IN THE MATTER OF CRIMINAL PROCEEDINGS INSTITUTED BY THE NATIONAL ANTI-CORRUPTION BUREAU OF UKRAINE AND THE SPECIALISED ANTI-CORRUPTION PROSECUTOR'S OFFICE OF UKRAINE

AND IN THE MATTER OF [redacted]

EXPERT OPINION

A INTRODUCTION

1. Mr [redacted] ("**Mr** [redacted]") and Mr [redacted] ("**Mr** [redacted]") have, since at least 24 March 2017, been the subject of a series of linked criminal investigations conducted by the National Anti-Corruption Bureau of Ukraine ("**NABU**") and the Specialised Anti-Corruption Prosecutor's Office of Ukraine ("**SAPO**"). Mr [redacted] and Mr [redacted] were, respectively, the [redacted] and the [redacted] within the [redacted] of DTEK [redacted], one of the Ukrainian companies within the DTEK [redacted]. We are jointly instructed to prepare this Expert Opinion on behalf of Mr [redacted], Mr [redacted], and DTEK [redacted] company within the DTEK [redacted] (hereinafter, "**DTEK**").

2. The criminal investigation in relation to Mr [redacted] and Mr [redacted], concerns the introduction of a formula for calculating the projected wholesale electricity market price in Ukraine, known as the "**Rotterdam+ formula**". The Rotterdam+ formula was introduced by the National Energy and Utilities Regulatory Commission ("**NEURC**"), by Resolution No. 289 of 3 March 2016 ("**Resolution No. 289**").

3. In short, the NABU / SAPO allege that Mr [redacted] and Mr [redacted] conspired with public officials of the NEURC, such that those officials would abuse their official position to include within the formula for the calculation of the projected wholesale electricity market price in Ukraine certain elements which ought not properly to have factored in that calculation. That conduct is alleged by the NABU / SAPO to have caused significant economic losses to energy consumers.

4. We are asked to provide an Expert Opinion addressing:

4.1. **First**, whether, in the event that the allegations against Mr [redacted] and Mr [redacted] were justiciable in England and Wales, there would be a realistic prospect of criminal prosecution and conviction.

4.2. **Secondly**, whether certain aspects of the conduct of the criminal investigation and proceedings against Mr [redacted] and Mr [redacted] have satisfied minimum standards of fairness and natural justice, pursuant to Article 6 of, and Article 4 of the Seventh Protocol to, the European Convention on Human Rights ("**ECHR**" or "**the Convention**").

5. We are not invited to consider, and are in any event not qualified to consider, compliance with domestic Ukrainian criminal law or procedure.

6. In preparing this Expert Opinion, we have had regard to the documents identified in **Annex A**.

7. In preparing this Expert Opinion, we confirm that we have complied with the duties of an expert witness set out in the Criminal Procedure Rules 2020 (England and Wales), and in particular rules 19.2 and 19.4 (which are reproduced in **Annex B**).

B THE AUTHORS

8. The joint authors of this Expert Opinion are as follows:

9. **Lord Macdonald of River Glaven Kt KC** was called (admitted) to the Bar of England and Wales in 1978 and practises in criminal, public and arbitral law in the English courts, in the Caribbean and in Hong Kong. In 1997, He became a King's Counsel (then Queen's counsel). In 2003, he was elected Chairman of the Criminal Bar Association of England and Wales and later that year he was appointed Director of Public Prosecutions ("**DPP**") for England and Wales. In this capacity he was Chief Prosecutor and the Director of the English national prosecuting authority, the Crown Prosecution Service ("**CPS**"). As DPP, he was responsible to Parliament for all prosecutions brought within the English jurisdiction, and personally responsible for the most serious cases; for determining and preferring criminal charges, including in the most serious national security cases; for the development of criminal justice policy in conjunction with senior government ministers and the Prime Minister; for the performance of the CPS; for relations with overseas prosecutors and prosecuting agencies; and for the ethical and professional conduct of prosecutors in court. He held the post of DPP for five years until 2008.

10. Between 2001 and 2016 he sat as a Recorder (part-time judge) of the Crown Court, latterly at

the Central Criminal Court in London. Since 2010, he has been a Deputy (part-time) High Court Judge sitting in the Administrative Court of the High Court in London dealing with judicial reviews of the policies and practices of Government and public bodies.

11. In 2007, he was knighted by the Queen for services to the law, and in 2010 he was appointed to the House of Lords, the Upper Chamber of the United Kingdom Parliament, where he sits as an Independent. He was a Visiting Professor of Law at the London School of Economics between 2009-2012. In 2012, he was elected Warden (President) of Wadham College in the University of Oxford, serving in that office until 2021, and he has been a member of the Law Faculty of Oxford University since 2012.

12. He has a very high level of expertise in criminal law and in the part played by international human rights instruments and treaties in regulating criminal law and the ethical and professional behaviour of judges and prosecutors in criminal proceedings.

13. **Mr Tim James-Matthews** was called (admitted) to the Bar of England and Wales in 2018. He is a member of Matrix Chambers, London. Mr James-Matthews is also admitted as a lawyer of the Supreme Court of New South Wales, Australia. Mr James-Matthews holds a Bachelor of Laws from the University of Sydney, and a Master of Law from the University of Cambridge. Mr James-Matthews is a specialist in criminal law, public law and human rights law.

C SUMMARY OF OPINION

14. In summary, and for the reasons which follow, we are of the opinion that:

14.1. **First**, if the allegations against Mr [redacted] and Mr [redacted] were justiciable in England and Wales, there would **not** be a realistic prospect of criminal prosecution and conviction for the analogous English criminal offence of conspiracy to commit misconduct in public office. In our view, a Court in England and Wales would likely regard the allegations advanced by NABU / SAPO to be fundamentally defective. See **Part G**, below.

