Expert Opinion of the Council of Europe expert advisory group to the Office of the Prosecutor General of Ukraine on the Draft Law of Ukraine "On amending Criminal Procedure Code of Ukraine regarding Improvement of the Activities of Joint Investigative Teams"

on the basis of comments by Mr. Jeremy McBride and reviewed by Ms. Nona Tsotsoria

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The expert opinion was prepared within the framework of the Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine" which is part of the Council of Europe Action Plan for Ukraine 2018-2022.

A. Introduction

1. This expert opinion concerns the Draft Law of Ukraine ref.no. 7330 "On amending Criminal Procedure Code of Ukraine regarding Improvement of the Activities of Joint Investigative Teams" ("the Draft Law").

2. The Draft Law has been prepared by the People's Deputies of Ukraine.

3. The rationale for the changes being proposed in the Draft Law – which relate to Article 571 of the Criminal Procedure Code ("the Code") – is explained in the Explanatory Note as being to:

> ensure a comprehensive and full pre-trial investigation of criminal offenses committed by armed formations of the Russian Federation at the territory of Ukraine, to create appropriate guarantees for documentation of facts of their criminal activities, to ensure effective process for obtaining of evidence and their use in order to bring the guilty persons to criminal liability both at national and international institutions there is a need to improve procedural mechanism for the operation of joint investigative teams during conducting of criminal proceedings.

4. Moreover, the purpose and tasks of the Draft Law is, according to its Explanatory Note, to improve "the procedure of establishment and activities of joint investigative teams in criminal proceedings".

5. The Draft Law seeks to do these through the making of certain additions to the first three paragraphs of Article 571 of the Code, replacing the fourth paragraph in its entirety and introducing an entirely new fifth paragraph.

6. The expert opinion first reviews the European standards and best practices that are relevant for the establishment and operation of joint investigative teams. They then examine provisions in the Draft Law, before providing an overall conclusion as to their compatibility with European standards and best practices.

7. *Recommendations for any action that might be necessary to ensure compliance with European standards and best practices – whether in terms of modification, reconsideration or deletion – are italicized.*

8. The expert opinion has been developed by Mr. Jeremy McBride[1] and peer reviewed by Ms. Nona Tsotsoria[2] under the auspices of the Council of Europe expert advisory group to the Office of the Prosecutor's General in the framework of the Project "Human Rights Compliant Criminal Justice System in Ukraine". They have been based on English translations of the Draft Law and its Explanatory Note provided by the Council of Europe's Secretariat.

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B. European standards and best practices

9. The move to establish joint investigative teams was initially a response to the increasing incidence of transnational organised crime. However, such teams have advantages where any form of criminality may affect or concern more than one State.

10. In particular, their establishment allows for the direct gathering and exchange of information and evidence between the relevant bodies of the States involved and also allow those bodies to exchange requests for investigative or coercive measures without having to resort to the more cumbersome process of seeking mutual legal assistance.

11. Moreover, the use of a joint investigative team can help dispense with the need for parallel investigations in the States concerned and is thus less resource intensive.

12. Furthermore, reliance on such teams can mean that investigations into particular crimes, and ultimately prosecutions in respect of them, can be handled more expeditiously.

13. A decision to establish a joint investigative team is likely to be influenced by the number and complexity of the investigative measures to be carried out and the extent to which investigations in the States concerned may be interconnected.

14. Encouragement for the possibility of establishing such teams can be seen, e.g., in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 2000 ("the EU Convention"), the United Nations Convention against Transnational Organized Crime of 2000 ("the United Nations Convention"),[3] the Second Additional Protocol to the Council of Europe's European Convention on Mutual Assistance in Criminal Matter of 2001 ("the Second Additional Protocol")[4] and the European Union Council's Framework Decision on Joint Investigative Teams of 2002 ("the Framework Decision")[5].

15. On 14 September 2011 Ukraine ratified the Second Additional Protocol, the provisions of which came into force for it on 1 January 2012. It also ratified the United Nations Convention on 21 May 2004.

16. It is in the Second Additional Protocol, the EU Convention and the Framework Decision that the most detailed standards governing the actual operation of joint investigative teams are to be found.

