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Executive Summary

Note by the Secretariat

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II. Executive summary

Ukraine

1. Introduction

1.1. Legal system of Ukraine — Incorporation of the United Nations Convention against Corruption in the domestic legal system

Ukraine signed the Convention on 11 December 2003 and ratified it in 2006. The ratification law entered into force in July 2009. Ukraine deposited its instrument of ratification with the Secretary-General on 2 December 2009. According to article 9 of the Constitution, the UNCAC became, upon ratification, an integral part of national legislation with overriding legal effect against any other contrary provision of domestic laws.

1.2. Overview of the anti-corruption legal and institutional framework of Ukraine

The national legal framework against corruption encompasses different pieces of legislation, including the Constitution, the Criminal Code (CC) and the Criminal Procedure Act (CPC). The CC came into force on 1 September 2001. The corruption-related provisions were subject to legal amendments, introduced by Law No. 3207-VI "On amendments to several legislative acts concerning liability for corruption offences", as well as Law No. 3206-VI "On the Principles of Preventing and Combating Corruption". Both laws came into force on 1 July 2011. Other specific laws include, inter alia, the Law on Prevention and Counteraction to Money Laundering (in force since August 2010) and the Law on Special Investigative Techniques.

A new CPC was adopted by the Parliament on 13 April 2012 and enters into force on 19 November 2012. A law on confiscation aiming at streamlining the domestic confiscation regime has not yet been enacted.

The national legislation also provided for administrative liability for certain corruption-related acts. Law No. 3207-VI introduced a specific chapter on "administrative corruption offences" into the Code of Administrative Offences (CAO). The experts took into account the parallel existence of both criminal and administrative corruption offences and raised concerns about potential overlapping and expansion of administrative offences at the expense of criminal. As an example, article 1723 of Law No. 3207-VI on active bribery may overlap with article 369 CC and further create confusion as to the high threshold of illegal benefit set forth therein. In response, the national authorities highlighted the secondary nature of administrative offences (article 9 of CAO) and referred to policy used to relieve criminal courts from backlog of criminal cases.

In general, the review team welcomed the national efforts to strengthen criminal legislation against corruption and urged the Ukrainian authorities to continue such efforts with a view to further improving the anti-corruption framework in the country. Noting, though, that in recent legislative initiatives, either completed or still under discussion, there seemed to be a lack of linkages with, and cross-references to, other pieces of legislation in force, the review team emphasized the need to ensure that all legislative changes and updates are decided and

implemented in a manner that guarantees complementarity, coherence, robustness and consistency of the anti-corruption legislation as the most effective deterrent against corruption. The review team expressed concerns that swift legislative changes might hinder sustainable development of the anti-corruption legislation as well as contribute to lack of legal certainty.

The notes under certain provisions of the CC constitute an integral "commentary" accompanying the text of the provisions. The resolutions of the Plenary Session of the Supreme Court of Ukraine intend to provide guidance and interpretation on the application of legal concepts contained in the legislation, as well as to resolve ambiguities and ensure consistency of judicial practice.

The institutional framework domestically in place to address corruption refers to the competences and functions of, as well as coordination between, various authorities, including the prosecution services, the organized crime task force of the Ministry of Interior, the special anti-corruption and organized crime task force of the Security Service, as well as the State Financial Monitoring Service — the national FIU — in the field of money-laundering.

A new National Strategy against Corruption for the period 2011-2015 was adopted in 2011, aiming at streamlining state anti-corruption policies and introducing measures to decrease the corruption level in the country.

2. Implementation of chapters III and IV

2.1. Criminalization and law enforcement (chapter III)

2.1.1. Main findings and observations

The active and passive bribery of public officials are criminalized through articles 369 and 368 CC respectively. Article 369 CC refers to "offering or giving a bribe". The national authorities confirmed during the country visit that the "promise of a bribe" was lacking as a constituent element of the offence of active bribery, but they referred, instead, to the application of the general provisions of the CC on preparation or attempt to cover related instances.

The bribery provisions of the CC employ the term "official", which is defined in the note to article 364 CC (abuse of authority or office). This definition was substantially broadened through Law No. 3206-VI to include persons authorized to perform functions of State or local government, as well as persons who have been conferred the status of authorization to perform such functions. The latter category further includes officials of foreign States and officials of international organizations, thus ensuring that the bribery provisions are also applicable in relation to these officials.

