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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

GEORGIA

DRAFT OPINION

ON THE CONCEPT OF THE LEGISLATIVE AMENDMENTS TO THE CRIMINAL PROCEDURE CODE CONCERNING THE RELATIONSHIP BETWEEN THE PROSECUTION AND THE POLICE

on the basis of comments by

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Table of Contents

I. Introduction

1. By letter of 14 January 2019, Ms Natia Mezvrishvili, the Deputy Minister of Internal Affairs of Georgia, requested an opinion from the Venice Commission on the concept on the amendments to the Criminal Procedure Code of Georgia concerning the relationship between the prosecution and the investigators, hereinafter referred to as the Concept Paper. Together with the Concept Paper, the Georgian authorities provided a background document explaining the current situation in the law and in practice (CDL-REF(2019)004).

2. On 11-12 February 2019 a delegation of the Venice Commission composed of Mr Martin Kuijer, Mr András Varga, Mr James Hamilton, accompanied by Mr Grigory Dikov, legal officer at the Secretariat, visited Georgia. The delegation met with the Minister and Deputy Ministers of Internal Affairs, Minister and Deputy Minister of Justice, the Prosecutor General and his deputies, judges, lawyers, parliamentarians, NGOs and other stakeholders. The Venice Commission is grateful to the Georgian authorities for the excellent preparation of the visit.

3. The English translation of the Concept Paper, of the accompanying document and of the laws in force was provided by the authorities of Georgia. Inaccuracies may occur in this opinion as a result of incorrect translation.

4. *The present opinion was prepared on the basis of the contributions of the rapporteurs and on the basis of the information provided by the interlocutors during the visit and adopted by the Venice Commission at its … Plenary Session (Venice, … 2019).*

II. Analysis

5. At the outset, the Venice Commission notes that the present opinion examines the Concept Paper which does not contain specific legislative proposals and amendments to the text of the Criminal Procedure Code (the CPC). It is welcome that the Georgian authorities opted to get the Venice Commission involved at such an early stage of the legislative work. At the same time certain details of the proposed reform are still unclear, which makes proper analysis of the proposals more difficult.

6. For this reason, the focus of the present opinion is on the overall direction of the proposed reform, and on some of its elements which may appear problematic. The Venice Commission does not comment on each and every proposal of the Concept Paper, most of which are on the face reasonable, or a matter of practical choice.

A. The proposed reform and the rationale behind it

7. In the current system prosecutors and investigators share responsibility for the pre-trial investigations. Most of the investigations are conducted by the investigators of the police and of several other ministries and services, but under close supervision by the prosecutors.

8. From the procedural point of view, the prosecutors play a pro-active role in the investigative process, in the sense that they supervise initiation of criminal cases, take important decisions related to the fact-finding, authorise preventive measures or ask the court's authorisation for them, and take other procedural steps and actively guide investigators. According to all interlocutors, the position of the prosecution´s office in the criminal procedure may be qualified as being predominant, and that is since the 2003 reform of the CPC (now the 2009 CPC is in force). The prosecutor's office does not merely supervise criminal investigations, it *de facto* conducts the investigations.

9. From the institutional point of view, prosecutors and investigators are separate. The prosecutors represent an autonomous system with the Prosecutor General at the top. Since 2018 the Prosecutor General is not appointed by or answerable to the Minister of Justice anymore.[1] Investigators exist within several ministries and have their own hierarchy. Most of the investigators are under the authority of the Ministry of Internal Affairs, so in the present opinion they will be referred to as the "police investigators". That being said, the General Prosecutor's Office has a number of its own investigators, competent to deal with certain categories of cases (mostly related to the abuse of office by the State officials).

10. The impetus for the reform was given by a so-called Khorava Street case, which concerned a murder of two boys in a street fight. This case ended with the acquittal of one of the alleged perpetrators, which was widely seen as a sign of corruption or lack of professionalism of the law-enforcement bodies.[2] This development led the Prosecutor General Irakli Shotadze to resign. An inquiry commission, led by the opposition, was established in Parliament. One of the main findings of the commission was that the separation of responsibilities between the prosecution and the police was unclear, which undermined the efficiency of the system.