17. Thus, Article 20 of the Second Additional Protocol provides that:

> 1 By mutual agreement, the competent authorities of two or more Parties may set up a joint investigation team for a specific purpose and a limited period, which may be

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[3] Set out in Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union,
[4] European Treaty Series No. 182.
[5] Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA).

extended by mutual consent, to carry out criminal investigations in one or more of the Parties setting up the team. The composition of the team shall be set out in the agreement. A joint investigation team may, in particular, be set up where:

a a Party's investigations into criminal offences require difficult and demanding investigations having links with other Parties;

b a number of Parties are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated, concerted action in the Parties involved.

A request for the setting up of a joint investigation team may be made by any of the Parties concerned. The team shall be set up in one of the Parties in which the investigations are expected to be carried out.

2 In addition to the information referred to in the relevant provisions of Article 14 of the Convention, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.

3 A joint investigation team shall operate in the territory of the Parties setting up the team under the following general conditions:

a the leader of the team shall be a representative of the competent authority participating in criminal investigations from the Party in which the team operates. The leader of the team shall act within the limits of his or her competence under national law;

b the team shall carry out its operations in accordance with the law of the Party in which it operates. The members and seconded members of the team shall carry out their tasks under the leadership of the person referred to in sub-paragraph a, taking into account the conditions set by their own authorities in the agreement on setting up the team;

c the Party in which the team operates shall make the necessary organisational arrangements for it to do so.

4 In this article, members of the joint investigation team from the Party in which the team operates are referred to as "members", while members from Parties other than the Party in which the team operates are referred to as "seconded members".

5 Seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the Party of operation. However, the leader of the team may, for particular reasons, in accordance with the law of the Party where the team operates, decide otherwise.

6 Seconded members of the joint investigation team may, in accordance with the law of the Party where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Party of operation and the seconding Party.

7 Where the joint investigation team needs investigative measures to be taken in one of the Parties setting up the team, members seconded to the team by that Party may request their own competent authorities to take those measures. Those measures shall be considered in that Party under the conditions which would apply if they were requested in a national investigation.

8 Where the joint investigation team needs assistance from a Party other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operation to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.

9 A seconded member of the joint investigation team may, in accordance with his or her national law and within the limits of his or her competence, provide the team with information available in the Party which has seconded him or her for the purpose of the criminal investigations conducted by the team.

10 Information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Parties concerned may be used for the following purposes:

a for the purposes for which the team has been set up;

b subject to the prior consent of the Party where the information became available, for detecting, investigating and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger

criminal investigations in the Party concerned or in respect of which that Party could refuse mutual assistance;

c for preventing an immediate and serious threat to public security, and without prejudice to sub-paragraph b. if subsequently a criminal investigation is opened;

d for other purposes to the extent that this is agreed between Parties setting up the team.

11 This article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.

18. The same approach is essentially embodied in both Article 13 of the EU Convention and Article 1 of the Framework Decision.

19. In all cases, the establishment of a joint investigative team is a matter for the mutual agreement of the States concerned.[6] Thus, the fact that Ukraine has ratified the Second Additional Protocol does not mean that it imposes any obligation as to the manner in which it may establish some form of joint investigative team.[7] However, its provisions are clearly a reflection of many aspects of best practice in Europe.

20. The following paragraphs – based on the provisions of the Second Additional Protocol and other aspects of practice[8] – set out the key points to observe in establishing and operating joint investigative teams.

21. The competent authorities of the States concluding an agreement to establish a joint investigative team can be either judicial (judges, prosecutors and investigative judges) or law enforcement ones, with practice varying between States.

22. Such agreements are for a limited duration and for a specific purpose.

23. The agreement may provide that the active or passive participation of officers from a different jurisdiction to that where the investigation takes place, i.e., participation will be active where there is some ability for those officers to exercise operational powers, but it will be passive where those officers only have an advisory or consultative role.[9]

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[6] For a model agreement, see Consolidated text of the model agreement on the establishment of a Joint Investigation Team (2022/C 44/02), available at: https://www.eurojust.europa.eu/sites/default/files/assets/celex-32022y0128-01-en-txt.pdf. This model agreement is currently being relied upon, for example, by Georgia.

