Non-official translation

MEMORANDUM

on the draft law of Ukraine "On Introduction of Amendments to the Code of Criminal Procedure of Ukraine as to improvement of procedure for detention on remand as a preventive measure" and "On Introduction of Amendments to the Code of Criminal Procedure of Ukraine regarding improvement of application of certain preventive measures"

(in execution of the European Court of Human Rights judgments in the case of *Chanyev v. Ukraine case*)

Introduction

1. Special Advisor of the Secretary General on Ukraine Régis Brillat, with the assistance and technical advice of the Council of Europe cooperation activity "Continued Support to the Reform of the System of Criminal Justice of Ukraine" and the Department for the Execution of Judgments of the European Court of Human Rights, initiated a meeting on review of a draft law in response to the judgment of the European Court of Human Rights in *Chanyev v. Ukraine*.[2] As a result of the meeting held with the Members of the Parliament of Ukraine presented the Department with the following two draft laws:

- "On Amendments to the Code of Criminal Procedure of Ukraine concerning improvement of detention on remand as a preventive measure" ("**Draft law number 1**", the draft was given by MPs during consultations in Strasbourg, held on November 9, 2016), and
- "On Amendments to the Code of Criminal Procedure of Ukraine regarding improvement of application of certain preventive measures" ("**Draft law number 2**", the draft was handed over the Council of Europe Office in Kyiv

[2] This conclusion does not apply to the wider issues of "ensuring the right to liberty and security of person" that are being under examination in the context of *Kharchenko and others group of cases* regarding Ukraine. Also, this conclusion is not reflecting the official position of the Committee of Ministers or the Council of Europe, but is only a working expert opinion within the framework of cooperation with the legislative body of Ukraine. This conclusion does not reflect the requirements of the recently adopted judgment in *Ignatov v. Ukraine* case (40583/15 of 15 December 2016), which has not yet become final and which would require introduction of changes to legislation and / or judicial or administrative practice. This judgment applies to a greater extent the practice of justification of preventive measures by the prosecution and the judiciary, which are contrary to the requirements of Article 5 of the Convention.

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and received on December 2, 2016. The authors of the draft law said that this version seems "more thorough").

After carefully examined the submitted draft laws, the Department considers it necessary to note the following:

Regarding the draft law number 1

Overall evaluation of the draft law

2. The draft law aims to streamline the application of detention on remand as a preventive measure in the period between the end of pre-trial investigation and the commencement of review of the criminal charges on their merits. It is necessary to recall that in the judgment of *Chanyev v. Ukraine* dated 9 October 2014 (became final on January 9, 2015, application no. 46193/13), the European Court of Human Rights found that the Ukrainian legislation does not regulate with sufficient clarity the detention on remand as a preventive measures in this particular period of procedure.

3. In particular, as established by the European Court (§§ 28-31), there is a legislative *lacunae*, according to the Code of Criminal Procedure 2012 ("CCP"), in the procedure for extending detention measures after the end of the pre-trial investigation and transmission of the criminal case, together with the indictment, to the court for trial and, in fact, the commencement of a trial, which takes form of a regulatory action at the preparatory court hearing stage (art. 314 and seq. CCP).

4. It should be noted, that the CCP entitles the court already at the stage of the preparatory court hearing to impose, alter or revoke measures to ensure the conduct of the criminal proceedings, including a preventive measure, imposed against the accused, in a form of detention. However, the court can reconsider detention measures only at the request of the participants in the trial. In the absence of such a request from the parties to the trial court, the measures to ensure the conduct of the criminal proceedings that were selected at the pre-trial investigation stage shall be deemed to be automatically extended (Art. 313.3 of the CCP).

5. Subject to the demands of the Convention on the presumption in favor of liberty, adversarial nature of the proceedings and equality between the parties, it is considered quite reasonable to expect that, in absence of a request by a person (or a lawyer), against whom a preventive measure in the form of detention shall be applied, to alter or revoke a preventive measure at the stage of the preparatory court hearing, it is not a part of the obligations of the trial court. Indeed, at the stage when the investigation is completed and the indictment is finalised – the circumstances that may affect the course of the investigation are no longer valid. Accordingly, if an interference with the course of the investigation or possible avoidance of cooperation with the investigation were used as justification for application of preventive measures before the termination of the investigation, they cannot serve as justification for continued detention of a person at this further stage of the procedure. Consequently, they must be reviewed by the court, based on the parties' requests, with reference to the presumption in favor of liberty. Also, in the

absence of such requests, the person should be immediately released from custody in case of expiry of the relevant decisions of the investigating judge on the preventive measure. Otherwise, it would lead to the violation of conventional rights of a person and would constitute grounds for a finding of a violation of Article 5 of the Convention by the Court.