11. In parallel, studies were conducted which showed, *inter alia*, that the prosecutors are closely involved in the investigative decision-making at every level, which leads to a failure to exercise proper independent supervision over it. Such a working relationship may also lead to a situation in which the prosecutor will be more hesitant to take the position that something went wrong in the early investigative stages because he or she shares the responsibility for such failures.

12. The idea behind the reform is to clearly separate the investigative function and the function of pressing charges and supporting the accusation at the trial, to give the police investigators more autonomy at the initial stage of the investigation, before the criminal prosecution is launched and the charges are brought against a suspect. Prosecutors will keep some functions of supervision of the investigation at this early stage, but to a lesser extent than before. The investigator will be responsible for launching investigation and for its independent conduct, while the prosecutor will be responsible for launching (or declining to launch) criminal prosecution, negotiating a guilty plea, dropping the case, referring it to a court, and maintaining the accusation at the trial.

13. Nearly all interlocutors the delegation met in Tbilisi were generally in favour of the reform, and most of the discussions turned around the question of how far this reform should go. The strongest reserves were expressed by judges, who seemed to prefer working with the prosecutors rather than investigators in the situations where they (the judges) were called upon to authorise certain investigative actions or preventive measures. However, on the whole, the reform is generally seen positively by State institutions concerned, by the politicians and by the civil society. Such unanimity is remarkable, and provides support for the view that the problems identified by the Georgian authorities are real, that the reform of the pre-trial investigation is necessary.

14. The Venice Commission will address two questions: whether the proposed model is compatible with the international standards, and whether, from the practical perspective, it will be capable of achieving its objectives.

[1] The VC in the previous opinions on the prosecution service of Georgia called for an increased autonomy of the prosecution service. Before the constitutional reform of 2017 the Prosecutor General was subordinated to the Minister of Justice. Now it is not the case anymore, and the Prosecutor General gained autonomy from the Ministry, which is in line with Venice Commission recommendations (see CDL-AD(2018)029).

[2] See https://www.georgianjournal.ge/component/content/article/9-news/34537-tbilisi-city-courts-verdict-on-murder-of-two-boys-caused-outrage-among-citizens.html and http://crrc-caucasus.blogspot.com/2018/07/murder-on-khorava-street-publics.html

B. Compliance with the standards

1. Role of the prosecutor in different criminal justice systems

15. The Venice Commission acknowledges that the role of prosecutors in criminal investigations varies from one system to another.[3] Thus, in civil law countries the investigator is often subordinated to the prosecutor, but the extent to which day-to-day control is exercised by prosecutors varies considerably and especially in routine cases may in practice be very slight. In certain Scandinavian countries there is an integration between the police service and the prosecutor. In common law countries following the English tradition the office of public prosecutor was a late development and in some jurisdictions the police not only have a monopoly over investigation but may even retain a power to prosecute, particularly in minor cases.[4]

16. Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe, in p. 21, explains that "in general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police." States in which the police is independent of the prosecution are expected to take all measures to guarantee that there is "appropriate and functional co-operation between the Public Prosecution and the police" (p. 23). So, the Committee of Ministers acknowledges the legitimacy of a system of independent police investigations and requires only "appropriate and functional cooperation", which is a rather vague formula leaving the Georgian authorities a considerable margin of appreciation on how to organise it.[5]

17. Opinion no. 10 of the Consultative Council of European Prosecutors, the CCEP (which is the most detailed document in the field),[6] presents a similar picture. It distinguishes between three models: prosecutors conducting the investigations, prosecutors supervising the investigations, and investigations conducted independently by the police. Opinion no. 10, in p. 27, stipulates that "in member States where prosecutors supervise investigations […] prosecutors should have the power to either approve the adoption of […] important decisions by the investigator [concerning the initiating, suspending and terminating a criminal case] or to overrule them […]". It follows naturally that the scope of the power to approve important decisions of the investigator depends on the national regulations.