[7] This is made clear by Article 20(11) of the Second Additional Protocol; “This article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams”.

[8] For guidance on practice, see: JITs Network, *Joint Investigation Teams Practical Guide* (2021); *The use and role of joint investigative bodies in combating transnational organized crime*, CTOC/COP/WG.3/2020/2, 12 May 2020 and the *Handbook on Joint Investigation Teams* (GIZ, 2014).

[9] Articles 20(5) and (6), 13(5) and (6) and 1(5) and (6) of the Second Additional Protocol, the EU Convention and the Framework Decision respectively envisage both possibilities.

24. The precise composition of joint investigative teams will be a matter to be determined in the agreement on establishment or a subsequent decision[10] but, in practice, they can include some or all of the following: prosecutors, judges, law enforcement officers and experts.[11]

25. In practice, joint investigative teams will be set up in the State where it is expected that the major part of the investigation concerned will occur.

26. The agreement may also provide that the State which is most significantly affected or has the most complete overview of the criminal activity is the one that plays the main role in organising the cooperation between the different national authorities involved.[12]

27. In view of the right to a fair trial, and especially the right to an effective defence, it is important that the legal position of suspects should not be weakened as a result of the participation of officers from different States in the joint investigation. This will require a clear determination of the law that is applicable to matters such as the conduct of interrogation of both suspects and witnesses, undercover activities and interception of communications. As a result, this is specifically provided for in the Second Additional Protocol, the EU Convention and the Framework Decision, namely, as being the law of the State in which the team operates.[13]

28. Moreover, mechanisms of control over investigative measures, such as the requirement for judicial authorisation, should be applicable in the same way as they would in the more usual form of criminal proceedings.

29. It is also important that there be clarity as to the State in which any trial will eventually be held so that there is no ultimate difficulty regarding the admissibility of evidence, particularly if there are different approaches regarding this between the State where the investigation occurs and the State where the trial is held.[14]

30. Where information can be shared between those involved in a joint investigative team, it will be desirable to clarify whether this is subject to any limitations on its subsequent use, i.e., will it be limited to the purpose for which the team was established? The agreement can certainly provide that there is to be no such limitation. [15]

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[10] A request for the setting up of a joint investigative team should include proposals for its composition; Articles 20(2), 13(2) and 1(2) of respectively the Second Additional Protocol, the EU Convention and the Framework Decision.

[11] As regards experts, the decision as to whether they actually take part in a joint investigative members will be a matter for the agreement according to Articles 20(12), 13(12) and 1(12) of respectively the Second Additional Protocol, the EU Convention and the Framework Decision.

[12] This is provided for in Articles 20(3)(a), 13(3)(a) and 1(3)(a) of respectively the Second Additional Protocol, the EU Convention and the Framework Decision.

[13] In respectively, Articles 20(3)(b), 13(3)(b) and 1(3)(b) of the Second Additional Protocol, the EU Convention and the Framework Decision.

[14] It will be important to iron out potential difficulties as soon as possible since it is the law of the State in which the team operates that should govern the activities of a joint investigative team; see para. 27.

[15] Indeed, Articles 20(10), 13(10) and 1(10) of respectively the Second Additional Protocol, the EU Convention and the Framework Decision specifies the purposes for which information lawfully obtained by anyone while a

31. Similarly, it is considered desirable for the agreement to deal with the extent to which information shared can or must be included in the proceedings ultimately brought and may be disclosed to the parties to them, as well as at what stage such disclosure might occur. Addressing this issue at the outset is crucial since difficulties may emerge should it later be found that the approach of the States concerned on these matters differs in important respects.

32. The adoption of an operational action plan – which would cover, in addition to the points already mentioned, matters such as identification of working methods, specification of the means of communication, division of work between those involved, communication with the media and responsibility for prosecutions – is seen as a useful way of focusing the activities to be undertaken by a joint investigative team.

33. Finally, there will be a need to ensure that the necessary resources are in place to cover the expenses of those members of a team from States other than the one in which the investigation takes place. Such expenses will include not only travel and daily allowances but also the costs incurred in respect of translation and interpretation.