The provisions on active and passive bribery do not specify whether the offence could be committed directly or indirectly. The general provisions of the CC on complicity are applicable in this regard.

The same provisions do not further expressly specify whether the advantage must be for the official him/herself or for a third person. The national authorities referred to relevant jurisprudence (Supreme Court Resolution No. 5) indicating that bribery also occurs in cases where the official receives an advantage not for him/her personally but for the benefit of close persons (relatives, acquaintances, etc.).

The 2011 amendments of the domestic legislation introduced two articles in the CC criminalizing bribery of persons who are not public officials, namely article 368.3 on commercial bribery of officials of legal entities of private law and article 368.4 on bribery of persons who provide public services, such as auditors, notaries, arbitrators, etc.

In assessing the provisions on the criminalization of bribery in the public and private sector, the review team noted an inconsistent use of terms to define the generic concept of "undue advantage". Sections 368 and 369 CC on passive and active bribery in the public sector respectively employ the notion of a "bribe" which is not further defined by law. The national authorities referred to Resolution 5 of the Plenary Session of the Supreme Court as a guidance tool to avoid ambiguity in understanding the term "bribe". Further, the 2011 legal amendments introduced the concept of "illegal benefit" into the CC provisions on private sector bribery and trading in influence. This concept is defined broadly in article 1 of Law No. 3206-VI to include "pecuniary funds or other assets, advantages, perks, services, or non-material assets which without lawful grounds are promised, offered, provided, or received without pay or at a price below the minimum market price". It would therefore appear that, as far as the provisions on private sector bribery and trading in influence are concerned, the definition given is broad enough to cover any material and non-material advantages, whether such benefits have an identifiable market value or not. However, the review team, also taking into account the differing views expressed during the country visit among the national experts on the respective use of the terms "bribe" and "illegal benefit" in the domestic legal system, concluded that:

- The existing terminological discrepancies could not be attributed merely to linguistic variations; and
- For purposes of ensuring consistency, clarity and legal certainty, it would be beneficial to implement and interpret all corruption offences in a more uniform approach as to the terminological delineation of the concept of "undue advantage".

Trading in influence, in both its active and passive forms, is criminalized under the new provisions of article 369.2 CC introduced by the 2011 legal amendments. The constituent elements of bribery offences largely apply with regard to trading in influence as well. As in the provisions on bribery in the private sector, the concept of "illegal benefit" is used instead of "bribe". Further, article 369.2 does not expressly specify whether the advantage must be for the official him/herself or for a third person.

Money-laundering is established as a criminal offence in article 209 CC. The new Law on Prevention and Counteraction to Money Laundering supplements article 209 and provides for a much wider definition of predicate offences. These are now defined as "socially dangerous unlawful actions" punishable by imprisonment in general (previously imprisonment for a term of three to six years) or a fine.

The Ukrainian authorities referred convincingly to article 198 CC as the provision domesticating article 24 of the UNCAC on the criminalization of concealment.

Article 191 CC is the basic provision criminalizing embezzlement of property in both the public and private sectors. The Ukrainian authorities referred to article 190

of the Civil Code and the judicial practice of the Supreme Court for the definition of property, which was reported to be considered in a broad manner to entail property rights and liabilities as well. The review team reiterated its comments made on bribery offences regarding the lack of reference to "third-party beneficiaries".

The abuse of functions is criminalized through article 364 CC. Information was provided on pertinent judicial practice of the Supreme Court, interpreting the damage caused by such action as a requirement for triggering the application of article 364. The review team, bearing in mind the optional wording of article 19 of the UNCAC, welcomed the establishment and interpretation of the offence in the Ukrainian legal order. For purposes of assisting the national authorities in implementing broadly the domestic legislation, the review team recalled that the element of "damage" was not required by the Convention.

