be examined in no longer than 3 days. The second paragraph of the draft law (amending para. 5 of Article 294 of the CAO), follows the same method. The drafters inserted an exception requiring appellate judges to inform and summon the parties to hearing one day prior the day of hearings, in the contrary to the current 3 days in advance for the ordinary appeal hearings in other cases.

It appears to be a welcomed development, in particular in view of the long-standing issue pending at the supervision of the Committee of Ministers. In its Decision on the *Shvydka* case, it endorsed the Ukrainian Constitutional Court’s decision nullifying some parts of the relevant legislation concerning the appeal proceedings in administrative cases¹². Still, the issues concerning the effective exercise of the appeal in

¹⁰ “Clear” means easy to understand or intelligible. It also means unequivocal or unambiguous. For a document to be described as clear, it must not only be easy for its audience to understand but also convey the same message to those who read it. Order, neatness and precision are related concepts. What is orderly, neat and precise is also clear. On the other hand, disorder and imprecision lead to confusion and ambiguity...’ Gérard Caussignac, ‘Clear Legislation (Orig. “Une Législation Claire”)’ [2005].

¹¹ *Del Río Prada* (n 7).

¹² ‘para. 5... as regards the violation of Article 2 of Protocol No. 7 to the Convention, welcomed the declaration of unconstitutionality adopted by the Constitutional Court in November 2018, ruling on the complaint by the

administrative cases are not fully resolved. The Committee of Ministers' Notes reveal that, while the Constitutional Court's Decision shows the progress in conceptualising the system of appeal in administrative matters, it actually does not fully follow the meaning the ECtHR findings in the *Shvydka* case¹³.

Moreover, it seems that the part declared unconstitutional has not been yet amended. The Constitutional Court's decision invalidated para. 1 of Article 294 (and Article 326 in full) of the CAO, that actually created a void in the administrative legislation. It is unclear, unless one reads the Constitutional Court Decision, how and when an administrative detention sentencing becomes enforceable. It appears that any decision of the 1st instance court sentencing to administrative detention (as well as military detention under Article 32¹) of the CAO becomes enforceable after the appeal proceedings. The enforceability of the administrative detention sentences remains to be regulated in cases when the administrative detainee would not appeal against such a decision. As mentioned above, the prerequisite of Article 5 § 1 (a) of the Convention, within the scope of which the administrative detention as a punitive measure definitely falls, is the legality and clarity of the domestic legislation regulating all aspects of deprivation of liberty. In the present case, the standards of the quality of the law are not met.

Turning to the unresolved questions of the *Shvydka* judgment, it should be noted that this case was not entirely about the enforceability of the administrative detention. On the contrary, the case rather concerned the effectiveness and the suspensive effect of the appeal in administrative cases ended by deprivation of liberty. Indeed, the Constitutional Court declared unconstitutional the regime of enforcing the administrative detention sanctions after the 1st instance courts' sentences. The effects of this Decision mainly concerned to identification of the decisive day when the detention would become enforceable if appealed. The Constitutional court eventually noted that the administrative detention, if ordered by the *judex a quo*, cannot be immediately enforced without exercising the right to appeal or if the appeal is pending before *judex ad quem*. Again, para. 1 of Article 294 the CAO, as it stands now is void. However, the appeals in administrative detention cases are not only about the enforceability of this type of the deprivation of liberty. The appeals should follow the minimum standards of the effectiveness and promptness under Article 2 of the Protocol 7 to the Convention taken in conjunction with the general principles of the effective remedies (Article 13). Some explanations are required in this sense.

The case of *Shvydka* did not question the applicability of the right of appeal in criminal matters (Article 2 of Protocol No. 7) to the administrative detention cases. Indeed, once a person faces a punishment of deprivation or liberty in an administrative case, it is likely that such proceedings will be qualified as criminal within autonomous meaning of the Convention, according to the so-called "Engel criteria". In the

Parliamentary Commissioner on Human Rights, regarding the provisions restricting the right to appeal in similar cases;' Committee of Ministers, 'DECISION CM/Del/Dec(2019)1362/H46-33, 362 Meeting (DH) December 2019 - H46-33 *Shvydka v. Ukraine* (Application No. 17888/12)' (5 December 2019).