34. Apart from standards and practices specifically concerned with joint investigative teams, it should also be borne in mind that the activities of such teams must conform to the requirements of the European Convention on Human Rights ("the European Convention") and the case law of the European Court of Human Rights ("the European Court") in the same way as these requirements apply to the more regular conduct of criminal proceedings.[16]

C. The Draft Law

35. The existing provisions in Article 571 of the Code are a reflection of the fact that the idea of establishing joint investigative teams to combat cross-border criminal activities is, as has been seen above, something now well-established in practice within Europe and beyond.

36. However, those provisions do not have the same level of detail as is to be seen in the Second Additional Protocol, the EU Convention and the Framework Decision.

37. Rather, they are limited to authorising the establishment of joint investigative team,[17] specifying who decides on setting one up, setting out a broad approach for the working arrangements of the team and providing who shall carry out investigative (searching) and other procedural actions.

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member of a joint investigation team which is not otherwise available to the competent authorities of the States concerned.

[16] The European Court has not so far had to rule on any aspect of the establishment and operation of joint investigative teams. The existence of such a team is, however, part of the factual background to its consideration of communicated cases *Ayley and Others v. Russia and Angline and Others v. Russia*, nos. 25714/16 and 56328/18. Ukrainian police officers and prosecutors are members of this team, which is coordinated by prosecutors from the Netherlands.

[17] The English translation of the Draft Law uses the term "group" rather than "team" but the latter one will be used so as to be consistent with the terminology in European standards.

38. However, these provisions seem sufficient to provide a legal basis for the establishment of joint investigative teams, even if the detail of the operation is not covered in them.

39. This is indeed essential as Article 544 of the Code – which deals with providing and receiving international legal assistance or other international cooperation without a treaty – would not appear to provide a separate legal basis for agreeing on joint investigative teams as the definition of international legal assistance in Article 541.1(1)[18] does not seem capable of covering such teams.

40. The changes proposed in the Draft Law relate to the purpose of establishing joint investigative teams, the procedure for establishing a team and determining its composition, the scope of the working arrangements and coordination of a team's activities, the conduct of investigative (searching) and other procedural actions and the admissibility of evidence obtained by members of the team.

i. Paragraph 1

41. The proposed change to this provision would result in a significant broadening of the language governing the purposes for which any teams that might be established.

42. Thus, the purpose would not be limited to the conduct of pre-trial investigation but would cover: (a) the comprehensive and full of operation of such an investigation and trial; (b) obtaining and checking obtained evidence, and (c) establishing meaningful circumstances for the criminal proceedings concerned.

43. Moreover, it would not be limited to the circumstances of offences committed in the territories of several States or where the interests of those States are affected but could also be concerned with criminal proceedings conducted in the territory of just one State.

44. It is not clear what is intended by the addition of "trial" to the purposes of joint investigative teams, which is not really explained in the Explanatory Note. Taking part in trials is not a feature of the provisions in the second Additional Protocol, etc. and does not seem to be an element of practice either.

45. Certainly, it is good practice for there to be agreement as to which State will be responsible for conducting a prosecution based on the work of joint investigative teams.[19] However, agreeing about that will not necessarily require that members of the team will have to be involved in the trial process following the investigation.

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[18] Namely, "conducting procedural actions by competent authorities of one State, execution of which is required for pre-trial investigation, trial or enforcement of sentence delivered by a court of another State or an international judicial institution".
[19] See para. 29 above.

46. It may be that the intention is to allow members of the team to give evidence at a trial following investigative activities undertaken by them, but it is not evident that this is something that is essential to be included in Article 571 as those members could take part in criminal proceedings as a witness under the existing provisions of the Code.

47. On the other hand, it may just be a way of emphasising the role of joint investigative teams in preparing cases for trial.

48. *There is thus a need to clarify what the reference to "trial" is intended to cover as it is not evident that this is really necessary.*

49. The proposed addition to the purpose relating to evidence is really no more than a necessary consequence of conducting an investigation and is not problematic.

