

Ukrainian Private Law and the European Area of Justice

Edited by
EUGENIA KURZYNSKY-SINGER
and RAINER KULMS

*Max-Planck-Institut
für ausländisches und internationales
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und internationalen Privatrecht*

Mohr Siebeck

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Preface

More than five years have passed since the *Euromaidan*, when Ukrainian citizens protested vigorously for their country's orientation towards the European Union. In May 2014, Ukraine and the European Union concluded an Association Agreement that provides for gradual integration into the Internal Market by way of progressive approximation of Ukrainian law. The Association Agreement represents a deliberate policy choice which combines political conditionality with the Europeanisation of Ukrainian private law.

Ukraine's pro-European approximation process has never been linear. The country's potential for accommodating the *acquis communautaire* is severely tested, for both external and domestic reasons. Ukraine has to master the problems typical for a transition economy. The country also needs to organise its trajectory from the traditions of Soviet legal thinking to the sophisticated set of rules of European Union law which the Association Agreement is ushering in. Approximation presents legislators and scholars with a formidable challenge; sometimes the results are not fully convincing.

This volume assembles contributions from scholars from the region and from Germany. The underlying intention is to present a case of first impression as Ukrainian scholars assess modernisation of specific fields of their country's private law. This comes very close to taking a snapshot of private law issues that are subject to further evolution in the years to come. The non-Ukrainian contributors explore the impact of the Association Agreement and the *acquis communautaire*, and supply comments on the country's institutional needs. A final section reviews the EU's policy towards other East European neighbours in order to highlight transition analogies and reflect on potential alternatives to current integration models.

Hamburg, November 2018

Eugenia Kurzynsky-Singer
Rainer Kulms

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Abbreviations

AA	Association Agreement
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
Am. J. Comp. L.	American Journal of Comparative Law
Art(s).	Article(s)
BGB	Bürgerliches Gesetzbuch
bn	billion
BRICS	Brazil, Russia, India, China and South Africa
Brussels I	Regulation (EU) No 1215/2012
CC	Civil Code
cf.	compare
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
DCFTA	Deep and Comprehensive Free Trade Area
DRS	State Regulatory Service of Ukraine
EAEU	Eurasian Economic Union
EaP	Eastern Partnership
EC	Economic Code
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ed.	edition
ed. / eds.	editor/editors
EFTA	European Free Trade Association
EMCA	European Model Company Act
ENP	European Neighbourhood Policy
ERCL	European Review of Contract Law
et al.	et alii
etc.	et cetera
EU	European Union
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GNP	gross national product
GOST	Gosudarstvennyj Standart (State Standard)
HQCJ	High Qualification Council of Judges
i.e.	id est

IACL	International Association of Constitutional Law
ibid.	ibidem
ICC	International Criminal Court
id.	idem
IMF	International Monetary Fund
IRZ	Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit
JSC	joint-stock company
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
LLC	limited liability company
n.	note/footnote
NABU	National Anti-Corruption Bureau of Ukraine
NGO	non-governmental organization
No.	Number
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
OPEC	Organization of the Petroleum Exporting Countries
p. / pp.	page/pages
para(s).	paragraph(s)
PCA	Partnership and Cooperation Agreement
PIC	Public Integrity Council
PIL	Private International Law
pos.	position (section)
PPO	Public Prosecutor's Office
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev. dr. unif.	Revue de droit uniforme
RF	Russian Federation
RG	Rossijskaja gazeta
Rome I	Regulation (EC) No 593/2008
Rome II	Regulation (EC) No 864/2007
RPR	Reanimation Package of Reforms
Rus.	Russian
SAA	Stabilisation and Association Agreement
SBOF	Statistical Branch for Organizational Forms of Economic Entities
SCO	Shanghai Cooperation Organization
SGiP	Sovetskoe Gosudarstvo i Pravo [Soviet State and Law]
SMEs	small and medium-sized enterprises

SNG	Sodruzhestvo Nezavisimykh Gosudarstv [Commonwealth of Independent States]
Solvency II	The Solvency II Directive (2009/138/EC)
SPS	Sanitary and Phytosanitary Measures
SRO	self-regulated organization
SSR	Soviet Socialist Republic
subpara.	subparagraph
SZ RF	Sobranije zakonodatelstva Rossijskoi Federacii [Collection of Laws of the Russian Federation]
TASS	Russian News Agency
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UAH	Ukraine Hryvnia (national currency)
Ukr.	Ukrainian
UNIDROIT	Institut international pour l'unification du droit privé
UNO	United Nations Organisation
UNTS	United Nations Treaty Series
US	United States
USAID	United States Agency for International Development
USSR	Union of Soviet Socialist Republics
Venice Commission	European Commission for Democracy Through Law
Vol.	Volume
vs.	versus
WiRO	Wirtschaft und Recht in Osteuropa
WTO	World Trade Organization
ZEuP	Zeitschrift für Europäisches Privatrecht

I. From Association to Harmonisation

EU Private Law in Ukraine

The Impact of the Association Agreement

Jürgen Basedow

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The Association Agreement (AA) concluded in 2014 between the European Union (EU) and Ukraine¹ will have far-reaching consequences for the future of private law in Ukraine, a topic which will be explored in this paper. It will set out with a general survey of the Association Agreement (I.), then turn to its impact on private law (II.) and finally outline some considerations relevant to implementation (III.).

I. The EU–Ukraine Association Agreement

I. The agreement and the external policy of the Union

The Treaty on the Functioning of the European Union (TFEU)² distinguishes two types of association agreements: those concluded with former colonies and dependant territories of some Member States, and those transacted with

¹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3.

² Treaty on the Functioning of the European Union, consolidated version in OJ 2016 C 202/47.

other countries. The former are specifically regulated in Part IV, see Articles 198–204, and have lost much of their significance in the course of decolonization.³ The latter are just one type of international agreement which the Union may conclude in accordance with Title V of Part V, see Article 217. The EU–Ukraine Association Agreement is a treaty of the second kind, based upon Articles 217 and 218(5) and (8) TFEU.⁴

From treaty practice several types of association agreements emerge:⁵ Alongside agreements on “development association“ based upon the above-mentioned Article 198 TFEU, there are treaties concluded under what is now Article 217 TFEU providing for a “free trade association”, such as the one with South Africa,⁶ and others establishing an “accession association” considered as a first step of the respective country on the road towards full membership in the EU; many countries which are now Member States have in fact concluded such association agreements some years before their accession, laying down clear commitments on both sides to allow the non-EU party to “participate in the process of European integration”.⁷ The EU–Ukraine Agreement appears to fall into a fourth group of agreements providing for a close cooperation, in particular a Deep and Comprehensive Free Trade Area (DCFTA), without however making explicit the Contracting Parties’ intention of a future accession.⁸ Since this agreement was concluded in the context of

³ See *A. Zimmermann*, Vorbemerkung 1 zu Art. 198 AEUV, in: von der Groeben/Schwarze/Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. Baden-Baden 2015.

⁴ Council Decision (2014/295/EU) of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ 2014 L 161/1.

⁵ On the following classification see *Bungenberg* in: von der Groeben/Schwarze/Hatje, supra n. 3, Art. 217 AEUV, para. 90.

⁶ Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, done at Pretoria on 11 October 1999, OJ 1999 L 311/3.

⁷ See for example for Latvia the second paragraph of the preamble of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, done at Luxembourg on 12 June 1995, OJ 1998 L 26/3.

⁸ See on this issue *Tiede/Spiesberger/Bogedain*, *Das Assoziierungsabkommen zwischen der EU und der Ukraine – Weichensteller auf dem Weg in die EU?*, *KritV* 2014, pp. 151–159, in particular p. 153 f. Contrary to the Europe Agreement of Latvia, previous n., paragraph 6 of the preamble of the EU–Ukraine Agreement simply points out that the EU “acknowledges the European aspirations of Ukraine”, but it does not contain a political or legal commitment of the EU to accept Ukraine as a full member; this is considered as a novel concept designated as ‘integration without membership’ by *Van der Loo*, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*, Leiden and Boston 2016, pp. 175 ff.

the Neighbourhood Policy of the EU, one may refer to this type of association as a “neighbourhood association”.

Although the EU–Ukraine Agreement does not express the Union’s commitment to further integration of Ukraine, it provides for a far-reaching assimilation of structures and an approximation of laws, see below. This may be perceived as a certain contradiction between legal means and political objectives, enhanced by the trade-related provisions concerning third States. Articles 25 and 26 AA confine the free trade envisaged to “trade in goods originating in the territories of the Parties”, excluding goods from third States, in particular Russia. While this may appear as a normal corollary of a bilateral trade agreement, it cannot be ignored that Russia is the most important trading partner of Ukraine⁹ and that some manufacturing industries in both countries are closely integrated due to the common history. The exclusionary character of the EU–Ukraine Agreement is further exacerbated by the prohibition, enshrined in Article 39(1) AA, against maintaining or establishing customs unions or free trade areas with other States which are in conflict with the trade arrangements of the EU–Ukraine Agreement. These observations explain the critical assessment of the Agreement by some leading politicians.¹⁰

2. Liberalization and approximation

a) The Internal Market

The core element of the European Union is the Internal Market. It has brought about unprecedented prosperity on the continent and contributed to an integration of peoples that was previously unthinkable. Consequently, all applicants for membership have primarily been attracted by the Internal Market, and the various association agreements have mainly pursued the objective of preparing the candidate States for the later participation in the Internal Market. This is also the general thrust of the EU–Ukraine Agreement.¹¹

⁹ According to statistics provided by the private statistics portal Statista, 32.4% of Ukrainian imports from the year 2012 originated in Russia, while 31.0% originated in all EU Member States. 24.9% of the exports had a destination in the EU and 25.7% in Russia, see <<https://de.statista.com/infografik/1944/importe-und-exporte-der-ukraine>> (13 August 2016). The author *Andreas Gries* concludes that Ukraine needs both the EU and Russia. Statistics for the year 2014 published by the Broad College of Business of the Michigan State University indicate a share of 23.3% of Ukrainian imports coming from Russia and a share of 18.2% of all exports going to Russia; although these shares are lower than those given for 2012, Russia is still by far the most important trading partner, see <www.global.edge.msu.edu/countries/Ukraine/tradestats> (13 August 2016).

¹⁰ The Wikipedia entry “Assoziierungsabkommen zwischen der Europäischen Union und der Ukraine” cites critical statements by three former German Chancellors: *Helmut Schmidt*, *Helmut Kohl* and *Gerhard Schröder*.

In *economic* terms the Internal Market is a market, i.e. a device governing the production and distribution of goods and services. The demand and supply of such goods and services are balanced by the price mechanism: a shortage of supply will lead to rising prices, which incentivize suppliers to offer additional products and buyers to change to substitutes or reduce demand. By the same token, an excess of supply will have the converse effect, through falling prices, on both supply and demand. It is essential for this mechanism that prices be determined by the free interplay of supply and demand and that neither the State nor private third parties interfere, i.e. that resources can freely flow to the place of their most efficient use and that competition and freedom of contract are undistorted.

These objectives were enshrined and enlarged, from the national to the European scale, by the Rome Treaty of 1957,¹² under the designation of the Common Market, which was re-named the Internal Market by the Single European Act of 1986.¹³ As a *legal* concept, the Internal Market is defined as comprising “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured [...]”¹⁴ These basic freedoms are secured and specified by Articles 34 f. TFEU (free movement of goods), 45 (free movement of workers), 49 (freedom of establishment), 56 (freedom to provide services) and 63 (free movement of capital and payments). They are meant to protect the Internal Market against interference by Member States. In addition, Protocol no. 27 annexed to the TFEU makes clear that the Internal Market “includes a system ensuring that competition is not distorted”,¹⁵ and Articles 101 ff. TFEU in fact prohibit certain types of private anti-competitive conduct.

In the real world the free flow of resources encounters numerous obstacles. Many of them are caused by legislation of the various Member States: technical standards for goods; licence, education and quality requirements for services; currency exchange regulations; intellectual property rights; mandatory provisions relating to the establishment of companies, contracts and liability; etc. They all make it difficult and costly for foreign competitors to adjust, or even exclude, their operation in a national market; as a result, competition is distorted. Consequently, in order to be effective the liberalization ensured by the basic freedoms has to be supplemented by an approximation of the national rules governing the operation of the markets. The TFEU pro-

¹¹ *Tiede/Spiesberger/Bogedain*, An der Schwelle zum Binnenmarkt: Wirtschaftlicher Teil des Assoziierungsabkommens zwischen der EU und der Ukraine, WiRO 2014, pp. 321–324.

¹² Treaty establishing the European Economic Community, done at Rome on 25 March 1957, 298 UNTS 11.

¹³ Single European Act, done at Luxembourg on 17 February 1986, OJ 1986 L 169/1.

¹⁴ See now Article 26(2) TFEU.

¹⁵ Protocol (no. 27) on the Internal Market and Competition, see OJ 2016 C 202/308.

vides for such approximation in many contexts; the most important provision is Article 114 TFEU, which allows for harmonization measures for the “establishment and functioning of the Internal Market”. They are adopted by the approval of the European Parliament and by a qualified majority of the Council, i.e. even against the opposition of individual Member States.

b) The Association Agreement

This model has guided the drafters of the EU–Ukraine Association Agreement. The objective of free trade is laid down in Article 25 AA; the ban on prohibitions and restrictions of imports and exports, and of all measures having an equivalent effect, is stated in Article 35 AA. With regard to the right of establishment and the cross-border supply of services, both sides grant each other treatment no less favourable than the treatment accorded to subsidiaries, branches etc. of their own companies, Articles 88, 94 AA (“national” treatment); however, the cross-border supply of services is only liberalized in accordance with specific commitments relating to single sectors, Article 93 AA and Annexes XVI B and XVI E. The freedom of payments is ensured by Article 144 AA, and the free movement of capital is regulated in greater detail in Article 145 AA. Private anticompetitive practices and conduct are declared to be incompatible with the Association Agreement in Article 254. It is only the free movement of workers that is not enunciated as an objective; decisions on greater mobility of workers are reserved for the future and left to the Association Council, Article 18 AA.

As a supplement to these provisions on liberalization, Ukraine has accepted a great many obligations to adjust its law to EU standards. Article 474, which has a general bearing on all parts of the Agreement, provides that “Ukraine will carry out gradual approximation of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement, based on commitments identified in Titles IV, V and VI of this Agreement, and according to the provisions of those Annexes.” Title IV on trade and trade-related matters (Articles 25–336 AA) and Title V on economic and sector cooperation (Articles 337–452 AA) contain numerous provisions that stipulate the approximation of Ukrainian law to legislative acts of the Union; long annexes specify these commitments in terms of both content and timeframe.¹⁶ Apparently, the

¹⁶ On the interaction between the general and the specific approximation rules see *Van der Loo*, supra n. 8, pp. 301 ff. Specific approximation rules are to be found in Articles 56 and Annex III for technical standards, 64 and Annex V for sanitary, phytosanitary and animal welfare regulations, 114 and Annex XVII for postal and courier services, 124 and Annex XVII for electronic communication, 133 and Annex XVII for financial services, 138 and Annexes XVII and XXXII for transport services, 152 f. and Annex XXI for public procurement, 256 for competition law, 387 and Annexes XXXIV to XXXVI for company law, 394 and Annex XVII for the information society, 397 and Annex XXXVII for broad-

law of intellectual property had the greatest significance for the drafters; its adjustment is not left to the Annexes but is regulated with regard to both substance and enforcement in not less than ninety-six articles by the Association Agreement itself.¹⁷ Some of the commitments relating to private law will be dealt with further in Part II below.

While the overall structure and content of the Agreement resemble the European Treaties, there are some profound differences. In particular, not a single provision of the Agreement can be construed as conferring rights or imposing obligations which can be directly invoked in court proceedings.¹⁸ The lack of direct applicability has the effect of reserving for both sides the possibility of withdrawing from any undertaking laid down in the Agreement. If Ukraine does not implement the legal changes it has promised and an EU Member State therefore declines to grant one of the freedoms to Ukrainian products or nationals, no judicial remedy will be available in the EU. This clearly differs from the direct and unconditional effect of some provisions of the EU Treaties, in particular the basic freedoms¹⁹ and the rules on competition.²⁰ At some points the Association Agreement even goes a step further, indicating that access to the Internal Market will be granted only after progress in the area of approximation has been ascertained by the Trade Committee.²¹ Thus, the Association Agreement, while binding in terms of public international law, rather constitutes a programmatic scheme from the perspective of private actors in the markets.

II. The impact on private law

1. *Private law of the EU – General aspects*

The purpose of the European Union was not the unification of laws but the integration of markets. To date, the Treaties do not contain a mandate for

casting and television, 405 and XXXVIII for agriculture, 417 and Annex XXXIX for consumer protection, 424 and Annex XL for employment and social policy, 428 and Annex XLI for public health.

¹⁷ See Articles 157 to 252 AA; see *Van der Loo*, supra n. 8, pp. 284 ff.

¹⁸ This has explicitly been stated in Article 5 of the Council Decision, cited supra in n. 4.

¹⁹ See CJEU 8 November 1979, case 251/78 (*Denkavit*), [1979] ECR 3369 para. 3 for the prohibition of import restrictions (now Article 34 TFEU); CJEU 21 June 1974, case 2/74 (*Reyners*), [1974] ECR 631, paras. 29–32 for the right of establishment; CJEU 3 December 1974, case 33/74 (*van Binsbergen*), [1974] ECR 1299, paras. 18–27 on the freedom to provide services; CJEU 4 December 1974, case 41/74 (*van Duyn*), [1974] ECR 1337, paras. 4–8 for the free movement of workers.

²⁰ CJEU 30 January 1974, case 127/73 (*BRT v. SABAM*), [1974] ECR 51, paras. 15–16.

²¹ See Article 154 AA on public procurement and Article 4 of Annex XVII on access to some services markets.

harmonization or unification of private law or business law at large. But as pointed out above, market integration is not possible without a certain approximation of the legal standards which determine the cost of production and distribution; where the national standards differ too greatly, the Member States will decline to open their markets to foreign products and nationals.²²

Over more than fifty years, three layers of EU law have emerged which impact private law. The first consists of the Treaty provisions which are directly applicable. In the circumstances of the case they may determine private law relations; thus, anticompetitive agreements are void under Article 101(2) TFEU. Second, the Court of Justice has given effect to, or rather “discovered”, certain general principles of law which serve for interpreting EU law or filling gaps, and sometimes even for reviewing the compatibility of national law with EU law.²³ The third and most important layer is legislation approximating the national laws of the Member States that has been enacted ever since the late 1960s; such legislation has been adopted by EU institutions based upon numerous provisions of the TFEU, in particular Article 114.

Given the historical purpose of the Union, the lack of a comprehensive legal basis, the complicated legislative procedure of the Union and the sovereignty claims of Member States, EU legislation has only tackled specific issues which are considered to be obstacles to the operation of the Internal Market. As a result, EU law in general and EU private law in particular is fragmentary; there is no overarching concept or system. While more recent years have witnessed attempts at consolidation in more comprehensive legal acts, the basic approach is still to pinpoint individual problems. Thus, there is no general contract law but a directive on distance contracts,²⁴ and not even a general sales law but only a directive dealing with certain aspects of the sale of consumer goods.²⁵

²² See *supra* section I.2.a), the text following n. 15.

²³ See *Metzger*, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht*, Tübingen 2009; *Basedow*, *General Principles of European Private Law and Interest Analysis – Some Reflections in the Light of Mangold and Audiolux*, *European Review of Private Law* 2016, pp. 331–352.

²⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19, now replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

²⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

EU law is enacted in different forms of legislation:²⁶ the most frequent one for private law is the *directive*, which does not apply as such in national courts but has to be implemented by the Member States in accordance with their own legal systems. By contrast, *regulations* are directly applicable in the Member States. Some of them are compulsory in the sense that they supersede national law; we find examples in the field of competition law²⁷ and transport law.²⁸ Others are optional, allowing private parties to avail themselves of the legal regime laid down in the regulation as an alternative to the otherwise applicable national law; examples are the Community Trade Mark²⁹ and the *Societas Europaea*, a corporation established under EU law.³⁰ *Decisions* are a further form of EU legislation; they are primarily issued for the implementation of international conventions concluded by the EU in the internal law of the Union; an example is the Hague Convention on Choice of Court Agreements.³¹ These different forms are of course irrelevant for the EU–Ukraine Association Agreement, which does not produce any direct effect anyway and simply lays down obligations requiring Ukraine to approximate its law to the various EU instruments; it does not matter whether these instruments are directly applicable in EU courts or not.

The private law of the Union is not clearly separated from public law; the policy orientation of EU legislation often leads to a mix of private and public law rules, which are both considered as tools for achieving certain policy goals. The body of private and business law which Ukraine will have to adjust to is immense and covers multiple areas, including company law, consumer law and labour law.³² Some exemplary remarks must suffice in this context. They will touch upon financial services, *infra* 2., and consumer law,

²⁶ See Article 288 TFEU, where three binding forms are listed; the regulation exists in dual format, see the following text.

²⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1, dealing with exemptions from the prohibition and invalidity of vertical agreements restricting competition.

²⁸ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/1.

²⁹ Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1.

³⁰ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L 294/1.

³¹ Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ 2014 L 353/5.

³² See *supra* n. 16.

infra 3., and will finally deal with legislation that Ukraine is not obliged to adopt, infra 4. and 5.

2. *Financial services*

Annex XVII of the EU–Ukraine Association Agreement specifies a variety of financial services: banking, insurance, trade in securities, collective investments in transferable securities (investment funds), market infrastructure (settlement mechanisms), payments and money laundering. For these areas a total of almost sixty binding EU instruments are listed which Ukraine promises to adopt. Most of these acts relate to the regulatory framework of financial services and are of a public law nature, but some contain provisions on private law as well. To illustrate the meaning of this obligation, the following remarks will focus on the example of the Solvency II Directive for insurance.³³

The original version of the Solvency II Directive comprises 312 articles and five annexes. Some of them simply codify provisions dealing with the conditions for the establishment and the cross-border provision of insurance services that had been enacted in several “generations” of directives for non-life and life insurance since the early 1970s; that is the “old” part of the Directive. While insurance contract law is still mainly in the hands of the Member States, Articles 178 ff. contain provisions of a private law nature, in particular on the policyholder’s right of withdrawal from the contract, on information requirements and on the law applicable to the insurance contract. The “new” part aims at a risk-oriented regulation of insurance companies, regarding in particular the assessment of the risks they accept and the equity and solvency they need to cope with those risks.

The original version of the Directive prescribed an implementation of the “new” part into Member State law by March 2012 (Article 309). It turned out that this deadline was too short for the complicated adjustment which Member States and insurers had to carry out. Consequently the Union extended the deadline for implementation to March 2013,³⁴ and when this again proved too short, to March 2015.³⁵ Thus, Member States could take up to five and a half

³³ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast version), OJ 2009 L 335/1.

³⁴ Directive 2012/23/EU of the European Parliament and of the Council of 12 September 2012 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives, OJ 2012 L 249/1.

³⁵ Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I), OJ 2013 L 341/1.

years to comply with their obligation to implement the Directive – or rather: only the “new” part of it.

By contrast, the period allowed to Ukraine for the implementation of the whole Directive, including the “old” part, is only four years. It is difficult to imagine that the implementation in this period of time will be more than just a mechanical transformation, i.e. the literal translation of the Directive and its publication in the official gazette. In light of the highly technical and complex nature of many provisions, it appears unlikely that the personnel of the supervisory authority, of the courts and of the insurance industry will become sufficiently familiar with the regulations in order to allow their having any practical effect in the Ukrainian insurance sector in the imminent future; an adjustment of the law in action cannot be expected in the years ahead. It is an open question why the EU Commission demanded such haste from a country which is supposed to remain a neighbour and not become a Member State.

3. Consumer protection

A criticism of a different nature is appropriate with regards to consumer law. Annex XXXIX lists sixteen binding acts of EU law which Ukraine has promised to adopt. Four of them deal with product safety and can be regarded as corollaries of free trade: if goods are permitted for import they must comply with the safety standards of the import country. But the commitment of Ukraine goes beyond these instruments and covers a number of directives protecting the commercial interests of consumers as well. It has correctly been observed by a leading European expert on consumer law that “consumer protection is considered to represent one of the ‘core aspects’ of the ENP policy”³⁶ and that the “2014 SAAs with Georgia, Moldova and Ukraine pay particular attention to consumer protection”.³⁷

Under Annex XXXIX, Ukraine will indeed have to implement in its internal law, within the next three years, the most important consumer law directives: the Unfair Contract Terms Directive³⁸, the Unfair Commercial Practices Directive,³⁹ the Consumer Sales Directive,⁴⁰ the Distance Contracts Di-

³⁶ *Stuyck/Durovic*, The external dimension of EU consumer law, in: Cremona/Micklitz (eds.), *Private law in the external relations of the EU*, Oxford 2016, pp. 227–248 (241). ENP = European Neighbourhood Policy.

³⁷ *Stuyck/Durovic*, previous n., p. 243. SAA = Stabilization and Association Agreement.

³⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

³⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/

rective,⁴¹ the Doorstep Selling Directive,⁴² the Package Travel Directive,⁴³ the Timeshare Directive⁴⁴ and the Consumer Credit Directive.⁴⁵ These instruments provide for minimum standards of consumer protection and allow for a better protection by national law. It is unclear whether this permission of higher standards is still valid where, in the meantime, minimum harmonization has been replaced within the EU by full harmonization; this has to a large extent occurred with the Distance Contracts Directive and the Doorstep Selling Directive, which were merged into the Consumer Rights Directive in 2011.⁴⁶ Since the Association Agreement was concluded only in 2014 and does not mention the 2011 Consumer Rights Directive, Ukraine appears not to be bound.

The question is, however, whether the imposition of minimum standards of consumer protection on Ukraine makes sense. It is not an indispensable precondition for cross-border trade with the EU, and it is of doubtful benefit at the domestic level. The need for consumer protection arises subsequent to consumption. Without consumption, consumer protection is redundant and a costly luxury. Consumer law emerged in the Western world when private wealth increased at a larger scale and broad parts of the population started to invest in more or less expensive consumer goods, such as cars and boats, furniture and kitchen appliances. This occurred in the USA in the 1960s⁴⁷ and

2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ 2005 L 149/22.

⁴⁰ See supra n. 25.

⁴¹ See supra n. 24.

⁴² Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

⁴³ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

⁴⁴ Directive 2008/122/EC of the European Parliament and of Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009 L 33/10.

⁴⁵ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66.

⁴⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

⁴⁷ The rise of consumer law is usually attributed to US President *Kennedy's* consumer message of 1962, see President *John F. Kennedy*, "Special Message to the Congress on Protecting the Consumer Interest, 15 March 1962", in: *Public Papers of the Presidents of the United States, John F. Kennedy*, containing the Public Messages, Speeches and Statements of the President, January 1–December 31, 1962, pp. 235–243, here cited from the reprint in: *von Hippel, Verbraucherschutz*, 2nd ed. Tübingen 1979, pp. 225–234.

in Western Europe in the 1970s and 1980s (at a time when private budgets available for consumption emerged from the previous poverty that had prevailed in the aftermath of World War II).

Is Ukraine already in a similar economic situation? Ukraine is one of the poorest countries in Europe. According to the International Monetary Fund its gross domestic product (GDP) per capita amounted to 7,519 US-\$ in 2015, which ranked the country as no. 115 in the world. In the World Bank statistics, Ukraine ranked as no. 107 with a per capita GDP of 8,666 US-\$ in 2014. The poorest EU Member States of Bulgaria and Romania rank around no. 60, with a per capita GDP more than twice as high as that of Ukraine, and the per capita GDP of the more prosperous Member States such as France, Germany or the Netherlands ranges from 40,000 to 50,000 US-\$.⁴⁸ In fact, Article 43 AA explicitly acknowledges that Ukraine qualifies as a developing country for the purposes of some instruments of world trade law.

In such a country most people struggle hard to keep their heads above water; their primary concern is consumption, not consumer protection, and they have to generate sufficient income for their daily needs. Correspondingly, traders and producers will generally offer low-priced goods which often are of modest quality but meet the purchasing power of the population. From an economic policy perspective the government of such a country should avoid all regulations that raise prices, and it would be well-advised to think of consumer protection only at a later stage.

4. Inconsistencies

The selection of the EU instruments listed in the Annexes for approximation purposes sometimes appears fortuitous. While consumers receive particular attention, see above, small and medium-sized enterprises (SMEs) such as start-ups do not, although their activities foster economic growth and the emergence of a middle class. But the Association Agreement refers neither to the Directive on commercial agency, which ensures that agents will get the reward for their investment even after termination of the agency contract,⁴⁹ nor to the Directive on combating late payment, which through the imposition of high interest rates helps protect SMEs against the deferral of payment by their dominant contracting partners.⁵⁰

A further example is provided by the law on product safety. Under Article 56 AA, Ukraine commits itself to gradually adjusting its laws to EU tech-

⁴⁸ The data are reproduced in a Wikipedia entry on “List of countries by GDP (PPP) per capita”; they can be retraced on the websites of the institutions mentioned above.

⁴⁹ Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382/17.

⁵⁰ Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ 2011 L 48/1.

nical regulations and standards, and Annex III specifies the field of “general product safety” as being part of that obligation. The respective EU standards are laid down in the Directive on general product safety which, thus, will have to be adopted by Ukraine.⁵¹ While this Directive deals with the safety conditions for the marketability of products, the EU has also harmonized the consequences of damage caused by defective products, imposing strict liability on producers and importers.⁵² From a holistic perspective both instruments address the problem raised by defective products: one is preventative, the other compensatory; where a product does not meet the standards laid down in the Product Safety Directive, the producer’s liability is triggered under the Product Liability Directive or national tort law.⁵³ Yet, the Association Agreement does not mention the Product Liability Directive.

A third example is the law on passenger rights in the field of transport. Over the years the EU has adopted regulations dealing with this area and in particular with the carrier’s liability for air transport,⁵⁴ rail transport,⁵⁵ sea transport⁵⁶ and road transport.⁵⁷ As shown by the case law of the CJEU, the Air Passenger Regulation is of great importance in legal practice.⁵⁸ Nevertheless, some individuals will doubt whether these regulations are indispensable elements of the approximation of Ukrainian law to EU standards. But even for such critics, it is difficult to understand why Annex XXXII requires Ukraine to adopt the instruments on rail and sea transport but not those on air and bus transport. The only possible explanation for all these inconsistencies

⁵¹ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ 2002 L 11/4.

⁵² Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

⁵³ *Marburger*, Produktsicherheit und Produkthaftung, in: Festschrift für Erwin Deutsch, Köln 1999, pp. 271–289 (281 ff., 285); the author points out that compliance with the Product Safety Directive does not immunize the producer against liability however, see pp. 282 f.

⁵⁴ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/1.

⁵⁵ Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations, OJ 2007 L 315/14.

⁵⁶ Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ 2009 L 2009 L 131/24.

⁵⁷ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, OJ 2011 L 55/1.

⁵⁸ See *Bobek/Prassl (eds.)*, Air Passenger Rights – Ten Years On, Oxford and Portland 2016.

is that different people within the bureaucracy of the EU Commission have listed the various instruments Ukraine is expected to adopt and that there was no general survey and oversight.

5. *Blind spots in private international law*

The absence in the Association Agreement of specific rules on the further development of private international law as between the EU and Ukraine is to be deplored. Article 24 AA only highlights the agreement of both Parties “to further develop judicial cooperation in civil [...] matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.” The second paragraph states that the Parties agree to “facilitate further EU–Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children.”

There is no specific obligation for Ukraine to adjust its law to any of the numerous EU-instruments in this field. Instead, Article 24 refers to international instruments which are inexistent in many areas that matter for international commerce. The blind spot of the Agreement is understandable with regard to some issues; for example, the mutual recognition of judgments established by the Brussels I Regulation⁵⁹ cannot be extended to a third State, but could the Agreement not have provided for negotiations on a pertinent treaty?

The EU *acquis* also includes several acts dealing exclusively with the applicable law, which do not affect the sovereignty of the States involved. For example, the Rome II Regulation establishes the law applicable to non-contractual liability not only for intra-European fact situations but also in cases where the law applicable is that of a third State such as Ukraine.⁶⁰ Ukrainian private international law differs from the Rome II Regulation⁶¹ on several points; a uniformity of outcome is therefore difficult to achieve as between the EU and Ukraine as far as non-contractual liability is concerned. From the viewpoint of a European Neighbourhood Policy it would have reflected significant progress had the Association Agreement secured a harmo-

⁵⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

⁶⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/4.

⁶¹ See *Dovgert*, Ukraine, in: Basedow/Rühl/Ferrari/de Miguel Asensio (eds.), *Encyclopedia of Private International Law*, vol. III, Cheltenham 2017, pp. 2602–2611.

nization of the conflict rules that apply in the courts of the Member States of the EU as well as in the courts of its neighbour Ukraine.