¹³ "...Meanwhile, the declaration of unconstitutionality by the Constitutional Court in November 2018, incorporating the jurisprudence of the European Court into its reasoning and based on the submission of the Parliamentary Commissioner on Human Rights, is positive. Nevertheless, the Committee might wish to invite the authorities to clarify the implications for the execution of this case of the recent draft laws on bringing the overall legislation on administrative responsibility into line with the standards and practice of the European Court, and to submit updated information on the progress in the adoption of these amendments. Committee of Ministers, 'NOTES CM/Notes/1362/H46-33, 362 Meeting (DH) December 2019 - H46-33 *Shvydka v. Ukraine* (Application No. 17888/12)' (5 December 2019).

alternative, even some serious administrative fines could be also qualified as criminal according to the “Engel criteria” and thus be subjected to the right to appeal¹⁴.

The case actually questioned the legislative system that allows an administrative detention to expire before an appeal against such a punishment is determined¹⁵. In other words, an appeal that is unable to cure the deficiencies of the 1st instance court decision is devoid of purpose¹⁶. The ECtHR expressly referred to the requirements of effectiveness as established by more general right to an effective remedy, under Article 13 of the Convention¹⁷. The Committee of Ministers rightly pointed the same problem, that the legislative system of appeal as such is unable to create an effective means of remedy¹⁸.

Basing on these reasons, the proposed amendments to Article 294 of the CAO raise valid concerns. Indeed, the intention of the drafters was to reduce both the length of the appeal proceedings and the time-limits of summons and notifications. As it was mentioned above, this was made by inserting exceptional time-limits of 3 and 1 days, respectively. However, it seems that these exceptional time-limits do not corroborate with other general time-limits for lodging appeals. For example, the time-limit of 10 days for appeal under Article 289 of the CAO¹⁹ is actually a much longer than the expediency of appeal proceedings that the drafters intended to guarantee by the amendments.

Of course, it could be argued that the delay to lodge an appeal against an administrative decision to detain could be fully attributed to the person concerned; it is not for the authorities to determine how an administrative detainee would exercise his right to appeal. However, the delays of such character could not justify the inefficiency of the appeal proceedings. The authorities cannot blame a detainee for the rightful exercise of his right to appeal within the time-limit set up by law. For example, if a sentenced administrative offender lodged an appeal on the 10th day as provided by law, it could lead to a situation when the administrative detention of the 10 days expires before appeal proceedings. Then these appeal proceedings are again out of scope. On the other hand, if the 1st instance court would order the administrative detention of 3 days or less, than, yet again, examination of appeal under the new time-

¹⁴ E.g. an insignificant administrative fine imposed to a student had fallen into the criminal ambit of Article 6, *Ziliberg v. Moldova*, no. 61821/00, 01/02/2005.

¹⁵ ‘...In the present case, however, the appellate review took place after the detention sentence imposed on the applicant by the first-instance court had been served in full. The Court finds it inconceivable how that review would have been able to effectively cure the defects of the lower court’s decision at that stage....’ *Shvydka v Ukraine* No. 17888/12, para 53 (30 October 2014).

¹⁶ ‘...this provision is aimed at providing a possibility to put right any shortcomings at the trial or sentencing stages of proceedings once these have resulted in a conviction (...). Indeed, an issue would arise under the Convention if the appellate jurisdiction is deprived of an effective role in reviewing the trial procedures (...)’ *ibid* para 51.

¹⁷ ‘... The Court has held that delays by the national courts in examining appeals against decrees on a special prison regime applicable for a limited period time may raise issues under the Convention, in particular, its Article 13....’ *ibid* para 52.

¹⁸ ‘...The European Court found a violation of Article 2 of Protocol No. 7 to the Convention in this case as the appellate review could not “effectively cure the defects of the lower court’s decision” (§ 53). This was due to the restrictive legislation on appeals against decisions ordering detention as an administrative sanction. Such a situation led to the appellate review taking place only after the sentence imposed on the applicant by the first-instance court had been served in full. As set out already in the initial action plan submitted by the Ukrainian authorities, changes to legislation are required...’ Committee of Ministers, ‘CM/Notes/1362/H46-33’ (n 11).

¹⁹ Article 289. Time-limits for challenging a ruling on an administrative offence. “An appeal against a ruling on an administrative offence may be lodged within ten days of the date of the pronouncement of the ruling...”

limits will be devoid of purpose, since the appeal will reach the appellate judges at the end of the detention sentence.

It could be argued that the administrative sentences to detention of the 1st instance court might be suspended before the appeal (*mutatis mutandis* Article 301 of the CAO). But how a trial judge would presuppose that a person would appeal before sentencing and what would be the purpose of the detention if it is suspended; an administrative offender would likely appeal to have his appeal rejected and thereby confirm his detention²⁰.