50. The proposed reference to the purpose being to:

> establish meaningful circumstances for the criminal proceedings which is conducted

does not seem to add much that is of any real use since this ought to be the goal of any pre-trial investigation.

51. *There is thus a need to reconsider the need for this phrase to be retained in the Draft Law.*

52. The proposed stipulation that a joint investigative team can be concerned with proceedings in just one State reflects the present need for investigations into the offences alleged to have been committed by the armed formation of the Russian Federation in the territory of Ukraine.

53. However, the proposed change to paragraph 1 would also remedy a deficiency in the existing provision as European standards do envisage joint investigative teams having a focus on investigations in the territory of just one State.[20]

54. The proposed addition is thus appropriate.

ii. Paragraph 2

55. The proposed change to this provision would substitute the "Prosecutor General (the person in charge of him/her)" for the Prosecutor General's Office of Ukraine for the purpose on considering and deciding requests to establish joint investigative teams.

[20] See respectively, Articles 20(1), 13(1) and 1(1) of the Second Additional Protocol, the EU Convention and the Framework Decision.

56. In addition, the competence to make the relevant requests would not be the Ukrainian pre-trial investigation agency's investigator, a public prosecutor or foreign competent authorities but the head of the pre-trial investigative body, the head of the regional public prosecutor's office and persons in charge from foreign competent authorities.

57. Furthermore, it would elaborate the consequences of deciding on a request by providing that the Prosecutor General (the person in charge of him/her) would give instructions to the head of the pre-trial investigative body if the offence was committed in the territory of Ukraine.

58. In such a case, the head of the pre-trial investigative body would then take a decision on establishing a team and identifying its composition, with the latter including the senior investigator which would be in the form of the regulation upon the approval of the Prosecutor General (the person in charge of him/her).

59. The proposed changes in the different personnel concerned would seem to give greater clarity as to who is involved in the decision-making process connected to establishing joint investigative teams. However, the wording might be taken to be understood as requiring the Prosecutor General to decide on the establishment of such teams except where s/he is absent. This might add unduly to the burden of the Prosecutor General and it would be preferable for it to be made clear that the Prosecutor General has the authority to delegate the relevant functions to a member of her/his staff without having to be absent.

60. *There is thus a need to make it clear that the exercise of these functions can also be delegated by the Prosecutor General.*

61. However, the proposed changes – unlike the existing provision – seem almost to be predicated upon the operation of a joint investigative team taking place in Ukraine. Although the qualifying phrase "if the criminal offence was committed in the territory of Ukraine" might suggest otherwise, it is not sufficiently clear that there is a distinction between the senior investigator referred to in paragraph 2 – who would seem to be Ukrainian[21] – and the one that would be referred to in paragraph 3 if this position replaces the initiator of the team's establishment. Certainly, the existing provision clearly leaves the responsibility for coordination to a person from State in which a joint investigative team is established and this is not limited to Ukraine.

62. A limitation on teams being established in Ukraine would not be problematic in the context of the offences with which the Draft Law is concerned.

63. However, it would not be appropriate for the proposed changes to give the impression that the existing legal basis for the Ukrainian authorities to take part in joint investigative teams in other States is being removed. Unlike the formulation of the proposed paragraphs 4 and 5, paragraph 2 risks creating uncertainty on this matter.

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[21] See para. 71 below.

64. *There is thus a need to restructure the changes so that it is clearer that there continues to be a possibility for Ukrainian authorities to take part in joint investigative teams in other States.*

65. Neither the existing provision nor the proposed amendments deal with the conclusion of an agreement with the foreign competent authorities concerned as to the establishment of a joint investigative team, as well as the specification in that agreement of the mandate of the team and its duration.

66. The conclusion of such agreements is required by European best practices[22].

67. Nonetheless, it is not essential that every detail regarding the conclusion of an agreement be included in the Code. However, it would be appropriate for paragraph 2 to refer to the decision taken by the Prosecutor General on setting up a joint investigative team to be taken only after concluding an agreement with the foreign competent authorities concerned.

