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(VENICE COMMISSION)

KYRGYZSTAN

OPINION

**ON DRAFT AMENDMENTS TO THE CRIMINAL PROCEDURE CODE
CONCERNING BAIL AND VIDEOCONFERENCING IN CRIMINAL
PROCEEDINGS**

**Adopted by the Venice Commission
at its 140th Plenary Session
(Venice, 11-12 October 2024)**

on the basis of comments by

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I. Introduction

1. By letter of 5 August 2024, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic, requested an opinion of the Venice Commission on Amendments to the Criminal Procedure Code concerning bail and videoconferencing in criminal proceedings (CDL-REF(2024)033, hereinafter the “draft law”).
2. Ms Deskoska, Mr Rørdam and Mr Patricio acted as rapporteurs for this opinion.
3. On 16-17 September, the rapporteurs, along with Mr Garrone, Mr Longurashvili and Ms Gullholmer from the Secretariat, had online meetings with representatives of the Ministry of Justice, the Supreme Court, the Office of the Ombudsman, the Bar Association as well as with representatives of the Delegation of the European Union to the Kyrgyz Republic and civil society organisations. The Commission is grateful to the Ministry of Justice for the support provided in organising the online meetings.
4. This opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.
5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings on 16-17 September 2024. Following an exchange of views with Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic, the Opinion was adopted by the Venice Commission at its 140 Plenary Session (Venice, 11-12 October 2024).

II. Background and scope of the opinion

A. National legislation and proposals for amendments

6. As it appears from the explanatory report and the online exchanges with the representatives of the Ministry of Justice, the draft law aims to improve the existing mechanisms and the institution of bail in the system of preventive measures to facilitate its more effective use and to enhance the transparency and efficiency of the judicial process by using digital means which could shorten the procedure time (e.g. by avoiding postponed hearings due to ill-adapted vehicles used in the transportations of detainees), raise public awareness of the judicial system through improved access to proceedings broadcast, prevent corruption in state services and lower the costs.

1. On bail

7. According to Article 112(1) of the Kyrgyz Criminal Procedure Code (CPC), bail is a sum of money deposited by the accused or another person into a special account of an authorised state body as a guarantee that the accused will not abscond from the investigation or the court, threaten witnesses or other participants in the criminal proceedings, destroy evidence, or otherwise obstruct the objective conduct of the investigation and the trial, or continue engaging in criminal activity (Article 105).

8. The current version of the CPC contains the provisions on bail (Articles 32, 104, 108 and 112). It is proposed to amend Article 112(2) as follows: the amount of the bail is determined by the investigating judge, the judge or the court. It has to consider the damage caused, the crime's severity, and the accused's personal and financial circumstances.

2. On the use of electronic means, in particular, videoconference and broadcasting

9. The proposed draft amendment to the CPC includes provisions for broadcasting court proceedings, enabling participation via videoconferencing and mandating the recording of audio

and video during proceedings. Moreover, an electronic signature system is introduced for the purposes of expediting immediate release from custody. The proposed innovations can be summarised as follows:

10. *Article 5: Definitions* – The draft law adds two new definitions in Article 5. It introduces definitions for “video conferencing” (remote participation in court proceedings using technical means that provide real-time transmission of audio and video images) and “broadcast (online broadcast)” (live transmission of court proceedings via television, radio, and (or) the Internet for an unlimited number of users).

11. *Article 46: Rights of the accused and participants* – The draft law adds new rights of the accused to Article 46, in connection with the broadcasting and recording of public hearings: the right to review court minutes, including audio and video recordings and to submit comments on it, and the right to request a live broadcast of court hearings on television, radio, or the Internet. Also, according to the draft law, a person convicted or acquitted has the right to get acquainted with the minutes of the court hearing (including audio and video recordings) and submit comments on it.

12. *Article 49: Legal Representation* – The draft law clarifies that a lawyer can also participate remotely in a case with the client’s consent, starting from the first interrogation or detention of the client.

13. *Article 280: Broadcast of court proceedings* – The draft law adds the possibility of broadcasting court sessions online or in media outlets.

14. *Article 290: Participation of accused in court* – Court proceedings concerning persons held in institutions of the penal system as well as in pre-trial detention centres of national security agencies should as a rule take place online. Court proceedings are carried out at the place of the hearing, (only) upon request of the accused (convicted), his/her lawyer or the public prosecutor (beforehand it was only on the request of the accused).