Illicit enrichment is criminalized through article $368,^{2}$ which was introduced as a result of the legal amendments enacted by Law No. 3207-VI. The conduct of illicit enrichment is defined as the "obtainment by an officer of illegal benefit in substantial amount or transfer by the officer of such benefit to close relatives, in the absence of signs of bribery". The offence is still a new crime and concrete jurisprudence is needed to further determine the increase of income "in the absence of signs of bribery". The latter condition ("in the absence of signs of bribery") seems to be an additional requirement in that the courts may go into the direction of first proving that no bribery act was committed and then applying the provision on illicit enrichment. The national authorities confirmed that the burden of proof to demonstrate that the enrichment is beyond the lawful income of the perpetrator remained on the prosecution. Taking into account the optional wording of article 20 of the Convention, the review team welcomed the establishment of the offence of illicit enrichment in the domestic legal order. With the aim to assist the national authorities to fully benefit from their commendable initiative to criminalize this conduct, the reviewing experts also noted the future significance of ensuring further clarity and consistency in applying article 368^{2} CC.

Ukraine reported a quite comprehensive nexus of provisions in the CC (articles 343-349 and 376-379) criminalizing various acts of witness intimidation and interference in the witness testimony and in the exercise of official duties of law enforcement and judicial authorities.

Despite the effort made with the adoption of Law No. 3206-VI, the Ukrainian authorities confirmed during the country visit that more needed to be done to clearly establish liability for legal entities. Therefore, this issue is included among the basic objectives of the National Strategy against Corruption for the period 2011-2015. The national authorities also recognized the need for amendments in the domestic legislation to ensure the recognition of administrative liability of legal persons for corruption-related offences, given that, at the time of the country visit, such liability was foreseen only with regard to money-laundering.

In assessing the sanctions applicable for corruption offences, the review team noted that the rather high sanctions were available for aggravated cases of such offences, but the minimum penalty of the basic forms of such offences as passive bribery in the public sector ("arrest" of six months), active bribery in the public sector (imprisonment of up to two years), or bribery in the private sector (imprisonment of up to two years), appeared to be comparatively lower. Moreover, the "offering" of a

bribe in the public sector is subject to less severe sanctions than the "giving", and the aggravated circumstances are foreseen only for the "giving" of the bribe. The review team drew the attention of the national authorities to this disparity of sanctioning measures and invited them to consider ways and means to address such disparity in future reviews of criminal legislation.

According to the Constitution, the following categories of high-ranking officials benefit from immunity in criminal proceedings: the President, Members of the Parliament and judges. The President enjoys immunity during the term of office and may be removed from office by impeachment, which requires a three-quarters majority decision of the Parliament. Members of the Parliament are not legally liable for the results of voting or for statements made in the Parliament. The judges cannot be detained or arrested without the consent of the Parliament, but they can be convicted without its consent. The procedure for lifting the immunity of MPs or judges is established by the Regulations of Parliament.

The role and functions of the Office of the Prosecutor General are set out in the Constitution. The Prosecutor General is appointed to office by the President with the consent of the Parliament, reports to both the President and the Parliament and is dismissed from office by the President. Specialized divisions are operating within the prosecution services to deal exclusively with corruption cases.

The initiation of criminal proceedings is based on the principle of mandatory prosecution. Article 4 CPC foresees a duty for the prosecutor to initiate criminal proceedings upon detection of offence indications. The new CPC prescribes the possibility of concluding a plea agreement between the prosecutor and the accused person, which can determine, inter alia, that person's obligations regarding cooperation in detecting the criminal offence perpetrated by another person.

Specifically with regard to persons who have participated in the commission of crimes and have provided assistance to the law enforcement authorities, the prosecutor is entitled to release such persons from criminal responsibility if their assistance was provided prior to the commencement of the investigation.

The independence of judges is guaranteed by the Constitution and legislation and any effort to exercise influence upon them is prohibited. The Supreme Court is the highest appeal judicial body of general jurisdiction and it is charged with ensuring the uniform application of the law by all general courts. In this context, the Plenary of the Supreme Court gives opinions on certain legal issues to ensure the uniform application of the law by other courts.

The CPC (articles 52-1, 292 and 303), the specific Law on Ensuring Security of the Persons Participating in Criminal Proceedings, as well as the Law No. 3206-VI, constitute a comprehensive legal framework for the protection of witnesses. A wide definition of persons to be protected has been adopted to cover all "persons who participate in criminal proceedings".

