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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

ARMENIA

**DRAFT AMENDMENTS TO THE CRIMINAL CODE AND THE
CRIMINAL PROCEDURE CODE**

**LAW OF THE REPUBLIC OF ARMENIA “ON MAKING A SUPPLEMENT TO THE
CRIMINAL CODE OF THE REPUBLIC OF ARMENIA”**

Article 1. Criminal Code of the Republic of Armenia of 5 May 2021 shall be supplemented with a new Article 503.1 which reads as follows:

“Article 503.1. Refusing to undergo personal inspection, expert examination, as well as to submit samples

1. Refusing by a witness or a victim to submit samples, to undergo personal inspection, as well as expert examination upon the request of the body administering proceedings as prescribed by law shall be punished by a fine in the amount of maximum ten-fold, or by restriction of freedom for a term of maximum one year, or by short-term imprisonment for a term of maximum two months.
2. Committing the act provided for by part 1 of this Article by an arrested person or accused person shall be punished by a fine in the amount of maximum twenty-fold, or by restriction of freedom for a term of maximum three years, or by short-term imprisonment for a term of maximum four months, or by imprisonment for a term of maximum three years.
3. The acts provided for by part 1 or 2 of this Article which have been committed:
 - (1) with mercenary motives; or
 - (2) in case of grave or particularly grave crimesshall be punished by imprisonment for a term of maximum five years.
4. The person having committed the acts provided for by parts 1, 2 or 3 of this Article shall be exempt from criminal liability, where prior to leaving for a separate room for the purpose of rendering a decision on applying coercive measures by the court, or prior to rendering a decision on dismissing the proceedings in the course of preliminary investigation, or prior to leaving for a separate room during trial for the purpose of rendering a criminal judgment or a decision by the court, has voluntarily appeared to sampling or has voluntarily underwent personal inspection, expert examination and the samples submitted in a timely manner have not lost their evidential significance”.

Article 2. This Law shall enter into force on the tenth day following the day of its official promulgation.

**LAW
OF THE REPUBLIC OF ARMENIA
“ON MAKING AMENDMENTS AND SUPPLEMENTS
TO THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA”**

Article 1. Article 18 of the Criminal Procedure Code of the Republic of Armenia of 30 June 2021 (hereinafter referred to as “the Code”) shall be added with point 10 which reads as follows:

“10. The body administering proceedings may discharge proportionate physical force as an exceptional measure, based on a decision of the court, in the cases and in the manner provided for by this Code, to the extent it is necessary to ensure the fulfilment of the obligation to undergo investigation and expert examination or give samples, unless otherwise possible to ensure the fulfilment of those obligations by other means.”.

Article 2. Point 5 of part 1 of Article 41 of the Code shall be amended as follows:

“(5) apply to the court with motions for imposing the coercive measures, extending the term of detention, conducting investigative and secret investigative actions, compulsorily carrying out personal inspection, expert examination or compulsorily obtaining samples prescribed by this Code by immediately forwarding the carbon copy of the motion to the supervising prosecutor;”.

Article 3. The words “compulsorily carrying out personal inspection, expert examination or compulsorily obtaining samples” shall be added after the word “seizure” in point 1 of part 4 of Article 209 of the Code.

Article 4. Article 227 of the Code shall be added with part 3 which reads as follows:

“3. In case of voluntarily refusing to follow the requirements of the decision of the investigator on undergoing personal inspection, a protocol shall be drawn up, and clarification shall be provided on the possibility of compulsorily conducting it, upon the decision of the court, in case of refusing to voluntarily undergo personal inspection.

The body administering proceedings shall have the right to apply to the court with a motion for authorisation for compulsorily carrying out personal inspection of the person having refused to voluntarily undergo personal inspection.”.

Article 5. Article 254 of the Code:

1) shall be added with parts 8 and 9 which read as follows:

“8. In case of failure to voluntarily fulfil the obligation provided for by this Code for expert examination, the personal inspection, expert examination shall be carried out or samples shall be obtained compulsorily as prescribed by law, based on the decision of the court, by observing the principle of proportionality of interference with the rights.

When conducting compulsory investigative actions, the application of measures and methods which may include torture or inhuman or degrading treatment or cause severe physical or mental pain or suffering to a person shall be prohibited.

9. The persons referred to in Articles 43, 50, 58 of this Code shall be warned about the criminal liability provided for by Article 503.1 of the Criminal Code of the Republic of Armenia.”.

Article 6. This Law shall enter into force on the tenth day following the day of its official promulgation.