18. In sum, in the absence of a uniform European approach, the change from a system where the investigators are answerable to and under the authority of the prosecutor, to a system with the investigators acting independently is perfectly legitimate (as would be a decision to retain the present system). The choice is one for the national legislator.

[3] See the Report on the European Standards as regards the independence of the judicial system: Part II – the Prosecution Service, CDL-AD(2010)040, § 7.

[4] It is probably true to say, however, that in these countries the tendency in recent years has been for the prosecutor's powers to be extended at the expense of the police both in relation to the power to supervise the investigation and in relation to the power to prosecute which in some cases now rests exclusively with the prosecutor.

[5] This reading is confirmed by the explanatory memorandum to the recommendation, which reads in p. 16 as follows: "With regard to investigations, the role assigned to the public prosecutor falls in every case between two extremes - one being the complete absence of authority to initiate investigations and the other the case where the prosecutor is fully empowered to investigate. In some countries the public prosecutor normally acts only when its attention has been drawn - usually by the investigating police authority - to apparent violations of criminal law. In other countries, the public prosecutor can make the first move and has its own active role in identifying breaches of the law - part of its task in these circumstances being to direct investigations."

[6] See Opinion No. 10 (2015) of the Consultative Council of European Prosecutors, the CCEP, § 4.

2. Role of the prosecutor in ensuring the rights of a defendant in a criminal case

19. The European Convention on Human Rights (the ECHR) and the case-law of the European Court of Human Rights (the ECtHR) require that certain measures taken in the course of the pre-trial investigation are authorised by a judge. This concerns, primarily, arrest and pre-trial detention of a suspect (Article 5 § 1 (c) in combination with §§ 3 and 4 of the ECHR). It also concerns certain investigative actions which interfere with the rights guaranteed by Article 8 of the Convention and Article 1 of Protocol no. 1 thereto (most often, the rights of a criminal defendant): searches of premises, seizures of documents and objects, wiretappings, accessing private correspondence and computer files, etc.

20. Currently, the CPC provides for the judicial supervision of those measures, and the proposed reform does not remove this judicial guarantee. Article 112 of the CPC, which requires a court order for "an investigative action that restricts private property, ownership or the inviolability of private life" will remain in force. Similarly, Article 117, which requires a court order for arresting a suspect pending investigation will also remain unchanged. The only change is that the investigator will be able to apply to the court directly, without the intermediary of a prosecutor.[7]

21. For the ECtHR, in most of those contexts the presence of a prosecutor in the process of deciding to investigate and carrying out of investigations is not mandatory, although may potentially be a useful additional guarantee of the defendant's rights.[8] The authorities' assessment, was, however, the opposite: based on the Georgian experience, they see the prosecutor as an unnecessary middleman. In the absence of a binding European standard in this area, the Venice Commission accepts that, to the extent that the CPC and other legislation provides for the involvement of a judge for the *ex ante* or *ex post* control of such intrusive measures (in the latter case without delay), the presence of the prosecutor is not mandatory.

3. The requirement of efficiency of the criminal justice system

22. The ECHR does not only offer protection to suspects in criminal trials, but also offer some protection to victims of criminal offences, at least in certain contexts, especially in cases where the victims' life, limb and physical integrity are at stake. Thus, from Articles 2 and 3 of the Convention a positive obligation of the national authorities derives to ensure that the investigation into certain forms of crime is effective.[9] Whether the investigation was effective or not depends on a vast array of factors (independence of the investigative body, thoroughness and promptness of the investigation, sufficient involvement of the victim, etc.). For a good outline of the notion of "effective investigation", its elements and its application in the Georgian context see the ECtHR judgment in the case of *Enukidze and Girviliani*, §§ 241 et seq.[10]

23. This procedural positive obligation under ECtHR (which covers a certain narrow category of crimes) is complemented by a more general principle of the European legal order which requires the States to ensure the effectiveness of their criminal justice systems. Although this principle as such is not codified, it manifests itself indirectly in certain European and international instruments, such as the Criminal Law Convention on Corruption (1999), Convention on the Prevention of Terrorism (2005), etc. The principle of effectiveness is explained more elaborately in the Venice Commission opinion on amendments to the

[7] For the arrests the prosecutor will retain this power in parallel with the investigator.
[8] Indeed, the decision to prosecute or not to prosecute should belong to the prosecutors, as it is the case in the proposed system.
[9] See for example ECtHR [GC] 15 May 2007, *Ramsahai and others v. the Netherlands*, no. 53291/99.
[10] ECtHR, 26 April 2011.