A draft Law on Amendments to Criminal and Criminal-Procedural Codes on Improving the Procedures for Carrying out Confiscation was not enacted, although it had gained general approval by international experts in the past. The review team was not in a position to assess the adequacy of the provisions, as they were not yet part of the national legislation, but urged the national authorities to accelerate the process of putting in place a solid legal framework on confiscation mechanisms,

possibly through reconsideration of this matter in view of the provisions of the new CPC.

The Law on Prevention and Counteraction to Money Laundering was found to provide guarantees that bank secrecy does not hamper domestic criminal investigations of corruption-related offences.

In general, the statute of limitations periods prescribed for different crimes according to their gravity were deemed long enough to preserve the interests of the administration of justice. The review team noted the comparatively lower statute of limitations period for minor offences carrying imprisonment (three years), but also received explanations regarding the suspension of such a statute of limitations period where the offender evades the administration of justice. The reviewing experts further invited the national authorities, if deemed necessary, to consider extending the limitation period for those crimes as well as in future reviews of criminal legislation.

Jurisdiction principles are established in articles 6-8 CC and apply to all corruption-related offences. Jurisdiction based on territoriality and active personality is expressly foreseen (articles 6 and 7 CC). Pursuant to section 8 CC, foreign citizens and stateless persons not residing permanently in Ukraine who commit a criminal act outside the territory of Ukraine are subject to criminal liability, if criminal liability is provided for by international treaties, including the UNCAC, or if such persons have committed grave or particularly grave offences punishable under the CC against the rights and freedoms of Ukrainian citizens or the interests of Ukraine. Such grave offences are defined by section 12 CC as offences punishable by up to 10 years of imprisonment, and therefore only aggravated forms of corruption offences seem to be covered by the second part of section 8 CC. In relation to those aggravated corruption offences, the first part of section 8 CC allowed for the direct applicability of article 42 of the UNCAC. However, no jurisprudence on the direct application of international treaties domestically was submitted to support this argument.

The Ukrainian authorities confirmed that the Law No. 3206-VI contained a specific section on the “Elimination of Consequences of Corruptive Offences” and stressed their need for assistance to ensure its effective implementation through a summary or compilation of good practices or lessons learned on the annulment of public contracts as a consequence of acts of corruption.

The domestic legislation requires law enforcement authorities to coordinate and inform each other when detecting corruption offences or obtaining information that such offences have been committed. Better coordination is also pursued through meetings of an Investigation and Operational Body, which functions as a “quick response” group involving prosecutors, investigators, as well as officials from the Ministry of Interior and other agencies. The review team was also informed of the work of the Department of Financial Investigation of the State Financial Monitoring Service to detect and analyse suspicious financial transactions, as well as its cooperation with the Office of the Prosecutor General, the Security Service and the Office of Tax Inspection.

The review team encouraged the national authorities to continue their ongoing good efforts to facilitate the best possible coordination among agencies with a law enforcement mandate in the fight against corruption.

2.1.2. Successes and good practices

The review team identified the following measures, initiatives or practices that have the potential, as good practices, to significantly facilitate Ukraine's efforts in the field of anti-corruption:

- The comprehensive nature of the domestic legislation on protection of witnesses and generally persons who participate in criminal proceedings, as well as family members and close relatives of such persons; and
- The solid legal framework to prevent and combat money-laundering, as it was further enhanced in 2010 by specific legislation in this field.

2.1.3. Challenges and recommendations

While noting Ukraine's efforts to bring the national legal system in line with the UNCAC provisions on criminalization and law enforcement, the reviewers identified some grounds for further improvement and made the following recommendations for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant UNCAC requirements):

- Construe the administrative offence of active bribery in a way that prevents overlapping with the corresponding provision of the CC, including through reducing the "monetary threshold" used to define the illegal benefit in the administrative offence;
- Continue efforts to provide for more certainty, clarity and uniformity on the definitions of "bribe" and "illegal benefit" contained in corruption offences and address issues of potential inconsistencies in the manner that such definitions are interpreted domestically, both at the levels of legislation and application of criminal laws;
- Construe the bribery and embezzlement offences in the public sector, as well as the offence of trading in influence, in a way that unambiguously covers instances where the advantage is not intended for the official himself/herself, but for a third party (third-party beneficiary);
- Consider, in the context of future reviews of criminal legislation, ways and means to address existing disparities of sanctioning measures against basic forms of such crimes as bribery in the public and private sectors, as well as against certain conducts constituting bribery (offering a bribe, as opposed to giving a bribe);
- Ensure that the domestic legislation provides for liability of legal persons for offences established in accordance with the UNCAC, in line with article 26 of the UNCAC; and
- Continue and streamline efforts to put in place new legislation on confiscation of proceeds of crime or property.