15. *Article 290¹: Broadcasting of court hearings* – The draft law introduces a new article which enables courts to authorise live broadcasts of hearings, considering justice, transparency, and safety concerns. The court, at the request of the persons participating in the case, or on its own initiative, has the right to allow the broadcast (online broadcast) of the court hearing live on television, radio and (or) on the Internet. The decision on the admissibility of broadcasting (online broadcast) of a court hearing is determined by the court, taking into account the interests of justice, transparency and the need to ensure the safety of participants in the proceedings.

16. *Article 294: Preparation for court hearings* – The draft law requires the court secretary to check the functionality of the audio and video recording equipment before a session, and to document any issues. If it is impossible to use audio and video recording devices, the court secretary draws up an act indicating the reasons and attaches it to the case materials.

17. *Article 301: Postponement of trials* – The draft law adds the 'malfunction of audio and video recording equipment' as a ground for postponing a trial. Additionally, it requires the court session secretary to ensure the proper functioning of the audio and video recording equipment.

18. *Article 308: Court session protocols* – The draft law stipulates that protocols can be prepared not only by computer, typewritten, or handwritten methods, but also electronically, by attaching audio and video recordings. If during the trial a photography, an audio or a video recording of interrogations were carried out, then this is noted in the minutes of the court session. In this case, photographic materials, audio and video recordings are attached to the case materials. When (online) broadcasting a court hearing live on television, radio and (or) on the Internet, a corresponding note is made in the minutes of the court hearing.

19. *Article 310: Recording of court proceedings* – The draft law makes the audio and video recording of all court hearings compulsory. An exception may be made only where the recording is technically impossible and this cannot be remedied, and only with the consent of the key participants in the trial (the accused, their lawyer, and the public prosecutor). If these conditions are met, the judge or the court may decide to proceed without recordings, but this decision must be justified in the interest of justice and the protection of procedural rights. A novelty in the new article is the legal consequence of missing recordings: the absence of audio and video recordings is now a ground for altering, reviewing, or cancelling a court decision, except in cases where the court has specifically decided to proceed without recordings under the outlined exceptional circumstances.

20. *Article 359: Release of acquitted persons* in case of remote hearing – The new article expands on the old article by providing more specific procedures for the release of the accused. In addition to the courtroom, the new article includes the possibility of releasing the accused from various detention facilities, such as penal institutions, pre-trial detention centres under national security authorities, and military guardhouses. This expansion covers all potential places where the accused might be held. Article 359 introduces the possibility of the court *digitally signing the verdict that orders the immediate release* of those accused or acquitted, when it has determined that they are not going to be subject to a measure related to detention.

B. International standards

1. On the use of bail as an alternative measure

21. Although Kyrgyzstan is not bound by European standards in the area of the right to liberty and security, certain elements of the European constitutional heritage that have universal relevance may be useful in interpreting and applying provisions of international law applicable to Kyrgyzstan. Therefore, the Venice Commission's recommendations will be based both on international and European standards and best practices.

22. Article 9(3) of the International Covenant on Civil and Political Rights,¹ to which Kyrgyzstan is a party, provides that “Anyone arrested or detained on a criminal charge shall be... entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement”. The procedural standards regarding the use of bail were further developed in the case law of the UN Human Rights Committee, which provided, *inter alia*, that Courts must examine whether alternatives to pretrial detention, such as bail, would render detention unnecessary in the particular case. Bail should be granted, except in situations where the likelihood exists that the accused would abscond or tamper with evidence, influence witnesses or flee from the jurisdiction of the State. Such grounds should not only be invoked but also be duly justified by the State.²

23. European standards in this field are more detailed. Article 5(3) of the European Convention on Human Rights (ECHR) contains a similar provision. The most important source of European Law in this respect is the jurisprudence of the European Court of Human Rights (ECtHR), which provides that when deciding whether a person should be released or detained, the authorities

¹ See [International Covenant on Civil and Political Rights](#).