III. Implementation

In accordance with the obligations incurred in the Association Agreement, Ukraine will have to adjust its private law legislation to a vast array of EU enactments in the years ahead. While Ukraine's commitment is limited to what has been promised in the Agreement, the country is of course free to approximate its laws in other areas, such as those outlined above,⁶² as well. This will certainly affect the overall understanding of private law in Ukraine, which should therefore be highlighted as a first step, see *infra* 1. The present survey also has an impact on another question raised in this context, i.e. how Ukraine should proceed when implementing EU private law in its own private law, *infra* 2.

1. Private law in Ukraine

As a part of the former Soviet Union, after its declaration of independence Ukraine adopted the Soviet legislation on civil law, in particular the Ukrainian Civil Code of 1963, which was based on the USSR's Foundations of Legislation on Civil Law of 1962,⁶³ and the 1969 Code on Marriage and Family.⁶⁴ It is well-known that the Soviet legislation reduced the private sphere to next to naught, in accordance with *Lenin's* famous statement that "we do not recognize anything as 'private', for us everything in the field of the economy is of a public-law and not of a private-law nature."⁶⁵ Some basic rules emerged from this approach, notably the dependence of contracts and their validity on the central economic plan and on other administrative measures, which completely blurred the borderline between the public and the private sphere and between public and private law.

After the collapse of the USSR, work on a re-codification – intended to cope with Ukraine's transition to national sovereignty, to the rule of law, to

⁶² See *supra* sections II.4. and 5.

⁶³ A German translation of these Foundations (*Grundlagen der Zivilgesetzgebung*) has been published in: Die Grundlagen der sowjetischen Gesetzgebung, Moskau 1977, pp. 355–427; cf. *Reich*, Sozialismus und Zivilrecht, Frankfurt am Main 1972, pp. 303 ff., in particular, pp. 311–323.

⁶⁴ See *Kossak*, General Principles of Private Law in Ukraine, in: Jessel-Holst/Kulms/Trunk (eds.), Private Law in Eastern Europe – Autonomous Developments or Legal Transplants?, Tübingen 2010, pp. 87–92.

⁶⁵ Cited after *Reich*, *supra* n. 63, p. 133 (my translation from the German translation, J.B.).

the recognition of human rights and to a market economy based on individual liberty – was carried out from the mid-1990s onwards. It ultimately led to the adoption of a new Civil Code, the Economic Code and a new Family Code as well as further laws on land, corporations etc. in 2003/2004.⁶⁶

Yet new legislation is not always equivalent to new law. The law in action is often impregnated by methodological traditions and underlying principles which dominate minds in a society and which do not lose their practical impact by legislative command. This has repeatedly been highlighted in the context of the transformation of the former Soviet republics into independent states having a purportedly Western orientation.⁶⁷ One of the leading private law scholars on Ukraine points out that Ukrainian law has mainly been formed by the traditions of socialist law in the former USSR, in particular by its version of “normativism”: actions were considered as lawful only where explicitly provided by law. According to his assessment, present-day Ukraine has not conceived of “how to design the transition from Soviet-style law, with its normativism and unjustified state interference with private life, towards the liberal conception of law that is familiar in Western European countries and that is a determinant factor for the implementation of the requirements of the Copenhagen criteria for Ukrainian membership in the EU.”⁶⁸

It is in this context neither possible nor necessary to go into further detail. What matters is the outright contradiction between the societal model of the EU Member States and the one that apparently is still alive in Ukraine. The “unjustified state interference with private life” is the opposite of what generally is referred to as party autonomy, i.e. a private sphere where individuals take their own free decisions on the course of their lives. One of its components is the freedom of contract⁶⁹ and the binding effect of such contracts irrespective of state intervention. But it has other aspects as well, many of

⁶⁶ See *Kossak*, supra n. 64, p. 87; *Maydanyk*, Die Entwicklung des ukrainischen Privatrechts in den Jahren 1991–2016, ZEuP 2017, pp. 373–395.

⁶⁷ See e.g. *Kurzynsky-Singer*, Wirkungsweise der legal transplants bei den Reformen des Zivilrechts, in: id. (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 3–38 (6 and 13 ff.); *Pankevich*, Phenomena of Legal Transplants Related to the Social Model of the Post-Soviet Countries, *ibid.*, pp. 39–64; at p. 62 the author points out that borrowing from the West only at the “high levels of political institutions [...] enables the elites of the post-Soviet states to mimic an institutional order of their counterparts abroad [...] [and] leaves the deep layers of social reality untouched.”

⁶⁸ *Maydanyk*, supra n. 66, ZEuP 2017, p. 377 (my translation, J.B.).

⁶⁹ CJEU 18 July 2013, case C-426/11 (*Alemo-Herron*), ECLI:EU:C:2013:521, para. 32, where the Court bases the freedom of contract on the safeguarding of entrepreneurial freedom under Article 16 of the Charter of Fundamental Rights, *infra* at n. 70; see also *Basedow*, Freedom of Contract in the European Union, *European Review of Private Law* 2008, pp. 901–923.

which are protected by the European Human Rights Convention,⁷⁰ to which Ukraine is a Contracting State, and – in the EU – by the Charter of Fundamental Rights.⁷¹ The difference of background raises doubts as to the effective real world implementation of the numerous EU enactments listed in the Association Agreement. It is this difference which should be addressed by appropriate measures, e.g. by conferences and continuing education for government officials, judges and practitioners.

2. Ways of implementation

On a more technical note Ukraine has to decide on the legislative procedure to be followed when implementing the EU *acquis* listed in the Association Agreement. Given the immense workload the procedure should be streamlined in order to allow for quick results. A more profound reflection and deliberation leading to further amendments could be postponed until some experience has been gained.

In light of the divergent background of the Ukrainian codes and the EU *acquis*, it is at present not advisable to implement the numerous specific EU acts through amendments of the codes; their adjustment would be time-consuming and give rise to numerous frictions. For the time being an implementation of the *acquis* in special statutes appears simpler. For greater clarity the special statutes could be integrated in collections dealing with specific areas, such as insurance, consumer protection etc. For similar reasons an implementation going beyond the provisions of the various *acquis* enactments cannot be recommended. Many EU instruments allow, for instance, for a better protection of the consumer or of workers or for other deviations in the national implementing provisions from the text of the EU act. Where a country makes use of such discretion, the discussion will soon become detailed and slow down.

Subsequent or parallel to the fast track implementation outlined above, Ukraine might think of a more thorough overhaul of its present codes, in particular the Economic Code, in order to overcome the traditional socialist structures that appear to subsist in that instrument.⁷² If that project is tackled, the experience of Georgia could show the way. The government of Georgia built up a close cooperation with German experts, who are said to have deleted the relics of old Soviet law from the drafts of the Georgian Civil Code.⁷³

⁷⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, 213 UNTS 221.

⁷¹ OJ 2016 C 202/389.

⁷² See *Maydanyk*, supra n. 66, ZEuP 2017, p. 380.

⁷³ See *Chanturia*, Codification of Private Law in Post-Soviet States of the CIS and Georgia, in: Wen Yeu Wang (ed.), *Codification in International Perspective – Selected Papers from the 2nd IACL Thematic Conference*, Cham 2014, pp. 93–106 (95).

This would be the right moment for considering a merger of the codes with the statutes implementing the EU *acquis*.

IV. Conclusion

The EU–Ukraine Association Agreement has been negotiated by the Union as part of the European Neighbourhood Policy, and it represents an effort to transform the Ukrainian state, economy and society with the assistance of the EU.⁷⁴ Through the establishment of a Deep and Comprehensive Free Trade Area (DCFTA), the Agreement allows for an especially strong form of association,⁷⁵ without however envisaging later membership. While only touching upon the political criticism voiced against the Agreement, this paper has focused on the obligations accepted by Ukraine to approximate her laws to EU standards as a condition for market integration.

The overall impression arising from our *tour d'horizon* relating to the law of financial services and to consumer law is that Ukraine is burdened with regulations that are excessively complicated for the country and that are redundant for or even detrimental to a country that numbers among the poorest places in Europe. In other areas clear inconsistencies emerge from a comparison of the imposed *acquis* and other EU enactments in the same field which are not mentioned in the Agreement. From the viewpoint of a neighbourhood policy, it finally appears incomprehensible that the issues of legal cooperation in civil matters have almost completely been neglected. The basic concept of a neighbourhood policy would seem to require a better understanding of what Ukraine actually needs and what could promote its relations with the Union.

Upon imposing such an immense load of EU instruments on Ukraine, it should not have gone unnoticed that over decades the history of the country has been marked by the downgrading or even complete rejection of private law as a factor ordering society. Nevertheless, when the Association Agreement takes effect the obligations it enshrines will be binding on Ukraine, which should however prefer a fast-track legislative procedure for the approximation of her laws.

⁷⁴ Lippert, Europäische Nachbarschaftspolitik, Jahrbuch der Europäischen Integration 2015, pp. 277–286 (277).

⁷⁵ Lippert, previous n., p. 280.

The Implementation of the EU *Acquis* in Ukraine

Lessons from Legal Transplants

Eugenia Kurzynsky-Singer

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I. Introduction

The Europeanisation of Ukrainian private law is determined by the Association Agreement between the EU and Ukraine,¹ which was concluded in 2014 and obliges Ukraine to an extensive approximation of national legislation to European requirements² with the aim of achieving the economic integration of Ukraine into the EU internal market.³

This obligation reflects the idea that market integration is not possible without an approximation of legal standards.⁴ Therefore, the aim of the obligation to implement the EU *acquis* as settled in the Association Agreement is to create in the Ukraine similar market conditions as in the EU and to promote the Europeanisation of Ukrainian law. Insofar, this process is part of a

¹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3. (further referred to as: AA).

² See *Basedow*, EU Private Law in Ukraine – The Impact of the Association Agreement, pp. 3 ff. (in this book).

³ Article 1 para. 2 (d) AA.

⁴ *Van der Loo*, The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, Leiden and Boston 2016, p. 181.

value-based Europeanisation of the entire Ukrainian society. In terms of specific values, the preamble and Articles 2 and 3 of the Association Agreement enumerate especially respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, human dignity and a commitment to the principles of a free market economy. In this sense, the creation of similar market conditions presupposes a change of the entire legal and institutional environment. The Europeanisation of private law, which will be addressed in this paper, is only a part of this process.

II. Lessons from legal transplants

1. Provisions of the *acquis communautaire* as legal transplants

According to the Association Agreement, the Europeanisation of Ukrainian private law should proceed by means of reception,⁵ which is a process of individual rules, institutions or even whole areas of law being borrowed by one legal system from another.⁶ So far, the Association Agreement obliges Ukraine to implement diverse European legal acts into its national legal system, especially diverse EU directives which have to be transposed into Ukrainian law.⁷

Such a borrowing of legal provisions or legal ideas, a notion which is addressed in a huge amount of research articles as so-called *legal transplants*, is a well-known phenomenon. The historical archetype of a reception process is held to be the reception of Roman law in Europe.⁸ In the present era, the reception of American corporate law provisions in German law offers an example of successful legal transplants.⁹ The main example however – and the most interesting in the present context – is the ongoing approximation of the legal systems of European countries as a result of the efforts of the European Union to create the European Single Market.¹⁰

⁵ See *Petrov/Van Elsuwege*, What does the Association Agreement mean for Ukraine, the EU and its Member States, available at <<https://www.researchgate.net/publication/303078233>>.

⁶ *Rehm*, Reception, in: Basedow/Zimmermann/Hopt (eds.), *The Max Planck Encyclopedia of European Private Law*, vol. II, Oxford 2012, pp. 1415–1420.

⁷ See, for example, Articles 124, 363, 387, 417, 424 and 474 AA.

⁸ *Watson*, *Legal Transplants – An Approach to Comparative Law*, Athens 1993, pp. 31 ff.

⁹ *Fleischer*, Legal Transplants im deutschen Aktienrecht, NZG 2004, pp. 1129 ff.

¹⁰ See, for example, *Basedow*, Grundlagen des europäischen Privatrechts, JuS 2004, pp. 89–96; *Klamert*, What We Talk About When We Talk About Harmonisation, Cambridge Yearbook of European Legal Studies 17 (2015), pp. 360–379.

However, it has also been observed that in many cases of legal transplants there is a gap between the formal law on the books and the law in action.¹¹ Legal transplants have even been held to be impossible because of the cognitive dimension of the law, which causes the original rule to necessarily undergo a change while being implemented in another legal system.¹² In any case, the modern research on legal transplants proves that the reception of legal provisions does not necessarily create in the borrowing legal system a rule which would be identical to the rule the borrowed provision creates in the original jurisdiction.¹³ Especially in developing and transition countries, the reception process is a complicated and often ineffective one.¹⁴ The recent research on legal transplants, especially regarding transition countries, questions in particular the assumption that legal harmonisation will result automatically in an improvement of legal institutions.¹⁵

Indeed, the European integration of Ukraine faces problems which are typical of the legal environment encountered in a transition country. In particular, there are difficulties in the formation of the institutions that would meet European standards, such as an independent and well-educated judiciary, the rule of law, good governance and a low level of corruption. Without a doubt, these conditions influence the legal standards the Ukrainian market can offer its participants. However, these institutional problems are, in my opinion, not the only obstacle for the approximation of Ukrainian law – and especially the substantive private law – to European standards.

2. *Legal transplants in transition countries*

The observation of legal transplants, especially in transition countries, gives evidence that the implementation of a foreign legal provision or legal institution into national legislation can produce a wide range of outcomes. Georgian law provides in this regard very interesting examples. Georgia, as well as Ukraine, is a country which is orientated towards the European Union and is aiming at a Europeanisation of private law, including the implementation of

¹¹ *Berkowitz/Pistor/Richard*, The Transplant Effect, *Am.J.Comp.L.* 51 (2003), pp. 163–203 (177).

¹² *Legrand*, The Impossibility of “Legal Transplants”, *Maastricht Journal of European and Comparative Law* 4 (1997), pp. 111–124 (120).

¹³ An example is offered by the family law of Turkey. See *Fögen/Teubner*, *Rechtstransfer, Rechtsgeschichte* 7 (2005), pp. 38–45 (42); *Aslan*, *Rückfahrkarte – Das schweizerische Zivilgesetzbuch in der Türkei*, *Zeitschrift für Rechtsgeschichte* 7 (2005), pp. 33–37.

¹⁴ *Knieper*, *Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht*, *RabelsZ* 72 (2008), pp. 88–113.

¹⁵ *Pistor*, *The Standardization of Law and its Effect on Developing Economies*, *Am.J.Comp.L.* 50 (2002), pp. 97–130.

the EU *acquis* as well as a fundamental reform of its civil code.¹⁶ It should be mentioned that the Georgian Civil Code was elaborated in cooperation with German scholars and is based on the German Civil Code, the BGB, making many (although not all) provisions legal transplants as well.¹⁷ The selected case studies on Georgian law, which were conducted in the course of a project on legal transplants at the MPI,¹⁸ showed, inter alia, that legal transplants could be ignored by the legal order, as seems to be the case in Georgia in regards to consumer law¹⁹ and private international law.²⁰ The borrowed provisions could, further, be changed in the course of their interpretation, which was the case for some provisions of property law,²¹ or in the course of their interaction with other provisions of the national legislation. However, an effective transplant, which produced rules very similar to the original ones, could also be identified.²² A further possible outcome which could occur in the course of the implementation of the EU *acquis* would be a situation in which a previous rule of national legislation was replaced by a provision which is less appropriate for meeting the regulatory need at issue. In such a case the transplant is not just ineffective but harmful. In addition, a legal transplant can develop into a legal irritant which conflicts with the recipient legal order and influences the legal or even social discourse.²³

Summing up, it should be understood that the outcome of a legal transplant can vary widely. It can be effective, i.e. “accepted”, by the recipient legal

¹⁶ *Chanturia*, Die Europäisierung des georgischen Rechts – bloßer Wunsch oder große Herausforderung?, *RabelsZ* 74 (2010), pp. 154–181.

¹⁷ *Chanturia*, Das neue Zivilgesetzbuch Georgiens: Verhältnis zum deutschen Bürgerlichen Gesetzbuch, in: Basedow/Drobnig/Ellger/Hopt/Kötz/Kulms/Mestmäcker (eds.), *Aufbruch nach Europa*, Tübingen 2001, pp. 893–904, 896; *idem*, Recht und Transformation, *RabelsZ* 72 (2008), pp. 114–135.

¹⁸ The results were published in: *Kurzynsky-Singer (ed.)*, *Transformation durch Rezeption?*, Tübingen 2014. Information on the project is available at <http://www.mpipriv.de/de/pub/forschung/auslaendisches_recht/russland_und_weitere_gus/stipendienprogramm_cfm>.

¹⁹ *Giorgishvili*, Das georgische Verbraucherrecht, in: *Kurzynsky-Singer (ed.)*, *Transformation durch Rezeption?*, Tübingen 2014, pp. 219–288.

²⁰ *Vashakidze*, Kodifikation des Internationalen Privatrechts in Georgien, in: *Kurzynsky-Singer (ed.)*, *Transformation durch Rezeption?*, Tübingen 2014, pp. 289–330.

²¹ *Kurzynsky-Singer/Zarandia*, Rezeption des deutschen Sachenrechts in Georgien, in: *Kurzynsky-Singer (ed.)*, *Transformation durch Rezeption?*, Tübingen 2014, pp. 107–138.

²² *Tsertsvadze*, The New Georgian Arbitration Law in Practice, in: *Kurzynsky-Singer (ed.)*, *Transformation durch Rezeption?*, Tübingen 2014, pp. 139–218.

²³ The effect of legal irritants was first described by *Teubner*, Legal Irritants, Good Faith in British Law or How Unifying Law Ends up in New Divergences, *Modern Law Review* 61 (1998), pp. 11–32. An example of such an effect is given in *Kurzynsky-Singer/Pankevich*, Freiheitliche Dispositionsmaxime und sowjetischer Paternalismus im russischen Zivilprozessrecht: Wechselwirkung verschiedener Bestandteile einer Transformationsrechtsordnung, *ZEuP* 2012, pp. 7–22.

order, so that the transplant interacts with the legal order's other elements in the desired way and produces a rule similar to the rule which was produced by the transplanted provision in the original jurisdiction. However, the legal transplant can also be "rejected" by the recipient legal order or interact with it in one of the described ways, producing a rather unpredictable outcome.

3. Explanatory model

The empirical data on legal transplants in transition countries indicates that the most effective transplants, i.e. those most easily accepted by the recipient legal order, are transplants which solely develop the existing regulations and not ones that intend to initiate radical changes²⁴ or that create a regulation for a tabula rasa.²⁵ In the project which was referred to above, this observation was supported in particular by a case study on rights of minors in Uzbekistan. The implementation of the United Nations Convention on the Rights of the Child (1989)²⁶ in Uzbek family law was shown to be an effective transplant. This outcome could be explained by the fact that the implemented provisions did not conflict with basic values of Uzbek family law, which are rooted in Soviet family law and already correlated with the values of the Convention.²⁷

By contrast, the greater the differences between the values and structural peculiarities transported by a legal transplant and those of the recipient legal order, the lesser the effectiveness of the transplant. A good example here is the failure in the attempt to implement trusts into Russian law, an effort which was undertaken in the 1990s.²⁸

To explain this effect it is important to focus on law as a cultural complex-ion with a social dimension. A comparative researcher should be aware of the fact that legal provisions do not exist in a contextual vacuum. In the original legal order the transplanted legal provision has been a subject to interpretation and legal discourse which have been deeply influenced by factors inher-

²⁴ For an example see *Djuraeva*, Personal Non-property Rights of Minors in Uzbekistan, in: Kurzynsky-Singer (ed.), *Transformation durch Rezeption?*, Tübingen 2014, pp. 361–394.

²⁵ For an example see *Tsertsvadze*, The New Georgian Arbitration Law in Practice, supra n. 22.

²⁶ See the English text of the UN Convention at <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>.

²⁷ *Kurzynsky-Singer*, Wirkungsweise der legal transplants bei den Reformen des Zivilrechts, in: idem (ed.), *Transformation durch Rezeption?*, Tübingen 2014, pp. 3–38 (26).

²⁸ Ukaz Prezidenta RF ot 24 dekabrja 1994, Nr. 2296 "O doveritel'noj sobstvennosti (traste)" [Decree of the President of the Russian Federation of 24.12.1994, No. 2296 "On trusts"]. See in detail: *Doždev*, Meždunarodnaja model' trasta i unitarnaja koncepcija prava sobstvennosti [The international model of trusts and the notion of unitary ownership], in: Chazova (ed.), *Žizn' i rabota Avgusta Rubanova* [Life and Work of Avgust Rubanov], Moscow 2006, p. 282.

ent to the original legal order, such as the interaction with other provisions, legal methodology, values immanent to the society and the social structure. Not all of these factors are obvious, due to the fact that every legal system contains a great amount of implicit knowledge and understanding, what has been termed *cryptotypes*.²⁹ This silent dimension of law³⁰ has an enormous effect on the application of a legal provision and its impact on the legal system as whole. After being transplanted into another legal environment the legal provision will be influenced by the corresponding elements of the recipient legal order, including its silent dimension. Therefore the efficiency of the legal transplant depends on the similarity between the original and the recipient legal order. An effective legal transplant is easily possible if the origin and recipient legal order have much in common, especially if they share the same values and legal approaches. Conversely, the reception is likely to be ineffective if the legal transplant conflicts with the values of the recipient legal order.

This approach can also explain the legal irritant effect.³¹ If values which are immanent to the transplanted legal provision in the original legal order differ so much from the values of the recipient legal order that they cannot simply be integrated by an interpretation of this provision, a conflict between different elements of the recipient legal order arises and initiates friction in legal and social discourse.

For these reasons, the key to understanding and predicting the outcome of a reception should be an analysis of the relationship between the legal transplant and the recipient legal order.

III. The common core of European private law and the diversity of legal cultures

Considering the provisions of EU *acquis* as being legal transplants for the Ukrainian legal order leads to a question: what requirements should the Ukrainian legal order fulfil to enable an effective implementation of these provisions? In other words, what are the specific characteristics of the legal orders of the European countries which enable an emergence of the *acquis communautaire*?

However, the most eye-catching detail of the European area of justice is the enormous diversity of legal cultures. Comparative legal research points to

²⁹ Sacco, Legal Formants: A Dynamic Approach to Comparative Law, *Am. J. Comp. L.* 39 (1991), pp. 1–34 and pp. 343–401 (386).

³⁰ Graziadei, Legal Transplants and the Frontiers of Legal Knowledge, *Theoretical Inquiries in Law* 10 (2009), pp. 723–743 (735).

³¹ See *supra*.

the differences in structure and approach as well as to the differences between rules.³² These differences challenge the attempts to state the principles of European private law or even to unify it, be it in the form of a Draft Common Frame of Reference, Principles of European Contract Law, a Common European Sales Law or a codification of European private law.³³

On the other hand, these differences should not be exaggerated. Especially for contract law it has been held that it differs “more in the formulations and techniques than in results”, including a wide concern as to how the law should be.³⁴ According to *Reinhard Zimmermann*, the fragmentation of the European civilian tradition generally “appear[s] to be, much more often than not, historically contingent rather than determined by cultural traditions”.³⁵

Actually, the continental European legal orders share a long common legal development. Initially, Roman law had constituted the foundation of the *ius commune* prevailing in medieval and early modern Europe.³⁶ Then, in the epoch of the Enlightenment, this foundation was enriched with principles of natural reason,³⁷ which constituted values that are still immanent to the European legal orders.³⁸ The revolutions of 19th century followed, removing the old feudal structures and promoting ideas of democracy, liberalism and independent national states. As the consequence of this development, some of the older codifications of private law established essential principles characterizing the private law of the European countries until today. Under such basic principles, one should name the freedoms of contract and of testation, the recognition of private property and equality before the law.³⁹ In this sense, the European legal orders share the same basic values. This common core of European private law is additionally backed by the similarity of economic and social conditions in the EU.

For a European legal scholar, this common core of the legal culture is likely to be so obvious as to not require an exact definition of its significant criteria. The common values and basics already exist and do not need to be discussed in the course of the unification debate. The Association Agreement seems to presuppose that Ukrainian private law already shares this common core of European private law. However, it seems worth questioning this presupposition.

³² *Lando*, Culture and Contract Laws, ERCL 2007, pp. 1–20 (10).

³³ See, for example, *v. Bar*, Privatrecht europäisch denken, JZ 2014, pp. 473–528 with further references.

³⁴ *Lando*, Culture and Contract Laws, ERCL 2007, pp. 1–20 (17).

³⁵ *R. Zimmermann*, Codification, ERCL 2012, pp. 367–399 (380).

³⁶ *R. Zimmermann*, Europa und das römische Recht, AcP 202 (2002), pp. 243–316.

³⁷ *R. Zimmermann*, Codification, ERCL 2012, pp. 367–399 (376).

³⁸ See in detail: *Auer*, Der privatrechtliche Diskurs der Moderne, Tübingen 2014, pp. 13–45.

³⁹ *R. Zimmermann*, Codification, ERCL 2012, pp. 367–399 (390).

IV. Ukrainian private law as a European legal order?

1. *Development of Ukrainian private law*

The development of Ukrainian private law differs significantly from the European model. Like the private law of most of the CIS countries, Ukrainian private law has to a great extent developed from Soviet civil law. Insofar, the modern private law of Ukraine has been deeply influenced by its Soviet heritage. However, as a part of the Soviet legal tradition, it is also rooted in the legal tradition of European, especially German, civil law.⁴⁰ These roots go back to the law of the pre-revolutionary Russian Empire, in particular to the pre-revolutionary draft of the civil code which, while never enacted, nevertheless influenced the civil codes of the Soviet republics.⁴¹ However, despite the semantic similarity that existed between individual civil code provisions of Soviet republics and civil code provisions of Western European countries, Soviet civil law was not a part of the European legal tradition. The initial core of private law in Soviet legislation was overwritten by Soviet ideology, which deeply influenced the legal tradition and in particular legal methodology.⁴² The above-mentioned basic values and principles of western European private law – such as freedom of contract, recognition of private property and independence between public and private domains – contradicted Soviet ideology and were not inherent to Soviet private law.

After the collapse of the Soviet Union, Ukraine, as well as other successor states, initiated reforms to adopt its legislation to the requirements of the market economy, which imbued the civil law with a liberal approach.⁴³ These reforms changed the legislation significantly, but they could not completely replace the previous legal doctrine that was rooted in Soviet law. In fact, the liberal ideas and approaches can be expected to complement the legal discourse,⁴⁴ competing with the old Soviet approach but not building the basic values and principles of contemporary Ukrainian law.

⁴⁰ *Avenarius*, Das russische Seminar für römisches Recht in Berlin (1887–1896), ZEuP 1998, pp. 893–908.

⁴¹ For a detailed discussion see *Reich*, Sozialismus und Zivilrecht, Frankfurt/Main 1972, pp. 147, 155; *Novickaja*, Neizvestnye stranicy istorii sozdanija Graždanskogo Kodeksa RSFSR 1922 [The unknown pages behind the creation of the Civil Code of RSFSR], SGiP 1990, No. 10, pp. 112 ff.

⁴² See, for example, *Brunner*, Was ist sozialistisch am “sozialistischen Recht”, in: Hofmann/Meyer-Cording/Wiedemann (eds.), Festschrift für Klemens Pleyer zum 65. Geburtstag, München 1986, pp. 187–205.

⁴³ See Article 3 Civil Code of Ukraine.

⁴⁴ *Majdanyk*, Rozvytok privatnoho prava Ukraïny [Development of the private law in the Ukraine], Kiïv 2016, p. 24.

2. Coexistence of the Civil Code and the Economic Code

The coexistence of contradictory and competing approaches, doctrines and ideas is characteristic to some degree of all successor countries of the Soviet Union. In Ukraine, it emerges even at the level of private law legislation, where the Civil Code and the Economic Code coexist. Such coexistence is highly controversial not only in Ukraine. An Entrepreneurial Code was recently adopted in Kazakhstan,⁴⁵ where it was very strictly opposed by many scholars.⁴⁶ It is remarkable that the most discussed point concerning the economic code in Ukrainian legal literature, as well as in the Kazakhstani debate, is not so much the content of the regulations but far more the legislative technique of a separate economic code. The problems that are mostly stressed are the conflicts between the norms of the Civil Code and the Economic Code.⁴⁷ Yet the significance of the Ukrainian Economic Code goes far beyond this. The Civil Code and the Economic Code represent two different models for the further legal development of Ukrainian private law. The Civil Code stands to a greater extent for a European path in the development of private law as its roots trace back to the pre-revolutionary draft of the Civil Code of the Russian Empire. It adopts many instruments of market economy regulation, these being similar to the regulations of the European countries. By contrast, the Economic Code, which pursuant to its Article 1 applies to business relationships in the course of economic activity, is a product of Soviet legal theory⁴⁸ and therefore contains many more relics of Soviet legal thinking.

The most notable of such relics is undoubtedly the possibility to create state and municipal unitary enterprises. The peculiarity of this legal institution consists in the fact that these entities do not own their assets, which remain in state ownership. Rather, the state enterprises hold a right of operative management or a right of economic jurisdiction in such assets, which allows them to conduct business activity.⁴⁹ This legal institution, which is common

⁴⁵ Predprinimatl'skij kodeks Kazachstana [Entrepreneurial Code of Kazakhstan], No 375-V, 29 October 2015, available at <https://online.zakon.kz/Document/?doc_id=38259854>.

⁴⁶ See for example *Sulejmenov (ed.)*, Predprinematel'skij kodeks kak instrument razvala pravovoj sistemy Kazachstana [The Entrepreneurial Code as a means of demolishing the legal order of Kazakhstan], Almaaty 2011.

⁴⁷ See *Majdanyk*, Development of Ukrainian Private Law in the Context of its Europeanization, pp. 143, 150 ff. (in this book).

⁴⁸ On the history of the economic law see *Ioffe*, O chozjajstvennom prave [On economic law], reprinted in: *Sulejmenov (ed.)*, Predprinematel'skij kodeks kak instrument razvala pravovoj sistemy Kazachstana, supra n. 46, pp. 61–99.

⁴⁹ See *Majdanyk*, Development of Ukrainian Private Law in the Context of its Europeanization, pp. 143, 156 ff. (in this book).

for other CIS countries as well,⁵⁰ was inherited from Soviet law, where it reflected the tension between ideological parameters and the needs of the economy. The communist ideology was premised on state ownership of the means of production, yet the economy demanded that enterprises be provided with a legal capacity allowing them to operate the assets in their control. This concept survived the collapse of the Soviet Union. However, now it is supposed to operate under conditions of a market economy.

Further, the Economic Code contains strong ideological elements that contradict the ideas of a free market. The Economic Code stipulates the expectation that economic entities are supposed to carry out state policy in regards of the economy. Article 11 para. 1 EC obliges legal entities to take into consideration the state program on economic and societal development. As a sanction for contradicting this expectation, Article 11 para. 5 EC states, for example, that business entities which fail to take into account social interests – as reflected in governmental official materials on economic and social development – may not be granted the legal benefits and privileges associated with carrying out business activity. Such an unspecific obligation to promote state policy is a reflection of the Soviet legal theory which stipulated that the state, the state enterprises and the Soviet people have the same goals and no conflicts of interest.⁵¹

The differences between the Civil Code and the Economic Code in respect of the notion of contractual freedom establish further evidence of the conflict between different approaches in Ukrainian private law. The Economic Code is much more paternalistic, limiting the freedom of contract in business relations in ways that the Civil Code does not. For example, pursuant to Article 216 EC, it is not permitted in a business agreement to exclude or restrict the liability of a manufacturer or seller. The Civil Code, conversely, does not contain such a restriction. Pursuant to Article 614 Civil Code, a person that violates an obligation is liable, provided his guilt (intent or negligence) is established, unless otherwise stipulated by agreement or by law. By limiting contractual freedom in transactions falling under the Economic Code but allowing contractual freedom for transactions falling under the Civil Code, Ukrainian law creates relatively more protection for business entities transacting among themselves than for private parties who engage with entrepreneurs as consumers. This is, furthermore, in contradiction to the general scheme of European private law.

⁵⁰ For example, in the Civil Code of the Russian Federation, the right of operative management and the right of economic jurisdiction are explicitly stated as rights in rem (Article 216 Civil Code).

⁵¹ *Ioffe*, *Sovetskoe graždanskoe pravo* [Soviet Civil Law], quoted from: *Izbrannye trudy* [Selected Works], Vol. II, St. Petersburg 2004, p. 39. See also *Kurzynsky-Singer*, *Wirkungsweise der legal transplants bei den Reformen des Zivilrechts*, supra n. 27.