14.2. **Secondly**, we consider that certain aspects of the conduct of the criminal investigation and proceedings against Mr [redacted] and Mr [redacted] have failed to satisfy minimum standards of fairness and natural justice, pursuant to Article 4 of the Seventh Protocol to the ECHR. In particular, we consider that the latest re-institution of the proceedings by the SAPO is in breach of the *ne bis in idem* principle, and is a potential violation of Article 4 of the Seventh Protocol to, the ECHR.See **Part H**, below.

D FACTUAL BACKGROUND

15. As noted above, the criminal investigation in relation to Mr [redacted] and Mr [redacted], concerns the decision by the NEURC to introduce a formula for calculating the projected wholesale electricity market price in Ukraine, known as the Rotterdam+ formula. In this **Part B**, we set out a brief summary (derived from the documents identified in Annex A) of the factual background to the adoption of the Rotterdam+ formula. We have not sought to include an exhaustive summary of all of the facts, but confine our analysis to those facts which are necessary for the reader to understand our Expert Opinion.

D.1. The NEURC, and the wholesale electricity market

16. The NEURC is the state regulatory authority for the electricity sector in Ukraine. The roles and functions of the NEURC, established pursuant to the Law of Ukraine On Electricity, include ensuring the implementation of price and tariff policy within the electricity sector. Inevitably, the performance of that function will involve balancing the interests of the State, corporate participants in the electricity market, and consumers of electricity (including both substantial corporate consumers, and domestic household consumers).

17. Pursuant to Article 15 of the Law of Ukraine On Electricity, purchases of all electrical power generated at power plants with capacity over a certain threshold, and all wholesale of electrical power, are conducted on the wholesale electricity market (or 'WEM'). There is a single wholesale electricity market in Ukraine.

18. A further significant contextual factor is the impact of the war in Eastern Ukraine, and the unlawful annexation of parts of Ukrainian territory by the Russian Federation in 2014. Of relevance to the present case, one impact of that conflict was that Ukraine became a net *importer* of coal (having previously been a net *exporter* of coal).

D.2. The adoption of the Rotterdam+ formula

19. In order to understand the summary which follows, it is necessary briefly to explain the particular methodology for the calculation of the wholesale electricity market price which is at issue in the present case. The methodology eventually adopted was known as 'Rotterdam+', because it comprises: (**i**) the average price for coal for the preceding 12 months, according to the standard Amsterdam-Rotterdam-Antwerp ("**ARA**") coal price index, referred to as "**API 2**" (the "Rotterdam" aspect of the methodology); together with (**ii**) the cost of transportation of thermal coal to Ukraine, including the cost of steam coal delivery by sea to Ukraine for the preceding 12

months, its transportation from the ship to warehouses of Ukrainian ports for the preceding 12 months, and the cost of transporting coal by rail throughout the territory of Ukraine for the preceding 12 months (the "plus" aspect of the methodology). We understand that the adoption of the Rotterdam+ formula was always intended to be a temporary measure, pending electricity market liberalisation.

20. On 18 November 2015, the NEURC published a draft procedure for the calculation of the wholesale electricity market price. At that stage, the proposal was that the price should reflect the API 2 index, but should *not* include the cost of transportation. That is, at that stage, the proposal was *not* to adopt the Rotterdam+ methodology.

21. It is possible to identify, in the documents we have reviewed, the methodology adopted by the NEURC in using the Rotterdam+ formula in Resolution No. 289. In particular:

    21.1. The NEURC wrote to the Antimonopoly Committee of Ukraine indicating that it had undertaken "*comparative calculations of several variants of general approaches and principles*" to the determination of the wholesale electricity price. In particular, it would appear that the NEURC considered at least three alternative bases for the pricing: **(i)** the average cost of the price of Ukrainian coal, sold on the European market; **(ii)** the API 2 index; and **(iii)** the API 2 index, together with transportation costs (i.e. the Rotterdam+ formula).

    21.2. At one stage of the NEURC's formulation of Resolution No. 289, the NEURC favoured the adoption of the API 2 index (i.e. without including the cost of transportation). As noted above, that was the method of calculation adopted in the draft procedure for the calculation of the wholesale electricity market price, published on 18 November 2015.

    21.3. It is clear that the NABU / SAPO do not know the circumstances by which the NEURC *in fact* came to change its favoured methodology to the calculation of the wholesale electricity market price, and came to favour the Rotterdam+ methodology. The indictment against Mr [redacted] and Mr [redacted] explicitly states that the NEURC's position changed "*under circumstances not established by the investigation*", but as a result of "*further systematic actions [by "unidentified officials of the DTEK Group of Companies"] aimed at persuading and further assisting*" NEURC officials in their consideration of the appropriate methodology. That is a very significant limitation.

    21.4. It is alleged that some DTEK employees (and, in particular, Mr [redacted] and Mr [redacted]) were involved in advocating to officials of the NEURC in favour of the adoption of the

Rotterdam+ formula. For example, it is alleged that Mr [redacted] sent an "*informal proposal*", reflecting the Rotterdam+ formula to an official at the NEURC. However, we note that it is also clear from the indictment that other electricity market participants (including PJSC Donbasenergo and SE Energorynok) were also involved in advocacy to the NEURC at this time.

21.5. The proposal which would become Resolution No. 289 was approved by each of the members of the NEURC (the majority of whom are not alleged to be part of any criminal agreement involving Mr [redacted] and Mr [redacted]).

21.6. The proposal was also approved by: **(i)** the Antimonopoly Commission of Ukraine; **(ii)** the State Regulatory Service of Ukraine; and **(iii)** the Ministry of Energy and Coal Industry of Ukraine.