If, according to the Constitutional Decision's reasons, the 1st instance court's judgment ordering 10 days of detention is not enforced until the time-limit for appeal expires, what would guarantee the enforcement of administrative detention after 10 days passing the time-limit of appeal. Drafted in this way, it appears that the law itself condones the non-enforceability of the 1st instance courts' judicial decisions after their delivery. Such a system of appeal would tolerate impunity and inefficiency of the administrative sanctions. All administrative arrests will be virtually suspended up to 10 days. While this was not the case of *Shvydka*, who appealed on the very day of her sentencing, this could not be considered a predictable pattern of behaviour for all administrative offenders. Other persons could, arguably, use the deficiencies of the legal provisions to their benefit and claim a violation by appealing within the legal limits of the law.

All above reasons question the foreseeability of the Draft Law provisions. The overall conclusion is that the proposed amendments to the CAO, while pursue valid scopes, nevertheless do not resolve in full the problems of inefficiency and expediency of the appeal proceedings. The exceptional time-limits enshrined in Article 294 paras. 4 and 5 of the CAO does suffice to make the appeal in administrative detention proceedings compatible with the Convention. However, as it was illustrated above, new drafted provisions do not guarantee that a similar violation, as in the *Shvydka* case, would not reoccur.

It is not for the present Report to recommend detailed *de lege ferenda* provisions. The Report ascertains that, in this particular case, the appeal system in administrative proceeding need a review as a whole. It is flawed by too many incoherencies and needs a conceptual review. It is not the scope of the present report to propose such substantive suggestions for improvement of the appeal proceedings in administrative proceedings. Moreover, the Ukrainian Government declared that there is a huge drafting process to review administrative legislation, including in matters of appeal²¹.

Thus, as a general conclusion, the present amendment could be accepted only as a temporary solution. In the area of drafting legislation, however, temporary provisions tend to become permanent and difficult to change afterwards. Accordingly, it is preferred to review the whole set of provisions on appeal in administrative cases potentially qualifiable as criminal under the autonomous meaning of the Convention²².

²⁰ See *mutatis mutandis Ruslan Yakovenko v. Ukraine*, where the applicant has been dissuaded from lodging an appeal against conviction since any appeal would have delayed his release.

²¹ '...The authorities indicated that relevant legislative amendments to the Code on Administrative Offences were drafted in 2016. However, they have not been adopted. It appears from public sources that there is an ongoing debate in Ukraine on bringing the overall legislation on administrative responsibility into line with the standards and practice of the European Court, and several draft laws modifying the Code on Administrative Offences are pending, including a reform of the legislation on misdemeanors...' *ibid*.

²² See the Engel test and the *Ziliberberg* precedents.

It should be observed that the right to appeal under Article 2 of the Protocol no. 7 is largely discretionary. There is no universal model of appeal acceptable from the Convention point of view. On the contrary, the Convention allows appeals in criminal matters to be limited in scopes and procedural means. Yet, any legislative limitations must not impair the very essence of the right²³ and an appeal once introduced by legislation must fulfil the full panoply of fair trial guarantees²⁴. This means that Ukraine would rather draw inspiration from other countries with well-established and modern systems of appeals in administrative proceedings.

Criminal procedure code

Articles 43 and 64¹

Here the drafters inserted additional guarantee of disclosure to benefit the convicted and acquitted persons (Article 43) as well as representatives of prosecuted legal persons (Article 64-1). It is justified by the drafters in view of the *Naydyon* and *Vasiliy Ivashchenko* cases.

Disclosure is the process by which evidence and materials of criminal case-files collected during an investigation are made available to the accused and the defence. This is a specific guarantee of fairness of the proceedings (Article 6 of the Convention) and it forms a part of the rights to effective defence and equality of arms²⁵. The *Naydyon* and *Vasiliy Ivashchenko* cases in particular concerned the practical difficulties of convicted prisoners to obtain copies of their criminal case-files for the purposes to substantiate their applications to the ECtHR. The violation found in these cases appears to be a pattern attributed to the domestic courts and prison authorities that constantly refuse to provide copies of the case-files for unknown reasons²⁶. In its last Decision, the Committee of Ministers, while accepting legislative amendments to prison rules and other secondary legislation, noted that a coordination mechanism between the Ukrainian penitentiary and judiciary systems is needed to make the rights effective in practice²⁷.

It is unclear how these draft provisions in the CCP would contribute to the establishment of these practices to benefit the prison population. The current provisions of Articles 43 and 61¹ of the CCP already provide the convicted persons with the right to ask and receive copies, seemingly for free (see Article 42 p.18 of the CCP). They are applicable to prisoners, who are convicted persons. Legal persons, however, in criminal proceedings are always represented by a physical person, a representative. It is hardly conceivable to equate the situation of prisoners with the legal standing of the accused legal persons. Prisoners are highly

²³ For example, *Galstyan v. Armenia* or *Gurepka v. Ukraine* on the limitations to lodge an appeal in administrative matters without involvement of prosecution.

