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*Expert opinion on the draft law of the Republic of Kazakhstan "Introducing changes and amendments into some legislative acts of the Republic of Kazakhstan regarding the issues of criminal investigation measures" **

The Main Points of the Draft

The said legislative act is intended to introduce changes and amendments into a number of norms of the current RK CPC and the RK Law "Criminal investigation measures" of 15 January 1994 (hereinafter RK Law on CIM). Many of these changes and amendments, albeit undoubtedly important, are solely to do with drafting: we shall not dwell upon those in this expert opinion. At the same time the proposed draft is not limited to drafting corrections of the criminal procedure and criminal investigation legislation of the RK and **touches upon some fundamental human rights.**

In our opinion, the most significant aspect of the draft is the desire of the drafters to expand the possibilities for engaging a number of criminal procedure and criminal investigation activities (measures), which restrict such fundamental human rights as the right to privacy, confidentiality of telephoning and other communications and so on. If the draft is adopted as a law, implementation of certain criminal procedure actions and criminal investigation measures will be permitted not only in cases of especially grave and grave crimes but in cases of **crimes of medium gravity** as well. The innovation will involve a procedural action in the form of tapping, bugging and recording provided for by Article 237 of the RK CPC as well as **all** so-called "special criminal investigation measures". Upon revising the list of the latter provided for by Article 11 of the RK Law on CIM (the list is to be amended by the same law) such measures will include: 1) monitoring postal and telegraph dispatches; 2) operational search on communication network; 3) secret tapping, bugging and recording of communications (telephone and other devices); 4) eavesdropping on communication channels, computer systems and other devices; 5) operational penetration, that is penetration into dwelling places and other premises.

The subject of our expert analysis is the obtaining of the right by law-enforcement bodies to carry out the above-listed procedural actions and criminal investigation measures restricting fundamental human rights, not only in cases of especially grave and grave crimes but *also in cases of crimes of medium gravity*, which, if the law is adopted, will be conferred upon the law-enforcement bodies.

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Actual Consequences of Adoption of the Law

Such consequences, including those from the point of view of human rights, cannot be identified solely by way of isolated interpretation of the draft law provisions we are concerned with. To understand their real meaning we need to apply system analysis, including the one by way of comparing the proposed innovations with those provisions of Kazakh legislation which are currently in force, and which, judging by the draft law, are not going to be changed.

In this connection let us look at a number of extremely important provisions of the existing Kazakh legislation. In conformity with Article 10 of the RK CC, crimes of medium gravity are premeditated crimes, the punishment for which does not exceed 5 years of deprivation of liberty, and which do not fall under the category of crimes of little gravity, as well as all crimes committed through negligence, the punishment for which exceeds 5 years of deprivation of liberty. Pursuant to paragraph 4 of Article 12 of the RK Law on CIM, the carrying out of "special criminal investigation measures", in other words, measures, restricting fundamental human rights, will be permitted not only for resolving crimes of medium gravity but also for their *detection, prevention and suppression*. In conformity with part 1 of Article 237 of the RK CPC, tapping, bugging and recording of communications of not only the suspect and the accused but of any "other persons who can have information about the crime" will be permitted whilst investigating cases of crimes of medium gravity.[†]