² See [CCPR/C/94/D/1178/2003](#), *Smantserv v. Belarus*, 17 November 2008, paras 10.3 – 10.4.

are obliged to consider alternative measures to ensure his or her appearance at the trial.³ The Council of Europe encourages the use of alternative measures whenever possible.⁴

24. Finally, the Venice Commission also took into account Recommendation No. R (80) 11 of the Committee of Ministers to Member states concerning custody pending trial, which stipulates that a “person on whom any alternative measure is imposed shall, in so far that measure requires, have the benefit of the same safeguards as are accorded under the present recommendation to a person placed in custody pending trial.”⁵

25. The bail, as an alternative measure, may be only required as long as reasons justifying detention prevail.⁶ The alternative measures provided in Article 5(3) of the Convention are not designed to ensure the reparation of loss but rather the appearance of the accused at the hearing. Its amount must therefore be assessed principally “by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond”.⁷ “This concern to fix the amount of the guarantee to be provided by a detained person solely in relation to the amount of the loss imputed to him does not seem to be in conformity with Article 5-3 of the Convention. The guarantee provided for by that Article (Article 5-3) is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing.”⁸

26. Furthermore, the amount set for bail must be duly justified in the decision fixing bail⁹ and must take into account the *accused’s means*¹⁰ and *capacity to pay*.¹¹ In certain circumstances it may not be unreasonable to take into account also the amount of the loss imputed to him or her.¹² The authorities must take as much care in fixing the appropriate bail as in deciding whether or not the accused’s continued detention is indispensable.¹³

27. The accused has the right to a *procedure to challenge the amount of the bail*. The Court noted that arrested or detained persons are entitled to ask for review of the procedural and substantive conditions which are essential for the “lawfulness” of their deprivation of liberty. In the case of *Toshev v Bulgaria*, the Court noted that the applicant had no judicial procedure by which he could challenge the lawfulness of his detention after the decision to release him on bail. The applicant’s attempts to have the authorities review the amount of the bail because he had no ability to pay it proved futile. This implied that the applicant was denied the right to have the continued lawfulness of his detention reviewed by a court following the decision to release him on bail. Thus, there had been a violation of Article 5(4) of the Convention in that respect.¹⁴

³ ECHR, *Idalov v. Russia* [GC], No. 5826/03, 22 May 2012,(140).

⁴ Recommendation Rec (2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, Appendix to Recommendation Rec (1006)13, Preamble.

⁵ Recommendation No. R (80) 11 of the Committee of Ministers to Member states concerning custody pending trial (adopted on 27 June 1980 at the 321st meeting of the Ministers’ Deputies), point 15.

⁶ ECHR, *Muşuc v. Moldova*, No. 42440/06, 6 November 2007,(42; *Aleksandr Makarov v. Russia*, No. 15217/07, 12 March 2009,(76).

⁷ ECHR, *Mangouras v Spain* [GC], No. 12050/04, ECHR 2010,(78; *Neumeister v Austria*, 27 June 1968, Series A, No. 8,(14).

⁸ ECHR, *Neumeister v. Austria*, No. 1936/63, 27 June 1968,(14; ECHR, *Mangouras v. Spain* [GC], No. 12050/04, 28 September 2010,(75)

⁹ ECHR, *Georgieva v. Bulgaria*, No. 16085/02, 3 July 2008, §§ 15 and 30-31.

¹⁰ ECHR, *Hristova v Bulgaria*, No. 60859/00, 7 December 2006,(111).

¹¹ ECHR, *ECHR, Toshev v Bulgaria*, No. 56308/00, 10 August 2006, §§. 69-73.

¹² ECHR, *Mangouras v Spain* [GC], No. 12050/04, 28 September 2010, §§. 81 and 92.

¹³ ECHR, *Bojilov v Bulgaria*, No. 45114/98, 22.12.2004,(60, *Hristova v Bulgaria*, No. 60859/00, 7 December 2006,(110, *Georgieva v. Bulgaria*, No. 16085/02, 3 July 2008,(30).

¹⁴ ECHR, *Toshev v Bulgaria*, No. 56308/00, 10 August 2006, §§. 74-80.

2. On hearings held via videolink

28. The Venice Commission underlines that all guarantees to a fair trial under ICCPR and the ECHR apply to remote hearings in all judicial proceedings. The use of videoconferencing in judicial procedures must also meet the requirements for the protection of individuals with regard to automatic processing and protection of personal data.¹⁵ Recordings to which any person has had access in the course of a judicial proceeding may not be used, without judicial authorisation, for purposes other than jurisdictional ones.