22. On 3 March 2016, the NEURC adopted Resolution No. 289. Resolution No. 289 contained the proposed methodology for determining the projected WEM price.

23. We note, for completeness, that the appropriateness of the adoption of Resolution No. 289 has been subsequently considered by a number of administrative and judicial bodies:

23.1. The Antimonopoly Commission of Ukraine conducted a special investigation into possible violations of competition in the market, following the adoption of Resolution No. 289 (Case No. 128-26.13/66-19). The Antimonopoly Commission of Ukraine concluded that no violations had been committed by the NEURC. We are instructed that an appeal by the NABU against this decision was rejected by the Commercial Court of Kyiv.

23.2. The District Administrative Court of Kyiv City, in an administrative challenge to Resolution No. 289 (Case 826/13858/16), concluded that the NEURC had acted within its powers, based on good reasons, in good faith and impartially.

E PROCEDURAL BACKGROUND

24. On 24 March 2017, detectives of the NABU, under the procedural supervision of the SAPO, commenced the pre-trial investigation of criminal offences in Case No. 52017000000000209 ("**Case No. 209**").

25. On 8 August 2019, a number of individuals, including Mr [redacted] and [redacted], were formally notified that they were suspected of having committed criminal offences.

E.1. The first termination of the criminal proceedings

26. On 27 August 2020, the Senior Prosecutor at the SAPO issued a resolution to terminate criminal proceedings in Case No. 209. That was on the basis that "*no sufficient evidence [had] been collected against a person for proving [their] guilt in court and all other means of obtaining sufficient evidence have been explored.*" In particular, the Senior Prosecutor concluded that there was insufficient evidence to determine that the actions alleged against the suspects had caused loss ("*severe consequences*", as required by article 364(2) of the Criminal Code of Ukraine). The Senior Prosecutor concluded that "*no proper, admissible, reliable, and sufficient evidence was collected in [the] course of pre-trial investigation, which evidence would be conclusive proof showing that the development, adoption and implementation of [Resolution No. 289] caused to anyone severe consequences, i.e. direct damage or losses.*"

27. Two allegedly aggrieved parties sought to challenge the Senior Prosecutor's decision to terminate criminal proceedings in Case No. 209.

28. On 27 October 2020, a Pre-Trial Judge of the High Anti-Corruption Court of Ukraine ("**HACC**") (Pre-Trial Judge [redacted]) reversed the Senior Prosecutor's decision to terminate criminal proceedings in Case No. 209. That was on the basis that, in the view of the Pre-Trial Judge, the "*reasons and grounds*" relied upon by the Senior Prosecutor "*are not sufficient for making [the] decision to terminate criminal proceedings.*" In essence, the Pre-Trial Judge noted that the expert evidence obtained in the course of the investigation differed in the expert's conclusions as to whether the alleged conduct had caused "*severe consequences*", as required, and the prosecutor "*failed to specify in his resolution any particular expert opinion (examination report) he has disagreed with, and his reasons for such disagreement*".

E.2. The second termination of the criminal proceedings

29. On 21 January 2021, a Senior Prosecutor at the SAPO issued a further resolution to terminate criminal proceedings in Case No. 209. Again, that decision was taken on the basis of an insufficiency of the available evidence. In particular, the Senior Prosecutor noted that there were a range of expert opinions as to the existence of damage caused by the adoption of Resolution No. 289. However, given that guilt would need to be proved beyond reasonable doubt, it was impossible to establish the fact of damage. The Senior Prosecutor also noted that Resolution No. 289 had been the subject of several court challenges, but had never been invalidated.

30. However, on 25 January 2021, the First Deputy head of the SAPO cancelled the resolution to terminate criminal proceedings in Case No. 209.

E.3. The third termination of the criminal proceedings

31. On 9 April 2021, a Senior Prosecutor at the SAPO issued a further resolution to terminate criminal proceedings in Case No. 209. This decision was taken for substantially the same reasons as given in relation to the 21 January 2021 decision.

32. On 15 April 2021, the First Deputy head of the SAPO again cancelled the resolution to terminate criminal proceedings in Case No. 209.

E.4. The fourth termination of the criminal proceedings

33. On 20 May 2021, a Senior Prosecutor at the SAPO issued a further resolution to terminate criminal proceedings in Case No. 209. That decision was reached on the basis of "*the failure to establish sufficient evidence to prove the person's guilt in court and [having] exhaust[ed] the opportunities to obtain them.*" A number of different reasons were given in support of that conclusion, including that:

    33.1. The offence in Article 364 of the Criminal Code of Ukraine requires the "*use by an official of a government or position contrary to the interests of the service*". However, responsibility for the development and adoption of Resolution No. 289 did not lie with any of the suspects. Therefore, "*the criterion of a special subject of crime – an official – should not be met*".

    33.2. The decision as to the formula to be adopted for the calculation of the wholesale electricity market price was a matter within the discretion of the NEURC. There were a number of legitimate outcomes of the NEURC's decision, such that there was no "*imperative obligation to act in any one way*". Further, although Resolution No. 289 had been the subject of some criticism, and had been "*challenged repeatedly in an administrative manner*", it had nonetheless not been revoked.

    33.3. There was "*no proper and admissible evidence to support the occurrence of severe consequences*".

34. On 13 October 2021, the HACC dismissed appeals by alleged victims against the resolution to terminate criminal proceedings in Case No. 209. The HACC concluded that it was within the Senior Prosecutor's discretion to close the criminal proceedings on the basis that he considered that there was a lack of sufficient evidence to reach the criminal standard of proof; that the NABU

had exhausted all routes to obtain further evidence; and the deadline for the pre-trial investigation had expired.