What will it lead to if the above-mentioned norms are considered in their totality? To illustrate the real consequences of the draft law adoption let us consider, for example, separate crimes of medium gravity, the social danger of which is unquestionable per se. The crime of medium gravity could be, for example, illegal enterprise attended by profit making on an especially large scale, that is a profit exceeding 2 thousand monthly calculation indices (part 2 of Article 190 of the RK CC). Understandably, when signs of such a crime have been detected, it is necessary to bring a case before the court, to investigate it and to pursue adequate punishment in court. It also stands to reason that the guilt of the accused must be proven. However, upon adoption of the draft law, the investigative bodies will have the right to tap and bug conversations not only of the suspect and the accused but also of any other persons, with whom he/she has ever contacted in his/her life, including the most insignificant contact, or with whom he/she has not had any contact but could have had, since such people "may have information about the crime" (part 1 of Article 237 of the RK CPC as currently drafted). The most important thing is that the circle of such persons is *unspecified* and can include *any law-abiding* citizen, since people engaged in illegal business activities do not belong to any special criminal environment. Socially they are integrated into the ordinary social environment, which by and large consists of citizens who have never in their lives violated the criminal law, and whose fundamental rights, nevertheless, will then become lawfully exposed to very significant restrictions. Moreover, the RK Law on CIM will permit the carrying out of special criminal investigation measures including tapping and bugging of conversations, operational penetration into dwelling houses, etc., not only in the solving of the detected crimes but also for *detecting, preventing and suppressing* that same illegal enterprise. It turns out that in order *to detect* all occurrences of illegal enterprise, any number of persons, with regard to whom there is not the slightest shred of information about their committing any crime, can be subjected to special criminal investigation measures on a perfectly legitimate basis. *In other words, anyone can*

[†] We should note in passing that such a situation will almost fully disavow the rule in part 2 of Article 237 of RK CPC according to which tapping of conversations by witnesses and victims is permitted only "with their knowledge" where there are threats, extortion and so on. But the witness and the victim are, undoubtedly, among the "persons who can have information about the crime", therefore tapping of their conversations can be easily carried out under the rules of part 1 of Article 237 that is without "any knowledge" on their part. It may be, of course, assumed that the norm about the "knowledge" makes sense for cases in crimes of little gravity, in which tapping under part 1 of Article 237 is currently ruled out, but such understanding proves to be a sham because cases in crimes of little gravity do not include threats, extortion and other features of dangerous crime.

become exposed to such measures. The question "on what grounds are my conversations being tapped or was my flat entered in my absence?" will lose any sense because it can always be answered with the following: "We do not have any problems with you personally but we have the right *to detect* those who are engaged in illegal enterprise, and we had to be sure that you are not among those people. Therefore our actions are fully legitimate."

Let us consider, for example, another crime of medium gravity – violation of road traffic regulations and rules applying to the operation of motor vehicles by persons in charge of those vehicles when such acts result in death by negligence of two and more persons (part 3 of Article 296 of the RK CC). Undoubtedly, the persons whose actions resulted in such grave consequences deserve extremely harsh punishment. The problem here is different: to detect or solve such crimes as quickly as possible the law will permit installing tapping devices in any car or tapping telephone conversations of any driver or motor vehicle owner because any motorist hypothetically can commit by negligence the offence provided for by part 3 of Article 296 of the RK CC. The possibility of detecting crimes committed through *negligence* by way of carrying out criminal investigation measures generally removes all barriers in the way of their application because no one, not even the most decent person is negligence-proof.

Speaking about the probability of occurrence of the above-described consequences, we, by no means, insist on the fact that Kazakh law enforcement bodies will inevitably start abusing additional powers, which the new law will confer on them. On the contrary, nobody doubts their good intentions and professionalism. However, the legal system and legal regulation cannot be geared to the personal qualities of the majority of the law enforcement officers. Providing for harsh criminal responsibility for, for example, a murder, that is, a crime which under no circumstances will be committed by the overwhelming majority of people, legislators of all countries proceed from the existence of a narrow group of persons whose behaviour deviates from the generally accepted system of ethical norms. In restricting the powers of the law enforcement bodies we should also not focus on the rule but on hypothetical exceptions from it.