²⁴ “..Judicial decisions always affect persons. In criminal matters, especially, accused persons do not disappear from the scene when the decision of the judges at first instance or appeal gives rise to an appeal in cassation. ... In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision...” *Delcourt v. Belgium*, paras 25-26

²⁵ See among many authorities *Kuopila v. Finland*, § 38

²⁶ *Naydyon v Ukraine* No. 16474/03, para 65 (14 October 2010); *Vasiliy Ivashchenko v Ukraine* No. 760/03, para 107 (26 July 2012).

²⁷ ‘5...it is essential to ensure that these procedures are effectively implemented in practice...’ Committee of Ministers, ‘DECISION 1348 Meeting (DH) June 2019 - H46-34 Naydyon Group and Vasiliy Ivashchenko v. Ukraine (Application No. 16474/03)’ (6 June 2019).

dependent, as in *Naydyon*, from prison authorities. Legal persons, on the other hand, cannot be sentenced to imprisonment or be taken into custody.

Yet, these provisions enshrine additional disclosure guarantees for the representatives of legal persons (Article 63¹). They also clarify the disclosure procedure for the convicted and acquitted persons (Article 43). From legislative perspective, if such a provision would bring an added value to the development of practices and grant further access to the criminal case-files, then there is nothing but to commend such an initiative. Besides, “...in the area of human rights he who can do more cannot necessarily do less...”²⁸

Article 176 § 4

This is a general provision concerning preventive measures in criminal proceedings. It regulates application of both alternative measures to detention, house arrest and detention. It seems that this particular provision concerns, *inter alia*, pre-trial detention as the drafters proposed to extend its application “until the start of preparatory hearings”. Such an amendment to legislation is justified in view of the cases of *Chanyev*, *Kushch* and *Kharchenko*, as these judgments underlined that the rules of detention should be applied regardless of the stages of the criminal proceedings, from the day of taking into custody until release or determination of the criminal charges²⁹.

As mentioned above, the cases of *Kushch* and *Kharchenko* concern the old procedural legislation and they were closed by the Committee of Ministers to give way for supervision of the same problem in the *Chanyev* group. Accordingly, the present Report will consider the amendments with the reference to the latter case only, as it appears to be the only relevant.

The *Chanyev* case concerns a recurrent problem in Ukraine resulting from legislative lacunae, as it was framed by the ECtHR. It repeatedly deplored the practice of detaining persons without a court order during the period between the end of pre-trial investigation and the beginning of the trial itself. Such practice was found incompatible with the requirement of legality under Article 5 § 1, i.e. when the detained persons find themselves suspended in a legal limbo pending the preliminary hearings. Such a system in criminal procedure was criticised by the Committee of Ministers, that despite the Ukrainian Constitutional Court’s Decision of 23 November 2017, still insists on clear legislative provisions regulating the status of detained persons pending this stage of criminal proceedings³⁰. It is noted that the

²⁸ *Deweere v. Belgium*, § 53

²⁹ See for example the *Solmaz v. Turkey*, where the multiple consecutive periods of detention, pending appeal and cassation stages when the sentence was canceled, had to be regarded as a whole. Thus, in order to assess the reasonableness of the length of the applicant's pre-trial detention, the Court made a global evaluation of the accumulated periods of detention under Article 5(3).

³⁰ ‘...As regards the issue of the automatic extension of detention on remand without a court order between the end of the investigation and the beginning of the trial (*Chanyev*), the fact that the defective legislative provision is not applied following the Constitutional Court’s decision in 2017 is to be welcomed. It appears that decisions on the extension of such detention are now taken in accordance with the norms applicable for other periods of remand detention, including evaluation of risks and legal grounds for its continuation. The adoption of the draft law tabled with Parliament in 2017, taking into account the ruling of the Constitutional Court, is still required to eliminate all possible uncertainty and deviations with regard to this issue, and should be proceeded with rapidly...’ Committee of Ministers, ‘NOTES CM/Notes/1348/H46-33, 1348 Meeting (DH) June 2019 - H46-33 Ignatov Group, Korneykova and Chanyev v. Ukraine (Application No. 40583/15, 39884/05, 46193/13)’ (6 June 2019); ‘5. encouraged the authorities to accelerate the adoption of the law prepared in response to the *Chanyev* judgment concerning automatic extension of detention between the end of the investigation and the beginning of the trial;’ Committee of Ministers, ‘DECISION 1348 Meeting (DH) June 2019 - H46-34 Naydyon Group and Vasiliy Ivashchenko v. Ukraine (Application No. 16474/03)’ (6 June 2019).