35. On 21 September 2022, the HACC Appeals Chamber upheld the decision by the HACC to dismiss the appeals, concluding that none of the alleged victims had standing to pursue the appeals.

E.5. The cancellation of the termination of Case No. 209, and the institution of Case No. 278 and Case No. 276

36. Notwithstanding the decision of the HACC Appeals Chamber, on 22 September 2022 (i.e. the day after the decision of the HACC Appeals Chamber), the Head of the SAPO cancelled the resolution to terminate criminal proceedings in Case No. 209.

37. Also on 22 September 2022:

37.1. A SAPO prosecutor 'split' Case No. 209, and, on 18 October 2022, transferred the materials from Case No. 209 to Case No. 52022000000000278 ("**Case No. 278**").

37.2. Detectives at the NABU commenced an investigation concerning the application of the Rotterdam+ formula in the period 2018 to 2019, in Case No. 52022000000000276 ("**Case No. 276**").

38. The subject matter of Case No. 278 and Case No. 276 overlaps substantially with the subject matter of Case No. 209. As we understand the position, the only minor differences between Case No. 209 and Case No. 278 and Case No. 276 are:

38.1. First, that Case No 209 and Case No. 278 both relate to the period 2016 to 2018 (i.e. the adoption and implementation of Rotterdam+); whereas Case No. 276 is said to relate to the *impact* of the Rotterdam+ formula in the period 2018 to 2019.

38.2. Secondly, Case No. 276 also concerns additional allegations concerning certain other NEURC employees.

39. On 14 March 2023, a number of individuals, including Mr [redacted] and Mr [redacted], were indicted in relation to Case No. 209.

F THE CRIMINAL ALLEGATIONS AGAINST MR [redacted] AND MR [redacted]

40. We have reviewed the indictment dated 14 March 2023 in Case No. 209 ("**the Indictment**"). The charges against Mr [redacted] and Mr [redacted] are in identical terms, namely:

> *ч. 5 of Article 27, Part 2 of Article 28, Part 2 of Article 364 of the Criminal Code of Ukraine - aiding and abetting in the abuse of office, i.e. intentional use of official position by an official contrary to the interests of the service, which caused grave consequences for the state and public interest, committed by a group of persons by prior conspiracy.*

41. Based on the Indictment, the essence of the criminal allegations against Mr [redacted] and Mr [redacted] appears to be as follows:

41.1. **First**, it is alleged that Mr [redacted] and Mr [redacted] entered into an "*agreement*" with three NEURC officials, namely Mr [redacted], Mr [redacted] and Mr [redacted]; and "*other officials of DTEK Group of Companies not identified by the investigation*".

41.2. **Secondly**, it is alleged that it was agreed that the NEURC officials identified above would intentionally "*[use] their official position contrary to the purpose, goals, functions and tasks assigned to the state collegial body ... [and] contrary to the interests of the service*", by procuring the "*preparation and adoption (issuance) of a regulatory legal act of a regulatory nature*" which favoured DTEK "*by unjustified inclusion of delivery costs in the forecast price (tariff) for the sale of electricity in the Wholesale Electricity Market of Ukraine*". That is, it is alleged that, by the adoption of Resolution No. 289, the NEURC officials sought the "*unjustified*" adoption of the Rotterdam+ formula. The basis upon which the adoption of the Rotterdam+ formula is said to be "*unjustified*" appears to be that the transportations involved in the 'plus' element "*are not documented and were not actually carried out*".

41.3. **Thirdly**, it is alleged that the object of the agreement was to "*obtain illegal benefits*" by DTEK. The benefit is alleged to be UAH 13,137,211,170.80 "*which was overpaid by electricity consumers*". The basis for the calculation of that figure is not set out in the Indictment. Those alleged overpayments by "*electricity consumers*" are alleged to constitute "*grave consequences*".

G PART 1: THE PROSPECT OF CRIMINAL PROCEEDINGS AND CONVICTION IN ENGLAND AND WALES

42. We are asked to consider whether, in the event that the allegations against Mr [redacted] and Mr [redacted] were justiciable in England and Wales, there would be a realistic prospect of criminal prosecution and conviction.

G.1. Comparable criminal offence in England and Wales

43. It is of assistance to identify, first, the criminal offence in England and Wales which would be analogous to the offence with which Mr [redacted] and Mr [redacted] have been charged (i.e. the offence of aiding and abetting in the abuse of office, contrary to ч. 5 of Article 27, Part 2 of Article 28, Part 2 of Article 364 of the Criminal Code of Ukraine).

44. In our view, the analogous criminal offence in England and Wales would be conspiracy to commit the offence of misconduct in public office.

45. In England and Wales, the offence of misconduct in public office has four elements,[1] being:

45.1. **First**, the defendant must be a public officer, acting as such. That is, the defendant must *both*: **(i)** be a 'public officer', in the sense that they are "*appointed to discharge a public duty*";[2] and **(ii)** be 'acting as such' (i.e. "*acting in the discharge of the duties of the office*") at the time of the commission of the offence.[3]

45.2. **Secondly**, the defendant must wilfully neglect to perform his duty and/or wilfully misconduct himself. Misconduct may take a variety of forms (including both an act and, in some circumstances, an omission to act).[4] Whether something *is* or *is not* misconduct is a question of fact, in the circumstances of each individual case.

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1 See: *Attorney General's Reference (No3 of 2003)* [2005] 1 QB 75; *Chapman* [2015] QB 883.