29. The ECtHR, applying Article 6 ECHR on the right to a fair trial which includes guarantees similar to those of Article 14 ICCPR, has stated what follows concerning a defendant's participation in a hearing via videoconference:¹⁶

- a defendant's participation in proceedings by videoconference is not as such contrary to the Convention
- nevertheless, recourse to this measure in any given case must serve a legitimate aim; and
- the arrangement for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention.

30. Additionally, the Court has stressed the need to ensure the relevant procedural safeguards. In particular, the Court has held that the defendants must be able to follow the proceedings and to be heard without technical impediments and have effective and confidential communication with their lawyer.¹⁷

a. Decision to hold a remote hearing – legitimate aim

31. The need for a legitimate aim for a remote hearing is stressed in the documents of the CEPEJ¹⁸ and the ECtHR case-law, especially in the criminal field. It follows from the ECtHR case-law that the domestic authorities have to provide *sufficient reasons* if they decide that the defendant will participate in hearings via videoconference.¹⁹ The Court found that prevention of disorder, prevention of crime, as well as protection of the witnesses and victims of offences in respect of their rights to life, freedom and security, are '*legitimate aims*' for hearing via video link.²⁰ Also, the Court considered compliance with the "reasonable time" requirement in judicial proceedings to be a legitimate aim. According to the Court, the videoconferencing measure also aimed at reducing the delays incurred in transferring detainees and thus simplifying and accelerating criminal proceedings.²¹

b. Legal assistance

32. According to the ECtHR case law, the exercise of the right to *legal assistance* takes on particular significance where the applicant communicates with the courtroom via video link.²² The Court has held in several cases that the interests of justice demand that, in order to receive a fair hearing, the applicants who appeared before the court by videoconference should be

¹⁵ See in particular the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).

¹⁶ ECHR, *Marcello Viola v. Italy*, No. 45106/04, ECHR 2006-XI,(67).

¹⁷ ECHR, *Grigoryevskikh v Russia*, No. 22/03, 9 April 2009,(83).

¹⁸ "Guidelines on videoconferencing in judicial proceedings", adopted at the 36th plenary meeting of European Commission for the Efficiency of Justice (CEPEJ), June 2021, p. 11.

¹⁹ In *Medvedev v Russia*, No. 5217/06, 27 June 2017,(30, the Court noted that an applicant, who was imprisoned in Moscow, could not participate in person in an appeal hearing in Moscow and that the Government did not justify the decision to arrange for the applicant's participation via video link rather than ensuring his presence in the courtroom.

²⁰ ECHR, *Marcello Viola v. Italy*, No. 45106/04, ECHR 2006-XI,(72).

²¹ ECHR, *Marcello Viola v. Italy*, No. 45106/04, ECHR 2006-XI,(72).

²² ECHR, *Grigoryevskikh v Russia*, No. 22/03, 9 April 2009,(92).

represented by a lawyer.²³ In criminal proceedings, where a defendant is taking part via videoconferencing and his/her lawyer is not present with him/her in person, questions may arise whether they are able to obtain legal advice on a fully confidential basis during a hearing.²⁴ Recognising this challenge, the ECtHR stressed the necessity of ensuring adequate facilities and time for consultation with a lawyer when a defendant is participating in a hearing via video link,²⁵ without the risk of being overheard by a third party, as one of the basic requirements of a fair trial.²⁶

c. Publicity of the hearing

33. Hearings *via* video link may give rise to issues concerning the necessity to ensure the public nature of court proceedings. According to the ECtHR case law, a trial complies with the requirement of publicity only if the general public is able to obtain information about its date and place and if this place is easily accessible to them.²⁷

d. Other guarantees

34. When the proceedings are conducted remotely, an issue may also arise with respect to access to the file and disclosure of evidence.²⁸ Also, the way in which the defendant appears in a hearing held *via* video link may also be relevant from the perspective of the right to a fair trial. For instance, the Court has held that it would be difficult to reconcile the degrading treatment of a defendant in judicial proceedings with the notion of a fair hearing.²⁹

III. Analysis

A. Bail as an alternative measure

35. The CPC provides the same list of grounds for imposing all alternative measures to detention, enumerated in Article 104. This means that bail may be imposed not only to prevent absconding from the investigation or court, but also to prevent the accused from threatening witnesses or other participants in the court proceedings, destroying evidence, obstructing the objective conduct of the investigation and trial, or continuing to engage in criminal activity.