RATIONALE
ON ADOPTING DRAFT LAW OF THE REPUBLIC OF ARMENIA
“ON MAKING A SUPPLEMENT TO THE CRIMINAL CODE OF THE REPUBLIC
OF ARMENIA” AND DRAFT LAW OF THE REPUBLIC OF ARMENIA
“ON MAKING AMENDMENTS AND SUPPLEMENTS TO THE CRIMINAL PROCEDURE
CODE OF THE REPUBLIC OF ARMENIA”

1. Current situation and necessity for adopting the legal act

Pursuant to point 2 of part 2 of Article 43, point 3 of part 3 of Article 50, point 3 of part 2 of Article 58 of the Criminal Procedure Code of the Republic of Armenia, **the accused person, victim and witness shall, upon the request of the body administering proceedings, be obliged to hand over the samples provided for by this Code, as well as undergo personal inspection and expert examination.**

It follows that the above-mentioned participants of the criminal proceedings shall, as prescribed by law, bear the obligation to undergo **personal inspection** expert examination, as well as submit samples, while in case of refusing to fulfil the mentioned obligations, the norm envisaging obligation is missing.

2. Nature of the recommended regulation

The regulations of a number of criminal codes of foreign countries, in particular, Article **262.1 of the Criminal Code of Latvia**, is entitled as “Refusing to undergo expert examination for detecting alcohol, narcotic drugs, psychotropic substances, toxic substances or other soporific substances”, and pursuant to that Article, a driver of the vehicle who has committed an offence for the second time during the year and refuses to undergo expert examination for detecting alcohol, narcotic drugs, psychotropic substances, toxic substances or other soporific substances, is punished by imprisonment for a term of up to one year, detention or community service or a fine in the amount of fifty-fold of the minimum salary, by deprivation of the right to drive vehicles for a term of three to five years with confiscation of property.

Article 383 of the Criminal Code of the Kingdom of Spain prescribes criminal liability for a driver of the vehicle who refuses to test for alcohol, as well as narcotic drugs, psychotropic substances and toxic substances. A punishment in the form of imprisonment for a term of 6 months to 1 year or with deprivation of the right to drive a vehicle for a period of up to 4 years is envisaged for the mentioned act.

Such provision is envisaged also by the Criminal Code of the French Republic, Article 222.19.1 of which prescribes criminal liability for refusing by a driver to test for blood or alcohol in case of a suspicion of using alcohol or narcotic drugs.

Pursuant to Article 241 of the Penal Code of Israel, where a person is obliged to give testimony or submit other evidence during the trial but he or she refuses to do it, he or she is punished by imprisonment for a term of up to 2 years. Failure to give samples for the expert examination shall also be deemed to be as refusal to give other evidence.

Pursuant to Article 308 of the Criminal Code of the Russian Federation, refusal by a witness or victim to give testimony or to participate in personal inspection of the victim, avoiding thereby to undergo expert examination where his or her consent is not mandatory, or refusing to provide manuscript sample or other samples for comparative study is punished by a fine in the amount of up to 40 thousand roubles or in the amount of the salary or any other income of the convicted person for a period of up to three months, or by community service for a term of up to three hundred and sixty hours or by correctional labour for a term of maximum up to one year, or by detention for a term of maximum up to three months.

It is recommended by the Draft to add a new Article 503.1 to the Criminal Code of the Republic of Armenia that will prescribe a criminal liability for refusal to undergo personal inspection, expert examination, as well as to submit samples.

Envisaging such crime by the Criminal Code of the Republic of Armenia is not an end itself and may significantly impact on the efficiency of investigation of criminal proceedings.

In addition, as it was mentioned above, the private participants of the criminal proceedings shall, as prescribed by law, bear an obligation to undergo personal inspection, expert examination, as well as to submit samples, but there is no norm to envisage liability in case of refusing to fulfil these obligations.

It follows that there is a norm prescribing obligations, but there are no procedures that cause liability for non-fulfilment thereof, in which conditions the legitimate aim of applying the norm is not ensured.

Moreover, it should be noted that as a result of undergoing personal inspection, expert examination, as well as submitting samples the main and the most significant information is obtained under criminal case, moreover, more often data are obtained which are simply impossible to obtain or replace with other evidence, therefore, the non-fulfilment thereof in many cases may lead to non-disclosure of the crime or exempt an obviously guilty person from criminal liability merely on the ground that it was impossible to obtain samples having key significance for scheduling expert examination.