2 There is no exhaustive definition of what constitutes a 'public officer', for the purposes of the offence. A public officer is "*every one who is appointed to discharge a public duty, and receives compensation in whatever shape whether from the Crown or otherwise*": *Henly v Lyme* Corp (1828) 5 Bing 91, 130; Bowden [1996] 1 WLR 98, 103; *Belton* [2010] EWCA Crim 2857 at §29. Put another way, a public officer is "*an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public*": *Whitaker* [1914] 3 KB 1283, 1296. The focus is on the duties carried out by the individual, and whether they "*represent[] the fulfilment of one of the responsibilities of government*": *Cosford* [2014] QB 81 at §34.

3 *R (Johnson) v Westminster Magistrates' Court* [2019] EWHC 1709 (Admin) at §27. Put another way, "*at the time of the alleged misconduct the individual must be acting as, not simply whilst, a public official.*" (ibid, §33).

4 *Dytham* [1979] QB 722.

45.3. **Thirdly**, the defendant must misconduct himself to such a degree as to amount to an abuse of the public's trust in the office holder. Put another way, the misconduct must be sufficiently serious to be "*worthy of condemnation and punishment*".[5]

45.4. **Fourthly**, the defendant must engage in the relevant misconduct without reasonable excuse or justification.

46. We note that the applicable Ukrainian criminal offence requires that the abuse of office give rise to "*grave consequences*". While that is not an explicit requirement of the offence of misconduct in public office in England and Wales, that *is* a factor which is taken into account in assessing the seriousness of the relevant misconduct. The consequences of the misconduct will normally be relevant to its seriousness. In *Attorney General's Reference (No3 of 2003)* [2005] 1 QB 75, the Court of Appeal of England and Wales reasoned that:

> *It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively ... will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer.*

47. In addition, in England and Wales, a criminal 'conspiracy' requires proof that:[6]

47.1. **First**, the defendant entered into an agreement with at least one other person; and

47.2. **Secondly**, the nature of that agreement was that a course of conduct will be pursued which, if carried out in accordance with the conspirators' intentions: (a) will necessarily amount to, or involve, the commission of a criminal offence by one or more parties to the agreement; or (b) would amount to, or involve, the commission of a criminal offence, but for the commission of that criminal offence being factually impossible.

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[5] The threshold of seriousness has been expressed in different ways. Most recently, in *Chapman* [2015] QB 883, the Court of Appeal determined that the jury should be told that the misconduct must be "*worthy of condemnation and punishment*", and that it must "*be judged by them as having the effect of harming the public interest*". In *Attorney General's Reference (No3 of 2003)* [2005] 1 QB 75, the standard was described as being such that the misconduct is "*an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder*".

[6] Criminal Law Act 1977, s 1(1).

G.2. Expert Opinion

48. We are of the clear view that, if the allegations against Mr [redacted] and Mr [redacted] were justiciable in England and Wales, there would **not** be a realistic prospect of criminal prosecution and conviction for the offence of conspiracy to commit misconduct in public office. That is because:

49. **First**, a Court in England and Wales would likely consider there to be an absence of any clear basis for the allegation that the adoption of the Rotterdam+ formula involved any form of unlawfulness or misconduct (by Mr [redacted] and Mr [redacted], or at all). That is because:

    49.1. It is clear that the decision of the NEURC to adopt Resolution No. 289, and the Rotterdam+ formula, was taken after a considerable period of consideration, involving extensive consultation with relevant stakeholders. That process included: **(i)** the publication of draft proposals for public consultation; **(ii)** consultation with various market participants and stakeholders; **(iii)** the approval of all of the members of the NEURC; and **(iv)** the approval of the Antimonopoly Commission of Ukraine, the State Regulatory Service of Ukraine, and the Ministry of Energy and Coal Industry of Ukraine. We consider that a Court in England and Wales would regard that to be a transparent, legitimate, and obviously lawful process.

    49.2. As noted above, it is clear that the NABU / SAPO do not know the circumstances by which the NEURC *in fact* came to change its favoured methodology to the calculation of the wholesale electricity market price, and came to favour the Rotterdam+ methodology. Indeed, the indictment against Mr [redacted] and Mr [redacted] explicitly states that the NEURC's position changed "*under circumstances not established by the investigation*", but as a result of "*further systematic actions [by "unidentified officials of the DTEK Group of Companies"] aimed at persuading and further assisting*" NEURC officials in their consideration of the appropriate methodology. In our view, a Court in England and Wales would consider that to be a very significant omission in the NABU's / SAPO's case. Fundamentally, it means that the NABU / SAPO cannot exclude (as necessary, to the criminal standard) the reasonable possibility that the NEURC's ultimate decision to prefer the Rotterdam+ methodology was a decision taken in good faith, and on the basis of proper and lawful consideration of all relevant matters. Further, it has the effect that the NABU / SAPO have no evidence as to any *causal* relationship between conduct by Mr [redacted], Mr [redacted], or any other DTEK employee, and the NEURC's decision.

    49.3. The height of the allegations made by the NABU / SAPO appears to be that DTEK employees advocated for the adoption of the Rotterdam+ formula to certain officials of the

NEURC. However: First, it is not at all clear on what basis advocacy of that kind is said to be *improper*, much less unlawful. Of course, it is entirely proper, and wholly consistent with democratic principles, for individuals and entities to advocate to public bodies for the adoption of particular policies. Secondly, and in any event, in view of the conclusion that the NABU / SAPO do not know the circumstances by which the NEURC *in fact* came to adopt the Rotterdam+ methodology, it is wholly impossible to identify any basis for suggesting that any advocacy by DTEK employees in fact impacted upon the NEURC's decision to prefer the Rotterdam+ formula.