68. *There is thus a need to revise paragraph 2 accordingly.*

69. It is understood that cooperation with the International Criminal Court is dealt with in a separate law. However, as there may arise in the future a need to work with other entities of an international or supranational nature, it might be useful to make it clear that the term "foreign competent authorities" is not limited to authorities of other States.

70. *Consideration should thus be given to the need to allow agreements also to be concluded with the authorities of international or supranational bodies.*

71. It seems implicit in the proposed changes that the "senior investigator" would be a Ukrainian investigator, particularly as the decision on her/his selection is entrusted to the head of the pre-trial investigative body. Moreover, it is an element of European standards that the leader of a joint investigative team be a representative of the competent authority participating in the criminal investigations from the State in which the team operates.[23] Nonetheless, this ought to be dealt with explicitly.

72. *There is thus a need to revise paragraph 2 accordingly.*

73. The head of the pre-trial investigative body would also be entrusted with determining the composition of any joint investigative team established. This is not, as such, problematic.

74. However, there are no parameters set as to who can be included in such a team; will it be restricted to investigators from Ukraine and their counterparts in other States or will there also be prosecutors, investigating judges and so on as members.

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[22] *Ibid.*

[23] See respectively, Articles 20(3), 13(3) and 1(3) of the Second Additional Protocol, the EU Convention and the Framework Decision.

75. Certainly, there is some practice of teams having a wide composition[24] but the provisions in the Draft Law only deal with the role of the senior investigator in the operation of joint investigative teams. This would not be a problem if the members of the teams were restricted to just investigators. However, if it is expected that the teams in Ukraine would also comprise prosecutors and investigating judges, an explicit role only for the senior investigator could run counter to the provisions in other legislation directed at securing the independence of prosecutors and investigating judges. It would not be appropriate for prosecutors and investigating judges to be subject to direction by the senior investigator as to the exercise of their prosecutorial and judicial functions and, in the event of their involvement being expected, some more detailed regulation as to the nature of that involvement consistent with the guarantees for their independence would be needed in the Draft Law.[25]

76. *There is thus a need to clarify in this provision whether joint investigative teams will include persons other than investigators and their foreign counterparts and, if so, to ensure that this does not undermine provisions directed at securing the independence of prosecutors and investigating judges.*

iii. Paragraph 3

77. The proposed change to this provision would provide that the members of a joint investigative team should instead of agreeing between them the basic vectors of the pre-trial investigation should so agree on the basic vectors of conducting criminal proceedings, while leaving unchanged the requirement for their agreement on the conduct of procedural actions and exchange of information obtained.

78. In addition, instead of providing that the activities of the team should be coordinated by the initiator of its establishment or by one of its members, the coordination would only be by the team's senior investigator.

79. Paragraph 3 is a manifestation of the good practice of having an operational plan for the work of a joint investigative team[26].

80. However, the first change - "conducting the criminal proceedings" instead of "pre-trial investigation" – could mean that the agreement would extend to the initiation of prosecutions and even the conduct of trials. Certainly, the use of such phrase in the Code would suggest that that is how this phrase is to be understood.[27] While operational plans should work out the responsibility for conducting prosecutions, there does not seem any similar practice relating to the conduct of trials.

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[24] See para. 24 above and also fn. 15. The latter refers to an instance of Ukraine's involvement in a team comprised of both police officers and prosecutors.
[25] It is not known whether and, if so how, this was something considered in the instance referred to in fn .15.
[26] See para. 32 above.
[27] See, e.g., Articles 40.2(5), 288.4 and 459.

81. *As with paragraph 1,*[28] *there is thus a need to clarify whether trials are intended to be covered in the agreement on the basic vectors as it is not evident that this is really necessary.*

82. The reference to exchange of information could be interpreted to cover the use to which such information can be put and any limits that might be required as to its disclosure in the course of criminal proceedings, matters that best practice indicates should be addressed.[29] However, there is no guarantee that this will occur.

83. Furthermore, it ought to be made clear how Article 222 of the Code – which provides that information of pre-trial investigation may be disclosed only with written permission of an investigator or public prosecutor – applies to members of a joint investigative team who are not Ukrainian investigators or prosecutors.