On the whole, the major problem of the analysed draft law is, in our opinion, that its adoption creates the possibility to lawfully restrict fundamental rights of absolutely any citizen, including such citizens who have never in their lives violated the criminal law and are not going to do so. And it is this approach that invokes the biggest objection because it is not characteristic of the rule-of-law state but typical of a police state where total monitoring by special forces is carried out not only of persons regarding whom there is information of their committing crimes, extremely dangerous for the community, but of all other citizens without exception. In this situation it is deemed necessary to turn to the international law approaches because they were developed to address problems such as those, which have been encountered by the Kazakh legislator. We are talking about the search for a reasonable balance between the necessity to effectively combat crime and to exercise respect for individual rights and freedoms. It is the search for such a balance that is one of the key features that differentiates the rule-of-law state from the police state.

International Law Approach

From the international law viewpoint the right to privacy is considered to be one of the fundamental human rights, which, in particular, was reflected in Article 17 of the International Covenant on Civil and Political Rights (hereinafter ICCPR), in conformity with which no one shall be subjected « to arbitrary or unlawful interference with his privacy, family, home or correspondence… ». When interpreting this principle, the decisions and conclusions of the UN *Human Rights Committee* have a special significance. The UN Human Rights Committee has, in particular, the authority to assess the national legal norms of various countries as to their compatibility with the principles laid down in the ICCPR.

The Human Rights Committee, including recent years, repeatedly made clear its position regarding the criteria the police (criminal investigation) measures and/or criminal procedure measures,

stipulated by various states and involving encroachment upon citizens' privacy, should correspond to regarding the states' commitment to comply with the principle laid down by Article 17 of the ICCPR. For example, in its consideration of the report by Portugal submitted under Article 40 of the ICCPR, the Human Rights Committee pointed out that the exceptional provisions aimed at collecting information stipulated in the Portugeese legislation, the existence of which was justified by the necessity to combat terrorism, could only relate to *exceptional* situations. This should fully rule out the slightest risk of abusing the corresponding powers on the part of law enforcement agencies, which means that clear-cut legislative guarantees should be put in place to ensure that such measures will not be applied beyond the scope of the fight against terrorism. Failing that Portugal will violate Article 17 of the ICCPR (paragraph 15 of the Consideration of the Report by Portugal, 78th session of the UN Human Rights Committee, 17 September 2003). Somewhat later the Human Rights Committee asked Albania to provide an explicit answer to the question : "What mechanisms of judicial supervision are envisaged by the Albanian legislation in implementing criminal investigation measures restricting confidentiality of communications, telephone and other conversations?" (paragraph 20 of the list of questions posed to Albania in consideration of its report, 81st session of the UN Human Rights Committee, 13 August 2004). The Human Rights Committee's requirements for complying with Article 17 of the ICCPR were formulated, perhaps, in the most explicit way in the Committee's consideration of Hong Kong's report, where the Committee expressed its concern about the fact that, although the right to intercept any communications (including oral ones) and carry out covert surveillance is based on Hong Kong law, there is no clear legislative framework restricting the relevant capacity of law enforcement agencies. Moreover, the Human Rights Committee pointed out to Hong Kong that it was necessary to enact legislation providing for a mechanism of protection and redress to individuals claiming interference with their privacy (paragraph 12 of the Consideration of the Report by the Hong Kong Special Administrative Region, 86th session of the UN Human Rights Committee, 13-31 March 2006).

On the whole, summing up the position of the UN Human Rights Committee[‡] regarding the requirements the states should fulfil in order to comply with Article 17 of the ICCPR, it is possible to identify the following standards formulated by the Committee for applying special police (criminal investigation) measures and/or criminal procedure measures related to restricting privacy:

1) such measures can only be of an *exceptional character*, which means that they can be used against the most dangerous encroachments upon public interests, which are clearly set out in law. Even theoretically it should be impossible to apply them in other situations, including cases of committing or a threat of committing crimes beyond the outlined scope;
2) such measures should be restricted by boundaries for their application which must be clearly defined by law, with restrictions referring not only to certain crimes but to certain categories of individuals who can be subjected to such restrictions;
3) such measures should be accompanied by judicial supervision and an efficient mechanism of protection of individuals subjected to those measures, including the mechanism of redress.