49.4. We also note that other electricity market participants (including PJSC Donbasenergo and SE Energorynok) were also involved in advocacy to the NEURC at this time. The Indictment *acknowledges* the advocacy of those other participants, but does not suggest that there was anything wrongful about advocacy of that kind. It is difficult to see how there could be any meaningful distinction of principle between the activities of PJSC Donbasenergo, SE Energorynok, and others (which NABU / SAPO appear to regard as legitimate conduct), and precisely the same conduct of DTEK employees (which is alleged to be criminal). To state the obvious: Whether or not the NABU / SAPO *agrees with* the position taken by DTEK, PJSC Donbasenergo, and/or SE Energorynok cannot coherently inform the legitimacy (in principle) of the act of advocating for a particular position with the NEURC. The act of advocating for a particular position is either legitimate, or it is illegitimate (in all cases, and notwithstanding the merits of the substantive position taken). We do not consider that there is material in the Indictment capable of supporting the conclusion that advocating to the NEURC in relation to the methodology for the setting of the wholesale electricity market price was *per se* wrongful, illegitimate, or criminal.

50. **Secondly**, we consider that a Court in England and Wales would approach the assessment of the appropriateness of the Rotterdam+ formula on the basis that the NEURC was required to undertake an expert evaluation of competing pricing proposals and, thereby, to strike a justifiable balance between complex competing interests. Moreover, it is inherent in the nature of such an evaluation that: **(i)** reasonable decision-makers may well differ as to the preferred pricing approach, such that it does not admit of a single "*correct*" answer; and **(ii)** the ultimate judgment as to which pricing approach is to be preferred is likely to be regarded, in essence, as a political decision.

51. In view of the foregoing, we consider that the approach of NABU / SAPO in asserting that the Rotterdam+ formula is "*unjustified*", or that the adoption of the API 2 index (i.e. without the addition of transportation costs) is "*the most balanced*" of the methodologies available, would

be treated with considerable scepticism by a Court in England and Wales. We do not doubt that there are those who would disagree (and, perhaps, disagree *strongly*) with the adoption of the Rotterdam+ formula. The adoption of *any* pricing methodology will invariably favour some market participants, and cause detriment to others. It is for that reason that a responsible State authority is required to take the *political* decision as to how those competing interests ought properly to be balanced. However, the fact that a different methodology is *capable* of being justified, or even preferred (including by a prosecutor), does not answer whether it properly constituted a *criminal offence* for the NEURC to adopt the methodology which it ultimately chose.

52. **Thirdly**, and in any event, a Court in England and Wales would likely consider that the allegations in the Indictment do not support the assertion by the NABU / SAPO that the adoption of the Rotterdam+ formula was "*unjustified*":

52.1. As noted above, the District Administrative Court of Kyiv City concluded that Resolution No. 289 was adopted by the NEURC within the scope of its authority, and for good reasons. We consider that a Court in England and Wales would exercise considerable caution before concluding that a decision found to be lawful and proper by an administrative court was, in the criminal context, "*unjustified*" and criminal.

52.2. Two contextual factors are, in our view, particularly significant in determining the economic justification for the wholesale electricity market price: First, the NEURC was determining the *single* wholesale market price for electricity in Ukraine. That is, whatever methodology was to be adopted for the determination of the wholesale price had to be the 'best fit' for the entirety of the electricity market. Secondly, following the conflict in Eastern Ukraine, Ukraine had become a net *importer* of coal. That is, a significant part of the coal-generated electricity in Ukraine was to be derived from *imported* coal with unavoidable transportation costs.

52.3. We note, also, that the economic justification for the adoption of the Rotterdam+ formula is supported by available expert evidence. By way of illustration:

52.3.1. Experts [redacted], [redacted], and [redacted] concluded that "*the inclusion of the costs of transporting coal from the ports of Amsterdam-Rotterdam-Antwerp during the determination of the forecasted wholesale market price ... is economically justified.*" In particular, the experts conclude that:

Analysis of global and Ukrainian coal markets demonstrates that adding freight from ARA ports to Yuzhnyi and terminal handling costs as components of coal prices

is justified, is a mechanism for setting a fair price for Ukrainian coal, ensures a level playing field exists for the domestic producers, facilitates transparent and uniform price-setting mechanism for coal, growth of coal production in Ukraine, and reduction of coal imports.

52.3.2. A September 2018 research paper by the European Association for Coal and Lignite ("**EURACOAL**") concluded that the adoption of the Rotterdam+ formula was "*entirely correct*".

52.4. The case advanced by the NABU / SAPO appears to be that the Rotterdam+ formula was "*unjustified*" because in *some* cases, that will involve payments for transportation which is "*not documented and were not actually carried out*". In one sense, that is inevitable: *Some* market participants did not import coal from outside Ukraine, such that the inclusion of transportation costs did not reflect the true cost – for *those* market participants – of the electricity generation. However, with respect, that does not strike as a persuasive justification for the conclusion that the Rotterdam+ formula was "*unjustified*":

52.4.1. As noted above, the NEURC was required to adopt a methodology for determining the *single* wholesale market price for electricity in Ukraine. Invariably, that determination involved balancing between market participants in different positions (for example, those who imported coal, and those who did not).

52.4.2. The approach of the NABU / SAPO also ignores the fact that the alternative (i.e. API 2) risked damaging the electricity market more generally. If the wholesale price *did not* account for the cost of transfer, those who *did* import coal into Ukraine would nonetheless be subject to a wholesale pricing mechanism which did not take account of that significant additional cost. That would affect the economic viability of the importation of coal. In circumstances where Ukraine had become a net importer of coal, the NEURC were plainly entitled to consider that accommodating the economic interests of entities who did import coal was in the interests of the market more generally.

53. **Fourthly**, a Court in England and Wales would likely consider there to be an absence of any clear basis for the allegation that the adoption of the Rotterdam+ formula caused overpayments by electricity consumers, or any other "*grave consequences*".