Romanian Criminal Code and Criminal Procedure Code.[11] In that opinion the Venice Commission concluded that "a State is under a positive obligation to ensure that its criminal system is effective in the fight against serious forms of crime, […] that perpetrators of such offences do not enjoy *de facto* impunity" (§ 31).

24. On the face of it, none of the proposals contained in the Concept Paper, taken as such, prevents criminal investigations from being effective. On the contrary, the authors of the Concept Paper aim to increase the efficiency of the system. So, from a purely legal point of view, the Venice Commission does not see any contradiction between the Concept Paper and the ECtHR case-law or any international conventions in the criminal law sphere.

25. That being said, the question before the Georgian authorities is primarily not a legal but rather a practical one: what would be the *practical* effect of reform, of all of its proposals taken together? Even if there is no direct contradiction between the international standards and each specific element of the proposed reform, will this reform *as a whole* increase or diminish the efficiency of the Georgian criminal justice system? These questions are examined below.

C. Practical effects of the reform

1. Opening of the investigation

26. The Concept Paper distinguishes between the initial phase of the investigation, when the suspect is not yet identified and the investigation is conducted *in rem*, and the subsequent phase, which starts from the moment when the case is ready for bringing formal charges against a suspect.

27. From this moment on, the prosecutor will be in control: the prosecutor will bring charges or drop the prosecution, direct the investigator to take additional investigative actions, prepare the bill of indictment and transfer it to the court, negotiate a guilty plea and, finally, support the accusation at the trial. These latter phases are not affected by the proposed reform. As to the initial phase (before launching of a criminal prosecution) the authorities' plan is to ensure supervision within the hierarchical chain of command of each Ministry,[12] and to remove the close supervision by the prosecution, replacing it with some reduced residual powers which are nevertheless not without importance.

28. These powers are the following. The prosecutor during the initial phase of investigation will able to decide on the recusal of the investigator, in cases where the impartiality of the investigator is in doubt, (p. 9), and on the transfer of the case based on institutional jurisdiction, which will henceforth be specified in the CPC (p. 6). The Prosecutor General will have the right to transfer a case to another investigative authority irrespectively of the investigative jurisdiction (p. 6). And, when the time comes, the prosecutor will assess "the grounds for launching criminal prosecution or termination of investigation" (see p. 3).

[11] CDL-AD(2018)021, §§ 22-31.

[12] After the reform the decision to launch the investigation will belong to the investigator, who "shall not be obliged to notify a prosecutor on launching an investigation" (p. 4). Furthermore, "a decision on refusal of launching an investigation shall be appealed to a chief of investigative unit" (p. 4). Similarly, "complaints regarding delaying investigation, conduct of various investigative activities and other issues linked to the direction of investigation (including the qualification of the case) will be reviewed by the head of the investigative unit [of the respective Ministry]" (p. 3). An investigator at this stage "shall decide on termination of an investigation […]" (p. 7), and will also decide on the joinder and separation of cases (p. 4). An investigator's decision to terminate the investigation will be subject appealed to the head of an investigative authority and afterwards to a court (p. 10).

29. This approach is generally in line with the CCEP Opinion no. 10.[13] When speaking of the initial phase of investigation, Opinion no. 10 requires the prosecutor only to "monitor" the investigations, which is not a very stringent requirement.