At the level of international law privacy is protected not only by the ICCPR but by other international law instruments among which a special place is given to the European Convention for Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter ECPHRFF). Regardless of its regional character it is believed that Article 8 of this Convention[§], as well as the practice of the European Court of Human Rights in Strasbourg cannot fail to be of interest for the Kazakh legislator because, undoubtedly, Kazakh law has been evolving in the mainstream of continental European traditions.

The European Court of Human Rights in Strasbourg (ECHR) in its decisions repeatedly addressed the issues related to the interpretation of Article 8 of the ECPHRFF. Perhaps, its most well-known

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[‡] The list of examples of interpreting Article 17 of the ICCPR by the UN Human Rights Committee, cited here, is by no means exhaustive.

[§] Despite certain drafting discrepancies Article 8 of the ECPHRFF is not much different in meaning from Article 17 of the ICCPR, and, therefore, we will not reproduce its language here.

decision on the issue of legality of tapping and bugging of individuals' conversations by law enforcement bodies for the purposes of combating crime is the decision in the case of Kruslin and Huvig versus France, made on 24 April 1990. Since that time the ECHR has repeatedly addressed the same issue under different conditions, including the increasing fight against terrorism in recent years. However, its principled stance formulated on the above-mentioned case has not changed. It is worthy of note that at the moment of considering the case of Kruslin and Huvig the French legislation allowed for the possibility of "tapping" only in formally instituted criminal cases involving preliminary investigation and solely upon the decision by a representative of the judiciary – the investigating judge (in other words, it was not a police measure but one of judicial procedure). However, even under these circumstances the ECHR "condemned" France, having acknowledged that it was violating Article 8 of the ECPHRFF. According to the ECHR, the French criminal procedure legislation did not indicate "with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities" and did not envisage "adequate safeguards against various possible abuses. For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined… " (ECHR Judgement of 24 April 1990 in the case of Kruslin and Huvig). It is impossible to fail to notice the most important consequence of this judgement : the thesis that potential restriction of the right to privacy *can not have general charachter* has become an axiom. In other words, the law enforcement bodies should not have the power to tap an unspecified set of people – according to the general rule, only individuals, suspected or accused of committing a crime, can be subjected to tapping.[**]

On the whole, undoubtedly, the stance of the European Court on Human Rights in Strasbourg does not differ in the issue of our concern from that of the UN Human Rights Committee. In this situation it is possible to conclude that there have been developed true international law standards regarding the restriction on the fundamental right to privacy. These standards have been reflected in legislation of many countries, which is linked to the comparative law approach to the problem.

Comparative Law Approach

It must be acknowledged that not all countries have brought their legislation in compliance with the above-mentioned international law standards in the area of our concern, although the road forward almost everywhere is pointing in their direction. Three countries have been selected as examples for comparative law analysis – the Russian Federation, France and Switzerland. The choice is explained by the fact that these are countries with a continental law tradition, whose law approaches and problems, especially Russia's, are fairly close to Kazakh law approaches and problems.

A) Russian Federation

At first sight, the Kazakh reform is consistent with the recent changes in Russian legislation. We are referring to the RF Law of 24 July 2007 "Introducing changes into certain legislative acts of RF in connection with improving state management in the area of counteracting extremism". In conformity with this law the carrying out of investigation activities envisaged by Article 186 of the RF CPC ("Monitoring and recording of conversations") and the implementation of relevant criminal investigation measures, restricting the constitutional right to privacy, confidentiality of correspondence, etc. ("tapping", "bugging", "eavesdropping", etc.) envisaged by RF Law "Criminal investigation activities", are now permitted not only in cases of grave and especially grave crimes but also in crimes of medium gravity. At the same time considering Russian reform as a comparative law example would be obviously premature for the Kazakh legislator.