54. As above, it is of concern that, although the Indictment alleges that UAH 13,137,211,170.80 "*was overpaid by electricity consumers*", the basis for the calculation of that figure is never set out in

the Indictment. That makes it impossible properly to scrutinise the alleged "*grave consequences*" in this case.

55. Indeed, we note that the expert evidence available to NABU / SAPO significantly undermines the suggestion that the adoption of the Rotterdam+ formula caused any gain to the alleged conspirators (or DTEK) and/or loss to "*electricity consumers*". As to that:

55.1. Expert [redacted] concluded that "*there is no documentary evidence that the adoption of [the Rotterdam+ formula] has led to an increase in the profitability of thermal power generation enterprises of Ukrainian TPPs above the global average level of the electricity generation industry*" (Question 4). Further, "*there is no documentary evidence that the adoption of [the Rotterdam+ formula] has led to an increase in the profitability of DTEK's enterprises above the global average*" (Question 4).

55.2. Expert [redacted] concluded that "*consumers did not incur material losses (damages) in the period from April 2016 to December 2017 in the amount of UAK 18,868,148,667.62 as a result of the implementation of*" the Rotterdam+ formula (Question 1). [redacted] further concluded that "*there is no evidence of excessive profits of DTEK's TPP Group*" (Question 2).

55.3. Experts [redacted], [redacted], and [redacted] concluded that "*there is no documentary evidence that the adoption of [the Rotterdam+ formula] led to an increase in the profitability of coal mining enterprises and thermal power generation enterprises of Ukrainian TPPs in 2016-2018*" (Question 2). Further, the exerts found that there were "*no damages to the state and/or consumers and/or other business entities*" as a result of the adoption of the Rotterdam+ formula (Question 4).

55.4. Expert [redacted] concluded that "*no losses were incurred by the state and/or consumers and/or business entities*" by the adoption of the Rotterdam+ formula (Question 4).

56. We readily acknowledge that it is possible that other experts (including those engaged by NABU / SAPO) may take a different view to the determination of any gain to the alleged conspirators (or DTEK) and/or loss to "*electricity consumers*". However, given that it is necessary for the Court to be satisfied of criminal allegations *beyond reasonable doubt*, the existence of a cogent body of expert evidence suggesting an absence of harm caused by the adoption of the Rotterdam+ formula would, in our view, be a matter of real concern to a Court in England and Wales.

57. As noted above, the analogous criminal offence in England and Wales does not require proof of "*grave consequences*". However, that *is* a factor which is routinely taken into account in assessing the seriousness of the relevant misconduct. In our view, the absence of proof of overpayments by electricity consumers, or any other "*grave consequences*", would invariably lead a Court in England and Wales to conclude that any misconduct was not "*serious*" / criminal.

H PART 2: FAIRNESS OF THE UKRAINIAN CRIMINAL PROCEEDINGS

58. We are asked to consider whether certain aspects of the conduct of the criminal investigation and proceedings against Mr [redacted] and Mr [redacted] have satisfied minimum standards of fairness and natural justice, pursuant to Article 4 of the Seventh Protocol to the ECHR.

H.1. Fairness and natural justice: Legal principles

59. Article 4 of the Seventh Protocol to the Convention provides that:

> *1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
>
> *2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*
>
> *3. No derogation from this Article shall be made under Article 15 of the Convention*

60. Article 4 of the Seventh Protocol enshrines a fundamental right guaranteeing that no one is to be tried or punished in criminal proceedings for an offence for which they have already been finally convicted or acquitted: *Zolotukhin v Russia* (Application No. 14939/03, 10 February 2009) at §58. The three components of the *ne bis in idem* principle (see *Mihalache v Romania* (Application No. 54012/10, 8 July 2019) at §49) are:

60.1. First, the two sets of proceedings must be "criminal" in nature;

60.2. Secondly, the two sets of proceedings must concern the same facts (or "*substantially the same facts*", see *Zolotukhin* at §82); and

60.3. Thirdly, there must be a duplication of proceedings.

61. There is no requirement that the decision resulting in the 'acquittal' or 'conviction' of the applicant should be a decision of a court (although that will often be the case). The European Court of Human Rights has given detailed consideration to whether the discontinuance of criminal proceedings by a public prosecutor amounts to an 'acquittal' or a 'conviction' for the purposes of Article 4 of the Seventh Protocol. In *Mihalache v Romania* (Application No. 54012/10, 8 July 2019) at §§97-98, the Grand Chamber explained:

> *97. In order to determine whether a particular decision constitutes an "acquittal" or a "conviction", the Court has therefore considered the actual content of the decision in issue and assessed its effects on the applicant's situation. Referring to the text of Article 4 of Protocol No. 7, it considers that the deliberate choice of the words "acquitted or convicted" implies that the accused's "criminal" responsibility has been established following an assessment of the circumstances of the case, in other words that there has been a determination as to the merits of the case. In order for such an assessment to take place, it is vital that the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case. The authority must then study or evaluate the evidence in the case file and assess the applicant's involvement in one or all of the events prompting the intervention of the investigative bodies, for the purposes of determining whether "criminal" responsibility has been established (see, mutatis mutandis, Allen v. the United Kingdom [GC], no. 25424/09, § 127, ECHR 2013, a case concerning the scope of the presumption of innocence under Article 6 § 2 of the Convention, in which the content, and not the form, of the decision, was the decisive factor for the Court).*
>
> *98. Thus, the finding that there has been an assessment of the circumstances of the case and of the accused's guilt or innocence may be supported by the progress of the proceedings in a given case. Where a criminal investigation has been initiated after an accusation has been brought against the person in question, the victim has been interviewed, the evidence has been gathered and examined by the competent authority, and a reasoned decision has been given on the basis of that evidence, such factors are likely to lead to a finding that there has been a determination as to the merits of the case. Where a penalty has been ordered by the competent authority as a result of the behaviour attributed to the person concerned, it can reasonably be considered that the competent authority had conducted a prior assessment of the circumstances of the case and whether or not the behaviour of the person concerned was lawful.*