3. Approximation of Ukrainian law to European legal standards

Thus far, it has to be realised that a mechanical implementation of the EU *acquis* will not automatically approximate Ukrainian private law to the private law of the European Union and meet the goals of approximation obligation. The implementation of the *acquis* provisions in a legal environment which does not share at least the same values and basic concepts is likely to lead to a situation where these provisions prove an ineffective legal transplant.

The Europeanisation of Ukrainian private law in fact entails as a prerequisite its access to the common core of the private law of the European area of justice. In this sense, the approximation should comprise the above-discussed silent dimension of law, i.e. implicit knowledge and understanding as well as legal methodology and underlying values.

The methodology of such an approximation is far from obvious. As stated above, there is actually no consensus about which elements constitute the essential components of European private law's common core. Furthermore, the preceding discussion on the possibility of legal transplants indicates a close connection between the basic concepts of law and society. This "law as a mirror" theory has emerged in different contexts and epochs, and it was applied for example by *Montesquieu*, *Marx*, *Savigny* and, in the modern context, *Legrand*.⁵² The general implication of this theory is the impossibility of achieving social engineering by legal reform and also the impossibility of rapidly accomplishing radical legal reform.

This implication has, however, been rather controversial until present. In particular, the discussion between *Savigny* and *Thibaut*⁵³ concerning the proposed codification of German civil law has often been referred to in recent times in the course of the debate on the unification of private law in the EU.⁵⁴ The experience from European codifications of the 19th century could, however, be a source of inspiration for the methodology of transforming post-Soviet legal orders. Most of these codifications were legal acts which documented and perpetuated the transformation of the respective societies from feudalism to capitalism. The main factor that contributed to the success of the national codifications has been identified as there being a manifestation of a tradition of legal scholarship; additionally, their preparation usually took a

⁵² For references see *Pankevich*, Phenomena of Legal Transplants Related to the Social Model of the Post-Soviet Countries, in: Kurzynsky-Singer (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 39–64 (42).

⁵³ *Thibaut*, Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland, Heidelberg 1814.

⁵⁴ See, for example, *R. Zimmermann*, Codification, ERCL 2012, pp. 367–399 (399); *Lando*, Principles of European Contract Law and Unidroit Principles, Rev.dr.unif. 2003, pp. 123–133 (129) with further references.

long time and codification was facilitated by the existence of a well-established and well-documented body of legal scholarship.⁵⁵

Similar mechanisms could apply for the transformation of civil law in the post-Soviet area as well. In this sense, a change in the inherited approaches would require a value-based discussion, one which would see the civil law as an instrument to balance different interests and to enable the participants of the market to realise a self-determined protection of their interests. A very important part of this process is access to European legal discourse, something which is more important than any legislative reform.

⁵⁵ *R. Zimmermann*, Codification, ERCL 2012, pp. 367–399 (392 f.).

EU–Ukraine Association

An Asymmetrical Partnership

*Natalia Pankevich**

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I. Introduction

The clear call of Ukrainian society for a Europeanization of the entire social system has had a high price: two revolts and the loss of people’s lives in a number of regions. The high expectations of this neighbouring nation towards cooperation with the EU are evident and presuppose tangible results in improving the situation of social and economic collapse. To pursue these goals, a model of Ukrainian integration into the European context that entailed a prospective granting of European market access without accession to EU membership was designed and supported by the EU under the EU–Ukraine Association Agreement (AA).¹ Despite the fact that fully-fledged participati-

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¹ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3; European Council, Conclusions on Ukraine, 15 December 2016, available at <<http://www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf>>.

on and representation in European policy and decision-making is precluded for Ukraine at least in the medium-term, the country is obliged to implement a vast amount of the European *acquis*.

The article will examine the compatibility of this model with the current social and institutional context in Ukraine; further, it will consider the inbuilt capacities of this model that potentially threaten the success of the entire integration effort. First, the current situation of Ukrainian institutional development will be surveyed in order to demonstrate the mismatch of the social and institutional environment with the foundational priorities of the AA. Second, the inbuilt AA asymmetries will be studied as a risk factor, potentially delegitimizing the entire course of cooperation due to the lack of representation and voice being provided for Ukraine.

II. Demand for Europeanization in Ukraine: the current situation in institutional development

1. Economic decline and a divided society

The position of Ukraine in the current global controversy is extremely difficult. The post-Soviet trajectory of this country is often described as a story of lost opportunity.

At the end of the USSR era, Ukraine had reached a significant level of economic development, one of the highest among the subsequent post-Soviet countries. Specifically, Ukraine had the highest level of industrialization, out-producing each of the other Soviet republics, “producing about four times the output of the next-ranking republic”.² Ukraine manufactured 100% of all Soviet rotor-excavators, nearly 95% of the heavy coal-mining machinery, about 40% of the steel manufacturing and blast-furnace equipment, nearly half the power transformers, a third of the rolling equipment, and a fourth of all heavy machinery. On the eve of independence, the country was the sole missile producer in the USSR. Airplane construction produced 250 airplanes per year (compared to one today).³ In 1991, the shipping company *Černomorskoe morskoe parochodstvo* was the second biggest in the world, owning

² CIA, World Factbook – Ukraine: Economy, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/up.html>>.

³ *Prigožin*, GP “Antonov” i ves’ aviaprom Ukrainy: aktiv bez buduščego [State enterprise “Antonov” and the entire aviation industry of Ukraine: an asset with no future], RIA Novosti Ukraine [Russian Information Agency News Ukraine], 4 April 2015, available at <<http://rian.com.ua/analytics/20150404/365781235.html>>.

295 ships and generating a net-profit of over one billion dollars. Today it possesses only one single vessel.⁴

Ukraine was also a Soviet-wide agricultural leader in the harvesting and production of sugar, grain, vegetable oils, canned vegetables, milk, meat, maize and beetroot. At the time of the dissolution of the USSR, Ukraine generated more than one-fourth of the Soviet agricultural output.⁵

These facts present a significant obstacle to defining this country as a former colony under imperial pressure.⁶

When the Soviet state unity was split, Ukraine and the other post-Soviet republics did not inherit Soviet and pre-Soviet state debts, which were placed on Russia.⁷ Moreover it had a more advanced legal status under international law: during the Soviet period, Ukraine (and Belarus as well) had been a UNO member since 1945, while the Russian Soviet Federative Socialist Republic was not.

⁴ *Suharevskaja*, Do i posle – Ukraina ot socializma k polnoj nezavisimosti [Before and after – Ukraine from socialism to full independence], RIA Novosti Ukraine [Russian Information Agency News Ukraine], 18 August 2016, available at <<http://rian.com.ua/columnist/20160818/1014892653.html>>.

⁵ *CIA*, World Factbook, supra n. 2.

⁶ *Szeptycki*, Ukraine as a post-colonial state? – The Polish Quarterly of International Affairs 2011, No. 1, p. 14: “the former province, Ukraine, is today dependent on raw material imports from the former metropole, Russia – quite in contradiction of the predictions formulated by theoreticians of post-colonialism”.

⁷ Initially the debts of the USSR were shared among the newly independent states under the Treaty of 4 December 1991 (Art. 4), with 61.34% placed on Russia, 16.37% on Ukraine, and the rest in minor shares were distributed over other republics. Seven of these states did not accede to the Treaty. See: Dogovor o pravopreemstve v otnošenii vnešnego gosudarstvennogo dolga i aktivov Sojuza SSR [The Treaty on succession to external state debt and assets of USSR], adopted 4 December 1991, Ispolnitel’nyj Sekretariat Sodružestva Nezavisimych Gosudarstv. Pravopreemstvo gosudarstvennoj sobstvennosti byvšego Sojuza SSR [The Executive Secretariat of the Commonwealth of Independent States. Succession to state property of the former USSR], Minsk 1996. – Later, in 1993, Russia entered into a number of Agreements that served to accumulate the debts and assets of the USSR, including those of Ukraine. See: Postanovlenie Soveta Ministrov – Pravitel’sstva RF “O podpisanii s gosudarstvami – respublikami byvšego SSSR soglašenija ob uregulirovanii voprosov pravopreemstva v otnošenii vnešnego gosudarstvennogo dolga i aktivov byvšego SSSR” [The Resolution of the Council of Ministers – Government of RF “On the signing of an agreement with the States – republics of the former USSR on the settlement of issues of succession concerning the external public debt and assets of the former USSR”], issued 17 May 1993, No. 459, Rossijskie Vesti [Russian News], 21 May 1993; Postanovlenie Pravitel’sstva RF “Ob utverždenii soglašenij meždu Rossijskoj Federaciej i gosudarstvami-učastnikami Sodružestva Nezavisimych Gosudarstv ob uregulirovanii voprosov pravopreemstva v otnošenii vnešnego gosudarstvennogo dolga i aktivov byvšego Sojuza SSR” [The RF Government Decree “On approval of agreements between the Russian Federation and the States – participants of the Commonwealth of Independent States on the settlement of issues of succession concerning the external public debt and assets of the former Soviet Union“], issued 9 October 1995, No. 992, SZ RF, 16 October 1995, No. 42, pos. 3991.

In 1991, the Russian Federation continued the membership of the Soviet Union in the UNO with the support of eleven (of fifteen) former Soviet republics.⁸

By gaining independence, Ukraine had a clear opportunity for rapid and unrestricted development. However, this did not happen. In 2011 *Forbes* listed the Ukrainian economy at fourth place in the world's ten worst economies, describing a country that "could [have] become a leading European economy — yet per-capita GDP trails far behind even countries like Serbia and Bulgaria".⁹

In fact, this comparison of Ukraine to Serbia and Bulgaria is very modest. The figures provide a discouraging picture of converting advantageous starting conditions into a macro-systemic failure in economics, politics and society.¹⁰ Today it is a country that has managed to lose nearly 30% of its economy over twenty-five years of market-oriented reforms¹¹ and that has experienced a population decline of nearly ten million people.¹² As of 2015¹³, it remains the most corrupt European country with an oligarchy controlling the economy.¹⁴

As of 2016, Ukraine ranked as one of the poorest countries in Europe, with a per capita GNP of 8,229 dollars.¹⁵ To get an understanding of what poverty officially means in this country, one can refer to the "consumer basket" — a minimum set of meals, goods and services for different categories of the population. This measurement standard is revised periodically by the government.¹⁶ Today, it is a minimum suited only for physical survival as a biological organism, providing for minimal levels of nutrition with a menu composed generally of bread, sugars and potatoes and lacking in proteins; it

⁸ *UNO*, Member States, available at <<http://www.un.org/en/member-states/index.html>>.

⁹ *Fisher*, *The World's Worst Economies*, *Forbes* 5 July 2011, available at <<http://www.forbes.com/sites/danielfisher/2011/07/05/the-worlds-worst-economies/#3cc6c38e30bc>>.

¹⁰ See cherry-picked statistics: *Krivoguz*, *Ukraina – 2015: Ėkonomičeskie itogi goda* [The economic results of the year], *Rossija i novye gosudarstva Evrazii* [Russia and new states of Eurasia] 2016, No. 1, pp. 109–126.

¹¹ *International Monetary Fund*, *World Economic Outlook Database*, October 2016, available at <<http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx>>.

¹² *Deržavna služba statistiki Ukraïni* [Ukrainian State Service for Statistics], *Naselenie* [Population], available at <http://www.ukrstat.gov.ua/operativ/operativ2007/ds/nas_rik/nas_u/nas_rik_u.html>.

¹³ *Transparency International*, *Corruption Perceptions Index*, 2015, available at <<http://www.transparency.org/cpi2015>> (the index lists Ukraine 130 of 167).

¹⁴ *European Court of Auditors*, *EU Assistance to Ukraine – Special report*, Luxemburg 2016, pp. 9, 11, 16.

¹⁵ *International Monetary Fund*, *supra* n. 11.

¹⁶ *Postanova Kabinetu Ministriv Ukraïni* "Pro zatverdžennja naboriv produktiv charčuvannja, naboriv neprodovol'čich tovariv ta naboriv poslug dlja osnovnich social'nihi demografičnich grup naselennja" [Resolution of the Cabinet of Ministers of Ukraine "On approval of sets of food, sets of non-food products and sets of services for basic social and demographic groups of the population"], issued 11 October 2016, No. 780, available at <<http://zakon3.rada.gov.ua/laws/show/780-2016-%D0%BF>>.

features, moreover, minimal clothing, communal services and cultural services. This subsistence level basket generally cannot be regarded as compatible with the values of human dignity.¹⁷

At the same time, the electronic declarations submission campaign of 2016, launched with the cooperation of the EU and the IMF, provided evidence of a huge gap in wealth between social groups. Based on a novel set of norms, state officials, deputies, civil state and municipal officers, judges and other public individuals were obliged to declare their incomes and owned assets,¹⁸ and these declarations became publicly available. Declarations, including those of the president, ministers and other officials, can be accessed through the website of a special agency in charge of publication.¹⁹ The campaign produced a massive response and was hotly discussed for the social shock it produced.²⁰ State officials and deputies declared luxurious real estate owned for residential and commercial purposes, private churches, land lots, collections of art objects and paintings, jewellery and trillions in *hryvnias*; vast cash holdings in foreign currencies were declared as well, thus also revealing a lack of trust in the national banking system.

2. Damaged society

a) Imperfect state/private division, imperfect community structure and property rights insecurity

By the time of independence, state-building in Ukraine was characterized by a more competitive political regime (as opposed to the regimes of other CIS countries, which are normally classified as regimes having a dominant power

¹⁷ On a “physiology” approach to the consumer basket, its difference as to social standards in Europe and the world, and the mismatch of provision with the current economic situation, making it still less adequate, see *Bereziuk*, Ukrainian consumer basket: Realities and prospects, *Sworldjournal* 2016, Vol. 17, No. j116 (10), pp. 29–38. For the mismatch between the consumer basket and the rational medical consumption rates, see *Thorevs'ka/Uščapovs'ka*, Spoživčij košik v Ukraïni: regional'nij aspekt [The consumer basket in Ukraine: Regional aspect], *Jekonomična ta social'na geografija* [Economic and social geography], Kiïv 2015, No. 72, p. 55.

¹⁸ *Zakon Ukraïni Pro zapobigannja korupcii* [The Law of Ukraine on prevention of corruption], adopted 14 October 2014, No. 1700-VII, *Vidomosti Verchovnoi Radi* [Bulletin of the Verchovna Rada] 2014, No. 49, pos. 2056.

¹⁹ *Nacional'ne agentstvo z pitan' zapobigannja korupcii* [The National Agency for the Prevention of Corruption], *Jedinij deržavnij rejestr deklaracij osib, upovnovaženich na vikonannja funkcij deržavi abo miscévogo samovrjaduvannja* [The unified state register of declarations of persons authorized to perform state or local self-government functions], 2016, available at <<https://public.nazk.gov.ua/>>.

²⁰ *Prentice*, Ukrainians shocked as politicians declare vast wealth, *Reuters*, 31 October 2016, available at <<http://www.reuters.com/article/us-ukraine-crisis-corruption-idUSKB N12V1EN>>.

or an autocracy).²¹ But this democratic situation has not developed into a comprehensive political regime. The state was invaded by competing oligarchic *clans*²² and thus lost its function as a public authority.²³ This had two major damaging effects. The social structure in the country has been distorted by the emergence of two major groupings: first, the privileged oligarchy minority, empowered by property and direct access to decision-making through personal representation in state institutions; and, second, the deprived majority, or *precariat*.²⁴ This leads directly to the second major set of consequences: the absence of transparency in governing the state – generally and within particular offices – and unprecedented corruption.²⁵

Competition among oligarchic groupings within the state organs is a reason why – despite the two *Maidan* public uprisings that resulted in a parliamentary reshaping of the country’s constitutional design²⁶ so as to make it institutionally less exposed to interest-group influence²⁷ and despite a

²¹ *Gel'man*, Uroki ukrainskogo [Ukrainian Lessons], Polis – Political Studies 2005, No. 1, pp. 36–49.

²² *Matuszak*, The Oligarchic Democracy: the influence of business groups on Ukrainian politics, Centre for Eastern Studies, Warsaw 2012, available at <http://aei.pitt.edu/58394/1/prace_42_en_0.pdf>; *Korhonen*, Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars, German Law Journal, July 2015, Vol. 16, Issue 3, pp. 452–478.

²³ *Lebedev/Inozemtsev*, The west is wrong to write off Ukraine’s debts, The Guardian 13 April 2015: assessing the effectiveness of international aid to Ukraine, the authors provide an explicit definition of Ukraine’s identity: “Between 2010 and 2014, Ukraine was something unknown in modern history – a private state”; “debt relief may mean a full amnesty for a corrupt clique who has brought the nation to its knees. If the international community wants to fight against global corruption, Ukraine may be the best place to start”, available at <<https://www.theguardian.com/world/2015/apr/13/ukraine-debts-lebedev-corruption>>.

²⁴ *Eppinger*, Property and Political Community: Democracy, Oligarchy, and the Case of Ukraine, George Washington International Law Review 2015, Vol. 47, pp. 825–891.

²⁵ *Bazaluk*, Corruption in Ukraine: Rulers’ Mentality and the Destiny of the Nation, Geophilosophy of Ukraine, Cambridge 2016, pp. 45–189; *Avioutskaa*, The Consolidation of Ukrainian Business Clans, Revue internationale d’intelligence économique 2010/1, Vol. 2, pp. 119–141, available at <<https://www.cairn.info/revue-internationale-d-intelligence-economique-2010-1-page-119.htm>>; *Pucket*, Clans and the Foreign Corrupt Practices Act: Individualized corruption prosecution in situations of systemic corruption, Georgetown Journal of International Law, 2010, Vol. 41, pp. 834–843.

²⁶ See generally amendments to Ukraine’s Constitution introduced by: Zakon Ukraïni “Pro vidnovlennja diï okremich položen’ Konstitucii Ukraïni” [The Law of Ukraine “On the renewal of certain provisions of the Constitution of Ukraine”], adopted 21 February 2014, No. 742-VII, Vidomosti Verchovnoi Radi [Bulletin of the Verchovna Rada] 2014, No. 11, pos. 143. – This law strengthened Parliament’s powers towards other branches by approving an enlarged list of state officials due to amendment of Arts 85.12; 112–114.

²⁷ Zakon Ukraïni “Pro vidnovlennja diï okremich položen’ Konstitucii Ukraïni” [The Law of Ukraine “On the renewal of certain provisions of the Constitution of Ukraine”], supra n. 26. Art. 78 of the Constitution now requires that a deputy of Parliament not occu-

strengthening of judiciary independence²⁸ – the macro-social situation currently remains unchanged even in the face of intensive legal reforms.²⁹ The competition for domination in Parliament gives oligarchic groups potentially even more opportunities to access power than a presidential model as it gives a particular group a more advantageous position subject to the discretion and patronage of the top administrator. The major achievement introduced by constitutional reform today is that the new structure prompts a balancing of oligarchic interests by requiring collective action, thereby minimizing purely individualistic strategies. But the state remains dominated by clans³⁰ still exploiting the public as before.

Thus, the general problem in Ukraine is caused not only by an imperfect model of power separation between the branches of state apparatus. The invasion of the state by self-interested groups enables persistent patterns for the dispersal of authority in respect of society. Oligarchic competition then produces a very specific profile of corruption: it becomes disorganized and unpredictable. Empiric evidence provided by field researches³¹ demonstrates that holders of state or municipal offices in Ukraine are subject to dual pressures. The opportunities for a typical bureaucrat (and also a typical clan-aligned entrepreneur) to access public resources depend not only upon loyalty to the immediate principal within vertical hierarchies, as is the case in stable autocracies, but also on allegiance to a particular oligarchic group and the total weight of this group in an entire competition. Here, even lower level state

py a paid office (except relating to teaching, research or creative or artistic activity) or continue in entrepreneurial activity. This prohibition is a barrier for a direct access to state decisions for business holders or deputies directly interested and dependent upon interests. Art. 81 introduces more party discipline and aims to make a deputy act based on political motivations rather than personal interests. The competition of clan interests within Parliament is partly tempered by Art. 83. The article introduces the institute of coalitions of factions, compromising a parliamentary majority, and thus provides a need to coordinate interests and prevent the individualistic opportunism of particular actors within the Parliament. A failure to compose a coalition will lead to dissolution of the Parliament under Art. 90.1 of Ukraine's Constitution.

²⁸ Amendments to Ukraine's Constitution by: Zakon Ukraïni "Pro vnesennja zmin do Konstitucii Ukraïni (ščodo pravosuddja)" [The Law of Ukraine "On amendments to the Constitution of Ukraine (regarding justice)"], adopted 2 June 2016, No. 1401-VIII, Vidomosti Verchovnoi Radi [Bulletin of the Verchovna Rada] 2016, No. 28, pos. 532.

²⁹ *European Court of Auditors*, supra n. 14, pp. 9, 11.

³⁰ *European Court of Auditors*, supra n. 14, p. 32, also taking into account as major problems the inadequate role of big enterprises, dominating markets, the lack of competitiveness in Ukraine's economy and corruption, as seen by the World Economic Forum. See Schwab (ed.), *The Global Competitiveness Report 2014–2015: Full Data Edition*, Geneva 2014, pp. 25, 372, available at <http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf>.

³¹ Markus, Property, Predation and Protection – Piranha Capitalism in Russia and Ukraine, Cambridge 2015, 243 pp. See also Eppinger, supra n. 24, pp. 869–874.

officials can expropriate authority in the hands of those above them if they belong to competing clans and can rely on their support (allowing, for example, takeovers of locally distributed state property such as medical facilities, hotels, resorts and the tourist infrastructure).³²

This leads to important systemic failures. Firstly, an independent private business outside the clan structure remains exposed to unpredictable bureaucratic expropriation which cannot be controlled by upper principals as it is in more centralized (albeit corrupt) systems. Ukrainian clan-independent private entrepreneurship is risky, ineffective and not reliable as an engine that produces wealth for the private sector. Property rights, though constitutionally allocated to private individuals,³³ are not guaranteed in practice unless they are supported by clan allegiance.

Secondly, traditional methods of combating corruption are almost useless, even if state leaders declare their commitment to fair play and fair competition,³⁴ as the state apparatus is not rationally controlled, and the office is in many cases the source of the holder's enrichment. The multiplicity of offices directly related to the regulation of the private sector is a good illustration. According to *Markus*, since Ukraine's independence from the USSR and before the reforms of 2010–2013 aimed at cutting the number of offices empowered with discretionary decision-making power for business and society, the number of bureaucrats increased by 76% and the bodies in charge of direct control of private entrepreneurship managed to more than triple their staffs.³⁵

Oligarchic competition over the state also creates a peculiar situation when the rule of law is not impossible *per se* but is institutionally precluded. The law is manipulated depending on the power status of the parties involved. This legal uncertainty prevents an on-going and permanent aggressive redistribution of economic assets. Thus, competing and lobbied-for norms are frequently introduced, and contradicting sets of law are able to survive within a single legal order.³⁶ This is true for the competing Civil and Economic Codes of Ukraine, since both can be employed to settle disputes.

³² *Markus*, Property, Predation and Protection, supra n. 31, p. 47.

³³ Konstitucija Ukraïni [The Constitution of Ukraine], adopted 28 June 1996, Vido-mosti Verhovnoi Radi [Bulletin of the Verchovna Rada] 1996, No. 30, pos. 141, Art. 41.

³⁴ As regards an evaluation of President's Juščenko personal commitment and action against corruption, see *Markus*, Property, Predation and Protection, supra n. 31, pp. 1–18.

³⁵ *Markus*, Property, Predation and Protection, supra n. 31, p. 101. – According to *Sukhova*, in the land administration sphere, the excessive staff of state officials is one of the reasons for productivity decreases. See *Sukhova*, Is it Real to Have Effective Land Administration When There is Power Disproportion?, International Federation of Surveyors FIG Congress, April 11–16, Sydney 2010, p. 9, available at <http://www.unece.org/fileadmin/DAM/hlm/prgm/cph/experts/ukraine/land_info/land.admin.sukhova.pdf>.

³⁶ *Kuznecova*, Graždanskoe zakonodatel'stvo Ukrainy: sostojanie, problemy, neobchodimost' sistemnogo soveršenstvovanija [The civil law of Ukraine: state, problems, the need

Addressing this constellation of factors solely by transposing the progressive rules of the European *acquis* can be problematic in terms of efficiency. This process necessarily operates at the “law on the books” level. But this does not by any means guarantee that the deeper patterns of social and economic action will be impacted and will react positively to this transposition so as to secure the intended outcomes.

b) Unconventional forces as a threat to Europeanization

To complete the picture of social collapse (embodied, of course, by the war in the east of the country) one should note that extremely radical political organizations with ultra-right and nationalistic orientations are competing with more respectable parties in the conventional political arena (elections).³⁷ This makes Ukrainian policy difficult to predict and in many cases contradictory to the key European policies that Ukraine adopted under the Association Agreement, especially as regards core values such as democratic rule, the market as a foundational economic institute, minority protection or questions of security.

To illustrate: Fighting against the proliferation of weapons of mass destruction is essential for European external action in general and the Association Agreement in particular.³⁸ Despite the fact that such anti-proliferation provisions constitute an essential element under the AA (Art. 11), fractions of the Ukrainian Parliament (Verchovna Rada) produce draft laws like the proposal to restore the rights of Ukraine with respect to nuclear weapons,³⁹ directly contradicting the spirit of association with the EU.

It is very obvious that by having ratified the Association Agreement, the Rada – both collectively and in terms of its individual members– should understand the obligations of the country under the AA as well as under other connected international treaties. Thus, such an event is very perplexing. Though the success of such an initiative today is nearly impossible (the fraction which initiated the proposal numbers twenty-one deputies out of 450 in the

for systemic improvement], in: *Pravovoe regulirovanije osuščestvlenija i zaščity prav fizičeskich i juridičeskich lic* [Legal regulation of realization and the protection of rights for physical and legal entities], Minsk 2015, pp. 151–155.

³⁷ *Rabotjažev*, *Parlamentskie vybory na Ukraine: povorot na zapad* [Parliamentary elections in Ukraine: the turn to the West], *Rossija i novye gosudarstva Evrazii* [Russia and new states of Eurasia] 2015, No. 1, pp. 9–23.

³⁸ EU–Ukraine Association Agreement, Preamble, Arts. 2, 7 and 11.

³⁹ *Proekt Zakonu pro viznannja takim, ščo vtrativ činnist’, Zakonu Ukraïni “Pro prijednannja Ukraïni do Dogovoru pro nerozpozvsjudžennja jadernoï zbroï vid 1 lipnja 1968”*, ta ponovlennja prav Ukraïni ščodo jadernoï zbroï [The draft law of Ukraine on recognition of the law of Ukraine “On accession of Ukraine to the Treaty on the nonproliferation of nuclear weapons of 1 July 1968” as invalid, and to restore the rights of Ukraine with respect to nuclear weapons], adopted 6 December 2016, No. 5489, available at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60636>.

state Parliament⁴⁰ and is supported by merely 7.44% of Ukrainian voters⁴¹), it makes very clear that any provision under the Association Agreement and in respect of Europeanization as a whole can be contested in Ukraine at any stage of the approximation process.

c) Oscillation towards Russia

Importantly, Ukraine remains a deeply divided society which is separated along regional lines. The contradictions between the western and eastern/southern parts of Ukraine have not yet been overcome, and political consensus has not yet been established. These rifts are the reason for the contradicting orientations of the regions towards two centres of gravity – Russia and the EU.⁴² In spite of the government's clearly expressed choice in favour of European integration, there is also a voice supporting a pro-Russian orientation. This comes not only from the Russian-speaking population but from particular sectors of industry and individual enterprises.

Russia retains its influence in Ukraine due to a set of valid reasons. The most obvious and continuous is the policy of economic help, including subsidized energy prices for the industry and housing sectors.⁴³ Without this sponsorship, the utility tariffs increased by 50–110% in 2016, making about 7.5 million households (nearly half the Ukrainian population) eligible for subsidies as they would otherwise be unable to pay.⁴⁴ Former President of the Russian Federation, D. Medvedev estimated the Russian economy had provided Ukraine with 250 billion dollars of assistance between dissolution and 2014, including indirect support by non-market preferences.⁴⁵

⁴⁰ Verhovna Rada Ukrainy [State Parliament of Ukraine], Frakcija Radikal'noi partii Olega Ljaška [Faction of the Radical party of O. Liashko] 2016, available at <<http://itd.rada.gov.ua/mps/fraction/page/2615>>.

⁴¹ Central'na viborča komisija [The Central Election Commission], Vidomosti pro pidrachunok golosiv viborčiv po zagal'noderžavnomu bagatomandatnomu viborčomu okruhu [Data on vote counting at the national multi-member constituency], 26 October 2014, available at <<http://www.cvk.gov.ua/pls/vnd2014/wp300?PT001F01=910>>.

⁴² *D'jakova*, Vlijanie etno-territorial'nykh i pograničnykh problem na otnošenija Ukrainy s RF, SŠA i NATO [The impact of ethno-territorial and border problems in Ukraine's relations with Russia, USA and NATO], Rossiya i novye gosudarstva Evrazii [Russia and new states of Eurasia] 2008, No. 1, pp. 41–56.

⁴³ Postanovlenie Pravitel'stva RF “O stavke vyvoznoj tamožennoj pošliny pri postavkakh gaza prirodnoho s territorii Rossijskoj Federacii na territoriju Ukrainy” [The RF Government Resolution “On the rate of export customs duty for natural gas supplies from the territory of the Russian Federation to the territory of Ukraine”], issued 24 September 2015, No. 1018, SZ RF 2016, No. 2 (part 1), pos. 369.

⁴⁴ *Linnik*, Tarif ”ukrainiskij” dvojnój [The “Ukrainian” rate doubles], Gazeta.ru – Kiev, 10 July 2016, available at <<https://www.gazeta.ru/business/2016/07/08/8382587.shtml>>.

⁴⁵ Medvedev: Posle raspada SSSR Possija okazala podderžku Ukraine v 250 mlrd dollarov [Medvedev: After the Soviet collapse, Russia has provided Ukraine with 250 billion

The foreign trade of Ukraine before the conflict was dominated by CIS countries and Russia in the import and export sectors. In 2013 Russia accounted for 30.2% of all Ukrainian imports and 23.8% of exports. By the end of 2015 these numbers dropped, respectively, to 12% and 19.9%; total exports in 2015 comprised only 68.4% of what they were in 2013, with imports at 85.2% of the 2013 level.⁴⁶ Thus, mutual trade has experienced a sharp decline. Having lost Russian markets due to both the shift favouring European integration and the sharp reaction of the Russian Federation, the industry and rural economy of Ukraine are in a troubling position. Petitions to the national government to resolve contradictions with a consequent return to the Russian market were launched in November and December 2016 by at least thirteen large enterprises,⁴⁷ (predictably in the east and south of the country).

The decline in the Ukrainian economy is critical and, according to the Ukrainian Minister of Social Policy, unemployment at the beginning of 2017 reached 44% of the economically active population.⁴⁸ This has made labour

dollars], *Vzgl'jad* 22 April 2014, available at <<http://www.vz.ru/news/2014/4/22/683388.html>>.

⁴⁶ Deržavna služba statistiki Ukraïni [Ukrainian State Service for Statistics], *Geografična struktura zovnišn'oi torgivli tovarami za 2013–2016* [Geographical structure of foreign trade for 2013–2016], available at <http://www.ukrstat.gov.ua/operativ/operativ2013/zd/ztt/ztt_u/ztt1213_u.htm>; *Dinamika jeksportu-importu poslug za kraïnami svitu* [Dynamics of exports and imports of services by countries of the world], available at <http://www.ukrstat.gov.ua/operativ/operativ2007/zd/din_rik/din_u/dei_posl07.htm>.