Constitutional Court declared void the provisions granting automatic blanket extension of the detention pending trial without judicial hearings and an order in this regard. It was reported by the Ukrainian government that the *Verkhovna Rada* is expected to annul these provisions and the courts established practice to extend detentions regardless of the controversial legal texts³¹.

In this context, the purpose of the amendments to Article 176 § 4 of the CCP is clear. It prepares the background to set up a special legal status to detention pending trial by setting up the references and the jurisdiction of investigative judges to extend pre-trial detention. In general, given the burdensome execution of the *Chanyev* case, such a change is more or less understandable. Though, according to the well-settled interpretation of Article 5, the length of detention of accused persons in the context of criminal proceedings should be taken as a whole, irrespective of the stages of criminal proceeding or their special phases³². This means that the detention in criminal proceeding is distinguished into pre-trial or pending trial detention only in theory. In practical terms, its length should be taken as a whole and the requirements of Article 5 § 1 (c) apply equally to all stages of criminal proceedings until the first determination of criminal charges by the 1st instance court, even if its sentence is not final.

The Ukrainian criminal procedure legislation formally does not grant special status to pre-trial detention or detention pending trial, which means that such a distinction could be drawn only in practice and, probably, for statistical purposes. This distinction in itself is irrelevant for the Convention institutions as well. The ECtHR is interested whether the authorities do set up similar minimum guarantees of judicial review and legality for all these types of the detention. In this particular situation, the amendments to the CCP should be assessed as a whole. In particular, it remains to be seen whether the amendments to the status of detention pending the only questionable stage of criminal proceedings, i.e. the preliminary hearings, would erase the legislative gaps that created legal uncertainty in the cases of the *Chanyev* group. As per Article 176 § 4 of the CCP, it appears to be a necessary amendment to enforce the changes of the legal status of detention pending preliminary hearings. However, the present amendment should be seen together with the comments on Article 315 § 3, below. It appears that the status of detention in that later article is disharmonised with the present provision. If Article 176 § 4 allows extension up to beginning of trial, thus passing the stage of preliminary hearing, then there is allegedly no need for special provision in Article 315 § 3. If, however, the detention would expire at the stage of preliminary hearings, i.e. before trial begins, than the provisions of 315 § 3 should be amended to allow a lawful extension. In other words, the extension of detention under Article 176 § 4 should normally cover the stage of preliminary hearings until the trial stage. Still, if this detention expired and the trial did not yet begin, then there is the need for extension under Article 315 § 3..

³¹ ‘..As regards the practical impact of the decision of the Constitutional Court of 23 November 2017 declaring unconstitutional the automatic extension of detention on remand without a court order between the end of the investigation and the beginning of the trial, the authorities clarified that the legal provision declared unconstitutional is no longer applied by the courts. The draft law No. 7986 amending the defective legislation (the “Draft Prolongation of Detention Act”), i.e. Article 315 of the Code of Criminal Procedure, taking into account the Constitutional Court’s ruling and its conclusions, will be examined in first reading before the end of Parliament’s current session in July 2019...’ Committee of Ministers, ‘CM/Notes/1348/H46-33’ (n 23).

³² “... In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance” see *Wemhoff v. Germany*, § 9; *Labita v. Italy* [GC] § 147; *Kalashnikov v. Russia*, § 110; etc.

In any case, the present amendment is a welcomed development. It builds the bridge between pre-trial detention and detention pending trial filling the gap in legal provisions regulating extension at the preliminary hearings. But it does not answer the question what might happen if the preliminary hearings would last longer than the extension of detention ordered under Article 176 § 4. These were the situations in the *Chanyev* group of cases. Article 315 § 3 could be the answer to this question (see below).

Article 199 § 6

These amendments follow the same reason of the *Chanyev* judgment as explained above. They institute the duties of the prosecution and the investigating judge to consider extension of pre-trial detention before the criminal case is committed to trial on the merits. In other words, the pre-trial detention would receive a legal order if the investigation judge would extend it. Accordingly, the detention is to be transformed into detention pending trial as it lasts after the formal end of criminal investigation until the start of preliminary hearings or even the trial itself.

In general, this legal formalities and transformations of detention from pre-trial into pending trial are irrelevant from the perspective of Article 5 § 1. As it was mentioned by the ECtHR, this Convention provisions do not endorse automatic extension operating by virtue of law, i.e. without periodic judicial review. In lack of judicial order or procedures to revisit the grounds for continued detention, the deprivation of liberty becomes arbitrary. Article 199 § 6 of the CCP prepares the criminal case to be sent to court with the detention already reviewed and with a legal judicial order. It is in conformity with the required legality under Article 5 § 1.