62. On the facts of *Mihalache*, the Grand Chamber concluded that a discontinuance by a public prosecutor (together with an administrative sanction) did amount to a 'conviction' for the purposes of Article 4 of the Seventh Protocol. Relevant factors in that assessment included (at §100):

> *In the instant case, under domestic law the public prosecutor's office was called upon to participate in the administration of criminal justice. The prosecutor had jurisdiction to*

investigate the applicant's alleged actions, questioning a witness and the suspect to that end. Subsequently, he applied the relevant substantive rules laid down in domestic law; he had to assess whether the requirements were fulfilled for characterising the applicant's alleged acts as a criminal offence. On the basis of the evidence produced, the prosecutor carried out his own assessment of all the circumstances of the case, relating both to the applicant individually and to the specific factual situation. After carrying out that assessment, again in accordance with the powers conferred on him under domestic law, the prosecutor decided to discontinue the prosecution, while imposing a penalty on the applicant that had a punitive and deterrent purpose (see paragraphs 11 to 15 above). The penalty imposed became enforceable on the expiry of the time-limit for an appeal by the applicant under domestic law.

H.2. Expert Opinion

63. We consider that certain aspects of the conduct of the criminal investigation and proceedings against Mr [redacted] and Mr [redacted] have failed to satisfy minimum standards of fairness and natural justice, pursuant to Article 4 of the Seventh Protocol to the ECHR. That is because:

64. **First**, there is no doubt that the proceedings against Mr [redacted] and Mr [redacted] are "criminal" in nature, in accordance with the *Engel* criteria: *Engel and others v The Netherlands*, 8 June 1976, Series A No. 22. That is true, both: **(i)** in the period prior to the fourth and final resolution to terminate criminal proceedings in Case No. 209; and **(ii)** in the period after the decision by the Head of the SAPO cancelled the resolution to terminate criminal proceedings in Case No. 209.

65. **Secondly**, we consider that the better view is that the termination of the criminal proceedings in Case No. 209 involves the 'acquittal' of Mr [redacted] and Mr [redacted], for the purposes of Article 4 of the Seventh Protocol to the ECHR. In particular, applying the decision in *Mihalache* (quoted above), we consider that, in the circumstances of this case, the preferable view is that the termination of the criminal proceedings (confirmed by the decision of the HACC Appeals Chamber) involves an 'acquittal'. That is because:

65.1. The decision to terminate Case No. 209 involved a considered, reasoned decision by an independent Senior Prosecutor of the SAPO. The prosecutor had complete jurisdiction in relation to the investigation and prosecution of the criminal allegations raised by the case. In deciding to terminate the criminal proceedings, the Prosecutor considered carefully the evidence which was available, and the investigatory measures which were outstanding.

65.2. Moreover, the termination decision has been the subject of careful, reasoned review by two judicial bodies (the Pre-Trial Judge of the HACC, and the HACC Appeals Chamber). That is, the decision of the Senior Prosecutor is also supported by independent *judicial* decision-making.

66. **Thirdly**, because this is a case which involves the *termination* and *reinstitution* of the same criminal proceedings, it is clear that the proceedings (both prior to termination, and after reinstitution) involve, both: **(i)** the same facts, or "*substantially the same facts*"; and **(ii)** the duplication of the proceedings.

67. Standing back, these proceedings have had a long and complex procedural history. The repetitive termination, and reinstitution, of the criminal proceedings is a striking and concerning feature of the background to this case. However, the fourth decision to terminate – a detailed and reasoned decision, endorsed by two judicial bodies on appeal – was of a nature as to afford finality in the resolution of the proceedings. We can well understand in these circumstances that Mr [redacted] and Mr [redacted] would feel aggrieved by the reinstitution of the proceedings. In that sense, the unfairness produced by the reinstitution of Case No. 209 is squarely of the kind which Article 4 of the Seventh Protocol is designed to protect against– ensuring an individual may not be tried or punished in criminal proceedings for an offence for which they have already been finally acquitted, by independent reasoned decision: *Zolotukhin* at §58.

68. Therefore, for the foregoing reasons, we consider that the latest re-institution of the proceedings by the SAPO is in breach of the *ne bis in idem* principle, and is a violation of Article 4 of the Seventh Protocol to, the ECHR.

G CONCLUSION

69. For the foregoing reasons, we consider that:

69.1. **First**, if the allegations against Mr [redacted] and Mr [redacted] were justiciable in England and Wales, there would **not** be a realistic prospect of criminal prosecution and conviction for the analogous criminal offence of conspiracy to commit misconduct in public office. In our view, a Court in England and Wales would likely regard the allegations advanced by NABU / SAPO to be fundamentally defective.

69.2. **Secondly**, we consider that certain aspects of the conduct of the criminal investigation and proceedings against Mr [redacted] and Mr [redacted] have failed to satisfy minimum standards of fairness and natural justice, pursuant to Article 4 of the Seventh Protocol to the ECHR. In particular, we consider that the latest re-institution of the proceedings by the SAPO is in breach of the *ne bis in idem* principle, and is a potential violation of Article 4 of the Seventh Protocol to, the ECHR.

LORD MACDONALD OF RIVER GLAVEN Kt KC

TIM JAMES-MATTHEWS

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London, United Kingdom

13 November 2023