2.2. International cooperation (chapter IV)

2.2.1. Main findings and observations

The extradition framework is regulated by both domestic legislation and pertinent international treaties. Ukraine is a party to the European Convention on Extradition (1957) and its two Additional Protocols, as well as the Commonwealth of Independent States (CIS) Convention on Legal Assistance and Legal relations in Civil, Family and Criminal Matters (1993) and its Protocol. Ukraine has concluded bilateral treaties on extradition with several countries.

Substantive and procedural conditions for extradition are regulated by articles 450-470 CPC, as amended by the new CPC.

Ukraine makes extradition conditional on the existence of a treaty. It further considers the UNCAC as a legal basis for extradition and has notified the Secretary-General accordingly. Reciprocity can be a part of international cooperation arrangements on a case-by-case basis (the new CPC extends this possibility to extradition as well).

Article 451 CPC stipulates the general conditions for extradition which is possible for offences carrying a maximum penalty of at least one year of imprisonment or, where extradition is requested for the purpose of enforcement of a sentence, for offences for which a period of sentence of at least four months remains to be served.

Article 466 CPC lists the grounds for refusal of an extradition request, including, among others, nationality (the extradition of nationals is also prohibited by the Constitution — article 25) and lack of double criminality. The UNCAC offences are not considered as political ones, although the concept of "political offence" is not defined explicitly in the domestic legislation.

In case extradition is denied on the grounds of nationality, the Office of the Prosecutor General is obliged to assign, upon request of the requesting State, a pretrial investigation authority to investigate the case in accordance with the domestic legislation. If extradition for purposes of enforcement of a sentence is denied on the grounds of nationality, the foreign sentence could be enforced in Ukraine by virtue of the European Convention on the Transfer of Sentenced Persons and the European Convention on the Validity of Foreign Criminal Judgments, or bilateral treaties on these matters.

The competent authorities for extradition are respectively the Prosecutor General's Office and the Ministry of Justice, unless otherwise provided in a treaty. The Prosecutor General's Office is the competent authority for the extradition of suspected persons sought at the stage of pretrial investigation proceedings. The Ministry of Justice is the competent authority for the extradition of convicted persons sought at the stage of trial proceedings or at the stage of the execution of the sentence imposed to them.

The usual length of extradition proceedings is 2-3 months. In exceptional circumstances, where the case is brought before the European Court of Human Rights, the extradition process may last much longer. Nevertheless, the maximum time of extradition detention is 18 months, and in practice there was no case in which this period was exhausted because of extradition proceedings pending. In

general, the time frame varies depending on the complexity of the case, the duration of appeal proceedings and the potentially parallel asylum proceedings.

The Ukrainian authorities confirmed that the new CPC included provisions to facilitate simplified extradition proceedings.

There is no database to enable the monitoring of duration of extradition proceedings and the content of the final decisions in extradition cases.

The effectiveness of certain aspects of Ukraine's extradition policy has been assessed by the OECD Anti-Corruption Network for Eastern Europe and Central Asia in 2010.

The transfer of sentenced persons is regulated by the Council of Europe Convention on the Transfer of Sentenced Persons (1983) and its Additional Protocol (1997). Bilateral agreements have also been concluded. Amendments of the current legal framework are included in the new CPC.

The transfer of criminal proceedings is based on the European Convention on the Transfer of Criminal Proceedings (1972) and article 21 of the European Convention on Mutual Assistance in Criminal Matters (1959), as well as on bilateral treaties. The domestic procedure for transfer of criminal proceedings is prescribed in the CPC. A practical difficulty encountered in cases of taking over of evidence related to criminal proceedings is that of translation, which requires time and additional resources.

Multilateral and bilateral mutual legal assistance (MLA) treaties were reported to be primarily the legal basis for granting and requesting MLA. Ukraine is a party to the European Convention on Mutual Assistance on Criminal Matters and its Additional Protocols, as well as the CIS Convention and its Protocol. In the absence of an applicable treaty, mutual legal assistance can be afforded on the basis of reciprocity.