36. In practice, and as confirmed by the Kyrgyz stakeholders during the online meetings, bail is not applied. A question is whether such a wide list of grounds prevents its use in practice, for example by opening the door to misuse of bail for compensations of damages – which should not be its main purpose, as stated by the European Court of Human Rights.

37. Article 106 stipulates that when applying a preventive measure, the investigator, prosecutor, investigating judge, or court shall issue a reasoned decision or ruling specifying, among other things, the type of preventive measure applied and the grounds for its selection. The investigator's decision to apply a preventive measure must be announced to the accused in writing, and a copy shall be sent to the prosecutor. At the same time, the procedure for appealing the decision to impose a preventive measure, as provided for in Chapter 15 of the CPC, must be explained to the accused.

²³ ECHR, *Grigoryevskikh v Russia*, No. 22/03, 9 April 2009,(92; *Shulepov v Russia*, No. 15435/03, 26 June 2008, §§. 34-36; *Slashchev v Russia*, No. 24996/05, 31 January 2012, §§. 57-58.

²⁴ CCJE Opinion No. 26 (2023): *Moving forward: the use of assistive technology in the judiciary*,(65.

²⁵ ECHR, *Sakhnovskiy v Russia [GC]*, No. 21272/03, 2 November 2010.

²⁶ ECHR, *Sakhnovskiy v Russia [GC]*, No. 21272/03, 2 November 2010, §§. 97, 102 and 104; *Medvedev v Russia*, No. 5217/06, 27 June 2017,(30.

²⁷ “Key Theme – Article 6 (criminal) Hearing via video link”, Last updated on 29.02.2024, Council of Europe, p. 3.

²⁸ “Key Theme – Article 6 (criminal) Hearing via video link”, Last updated on 29.02.2024, Council of Europe, p. 4.

²⁹ ECHR, *Yaroslav Belousov v Russia*, No. 2653/13 and 60980/14, 4.10.2016,(147.

38. Thus, Article 106(2) details the procedure for appealing the decision to impose a preventive measure. It is not explicitly stated whether an appeal can be raised against the amount of the bail. According to the information provided by the Kyrgyz stakeholders, this is not provided for by the legislation. Since up to now release on bail does not take place in practice, it is however not surprising that the question has not been settled. Due to the importance of (limiting) the amount of the bail to ensure the effectivity of this instrument, the Venice Commission recommends providing explicitly the possibility to appeal on this issue.

39. Article 112 is not precise on the cases when bail should be applied instead of detention. This may have contributed to the present ineffectiveness of this institution. The Venice Commission therefore recommends that the criteria for allowing release on bail be made more precise in the law.

40. The proposed amendments to the CPC, which involve basing bail on the accused's financial conditions, the severity of the crime, and the damage caused, introduce criteria for setting the amount of the bail. These criteria are welcome since they are the expression of the *principle of proportionality*, which should always be considered to ensure that the bail is proportionate to the defendant's means. Respect for the principle of proportionality – under its various aspects, that is adequacy, necessity, and proportionality in the narrow sense - is crucial when fixing the amount of the bail.

41. Concerning the criteria to determine the appropriate bail amount, the property status of the accused was added to the preexisting criteria, consisting of the damage caused and the severity of the crime. The identity of the accused was replaced by their personality.

42. As already said, the European Court of Human Rights has already ruled on the criteria to determine the appropriate bail amount by considering the bail's aim as the appearance of the accused at the hearing, not the reparation of damage.

43. The substitution of the term “identity” of the accused, with “personality” and the addition of the “property status” is welcome, since it is in line with the Court's case-law on this matter, particularly the obligation of taking into consideration the assets of the accused. Even though the former provision could be interpreted in such a way as to include the assessment of the accused's property status, it did not provide a clear enough indication of its mandatory nature. For example, in *Gafà v. Malta*³⁰ the Court found that there was a violation of Article 5(3) of the Convention, stating that:

“[...] none of those decisions explained how the amount of bail had been set by reference to the applicant's assets and his means. Nor did any of those decisions assess the applicant's capacity to pay the sum required.”

44. Notwithstanding, the legislator should consider taking a step further in line with the above-mentioned case-law, by explicitly stating the obligation to determine the amount of the bail on the basis on the property status of the accused while emphasising the greater relative importance of this criterion in comparison with the other legally relevant criteria. The Venice Commission therefore recommends revising the draft in this sense.