84. *There is thus a need to develop the point concerning exchange of information so that this also covers its use and any limits on its disclosure, and to clarify the applicability of Article 222 of the Code.*

85. It is entirely appropriate to determine who has the responsibility for coordinating the activities of a joint investigative team. However, as already noted,[30] the use of the term "senior investigator" for this purpose gives the impression that Article 571 would only allow joint investigative teams to be established in Ukraine, which would not be appropriate.

86. *There is thus a need to make it clear that the senior investigator in paragraph 3 is not necessarily the one referred to in paragraph 2, i.e., one chosen by the head of the pre-trial investigative body.*

iv. Paragraph 4

87. The proposed change to this provision would replace entirely the provision for investigative (searching) and other procedural actions to be carried out by members of the joint investigative team from the State where such actions are conducted.

88. Instead, the new paragraph 4 would authorise all members of the team to carry out these procedural actions both in the territory of the State where the criminal proceedings are conducted and in the territory of other States whose competent authorities are members of the team.

89. In all cases, the carrying out of the procedural actions concerned by members of the joint investigative team would require the written approval of the team's senior investigator.

[28] See para. 48 above.
[29] See paras. 30 and 31 above.
[30] See paras. 60 and 68 above.

Moreover, these actions should only be carried out in a State other than the one where the criminal proceedings are conducted if this is "required by the needs of pre-trial investigation or trial".

90. This authorisation is, in principle, consistent with the option seen in European standards of allowing seconded members of a joint investigative team to be entrusted with taking certain investigative measures.[31]

91. However, the present formulation of the provision could be interpreted as creating a new power to conduct investigative (search) and other procedural actions solely upon the written approval of the senior investigator.

92. This would have the effect of bypassing safeguards such as those concerning authorisation by a court and the approval of a prosecutor for undertaking such actions, as seen in Articles 13 and 40.2 in the case of undertaking such actions in Ukraine and comparable requirements in other States where they are carried out in them. It would also be inconsistent with the safeguards expected by the European Court where searches and other coercive procedural actions are undertaken.[32]

93. However, any uncertainty in this regard could be removed by the addition of the phrase

> and in accordance with the procedure established by this Code or in accordance with the procedure provided by the legislation of the state competent authorities concerned

after "upon the written approval of the senior investigator of the joint investigative team".

94. *There is thus a need to revise paragraph 4 accordingly.*

v. Paragraph 5

95. The insertion of an entirely new paragraph 5 would provide that evidence obtained by members of a joint investigative team is to be recognised as admissible and is not to be subject to legalization subject to two conditions, namely, (a) being obtained in accordance with the procedure established by the Code or the procedure provided by the legislation of the State whose competent authorities are members of the team and (b) the principles of fair trial as well as human rights and fundamental freedoms not being violated in the course of obtaining it.

96. The stipulation that evidence obtained by members of the joint investigative team is to be recognised as admissible is consistent with the provision in European best practice that

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[31] See respectively, Articles 20(6), 13(6) and 1(6) of the Second Additional Protocol, the EU Convention and the Framework Decision.

[32] See, e.g., *Stés Colas Est and Others v. France*, no. 37971/97, 16 April 2002 (as regards searches) and *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015 (as regards interception of communications).

information obtained by a member of such a team which is not otherwise available to the competent authorities of the State concerned may be used for the purposes for which the team was set up, [33] which is self-evidently the investigation and prosecution of suspected offenders.

97. Moreover, the subjecting of the use of this evidence to the conditions regarding the means by which was obtained – i.e., in accordance with the Code or another State's requirements – and there being no violation of the principles of fair trial and human rights and fundamental freedoms is, in principle, consistent with the requirement of European best practice that the evidence must be obtained lawfully.[34]

98. Although there might be no objection to the admissibility of evidence to be determined by the requirements of a State other than Ukraine where the proceedings in respect of an alleged offence take place in the courts of that State, it does not seem appropriate for proceedings in Ukraine to be governed by those admissibility requirements unless they are more exacting ones.

99. As this is not something that can be determined in the abstract, it would be more appropriate for the proposed provision to subject admissibility to the requirements in the Code where the relevant proceedings are in Ukraine,[35] with the possibility of admissibility being governed by the requirements of the State where the evidence was obtained only in the event of those requirements being more exacting than those in the Code.