6. However, even taking into account the above, paragraph 3 of Article 314 of the CCP cannot be deemed to be a “sufficient and effective remedy” for the absence of reasons for detention as according to the first paragraph of that article, the court, after having received the indictment, shall assign the date for a preparatory court hearing **within five days** after the day of receipt of indictment. This means that, theoretically, a person who is suspected of a crime for which the charges are submitted to the court, could be held in custody for at least five days without court any decision, which itself would constitute a breach of requirements of legality of Article 5 of the Convention. In addition, during the trial (i.e. after the preparatory court hearing), according to paragraph 3 of Article 331 of the CCP, the court*, in the absence of any requests,* **is allow not to examine** the use of a preventive measure for another 2 months, waiting for such requests. It is presumed that the person regarding whom the parties have not submitted a request for detention should not be released from custody because either there is another court decision on detention applicable at the preliminary stage of proceedings or the court should adopt another ruling on detention. It is also considered to be a problem in terms of Article 5 as the circumstances related to the person who was detained changed – investigation had been completed and indictment formed and therefore the risks of non-participation in the further criminal proceedings should be reassessed. Eventually, ensuring from the requirements for selection of "new preventive measures" at the discretion of the court, in the absence of the parties' motions, the problem appears to be of a more systemic nature: whether the court, in the absence of the parties' submissions, particularly, motions from the prosecutor, taking into account the principles of independence and impartiality, adversariness and equality, its judicial function and the requirements for the presumption of innocence, should impose on its own motion, preventive measure applied to the person, therefore essentially taking upon itself the function of prosecution. According to the European Court of Human Rights case-law, in particular with reference to the binding decisions on Ukraine - no, it (the court) shouldn’t.[1]

7. Based on the above it appears that the draft law **does not resolve the problem**, identified by the Court in the *Chanyev v. Ukraine* case.

8. In particular, it appears that the changes proposed to Article 203 CCP do not contain legal novels aimed at resolving the problems considered in the *Chanyev v. Ukraine* case. Thus, paragraph 5 of Article 202 provides that in case of termination of the period of validity of the investigating judge’s, court’s ruling on detention, the suspect, accused shall be released immediately, unless there is another judicial ruling that became binding and which directly prescribes keeping this suspect, accused in custody. Accordingly, it appears that reconstitution of this rule in a slightly altered form in Article 203 CCP is not expedient.

[1] Court ruled on the merits in more than 100 decisions concerning the right to liberty and security of person. Complete list of such judgments and information regarding certain aspects of their execution can be provided additionally.

The amendments proposed to Article 206 CCP intended to empower a judge who is examining a criminal case on its merits, with full authority of investigating judge regarding general obligations on human rights. This significant expansion of powers of the judge can essentially be considered positive, taking into account a clear division of competence between investigating judge and a judge who is reviewing the case on its merits (although quite likely that in a first instance court the investigating judge is the judge who is reviewing the case on the merits). Additionally, it is necessary to take into account the principles of ECtHR case-law regarding the eventual impartiality of the judge who first chooses a preventive measure and then rules on the merits of the criminal case. But most importantly, it is difficult to understand the expediency of such changes specifically as ensuing from *Chanyev v. Ukraine*.

9. Finally, regarding the changes proposed to Article 331 CCP ("Imposing, revoking or altering a preventive measure in court"). According to the draft law it is proposed to supplement this article with part four as follows:

In case ruling of the investigating judge on application of a preventive measure terminates at the time of preparatory court hearing, regardless of whether requests have been made, the court shall be obliged to examine without delay the reasonableness of the accused's continued detention after receipt of the indictment by the court.

10. First and most significant observation is the apparent **contradiction of the proposed rules** with the provisions of paragraph 5 of Article 202 of the CCP[2], which provides that in case of termination of investigating judge's ruling on detention, the suspect, accused shall be **released immediately**. Instead, the proposed rule provides that a person will **not be released**, and the court would examine the reasonableness of the accused's continued detention.

Herewith, meaning of the applied term "*without delay*" is not clear – would it mean immediacy or impossibility to postpone the release from custody. In particular, the question arises, whether the examination of reasonableness of the accused's continued detention is possible before assigning the date of preparatory court hearing.