⁴⁷ *Krupnejšij har'kovskij mašzavod prizval Porošenko vozrodit' èkonomičeskie svjazi s RF* [The largest machine-building plant in Kharkov called on Poroshenko to revive economic ties with Russia], *Vesti Ukraine*, 16 November 2016, available at <<http://business.vesti-ukr.com/210582-kollektiv-krupnejshoho-kharkovkoho-mashinostroitelnoh-zavoda-prizval-poroshenko-vozrodit-ekonomicheskie-svjazi-s-rf>>; *Volkov*, *Ukrainskie proizvoditeli potrebovali naladit' èkonomičeskie svjazi s RF* [Ukrainian producers demanded to establish economic ties with Russia], *Rossijskaja gazeta* (RG), 17 November 2016, available at <<https://rg.ru/2016/11/17/ukrainskie-proizvoditeli-potrebovali-naladit-ekonomicheskie-svjazi-s-rf.html>>; *Volkov*, *Ukrainskoje predpriatie potrebovalo vosstanovit' svjazi s RF* [Ukrainian company demanded to restore ties with Russia], RG, 20 December 2016, available at <<https://rg.ru/2016/12/20/ukrainskoe-predpriatie-potrebovalo-vosstanovit-svjazi-s-rf.html>>; *Volkov*, *Ukrainskie agrarii potrebovali vozrodit' èkonomičeskie svjazi s Rossiej* [Ukrainian farmers have demanded a revival of economic ties with Russia], RG, 10 November 2016, available at <<https://rg.ru/2016/11/10/ukrainskie-agrarii-potrebovali-vozrodit-ekonomicheskie-svjazi-s-rossiej.html>>; *Osipova*, *Neožidannoje priznanije: ukrainskie predpriatija zajavili o svoej bespomoščnosti* [Unexpected confession: Ukrainian enterprises expressed their helplessness], *Imperija – Informacionno-analitičeskij portal* [Empire – Informational-analytical portal], 15 December 2016, available at <<http://www.imperiyanews.ru/details/07830f95-cdc2-e611-9416-2e815323a23f>>.

⁴⁸ *Tol'ko u poloviny trudosposobnogo naselenija Ukrainy est' rabota* [Only half of Ukraine's economically active population has a job], *RIA Novosti* [Russian Information

migration to other countries an attractive option. In total about 10% of the active Ukrainian labour force is located abroad. According to the EU Neighbourhood Migration Report 2013, just over one million Ukrainians are working in the EU and over 3.5 million are working in Russia.⁴⁹ Today, Ukraine is heavily dependent on remittances from abroad. In 2015 these represented 5.7% of GDP. In 2015, the largest amount of remittances to Ukraine came from Russia, while the share of CIS nations was 32% of their total amount.⁵⁰

This path dependency and these actual interests fasten particular sectors and groups of the population to the Russian Federation and produce strong internal pressure within Ukraine capable of altering the trajectory of the country's development.

3. *Priorities of Ukrainian society's ongoing Europeanization*

Together these factors produce a highly problematic context for Europe-oriented policies. Particularly, these difficulties impact on the potential success of the Association Agreement and on its ability to produce a certain type of democratic polity and achieve economic outcomes through establishing a Deep and Comprehensive Free Trade Area (DCFTA). It is obvious at the moment that an attempt to build a market economy and democratic society in Ukraine proceeds in a socially defective model of property and power distribution in a state that oscillates between two centres of gravity, which themselves represent diverging societal and economic models (the EU and the Russian Federation).

The call for Europeanization in Ukraine comes primarily from a section of the Ukrainian constituency frustrated by unsuccessful reforms and inspired by the combined values of good governance, state transparency and human dignity as goals of the reform and as a probable remedy. The Europe-oriented part of Ukrainian society is also not willing to reproduce the institutional patterns of a pre-existing Soviet-type system, which was generally preserved in other post-Soviet states.⁵¹

It is important to observe that though this is the public choice of a community, one dissatisfied with the current situation and one which has twice ex-

Agency News], 11 January 2017, available at <<https://ria.ru/world/20170111/1485493192.html>>.

⁴⁹ *Fargues (ed.)*, EU Neighbourhood Migration Report, European University Institute 2013, p. 267.

⁵⁰ National Bank of Ukraine, Remittances to Ukraine review, 2016, pp. 2 f., available at <<https://bank.gov.ua/doccatalog/document?id=29778582>>.

⁵¹ *Padureanu*, More Expectations Towards the European Neighbourhood Policy: the Case of Ukraine, *Europolicy* 2015, Vol. 9, No. 2, p. 225: Ukraine entering the Association Agreement is explained by “[a] demand to ensure that the country would not transform its internal political regime in order to look more like the Russian Federation”.

pressed its will during two democracy-inspired revolts, the country's elites and state leaders, i.e. those individuals charged with Europeanization, have tended to reproduce a model of politics, economic behaviour and lifestyle contested by the people. Thus, the success of the entire process is fragile due to a shortage of leadership. It depends primarily upon the public choice, which is not secured institutionally and thus can be manipulated and used as a part of an inter-elite competition in order to control the state. In this case, public support will only bring new persons to existing offices, producing no deep impact across the entire system.

Ukrainian society, however, can genuinely and immediately benefit from the implementation of programmes launched by and with the support of the EU. These are the efforts that contribute to establishing a macro-institutional environment that will, in the future, allow for administrative reform, an independent judiciary and the combating of corruption: prime examples being a state building contract⁵² aimed at deep and sustainable democracy and also the political agenda of the Association Agreement.

It is highly doubtful though that establishing a Free Trade Area with the EU by means of massive imports of superior and thus more expensive standards (European *acquis* implementation) is really a primary concern for a poor society with a declining economy, massive poverty and an absence of those (market) institutions that provide the stability for Western society.⁵³ The reform itself will need substantial investments to back not only the legal imports as such, but also to build a new institutional framework to meet new technical and social standards. It is of crucial importance that macro-economic reform give proper consideration to micro-economic stability. This means ensuring that particular enterprises are not immediately threatened by the loss of traditional sales avenues due to legislative reforms.

Massive transposition of the European *acquis* is also excessive in that it is targeting a premature landscape. Thus, the creation of DCFTA that is supposed to be the final point of the reform process is problematic in itself since the European legal exports addresses market and societal conditions that are not yet well established.⁵⁴ Moreover, the specific capacities built into European politics towards its neighbours may expose the prospective partnership to the risks of future delegitimization.

⁵² European Commission, Commission Implementing Decision of 29.4.2014 on a Special measure 2014 in favour of Ukraine to be financed from the general budget of the European Union, C(2014) 2907 final, available at <https://ec.europa.eu/europeaid/sites/devco/files/special-measure-ua-2014_en.pdf>.

⁵³ *Basedow*, EU Private Law in Ukraine: The Impact of the Association Agreement, pp. 3 ff. (in this book).

⁵⁴ *Ibid.*

III. EU–Ukraine Association: institutionalized asymmetry

1. Model of integration without membership

According to the *differentiation* principle of the European Neighbourhood Policy,⁵⁵ the policies of the EU towards neighbouring countries carry country-specific conditions. This was intended to provide a given country with the opportunity to proceed with integration as far as it is in its interests, priorities and capacities to approximate.⁵⁶

The Treaty on European Union (TEU) does not restrict the scope of legal instruments available for the EU and its members, including both binding treaties and soft law such as action plans, programmes, road maps and other instruments. Moreover, external action is undefined in terms of the institutional constructions to be produced to secure integration. Due to this flexibility, the TEU allows for, among other options, the *integration without membership* that is offered today to East European post-Soviet republics, including Ukraine,⁵⁷ via a binding instrument of Association Agreements.⁵⁸

Within the process of EU-Ukraine AA ratification, some problematic issues arose; these led to the conclusion that *integration without membership* is a pivotal point of approximation and the highest form of bilateral relations accessible for this country. The consultative referendum of 6 April 2016 in the Netherlands provided evidence of resistance (albeit regionally, but nevertheless empowered by the highest form of peoples' approval) to Ukraine's deeper involvement in the European landscape.

Public opposition – totalling 61% of the vote⁵⁹ – created a serious problem for the government of the country, which due to its democratic character could

⁵⁵ *Gstöl*, Differentiated integration and the prospects of a Neighbourhood Economic Community between the EU and its Eastern Partners, in: Van Elsuwege/Petrov (eds.), *Legislative Approximation of EU Law in the Eastern Neighbourhood of the European Union*, New York 2014, pp. 89 f.

⁵⁶ Commission of European Communities, Communication from the Commission, European Neighbourhood policy: Strategy paper, Brussels, 12 May 2004, COM(2004) 373 final, pp. 8, 15, 16, available at <https://eeas.europa.eu/archives/delegations/georgia/documents/eu_georgia/commission_communication_enp_strategie_paper.pdf>.

⁵⁷ EU–Ukraine Association Agreement, *supra* n. 1.

⁵⁸ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, Brussels, 27 July 2014, OJ 2014 L 260/8; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, Brussels, 27 June 2014, OJ 2014 L 261/4.

⁵⁹ The Netherlands, Kiesraad, Uitslag referendum Associatieovereenkomst met Oekraïne, 12 April 2016, available at <<https://web.archive.org/web/20160412162613/https://www.kiesraad.nl/nieuws/uitslag-referendum-associatieovereenkomst-met-oekra%C3%AFne>>.

not ignore the vote despite the referendum being only of an advisory nature.⁶⁰ As a result, the AA's full implementation was sufficiently delayed. To meet public demand, the Netherlands did not ratify the Agreement until 15 June 2017 and conditioned ratification on the inclusion of special measures regarding Association Agreement interpretation. Those were provided by adoption of a Decision of the Heads of the EU Governments on 15 December 2016.⁶¹

For Ukraine and its citizens, this Decision expressly states that the Agreement: “does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future” (para. A); “does not contain an obligation for the Union or its Member States to provide collective security guarantees or other military aid or assistance to Ukraine” (para. B); “does not grant to Ukrainian nationals [...] the right to reside and work freely within the territory of the member states” (para. C); and “does not require additional financial support by the Member States to Ukraine” (para. D). The Decision also reiterates the possibility of “the suspension of any rights or obligations provided under the provisions of the Agreement” (para. F).

Within the EU, this situation is damaging as it questions the core values of the EU internally and reveals potential conflicts. Namely, democracy as the only possible regime of national decision-making encroaches on the consensual character of common decision-making (allowing one Member State to block the jointly agreed policy). This experience demonstrates that the EU's Eastern Policy could potentially meet popular opposition in other countries as well, and that the Agreement reflects only the European elite's vision of Neighbourhood Policy, one which does not have account of popular attitudes and can thus only be tested by aggregate public trust during the next electoral cycle.

For Ukraine, the formula as outlined creates a problematic situation that potentially serves to discredit not only the shift towards Europe as a whole but also pro-European leaders individually as ineffective in achieving the implementation of better regimes for integration and cooperation.

2. *Shortcomings of integration without membership*

a) *Lack of incentives for reforms and palliative legal reforms in Ukraine*

A commitment of the EU to transformative action in the Neighbourhood in order to bring the outer polity into line with the European format and the ruling-out of accession options has met with serious criticism.

Technically it is argued that by precluding prospective full-membership, the EU has failed to provide neighbouring states with a major incentive to imple-

⁶⁰ The Netherlands, Wet raadgevend referendum, 30 September 2014, available at <<http://wetten.overheid.nl/BWBR0036443/2015-07-01>>.

⁶¹ *European Council*, Conclusions on Ukraine, *supra* n. 1.

ment the law of the EU beyond the formal introduction of the “law on the books”.⁶² Thus these countries lose the opportunity to modernize swiftly, and the investments and efforts of the EU are not properly secured. The EU External Action Service reports that since independence the EU has given Ukraine €3.3 billion in grants, and other amounts were provided by EU Member States as bilateral assistance. Ukraine has received €10 bn in loans from the EU under beneficial terms and receives on average €150 m annually in grants under the European Neighbourhood Policy framework. In 2014, the European Commission proposed a support package for Ukraine worth at least €11 bn over the next several years.⁶³ Additionally, funding secured in 2015–2020 for actions towards the Neighbourhood comprises €15.4 bn.⁶⁴

Though the funding allocated to Ukraine is generous, the results have been merely modest. As an example, the formal character of introducing novel elements into the Ukrainian national legal system requires constitutional change in order to provide internal legitimacy for the International Criminal Court (required by AA Arts. 8; 24.3.).

Art. 9.2. of the Ukrainian Constitution provides that ratification of international treaties contradicting the Constitution can be done only after the Constitution is amended. In 2001, the Constitutional Court of Ukraine handed down a judgment⁶⁵ finding only partial compatibility between the Rome Statute and the Ukrainian Constitution: Art. 124 of the Constitution confers the function of justice exclusively to national courts, and the delegation of this capacity as well as its appropriation by other bodies, organs or officials was not permitted.⁶⁶ In its decision, the Court rejected the possibility of complementing the national judiciary with an international body.

⁶² *Tsybulenko/Pakhomenko*, The Ukrainian Crisis as a Challenge for the Eastern Partnership, in: Kerikmäe/Chochia (eds.), *Political and Legal Perspectives of the EU Eastern Partnership Policy*, Cham 2016, pp. 167–179 (173, 177).

⁶³ EU External Action, Factsheet – FAQs about Ukraine, the EU’s Eastern Partnership and the EU-Ukraine Association Agreement, Brussels, 24 April 2015, No. 150424/04, p. 2, available at <http://www.eeas.europa.eu/archives/docs/statements/docs/2014/140612_01_en.pdf>.

⁶⁴ European Commission, Neighbourhood at the crossroads – taking a stock of a year of challenges, Brussels, 27 March 2014, available at <http://europa.eu/rapid/press-release_IP-14-315_en.htm>.

⁶⁵ *Visnovok Konstitucijnogo Sudu Ukraïni u spravi za konstitucijnim podannjam Prezidenta Ukraïni pro nadannja visnovku ščodo vidpovidnosti Konstitucii Ukraïni Rims'kogo Statutu Mižnarodnogo kriminal'nogo sudu (sprava pro Rims'kij Statut)* [The Judgment of the Constitutional Court of Ukraine in a case on the constitutional representation of the President of Ukraine on providing an opinion regarding the conformity of the Constitution of Ukraine and the Rome Statute of the International Criminal Court (case on Rome Statute)], issued 11 July 2001, Case No. 1-35/2001, Kiïv, No. 3-B/2001, available at <<http://zakon5.rada.gov.ua/laws/show/v003v710-01>>.

⁶⁶ *Konstitucija Ukraïni* [The Constitution of Ukraine], supra n. 33.

To overcome this contradiction, Art. 124 of the Constitution was amended in 2016 by introducing the following sentence: “Ukraine *may* recognize the jurisdiction of the International Criminal Court as provided for by the Rome Statute of the International Criminal Court”.

The new norm will come into force on 30 June 2019,⁶⁷ thus providing the Verchovna Rada, most probably in a new composition due to new elections, with the possibility to ratify (or not ratify) the Rome Statute. Remarkably this innovation was not discussed by the Constitutional Commission in Ukraine, and consequently it was not submitted for evaluation by the Venice Commission when the latter was providing its comprehensive expertise on the constitutional reform of the Ukrainian judiciary.⁶⁸ This places the effectiveness of palliative methods such as Constitutional amendment in doubt, leading to concerns that Ukraine may try to evade its obligations⁶⁹ if the situation changes later in time.

b) Asymmetry question: misuse of negotiation power by the EU?

Another line of critique of “integration without membership” produces still more concerns. An alternative interpretation explaining the need to establish such a distant form of integration is that it is primarily a method to “halt further enlargement for those potentially eligible”.⁷⁰ This stems from the supposed enlargement *fatigue*⁷¹ experienced by the EU and its inability to properly integrate new members despite its still being willing and constitutionally obliged⁷² to preserve the ability to transform neighbouring states’ legal orders.

Under the AA, which is of binding nature, in order to gain access to European markets, as regulated by DCTFA, Ukraine has to fulfil an enormous set

⁶⁷ Zakon Ukraïni “Pro vnesennja zmin do Konstitucii Ukraïni (ščodopravosuddja)”, supra n. 28, Title II, Art. 2.

⁶⁸ European Commission for Democracy Through Law (Venice Commission), Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as Approved by the Constitutional Commission on 4 September 2015, adopted by the Venice Commission at its 104th Plenary Session (Venice 23–24 October 2015), available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)027-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)027-e)>.

⁶⁹ *Gnatovskij*, *Ukraina i Meždunarodnyj ugovnyj sud: Konstitucionnyj aspekt [Ukraine and the International Criminal Court: the constitutional aspect]*, *Vox Ukraine*, 12 January 2016, available at <http://voxukraine.org/2016/01/12/ukraine-and-the-international-criminal-court-a-constitutional-matter-ru/#_edn2>.

⁷⁰ *Edwards*, *The construction of ambiguity and the limits of attraction: Europe and its Neighbourhood Policy*, *Journal of European Integration* 2008, Vol. 30, Issue 1, p. 46.

⁷¹ *Szolucha*, *The EU and Enlargement Fatigue: Why has the European Union not been able to counter enlargement fatigue?*, *Journal of Contemporary European Research* 2010, Vol. 6, Issue 1, pp. 1–16.

⁷² See: *Pankevich*, *Eastern Neighbourhood of the EU: Alternatives for Integrative Projects*, pp. 255 ff. (in this book).

of obligations (compared to the obligations of prospective Member States). Legal export of this kind affects the recipient but keeps the European market safe as the EU retains sole decision-making power for key issues under the AA:⁷³ it is entitled to monitor and evaluate progress in legal harmonization; it determines whether to grant internal market access; and it preserves mechanisms to reverse actions should the reforms fail. Thus, this is an asymmetrical system based upon the EU's prevailing market alongside its negotiating and reputational might. For Ukraine, this situation is risky.

3. *Ukraine's representation and voice in the European legislative process*

Despite the condition of *no membership*, Ukraine is still obliged to implement an undefined number of regulations without any representation of the associated state within the European decision-making process – namely, in the European Parliament, Commission or Council. The structure of the Association Agreement echoes the famous formula of the American Revolution that blamed Britain for suppressing the American colonies by denying them representation, thus directly leading to the Declaration of Independence. Without EU membership, Ukraine remains a modest recipient of the norms exported from the EU, without a voice in the process.

At the moment, the country is represented only on consultative European bodies like inter-parliamentary assemblies, namely the *Parliamentary Assembly of the Council of Europe* and *Euronest*. The first provides for dialogue between the European and Ukrainian parliamentary house members generally, beyond the scope of Association Agreement, and it is not incorporated into the EU legal process. The second is established to connect the same constituency of European law-makers with the legislators of Eastern Partnership countries. This para-constitutional organ is empowered to act for the benefit of further economic integration between the EU and its Eastern Partners by promoting EU laws and standards and by establishing a deep and comprehensive network of free trade areas (Art. 2(b)).⁷⁴ But it has very modest capacities in translating the opinions and interests of Eastern partners into action. According to the Constituent Act (Art. 6), this body corresponds only to the Eastern Partnership and mainly provides expertise for its Summit.

As a result, Ukraine has virtually no direct access to the decisions on the Regulations and Directives it is obliged to implement; it is moderated via a set of mediating organs.

⁷³ EU–Ukraine Association Agreement Art. 475, Appendix XVII-6.

⁷⁴ Euronest Parliamentary Assembly, Constituent Act of the Euronest Parliamentary Assembly, available at <<http://www.euronest.euoparl.europa.eu/euronest/cms/home/act>>.

a) Voice under the Association Agreement

It is doubtful also whether Ukraine has an adequate voice in the organs established under the Association Agreement as regulated generally by AA Title VII (on Institutional, General and Final Provisions) and as governed more specifically by Chapter 1 (on the Institutional Framework).

Article 5 of the AA establishes a number of organs providing fora to discuss common decisions for the parties – in principle annually. These include the Summit (the highest level of political and policy dialogue as clarified later by Art. 460 AA); the Association Council (regular political and policy dialogue at ministerial level pursuant to Arts. 460.2.; 461 AA); the Parliamentary Association Committee (a forum for members of the EU Parliament and the Verchovna Rada under Art. 467 AA); meetings between representatives of the parties at the foreign minister level; and meetings between political and administrative leaders, experts and representatives of civil society (Arts. 469–470). Such a diversified structure that addresses and involves all the constitutional bodies of a partner country and the respective society at large is intended to produce a strong and sustainable mechanism, with a sophisticated inter-institutional diplomacy able to identify and consider all major voices and interests involved in approximating European and Ukrainian societies. It is also intended to be able to settle possible disputes according to the subsidiarity principle – at the lowest possible level of decision-making. Yet a close analysis of authority distribution and decision-making capacities, as constructed by the text of Association Agreement, reveals significant asymmetries.

Central to AA functions, the Association Council is composed of members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the government of Ukraine on the other, with this Council having the right to produce binding decisions within the scope of the Agreement (Arts. 462.1.; 463.1. AA).

The composition of the Association Council is peculiar as it includes representatives of the two key European decision-making bodies, both constitutionally involved in the European legislative process by initiative and vote. But it is quite surprising that dialogue within the Association Council is restricted according to Art. 462.1. AA to the participation of the Ukrainian government. That refers only to the executive branch of state authority and prevents the participation of elected legislators.

In turn, participation of the Ukrainian legislative branch in the decision-making process under the AA is limited by Art. 468 to the formal rights of the Parliamentary Association Committee as against the Association Council, namely to request relevant information regarding the implementation of the Agreement, to be informed of decisions and recommendations, and to make recommendations to the Association Council. Additionally, under Art. 462.4., the legislating branch, along with other bodies, is only granted a modest role

of observer in the work of the Association Council, and then “where appropriate, and by mutual agreement”.

Such provisions are inconsistent with the Ukrainian Constitution provision stating that the Verchovna Rada (national Parliament) is the only and exclusive legislating organ in the country⁷⁵ holding the competence to either consent to the binding nature of international treaties or denounce them.⁷⁶

Moreover, the Parliament is also the body empowered to impeach the president⁷⁷ (who is entitled to sign international treaties)⁷⁸, to exercise control over the cabinet⁷⁹ and to hold a no-confidence vote as regards the government.⁸⁰ Thus it is the Parliament that is supposed to discuss and test the new regulations in order to protect national interests and find the balance allowing for public support of the reforms. Any transposition of legal norms will unavoidably involve this body.

All these powers mean the Rada is at the core of legal approximation and can block it entirely. It is therefore unclear how the binding nature of Association Council decisions upon the amendment of AA Annexes should be secured in the present or the future. In short, it is unclear how to take account of the evolution of EU law without the reliable support of the Rada. By excluding the Rada from the implementation process, the European law acquires a purely administrative nature, granting officers of the EU the power to preside over legal developments in a third country, at least as regards trade, but also – due to the comprehensive character of the Agreement – in the political sphere.

Relocating decisions that belong constitutionally to the Parliament to a ministerial level is also damaging for the entire constitutional system and raises internal conflicts. This is especially disappointing given that the major achievements of the last decade in democratic reforms in Ukraine is attributed to the empowerment of Parliament in response to the two *Maidan* revolts. Precisely this institution, composed of elected members who are responsible to

⁷⁵ Konstitucija Ukraïni [The Constitution of Ukraine], supra n. 33, Art.75; Rišennja Konstitucijnogo Sudu Ukraïni u spravi za konstitucijnim podannjam 50 narodnih deputativ Ukraïni ščodo oficijnogo tлумachennja položen' statej 75, 82, 84, 91, 104 Konstitucij Ukraïni (ščodo povnovazhnosti Verchovnoi Radi Ukraïni) [The decision of the Constitutional Court of Ukraine on the constitutional representation of 50 people's deputies of Ukraine concerning official interpretation of the provisions of articles 75, 82, 84, 91, and 104 of the Constitution of Ukraine (concerning the authority of the Verchovna Rada of Ukraine)], issued 17 October 2002, Case N 1-6/2002, N 17-rp/2002.

⁷⁶ Konstitucija Ukraïni [The Constitution of Ukraine] Art. 85.32.

⁷⁷ Konstitucija Ukraïni [The Constitution of Ukraine] Art. 85.10.

⁷⁸ Konstitucija Ukraïni [The Constitution of Ukraine] Art. 106.3.

⁷⁹ Konstitucija Ukraïni [The Constitution of Ukraine] Art. 85.13.

⁸⁰ Konstitucija Ukraïni [The Constitution of Ukraine] Art. 87.

their constituencies, is expected to provide better transparency and accountability for the state bureaucracy and thus contribute to combating corruption.⁸¹

It is also very important to observe that the capacity to decide can be transferred to a lower level, i.e. to the Association Committee. This body “shall be composed of representatives of the Parties, in principle at senior civil servant level” (Art. 464.2. AA) and is obliged to meet in “a specific configuration to address all issues related to Title IV (Trade and Trade-related Matters)” (Art. 465.4. AA). This delegation can be made at the discretion of the Association Council, according to Art. 465.2. AA, but generally this body is empowered by the text of the Agreement.

Under the AA, major decisions on the principle goals of the Agreement are made at the Committee level, mostly the Association Committee in its Trade configuration. This is a body, which fulfils core functions in approximation and in the treatment of internal market provisions. It reviews the level of advancement as regards the transposition, implementation and enforcement of the EU *acquis* (Art. 96 AA); it makes decisions on granting internal market treatment to respective sectors (Art. 145.3. AA), (Annex VII Art. 4.3. AA); it reviews the measures taken and determines the modalities for further liberalization of trade regimes (Art. 147.3. AA); it revises the thresholds of public procurement (Art. 149.3. AA); it receives and evaluates roadmaps for the implementation of relevant *acquis* rules and evaluates each stage of implementation (Arts. 152.1.; 152.3.; 153.3. AA); it assesses the quality of legislation (Art. 154.2. AA); it plays a key role in dispute settlement (Title IV, Chapter 14 AA); it amends Appendices in order to take account of the evolution of European law (Annex VII Arts. 3, 5 AA); and it provides consultation on safeguard measures (Annex XVII AA).

The majority of actions towards market access under the Agreement are fulfilled at the ministerial level of the institutional framework. However, while this level is adequate for top-down control as regards the implementation of European law, it is almost useless in conducting bottom-up initiatives that would allow Ukraine to influence the scope and content of the laws to be implemented. Even though both the Association Council and the Committee are supposed to take decisions by agreement between the parties (Arts. 463.1.; 465.3. AA), this effectively only results in a veto for Ukraine and does not allow for the amendment of European policies; instead, it leads to suspensions in granting European market access.

b) Loss of independent legislative capacity

It is important that the AA not only obliges Ukraine to transpose a huge amount of then-existing European *acquis* (including numerous Council and Commissi-

⁸¹ Markus, Property, Predation and Protection, *supra* n. 31, pp. 36, 120.

on Regulations and Directives for the appropriate sectors) and prescribes the mode in which they should be implemented,⁸² but that the obligation is also to implement *future* EU norms in many important sectors. While the EU has only a duty to inform Ukraine about changes in subsequent Regulations,⁸³ Ukraine, for its part, has to implement them within the stated periods. This relates also to the corresponding case law of the European Court of Justice.⁸⁴

Discussion is only rarely envisaged. While the Sanitary and Phytosanitary Measures (SPS) section⁸⁵ does provide scope for a veto, the overall composition of the chapter makes this vote very weak, as the veto-strategy undermines the potential for a final decision in favour of establishing a regime of mutual recognition for SPS measures.

The most explicit text in depicting a loss of legislative capacity for Ukraine is Annex XVII (related to Establishment, Trade in Services and E-commerce). It describes in more detail the regime for Ukraine's transposition of EU legal norms, including the different stages.

At the stage *before* granting full internal market treatment under Annex XVII, Art. 3.3. AA, the Trade Committee is obliged "to add [...] any new or amended EU legislative act to the Appendices", while Ukraine "shall transpose the legislation into its domestic legal system". Only in a case of

⁸² EU-Ukraine Association Agreement Annex XVII Art. 2, building upon Art. 288 Treaty on Functioning of the EU, provides for the *acquis* stated in Annexes XVII.2–XVII.5: "(a) an act corresponding to a EU Regulation or Decision shall as such be made part of the internal legal order of Ukraine; (b) an act corresponding to a EU Directive shall leave to the authorities of Ukraine the choice of form and method of implementation. – A Regulation under the AA is not defined as a "directly applicable" norm (as it is in the EU), but its introduction into Ukraine's law system is mandatory. Thus, although there is a difference in the implementation procedure, the end result is the same.

⁸³ EU-Ukraine Association Agreement Art. 67.3. on Sanitary and Phytosanitary Measures provides: "the EU Party shall inform Ukraine well in advance of changes to the EU Party legislation to allow Ukraine to consider amending its legislation accordingly". Arts. 114.1., 124.1. and 133.1.), regulating "Establishment, Trade in Services and E-commerce", and Art. 153.1. on public procurement all claim, that: "Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*". Art. 138: "Ukraine shall adapt its legislation, including administrative, technical and other rules, to that of the EU Party existing at any time [...] insofar as it serves to achieve the objectives of liberalization, mutual access to the markets of the Parties, and the movement of passengers and of goods".

⁸⁴ EU-Ukraine Association Agreement Art. 153.2.: "[...] due account shall be taken of the corresponding case law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU *acquis* occurring in the meantime. The European Commission shall notify without undue delay Ukraine of any modifications of the EU *acquis*".

⁸⁵ EU-Ukraine Association Agreement Art. 74.6.: "any decision, recommendation, report or other action by the SPS Sub-Committee or any group established by the SPS Sub-Committee shall be adopted by consensus between the Parties".

particular difficulties and under exceptional circumstances can Ukraine be *partly or temporarily* exempted from this transposition (Annex XVII Art. 3.4. AA). Thus, this can only be construed as an obligation for Ukraine.

At the stage *after* the granting of full internal market treatment, the Trade Committee is given discretion on whether or not to add a new or amended EU act to the Appendices (Annex XVII Art. 5.3. AA). Thus, in the case of consensus, particular acts can be waived from being compulsory for transposition. But in disputed cases, when agreement on the addition of a new or amended Act cannot be reached, the EU may decide to suspend the granting of internal market treatment in the sector concerned (Annex XVII Art. 5.6. AA), and it may do it immediately under the circumstances (Annex XVII Art. 7.4. AA) should the procedures of dispute resolution fail.

In this way, Ukraine's compliance is required at both stages of approximation – before and after granting internal market treatment. Thus, a rather simple mechanism of reverse action is established for the EU: a suspension of national treatment for the EU is merely a technical decision. Conversely, for Ukraine the way back is hardly possible for it will pose a legal threat to the entire regulatory system in the relevant sector and create additional stress for the real economy.

Moreover, as envisaged later (Annex XVII Art. 5.7. AA), Ukraine loses the right to autonomously adopt new legislation or amend existing legislation in the sectors under approximation without first reporting its intention and allowing for further assessment. Again, the threat of losing such a hard-won regime of internal treatment is pronounced. Although agreed to by both parties of the Association Agreement, such a provision is above all an intervention into the sphere of state sovereignty in law-making.

c) Misbalanced dispute settlement

The next problematic issue is a dispute settlement mechanism for regulatory approximation established under Art. 322 AA. This article covers Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services, E-commerce), Chapter 8 (Public Procurement) and Chapter 10 (Competition). It transfers the capacity to interpret a provision of EU law to the competence of the European Court of Justice, exempting this function from arbitration (which is a regular dispute settlement mechanism under Chapter 14 AA on dispute settlement).

Article 322.2. AA explicitly posits that “[w]here a dispute raises a question of interpretation of a [relevant provision of EU law], the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give the ruling on the question. [This] ruling shall be binding on the arbitration panel”.

Under this provision, the court of one party is the only forum that produces decisions legally binding on the other party. By approving this framework Ukraine loses nearly all leverage in presenting its opinion on the issue at debate.

4. Use of reverse mechanisms by the EU

It is important to observe that such far-reaching provisions for legal approximation are sector specific (and thus are specific to a subsequent section of the AA and the DCFTA). Particular sections of the AA presuppose less persuasive European action in order to impose the norms into the Ukrainian legal system. For instance, in a very surprising manner, Chapter 10 on Competition sets out the relevant *acquis* in Art. 256 AA. The failure to place this list of instruments into the relevant Annex makes it impossible for the Association Council to update it and take account of the evolution of EU law. In contrast, Chapter 13 on Trade and Sustainable Development provides only general guidelines for legal approximation (Art. 290.2. AA) and does not specify particular *acquis* or the means by which this obligation is to be complied with.

It is doubtful whether these differentiated modes of legal approximation reflect sectors where legal approximation is envisaged as having different levels of importance for the EU. That is to say, it is questionable whether the difference is explained by varying goals and indicators or more simply because the text of individual articles was developed by different EU sub-institutes and collated without a general overview undertaken by a centrally authorized body.⁸⁶ To address this issue, a more economic-oriented analysis is needed.

For the purposes of this discussion, the important fact remains that when taken together, such provisions are highly asymmetrical and problematic in that they undermine the ideal of equal contracting parties and produce an imbalanced set of rights and obligations. This brings into question whether the EU is justifiably using its market along with its political and reputational might to compel compliance in a peripheral state today and in the future, while placing no trust in Ukraine.

A very remarkable picture is derived from the wording of Art. 463.3. of the Association Agreement:

“The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties [...]”

This formulation is explicitly one-sided, giving the evolution of EU law absolute priority and denying any importance of the same temporal process in Ukraine. Even when considering that the function of updating or amending the Annexes is not always compulsory (in light of the word *may*), this poten-

⁸⁶ Basedow, EU Private Law in Ukraine, supra n. 53, pp. 3 ff. (in this book).

tial weakness is more than balanced by introducing this robust obligation into specific sections of the AA and reinforcing it by mechanisms to suspend the AA in those sectors.