First of all, application of the above-mentioned investigating activities and criminal investigation measures in all crimes of medium gravity, the overwhelming majority of which have nothing to do

[**] См.: Renucci J.-F. *Droit européen des droits de l'homme*. Paris. L.G.D.J. 1999. P. 114.

with "extremism" and "counteracting" it, appears to be a very questionable legislative decision criticized by many representatives of Russian doctrine precisely for its departure from international law standards. What have all "negligent crimes" punishable by more than 2 years of deprivation of privacy (Article 15 of RF CC) to do with extremism? In this respect the decision of the Russian legislator to extend the terms of reference of relevant statutory provisions to all crimes of medium gravity is hardly worth following.

Secondly, as questionable as it may be, Russian innovation has far less dangerous repercussions than the proposed Kazakh reform. It should be borne in mind that the implementation of both, the investigative activities under Article 186 of the RF CPC and the said criminal investigation measures may take place *solely on the basis of a court decision,* which means that in this respect Russia is still complying with the international law standards related to judicial control (Kazakhstan does not have them so far).[††] Furthermore, it is very important that in Russia, in conformity with Article 8 of the RF Law on CIM, tapping and bugging can only be carried out "with regard to persons suspected or accused of committing crimes", including from now on crimes of medium gravity too, and with regard to "persons who may have information about the said crimes". In other words, Russian legislation *does not permit* tapping, bugging or carrying out any other criminal investigation measures called "special" in Kazakhstan in order *to detect or prevent* crimes of medium gravity. In such a situation tapping and bugging are only allowed in Russia where there is suspicion or accusation of committing a crime, the information of which has to be submitted to court. This rules out "preventive" police monitoring and complies with international law standards.

B) France

First and foremost, it is important to note one key detail: France, like the majority of other western countries, does not have such a notion as "criminal investigation activities". Any police activity targeting crime is regulated solely by criminal procedure legislation.

Another principle distinction lies in the fact that until recently the so-called "tapping and interception of communications" was allowed only in the course of preliminary investigation, which, as is known, is carried out in France by an investigating judge – a plenipotentiary representative of the judiciary, possessing the fully fledged status of a judge. In such a situation one should not be deluded by the fact that the Law of 10 July 1991, which was adopted after France "had been condemned " by the European Court on Human Rights in Strasbourg, as mentioned above, and which supplemented the French CPC with a special chapter "Interception of communications transmitted by telecommunication", made it possible to apply this measure to all crimes punishable by two or more years of deprivation of liberty. Technically this corresponds to Russian or Kazakh crimes of medium gravity, grave and especially grave ones. In reality an investigating judge deals with not more than 1% of criminal cases in the most dangerous crimes (the rest are investigated by the police). We are referring to cases, which were officially brought before the court and in which legal proceedings began on the demand of the prosecutor. This category of cases and procedural guarantees on them in no way can be compared with those cases, in which the Kazakh legislator is going to permit tapping within the framework of strictly "police" criminal-investigation measures and "police" (that is, not judicial) investigation.

As for the police, they, according to the general rule, do not have any right to apply tapping whilst investigating crimes in France. Recently just one exception was made from this rule and introduced by the Law of 9 March 2004. It only concerns the so-called "cases involving organized crime", that is, cases of especially dangerous crimes, the *exhaustive* list of which is given in Articles 706-73 of the French CPC (premeditated murder committed by an organized gang; drug

[††] As for the rest, Article 186 of the RF CPC as is currently drafted, has only one significant distinction from the proposed drafting of Article 237 of the RK CPC: in Russia "bugging" is not permitted (only "tapping"). However, this problem goes beyond the scope of this Expert opinion. As for the opportunity to tap "other persons", all critical considerations expressed with regard to the Kazakh reform, can be also addressed to the Russian legislator.

dealing; terrorism, etc.). This list, of course, even remotely cannot be compared with all crimes of medium gravity, grave and especially grave ones including not only premeditated crimes but negligent ones as well, in which "tapping" and other similar measures will be permitted in Kazakhstan. One more detail stands out: when a legislator is trying to create the means to fight crimes most dangerous to society, in practice, not just by using words, he, like in France, thinks not in "categories" of crime but in concrete crimes which pose a special danger to the public from the point of view of criminal policy. Such an approach is conventional for Western law but for some reason is ignored both in Russia and Kazakhstan.