11. The order of consideration of this issue is also not clear. If the court must examine this question *regardless of whether requests have been made*, it may mean that the prosecutor nor the lawyer were not given an opportunity to comment on the possible detention, provide explanations or to lodge submissions concerning imposed preventive measure, which may constitute a breach of Articles 5-3 or 5-4 of the Convention. There is also a danger that the hearing may be postponed to allow the parties to have adequate time and facilities to prepare their defense and to lodge appropriate motions. It should be recalled that according to paragraph 4 of Article 176 of the CCP preventive measures, in the course of the trial, shall be applied by the court *at the request of the prosecutor*. If the prosecutor does not file such a request, it is not clear, based on the principle of adversariness of criminal

[2] As well as with the proposed changes to the Article 203 (proposed paragraphs two and three), which, as noted, essentially duplicate the provisions of paragraph 5 of Article 202 of the CCP.

proceedings, what would be the grounds for the court's decision on this issues, whereas the court takes up the procedural functions of one of the parties, in fact the function of the prosecutor in criminal proceedings.

12. In addition, the proposed amendment indicates that the decision of the investigating judge shall be given *for the whole period of the pre-trial investigation*. It is believed that this wording is not legally correct in view of the fact that according to the CCP, the investigating judge's ruling on the application of preventive measures is given not for the period or duration of certain stages of criminal proceedings, but for a certain specific period of time[3], established in a court decision which may, in certain cases, cover different stages of criminal proceedings, including pre-trial investigation and trial (as in the case of *Chanyev v. Ukraine*). Thus, various stages of criminal proceedings may be covered by such judgments if the "risks", on which the preventive measure is based, remained unchanged and are similar to those that existed in previous stages of criminal proceedings.

Regarding the draft law number 2

13. The draft law is aimed in particular to address the problem of the detention of a suspect after the pre-trial investigation and the start of the trial without an appropriate decision of investigating judge or a court hearing the case on the merits (amendments to Articles 293 and 315 of the CCP). In addition, unlike the draft law number 1, this draft also offers amendments to other articles of the CCP concerning other stages of the court criminal proceedings (Articles 374, 404, 419, 433 and 442 of the CCP), in order, as seen, to streamline the application of a preventive measure in the form of detention and before or after sentencing, appeal and cassation review of a criminal case.

14. It should be noted at once that the application of a preventive measure in the form of detention after the beginning of court's examination of the case in the court of first instance is irrelevant to the requirements stemming from the *Chanyev v. Ukraine*, neither does it ensue from any other judgment, which is being supervised for execution by the Committee of Ministers. In other words, as of today the Court found no violations by Ukraine concerning unlawful detention in these stages of criminal proceedings, and therefore it is deemed inappropriate to focus on the analysis of the proposed changes to the CCP in this part.[4]

15. With respect to solving the issue addressed in the *Chanyev v. Ukraine* judgment – the draft law propose to complement Article 293 of the CCP - "*Providing a copy of the indictment, of the motion to impose compulsory medical or educational measures and register of pre-trial proceedings records*" – with the second paragraph as follows:

Indictment, motion to impose compulsory medical or educational measures in criminal cases where preliminary measures in the form of detention or home arrest

[3] Paragraph 4 of Article 196 of the CCP: Investigating judge, court shall be required to determine in its ruling on preventive measure of detention or home arrest, the date of its expiration within the time-limits established in the present Code.
[4] The views expressed in no way affect the unquestionable right of the *Verkhovna Rada of Ukraine* to review the proposed changes. However, given the specific mandate of the Department, it is considered appropriate to focus on the analysis of only those changes that are directly relevant to the decision in the *Chanyev v. Ukraine* case.

is applied to the suspect, are referred to the court not later than ten days before the expiry of the decision on the application or extension of this preventive measure.

16. In addition, it is proposed to supplement Article 315 - "*Resolution of issues related to preparation for trial*" – with final wording in the part three of this Article:

In the absence of such a request from the parties to the trial proceedings, the measures to ensure the conduct of the criminal proceedings that were chosen at the pre-trial investigation stage shall be deemed to be extended, **[*except measures, period of validity of which is defined by a ruling of investigating judge according to Art. 196.4 of CCP*]**.*

17. First, with regard to Article 315 of the CCP, in the form which it has at the moment, the very possibility of automatic extension of a preventive measure in the absence of the parties' requests, without checking risks of continuation of the trial in connection with the completion of a criminal investigation, constitute a violation of Article 5, because it violates the principle of the presumption in favor of person's liberty. Therefore, the provisions of Article 315 of the CCP need to be amended.

18. Secondly, an analysis of the changes proposed to Article 293 of the CCP, indicate that legislator attempts to introduce some **additional time limitation conditions** for a transfer of the indictment, motion to impose compulsory medical or educational measures, by the prosecutor to the court. Under the proposed rule, such a transfer should take place *not later than ten days before the expiry of the decision on the application or extension of this preventive measure*.