The important instrument that indicated the intention of the EU to keep relationships asymmetrical is the general principle established in the European Neighbourhood Policy and the Eastern Partnership policies. The relevant formulations explicitly point to the “reverse” mechanisms unilaterally available to the EU that can easily be invoked and are widely used against neighbour-states, and not only under Association Agreements.

An example of how such a principle functions can be seen in the debate over the visa-free regime for Ukraine at the Summit of November 2016. Article 19.3. AA provides: “The Parties shall take gradual steps towards a visa-free regime in due course, provided that the conditions for well- managed and secure mobility, set out in the two-phase Action Plan on Visa Liberalization presented at the EU-Ukraine Summit of 22 November 2010, are in place.”

While admitting in December 2015 that Ukraine had fulfilled all the EU requirements entitling access to the visa-free regime, the EU postponed such a step due to “the changing internal situation in the context of the current migratory crisis”. On 4 May 2016, the Commission decided to present a proposal to amend Regulation 539/2001 in order to revise the mechanism, making it easier to suspend visa-free regimes.⁸⁷

This demonstrates how irrevocable adjustments in the legal order of Ukraine (and other waiting countries – Georgia, Turkey and Kosovo) have met with an elusive commitment to the reciprocal decisions. This is the kind of a game that a dominant power can afford to play, while the minor players must wait patiently as the internal concerns of the principal are settled. But at the same time, this ruins the spirit of partnership and reciprocity. Moreover, in the specific case of Ukraine, it is precisely these questions of visa liberalization that were of crucial importance for the legitimacy of today’s leaders.

The failure to get what was promised will lead to Ukrainian public disappointment in the EU,⁸⁸ and it will be used in a guerrilla information campaign by opponents of Euro-integration. In the event of similar delays, the EU bears also a reputational risk of being seen as unreliable, especially in its commitment to *pacta sunt servanda* principles, the priority of law over current policies and other core values.

⁸⁷ Council of the European Union, Visas: Council agrees [on] its negotiating position on visa liberalisation for Ukraine, Press release 675/16 on 17 November 2016, available at <<http://www.consilium.europa.eu/en/press/press-releases/2016/11/17-visa-liberalisation-ukraine/>>.

⁸⁸ *Stern*, Ukrainians fall out of love with Europe, Politico, 11 January 2017, available at <<http://www.politico.eu/article/ukrainians-fall-out-of-love-with-european-union/>>.

IV. Conclusions

By signing on to creating an Association with Ukraine, the EU has entered very problematic terrain. Contemporary Ukraine presents a clear alternative to the European model of state and society. The constitutional and legal principles of state governance, the political regime and the core values provided by major legislative acts and introduced by reforms are, in practice, challenged by the relationships behind the law. Public authority deprived of a citizen constituency, oligarchical domination and the privatization of the state, along with omnipresent corruption, are hardly compatible with the key European principles of polity-building. At the same time, the type of economy the Ukraine now possesses is very far from a normative market featuring regulation by rules and institutions as opposed to one governed by personal ties, kinships and allegiances. This situation contributes to the sharp decline in social welfare seen in Ukraine; it also worsens poverty, decreases security and leads to a stronger demand for Europeanization, one that is significantly supported by common people. However, Europe-oriented reform may still fail to attract much leadership from the privileged elites who extract surpluses from their domination of the state and markets.

For the EU, integrating such a significantly deviating system is impossible. It threatens the core principles of European polity as well as macro-economic security. Thus, a profound, complex and entire model-changing-reform is needed as a necessary prerequisite of integration. To address the importance of radical social and economic transformation, the EU endorses a massive transposition encompassing the entirety of those legal complexes governing a mature and sustainable market democracy like that of the EU. This raises questions about the adequacy of the instrument in use for the immediate goals, needs and demands of Ukraine. Excessive legal reform can itself stop economic growth and can even promote further decline by introducing standards that are too complicated and exhausting for premature markets and industrially backward enterprises, making them still less able to compete with Europe. This factor can serve to immediately negate the efficiency and legitimacy of EU efforts in Ukraine.

The EU-Ukraine Association can also be contested from a longer-term perspective. The entire programme is founded on the idea that market and democratic reform in Ukraine can be fuelled only by EU market access. It is significant that legal transposition should be performed under the conditions of a no EU-membership model. This model is explicitly misbalanced and provides almost no immediate mechanisms for Ukraine to influence the scope and contents of the European *aquis* that it is obliged to transpose today and in the future. Ukraine has enrolled itself in a construction where its access and representation in European decision-making is illusive, the capacities for au-

onomous legislation are reduced and dispute settlement is performed by the other party's organs. Moreover, the EU has access to ample mechanisms to reverse any decision to provide market access. Thus, rather than an equal partnership, the Association appears more like a means of establishing EU domination in a distant region by the imposition of a discipline enhanced by the transposition of law.

In turn, the question of asymmetry in donor-recipient legal relations raises the suspicion that this asymmetry could reflect the EU shifting towards altering its identity to become a *de facto* contemporary political empire.⁸⁹ This potentially cultivates grounds for future disputes and withdrawals. But unlike the Ukrainian withdrawal of 2013, when a “totally corrupted” political regime decided to step away from the Association, a withdrawal resulting from disappointment will be a crucial failure of the EU's Eastern European politics. Considering that Europe is not the only entity advancing a vision for a future world configuration, the question of a more balanced and equal dialogue is important – the reputational might of the EU within a global society is at stake.

⁸⁹ *Vernygora/Troitino/Västa*, The Eastern Partnership Programme: Is pragmatic regional functionalism working for a contemporary political empire?, in: Kerikmäe/Chochia (eds.), *Political and Legal Perspectives of the EU Eastern Partnership Policy*, Cham 2016, pp. 7–22 (7).

Allure and Rejection

Legal Frameworks Governing EU–Ukraine Relations Before the Association Agreement

Danilo Flores

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The EU–Ukraine Association Agreement (hereafter: AA) transformed a vaguely defined partnership between Ukraine and the EU into a legally binding regime of EU-oriented legal approximation. Leaving behind the soft-law approach of previous agreements, the obligatory provisions of the AA embodied Ukraine’s far-reaching ambitions for deep integration with the EU. This paper will give an overview of the legal frameworks governing EU–Ukraine bilateral relations prior to the conclusion of the AA.

I. Post-Soviet arrangements

The formalization and intensification of Ukraine’s affiliation with the EU brought to the forefront contradictions arising from Ukraine’s involvement with overlapping regional integration initiatives emanating, on the one hand, from the EU in the West and, on the other hand, from Russia in the East.¹ Ukraine’s so-called “multi-vectored” policy² ultimately proved to be a balancing act that was impossible to maintain.

Gaining independence in 1991, Ukraine became a founding member of the Commonwealth of Independent States (CIS). This organization formed as a legal entity meant to succeed the disbanded Soviet Union. Aimed largely at

¹ See *Pankevich*, EU–Ukraine Association: An Asymmetrical Partnership, pp. 33 ff. (in this book).

² See *Fischer*, Ukraine as a Regional Actor, in: Fischer (ed.), Ukraine: Quo Vadis?, Chaillot Paper No. 108, Institute for Security Studies, Paris 2008.

the economic integration of the former Soviet republics, the CIS eventually comprised all of the successor states except for the Baltic states (with Georgia withdrawing from the CIS later in 2009).³ The fact that Ukraine never signed the CIS Charter in 1993 rendered its membership status in the organization somewhat unclear.⁴

As early as the mid-nineties, Ukraine's hesitation to become a fully-fledged CIS member was paralleled by official announcements which emphasized the resolve to accomplish wide-ranging association with or even accession to the EU.⁵ Ukraine's indecisiveness in terms of fully embracing the CIS partnership foreshadowed the conflicting foreign-policy alignments that were to pull Ukraine into different spheres of influence in the years to come.

II. The Partnership and Cooperation Agreement

The legal groundwork for EU–Ukraine bilateral relations was laid in March 1998 when a Partnership and Cooperation Agreement (hereafter: PCA) between the two parties came into effect.⁶ Having been in force for an initial period of 10 years, the agreement was supposed to be extended every subsequent year by default.⁷ Due to the perceived uniformity of the post-Soviet space, the EU offered PCAs to all CIS states (plus Mongolia).⁸ The PCAs contained legal instruments for coordinating co-operation in various sectors, such as energy,⁹ trade,¹⁰ environment,¹¹ and transportation.¹² In this respect,

³ *Kurzynsky-Singer*, Commonwealth of Independent States, in: Basedow/Hopt/Zimmermann (eds.), *The Max Planck Encyclopedia of European Private Law*, Oxford 2012, vol. I, p. 267.

⁴ *Dragneva/Dimitrova*, Patterns of Integration and Regime Compatibility: Ukraine between the CIS and the EU, in: Malfliet/Verpoest/Vinokurov (eds.), *The CIS and the EU and Russia: The Challenges of Integration*, New York 2007, p. 176.

⁵ *Van der Loo/Van Elsuwege*, Competing Paths of Regional Economic Integration in the Post-Soviet Space: Legal and Political Dilemmas for Ukraine, *Review of Central and East European Law* 2012, p. 422.

⁶ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, OJ 1998 L 49/1.

⁷ See Article 101 PCA.

⁸ Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan, OJ 1999 L 196/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Uzbekistan, OJ 1999 L 229/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Armenia, OJ 1999 L 239/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Azerbaijan, OJ 1999 L 246/3.

⁹ See, for example, Article 53 of the PCA with Uzbekistan.

¹⁰ See, for example, Title III of the PCA with Kazakhstan.

the PCAs can be likened to the association agreements between other Eastern European states and the EU. However, unlike the association agreements, the PCAs were devoid of any prospect of EU membership.

What distinguished the particular PCA concluded with Ukraine from those concluded with most of the other CIS states was the inclusion of “evolutionary clauses”. These provisions opened up the avenue for EU–Ukraine rapprochement in the long run. Article 4 PCA, for example, stipulates that the parties are to discuss “whether circumstances allow the beginning of negotiations on the establishment of a free trade area.”

In addition, Article 51 PCA proclaims that Ukraine “shall endeavour to ensure that its legislation be gradually made compatible with that of the Community [now Union].” While formulating a long-term perspective for EU–Ukraine relations, the evolutionary clauses did not specify how the stated objectives were to be achieved, nor did they set up penalties for any failure of the two parties in conforming to the envisioned goals.

The free-trade area obligation in Article 4 PCA and the approximation-of-laws obligation in Article 51 PCA were of a non-binding nature. The inherent inconsequentiality of the accord between the EU and Ukraine can thus be said to echo the uncertainty that characterized the meandering stance of Ukraine towards its CIS partners, which resulted from its refusal to sign the CIS Charter.

Rather than making hard-law prescriptions for the advancement of a clear-cut integration regime, the PCA mostly contained declarative statements that did not compel Ukraine to go straight ahead with legislative approximation, nor did it force the EU to make any concessions to Ukraine’s consistent appeals for attaining EU membership.¹³ Throughout the PCA, the Articles enumerate various measures that “shall” be taken in order to foster closer economic and political ties between the signees. Article 67 on Financial Services, for example, states that “Co-operation shall in particular aim at facilitating the involvement of Ukraine in universally accepted systems of mutual settlements.” Specific areas of technical assistance to be offered by the EU to Ukraine are then explicitly named, e.g. helping Ukraine to develop its financial services sector or introducing novel export credit insurance. However, symptomatic of the non-binding nature of the PCA, these agenda items remain mere statements of intent, with the wording shying away from formulating an actionable roadmap for implementation.

The PCA also became the basis for establishing several joint institutions.¹⁴ These bodies, however, were not endowed with the necessary mandate to

¹¹ See, for example, Article 55 of the PCA with Armenia.

¹² See, for example, Article 57 of the PCA with Azerbaijan.

¹³ As early as 1998, President Kučma defined EU membership as a core objective of Ukrainian foreign policy: Edict of the President of Ukraine, 11 June 1998, No. 615.

¹⁴ See Title X PCA.

rewrite the PCA in any meaningful way.¹⁵ The PCA, despite the inclusion of evolutionary clauses, was thus in and of itself incapable of accommodating any far-reaching contractual alterations, necessitating the conclusion of a new agreement in order to fulfil the persisting Ukrainian desire for closer EU integration.

III. Upgrades to the PCA

In 1999, the “Common Strategy”¹⁶ was adopted, a political instrument introduced by the EU which added nuance to some of the provisions of the PCA but did not lend the agreement any more of a legally binding nature.¹⁷ The EU perceived the Common Strategy as a foreign policy measure geared at enhancing the impact of the PCA. The Ukrainian side, however, found that the Common Strategy was bereft of any substantial additions that would infuse the PCA with more legal import.

“Europe Agreements”¹⁸ preceded the accession to the EU of several Central and Eastern European countries. These agreements contained an evolutionary clause similar to Article 51 PCA. However, following the completion of negotiations at the 1993 Copenhagen European Council – which set the stage for the EU’s eastward expansion – the placeholder-like evolutionary clause in those agreements, hitherto lacking finality, eventually transformed into a legally binding provision demanding, in particular, the adoption of EU legislation as a condition for the pre-accession process.¹⁹

Despite Ukrainian requests to implement a reference to future accession in the PCA,²⁰ no such provision found its way into the agreement. A certain unwillingness of the EU negotiators to make far-reaching promises to Ukraine in terms of EU membership seems to have contributed to the overall vagueness of the agreement.

¹⁵ Ukraine drafted a proposal to modify the PCA institutional framework, which the EU declined to adopt. *Dragneva/Wolczuk*, *The EU–Ukraine Association Agreement and the Challenges of Inter-Regionalism*, Review of Central and East European Law 2014, p. 216.

¹⁶ European Council Common Strategy of 11 December 1999 on Ukraine (1999/877/CFSP), available at <<https://www.consilium.europa.eu/uedocs/cmsUpload/ukEN.pdf>> (17 November 2017).

¹⁷ *Sasse*, *The EU Common Strategy on Ukraine*, in: Lewis (ed.), *The EU and Ukraine: Neighbours, Friends, Partners?*, London 2002.

¹⁸ See, for example, Article 68 of the Europe Agreement concluded with Poland, available at <<http://wits.worldbank.org/gptad/pdf/archive/ec-poland.pdf>> (21 August 2018).

¹⁹ *Van Elsuwege*, *From Soviet Republics to EU Member States – A Legal and Political Assessment of the Baltic States’ Accession to the European Union*, *The Hague/Boston* 2008, pp. 170 f.

²⁰ See *Agence Europe*, 27 March 1993, No. 5949.

Over time, some of the terminology contained in the PCA became obsolete due to changing conditions in both the EU and Ukraine. For example, the preamble and Article 1 refer to Ukraine as “a country with an economy in transition”. Such a designation, however, had become outdated after the acknowledgement of Ukraine’s market economy status in 2005²¹ and the country’s subsequent accession to the WTO in 2008.

The PCA had, in advance, incorporated provisions of trade liberalization corresponding to prescriptions made by WTO rules. For example, in the preamble and in several articles, adherence to the principles contained in the General Agreement on Tariffs and Trade (GATT) is affirmed.²² This amounted to a pre-emptive adoption of WTO rules, whereby favourable conditions for joining the organization in the long-term were created. The PCA, in this sense, anticipated the future development of Ukraine becoming a WTO member.

IV. The European Neighbourhood Policy

In May 2004, the EU established its European Neighbourhood Policy (hereafter: ENP). This policy framework, according to the European Commission, was designed to “avoid drawing new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union”.²³ The ENP was conceived as an overarching policy for standardizing foreign policy with neighbouring countries on the EU periphery.

ENP partners were granted “the prospect of a stake in the EU’s internal market and further integration and liberalization to promote the free movement of persons, goods, services and capital (four freedoms)”.²⁴ The roadmap drawn up by the ENP presented more tangible perspectives for economic integration to Ukraine than the PCA, notably the offer to commence negotiations on the establishment of a free-trade area contingent upon the fulfilment of certain criteria.

This proposal was reasserted by the EU within the context of an Action Plan, the principal instrument that the EU employed in conjunction with evaluative Progress Reports to further the goals formulated by the ENP.²⁵

²¹ Market economy status granted at the 2005 annual EU–Ukraine Summit, available at <http://eeas.europa.eu/delegations/ukraine/documents/eu_uk_chronology/eu-ukraine_summit_en.pdf> (17 November 2017).

²² See, for example, Articles 10, 11 of the PCA.

²³ European Commission, *Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, 11 March 2003, p. 5.

²⁴ *Ibid.*, p. 4.

²⁵ *Dragneva/Wolczuk*, *Review of Central and East European Law* 2014, p. 218.

According to the broad ENP umbrella approach,²⁶ the Action Plans were carved out of existing treaty frameworks between the EU and its neighbours. In the case of Ukraine, the Action Plan was issued by the Cooperation Council, the institutional body that was originally charged with the supervision of the PCA. In January 2004, negotiations over the Action Plan again revealed the intransigent Ukrainian ambition of EU membership – a concession the EU was still not willing to make. After protracted discussion on the content of the Action Plan, the Ukrainian side did succeed in convincing the EU negotiators to at least give consideration to the conclusion of a new enhanced agreement scheduled to come into effect in 2008.²⁷ The PCA, running out that very year unless renewed, would then be immediately superseded by an updated agreement, provided that the goals formulated in the three-year Action Plan were met by Ukraine. However, the EU had made the concession in only the vaguest of terms, effectively granting Ukraine no contractual guarantee regarding the exact modalities of delivering an augmented agreement in return for the fulfilment of the Action Plan. Again, just like the PCA, the Action Plan was apprehensively phrased, not committing to any real obligations towards Ukraine. Instead, the wording remained vague: “The *perspective* of moving beyond cooperation to a significant degree”; “The *opportunity* for convergence of economic legislation”; “*Possibilities* of gradual opening of, or reinforced participation in, certain Community programmes”²⁸ (emphasis added) – much to the dismay of the Ukrainian negotiators, the drafters of the Action Plan were cautious not to get any more specific than this.

V. An unexpected turn of events

The Orange Revolution in autumn 2004 acted as an overall catalyst to the process of legal approximation between Ukraine and the EU.²⁹ The signing of the Action Plan was still pending after the events of the Orange Revolution had brought to power the fiercely pro-EU President Yushchenko. The new political climate in Ukraine incentivized the EU to finally comply with Ukraine’s long-standing demands for a new agreement. A legally binding promise was inserted into the Action Plan, which obliged the EU to start negotiations on this matter as soon as the political criteria of the Action Plan, signed on 21 February 2005, were fulfilled. Informally, the EU communicat-

²⁶ European Commission, European Neighbourhood Policy – Strategy Paper, COM (2004) 373 final, 12 May 2004.

²⁷ PCA Cooperation Council, EU-Ukraine Action Plan, 21 February 2005, available at <<https://library.euneighbours.eu/content/eu-ukraine-action-plan-0>> (21 August 2018).

²⁸ Ibid.

²⁹ *Dragneva/Wolczuk*, Review of Central and East European Law 2014, p. 219.

ed to Ukrainian officials that ensuring “free and fair” conduct of the upcoming parliamentary elections in 2006 was deemed a critical precondition for proceeding with the preparations for an updated agreement.³⁰

Negotiations on the political part of the agreement, that is, the agenda encapsulated in the amended Action Plan, began in 2007 after Ukraine had passed the bottleneck of holding lawful parliamentary elections in 2006 as demanded by the EU. The first discussions of the economic part of the agreement, revolving largely around Ukraine’s integration into a “Deep and Comprehensive Free Trade Area” (DCTFA), coincided with Ukraine’s accession to the WTO in 2008. With the new agreement taking shape from then on, the EU even bowed to Ukrainian calls to use the label “Association Agreement”. Ironically, at the Ukraine–EU summit in Paris in 2008, “association” was decoupled terminologically from the implication of “future membership”, giving the Ukrainian AA a somewhat anomalous hue as compared to the AAs concluded with other Eastern European states that explicitly envisioned a membership prospect. In 2009, within the architecture of the ENP, the EU initiated a specific Eastern Partnership (EaP) intended to facilitate the political association and economic integration of the Eastern neighbours.³¹ This initiative, however, was not directly linked with the negotiations already underway. From a Ukrainian point of view, all hopes rested on the AA, as the EaP targeted a host of different states and was therefore perceived to be an ineffective tool to cater to Ukraine’s particular interests.

VI. Conclusions

EU–Ukraine relations have been characterized by mutual allure and rejection. Had the political context not undergone such a wide-ranging transformation during the Orange Revolution in 2004 – regarded by most scholars as a leap towards democratization – the long-sought legal approximation with the EU would have remained an unlikely scenario for Ukraine. In late 2013, President Yanokuvych refused to go ahead with the scheduled implementation of the AA by withholding his signature. The decision of the Ukrainian leadership to “postpone” the imminent signing of the AA is said to have been due to the exertion of behind-the-scenes pressure by Russia.³² Ukraine’s unprecedented shift towards an EU commitment was thus momentarily thwarted in

³⁰ Ibid.

³¹ *Wolczuk*, Perceptions of, and Attitudes towards, the Eastern Partnership amongst the Partner Countries’ Political Elites, *Eastern Partnership Review* December 2011, No. 5, Estonian Centre of the Eastern Partnership, electronic version available at <https://ecep.eu/wp-content/uploads/2017/10/5_Review_No51.pdf> (21 August 2018).

³² *Dragneva/Wolczuk*, *Review of Central and East European Law* 2014, p. 231.

the political arena by the escalation of simmering tensions with Russia. Violence erupted as soon as the casual liaison between Ukraine and the EU was about to be fortified into a strategic partnership. Milestones in EU–Ukrainian legal approximation, namely the Orange Revolution in 2004 and the Euro-maidan escalation in 2014, seem to go hand-in-hand with geopolitical reconfigurations that lay bare Ukraine’s precarious position in overlapping zones of influence.

II. Reform of Ukrainian Justice

The Reform of the Ukrainian Judicial System and Civil Proceedings in the Context of the Association Agreement

Vitaliy Korolenko

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I. Introduction

The collapse of the Soviet Union, Ukrainian independence and the shift in the principles of social, economic and political life in 1991 created a need to reform the entire legal system of Ukraine. It became necessary to change the law of the socialist state, which did not recognize private property and declared the construction of communism to be an ends in itself, through legislation to establish the conditions for the formation of a system of market relations. The liberalization of the economy brought about increased economic activity by individuals and entities, a growing number of economically active entities, and the emergence of a significant number of new forms of economic activity.

Because of the lack of a tradition of market relations and the irrelevance of legislation in relations among the public, a significant number of disputes occurred between participants in legal relations. These disputes were resolved in the courts by judges whose legal perspective a few months earlier had not allowed for the existence of private property, entrepreneurship, etc. These

judges had, for example, recently sentenced people to long terms of imprisonment for illegal currency transactions, speculation and “unearned income”.

Reforming the judicial system and justice thus became an important matter at this time, more than 25 years ago. During this period, there were repeated changes to constitutional provisions,¹ laws on the judiciary and judicial proceedings,² and procedural codes.³ Concepts,⁴ principles⁵ and programmes

¹ Zakon Ukraïns'koï RSR “Pro zminy i dopovnennja Konstytucii (Osnovnoho Zakonu) Ukraïns'koï RSR” [The Law of the Ukrainian SSR “On Changes and Additions to the Constitution (Fundamental Law) of the Ukrainian SSR”] of 27 October 1989, No 8303-XI, <<http://zakon0.rada.gov.ua/laws/show/8303-11/print1364472210066531>>; Zakon Ukraïny “Pro vnesennja zmin do statii 152 Konstytucii (Osnovnoho Zakonu) Ukraïny” [The Law of Ukraine “On Amendments to Article 152 of the Constitution (Fundamental Law) of Ukraine”] of 17 June 1992, No 2463-XII, <<http://zakon0.rada.gov.ua/laws/show/2463-12/print1509544378549519>>; Zakon Ukraïny “Pro vnesennja zmin do statej 149 i 150 Konstytucii (Osnovnoho Zakonu) Ukraïny” [The Law of Ukraine “On Amendments to Articles 149 and 150 of the Constitution (Fundamental Law) of Ukraine”] of 24 February 1994, No 4013-XII, <<http://zakon0.rada.gov.ua/laws/show/4013-12/ed19940224/print1364472210066531>>; Konstytucija Ukraïny [Constitution of Ukraine] of 28 June 1996, No 254k/96-BP, <<http://zakon3.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/ed19960628/print1479235203759857>>.

² Zakon Ukraïns'koï RSR “Pro sudoustrij Ukraïns'koï RSR” [The Law of the Ukrainian SSR “On the Judicial System of the Ukrainian SSR”] of 5 June 1981 No 2022-X, <<http://zakon3.rada.gov.ua/laws/show/2022-10/print1479235203759857>>; and, in 1992, the Law of Ukraine “On Amendments and Additions to the Law of the Ukrainian SSR” of 17 June 1992, No 2464-XII, <<http://zakon2.rada.gov.ua/laws/show/2464-12/ed19920617>> refined questions of individual and collective proceedings and introduced inter-regional (district) courts. In 1994, with the Law of Ukraine No 4017-XII, <<http://zakon5.rada.gov.ua/laws/show/4017-12>>, the words “Ukrainian SSR” in the title were replaced with the word “Ukraine”, and rules were introduced on military courts, as were certain rules on the administration of justice only by the courts, the appointment and status of judges, and the composition of the courts of various levels. In 1998, with the Law of Ukraine No 312-XIV, <<http://zakon3.rada.gov.ua/laws/show/312-14/ed19981211/print1479235203759857>>, this was amended in connection with the creation of the State Department of Penitentiary. With the Law of Ukraine No 2056-III of 19 October 2000, <<http://zakon3.rada.gov.ua/laws/show/2056-14/ed20001019/print1479235203759857>>, this was amended in connection with the Law of Ukraine “On State Enforcement Service” and “On Enforcement Proceedings”. With the Law of Ukraine No 2171-III of 21 December 2000, <<http://zakon3.rada.gov.ua/laws/show/2171-14/ed20001221/print1479235203759857>>, this was amended in connection with the disbandment of the National Guard of Ukraine. The Law of Ukraine No 2531-III of 21 June 2001, <<http://zakon3.rada.gov.ua/laws/show/2531-14/ed20010621/print1479235203759857>>, made significant changes: it refined general principles of justice and redefined the system of courts of general jurisdiction, which consisted of local, appellate, and highly specialized courts and the Supreme Court of Ukraine, and determined the legal and organizational foundations of its activity; Zakon Ukraïny “Pro sudoustrij Ukraïny” [The Law of Ukraine “On the Ukrainian Judicial System”] of 7 February 2002, No 3018-III, cited according to the electronic database “Legislation of Ukraine”, <<http://zakon3.rada.gov.ua/laws/show/3018-14/print1479235203759857>>; Zakon Ukraïny “Pro

were developed for relevant reforms. Ukraine assumed the appropriate obligations to international organizations, but did not follow them.⁶

Reforms have been carried out irregularly and slowly. Meanwhile, the level of trust in the judiciary has remained consistently low. For example, in December 2004 trust in the courts (the sum of the answers “fully trust” and “trust rather than not”) was surveyed at 40%, and in December 2007 it was at

sudoustrij i status suddiv” [The Law of Ukraine “On the Judicial System and Status of Judges”] of 7 July 2010, No 2453-VI, of Ukraine”, <<http://zakon3.rada.gov.ua/laws/show/2453-17/ed20100707/print1479235203759857>>.

³ On 4 June 1991, the Law of the Ukrainian SSR “On Arbitration Courts”, <<http://zakon3.rada.gov.ua/laws/show/1142-12/ed19910604>>, was adopted, which, for the first time in the Ukrainian SSR, provided for the establishment of an independent system of arbitration courts. State arbitrators became arbiters of appropriate arbitration courts, <<http://zakon3.rada.gov.ua/laws/show/1143-12/print1452679859590486>>; Zakon Ukraïny “Pro vnesennja zmin do Arbitražnogo procesual’noho kodeksu Ukraïny” [The Law of Ukraine “On amendments of the Arbitration Procedure Code of Ukraine”] of 21 June 2001, No 2539-III, <<http://zakon2.rada.gov.ua/laws/show/2539-14/print1479675860368285>>; Cyvil’nyj procesual’nyj kodeks Ukraïny [Civil Procedure Code of Ukraine] of 18 March 2004, No 1618-IV, <<http://zakon3.rada.gov.ua/laws/show/1618-15/ed20040318/print1479235203759857>>; Kodeks administratyvnoho sudočynstva Ukraïny [The Code of Administrative Procedure of Ukraine] of 6 June 2005, No 2747-IV, <<http://zakon2.rada.gov.ua/laws/show/2747-15/ed20050706/print1479675860368285>>.

⁴ Postanova Verchovnoï Rady Ukraïny “Pro koncepciju sudovo-pravovoï reformy v Ukraïni” [Resolution of the Verkhovna Rada of Ukraine “On the Concept of Judicial and Legal Reform in Ukraine”] of 28 April 1992, No 2296-12, <<http://zakon3.rada.gov.ua/laws/show/2296-12>>; Ukaz Prezydenta Ukraïny “Pro koncepciju vdoskonalennja sudivnyctva dlja utverdzennja spravedlyvoho sudu v Ukraïni vidpovidno do jevropejs’kykh standartiv” [Decree of the President of Ukraine “On the Concept of Improvement of the Judiciary for the Establishment of a Fair Court in Ukraine in accordance with European Standards”] of 10 May 2006, No 361/2006, <<http://zakon3.rada.gov.ua/laws/show/361/2006>>; Postanova Verchovnoï Rady Ukraïny “Pro utvorennja Tymčasovoï special’noï komisii Verchovnoï Rady Ukraïny z pidhotovky koncepcii sudovo-pravovoï reformy” [Resolution of the Verkhovna Rada of Ukraine “On the Establishment of the Interim Special Commission of the Verkhovna Rada of Ukraine on the Preparation of the Concept of Judicial and Legal Reform”] of 23 December 2009, No 1789-VI, <<http://zakon3.rada.gov.ua/laws/show/1789-17>>.

⁵ Postanova Verchovnoï Rady Ukraïny “Pro zasady sudovo-pravovoï reformy v Ukraïni” [Resolution of the Verkhovna Rada of Ukraine “On the Principles of Judicial Reform in Ukraine”] of 21 May 1999, No 698-XIV, <<http://zakon3.rada.gov.ua/laws/show/698-14>>.

⁶ Application by Ukraine for membership in the Council of Europe: Opinion of the Parliamentary Assembly of the Council of Europe 26 September 1995, No 190, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en>>; Honouring of obligations and commitments by Ukraine: Resolution of the Parliamentary Assembly of the Council of Europe 27 January 1999, No 1179, <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16671&lang=en>>.

33%.⁷ In the early part of this decade, the level of trust in the courts continued to decline. In 2010, 11.6% of respondents fully trusted or mostly trusted the courts (1.2% and 10.4% respectively). In 2013, this level of confidence fell to 6.9%, with 1.3% fully trusting the courts and 5.7% mostly trusting them.⁸

Despite this low level of confidence in the courts, Ukrainians continue to actively seek the protection of their rights through civil, economic and administrative proceedings. Thus, the average local judge of the general courts⁹ as courts of first instance saw 178.6 cases and materials of different types of proceedings per month in 2008. This means that in 2008, 11.03% of proceedings in civil cases and special proceedings violated the terms set out in the Civil Procedure Code of Ukraine.¹⁰

The average local judge in 2014 received 58.50 cases and materials of different types of proceedings per month.¹¹ Thus, 5.95% of proceedings in civil cases of action and special proceedings in 2014 violated the terms set out in the Civil Procedure Code of Ukraine.¹²

In 2016, after the significant increase in court fees that took place on 1 September 2015, the average monthly caseload for a local judge was 54.88 cases and materials of different types of proceedings.¹³ Thus, 6.16% of proceedings in civil cases of action and special proceedings in 2016 violated the terms set out in the Civil Procedure Code of Ukraine.¹⁴

⁷ *Jablonskyj*, Analytyčna zapyska “Dovira hromadjan do orhaniv vlady ta bazovych social’nych instytutiv” [Analytical note “Citizens’ confidence in government bodies and basic social institutions”], <<http://old.niss.gov.ua/Monitor/May2009/5.htm>>.

⁸ *Vorona/Shulga (eds.)*, Ukraïns’ke suspil’stvo 1992–2013: Stan ta dynamika zmin, Sociolohičnyj monitorynh [Ukrainian Society 1992–2013: Current state and dynamics of changes, Sociological monitoring], Kyiv 2013, p. 481, <<http://i-soc.com.ua/assets/files/monitoring/soc-mon-2013.pdf>>.