Moreover, the obligation to provide compulsory samples and the key importance for criminal proceedings were also emphasised in the legal position expressed by the European Court of Human Rights, according which the right to remain silent is not absolute (see, *John Murray v. the United Kingdom*, Application No 18731/91, 8 February 1996, § 47); the principle of a person's refusal to testify against himself or herself does not apply to materials which may be obtained from the accused person **compulsorily through the use of powers and** which exist independently of the will of the accused person, for instance, *inter alia*, documents that were obtained as a result of orders rendered for the purpose of expert examination of breath, blood and urine samples, as well as body tissue, DNA (see, *mutatis mutandis*, *Saunders v. United Kingdom*, Application No 19187/91, 17 December 1996, § 69, *Jalloh v. Germany*, Application No 54810/00, 11 July 2006, § 112).

In the light of the above-mentioned arguments it should be noted that the necessary balance between and guarantees for public and private interests are ensured by the recommended regulations.

Moreover, it should be stated that **Article 457 was included in the Draft of the new** Criminal Code of the Republic of Armenia (refusing or avoiding to undergo personal inspection, expert examination, medical examination or to give samples), whereon the Directorate General for Human Rights and Rule of Law of the Council of Europe issued an opinion back in 2017 (September), according which the crime may be deemed as committed only if the person failed to obey the certain order of the court.

However, the aforementioned norm was not included in the **new** Criminal Code of the Republic of Armenia which was already adopted on 30 June 2021.

It should be noted that from the point of the European Convention for the Protection of Human Rights and Fundamental Freedoms the State bears positive obligation for conducting proper investigation with regard to a number of crimes (for instance, crimes against life, health, sexual integrity, torture). Undergoing personal inspection, expert examination, medical examination, finger-printing, photographing, providing samples for comparative study with regard to such type of crimes is the most significant, whereas in separate cases — the only measures for conducting proper investigation.

Concurrently, it is recommended to envisage a legal regime for releasing from criminal liability. Thus, the mandatory ground for releasing from criminal liability is considered to be the cases where the aforementioned persons - *prior to leaving, by the court, for a separate deliberation room for the purpose of rendering a decision on applying coercive measures, or in the course of the preliminary investigation prior to delivery of a decision on dismissing the proceedings, or in the course of trial prior to leaving, by the court, for a separate deliberation room for the purpose of rendering a criminal judgment or a decision — have voluntarily appeared for sampling or have*

voluntarily undergone personal inspection, expert examination, and the samples submitted in a timely manner have not lost their evidential significance, i.e. they may be used (are suitable) for disposition of a criminal case.

Two conditions are envisaged for the application of the mandatory grounds to release from criminal liability:

- (1) voluntarily submitting samples; and
- (2) submitting them in a timely manner.

The point is that in practice there may be cases where a person, for instance, under the influence of alcohol (narcotic drugs) refuses to undergo expert examination or provide samples at the initial stage of the preliminary investigation, while the person realises that these samples are retained in the human body for a certain period of time. Another case may be where during the preliminary investigation, he or she does not allow taking relevant traces from the body thereof with an expectation that he or she will be able to clean or wash them later. In this case, if a person has piously refused to fulfil his or her procedural obligation, but later he or she expresses a wish to fulfil this obligation voluntarily, he or she is exempt from criminal liability, if due to late submission of samples they have not lost their evidentiary significance or no danger of concealing it existed then.

It is also recommended that the Criminal Procedure Code of the Republic of Armenia envisages a provision according which undergoing personal inspection, expert examination, as well as providing samples, as prescribed by law, is conducted upon the decision of investigator, whereas in the case of impossibility thereof — also upon the court decision, by ensuring the protection of the right to physical integrity prescribed by Article 25 of the Constitution of the Republic of Armenia.

Moreover, the supervision of the court is conditioned not only by the constitutional protection of the right to physical integrity, but also by provision for liability for failure to perform these actions also in the future.

It is recommended that Article 41 of the Criminal Procedure Code of the Republic of Armenia, prescribing the powers of investigator, envisages a provision according which in addition to the powers of applying to the court with motions of extending the term of holding the accused person in detention and conducting secret investigative actions, **the investigator must be vested with the power to apply to the court also with the motion of conducting compulsory personal inspection, expert examination or obtaining samples.**

It is recommended that Article 209 of the Criminal Procedure Code of the Republic of Armenia, prescribing the grounds for conducting investigative actions, in addition to actions carried out on the basis of court decision, also envisages that compulsory conduct of personal inspection, expert examination or compulsory acquisition of samples will be carried out upon court decision as well.