Article 315 § 3

The amendment to this provision is small and rather clarifying the idea of the need to extend detention. In this sense, it is compatible with the above-mentioned standards in view of the execution of the *Chanyev* judgment.

Still the provision is of general character and it refers to any preventive measure, custodial or otherwise, that would be valid during the stage of preliminary hearings. Its third sentence however is highly controversial. Though, the drafters did not touch this sentence, the present Report cannot leave it aside as it runs against the whole spirit of the amendments proposed in the context of the *Chanyev* execution. This sentence reads as follows (the emphasis added):

*3. ... In the absence of such a request [motion to extend preventive measures] from the parties to the trial, the measures to ensure the conduct of the criminal proceedings that were selected at the pre-trial investigation stage **shall be deemed to be extended.***

In this reading the rationale of this text is problematic. It is the very provision extending any preliminary measure by virtue of law, including the detention. It neither compels nor motivates prosecution to seek extension. Even if, the drafters proposed inclusion of mandatory extension by prosecutors' motions at the later stages of the criminal proceedings (pending trial), at this stage the CCP sets up no such a duty.

Such a system, when the failure of prosecution to act will be covered by law extending automatically any preventive measure pending preliminary hearings, is incompatible. It makes all the current amendments futile. It is this particular provision that is at the core of the violation and it is that was declared unconstitutional. The drafters kept it unchanged and introduced one word setting up "extension" powers of the trial judge upon the motion of prosecution. However, if the drafters would not delete the last sentence, it might become valid despite of the Constitutional Court's Decision and the continuous ECtHR

and the Committee of Ministers recommendations to erase it. It would continue to create legal uncertainty, even if the Ukrainian authorities would continue to claim its nullity.

Thus, it is recommended, to erase the last sentence of Article 315 § 3 along with introduction of the word in the text of the 1st sentence.

Article 331 § 1 and 3

These proposed amendments do not require any additional comments as they follow the scope of the *Chanyev* judgment. They set up and clarify the procedure of extension of detention pending trial, which is to be made upon the prosecutor motion and by a reasoned court decision. These changes overrule the current system of *ex-officio* extension without motions from the prosecution. In this sense, the proposed amendments are more than welcomed, as they reinforce the procedural guarantees respecting equity and the presumption of liberty. The blanket extension of detention, even by decision of a court, could be hardly considered compatible if the judge decide on detention *suo motu* without hearing from the parties³³. Accordingly, the present changes setting up the same procedure to review the detention in judicial hearing and upon the motions of the parties are fulfilling the spirit of the procedural guarantees under Article 5³⁴. No issues were identified.

Article 374 § 4 p. 2 in fine

This provision regulates the content of the criminal sentence. The amendment enshrines the duty of the trial judge to decide on preventive measures “until the sentence becomes final”. The reason behind this amendment is to strengthen the legality principle under Article 5 that requires strong legal basis, not only in legislation, but in judicial decisions that would justify any deprivation of liberty. In the context of criminal proceedings, the present situation of detention falls in between two grounds of deprivation of liberty, detention after conviction (Article 5 § 1 (a)) or detention on remand (Article 5 § 1 (c)). In both situations the legality principle remains a prerequisite condition of non-arbitrariness. Criminal procedure legislation that clearly regulates these aspects contributes to the legal certainty.

As it was mentioned above, Article 5 qualifies an imprisoned person, even by a non-final sentence at 1st instance court, as convicted (Article 5 § (a)), contrary to the suspect subjected to remand detention (Article 5 § 1 (c)). This former qualification of the detention as convicted implies other requirements in comparison with the pre-trial detention or detention pending trial. It is no longer considered a remand detention under Article 5 § 1 (c), as a person detained under “reasonable suspicion”. In other words, within the autonomous meaning of Article 5 of the Convention, such a person sentenced by 1st instance court is considered to execute a lawful judicial conviction but not a judicial order of detention as a preliminary measure³⁵.

³³ There could be situations when violations, such as lack of appropriate judicial inquiry (*Lloyd și alții v. the United Kingdom*, §§ 108 and 116) or absence of summoning (*Khudoyorov v. Russia*, § 129), were classified as unlawful detention in lack of appropriate judicial order. A breach of legal provisions while issuing judicial order can amount into the lack of judicial basis for detention, thus unlawfulness.