⁹ Local general courts as the courts of first instance consider all civil cases, all cases of administrative offenses, some cases of administrative proceedings and some cases of criminal proceedings. According to the analytical tables on the state of justice for 2009, in 2008 the general courts as courts of first instance received 41.2% of the total number of cases of administrative legal proceedings and 97.2% of the total number of cases and materials of criminal proceedings, <<http://court.gov.ua/userfiles/table2009.xls>>.

¹⁰ Analytyčni tablyci ščodo stanu zdijsnennja pravosuddja za 2009 r. [Analytical tables on the state of justice for 2009], <<http://court.gov.ua/userfiles/table2009.xls>>.

¹¹ Analytyčna tablycja “Seredn’omisjačne nadchodžennja na odnogo suddju miscevoho sahal’noho sudu” [Analytical table “Average monthly caseload per one judge of a local general court”], <[http://court.gov.ua/userfiles/1_1_1\(8\).xls](http://court.gov.ua/userfiles/1_1_1(8).xls)>.

¹² Analytyčna tablycja “Operatyvnist’ roshljadu sprav miscevymy sahal’nymy sudamy” [Analytical table “Effectiveness of case consideration by local general courts”], <[http://court.gov.ua/userfiles/1_5_1\(8\).xls](http://court.gov.ua/userfiles/1_5_1(8).xls)>.

¹³ Analytyčna tablycja “Seredn’omisjačne nadchodžennja na odnogo suddju miscevoho sahal’noho sudu” [Analytical table “Average monthly caseload per one judge of a local general court”], <http://court.gov.ua/userfiles/file/DSA/DSA_2017_all_docs/17ordersmar ch/tabl_1_1_1_2016.xls>.

The average monthly caseload for a judge at a court of appeal in 2016 was 16.8 cases and materials. The average monthly caseload for a judge of a court chamber for civil cases of the High Specialized Court of Ukraine for Civil and Criminal Cases in 2016 was 123.9 cassation complaints, cases and claims.¹⁵

Recent statistics on the number of cases per judge might be slightly distorted. This is because a significant number of judges who remain in their positions are not permitted to engage in legal proceedings because they have reached the end of the five-year period for which they were elected, have reached the age of 65, or have not yet been sworn in.

As of 12 October 2016, in the 219 courts (4 of which are appeal courts) the proportion of judges without authority is 50% or higher. With a total staff of 1974 judges in these courts, the actual number of judges is 1335. Only 789 judges have the power to administer justice in these courts.¹⁶

As we can see from the statistics, the burden on the judicial system remains enormous. This makes it difficult to talk about the possibility of administering justice efficiently and within a reasonable timeframe.

Another major problem is the non-enforcement or delayed enforcement of court decisions. Thus, the draft recommendations of parliamentary hearings “On the status of court decisions in Ukraine” dated 22 May 2013 noted that in recent years the annual rate of enforcement of court decisions had hovered around 30%. In 2006 33.7% of judgements were actually executed; in 2011 33.4% were actually executed.¹⁷

¹⁴ Analitичna tablycja “Operatyvnist’ roshljadu sprav miscevyimy sahal’nymy sudamy” [Analytical table “Effectiveness of case consideration by local general courts”], <http://court.gov.ua/userfiles/file/DSA/DSA_2017_all_docs/BEREZEN_17/STAT_TABL/tabl_1_5_1_2016.xls>.

¹⁵ Postanova Plenumu Vyšchoho specializovanoho sudu Ukraїny z rozhljadu cyvil’nykh i kryminal’nykh sprav “Pro pidsumky roboty sudiv cyvil’noi i kryminal’noi jurysdykcїi u 2016 roci ta zavdannja na 2017 rik” [Resolution of the Plenum of the High Specialized Court of Ukraine for Civil and Criminal Cases “On the Results of the Work of the Courts of Civil and Criminal Jurisdiction in 2016 and Tasks for 2017”] of 3 February 2017, <<http://zakon0.rada.gov.ua/laws/show/v0001740-17/print1509544378549519>>.

¹⁶ Spysok sudiv, v jakych kil’kist’ suddiv, ščo ne zdijsnjujut’ pravosuddja (u zvjasku iz zakončennjam pjatyričnogo stroku povnovažen, dosjahnennjam suddeju 65-ričnogo viku ta z neskladennjam prysjahy suddi) skladaje 50% i bil’še vidstotkiv, stanom na 12.10.2016 [The list of courts in which the number of non-acting judges (in connection with the expiration of the five-year term of office, a judge’s attainment of the age of 65, and the judge’s lack of authority to adjudicate) is 50% or more, as of 10 December 2016], <<https://vkksu.gov.ua/ua/oblik-posad-sudiv/spisok-sudiv-w-iakich-kilkist-suddiv-shtcho-nie-zdijsniuit-pravosuddia-u-zwiazku-iz-zakintchienniam-piatiritchnogo-stroku-pownowazien-dosiagnienniam-suddieiu-65-ritchnogo-wiku-ta-z-nieskladienniam-prisiagi-suddi-skladae-50-i-bilshie-widstotkiw-stanom-na-1/>>.

¹⁷ Proekt Postanovy Verhovnoi Rady Ukraїny “Pro Rekomendacїi parlaments’kych sluchan’ na temu «Pro stan vykonannja sudovych rišen’ v Ukraїni»” [Draft Resolution of the Verkhovna Rada of Ukraine “On Recommendations of Parliamentary Hearings on the Topic

A typical indicator of the quality of the judicial system is the number of judgments of the European Court of Human Rights that recognize violations of Article 6 of the European Convention on Human Rights by Ukraine. This number increased from one judgement in one case in 2002 to 35 judgements in 2,244 cases in 2013. In 2016, 25 such judgements were adopted in 65 cases.¹⁸ The number of applications against Ukraine allocated to a decision-making body of the European Court of Human Rights increased from 1,869 in 2005 to 14,181 in 2014, and in 2016 totalled 8,658 or 16% of all such applications. Ukraine's population is 5.4% of the total population of the countries that recognize the jurisdiction of the European Court of Human Rights.¹⁹

All of these circumstances confirm the underlying problems of judicial protection of the rights of individuals and legal entities in Ukraine. Therefore, judicial reform concerns all areas of social, economic and political life. Individuals and entities are interested in effective protection of their rights, and employers need to protect investments. The state's response to the challenges of reforming the justice system may yet determine the answer to the question "To be or not to be?" for Ukraine.

II. Legal framework of judicial reform

1. *Conditions of the Association Agreement related to the judiciary*

The refusal of the Yanukovich-Azarov government to sign the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part,²⁰ was not only a catalyst for the events of

"On the Status of Implementation of Court Decisions in Ukraine"], of 27 November 2013, <<http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=49201&pf35401=284564>>.

¹⁸ According to the results of the search in the Database of ECHR documents with the criteria "Ukraine", "judgments" and "violation of Article 6", <<https://hudoc.echr.coe.int/eng#%20>>, 1 judgement was approved in 1 case in 2002, 12 judgments were approved in 22 cases in 2004, 107 were approved in 116 cases in 2005, 103 in 119 cases in 2006, 98 in 111 cases in 2007, 88 in 147 cases in 2008, 103 in 163 cases in 2009, 75 in 82 cases in 2010, 75 in 77 cases in 2011, 43 in 271 cases in 2012, 35 in 2,244 cases in 2013, 12 in 1,044 cases in 2014, 17 in 47 cases in 2015, and 25 in 65 cases in 2016.

¹⁹ The number of applications against Ukraine allocated to a decision-making body of the ECHR was 1,869 in 2005, 2,482 in 2006, 4,499 in 2007, 4,770 in 2008, <http://www.echr.coe.int/Documents/Stats_analysis_2008_ENG.pdf>, 4,693 in 2009, 3,962 in 2010, 4,618 in 2011, 7,796 in 2012, <http://www.echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf>, 13,132 in 2013, 14,181 in 2014, 6,007 in 2015, and 8,658 in 2016, <http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf>.

²⁰ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, <https://eeas.europa.eu/sites/eeas/files/association_agreement_ukraine_2014_en.pdf>.

2013–2014 in Ukraine, known as the Revolution of Dignity or the Euro-aidan Revolution.²¹ This agreement has also become a catalyst for the reform of many spheres of the state and public life in Ukraine. The matters of the reform of the judicial system and proceedings in Ukraine are defined as key areas in the Association Agreement. The agreement contains general and special provisions related to these issues.

The provisions of Article 14 “The rule of law and respect for human rights and fundamental freedoms”, Article 24 “Legal cooperation”, and Article 471 “Access to courts and administrative organs” are general.

Article 14 of the Agreement provides that in their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security.

Article 24 of the Agreement establishes that the Parties agree to further develop judicial cooperation on civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial. The Parties agree to facilitate further EU–Ukraine judicial cooperation on civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as its Convention on the Protection of Children. As regards judicial cooperation in criminal matters, the Parties shall seek to enhance arrangements on mutual legal assistance and extradition. This would include, where appropriate, accession to and implementation of the relevant international instruments of the United Nations and the Council of Europe, as well as the Rome Statute of the International Criminal Court of 1998 as referred to in Article 8 of this Agreement, and closer cooperation with Eurojust. On 27 July 2016, the Prosecutor General of Ukraine, Yuriy Lutsenko, and the President of Eurojust, Michele Coninx, signed an Agreement on Cooperation between Eurojust and Ukraine. The purpose of this agreement is to enhance cooperation between the Parties in combating serious crime, particularly organized crime and terrorism.²²

²¹ 2014 Ukrainian revolution, <https://en.wikipedia.org/wiki/2014_Ukrainian_revolution>.

²² Agreement on Cooperation between Eurojust and Ukraine, <[http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20on%20cooperation%20between%20Eurojust%20and%20Ukraine%20\(2016\)/Eurojust-Ukraine-2016-06-27-EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20on%20cooperation%20between%20Eurojust%20and%20Ukraine%20(2016)/Eurojust-Ukraine-2016-06-27-EN.pdf)>.

According to Article 471 of the Agreement, within the scope of this Agreement each Party undertakes to ensure that natural and legal persons of the other Party have access to its competent courts and administrative organs that is free of discrimination in relation to its own nationals in order to defend their individual rights and property rights.

Special rules on improving the enforcement of intellectual property rights contained in Articles 230–252 of the Association Agreement concern issues of evidence, measures for preserving evidence, injunctions, legal costs, publication of judicial decisions and administrative procedures. Thus, the reform of intellectual property protection is listed among the 62 urgent reforms in the Reform Strategy 2020.²³

2. The main bodies and directions of judicial reform

The long experience of reforming various spheres of government in Ukraine has shown that reforms made on the initiative of officials and in the manner determined by them do not bring the desired results. There is an urgent need for participation by non-governmental organizations, private sector professionals, researchers and practitioners. The events of 2013–2014 confirmed the desire of the Ukrainian people for change. In 2014, the newly elected President of Ukraine therefore created a number of advisory bodies to develop reforms. These bodies were entrusted with the elaboration of a general state reform strategy and the preparation of comprehensive bills on the reform of certain spheres of public life: medicine, pensions, public procurement, administrative arrangements and executive power, local self-government, and the judiciary.

The National Reform Council and Executive Committee for Reform were created by decree of the President of Ukraine on 12 August 2014 to implement a wide range of reforms.²⁴ The National Reform Council was created to ensure political consensus during the reform process. It consists of representatives of all stakeholders, and it is a platform for reaching consensus and making decisions. The primary objectives of the National Reform Council include setting reform priorities, coordinating reform actions, monitoring the implementation of reforms, and reaching their final goals. The decisions of the National Reform Council are implemented if necessary through the issuance in due course of acts of the President of Ukraine, the introduction by the

²³ Ukaz Prezidenta Ukraïny “Pro stratehiju staloho rozvytku «Ukraïna – 2020»” [Decree of the President of Ukraine “On the Strategy for Sustainable Development ‘Ukraine 2020’”] of 12 January 2015, No 5/2015, <<http://zakon2.rada.gov.ua/laws/show/5/2015>>.

²⁴ Ukaz Prezidenta Ukraïny “Pytannja Nacionalnoï rady reform i Vykonavčoho komitetu reform” [Decree of the President of Ukraine “Issues of the National Council for Reforms and the Executive Committee of Reforms”] of 12 August 2014, No 644/2014, <<http://zakon4.rada.gov.ua/laws/show/644/2014/print1443615917452143>>.

President of Ukraine of the relevant draft laws to the Verkhovna Rada,²⁵ or the assumption by related members of the National Reform Council of public commitments to implement the right of legislative initiative, the right of initiative in decisions of the Cabinet of Ministers of Ukraine. The National Reform Council may, in particular, create working groups, committees, and targeted expert teams to develop and implement the directions of reforms. These groups, committees and teams involve officials and employees of government agencies; local authorities; employees of enterprises, institutions and other organizations; and domestic and foreign scholars and experts.

The Council on Judicial Reform is the target expert team for the implementation of judicial reform. The personal composition of the Council was approved by Presidential Decree No. 826/2014 of 27 October 2014.²⁶ The Council on Judicial Reform is a consultative and advisory body to the President of Ukraine. The Council consists of the heads of the relevant central executive bodies and, if they so elect, of the Head of the Supreme Court and the heads of the cassation courts, the Head of the High Council of Justice, the Head of the High Qualification Commission of Judges, the Chairman of the Council of Judges of Ukraine, the Chairman of the State Court Administration of Ukraine, the Prosecutor General of Ukraine, and representatives of public associations of law, legal higher education and research institutions, relevant international organizations (Council of Europe, USAID), and leading experts in the field of law. The Council's decisions, if necessary, are implemented through the issuance of relevant acts of the President of Ukraine, and the President of Ukraine proposes appropriate draft laws to the Verkhovna Rada of Ukraine.

The Council for Judicial Reform developed a Strategy for reforming the judicial system, the judiciary and related legal institutions for the years 2015–2020.²⁷ The aim of the Strategy is to determine priorities for reforming the judicial system, justice and legal institutions related to the practical implementation of the rule of law and the functioning of the judiciary, which meet public expectations concerning an independent and fair trial and European values and standards of human rights.

According to the Strategy, the reform of the judicial system and civil and economic procedures consists of the following pillars:

- increasing the independence of the judiciary;
- streamlining judicial governance and the system for the appointment of judges;

²⁵ Verkhovna Rada – the Parliament of Ukraine.

²⁶ Ukaz Prezidenta Ukraïny “Pytannja Rady z pytan’ sudovoï reformy” [Decree of the President of Ukraine “Issues of the Council on Judicial Reform”] of 27 October 2014, <<http://zakon2.rada.gov.ua/laws/show/826/2014>>.

²⁷ Justice Sector Reform Strategy 2015–2020, <<http://jrc.org.ua/strategy/en>>.

- improving the competence of the judiciary;
- increasing the transparency and accountability of the judiciary;
- increasing the efficiency of justice and streamlining the competences of different jurisdictions;
- increasing the transparency and public accessibility of justice;
- strengthening the bar and legal aid;
- improving the enforcement system;
- strengthening PPO in accordance with European standards;
- enhancing fairness and defence rights in criminal proceedings;
- increasing the effectiveness of the justice sector in the fight against organized crime and corruption;
- increasing effectiveness in the prevention of crime and promoting rehabilitation in the execution of sanctions;
- improving the coordination of reform and the interoperability of justice sector information systems.

The Strategy provides for judicial reform to take place in two stages:

- the first stage of short-term regulatory amendments aimed at restoring public trust in the Ukrainian judiciary;²⁸

²⁸ On 4 April 2014, the Law of Ukraine “On Restoration of Trust in Judicial Power in Ukraine”, <<http://zakon0.rada.gov.ua/laws/show/1188-18>>, was adopted. This law defined the legal and organizational basis of special inspection of judges of general jurisdiction courts as a temporary enhanced method using existing examination procedures on bringing judges of courts of general jurisdiction to disciplinary liability and dismissal for breach of oath to enhance the authority of the judiciary and public confidence in the judiciary in Ukraine for the restoration of legitimacy and justice. – The judge was subject to the examination of the temporary special commission concerning whether he made the decision alone or as part of the panel:

- about limitation of the right to hold meetings, rallies, marches, and demonstrations in Ukraine in the period from 21 November 2013 to the enactment of this Act;
- about the application of preventive measures such as the arrest and criminal prosecution of persons recognized as political prisoners for actions related to their political convictions and citizenship;
- about the application of preventive measures as the arrest and criminal or administrative prosecution of persons who participated in mass protests in the period between 21 November 2013 and the enactment of this Act, related to their participation in the protests;
- in cases related to the elections to the 7th Verkhovna Rada of Ukraine, cancellation of their results or deprivation of the status of deputy of Ukraine of a person who was elected people’s deputy of Ukraine to the 7th Verkhovna Rada of Ukraine;
- for permission to conduct investigative (detective) and covert investigative (detective) action against persons who were participants in mass protests in the period between 21 November 2013 and 21 February 2014, in connection with their participation in such actions.

Judges who, alone or as part of the panel of judges dealing with the case or judgment, committed breaches of the European Convention on Human Rights as stated in the judg-

- the second stage of systemic changes in the regulatory framework, including amendments to the Constitution of Ukraine, and comprehensive building of institutional capacities.

The second stage involves five steps: amending the Constitution of Ukraine; reforming the judicial system; reforming procedural law; reforming advocacy and legal aid; reforming the enforcement of judgments.²⁹

To perform its tasks in the years 2016–2017, the Council for Judicial Reform held more than 10 expert and public events at which members of the Council participated and the professional community could discuss the content of draft regulations designed to implement judicial reform. The events were attended by representatives of the Council for Judicial Reform; judges of the appeal and cassation courts, the Supreme Court of Ukraine, and the Constitutional Court; and prominent lawyers and scholars. The last such event was held on 16 June 2017 in Odessa³⁰ after the submission by the President of Ukraine of the draft law on new editions of the Civil Procedure Code, the Economic Procedure Code and the Code of Administrative Procedure to the Verkhovna Rada of Ukraine.³¹ After broad discussion of the draft law, the Law of Ukraine “On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts” was adopted on 3 October 2017.³² In accordance with clause 1 of Section 6 “Final Provisions” of this

ment of the European Court of Human Rights also were subject to examination. – According to statistics on the results of temporary special commission activity as of 25 August 2015, <http://www.vru.gov.ua/content/statistics/zvit_TSK_08.2015_.xls>, 309 audits of 331 judges were initiated, and 66 inspections were completed. 41 conclusions concerning 46 judges were sent to the High Council of Justice. 12 conclusions concerning 12 judges were sent to the High Qualification Commission of Judges. 4 examinations concerning 5 judges were dropped. The High Council of Justice adopted around 30 decisions to submit referrals on the dismissal of judges, according to the conclusions of the temporary special commission during the years 2015–2016.

²⁹ Etapy sudovoї reformy [Steps of judiciary reform], <<http://jrc.org.ua/steps>>.

³⁰ Events of the Council for Judicial Reform, <<http://jrc.org.ua/events>>.

³¹ Proekt Zakonu Ukraїny “Pro vnesennja zmin do Hospodars’koho procesual’noho kodeksu Ukraїny, Cyvil’noho procesual’noho kodeksu Ukraїny, Kodeksu administratyvnoho sudočynstva Ukraїny ta inšych zakonodavčych aktiv” [The Draft Law of Ukraine “On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and Other Legislative Acts”] of 23 March 2017, No 6232, <<http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=61415&pf35401=419014>>.

³² Zakon Ukraїny “Pro vnesennja zmin do Hospodars’koho procesual’noho kodeksu Ukraїny, Cyvil’noho procesual’noho kodeksu Ukraїny, Kodeksu administratyvnoho sudočynstva Ukraїny ta inšych zakonodavčych aktiv” [The Law of Ukraine “On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of

Law, it entered into force on the day the new Supreme Court began its work, 15 December 2017.³³

3. *The constitutional basis of judicial reform*

The second stage of judicial reform is ongoing. The first step of the second stage of the reform is amending the Constitution of Ukraine concerning the judiciary. The Law of Ukraine “On Amendments to the Constitution of Ukraine (On Justice)”³⁴ changed the general provisions of the judicial system and the procedure for the election of judges, and clarified the powers of some state bodies. Later, these provisions were developed in special laws relating to the appointment and dismissal of judges, the Supreme Council of Justice, the system of courts, the constitutional court, access to justice, etc.

The first version of the Constitution of Ukraine³⁵ contained the basic rules on the judicial system, which provided that:

- justice in Ukraine shall be administered exclusively by the courts. Delegation of the functions of courts or appropriation of such functions by other bodies or officials shall be prohibited;
- the jurisdiction of the courts shall extend to all legal relations that arise in the State;
- judicial proceedings shall be performed by the Constitutional Court of Ukraine and courts of general jurisdiction;
- the system of courts of general jurisdiction shall be formed in accordance with the territorial principle and the principle of specialization;
- the Supreme Court of Ukraine shall be the highest judicial body in the system of courts of general jurisdiction;
- the respective high courts shall be the highest judicial bodies of specialised courts;
- the people shall directly participate in the administration of justice as people’s assessors and jurors.

Administrative Legal Proceedings of Ukraine and Other Legislative Acts”] of 3 October 2017, No 2147-VIII, <<http://zakon2.rada.gov.ua/laws/show/2147-19/print1509542199175329>>.

³³ Postanova Plenumu Verhovnoho Sudu “Pro vyznachennja dnja počatku roboty Verhovnoho Sudu” [Resolution of the Plenum of the Supreme Court “On Determining the Day When the Supreme Court Began Its Work”] of 31 November 2017, No 2, <<http://zakon3.rada.gov.ua/laws/show/va002700-17>>.

³⁴ Zakon Ukraïny “Pro vnesennja zmin do Konstytucit Ukraïny (ščodo pravosuđdja)” [The Law of Ukraine “On Amendments to the Constitution of Ukraine (On Justice)”] of 2 June 2016, No 1401-VIII, <<http://zakon2.rada.gov.ua/laws/show/1401-19/print1479675860368285>>.

³⁵ Constitution of Ukraine (official translation), <www.kmu.gov.ua/document/110977042/Constitution_eng.doc>.

According to the amended Constitution of Ukraine:

- jurisdiction of the courts extends to any legal dispute and any criminal prosecution. In cases provided for by law, the courts also consider other cases;
- the law may specify an obligatory pre-trial procedure for resolving a dispute;
- the people are directly involved in the administration of justice as the jurors;³⁶
- Ukraine can recognize the jurisdiction of the International Criminal Court under the terms of the Rome Statute of the International Criminal Court.

The Constitution is supplemented with provisions under which the court makes a decision in the name of Ukraine and the execution of the judgments

³⁶ The previous edition of the Constitution of Ukraine provided that the people shall directly participate in the administration of justice through people's assessors and jurors. The participation of people's assessors in litigation thus became impossible after the amendments to the Constitution of Ukraine took effect on 30 September 2016. Because there were no corresponding changes in procedure codes, some cases could not be considered by a court until the corresponding changes to the Civil Procedure Code had taken effect on 11 March 2017. These were, specifically, civil cases on: a) limitation of the civil capacity of a physical person, acknowledgement of the incapacity of a physical person, renewal of the civil capacity of a physical person; b) acknowledgement of a physical person as missing or announcement of their death; c) adoption; d) providing mental health care to a person in the enforcement order; e) compulsory admission to tuberculosis treatment institutions. Such cases were considered by a court of one judge and two people's assessors. The adopted changes to the Civil Procedure Code state that such cases shall be considered by a court of one judge and two jurors. As we can see, this kind of jury is not equal to most Western European countries' judiciaries. The Economic Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine, as well as drafts of new such codes, do not provide for the administration of justice with the participation of jurors. According to the Law of Ukraine "On the Judicial System and Status of Judges", <<http://zakon0.rada.gov.ua/laws/show/1402-19/print1364472210066531>>, a juror must be a citizen of Ukraine who has attained the age of thirty and is a resident of the territory under the jurisdiction of the court, unless otherwise provided by law. A persons cannot be a juror if they: a) have been recognized by the court as partially or fully incapable; b) have chronic mental or other diseases that interfere with the performance of a juror's duties; c) have an unrevoked or outstanding criminal record; d) are deputies of the Parliament of Ukraine, members of the Government of Ukraine, judges, prosecutors, law enforcement authorities (local police), military, court staff, other government officials, officials of local governments, lawyers, notaries, members of the High Qualification Commission of Judges of Ukraine, or members of the High Council of Justice; e) are persons to whom an administrative penalty for committing corruption offenses has been applied in the past year; f) are citizens over sixty-five years old; or g) are persons who do not speak the national language. For approval of the list of jurors, the regional branch of the State Judicial Administration of Ukraine makes a request to the relevant local councils to create and approve a list of citizens accepted as jurors.

is obligatory. The state ensures execution of a court decision in accordance with the procedure established by law, and the court controls the execution of a court decision.

The constitutional novelty is the introduction of an exclusive right for lawyers to represent persons in the courts.

The judiciary system in Ukraine is based on the principles of territoriality and specialisation, and is defined by the law. Courts are established, reorganised and dissolved by laws that are submitted in draft form to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice. The Supreme Court is the highest court in the judiciary system in Ukraine. Higher specialised courts may function in accordance with the law.

Amendments to the Constitution of Ukraine also provide for changes in the procedure for the appointment and dismissal of judges, the powers of the Constitutional Court, etc.

4. The Constitutional Court of Ukraine

The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine. The main issues within the scope of the Constitutional Court are determined by section 12 of the Constitution of Ukraine. The Constitutional Court of Ukraine is supposed to resolve issues of conformity of laws and other legal acts with the Constitution of Ukraine and provide the official interpretation of the Constitution of Ukraine and laws of Ukraine.

The Constitutional Court of Ukraine is supposed to have eighteen judges. The President of Ukraine, the Verkhovna Rada of Ukraine, and the Congress of Judges of Ukraine are each to appoint six judges to the Constitutional Court of Ukraine.

The Constitutional Court of Ukraine is to have the following powers:

- 1) the resolution of issues of the compliance with the Constitution of Ukraine (constitutionality) of:
 - laws and other legal acts of the Verkhovna Rada of Ukraine;
 - acts of the President of Ukraine;
 - acts of the Cabinet of Ministers of Ukraine;
 - legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.
 Such issues are to be considered upon request of: the President of Ukraine; no less than forty five people's deputies of Ukraine; the Supreme Court of Ukraine; the Authorised Human Rights Representative to the Verkhovna Rada of Ukraine; or the Verkhovna Rada of the Autonomous Republic of Crimea;
- 2) the official interpretation of the Constitution of Ukraine and the laws of Ukraine.

The Constitutional Court of Ukraine is, upon the request of the President of Ukraine or the Cabinet of Ministers of Ukraine, to provide opinions on the conformity with the Constitution of Ukraine of the international treaties that are in effect for Ukraine, and of international treaties submitted to the Verkhovna Rada of Ukraine for approval of their binding nature.

Prior to the 2016 amendment to the Constitution, natural and legal persons did not have the right to have the Constitutional Court declare a law or some of its provisions unconstitutional.³⁷ They could only ask the Constitutional Court to provide an official interpretation of the Constitution and laws of Ukraine.

Amendments to the Constitution changed the powers of the Constitutional Court. Now the Constitutional Court of Ukraine is to resolve issues of conformity of laws and other legal acts (in cases prescribed by law) to the Constitution of Ukraine and provide the official interpretation of the Constitution (not laws) of Ukraine. According to Article 150 of the Constitution, the Court shall have other powers prescribed by the Constitution. Article 151.1. of the Constitution provides that the Constitutional Court decides on the compliance with the Constitution of Ukraine (constitutionality) of a law of Ukraine if a constitutional complaint is made by a person alleging that the law of Ukraine that is applied to render a final court decision in his or her case contravenes the Constitution of Ukraine. A constitutional complaint may be lodged after all other domestic legal remedies have been exhausted.

Article 55 of the Constitution was extended with part 4, whereby everyone shall be guaranteed the right to lodge a constitutional complaint with the Constitutional Court of Ukraine on grounds defined in this Constitution and under the procedure prescribed by law. Ukraine has introduced the institution of the constitutional complaint. Within this institution, legal and natural persons may submit to the Constitutional Court complaints for the recognition of the unconstitutionality of provisions of law on which a final judgment in their case was based. Chairman of the Constitutional Court of Ukraine Yuriy Baulin noted that the Constitutional Court expects to receive 7,000 constitutional complaints each year.³⁸ According to the ECtHR Judge Ganna Yudkivska, the implementation of constitutional complaints makes it possible to prevent and

³⁷ At various points during the years of the existence of the Constitutional Court of Ukraine, natural and legal persons gained and lost the right to appeal to the Constitutional Court to find the law or some of its provisions unconstitutional in the various editions of the earlier Law on the Constitutional Court. Before the amendment of the Constitution in 2016, natural persons and legal persons did not have such a right. They could appeal to the Constitutional Court only to provide an official interpretation of the Constitution and laws of Ukraine.

³⁸ Ukraïns'ki novyny: KS otrymav peršu konstytucijnju skarhu [Ukrainian news: The Constitutional Court received the first constitutional complaint], 7 October 2016, <<https://ukranews.com/news/453273-ks-poluchyl-pervuyu-konstytuyonnuyu-zhalobu>>.

remedy human rights violations without further intervention by the ECtHR. It is the realization of the principle of subsidiarity. The experience of the ECtHR shows that the ECtHR receives the smallest number of complaints from the Member States in which it is possible for an individual to appeal to the Constitutional Court.³⁹

A procedure for the organisation and operation of the Constitutional Court of Ukraine, and a procedure for consideration of cases by the Constitutional Court of Ukraine, shall be determined by law. The previous edition of the Law of Ukraine “On the Constitutional Court of Ukraine”⁴⁰ did not contain the provision about constitutional complaints. Thus, the Constitutional Court informed citizens of Ukraine, foreigners, stateless persons and legal entities that the Court takes constitutional complaints but shall resolve them after the manner of resolution is established with the Law. The Constitutional Court received 85 complaints between 30 September 2016, when the amendments took effect, and 7 April 2017⁴¹. Such actions of the Constitutional Court are based on the provisions of paragraph 3 of Article 8 of the Constitution of Ukraine, according to which the Constitution is directly applicable. Accordingly, the Constitutional Court cannot refuse to accept a constitutional complaint, as it has no relevant constitutional and legal grounds. At the same time, the Constitutional Court cannot examine constitutional complaints without determining the order of consideration with the law because, according to Article 19 of the Constitution of Ukraine, bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

The Draft Law of Ukraine “On the Constitutional Court” passed the first hearing in Parliament on 9 February 2017 but did not pass the second hearing.⁴² After this, on 7 June 2017, the new Draft Law of Ukraine “On the Con-

³⁹ Suddja JeSPL Hanna Judkivs’ka: “Tam, de ne jdet’sja pro svidomyj zločyn proty pravosuddja, svoboda suddivs’koho rozsudu maje buty zachyščena“ [ECtHR Judge Ganna Yudkivska: “Where there is no question of a deliberate crime against justice, freedom of judicial discretion must be protected”], *Zakon I biznes* [Law and business], No 33, 2016, <http://zib.com.ua/ua/print/125127-suddya_espl_ganna_yudkivska_tam_de_ne_ydetsya_pro_svidomiy_z.html>.

⁴⁰ *Zakon Ukraïny “Pro Konstytucijnyj Sud Ukraïny”* [Law of Ukraine “On the Constitutional Court of Ukraine”] of 16 October 1996, No 422/96-BP, <<http://zakon3.rada.gov.ua/laws/show/422/96-%D0%B2%D1%80/print1479235203759857>>.

⁴¹ *Konstytucijni skarchy, ščo nadijšly do Konstytucijnoho Sudu Ukraïny stanom na 7 kvitnja 2017 roku* [Constitutional complaints submitted to the Constitutional Court of Ukraine as of 7 April 2017], <<http://www.ccu.gov.ua/novyna/konstytucijni-skargy-shchodnadiyshly-do-konstytucijnogo-sudu-ukrayiny-za-standom-na-7-kvitnja>>.

⁴² *Proekt Zakonu Ukraïny “Pro Konstytucijnyj Sud Ukraïny”* [Draft Law of Ukraine “On the Constitutional Court of Ukraine”] of 17 November 2016, No 5336-1, <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60542>.

stitutional Court” was submitted to the Verkhovna Rada.⁴³ The Draft Law was passed on 13 July 2017.⁴⁴

Article 50 of the Law on the Constitutional Court of Ukraine provides three kinds of appeal to the Court: the constitutional petition, the constitutional appeal, and the constitutional complaint. The constitutional petition is a written request to resolve issues of the compliance of acts with the Constitution of Ukraine (constitutionality) or of the official interpretation of the Constitution of Ukraine. The constitutional petition may be submitted by the President of Ukraine, at least 45 Deputies of the Parliament, the Supreme Court of Ukraine, the Ombudsman, or the Parliament of the Autonomous Republic of Crimea.