It is noteworthy that the regulation provided for by part 9 of Article 292 of the Criminal Procedure Code of the Republic of Armenia is also applicable under the given supplements, according which **it will be considered** by the court **immediately** after the latter receives the motion of conducting probative action.

Article 227 of the Criminal Procedure Code of the Republic of Armenia, defining personal inspection, will envisage a provision according which in case of refusal to voluntarily fulfil the requirements of the decision of investigator on undergoing personal inspection, a protocol will be drawn up and clarification will be provided on the opportunity of compulsory conduct of personal inspection, upon court decision, in case of refusal to voluntarily undergo it.

A body administering proceedings will have the right to apply to the court with the motion of obtaining authorisation to compulsorily conduct personal inspection of the person having refused to undergo personal inspection.

It is recommended to supplement Article 254 of the Criminal Procedure Code of the Republic of Armenia, prescribing the acquisition of samples for an expert examination, with new points

according which in case of failure to voluntarily fulfil the obligation provided for by this Code, the personal inspection, expert examination or receiving samples will be carried out compulsorily as prescribed by law, based on court decision, with observation of the principle of proportionality of interference with rights. At the same time, it will be clearly stipulated that in the course of compulsory conduct of investigative actions the application of measures and methods that may contain torture or inhuman or degrading treatment or inflict severe physical or mental pain or suffering on a person are prohibited.

Moreover, the persons will be also warned about the criminal liability provided for by Article 503.1 of the Criminal Code of the Republic of Armenia.

It is worth mentioning that a similar norm is provided for, for instance, by the Criminal Procedure Code of Georgia,¹ according to part 8 of Article 111 whereof, in the course of investigative actions the application of surgical means and methods or conduct of medical examination that inflict severe pain are allowed only in exceptional cases with the consent of the given person.

Pursuant to part 1 of Article 147 of the **Criminal Procedure Code of Georgia**, where it is impossible to voluntarily take samples it is carried out based on the motion of the parties, *upon court decision*.

A similar regulation exists also in the **Criminal Procedure Code of Ukraine**², pursuant to part 3 of Article 245 whereof, where a person refuses to voluntarily submit biological samples, the investigator-judge or upon the motion of the person administering proceedings — the judge is entitled to authorise the investigator, prosecutor (or to oblige them where the motion was filed by the defendant party) *to take the biological samples compulsorily*.

The procedural rules for taking samples from an accused person and victim (witness) are distinguished in **the Criminal Procedure Code of Kazakhstan**³. Thus, pursuant to part 1 of Article 268 of the Criminal Procedure Code of Kazakhstan, samples may be compulsorily taken from a suspect or accused person. Pursuant to part 2 of the same Article, a sample may taken from a victim or witness only upon their consent, with the exception of the cases where taking a sample is requested by the suspect, the accused person in order to verify the testimony exposing them to the committal of a criminal offence, as well as the cases where the need to take samples is conditioned by diagnosis of venereal or other infectious diseases where such diagnosis is significant for the disposition of the case. In the aforementioned cases, compulsorily taking samples from a victim or witness is done only with the authorisation of the prosecutor or upon court decision.

Thus, it is recommended to envisage a provision in the Criminal Procedure Code of the Republic of Armenia, according which **the consideration by the court** of the motions with regard to compulsorily taking samples **will be carried out immediately**, as in practice there may be cases where a person, for instance, under the influence of alcohol (narcotic drugs) will refuse to undergo an expert examination or will refuse to provide samples with the acknowledgement that given samples will be retained in his or her body for a certain period of time, or during the preliminary investigation he or she will not allow to take respective traces from the body with the expectation that he or she may later clean or wash them.

Institutions and persons involved in drafting

The drafts have been elaborated by the Investigative Committee of the Republic of Armenia.

4. Expected outcome

As a result of adoption of drafts, some legal regulations provided for by the Criminal Code and Criminal Procedure Code of the Republic of Armenia will be improved, which will provide an opportunity to solve the problems arising in practice

5. On the necessity for additional financial resources and expected changes in revenues and expenditures of the State Budget

Upon the adoption of the drafts no changes in revenues and expenditures of the State Budget of the Republic of Armenia are foreseen.

6. Other draft legal acts to be adopted with regard to adoption of the draft or on the absence of necessity for their adoption

Upon the adoption of drafts, there will be no necessity to make amendments to the sector-related secondary regulatory legal acts.