30. That being said, to be able to "monitor" the investigation the prosecutor must know, at the very least, what is happening. The Concept Paper indicates that the reform "does not exclude the access of the prosecutor to the criminal case files". The authorities, during the visit to Tbilisi, stressed that the prosecutor has access to an electronic information system of the police. This is positive, but it should be formulated more clearly in the Concept Paper and in the legislative drafts: the prosecutor's office should have access to the electronic information system which, in turn, should contain sufficient information about the case and the major developments in it, and should be able to examine physical files, if necessary. It would be useful to introduce a system of automatic notifications of the prosecutor about certain types of decisions taken by the police investigator, or of the expiry of the dead-lines for taking such decisions, etc.

31. Another question is what happens when the investigator decides *from the outset* that there is no case to answer and does not open an investigation, or if the investigation was opened but is not pursued vigorously enough. Inactivity of the investigator in an *existing* case is addressed by the power of the Prosecutor General to transfer a case to another investigative authority (p. 6).[14] This is positive. However, this power can be exercised only if the investigation has started. If the investigator does not open a case, such decision cannot be challenged anywhere outside of the relevant Ministry. The same concerns termination of the investigation before the prosecution is launched – it appears that the investigator will have the sole responsibility for such decisions (p. 9).

32. Again, there is no clear international standard requiring an *external control* of such decisions. And, normally, the police should be capable of distinguishing between clearly unmeritorious complaints and more serious cases which warrant investigation. However, in certain situations this may be not so clear (for example, where the allegations of ill-treatment in custody, or of domestic violence are concerned). In practical terms, such "unreported" cases, if the decision not to open an investigation happens to be mistaken, may cause great damage to reputation of the whole system, and the same is true about the cases where the investigation has been started and then discontinued.

33. The Venice Commission considers that the authorities should consider (if it is not already the case) the creation of a system of registration of *all* complaints (including those which did not result in the opening of the investigation), to which the prosecutors would have access. At the very least, the investigators should remain entitled to consult the prosecutor if he/she feels the need to do so in such borderline cases. In addition, the prosecutors should keep the power – at least in certain category of cases, and at the initial stages of the reform – to overrule the decision of the investigator/chief of the investigative department not to open an investigation/terminate it, and to transfer it to another investigator/investigative authority for re-consideration.

34. The power of the prosecutor to override the decision of the investigator in those circumstances should be accompanied by an obligation to give reasons in writing for using

[13] The bottom-line rule of the Opinion is that "prosecutors should scrutinise the lawfulness of investigations at the latest *when deciding whether a prosecution should commence* or continue" and should "monitor how the investigations are carried out and if human rights are respected" (p. 16). Thus, the prosecutor's involvement is required at the moment when charges against a particular person are brought. Before that moment. when the file is not yet ripe for bringing the charges, the police may act independently, subject only to "monitoring" by the prosecution.

[14] In this cast it would be necessary to provide in the CPC that the Prosecutor General has to give reasons for using such a power.

such a power. It would also be useful to consider having a quasi-appeal instrument to solve potential conflicts between prosecutors and investigators. Thus, the head of the police unit or chief investigator could be entitled to complain to a higher prosecutor about a decision of a lower prosecutor in cases where the lower prosecutor ordered the opening of a criminal investigation contrary to the decision of the investigator.

35. In addition, the reform should be accompanied by a number of legislative and non-legislative measures, which will be discussed below, in Section III.

2. Investigative actions

36. The proposed reform will reduce the control of the prosecution over specific investigative actions, before the criminal prosecution is launched. As noted earlier, a certain number of actions interfering with privacy and other fundamental rights[15] will require a prior court authorisation or, in the urgent cases, *ex post* review by a court (see pp. 6 – 8 of the Concept Paper). However, other actions may be taken by the investigator single-handedly, without any external controls. Before the criminal prosecution is launched, the prosecutor will only be able to give the investigator non-binding recommendations (see p. 3 of the Concept Paper).