B. Videoconferencing of judicial proceedings, broadcasting, audio and video recordings and digitalisation of trials

1. Definitions (Article 5)

45. The definitions proposed in Article 5(73-74) of the CPC, including “broadcast” and “videoconferencing” as basic concepts contained in the Code are appropriate, but the

³⁰ ECHR, *Gafà v. Malta*, 5No. 4335/14, 22 May 2018,(75).

interpretation of their exact meaning may raise some uncertainty. The definition of videoconferencing could be reconsidered, at least to eliminate the term “video conferencing” from its own definition. For example, the European Commission for the Efficiency of Justice’s guidelines on this subject, which define videoconferencing as: “[...] a system that allows two-way and simultaneous communication of image and sound enabling visual, audio and verbal interaction during the remote hearing”.³¹

2. Access to the case file (Article 46)

46. The accused’s access to the case file is an important dimension of the right to a fair trial, pursuant to Article 14(1) ICCPR and Article 6(1) ECHR. In this context, the amendments to Article 46(13¹) are commendable, since they clarify that there should be no distinction between written documents and video or audio recordings regarding the rights of the accused to review and submit comments on the case file. For the same reason, Article 46(7)(1) concerning access to the minutes of the court hearing is also commendable, with one precision: it is a right granted to a person that has been convicted or acquitted, and therefore should be applicable in the appeals phase of the criminal procedure. Also, the addition of Article 46(18) – the right to apply for a trial by using a *broadcast* – is an adequate measure to strengthen the accused’s right to a fair trial under Article 14(1) ICCPR, since it provides the possibility to request a higher level of exposure of the trial to public scrutiny – an important way of protecting litigants when subject to the administration of justice (see below on Articles 280, 290¹).

3. Legal assistance during remote hearings - Right to legal representation and confidential communication (Article 49)

47. One of the key concerns with videoconferencing is the right to confidential legal consultation. The draft law allows *the lawyer to participate remotely* with the client’s consent (Article 49(2)), which may be practical but must be coupled with guarantees for confidential communication. In its case-law, the ECtHR stressed that confidential legal consultation must be ensured, particularly when the defendant participates remotely. The Venice Commission recommends that the draft law specify technical and procedural safeguards to ensure that the accused can communicate confidentially with their lawyer, in particular through proper equipment.

48. If confidentiality is ensured, Article 49(2) is an important and commendable change that would have a positive effect on the right to a fair trial, specifically in relation to the right to have a public hearing within a reasonable time. Scheduling court hearings, if lawyers exercise this right, should become a more efficient process, contributing to faster sentencing. This should however not go against the rights of defence.

4. Decision to hold a remote hearing – Legitimate aim (Article 290)

49. Article 290 provides for remote hearing as a rule if the accused (convicted) is detained. He/she can participate in the hearing in the court room, upon request of one of the parties to the procedure (the accused/their lawyer or the public prosecutor).

50. Neither the CPC, nor the draft law regulate the reasons, or legitimate aim, for remote hearing. According to international standards, videoconferencing can be used if it serves a legitimate aim, such as preventing crime or ensuring the security of witnesses.³² Also, the courts have to provide for sufficient reasons if they decide that public hearings should be held via videoconference. Such

³¹ EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) Guidelines on videoconferencing in judicial proceedings, p. 8.

³² Article 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 182). See also European Committee on Crime Problems (CDPC), Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), Draft Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Article 2 (Modifications to Article 9 of the Second Additional Protocol).

provisions are missing in the CPC, so the Commission recommends the authorities of Kyrgyz Republic to define the legitimate aims of remote hearings.

51. The remote participation of the accused or convicted should be a right and not an obligation, according to the best interests of the defence. The proposal for Article 290(2) enables the accused's lawyer and the public prosecutor, and not only the accused, to request that the accused or the convicted person be present during the court hearing. While giving the competence to the lawyer is favourable to the defence, the public prosecutor should not have the right to impose the presence in the court room since, in some circumstances, the accused or convicted and their representatives may conclude that presence could be detrimental to the defence. The Venice Commission recommends that the public prosecutor should not be able to impose the presence in court.

52. The case law of the ECtHR stressed that remote proceedings should not undermine the dignity of the accused. The Venice Commission recommends mentioning this concern explicitly to ensure alignment with fair trial principles.