The constitutional appeal is a written request for a conclusion about:

- 1) conformity to the Constitution of Ukraine as applicable by Ukraine, an international treaty or an international agreement, which is submitted to the Verkhovna Rada of Ukraine for ratification;
- 2) issues of compliance with the Constitution of Ukraine (constitutionality) concerning a proposal for passing a national referendum on a popular initiative;
- 3) observance of the constitutional procedure of investigation and proceedings to remove the President of Ukraine from office by impeachment;
- 4) compliance of the draft law on amendments to the Constitution of Ukraine with Articles 157 and 158 of the Constitution of Ukraine;
- 5) violation of the Constitution of Ukraine or laws of Ukraine by the Parliament of the Autonomous Republic of Crimea;
- 6) compliance of regulations of the Autonomous Republic of Crimea with the Constitution and laws of Ukraine.

Depending on the case, the constitutional appeal may be submitted by the President, Parliament, Government or at least 45 Deputies of Parliament.

The constitutional complaint is a written request to check compliance of an individual provision of Ukrainian law (as applied in the challenged final judgment) with the Constitution of Ukraine (constitutionality). The constitutional complaint may be submitted by a natural person or a legal entity (except for a legal entity of public law).

The final provisions of the Law on the Constitutional Court of Ukraine provide that the constitutional complaint may be submitted if the final judicial

⁴³ Proekt Zakonu Ukraïny “Pro Konstytucijnj Sud Ukraïny” [Draft Law of Ukraine “On the Constitutional Court of Ukraine”] of 7 June 2017, No 6427-d, <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61971>.

⁴⁴ Zakon Ukraïny “Pro Konstytucijnj Sud Ukraïny” [The Law of Ukraine “On the Constitutional Court of Ukraine”] of 13 July 2017, No 2136-VIII, <<http://zakon5.rada.gov.ua/laws/show/2136-19/print1443615917452143>>.

decision in the case came into force no earlier than 30 September 2016. A constitutional complaint filed before the entry into force of this law in respect of a case for which the final judicial decision came into force before 30 September 2016 shall be returned by the Secretariat of the Constitutional Court to the person with the right to a constitutional complaint without consideration within ten days of the date of the entry into force of this law. A constitutional complaint regarding a case for which the final judicial decision entered into force in the period from 30 September 2016 until the entry into force of this law may be filed within three months of the date of entry into force of this law.

5. Appointment and dismissal of judges: The issues of the High Council of Justice

The Verkhovna Rada of Ukraine has been deprived of the right to elect judges for permanent terms or to consent to the detention or arrest of a judge. Judges are now appointed for an unlimited term by the President of Ukraine on the proposal of the High Council of Justice. Placements are made by competition, except in cases provided by the law. A citizen of Ukraine who is not younger than the age of thirty (consequently, the judge's minimum age has increased by 5 years) and not older than sixty-five, who has a higher legal education and has no less than five years' professional experience in the sphere of law, and who is competent and honest and has command of the state language may be appointed to the office of judge. Additional requirements to be appointed to the office of judge may be provided for in the law. As for judges of specialised courts, other requirements with regard to education and professional experience may be provided by law.

The new reasons for dismissal of judges are included in Article 126 of the Constitution. The grounds to dismiss a judge are the following: 1) inability to exercise his or her authority for health reasons; 2) violation of the incompatibility requirements; 3) commission of a serious disciplinary offence, or flagrant or permanent disregard of his or her duties that is incommensurate with the status of judge or reveals his or her incompatibility with the office; 4) submission of a statement of retirement or voluntary dismissal from office; 5) refusal to be transferred from one court to another in the event that the court in which a judge holds office is to be dissolved or reorganised; 6) violation of the obligation to justify the legality of the origin of property. The powers of a judge shall be terminated in the event of: 1) the judge's attainment of the age of sixty-five; 2) termination of the judge's Ukrainian citizenship or the judge's acquisition of the citizenship of another state; 3) the entry into effect of a court decision recognising or declaring a judge to be missing or dead, or recognizing a judge as legally incapable or partially legally incapable; 4) the death of a judge; 5) the entry into effect of a guilty verdict against him or her for committing a crime.

The authority of judges appointed for a term of five years⁴⁵ shall lapse at the end of the term for which they were appointed. These judges can be appointed as a judge in the manner specified by law. Judges who were elected for an unlimited term continue to execute their powers until they are dismissed or their authority is terminated for reasons specified by the Constitution of Ukraine. The compliance of the judges who were appointed for five years or were elected for an unlimited term before the enactment of the Law of Ukraine “On Amendments to the Constitution of Ukraine (On Justice)” should be evaluated in the manner specified by law. If the results of the evaluation reveal inconsistencies in the judge’s performance on the criteria of competence, professional ethics or integrity, or if the judge refuses this evaluation, these are reasons for the dismissal of the judge.

The High Council of Justice now takes on the primary role in the system of appointment and dismissal of judges.

According to Article 131 of the Constitution of Ukraine, the High Council of Justice: 1) presents submissions for the appointment of a judge to office; 2) decides on the violation by a judge or a prosecutor of the incompatibility requirements; 3) reviews complaints about decisions of the relevant body imposing disciplinary liability on a judge or a prosecutor; 4) decides on the dismissal of a judge from office; 5) grants consent for detention of a judge or to keep him or her under custody; 6) decides on temporary withdrawal of the authority of a judge to administer justice; 7) takes measures to ensure the independence of judges; 8) decides on the transfer of a judge; 9) exercises other powers defined by the Constitution and laws of Ukraine.

The High Council of Justice consists of twenty-one members: ten of them are elected by the Congress of Judges of Ukraine from among judges and retired judges; two of them are appointed by the President of Ukraine; two are elected by the Verkhovna Rada of Ukraine; two are elected by the Congress of Advocates of Ukraine; two are elected by the All-Ukrainian Conference of Public Prosecutors; two are elected by the Congress of Representatives of Law Schools and Academic Institutions of Law. The procedure for election or appointment to office of members of the High Council of Justice is prescribed by law. The Chairperson of the Supreme Court is a member of the High Council of Justice *ex officio*.

The term of office for elected or appointed members of the High Council of Justice is four years. A person cannot hold the office of member of the High Council of Justice for two consecutive terms. A member of the High Council of Justice shall not belong to political parties or trade unions, take part in any political activity, hold a representative mandate, occupy any other

⁴⁵ According to the previous version of the Constitution, the judge was appointed for the first time by the President of Ukraine for a term of 5 years. After this term, the Verkhovna Rada elected a judge for an indefinite period.

paid office (except for the office of the Chairperson of the Supreme Court), or engage in other paid work except for academic, teaching or creative activity. Members of the High Council of Justice shall be legal professionals and meet the requirement of political neutrality. Additional requirements for members of the High Council of Justice may be provided for in the law. The High Council of Justice is competent to act if it has at least fifteen elected and appointed members, the majority of whom are judges.

The Law of Ukraine “On the High Council of Justice” was adopted on 21 December 2016 and came into force on 5 January 2017.⁴⁶ Article 3 of the Law expands the list of powers established in the Constitution.⁴⁷

Selection and appointment of judges shall be as prescribed by Article 70 of the Law of Ukraine “On the Judicial System and Status of Judges”,⁴⁸ and includes the following steps:

⁴⁶ Zakon Ukraïny “Pro Vyšču Radu Pravosuddja” [The Law of Ukraine “On the High Council of Justice”] of 21 December 2017, No 1798-19, <<http://zakon3.rada.gov.ua/laws/show/1798-19/print1479235203759857>>.

⁴⁷ The additional powers of the High Council of Justice are: 1) to take measures to ensure the authority of justice and judicial independence; 2) to decide on the transfer of judges from one court to another, the decision to assign a judge to another court of the same level and specialization; 3) to decide on the termination of the retirement of a judge; 4) to confirm the number of judges on the court; 5) to approve the Regulation on the unified court information (automated) system; Regulations on the State Judicial Administration of Ukraine and the default regulation of its territorial administration; the Regulation on the courts’ security; the Regulation of the competition for the appointment of civil servants in courts, bodies and judiciary agencies; the Regulation on the Commission on senior civil servants in the judiciary system; and the Order of the unified state register of judgments; 6) to agree on the typical regulation of court staff, the Regulation on the establishment and functioning of the service of court officers; 7) to provide binding advisory opinions regarding the consideration of drafts on the establishment, reorganization or liquidation of the courts, the judicial system and the status of judges, and generalize propositions of judges, organs and institutions of justice for legislation concerning their status and functioning of the judicial system and status of judges; 8) to perform the functions of the main manager of the State Budget of Ukraine for financial support of its activities; to participate in defining the State Budget of Ukraine for the maintenance of courts and institutions of the judiciary system; 9) to approve the proposition of the State Judicial Administration of Ukraine regarding norms for personnel, financial, logistical and other support of courts; 10) to confirm in the established order the redistribution of budget expenditures between the courts with the exception of the Supreme Court; 11) to appoint and dismiss the Chairman of the State Judicial Administration of Ukraine and his deputies; 12) to approve the proposition of the Chairman of the State Judicial Administration of Ukraine regarding the maximum number of employees of the State Judicial Administration of Ukraine, including its regional offices; 13) to exercise other powers defined by this Law and the Law of Ukraine “On the Judicial System and Status of Judges”.

⁴⁸ Zakon Ukraïny “Pro sudoustrij i status suddiv” [The Law of Ukraine “On the Judicial System and the Status of Judges”] of 2 June 2016, No 1401-VIII, <<http://zakon5.rada.gov.ua/laws/show/1402-19>>.

- 1) the High Qualification Commission of Judges of Ukraine decides to announce the selection of applicants for judgeships, considering the estimated number of vacant judge posts;
- 2) the High Qualification Commission of Judges of Ukraine places the announcement of the selection of judges on its official website;
- 3) persons who intend to become a judge submit to the High Qualification Commission of Judges of Ukraine relevant statements and documents specified in the law;
- 4) the High Qualification Commission of Judges of Ukraine verifies that the persons who submitted applications for participation in the selection process established by this law meet the requirements for judicial applicants on the basis of the documents;
- 5) the High Qualification Commission of Judges of Ukraine admits those persons who comply with the requirements established by law at the time of this law to participate in the selection and qualifying examination;
- 6) the persons allowed to participate in the selection process take the qualifying examination;
- 7) the High Qualification Commission of Judges of Ukraine evaluates the qualifying exam results and publishes them on the official website of the High Qualification Commission of Judges of Ukraine;
- 8) persons who have passed the qualifying examination undergo a background check in accordance with the law on the prevention of corruption, considering the characteristics defined in the law;
- 9) applicants who have passed the qualifying exam and passed a special audit undergo special training; the special training is certified;
- 10) applicants who have been trained and whose qualifying examination results have been evaluated and found acceptable pass the selection process;
- 11) the High Qualification Commission of Judges of Ukraine enters applicants for judgeships into the reserve for vacant judge positions on the basis of the results of the qualifying examination, ranks them, and publishes the list of applicants for judgeships included in the reserve and the rating list on the official website of the High Qualification Commission of Judges of Ukraine;
- 12) the High Qualification Commission of Judges of Ukraine announces a competition for filling vacant judge positions in local courts, according to the number of vacant positions;
- 13) the High Qualification Commission of Judges of Ukraine conducts a competition for the vacant judge positions based on the ranking of applicants who took part in this competition, and makes recommendations to the High Council of Justice regarding the appointment of applicants;
- 14) the High Council of Justice considers the recommendation of the High Qualification Commission of Judges of Ukraine and makes a decision on a judicial appointment;

- 15) the President of Ukraine issues a decree on the appointment of judges in the event that the High Council of Justice has made a proposal on the appointment of judges.

The qualification examination is conducted by means of an anonymized written test and the anonymized performance of a written practical task for a judge in order to determine the applicant's level of knowledge, practical skills and abilities in applying the law and conducting a court session. The results of the qualifying exam are valid for three years from the date of passing the exam. If a person has scored less than 75 per cent of the maximum possible score of the qualifying exam, he/she is deemed to have failed the qualification examination. A person who has failed the qualification examination may be admitted to retake the examination no less than one year later. A person who has failed the qualification examination repeatedly may be admitted to retake the examination no less than two years later. The High Qualification Commission of Judges of Ukraine shall determine the ranking of applicants for the post of judge according to the number of applicants scored by the results of the qualification examination. The rating also separately shows scores for tasks that test the applicant's ability to be a judge for the relevant specialization. The High Qualification Commission of Judges of Ukraine shall include in the reserve for the filling of vacant judge positions those applicants who scored at least 75 per cent of the maximum possible score on the qualifying examination.

The High Qualification Commission of Judges of Ukraine holds a competition for judge vacancies of local courts based on the ranking of applicants for the position of judges and judges who have indicated their intention to be transferred to another local court. This ranking is based on the qualifying examinations drawn up within the procedure for selecting judges or within the procedure for evaluating qualifications. The High Qualification Commission of Judges of Ukraine holds a competition for judge vacancies on the Court of Appeals or the Supreme Court on the basis of the ranking of participants according to the results of the qualification evaluation. The competition for judge vacancies on the Supreme Court is to be held in respect of a vacant post in the relevant cassation court. The High Qualification Commission of Judges of Ukraine holds a competition for vacant judgeships on the High Specialized Court on the basis of the participants' ratings based on the results of the qualification evaluation. The competition for occupying a vacant judge position consists in determining which participant in the competition has a higher position according to the rating system.

The criteria for determining the winner of a competition for a judgeship on the Supreme Anti-Corruption Court are determined by law.

According to the results of the competitive selection, the High Qualification Commission of Judges of Ukraine sends recommendations to the High Council of Justice regarding the appointment of judgeship applicants. Ac-

According to the recommendations made by the High Qualification Commission of Judges of Ukraine, the High Council of Justice at its meeting considers the issue of appointment of an applicant for a judge position, and in the event of a positive decision, it submits a recommendation to the President of Ukraine on the appointment of a judge to a position.

The High Council of Justice may refuse to make a recommendation to the President of Ukraine on the appointment of a judge only on the following grounds:

- 1) the existence of a reasonable doubt as to whether the applicant meets the criteria of integrity or professional ethics, or other circumstances that may adversely affect public trust in the judiciary in connection with such appointments;
- 2) violation of the procedure for judicial appointments determined by law.

The judge's compliance with integrity requirements is judged by the Public Council of Integrity. According to Article 87 of the Law of Ukraine "On the Judicial System and Status of Judges", the Public Council of Integrity is formed with the purpose of assisting the High Qualification Commission of Judges of Ukraine in determining the suitability of a judge (applicant for a judgeship) in terms of the criteria of professional ethics and integrity for the purposes of the qualification evaluation. The Public Council of Integrity consists of twenty members. Members of the Public Council of Integrity may be representatives of human rights organizations, members of community associations, legal scholars, lawyers, or journalists. They must be recognized professionals in their field of activity, have a positive professional reputation and meet the criteria of political neutrality and integrity.

The Public Council of Integrity:

- 1) collects, verifies and analyses information regarding a judge (applicant for a judgeship);
- 2) provides the High Qualification Commission of Judges of Ukraine with information regarding a judge (applicant for a judgeship);
- 3) provides, on certain grounds, the Higher Qualification Commission of Judges of Ukraine with conclusions regarding a discrepancy between the judge (judicial applicant) and the criteria of ethics and integrity. This comes with the file of an applicant or the judicial dossier;
- 4) delegates an authorized representative to attend the meeting of the High Qualification Commission of Judges of Ukraine concerning the judicial applicant whose qualifications are being evaluated;
- 5) may create an information portal for gathering information on the ethics and integrity of judges and judicial applicants.

Members of the Public Council of Integrity are appointed by the meeting of representatives of public associations for a term of two years and may be

reappointed. The meeting of representatives of public associations is convened by the Chairman of the High Qualification Commission of Judges of Ukraine. An announcement of the convening of the meeting is published on the official website of the Commission.

The High Qualification Commission of Judges of Ukraine adopts a grounded decision to confirm or not confirm the ability of a judge (applicant for a judgeship) to administer justice in a relevant court. If the Public Council of Integrity concludes that a judge (applicant for a judgeship) does not meet the criteria for professional ethics and integrity, the High Qualification Commission of Judges of Ukraine may decide to confirm the ability of such a judge (applicant for a judgeship) to administer justice in a relevant court only if this solution is supported by at least eleven of its members.

A judge (applicant for a judgeship) who does not agree with the decision of the High Qualification Commission of Judges of Ukraine regarding his qualification assessment may appeal this decision in accordance with the procedure provided for by the Code of Administrative Procedure of Ukraine. The decision of the High Qualification Commission of Judges of Ukraine, approved on the basis of the results of the qualification evaluation, may be appealed and cancelled solely on the following grounds:

- 1) the composition of members of the High Qualification Commission of Judges of Ukraine who conducted the qualification assessment did not have the authority to conduct it;
- 2) the decision was not signed by any of the members of the High Qualification Commission of Judges of Ukraine who conducted the qualification assessment;
- 3) the judge (applicant for a judgeship) was not duly informed about conducting a qualification assessment – if the decision was made not to confirm the ability of a judge (applicant for a judgeship) to administer justice in the relevant court for reasons of non-appearance for the qualification assessment;
- 4) the decision does not contain a reference to the grounds for its adoption by law or the Commission's motivations for reaching the relevant conclusions.

The competition for occupying judgeships on the Supreme Court is now being ended in Ukraine. Requirements for judges of the Supreme Court have changed radically. In particular, in addition to the results of qualification tests, the applicant must satisfy one of the following requirements:

- 1) has at least ten years' experience as a judge;
- 2) has a degree in the field of law and at least ten years' academic experience in the field of law;

- 3) has at least ten years' professional experience as an attorney who represents clients in court and/or protects them from criminal prosecution;
- 4) has at least ten years' combined experience in the aforementioned forms of professional activity.

Consequently, legal scholars and practitioners who have no experience working as judges (with all the negative and positive effects of this) will potentially have the opportunity to serve as Supreme Court judges. In my view, this is the major change in the organization of the judiciary.

The current selection process for judges of the Supreme Court of Ukraine started on 7 November 2016. Among the candidates admitted to the competition, 71% are judges, while 29% are scholars, lawyers and people with mixed forms of legal experience. 7% of the applying judges and 45% of the applying scholars, lawyers and people with mixed forms of legal experience were not admitted to the competition. 72% of current higher court judges participated in the competition.⁴⁹ 382 candidates remain in the competition to the Supreme Court following testing and writing assignments. Of these, 299 (78%) are current judges and retired judges and 83 (22%) are lawyers and scholars.⁵⁰ The High Qualification Commission of Judges of Ukraine publishes all relevant information about the candidates and the results of the competition on its website.⁵¹ But after the publication of the results of the written assignments, social activists alleged that there were some indications of unreliability in the competition results, and demanded that the candidates' written work be made public.⁵² One of the indicators of unreliable results is the fact that some candidates have in their work as judges dealt in practice with the case used for the preparation of the model case that candidates were instructed to resolve in their written examination.⁵³ The High Qualification Commission of Judges of Ukraine currently refuses to do this on the grounds that the law does not require it to do so.⁵⁴

⁴⁹ Chto jde do Verhovnoho Sudu: Kandydaty, jakych Vyšča kvalifikacijna komisija suddiv dopustyla do konkursu [Who goes to the Supreme Court: Applicants who are admitted to the competition], <<http://chesnosud.org/infographics/hto-jde-u-verhovnyj-sud/>>.

⁵⁰ Chto prodovžuje borot'bu v konkursi do Verhovnoho Sudu: Kandydaty, jaki uspišno sklaly pismove praktyčne zavdannja [Who continues to compete for the Supreme Court: Applicants who have successfully completed a written practical assignment], <<http://chesnosud.org/infographics/hto-prodovzhuye-borotbu-v-konkursi-do-verhovnogo-sudu/>>.

⁵¹ Konkurs do Verhovnoho Sudu [Competition for the Supreme Court], <<http://vkksu.gov.ua/ua/konkurs-do-wierchownogo-sudu/>>.

⁵² "RPR demands that the HQCJ publish the works and the scores of the Supreme Court nominees", <<http://rpr.org.ua/en/news/rpr-demands-that-the-hqcj-should-publish-the-works-and-the-scores-of-the-supreme-court-candidates/>>; "Lack of transparency is a road to nowhere – We stand for fair play": The Statement of the Public Integrity Council, <<http://grd.gov.ua/news/37/lack-of-transparency-is-a-road-to-nowhere-we-stand-for-fair-play>>.

⁵³ Zajava Hromads'ko¹ rady dobročesnosti "Ščodo situaci¹ dovkola vykonannja praktyčnogo zavdannja konkursantamy do Verhovnoho Sudu" [Statement of the Public Coun-

On 17 July, the High Qualification Commission of Judges of Ukraine held its last plenary meetings to discuss those candidates who, in the opinion of the Public Integrity Council, do not meet the criteria of integrity and professional ethics. Within a week, the High Qualification Commission of Judges drew up the final ranking of the candidates and submitted its recommendations to the High Council of Justice. At a briefing on July 18, Public Integrity Council representatives discussed the risk of dishonest candidates getting onto the new Supreme Court and the Public Integrity Council's role during the meetings of the High Council of Justice. Maryna Solovyova, a member of the PIC and chair of the NGO "Initiative for St. Andrew's Passage", said that during the plenary meetings the High Qualification Commission of Judges overruled almost two thirds of the opinions of the Public Integrity Council: "Twenty-six candidates were banned from the competition on the basis of the Public Integrity Council's opinions. At the same time, the High Qualification Commission of Judges has ignored the information about 76 candidates, having overruled the opinions of the Public Integrity Council." Another eight candidates have voluntarily withdrawn from the competition, which means that their compliance with the criteria of integrity and professional ethics will not be assessed.⁵⁵

Thus, despite the declared attempts of the state to increase the level of trust in the judiciary, NGOs have questioned the fairness of selection procedures for Supreme Court judges. This may adversely affect public trust in the highest court and the entire system of courts of general jurisdiction.

Chapter 6 of the Law of Ukraine "On the High Council of Justice" provides procedures for the dismissal of a judge. There are two forms of this procedure: one for general circumstances and one for special circumstances.

The first procedure of judge dismissal is used in cases of inability to exercise authority for health reasons or when a judge submits a statement of retirement or voluntary resignation from office. Such cases are considered at the meeting of the High Council of Justice. The High Council of Justice decides on dismissal of judges after preliminary clarification of the true will of the judge and the absence of outside influence or coercion. The High Council of Justice has the right to suspend consideration of cases under consideration

cil of Integrity "Concerning the Situation Concerning Implementation of Practical Challenges by Applicants for the Supreme Court"], <<https://grd.gov.ua/news/28/shchodotsyuatysii-navkolo-vykonannia-praktychnoho-zavdannia-konkursantamy-do-ver>>.

⁵⁴ "Ljudy Kivalova" i fal'syfikacii: Ščo ne tak iz konkursom do Verhovnoho Sudu Ukraïny? ["People of Kivalov" and falsifications: What's wrong with the competition for the Supreme Court of Ukraine?], <<https://www.radiosvoboda.org/a/28411600.html>>.

⁵⁵ "The Public Integrity Council Continues to Participate in the Supreme Court Competition and Will Defend its Opinions at the Meetings of the High Council of Justice", <<https://grd.gov.ua/news/75/the-public-integrity-council-continues-to-participate-in-the-supreme-court-comp>>.

at the time of complaints or statements which may result in the removal of the judge under special circumstances. After considering the issue of removal of a judge on general grounds, the High Council of Justice shall adopt a reasoned decision.

At its meeting, the High Council of Justice considers the removal of a judge on the grounds of violation of incompatibility requirements. The judge and his representative have the right to give explanations, ask questions to participants in the session, make arguments and objections on matters arising during the proceedings, and lodge petitions and challenges. If it is impossible to attend the meeting for important reasons, the judge may provide a written explanation of the matters of the case, which will be read out at the meeting. The repeated absence of a judge is a reason for a hearing in his absence. After the hearing, the High Council of Justice may decide whether the judge has violated requirements concerning incompatibility with other activities or the status of judges and whether the judge is to be dismissed from office. The decision in the case of incompatibility has to be taken by the majority of the members of the High Council of Justice who are participating in the meeting. The member of the Supreme Council of Justice who is chosen as the rapporteur in the case does not participate in the vote. The questions of removal of a judge on grounds of an essential offense, systematic or flagrant neglect of duties that is incompatible with the status of a judge, the revelation that he has left his post, or a breach of the obligation to confirm the legitimacy of the sources of the property are considered by the High Council of Justice upon the recommendation of the Disciplinary Chamber⁵⁶ that the judge be released. If the judge is absent for any reason from the meeting, but has been notified about the meeting in the manner prescribed by law, this absence does not preclude consideration.

When considering the removal of the judge on the grounds of disagreement with a transfer to another court in the event of liquidation or reorganization of the court in which the judge holds a position, the High Council of Justice clarifies the fact of the judge's refusal to be transferred to another court upon the request of the judge or the notification of the High Qualification Commission of Judges of Ukraine that the judge did not come to court for the administration of justice. Invitations to a judge to attend the meeting of the High Council of Justice which considers the issue of his release from office are obligatory. The judge and/or the judge's representative has the right

⁵⁶ The Disciplinary Chamber is formed with members of the High Council of Justice for considering cases concerning the disciplinary liability of judges. The number of disciplinary chambers and the number of members of each chamber is determined by a decision of the High Council of Justice. The Disciplinary Chamber includes at least four members of the High Council of Justice. The High Council of Justice must ensure that at least half, and if this is not possible at least a significant portion, of the members of the Disciplinary Chamber are judges or retired judges.

to be heard at a meeting of the High Council of Justice and provide clarification. If it is impossible to attend the meeting of the High Council of Justice for good reasons, the judge can submit a petition to postpone consideration of dismissal from office. Repeated absence of a judge from the meeting for any reason does not preclude consideration.

Thus, the High Council of Justice has the power to nominate people to the judiciary and to dismiss judges. This should promote the independence of judges from other branches of authority.

Amendments to the Constitution relate not only to the judiciary but also to some procedural issues. According to Article 59 of the Constitution of Ukraine, every person has a right to professional legal assistance. Such assistance is provided for free in cases specified in the law. Article 131.2. of the Constitution of Ukraine provides that the legal advocate shall act to provide professional legal assistance. Only a legal advocate can represent another person in court and defend a person against prosecution. Exceptions concerning representation in court can be determined by law in labour disputes, social rights protection disputes, disputes related to elections and referendums, or disputes of minor importance, and for representation in court of minors, adolescents, or persons declared by the court to be legally incapable or partially legally incapable.

6. The reform of the judicial system

The Law of Ukraine “On the Judicial System and the Status of Judges” was adopted on 2 June 2016, around the same time as changes to the Constitution. This Law develops the new provisions of the Constitution that concern the judicial system and the status of judges.

First of all, the judicial system has been changed. According to Article 17 of the Law of Ukraine “On the Judicial System and the Status of Judges”, the court system is based on the principles of territoriality, specialization and authority. The Supreme Court is the highest court in the system of justice.

The judicial system consists of: 1) local courts; 2) appellate courts; 3) the Supreme Court.

Local general courts are district courts, which are formed for one or several districts or city districts, or a city, or a district (area) and city or cities. Local general courts consider civil, criminal and administrative cases, as well as administrative violations in cases, in accordance with the procedure established by procedural law. Local economic courts are district economic courts. Local economic courts shall consider cases arising out of economic relations, as well as other cases assigned by law to their jurisdiction. Local administrative courts are district administrative courts, as well as other courts defined by procedural law. Local administrative courts consider cases of administrative jurisdiction (administrative cases). The jurisdiction of local courts re-

garding certain categories of cases, as well as the procedure for their consideration, is determined by law.

Appeals courts act as courts of appellate instance, and in cases specified by procedural law as courts of first instance for consideration of civil, criminal, economic, and administrative cases, as well as cases of administrative offenses. Appeals courts for the consideration of civil and criminal cases, as well as cases of administrative offenses, are appellate courts that are formed in appellate districts. The appellate courts for reviewing economic cases and for the consideration of administrative cases are, respectively, appellate economic courts and appellate administrative courts, both of which are formed in the respective appellate districts.

In order to review certain categories of cases, in accordance with this law, higher specialized courts operate in the judiciary system. As provided in Article 31 of the Law of Ukraine “On the Judicial System and the Status of Judges”, in the judicial system there are higher specialized courts, such as courts of first instance, to deal with certain categories of cases. The highest specialized courts are the Supreme Court on Intellectual Property and the Supreme Anti-Corruption Court.

Existing cassation courts (the High Specialized Court of Ukraine for Civil and Criminal Cases, the Supreme Economic Court, and the Supreme Administrative Court) have to be eliminated. The eliminated courts resolved cases mostly as courts of cassation (third instance). Due to the lack of new procedural legislation about the new specialized courts, it is difficult to say exactly which category of cases they will consider, or how the only Supreme Court on Intellectual Property will consider cases from the whole country.

The new Supreme Court will be grounded in the conditions of the law. The Supreme Court will be the highest court in the judiciary system, and will provide permanence and unity of judicial practice. The Supreme Court will carry out justice as the court of cassation (in some cases as a court of appeal or first instance). The Court will be composed of the Grand Chamber of the Supreme Court and the administrative, economic, civil and criminal courts of cassation. The separate chamber for cases concerning intellectual property rights protection will be found in the economic court of cassation.

Judges of the high courts will be dismissed with the elimination of these courts. However, the law does not prohibit them from participating in the selection of judges under the new legislation.

The Law of Ukraine “On the Judicial System and the Status of Judges” involves some procedural issues, and not only issues of the judiciary. One of the main issues is the legislative provision of the right of appeal and cassation, which has been changed. In the previous law on the judiciary, the right to appeal judgments was regulated equally for appeal and cassation: “... a person in the cases and procedures established by law has the right to have the court decision reviewed by a court of appeal or cassation, as well as to

have the case reviewed by the Supreme Court of Ukraine”. The new law contains the following wording: “The participants in the case and other persons have a right to an appellate review of the case and in the cases determined by law the right to appeal the court decision to a court of cassation”. This is a prerequisite for establishing procedural conditions for appealing court decisions to a court of cassation. The overall setting of procedural conditions is one of the important aspects of the reform.

Thus, the Law of Ukraine “On the Judicial System and the Status of Judges” implements provisions of the Constitution relating to the judiciary: the judicial system, the system of selection, and the appointment and dismissal of judges and jurors have been changed. Overall, these changes should enhance judicial independence and the transparency of the judicial system and increase confidence in the justice system.

7. Demarcation of civil and economic jurisdiction

The issue of demarcation of the jurisdiction of the courts of different specializations has always been much debated among judges, practicing lawyers and scholars in Ukraine. This issue stems from Soviet times, when the resolution of disputes between natural persons was entrusted to general courts and the resolution of economic disputes relied on a system of state arbitration and departmental arbitration bodies, which were not judicial bodies in nature. The authorities created enterprises and established arbitrage to resolve disputes between them. The Constitution of the Ukrainian SSR of 1978⁵⁷ provided that resolving the economic disputes between enterprises, institutions and organizations fell within the competence of state arbitration bodies. According to the Law of the USSR “On State Arbitration in the USSR”,⁵⁸ bodies of arbitration were bodies of the USSR and carried out their activities under the leadership of the Supreme Council of the USSR and its Presidium; the supreme councils of union and autonomous republics and their presidiums; territorial, regional and city councils of people’s deputies; and the councils of people’s deputies of autonomous regions and autonomous districts. The activity of state arbitration bodies was directed respectively by the Council of Ministers of the USSR and the councils of ministers of the union and autonomous republics, and the executive committees of regional, provincial and city councils of people’s deputies and the councils of people’s deputies of autonomous provinces and autonomous regions. On 19 June 1991, the Constitution of the

⁵⁷ Konstytucija Ukraïns’koï RSR [The Constitution of the Ukrainian SSR] of 20 April 1978, No 888-09, <<http://zakon3.rada.gov.ua/laws/show/888-09/ed19910604>>.

⁵⁸ Zakon SSSR “O gosudarstvennom arbitraže v SSSR” [The Law of the USSR “On State Arbitration in the USSR”] of 30 November 1979, No 1163-10, <<http://www.economics.kiev.ua/download/ZakonySSSR/data02/tex13789.htm>>.

Ukrainian SSR was amended:⁵⁹ the resolution of economic disputes was assigned to arbitration courts and the influence of any bodies, organizations or officials on the activity of the arbitrators of arbitration courts to resolve disputes was forbidden.