37. The Venice Commission reiterates that judicial review (*ex ante* or, in urgent cases, *ex post*) is, in principle, a sufficient safeguard against possible abuses, at least from the standpoint of a suspect (or any other person targeted by the investigative measures). That being said, a different logic applies if we look at the situation through the prism of *efficiency* of the criminal justice system or from the standpoint of a victim of a crime. The court will only be able to review actions of the investigator, but not his/her inaction. The court will not be in a position to advise the investigator *what* to do in particular case, and *how* to do it in order to build up a strong case. By contrast, the prosecution may give such an advice.

38. The Venice Commission recalls that in many European countries the prosecutors play a pro-active role in the police investigations, and that from the very beginning of the process. This model has a strong rationale. Ultimately, investigators and prosecutors pursue the same goal: to bring the culprit to trial, to obtain a judgment on the merits. The prosecutors are lawyers who know what happens in the courtroom, what makes the evidence inadmissible, etc. If the prosecutors do not have any influence on the investigation from the start, a certain number of "promising" cases may be rejected due to errors of police committed in the first hours or days of the investigation. There is also a risk that applications requesting a court order for certain investigative measures will contain legal errors, and will be rejected by the courts, which may ultimately have consequences for the trial process.

39. Some of those mistakes can be corrected later, after the launching of the criminal prosecution. At this stage, according to the Concept Paper, the prosecutor will be able to give "binding instructions to the investigator regarding identification of necessary circumstances to create the standard of evidence for the referral of the case to the court" (see p. 3 of the Concept Paper). But certain mistakes made at the early stages may be irreversible, and even if they are not, putting them right will cause unnecessary delays.

40. The question is whether the "soft" model of supervision by the prosecutor (through non-binding recommendations) is better than the existing model, where the prosecutor is actively guiding the investigator from the very beginning. There are arguments *pro* and *contra* this new model. It will certainly permit a clearer separation between the responsibilities of the two institutions (the prosecution and the police), which is one of the imperatives of the reform.

[15] Like search in premises or personal search, exhumation, access to computer data, wiretapping, taking samples, compelled appearance, forfeiture of property, suspension from duty, etc.).

The authors of the Concept Paper believed that this is the most important objective of the reform.

41. That being said, nearly all the interlocutors the rapporteurs met in Tbilisi agreed that currently the police investigators lack adequate legal knowledge, and are not capable of assuming the new responsibilities. At present, to become an investigator one does not need to obtain a university diploma in law. Thus, there is a risk that the quality of criminal investigations may deteriorate, since prosecutors will be unable to indicate to the investigators at an early stage what is needed in order to secure a conviction, and that less convictions (in bona fide cases, of course) can be secured. To reduce this risk, the Venice Commission invite the Georgian authorities to consider the following measures, both legislative and non-legislative, which are outlined in Section III below.

3. Arrest

42. As noted by the Concept Paper, the decision to arrest a suspect requires a standard of "probable cause" to be reached, and, in practical terms, it is almost equivalent to the standard required to justify charging (the person should be charged within 48 hours after the arrest, according to the "Brief description of the stages of investigation", see CDL-REF(2019)004, p. 12). Thus, a prosecutor will retain the right to apply with an arrest motion to a court (p. 10). An investigator will also retain the right to carry out an arrest in urgent cases, with an obligation to notify a prosecutor about arrest immediately (p. 10). This appears to be a reasonable division of functions, but the law must specify whether the prosecutor may overrule the investigator and obtain liberation of the suspect, and whether it can be done after the court has already authorised the pre-trial detention. Since the prosecutor is the master of the criminal case from this moment on, it would be natural for him to be able to oppose the detention and to order the liberation of the suspect.

4. Launching of the criminal prosecution

43. The Concept Paper states, on p. 3, that "prosecutor and head of the investigative unit will not be authorized to consider inadmissible the evidence obtained in violation of the requirements of the law. This will remain the prerogative of the judge in the pre-trial hearing."

44. This proposal of the Concept Paper runs contrary to Recommendation Rec2000(19), which provides in § 13 (e) that "public prosecutors remain free to submit to the court any legal arguments of their choice". In § 28 the Recommendation provides that "public prosecutors should not present evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence." The proposal of the Concept Paper places the prosecutor in a position of having to present evidence to the court which he or she believes to be unlawfully obtained or weak in substance. Furthermore, it implicitly limits the right of the prosecutor to ask the trial court to rule against the admissibility of evidence. This is apparently to be the exclusive prerogative of the judge in the pre-trial hearing, but it is not clear who will be in a position to raise such an issue at the pre-trial hearing.