³⁴ Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (*A. and Others v. the United Kingdom* [GC], § 203; *Idalov v. Russia* [GC], § 161). In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a judicial hearing is required (*Nikolova v. Bulgaria* [GC], § 58).

³⁵ In view of the essential link between Article 5 § 3 of the Convention and paragraph 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained “for the purpose of bringing him before the

The fact that the sentence of the 1st instance court is not final does not invalidate the legality of deprivation of liberty according to this ground³⁶. Only if the sentence is set aside by the appellate court and send back to re-trial, then the lawful ground for detention disappears and the defendant should be given a new status in respect of his preventive measure.

In view of these interpretations, the utility of such amendment is unclear. If the convicted decides to appeal his/her sentence any preventive measure, including the detention, would become invalid in terms of the domestic procedural rules. Apparently, this measure should be extended in appeal courts, though in view of the ECtHR it is not necessary, once the deprivation of liberty is based on the 1st instance court³⁷.

However, the draft proposal falls into the discretion of the Ukraine authorities. It is not against the Convention; on the contrary it enhances the protection and legal certainty. Yet, from the procedural perspective, it complicates the procedure and creates further risks of unlawfulness after the 1st instance conviction³⁸. For example, it is unclear what will happen if the detention would expire after the sentence and the beginning of appeal proceedings. The sentence is not final, so in terms of domestic legislation it cannot be considered as ground for detention.

In many other criminal procedure codes, the same dilemma is solved by obligation of the trial judge to order separate detention for the purposes of execution of the sentence. It could be reviewed by judge, even after the sentence, until the beginning of appeal proceedings if the sentence is appealed. Some other criminal procedure systems set up clear limits for appeals and beginning of appeal hearings that should be within the time-limit of extension of detention. For example, the time limit of appeal is 15 days, and the appeal proceedings must start in 3 days. The trial judge then must order detention to such a period so as to cover these 20 days at the latest. The ground for such detention is provisioned to be for the purposes of execution of the sentence, which is acceptable in terms of the Convention.

Articles 433 § 3, 442 § 2 p. 3) and 447 § 1 in fine.

The amendments to all these Articles compel the Cassation Court, as 3rd tier jurisdiction to decide on preventive measures, including detention on remand, when sending the criminal case for re-trial. It is a welcomed amendment, in particular because it strengthens the guarantees of Article 5 at the highest jurisdictions. It is more than expected by the *Chanyev* judgment. The reasons behind these amendments

competent legal authority on reasonable suspicion of having committed an offence”, as specified in the latter provision, but is in the position provided for by Article 5 § 1 (a), which authorises deprivation of liberty “after conviction by a competent court” *Belevitskiy v. Russia*, § 99; *Piotr Baranowski v. Poland*, § 45; *Górski v. Poland*, § 41.

³⁶ A defendant is considered to be detained “after conviction by a competent court” within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal *Ruslan Yakovenko v. Ukraine*, § 46. In *Grubić v. Croatia* the applicant, who had been convicted and sentenced to thirty years’ imprisonment by a first-instance court, complained of the unlawfulness of several months of his detention after the delivery of the judgment at first instance. His deprivation of liberty during that period was still considered “pre-trial detention” under the domestic legislation. The Court examined his complaint from the standpoint of Article 5 § 1 (a) of the Convention and found no indication of arbitrariness.

³⁷ A period of detention will, in principle, be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. The Strasbourg organs have refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by domestic appellate courts to have been based on errors of fact or law *Benham v. the United Kingdom*, § 42.

³⁸ see *mutatis mutandis Ruslan Yakovenko v. Ukraine*, when the person was not released upon expiration of his preventive detention because the sentence had not become final.

resemble the problems underlined by the ECtHR in the *Levința no. 2* case. In that case, the Supreme Court, while reopening the criminal case following the ECtHR judgment and sending it to appeal court for re-hearings, ordered the detention of applicants without proper reasons and justification. The situation amounted into violation of Article 5 § 1, as such an order was invalid and arbitrary in terms of the Convention³⁹. In view of these reasons, the present amendments to the CCP are more than necessary.

Article 533¹

This provision is fully new for the CCP and it sets up the required mechanism to grant copies of case-files to a variety category of prisoners. The provision is required in the context of the execution of the *Naydion* and *Vasiliy Ivashchenko* cases. To recall, these cases concern the lack of sustainable mechanism for prisoners to grant them access to their case-files.