53. Moreover, in accordance with the CEPEJ's recommendations, the Venice Commission recommends explicitly guaranteeing the right to effective participation during remote hearings, (the opportunity to test the audio and video quality prior, or at the start of the hearing allowing each participant to familiarise themselves with the features of the videoconferencing platform).

54. On the other side, the court can decide to interrogate the victim, witness, expert, specialist via video conferencing at the request of a person participating in the case, or on its own initiative. So, the accused can demand their participation live in the court room but cannot influence the decision on remote interrogation of a victim, witness, expert, or specialist. This could be reconsidered.

5. Public nature of hearings – Broadcasting of hearings (Articles 280, 290¹)

55. The draft law puts the emphasis on transparency by introducing provisions for video conferencing and the broadcasting of court hearings (whether held in the courtroom or remotely) live on television, radio, and/or the Internet (Article 290¹). Courts would be authorised to allow live broadcasting of proceedings via television, radio, or the Internet, at the request of involved parties or on the court's initiative. This move is intended to increase public access to judicial processes, although the court retains discretion to limit broadcasting to protect the interests of justice and the safety of participants. These provisions on broadcasting hearings online are positive in terms of ensuring the public nature of proceedings, a core requirement of Article 14(1) ICCPR. The European Court of Human Rights has emphasised that hearings must be accessible to the public. The broadcast of hearings offers benefits related to the submission of the administration of justice to public scrutiny. Allowing live broadcasts, as outlined in the draft law, enhances transparency while leaving it to the court to balance transparency, safety, and the interests of justice.

56. Article 280(3)(5) is a necessary addition, since it stipulates the moment when a decision is to be made about the broadcasting of the trial. The scheduling of the trial is an adequate moment to decide on this matter as it brings certainty to the proceedings. Moreover, the matter is analogous to other issues that must be decided at this point of the proceedings under Article 280(3).

57. According to the CPC, judges shall be physically present in the courtroom during remote hearings, which suggests that the rules governing the publicity of other hearings apply to remote hearings as well. The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes

to the achievement of a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.³³

58. However, the legislator should place limits on the judicial power when making this decision. The court should balance transparency, safety, and the interests of justice.

59. In particular, the Venice Commission recommends making a direct reference to the protection of the *presumption of innocence* that results from Article 6(2) of the Convention, since this may be one of the most frequent bases upon which the broadcasting of court proceedings should be refused.

60. For instance, in *Rupa v. Romania*,³⁴ the Court decided that the presumption of innocence of the accused was in jeopardy, in part due to an adverse press campaign, stating that:³⁵

“[...] la Cour ne saurait ignorer certains incidents survenus alors que le procès du requérant n’avait pas encore pris fin et qui étaient susceptibles d’influencer la perception du public quant à la personne du requérant: la diffusion à la télévision des images de l’intéressé et les propos du préfet, agent de l’État, au sujet de sa culpabilité [...]”.

61. Moreover, broadcasting may intimidate witnesses, which could affect their testimony to the detriment of the accused, the public interest or both. If the broadcasting includes the display of sensitive documents, it must also be considered how to ensure that the disclosure does not lead to misuse. Thus, the court faces difficult considerations, which should be more thoroughly reflected in the law. In other words, broadcasting is not an unconditional good, and in each case where there are counterarguments, it must be carefully considered whether the interest in public access can be met by allowing the public to physically attend the court hearings. The Venice Commission recommends addressing these concerns.

6. Recording of court proceedings, technical functionality (Articles 294, 301, 310)

62. Article 310(1) makes it mandatory to *record the court’s hearings audio and video*. If there are technical obstacles impossible to eliminate, the judge or court may decide to hold the session without audio and video recording, provided that the accused or convicted, his/her lawyer and the public prosecutor consent. In the absence of consent, the court hearing should not proceed. If it does, the absence of recording serves as a ground for changing, revising, or cancelling the court’s decision. Article 301(1) states that the malfunction of the audio and video recording equipment is a valid ground for postponing the trial of the case, while making it the secretary’s obligation to ensure that the equipment is functioning properly. Accordingly, Article 294(2) includes a valuable addition regarding the obligations of the secretary, which would now include checking the technical serviceability of the audio and video recording equipment before the start of the court session. This obligation is essential to fulfil the legislator’s goal of always having court hearings recorded, as it would limit the number of times that the court would have to postpone the trial until the equipment works properly, or not to record the audio and video altogether with the necessary consent of the relevant parties in case of an “*impossible to eliminate technical fault*”.