45. Recommendation Rec2000(19) in § 29 provides that "public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law − any information which they possess which may affect the justice of the proceedings". In the absence of an express obligation on the investigator to provide the prosecutor with all evidence in his or her possession the proposal will undermine the principle of equality of arms since the prosecutor will not be in a position to disclose evidence to the defense of which he or she may be unaware.

46. Recommendation Rec2000(19) also provides that "in general, public prosecutors should scrutinise the lawfulness of police investigations at the latest when deciding whether a prosecution should commence or continue. In this respect, public prosecutors will also monitor the observance of human rights by the police" (§ 21). It is clear from the provisions of §§ 21, 28 and 29 that the conduct of criminal proceedings before a court are for the prosecutor rather than the investigator. This does not necessarily mean, however, that an investigator might not have the power to seek court approval for measures of investigation taken before a decision is made to institute criminal prosecution.

47. It also follows from the duties imposed on the prosecutor not to use evidence unlawfully obtained and to disclose all relevant evidence to the accused that the investigator is under a duty to provide the prosecutor with all the evidence in his or her possession prior to the decision whether to prosecute, as well as the fullest possible information as to how that evidence was obtained. The future bill should expressly provide that this will be the case.

48. The Venice Commission agrees with those interlocutors who argue that the Bill should explicitly stipulate that the responsibility of the investigator is to collect all evidence, incriminating as well as exonerating. At the same time, the Commission stresses that such responsibility should equally exist for the prosecutor, and the prosecutor should be able to dismiss unlawfully obtained evidence, and if, as a result, the case is too weak, drop the charges. It would be wrong to shift the obligation to conduct an impartial and objective investigation to the investigator, and present a prosecutor as a party having only one interest – to obtain a guilty verdict.[16]

49. The Venice Commission recalls that in most European countries the prosecutor is perceived as an "officer of the court" whose main task is to uphold substantive and procedural law. The principle of adversarial proceedings is important, but it should not be interpreted as requiring that the prosecutors should have no duty to the court itself, or to serve the interests of justice, but should rather seek to ensure a guilty verdict by all means, and that the success of the prosecution should be measured only by the number of convictions obtained. The prosecutor has a dual responsibility for supporting the accusation and, at the same time, for ensuring that weak cases or cases based on illegally obtained evidence do not reach the court.[17] The fact that a criminal judge will eventually assess all evidence at the trial does not absolve the prosecutor from making an assessment of the quality of the evidence that he or she presents to the court.

III. Legislative and other measures to support the reform

50. In sum, the proposed reform aims at the "forced emancipation" of the police investigators, which will remain without prosecutors' guidance insofar as the decision to start or continue the investigation is concerned (see Section II (C) (1) above) and only with a "soft" supervision in respect of the specific investigative actions which may be taken (see Section II (C) (2)). Given that currently the police seem to be not ready to assume those functions, a transitional mechanism and/or postponed entry into force of the bill should be considered.

[16] The Venice Commission recalls in this respect that the General Prosecutor's Office in Georgia recently became largely autonomous from the executive (even though the term of "independence" may not be appropriate in this context). By contrast, the investigators work in the respective ministries, and are, therefore, a part of the executive. This model is perfectly acceptable, but it is more natural to expect that an autonomous official is well-equipped to act objectively.

[17] The bar should not be set too low or too high; the prosecution should not accept all files from the investigation, but should not, either, chose only those files which are 100% winnable.

51. First, the Deputy Minister of Internal Affairs indicated that the Government envisages a transition period of up to two years that would be needed before the investigators could assume their new responsibilities. This is certainly a wise approach. In parallel, the eventual success of such a reform could be helped by conducting pilot projects. These pilots could either be limited to a certain geographic area (for example, the capital) or to a certain category of investigations (which could also facilitate specialisation within the investigative authorities), so that the reform may be introduced incrementally.