100. It is possible that the same outcome of achieving a higher threshold than prescribed by the Code might be achieved through reliance on the condition concerning fair trial principles, etc. However, these are broad concepts which are not accompanied by any guidance as to their interpretation and application.

101. A more concrete steer in this regard could be provided through specifying that in all cases that the admissibility of evidence must comply with the European Convention as elaborated in the case law of the European Court.

102. *There is thus a need to revise paragraph 5 accordingly.*

103. The stipulation that the use of evidence obtained by members of a joint investigative team is not "subject to legalization" is presumably meant to refer to such evidence not being subject to any requirement of additional attestation as seen in Article 550 of the Code.

104. The dispensing with the need for additional attestation – which might otherwise be expected in the case of evidence obtained by persons other than Ukrainian investigators – is appropriate as it is consistent with the notion of the collaborative approach to investigation

[33] See respectively, Articles 20(10)a, 13(10)a and 1(10)a of the Second Additional Protocol, the EU Convention and the Framework Decision.

[34] *Ibid*.

[35] I.e., those in Articles 5.2, 86. 87, 88, 881, 89, 90 and 97.

by persons from different States that underpins the purpose of establishing joint investigative teams.

105. European best practices relating to joint investigative teams do not address the issue of apprehending and detaining suspects.

106. However, there is no reason why different standards should apply in respect of offences investigated by such teams.

107. *There is thus a need to make it clear that the relevant provisions of the Code are applicable where joint investigative teams are established.*[36]

D. Conclusion

108. The provisions in the Draft Law generally reflect best practices in Europe.

109. However, they could better reflect those practices, as well as avoid the risk of activity inconsistent with the requirements of the European Convention by making the following changes:

- refer in paragraph 2 to the decision taken by the Prosecutor General on setting up a joint investigative team to be taken only after concluding an agreement with the foreign competent authorities concerned;
- specify in paragraph 2 that the exercise of the functions of the Prosecutor General relating to joint investigative teams can also be delegated by her/him;
- specify in paragraph 2 that the "senior investigator" to which it refers would be a Ukrainian investigator;
- revise the point in paragraph 3 concerning exchange of information so that this also covers its use and any limits on its disclosure, as well as clarify the applicability of Article 222 of the Code to members of a joint investigative team who are not Ukrainian investigators or prosecutors;
- make it clear that the senior investigator referred to in paragraph 3 is not necessarily the one referred to in paragraph 2, i.e., one chosen by the head of the pre-trial investigative body;
- add the phrase "and in accordance with the procedure established by this Code or in accordance with the procedure provided by the legislation of the state competent authorities concerned" after "upon the written approval of the senior investigator of the joint investigative team" in paragraph 4; and
- specify in paragraph 5 that in all cases that the admissibility of evidence must comply with the European Convention as elaborated in the case law of the European Court.

110. In addition, there is a need to clarify what is intended in paragraph 1 as part of the purposes of joint investigative teams by:

- the reference to "trial" in paragraph; and

[36] These may, of course, be subject to any derogation that might be possible under Article 15 of the European Convention.

- the reference to "to establish meaningful circumstances for the criminal proceedings which is conducted"

111. There is also a need to clarify whether trials are intended to be covered in the agreement on the basic vectors to which paragraph 3 refers.

112. Furthermore, there is a need to clarify in paragraph 2 whether joint investigative teams will include persons other than investigators and their foreign counterparts and, if so, there will be a need for further provisions to be included in the Draft Law to ensure that this does not undermine guarantees in the Code and other legislation directed at securing the independence of prosecutors and investigating judges. In particular, it should be made clear that investigating judges and prosecutors will not be subject to the direction of the senior investigator in the exercise of their judicial and prosecutorial functions.

113. In addition, consideration should be given as to the need to allow agreements also to be concluded with the authorities of international or supranational bodies.

114. Finally, the provisions in the Draft Law – especially those in paragraph 2 - should make it clearer that there continues to be a possibility for Ukrainian authorities to take part in joint investigative teams in other States.