63. The draft law’s requirement for courts to ensure the proper functioning of audio and video equipment aligns with the CEPEJ recommendations, which stress the importance of high technical standards during remote hearings. The CEPEJ emphasises that courts should continuously monitor technical quality and suspend proceedings in case of technical failures. The Venice Commission endorses this recommendation.

³³ “Guide on Article 6 of the European Convention on Human Rights, European Court of Human Rights”, Council of Europe, updated on 29 February 2024, p. 59.

³⁴ ECHR, *Rupa v. Romania* (no. 1), No. 58478/00, 16 December 2008,(232).

³⁵ There is no official English translation of this judgement.

64. Some aspects of this new framework may, nonetheless, require some clarifications. Primarily, to prevent undue delays, it may be necessary to clarify what constitutes an “*impossible to eliminate technical fault*” for the purposes of Article 310(1), and a simple “*malfunction*” under Article 301(1), since the results determined by the law differ significantly. Also, it is worth considering whether the secretary’s obligation to check the technical serviceability of the video and audio recording equipment should be extended to the software systems used for videoconferencing and broadcasting which are not necessarily one and the same. For instance, if the lawyer exercises his or her right under Article 49(2) to participate in the court hearing remotely, the Venice Commission recommends that the secretary be required to check if the software system that is meant to connect the lawyer with the court is working appropriately.

65. As a whole, this amendment is a welcome attempt to provide an adequate balance between the benefits of audio and video recordings and the right to a fair trial, in particular the right to a decision within a reasonable time, under Article 6(1) of the Convention. Its implementation will however need to be monitored to ensure the proper functioning of the system.

7. Release of acquitted persons (Article 359)

66. Article 359 introduces the possibility of the court digitally signing the verdict that orders the immediate release of the accused or acquitted. This is a beneficial measure for the purposes of expediting court proceedings and achieving the “digital by default” principle recommended by the European Commission for the Efficiency of Justice guidelines³⁶, which refers to “[...] *providing public services by digital means as the preferred option for people to use them* [...]”.³⁷

IV. Conclusion

67. By letter of 5 August 2024, Mr Ayaz Baetov, Minister of Justice of the Kyrgyz Republic, requested an opinion of the Venice Commission on Amendments to the Criminal Procedure Code concerning bail and videoconferencing in criminal proceedings.

68. The draft law aims toward enhancing transparency, fairness, and modernising the Kyrgyz judicial system, with welcome provisions focusing on:

- *Regulating criteria for determining bail amounts*: Pretrial detention should be a last resort, with bail as the preferred option unless there are compelling reasons to deny it. Decisions regarding bail must be fair, proportionate, and non-discriminatory, ensuring the accused's right to liberty while balancing the needs of justice and public safety.
- *Incorporation of technology and emphasis on accurate record-keeping*: These measures ensure the proper documentation and reliability of court proceedings, thus supporting the integrity of the judicial process.
- *Enhancing transparency through the broadcasting of court hearings*: Broadcasting court hearings contributes to the transparency and public oversight of the judiciary, fostering trust in the legal system.

69. Further amendments to certain provisions could enhance the consistency of the draft law with international human rights obligations. The Venice Commission makes the following main recommendations:

- A. *Making the criteria for allowing release on bail more precise.*
- B. *Explicitly stating the obligation to determine the amount of the bail on the basis on the property status of the accused.*

³⁶ EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) Guidelines on electronic court filing (e-filing) and digitalisation of courts, p. 9.

³⁷ *Idem*, p. 5.

- C. *Ensuring clear procedures for defendants to contest the amount of bail*, thus reinforcing fairness and proportionality in pretrial detention decisions.
- D. *Ensuring technical and procedural standards for videoconferencing*, thus safeguarding the right to a fair trial by establishing robust standards that prevent any technical or procedural barriers to effective participation in remote hearings; making a direct reference to the principle of presumption of innocence.
- E. *Regulating the legitimate aims of remote hearings*: Defining guidelines for when remote hearings are appropriate.
- F. *Providing explicit guarantees for confidential communication*: Ensuring that defendants in remote proceedings have secure and private means of communicating with their legal representatives, preserving their right to effective defence.
- G. *Ensure that the disclosure does not lead to misuse* when broadcasting court hearings.

70. These and other recommendations are included throughout the text of this Opinion.

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