C) Switzerland

The Swiss approach to the problem with which we concern ourselves, is of particular interest in connection with the adoption of a new Swiss CPC on 5 October 2007 – the first nation-wide criminal procedure codification designed to replace fragmented cantonal criminal procedure legislation. Despite the fact that the Swiss CPC has not yet come into force, it is recognized, perhaps, as the most perfect criminal procedure code of today from the point of view of legal drafting. It should be noted that in Switzerland, as well as in France, the so-called "criminal investigation legislation" does not exist, which means that **all** relevant measures are regulated at the level of criminal procedure legislation.

The new CPC of Switzerland permits both tapping (interception) and bugging. As for **tapping**, it is only possible with the *simultaneous* presence of three conditions: a) it should refer to one of the most dangerous crimes, the exhaustive list of which is given in Article 269 of the CPC (notably, the regulated level is not that of categories of crimes but of a specific list of crimes); b) "tapping" has to be justified by the gravity of a specific crime; c) it is not possible to obtain evidence by applying another, more conventional method. But even with consideration of the aforesaid conditions not "just any person" capable of providing information can be tapped, as in Russia or Kazakhstan, but a strictly limited set of persons. Thus, in conformity with Article 270 of the CPC of Switzerland, tapping is implemented by attaching specific devices to a telephone or any other technical equipment belonging to a) either the suspect/accused (prévenu)[‡‡]; or to b) a third party, if there is information that the suspect/accused is using a third party's telephone or other technical equipment, or if there is information that a third party is receiving information either *for* the suspect/accused or *from* the suspect/accused in order to pass it on to other persons. There are no other cases when "the third parties" or "other" persons can be tapped. In addition, tapping, of course, requires a ruling made by the court.

As for **bugging**, it is only the conversations of the suspect/accused that can be bugged. A dwelling place or a motor vehicle of a person who is not a suspect/accused may be bugged only where there are grounds to assume that the suspect/accused is there at the time (CPC Article 281).

There is no doubt that the new Swiss criminal procedure legislation fully complies with all international law standards, being at the same time quite efficient from the viewpoint of new methods of combating crime.

Conclusion

The analysis of the proposed draft law and its comparison with international law requirements and comparative law approaches allow a conclusion to be drawn that upon the implementation of the

[‡‡] According to Article 111 of the CPC of Switzerland, *prévenu* – is a "person against whom criminal prosecution is carried out", that is "any person, who due to being mentioned in a communication or a complaint about a crime or on account of a procedural act (action) put together or implemented by the body engaged in criminal proceedings, is suspected, criminally prosecuted or accused in the committing of a crime." In other words, this status covers both the status of suspect and accused.

proposed reform Kazakh criminal procedure and criminal investigation legislation will not comply with the international law standards elaborated, in particular, by the UN Human Rights Committee on the basis of interpreting Article 17 of the International Covenant of Civil and Political Rights. From the point of view of comparative law it will also significantly lag behind the best foreign examples.

Moreover, the main problem is that if the draft is adopted as a law and applied within the system of the current Kazakh norms and existing approaches, *a situation will develop where legal grounds for invading privacy (for the purposes of tapping, bugging, operational penetration in a dwelling place, etc.) will arise not only with regard to those persons who have committed crimes of medium gravity, but, in fact, with regard to any citizen including those who have never committed any crimes.* Such a situation is unacceptable in a rule-of-law state.

Furthermore, there is no certainty that the draft law, if adopted, will create additional conditions to efficiently combat crimes, which are really dangerous for society. This law, once adopted, will have obvious negative repercussions for the fundamental rights of citizens, with its positive effect for combating crime being rather vague.

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