52. Second, the type of oversight by the prosecution can be differentiated depending on the importance of the case (minor/important cases): in important or difficult cases the prosecutor could have a deeper influence, while in minor cases the investigators could proceed alone. The categorisation of cases could be regulated by law. Again, this differentiation may be either kept permanently, or gradually phased out, if the results of the first pilot projects are promising.

53. Third, the system of communication between the police and the prosecution should be revised. It appears that there is little transparency in the existing working relationship between the two institutions: in practice the communication between both interlocutors is primarily conducted over phone, without any written record being kept. It is important to clarify that instructions by the prosecutor to the investigative authorities should ordinarily be provided in a written manner and should be disclosed to the defense. Some narrowly tailored exception for emergency situations in which an oral instruction is followed by a written confirmation could be justified.

54. Fourth, some non-legislative measures need to accompany the legislative reform. What is needed is a multi-annual action plan to assist such a process of emancipation and professionalization of the police and other investigators, which may include training, movement of personnel between the prosecutors' office and the police, introducing internal control mechanisms within the Ministry of Internal Affairs and other ministries, etc.[18]

55. This list of non-legislative measures is not exhaustive. The authorities may consider revising the selection process of police officers and setting up an evaluation mechanism for their work, allocating additional budgetary resources for the investigative authorities and, especially, for their legal training, introducing specialisation of the investigators, etc. In sum, it would be useful to accompany the reform with appropriate administrative, budgetary and staff changes, which would prepare the police for its new role in the criminal justice system.

56. If those measures are implemented, the new model of supervision by the prosecutor of the investigation before launching of the criminal case may have positive effects.

IV. Conclusions

57. The proposed reform aims to increase the autonomy of the investigative authorities vis-à-vis the prosecutors. Nearly all interlocutors in Georgia agreed that such reform is needed, and that prosecutors and investigators should have clearly defined areas of responsibility. The establishment of an independent investigation is a legitimate objective, and is not contrary to the international standards, which leave the Georgian legislator a considerable margin of appreciation in those matters. However, in order to avoid unwarranted effects, the transfer of powers from the prosecution to the investigators should be carefully prepared, so that the criminal justice system does not lose its efficiency. Some aspects of the proposals in

[18] To a certain extent, the authorities have already taken several measures to this effect: thus, the authorities have transferred some experienced prosecutors to the Ministry of Internal Affairs, and a centralised Department of Quality Control has been established within the Ministry of Internal Affairs.

the Concept Paper need to be re-balanced, and the whole reform should be introduced incrementally.

58. The Venice Commission thus recommends making certain transitional arrangements. The most important of them are as follows:

- the authorities should start with several pilot projects, enabling them to see how the new division of responsibilities between the police and the prosecutor's office works out in practice;
- the prosecutor should be able to monitor the work of the investigator, through an electronic information system or otherwise. At the early stages of the reform the prosecutor should be able to keep a closer supervision in respect of certain categories of most difficult/important cases, and should be able, at least, to overrule the decision of the investigator not to proceed with the criminal investigation in such cases. With time the investigators may receive more autonomy, and the prosecutors' close supervision of such decisions may be phased out, and be replaced in most areas with "soft" model (legal advice instead of the binding orders);
- instructions by the prosecutor to the investigative authorities should in principle be in writing (both binding orders and "recommendations"); decisions of the prosecutor overriding decisions of the investigator should contain reasoning;
- the future bill should explicitly provide the duty of the investigator to collect all evidence (incriminating as well as exonerating) and provide that the prosecutor should not rely on illegally obtained evidence;
- a multi-annual plan should be adopted and implemented to accompany the legislative reform; this plan should provide for adequate legal training of the investigators, strengthening of internal controls mechanisms within the relevant ministries, etc., and should be supported by adequate allocation of resources.

59. The Venice Commission remains at the disposal of the Georgian authorities for further assistance in this matter.