In general, the provision does not raise questions of compatibility with the Convention. It is feasible and foreseeable, except the last paragraph (§ 3) concerning limitation of access to confidential materials of security measures. It is not argued by the present report that such materials should be granted an unlimited access. Access to such materials can be restricted, in view of the general interest and the rights of others (in the present case the victims and witnesses under the protection programs). However, an unlimited legislative ban, without procedural guarantees of fairness, will be always problematic in terms of the Convention⁴⁰. Indeed, the present situation does not concern the trial as such, where the rules of disclosure are more rigorous than at the stages of execution of criminal sentences. However, the same rules might be extended to these stages as well, sometimes under the civil limb of Article 6 § 1 of the Convention⁴¹. Accordingly, without proper judicial review or other procedural guarantees a blanket legislative ban to seek security materials will be incompatible with the Convention.

³⁹ "33. The Court takes note of the Government's argument that the Plenary Supreme Court of Justice had no power to give reasons for the applicants' detention. However, it considers that a court which has the power to order a person's detention must also have the power to justify such detention, no matter how extraordinary the circumstances. This follows from the principle that detention should be the exception and that no one should be detained arbitrarily." *Levința v Moldova (no 2)* No. No 50717/09 (17 January 2012).

⁴⁰ 'The use of confidential material may be unavoidable, for instance, where national security or anti-terrorism measures are at stake (Khan, §§34-40). However, whether or not to disclose materials to the defence cannot be decided by the prosecution alone. To comply with Article 6, the question of non-disclosure must be: a) put before the domestic courts at every level of jurisdiction, b) approved by the domestic courts by way of the balancing exercise between the public interest and the interest of the defence – and only where strictly necessary (Rowe and Davis).' Dovydas Vitkauskas and Grigoriy Dikov, *Handbook on Protecting the Right to a Fair Trial under European Convention on Human Rights. 2nd Ed.* (Council of Europe 2017) 61–62.

⁴¹ "Thus, Article 6 applies to prisoners' detention arrangements (for instance, disputes concerning the restrictions to which prisoners are subjected as a result of being placed in a high-security unit [*Enea v. Italy* [GC], §§ 97-107] or in a high-security cell [*Stegarescu and Bahrin v. Portugal*]), or disciplinary proceedings resulting in restrictions on family visits to prison (*Gülmez v. Turkey*, § 30); or other types of restrictions on prisoners' rights (*Ganci v. Italy*, § 25). Article 6 § 1 has also been applied to proceedings instituted by the prison authorities with a view to requiring the presence of a prison officer at meetings between a prisoner and his lawyer, even though that measure had above all been aimed at preserving order and security in the prison." ECtHR, *Guide on Article 6. Right to a Fair Trial (Civil Limb)* (Council of Europe Publishing 2020) para 47.

RECOMMENDATIONS (IN BRIEF)

- An additional review of draft texts from the clarity and foreseeability perspectives is recommended. This would increase quality of law and its coherence. Moreover, some provisions should be checked against other sister-rules of the same legal branch, as it illustrated below;
- Article 294 paras. 4 and 5 the CAO appears to be not entirely foreseeable. It requires a scrutiny from the perspective of other provisions and it might be subjected to changes along with the entire system of appeal in administrative cases. However, as a temporary solution it might work, providing that the administrative offence procedures are subjected to the on-going reform and, thus will be amended anyway;
- Articles 43 and 64¹ CCP do not raise any concerns and seem to be out of the scope of the *Naydyon* and *Vasiliy Ivashchenko* cases, yet the authorities have discretion to introduce them;
- Article 176 § 4 CCP is not a substantive amendment but it virtually separates remand detention in relation with the stages of criminal proceedings – pre-trial detention and detention pending trial. In the current Ukrainian system of criminal proceedings, this amendment is reasonable and acceptable;
- Article 199 § 6 CCP is substantive and required amendment to secure extension of the remand detention after the investigation stage; it allegedly resolves the gap of lawfulness of detention as mentioned by the *Chanyev* judgment; the same is true for Articles 433 § 3, 442 § 2 p. 3) and 447 § 1 in fine of the CCP, that set up the Court of Cassation powers to order remand detention while exercising their jurisdiction to return cases for re-hearings;
- Article 315 § 3 CCP is problematic in its last sentence; it is recommended to erase it in full;
- Article 533¹ § 3 CCP remains to be reviewed in view of its compatibility with the guarantees of a fair trial. Additional procedural guarantees and judicial review for non-disclosure of secret materials should be provisioned;
- Other remained provisions do not require special comments.
- In future the draft laws might be better justified. The Explanatory Note and the Comparative table need to describe and refer solely to the problem, as identified by the ECtHR judgments, that these amendments intend to resolve. Otherwise the scope and the meaning of some amendments are not visible. Simple references to the case of the ECtHR and an abstract copy of Article 5 provisions does not bring added value to the legislative debates.