19. However, there is an immediate question that can be raised in this respect as to what happens after **non-compliance** with the deadline, will the court refuse to accept the indictment, motion to impose compulsory medical or educational measures? Will the person be released from custody only on the basis of a failure to comply with these terms? These consequences are not provided by the CCP. **Accordingly, the proposed rule cannot solve the issue of *Chanyev v. Ukraine* case.**

20. It appears that the changes proposed to the third paragraph of Article 315 of the CCP, also **cannot solve the issue in the *Chanyev v. Ukraine* case** due to the following. The proposed rule essentially suggests to impose the duty on the court to review, even in the absence of requests, a preventive measure **during the trial**. However, the violations in the *Chanyev v. Ukraine* case happened just **before the trial** (§§ 9-14 of the European Court's decision), i.e. in the period that is not covered by the proposed changes.

Possible ways of *Chanyev v. Ukraine* execution

21. It seems that the problem that was considered by the Court in the *Chanyev v. Ukraine* case is not fully and exclusively a legislature problem.

Indeed, as noted, the CCP clearly states that **in case of termination** of the period of validity of the investigating judge's, court's ruling on detention, the suspect,

accused **shall be released immediately** unless the authorized officer of the place of imprisonment, where the person is held in detention, has other court's decision which has taken legal effect and which directly prescribes keeping this suspect, accused in custody (paragraph 5 of Article 202 of the CCP). These requirements of the CCP should be precisely followed by the national courts.

In this context, it is interesting that the Court did not make reference to Article 202 of the CCP in its decision in the *Chanyev v. Ukraine* case.

22. It appears that one of the possible solutions to the problems identified by the Court in the *Chanyev v. Ukraine* case, could be introduction of the legislative changes - as required by paragraph 35 of the European Court's judgment in this case - not only to the Code of Criminal Procedure, but also to provisions of the **Criminal Code** (CCU).[5]

Also with regard to legislative proposals reflected in the draft law No. 5490 of 06/12/2016[6], the proposed amendments to Article 315 of the CCP, in the Department's opinion do not solve the problem of an existing legislative gap as once again, in the absence of decisions on detention, the only possible way to comply with Article 5-1(c) and 5-3 of the Convention is to immediately release the person from custody.

Any delay, even insignificant (in the Court's practice, such delays can be few hours long and there is no court decision on detention), would constitute a violation of Article 5 of the European Convention on Human Rights. **That is why, in our view the only possible changes to the CCP may be those changes that would prevent detention and prohibit it absolutely after termination of the period of validity of the investigating judge's or court's ruling and will make impossible any detention without a court ruling. Confirmation of effectiveness of such changes on the basis of practice of the courts and the prosecution would clearly strengthen the positions of the progress on the implementation of judgment in** *Chanyev v. Ukraine* case**.**

23. The Department is ready to continue the dialogue with public authorities, parliament committee and 9 November 2016 consultations' participants, to consider and to provide expert advice on other proposals for legislative amendments to

[5] Section XVIII of the Criminal Code already contains article 371 "Knowingly unlawful apprehension, taking into custody or arrest".[5] However, to clarify the dispositions of Article 371 of the Criminal Code, and in order to implement the decision of the Chanyev v. Ukraine case, it is considered to supplement the provisions of part 2 of this article as follows: *Knowingly unlawful home arrest or detention,* ***including the failure of any officer to comply with the implicit obligation to immediately release the suspect or accused in case of termination of the period of validity of the investigating judge's, court's ruling on keeping in custody the suspect or accused, as well as any actions that result in an unjustified delay in the release of a suspect or accused*** *- ... ".* The result of these changes would be a clearer definition of the offense under Art. 371 of the Criminal Code and increased criminal liability for hindering the release of persons in case of termination of the period of validity of the investigating judge's, court's ruling on keeping in custody the suspect or accused. In addition, the introduction of the above amendments to the Criminal Code would allow to reach progress in the implementation of the Court's judgment in the Chanyev v. Ukraine case, increasing responsibility for the absolute prohibition of detention of the suspect or accused person without a court decision. Finally, given the importance of the rights of the suspect or accused under Art. 5 of the Convention, it seems possible to propose to strengthen penalties for actions under Art. 371 of the Criminal Code.

[6] "... 16. In Article 315: 1) in the first paragraph after the word "court" complement with the words "after the acquaintance by the parties with the records of pre-trial investigation or after the expiry of a deadline to review the records of criminal case"; 2) the third part should read: "3. During the preliminary court hearing, the court at the request of the participants of the proceedings has the right to impose, alter or revoke measures to ensure the conduct of the criminal proceedings, including a preventive measure, imposed against the accused. In considering such requests the court follows the rules specified in Chapter II of the Code. "; ... ".

address the urgent problems of ensuring the right to liberty and security of person displayed in the judgment of *Chanyev v. Ukraine,* which will be examined at the Committee of Ministers' meeting on 6-8 March 2017.