At the domestic level, a law which was enacted in 2011 amended the CPC to make possible the ratification of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001). The law prescribes new conditions for the transfer of criminal proceedings and provides for such measures as the application of telephone- and videoconference during investigations and trial proceedings, and the formulation, operating procedures and action of joint investigative teams.

The Law No. 3206 "On Principles of Preventing and Counteracting Corruption in Ukraine" could be used as legal basis for exchange of information in the area of preventing and counteracting corruption.

The grounds for refusal of MLA requests are basically set forth in MLA treaties to which Ukraine is a party, as well as in the 2011 law which amended the CPC. The lack of double criminality is not a ground for refusing the execution of MLA requests. MLA requests shall not be refused solely on the ground that they involve fiscal offences. Bank secrecy does not seem to present an obstacle for granting assistance.

Ukraine notified the Secretary-General that the designated central authorities to deal with MLA requests were the Ministry of Justice (concerning requests of courts) and the Prosecutor General's Office (concerning requests of pretrial investigation agencies).

Article 472 CPC specifies a maximum period of two months as the time frame for the execution of MLA requests varies. The new CPC provides for a shorter period of one month. In general, the time needed for executing MLA requests varies depending on the nature of the request, the type of assistance and the complexity of the case. On average, it does take from two to four months to complete the process.

Law enforcement cooperation is facilitated through domestic provisions and bilateral agreements with other countries. One practical case was reported in which the UNCAC was used as legal basis for law enforcement cooperation.

The Ukrainian authorities confirmed a two-tier system of receipt of requests for law enforcement cooperation, namely at a centralized level, but also at a "decentralized" level to increase efficiency and to enable more rapid responses.

Matters pertaining to special investigative techniques are regulated in domestic legislation, whereas special investigative techniques employed at the international level are used on a case-by-case basis.

2.2.2. Successes and good practices

The review team found that Ukraine had put in place a detailed framework of international cooperation. The recent amendments of the domestic legislation served the purpose of streamlining existing regulations, upgrading assistance mechanisms and rendering cooperation more efficient and flexible. The review team emphasized the need to ensure that all legislative changes and updates are decided and implemented on a "long-term perspective" as a condition for their sustainability and coherence.

The review team identified the following indications as examples of particular value for the country's efforts to strengthen international cooperation and networking:

- The status as State party to numerous regional instruments on different forms of international cooperation per se, as well as regional and multilateral instruments containing provisions on international cooperation in criminal matters;
- The fact that the lack of double criminality is not a ground for refusing the execution of MLA requests; and
- The practice of "decentralizing" incoming requests for law enforcement cooperation to ensure better and more expeditious responsiveness.

2.2.3. Challenges and recommendations

The following is brought to the attention of the Ukrainian authorities for their consideration and with a view to further enhancing international cooperation mechanisms:

- Continue efforts to systematize and make best use of statistics, or, in their absence, examples of cases indicating the length between the receipt and execution of extradition and MLA requests for the purpose of assessing the efficiency and effectiveness of extradition and MLA proceedings;
- Continue to make best efforts to ensure that extradition and MLA proceedings are carried out in the shortest possible period;

- Continue to explore opportunities to actively engage in bilateral and multilateral agreements with foreign countries, with the aim to enhance the effectiveness of different forms of international cooperation; and
- Consider the allocation of additional resources to strengthen the efficiency and capacity of international cooperation mechanisms.

3. Technical assistance needs

The Ukrainian authorities indicated that they would benefit from the following forms of technical assistance:

- Summary/compilation of good practices/lessons learned on confiscation issues;
- Summary/compilation of good practices/lessons learned on the implementation of article 15, subparagraph (b), of the UNCAC on passive bribery of public officials;
- Summary/compilation of good practices/lessons learned on the implementation of article 18 of the UNCAC on trading in influence;
- Summary/compilation of good practices/lessons learned on the establishment of liability of legal persons;
- Summary/compilation of good practices/lessons learned on the annulment of public contracts as a consequence of acts of corruption, in line with article 34 of the UNCAC; and
- Trainings and workshops on issues pertaining to all of the above areas, as well as new and innovative types of mutual legal assistance under the CPC, including the application of telephone- and videoconference during investigations and joint investigations.