Thus, although the system of state and departmental arbitration was replaced by the system of arbitration courts (and later by economic courts), disputes between legal entities in other jurisdictions became trickier than disputes involving individuals. It is an artificial division on the basis of the subject matter, which was stifled for a long time due to discussions about the delimitation of civil and economic jurisdictions.

Article 19 of the new edition of the Civil Procedure Code states that courts will consider disputes arising from civil, land, labour, family, housing and other relationships, except for disputes that are to be considered in other legal proceedings; in civil proceedings, courts will consider demands for registration of property and property rights, and other registration actions if such demands are derived from disputes about property or property rights that are subject to consideration in the local general court. Courts will consider cases challenging the decisions of arbitration courts, cases to issue a writ of execution to enforce the decisions of arbitration courts, and appeals of the decisions of international commercial arbitration courts. They will also recognize and grant permission for the enforcement of international arbitration and foreign court rulings.

As we can see, the competence of general courts is determined with a list of fields of relationships, which can be interpreted widely, especially concerning civil relations. Civil relations cannot always be clearly distinguished from economic relations because the Economic Code contains several dozen regulations that refer to the Civil Code and assign to the Civil Code the regulation of certain economic relations that are unresolved by the Economic Code.

The authors of the draft law on the amendment of procedural codes declare that the division of jurisdictions will be based on the apparent substance of the case, not on the parties involved. But such a division is already based mainly on the apparent substance of the case in economic jurisdiction and not only on the parties involved, as provided in a draft. According to Article 12 of the previous edition of the Economic Procedure Code of Ukraine,⁶⁰ the following types of cases are subject to economic jurisdiction: 1) cases of disputes arising at the conclusion, amendment, termination and execution of

⁵⁹ Zakon Ukraïns'koï RSR "Pro vnesennja zmin i dopovnen' do Konstytucii (Osnovnoho Zakonu) Ukraïns'koï RSR" [The Law of the Ukrainian SSR "On Amendment of the Constitution (Basic Law) of the Ukrainian SSR] of 19 June 1991, No 1213a-XII, <<http://zakon2.rada.gov.ua/laws/show/1213%D0%B0-12>>.

⁶⁰ Hospodars'kyj procesual'nyj kodeks Ukraïny [The Economic Procedure Code of Ukraine] of 6 November 1991, No 1798-XII, <<http://zakon2.rada.gov.ua/laws/show/1798-12/print1479675860368285>>.

economic agreements, including the privatization of property and other grounds, except for disputes over the privatization of public housing; disputes in agreeing standards and specifications; disputes over the pricing of products (goods) and fees for services (work) if the prices and fees in accordance with the law cannot be established by agreement of the parties; disputes arising from public legal relations and within the competence of the Constitutional Court of Ukraine and administrative courts; other disputes that are to be resolved in accordance with the laws of Ukraine and international agreements of Ukraine within the jurisdiction of other organs; 2) bankruptcy proceedings; 3) cases on the claims of the Anti-Monopoly Committee of Ukraine or the Accounting Chamber of Ukraine on issues related to legislation in their jurisdiction; 4) matters arising from corporate relations disputes between the entity and its members (founders, shareholders, members), including a retired member, and between the members (founders, shareholders, members) of a legal entity related to the establishment, functioning, management and termination of such a person, except for labour disputes; 4-1) cases in disputes between a business entity and its officials (including an officer whose mandate has been terminated) for damages caused to the legal entity by such an officer through their actions (or inaction); 5) cases in disputes in respect of securities; 6) cases in disputes arising from land relations involving economic entities, except those within the jurisdiction of administrative courts; 7) cases in disputes with property claims against the respondent, concerning which an application for bankruptcy has been filed, including cases in disputes on the invalidation of any transactions (contracts) concluded by the respondent; recovery of wages; reinstatement of the officers and employees of the respondent, except for disputes relating to the determination and payment (recovery) of monetary obligations (tax debt) as defined under the Tax Code of Ukraine, as well as cases in disputes on the invalidation of contracts if the relevant claim is drawn to fulfil a mandate of supervisory authority as designated by the Tax Code of Ukraine; 8) cases on the approval of plans to reorganize the respondent before the initiation of bankruptcy proceedings.

According to Article 20 of the new edition of the Economic Procedure Code,⁶¹ economic courts will consider disputes arising in connection with economic activities and other affairs in accordance with the law: 1) disputes arising from the signing, amendment, termination and implementation of business contracts, except contracts with a natural person who is not an entrepreneur as

⁶¹ Zakon Ukraïny "Pro vnesennja zmin do Hospodars'koho procesual'noho kodeksu Ukraïny, Cyvil'noho procesual'noho kodeksu Ukraïny, Kodeksu administratyvnoho sudochynstva Ukraïny ta inšych zakonodavčych aktiv" [The Law of Ukraine "On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts"] of 3 October 2017, No 2147-VIII, <<http://zakon2.rada.gov.ua/laws/show/2147-19/print1509542199175329>>.

one of the parties and disputes concerning transactions concluded to secure obligations, the parties of which are legal persons and/or individual entrepreneurs; 2) disputes concerning property privatization, except disputes about the privatization of public housing; 3) disputes arising from corporate relations, including disputes among participants (founders, shareholders, members) in legal persons or between the entity and its participant (founder, shareholder, member), including retired members, concerning the creation, activities, administration or termination of such a legal person, except labour disputes; 4) disputes arising from transactions on corporate rights (shares) in a legal person, except transactions in family and inheritance relationships; 5) disputes concerning valuable papers, including rights related to valuable papers and rights arising from them; the issuance, placement, circulation and redemption of valuable papers; accounting for rights and obligations arising under promissory notes or securities owned by a natural person who is not an entrepreneur and promissory notes used in tax and customs relations; 6) disputes over property rights or other proprietary rights of property (movable and immovable, including land), registration or recording of rights concerning a property which (the right to which) is the subject of the dispute, invalidation of acts that violate these rights except disputes with a party which is a natural person who is not an entrepreneur, and disputes concerning the seizure of property for public purposes or for reasons of social necessity, and disputes over property that are collateral to obligations involving parties that are legal persons and/or natural persons as entrepreneurs; 7) disputes arising from the protection of economic competition and the restriction of monopolies in business, and from protection from unfair competition, including disputes relating to appeals of decisions of the Anti-Monopoly Committee of Ukraine and statements of the Anti-Monopoly Committee of Ukraine on matters within their competence; 8) bankruptcy cases and proceedings in disputes with property claims against the respondent, concerning which bankruptcy proceedings have opened, including cases in disputes on the invalidation of any transactions (contracts) concluded by the respondent; recovery of wages; reinstatement of officers and employees of the respondent, except disputes concerning the determination and payment (recovery) of monetary obligations (tax debt) as defined under the Tax Code of Ukraine, and disputes on invalidation of contracts on the claim of the supervisory authority in accordance with its powers defined by the Tax Code of Ukraine; 9) cases on the approval of a respondent's reorganization plans before the initiation of a bankruptcy case; 10) disputes concerning the appeal of acts (decisions) by entities and other bodies or their officials or officers in the organization and implementation of economic activity, except acts (decisions) of government agencies taken in pursuance of their administrative functions; 11) appeals against arbitration decisions and the issuance of writs for the enforcement of arbitration decisions established under the Law of Ukraine "On Arbitration Courts"; 12) disputes between the legal entity and its officers (including officials whose powers are suspended) for damages

caused to a legal person by the actions (or inaction) of such an official, emanating from a claim of a holder (participant, shareholder) of such legal person in order to safeguard its interests; 13) demands for registration of property and property rights, and other registration actions, as well as invalidation of acts that violate property rights, if such demands are derived from a dispute concerning such property or property rights or a dispute arising out of corporate relations, if the dispute is to be considered by the economic court and submitted for consideration with such demands; 14) disputes about the protection of a business's reputation, except disputes for which the party is a natural person who is not an entrepreneur; 15) other disputes between business entities. Economic courts also consider other cases assigned by law to the jurisdiction of economic courts; 16) applications for a court order if the claimant and/or the respondent is a legal entity or a natural person acting as an entrepreneur.

As we can see, the new edition of the Economic Procedure Code provides an expanded list of cases of economic jurisdiction. Some of them are defined on the substance of the case, but some are defined on the basis of the parties involved. It is interesting that the new edition of the Economic Procedure Code of Ukraine provides for cases referred to the jurisdiction of the High Court on Intellectual Property.⁶²

The new edition of the Economic Procedure Code conversely contains a wide range of specific types of cases which are dealt with in the economic procedure. I wish only to express surprise at the inclusion of cases concerning international commercial arbitration decisions in the competence of general courts. The reason for this may be that the relevant cases are not considered in their substance. However, proceedings on appeals against the decisions of arbitration courts, which relate to economic jurisdiction in terms of their substance, shall be within the competence of economic courts. And such appeals do not concern the substance of the case. In general, this approach is somewhat at odds with the philosophy proclaimed by the Council on Judicial

⁶² The High Court on Intellectual Property considers cases on intellectual property rights, including: 1) cases in disputes concerning the rights to an invention, utility model, industrial design, trademark, trade name or other intellectual property rights, including the rights of prior use; 2) cases in disputes concerning the registration of intellectual property rights, accounting for them, invalidation, prolongation, early termination of patents, certificates, other acts that certify such rights or on the basis of which such rights arise or such rights or related legal interests have been infringed; 3) cases of recognition that a trademark is well known; 4) cases in disputes concerning copyrights and related rights, including disputes regarding the collective management of property rights of authors and related rights; 5) cases in disputes concerning the conclusion, modification, and termination of contracts to manage intellectual property rights, or commercial concession agreements; 6) cases in disputes arising from relations connected with protection against unfair competition in relation to: illegal use of signs or products of other manufacturers; copying the look of the product; collection, use and disclosure of trade secrets; appeals against decisions of the Anti-Monopoly Committee of Ukraine as per this paragraph.

Reform, according to which the courts' jurisdiction is not determined by the parties involved in the case and the subject of dispute.

The authors of the current procedural legislation noted that the novelty of determining the jurisdiction of the case would be that the derivative claim may be considered in the court of the jurisdiction as a primary claim even though by all indications it should be considered in a court of another jurisdiction.⁶³ But according to Article 19 of the new edition of the Civil Procedure Code of Ukraine and Article 20 of the new edition of the Economic Procedure Code of Ukraine, it is not permissible to join in one case the demands to be considered under the rules of different types of proceedings, unless otherwise provided by law.

According to Article 19 of the new edition of the Code of Administrative Procedure of Ukraine, the jurisdiction of administrative courts extends to cases in public-law disputes, in particular:

- 1) disputes of natural or legal persons with an authority regarding the appeal of its decisions (legal acts or individual acts), acts or omissions, except for cases in which the law establishes a different procedure for court proceedings for the consideration of such disputes;
- 2) disputes concerning the acceptance of citizens for public service, the passage of public service exams, and dismissal from the public service;
- 3) disputes between persons who hold power over the implementation of their competence in the field of management, including delegated authority;
- 4) disputes arising in connection with the conclusion, execution, termination, cancellation or recognition of invalid administrative agreements;
- 5) upon the request of a person (with state authority) who has been authorised by statutory law to apply to a court for the resolution of a public-legal dispute;
- 6) disputes concerning legal relations connected with the electoral process or the referendum process;
- 7) disputes of natural or legal persons with the manager of public information regarding the appeal of their decisions, actions or inactivity regarding access to public information;
- 8) disputes concerning the seizure or compulsory alienation of property for public needs or for reasons of public necessity;
- 9) disputes concerning the appeal of decisions of attestation, competition, medical and social expert commissions and other similar bodies whose decisions are binding for bodies of state power, bodies of local self-government and other persons;

⁶³ "13 holovnykh zmin v hospodars'komu ta cyvil'nomu procesi" [13 major changes in economic and civil procedure], <<http://jrc.org.ua/upload/ckeditor/3b82083c135da1923c215a90f03b618f.jpg>>.

- 10) disputes concerning the determination of the composition of state bodies and bodies of local self-government or the election, appointment, or dismissal of their officials;
- 11) disputes between natural or legal persons regarding the appeal of decisions, actions or inaction of the customer in legal relations arising under the Law of Ukraine “On the Peculiarities of the Procurement of Goods, Works and Services for Guaranteed Defence Needs”, except for disputes related to the conclusion of the contract with the winner of the negotiation procedure for the purchase, as well as the modification, termination and execution of procurement contracts;
- 12) disputes concerning the appeal of the decisions, actions or inactivity of state border guard institutions in cases of offenses established by the Law of Ukraine “On the Liability of Carriers during International Passenger Transportation”;
- 13) disputes concerning appeals against decisions of the National Rehabilitation Commission in legal relations that arose on the basis of the Law of Ukraine “On Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917–1991”.

The jurisdiction of administrative courts does not apply to cases:

- 1) that are classified as falling under the jurisdiction of the Constitutional Court of Ukraine;
- 2) that are to be decided in accordance with the procedure of criminal justice;
- 3) that concern the imposition of administrative penalties, except in cases specified by this Code;
- 4) that regard relations which, in accordance with the law, are assigned to the internal activity or exclusive competence of the charter (regulations) of a public association or a self-regulatory organization, in addition to cases in disputes specified in clauses 9 and 10 of part one of this article.

Administrative courts do not consider claims that are derived from claims in a private law dispute and are filed with them if this dispute is subject to review in a procedure other than an administrative proceeding and is under consideration by the relevant court.

8. *Access to courts*

Changes to the Constitution of Ukraine, the new law on the judiciary and the status of judges, and new editions of procedural codes are aimed primarily at the optimization of legal proceedings, in particular by amending certain legal provisions regarding access to justice. Such conditions may indirectly include restrictions on access to courts of cassation, professional representation of the

parties' interests in court, provision of free legal aid, pre-trial settlement, mediation settlements, and regulation of court costs.

a) About advocacy and free legal aid

Constitutional amendments incorporate an advocacy monopoly on representation in court with certain exceptions. The law may determine exceptions to representation in court in labour disputes, disputes concerning the protection of social rights, disputes regarding elections and referendums, minor disputes, the representation of an underage person, and the representation of persons found incapable or partially incapable by a court. Under the transitional provisions of constitutional amendments, representation exclusively by prosecutors or lawyers in the Supreme Court and courts of cassation was implemented from 1 January 2017; in the courts of appeal it was implemented from 1 January 2018, and in the courts of first instance it will be implemented from 1 January 2019. Representation of state and local governments in court only by prosecutors or lawyers will start on 1 January 2020. Representation in court proceedings initiated before the entry into force of the Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)" will be carried out according to the rules that were in effect before the entry into force of this Amendment Act until the adoption of final judgments, which are not subject to appeal in the relevant cases.

The provisions on the advocacy monopoly are implemented in the procedural codes. The new edition of the Civil Procedure Code of Ukraine (Article 60) provides that in disputes arising out of labour relations and cases of minor disputes (minor cases), the representative must be a person who has attained the age of eighteen and has legal capacity allowing them to appear in civil proceedings. For the purposes of this Code, minor cases are defined as: 1) cases in which the cost of a claim does not exceed one hundred times the minimum monthly cost of living of an able-bodied person; 2) simple cases considered by the court to be insignificant, except for cases to be considered only under the general rules of proceedings, and cases where the cost of the action exceeds five hundred times the minimum cost of living of an able-bodied person (Article 19).

According to the new edition of the Economic Procedure Code of Ukraine, the party, the third party and the person who legally have the right to apply to court for the benefit of another person may participate in the trial in person (self-representation) and/or through a representative. A legal entity involved in the case through its head or a member of the executive body is authorized to act on its behalf in accordance with the law, statute or regulation (self-representation by a legal entity) or through a representative (Article 56). A representative in court may be a lawyer or legal representative. In cases of minor disputes (minor cases), a person who has attained the age of eighteen and has

legal capacity allowing them to appear in civil proceedings may serve as a representative (Article 58). For the purposes of this Code, minor cases are defined as: 1) cases in which the cost of a claim does not exceed one hundred times the minimum cost of living of an able-bodied person; 2) simple cases considered by the court to be insignificant, except cases to be considered only under the general rules of proceedings and cases where the cost of the action exceeds five hundred times the minimum cost of living of an able-bodied person (Article 12).

According to the draft of the Code of Administrative Procedure (Article 57), in cases of minor complexity (Article 12) and in other cases specified by this Code, the representative may be an individual who, in accordance with part two of Article 43 of this Code, has legal capacity to appear in administrative proceedings.

As was noted earlier, at this stage of reforms the introduction of the advocacy monopoly on representation in courts has the greatest impact on the issues of civil and economic procedure, especially the right to legal aid. At the same time, there is a law on free legal aid, which regulates its provision⁶⁴ in Ukraine. This law regulates the relation of the right to free primary legal aid established by this law to entities in the field of legal aid and the relation of entities to the right to secondary legal aid. This right is established by this law.

Primary free legal aid is guaranteed by the state and serves to inform people about their rights and freedoms, the procedure for their implementation, restoration in cases of violation and the procedure for appealing the decisions, actions or omissions of public authorities, local government officials and officers. Primary legal aid includes the following types of legal services: 1) providing legal information; 2) providing advice and clarification of legal issues; 3) drafting applications, complaints and other legal documents (except documents of a procedural nature); 4) assistance for access to secondary legal aid and mediation.

Every person under the jurisdiction of Ukraine has the right to primary free legal aid in accordance with the Constitution of Ukraine and this law.

Primary free legal aid in Ukraine is provided by: 1) executive bodies; 2) local governments; 3) natural and legal persons under private law; 4) specialized agencies.

In the case of a written request by a person to provide any type of primary free legal aid on matters within their authority, executive bodies and legal authorities must provide such services within 30 calendar days after the date of receipt of the appeal. If the appeal contains only individual requests for relevant legal information, such legal assistance is provided within fifteen days of the date of receipt of the request.

⁶⁴ Zakon Ukraïny "Pro bezoplatnu pravovu dopomohu" [The Law of Ukraine "On Free Legal Aid"] of 2 June 2011, No 3460-VI, <<http://zakon4.rada.gov.ua/laws/show/3460-17>>.

Local governments can form specialized agencies to provide primary free legal aid. Specialized agencies that provide primary free legal aid and have been created by local governments are non-profit organizations with the status of a legal entity, and have their own forms and a stamp with their name. Specialized institutions providing free primary legal aid that have been formed by bodies of local self-government are financed through local budgets and other sources not prohibited by law.

Local authorities may enter into a contract with entities of private law, who have the right to provide legal assistance agreements for the provision of primary legal aid on a permanent or temporary basis in the administrative-territorial unit.

According to this law, secondary legal aid guaranteed by the state is meant to create equal opportunities for access to justice. Secondary free legal aid includes the following types of legal services: 1) protection; 2) representation of people's interests in courts and to other government agencies, local governments, and other bodies; 3) drafting procedural documents. The law does not directly limit the provision of secondary free legal aid when appealing to the Constitutional Court of Ukraine.

The Law contains a wide range of 15 paragraphs naming persons with a right to secondary free legal aid. For example, the following have a right to secondary free legal aid: 1) persons whose average monthly income does not exceed two times the minimum cost of living, and persons with disabilities who receive a pension or other form of assistance in an amount not exceeding two times the minimum cost of living for disabled persons; 2) orphans, children deprived of parental care, children in difficult circumstances, and children affected by military operations and armed conflicts; 3) entities to which administrative detention is applied; 4) persons who are under criminal prosecution; 5) persons for whom the court is considering restrictions of their legal capacity, the recognition that they are incapable or the restoration of their legal capacity, for the provision of (temporary) compulsory psychiatric care and some others.

The following provide secondary free legal aid in Ukraine: 1) free secondary legal aid centres; 2) lawyers included in the register of advocates who provide free secondary legal assistance.

Appeals to grant one of the types of free legal services provided by the law are to be submitted by persons of full age to the free secondary legal aid centre or to the territorial justice authority at the place of residence of such persons, regardless of the registration of the residence or place of temporary residence.

Appeals to grant one of the types of free legal services relating to children that are provided by the law are to be submitted by the child's legal representatives at the place of residence of the child or their legal representatives, regardless of the registration of the residence or place of temporary residence.

Appeals to grant one of the types of free legal services provided by the law concerning person recognized by the court as incapable or limited in their

capacity are to be submitted by their guardians or trustees at the place of residence of such persons or their guardians or trustees, regardless of the registration of the residence or temporary residence.

Secondary free legal aid centres must decide on the provision of secondary legal aid within ten days of receipt of the appeal. Following the decision to provide secondary free legal aid, a free secondary legal aid centre appoints a lawyer providing free secondary legal aid on a permanent contract.

Centres for the provision of free secondary legal aid are funded from the state budget of Ukraine and other sources not prohibited by law.

The Law of Ukraine “On Free Legal Aid” contains other conditions which determine the organization of legal aid and the rights and obligations of participants in these relationships, including the right to remuneration for lawyers and others.

In general, the implementation of this law could create the proper conditions of protecting the rights of poor people, children, and others who need additional legal protection after the introduction of the advocacy monopoly.

The Council for Judicial Reform does not propose any changes to the law.

b) Litigation costs

Another task of reforming the justice system is to ensure the full reimbursement of costs to parties in whose favour cases have been resolved. Today in Ukraine, the most urgent issue is the size of the court fee, which is part of the total amount of court costs. As we know, the European Court of Human Rights does not always recognize the court fee as a factor in the accessibility of the courts. Thus, the Guide on Article 6 of the European Convention on Human Rights noted that “the right of access to a court may also be subject, in certain circumstances, to legitimate restrictions, such as [...] security for costs orders (Tolstoy Miloslavsky v. the United Kingdom, §§ 62–67)”.⁶⁵ But now the question of the size of the court fee may become a barrier to access to justice in Ukraine.

Exemptions to paying court fees have been reduced significantly. For example, before 1 September 2015 plaintiffs filing claims for recovery of wages, reinstatement and other claims arising from the employment relationship were exempted from payment of court fees. Since 1 September 2015, only plaintiffs filing claims for recovery of wages and reinstatement have been exempted from payment of court fees. No exemption from paying court fees is provided in other categories of labour disputes.

Besides this, according to various estimates between 2 and 20% of judgments are carried out in Ukraine⁶⁶, and non-enforcement is the predominant

⁶⁵ Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb), p. 22, <http://www.echr.coe.int/documents/guide_art_6_eng.pdf>.

grounds for recognition by ECtHR of violations of the right to a fair trial in Ukraine.⁶⁷ Thus, the high cost of going to court and the low probability of execution of the judgment may cause people to reject the use of court protection of their subjective private rights.

The new edition of the Civil Procedure Code and the new edition of the Economic Procedure Code provide detailed regulation of compensation costs for legal counsel.

The previous editions of the Codes stipulated that limitation of compensation costs for legal counsel was established by law. The new editions provide that the amount of the costs for legal services must be appropriate for the difficulty of the case and the works (services) provided by the lawyer, the time spent on the relevant works (services), the volume of the lawyer's services and work, the cost of action and/or the value of the case for the party, including the influence of the resolution of the case on the reputation of the parties or the public interest in the case.

The new editions of the Procedure Codes provide more detailed regulation of the distribution of costs, but the basic principle remains the distribution of costs in proportion to the satisfaction of the claim. However, this distribution of court costs may change under the influence of some factors: a) abuse of the procedural right that delayed consideration of the dispute; b) the actions of the party on the pre-trial settlement of the dispute or the non-contentious settlement of the dispute in court. These rules of distribution of judicial expenses are new laws of the procedural legislation.

The preliminary calculation of costs must be submitted with the claim. If the costs claimed for reimbursement substantially exceed the amount stated in the preliminary calculation, the court may deny the party in whose favour the decision was made part of the excess, unless the party proves that it could not predict such costs at the time of the preliminary calculation. If the amount of costs claimed for reimbursement and confirmed by appropriate evidence is substantially lower than the amount stated in the preliminary calculation, the court may deny the party in whose favour the decision was made the costs (excluding court fees) in whole or in part unless that party provides a reason for the reduction in this amount.

⁶⁶ *Koltok*, Reforma vykonavčoho provadžennja, Perezavantažennja: Jaki zminy čekajut' boržnykiv i stjahuvačiv pislja uchvalennja novacij [Reform of enforcement proceedings, Recast: What changes are waiting for debtors and creditors after the adoption of innovations], <http://zib.com.ua/ua/print/125029-reforma_vikonavchogo_provadzhenja_yaki_zmini_čekajut_borzh.htm>.

⁶⁷ *Rožok*, Dejaki pytannja ščodo posyzi¹ Jevropejs'koho sudu z prav ljudyny z pytan' nevykonannja rišen' nacionalnych sudiv [Some questions about the position of the European Court of Human Rights for non-enforcement of court decisions], <<http://old.minjust.gov.ua/15102>>.

The court determines each side's costs in connection with the case on the basis of evidence submitted by the parties (contracts, invoices, etc.). Such evidence is submitted before the end of oral arguments in the case or within five days after the decision of the court if the participant made a statement before the end of oral arguments in the case. In the event of failure to provide evidence within the time limit, such an application will not be considered.

c) Access to Court of Cassation

The changes provide for the introduction of procedural conditions to limit the categories of judgments which can be reviewed in cassation. Thus, according to Article 389 of the new edition of the Civil Procedure Code of Ukraine, Article 287 of the new edition of the Economic Procedure Code, and Article 328 of the new edition of the Code of Administrative Procedure, the following cannot be subject to cassation:

- 1) decisions and rulings of the court of first instance and rulings and decisions of the court of appellate instance in cases for which the decisions are subject to appeal to the Supreme Court;
- 2) judgments in minor cases, except in cases where:
 - a) the cassation complaint concerns a right that is fundamental to the formation of a single law enforcement practice;
 - b) the person submitting the cassation complaint in accordance with this Code is deprived of the opportunity to refute the circumstances established by the contested court decision in the course of consideration of another case;
 - c) the case represents a significant public interest or is of exceptional importance to the party who filed the appeal;
 - d) the court of first instance has classified the case as a minor one by mistake.

For the purposes of the Civil Procedure Code of Ukraine (Article 19 of the Draft) and Economic Procedure Code of Ukraine (Article 12 of the Draft), minor cases are:

- 1) cases in which the value of a claim does not exceed one hundred times the subsistence minimum for able-bodied persons;
- 2) cases of insignificance which are recognized by the court as insignificant, except cases which are subject to consideration only under the rules of general proceedings, and those cases where the value of the claim exceeds five hundred times the cost of living for able-bodied persons.

For the purposes of the Code of Administrative Procedure, cases of minor complexity are defined as cases concerning (Article 12):

- 1) the entry of citizens into public service, passage of public service exams, and dismissal from the public service, except cases where the plaintiffs are officials who, within the meaning of the Law of Ukraine “On Prevention of Corruption”, hold a particularly responsible position;
- 2) appeals against the inaction of persons holding authority or managers of information regarding the consideration of an appeal or request for information;
- 3) appeals by individuals of decisions, actions or inactivity of persons in positions of authority regarding the calculation, determination, recalculation, implementation, provision, or receipt of pension payments and social benefits for disabled citizens; payments for compulsory state social insurance; payments and benefits to children of war; and other social benefits, surcharges, social services, benefits, and protections;
- 4) termination of the appeal of a person holding authority in a legal entity or the entrepreneurial activity of a natural person as an entrepreneur in cases determined by law, or cancellation of state registration of termination of legal entities or entrepreneurial activity of sole proprietors;
- 5) appeals by individuals of the decisions, actions or inactivity of persons holding authority regarding entry into or departure from the temporarily occupied territory;
- 6) appeals of the decisions of persons holding authority, on the basis of which demands can be made to collect cash in an amount not exceeding one hundred times a living wage for an able-bodied person;
- 7) collection of money based on decisions of persons holding authority, for which the period of appeal set by this Code has been completed;
- 8) typical cases;
- 9) appeals of normative legal acts that reproduce the content of a legal act declared by a court to be unlawful and ineffective in whole or in part, or are adopted in pursuance of such a legal act;
- 10) other cases which the court will conclude to be unnecessarily complex, except cases that cannot be considered under the rules of simplified proceedings;
- 11) stays of foreigners or stateless persons in Ukraine.

The lists of decrees of general and economic courts which can be reviewed in cassation also are limited.

9. Improving civil and economic procedural law

The next step is amending procedural law.

The primary purpose of the new procedure codes was to bring legislation into line with the new judicial system. But the authors of the bill went further. They tried to harmonize the rules of civil and economic justice while preserving the specificity of each of them by unifying terminology and the way certain

proceedings are conducted, but with consideration of the features of cases of each jurisdiction, to ensure more efficient justice by creating a series of simplified proceedings and to establish the conditions for extrajudicial dispute resolution by increasing the cost of litigation and the effective reimbursement of costs, as well as to lay the foundation for the gradual introduction of electronic justice.

The philosophy guiding the reform is also based on the ambition of optimizing proceedings by introducing the encouragement of pre-judicial and extrajudicial resolution of disputes, introducing new forms of proceedings, reducing the number of cases which have to be heard by the panel of judges, and setting procedural conditions for actions and appeals, etc.

a) Mediation and dispute settlement

Changes to legislation regarding the amount of the court fee, costs and the conditions for expenses are designed to promote pre-court and extrajudicial settlement of disputes. One of the effective extrajudicial ways to resolve a legal dispute is mediation. Mediation can provide cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.⁶⁸

On 3 November 2016, the Verkhovna Rada of Ukraine adopted the Draft Law of Ukraine “On Mediation”⁶⁹ on first hearing. The draft law is intended to define the legal basis for provision of professional mediation services and is aimed at the introduction of mediation into society, the widespread practice of non-contentious settlement of disputes, and the use of non-judicial methods of ensuring a balanced relationship between mediation and the judicial institutional system. Among other things, the draft establishes the mediator’s immunity from giving evidence in court or arbitration proceedings. This is consistent with Article 23 of Directive 2008/52/EC, which provides that confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil or commercial judicial proceedings or arbitration.

It is noteworthy that this draft provides the right of a judge to inform the parties about the possibility of mediation procedures at all stages of the proceedings. The judge does not have the right to recommend or refer a specific

⁶⁸ Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ 2008 L 136/3.

⁶⁹ Proekt Zakonu Ukraïny “Pro mediaciju” [The Draft Law of Ukraine “On Mediation”] of 17 December 2015, No 3665, <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57463>.

mediator to the parties to resolve their dispute. The court or arbitration court has the right to suspend the proceedings at the joint request of the parties for the time they need to conduct the mediation procedure.

It is very important to ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. However, the new edition of the Civil Procedure Code and the new edition of the Economic Procedure Code do not provide such provisions.

Instead, Articles 201–205 of the Civil Procedure Code introduced an institution of dispute settlement involving a judge. Suspension of proceedings at the time of such a settlement is provided. The settlement of a dispute involving judges is conducted by the participants before the hearing on the case has started. Resolving the dispute with the judge is not allowed if a third person has come into the case claiming independent demands regarding the subject of the dispute. Resolving the dispute with the judge takes the form of joint and/or closed meetings. Parties are entitled to participate in such meetings by videoconference in the manner prescribed by the Code. Public meetings are held with all the parties, their representatives and judges. Closed meetings are initiated by judges from each side separately. At the beginning of the first joint meeting of the dispute settlement, the judge explains to the parties the purpose, the procedure for dispute settlement involving judges, and the rights and obligations of the parties. During the joint meetings, the judge finds the reason for the claim, the subject of the claim, and the grounds of objections. The judge also explains to the parties the subject of proof in the category of the dispute, offers for the parties to make proposals for a peaceful solution to the dispute, and performs other actions aimed at a peaceful resolution between the parties to the dispute. The judge may invite the parties to a possible peaceful solution to the dispute. During the closed meeting, the judge has the right to look to jurisprudence in similar disputes, and to offer a side and/or its representative possible ways of peacefully settling the dispute. During the dispute settlement, the judge has no right to give the parties legal advice and recommendations to provide an assessment of evidence in the case. Information obtained by any of the parties and the judge at the time of settlement of the matter is confidential. During the settlement of a dispute with the judge, there is no meeting protocol and no recording equipment. During the settlement of a dispute with the judge, the use of portable audio devices is prohibited, as is the recording of photographs, film, video, or audio. If participants in the peaceful regulation of disputes involving the judge reach an agreement, they enter into a settlement agreement approved by the judge.

When allocating costs, the court takes into account the actions of the party in relation to the pre-trial settlement and the settlement of the dispute by non-contentious means during the consideration of the case, and the stage to which the case had been advanced.

The new edition of the Economic Procedure Code contains similar provisions on the peaceful settlement of the dispute, but says that the settlement of a dispute with the judge is carried out by the judge rapporteur alone.

New editions of procedural codes determine that the law may provide for cases of mandatory pre-trial settlement of disputes, but do not directly indicate such cases. However, these codes provide the procedural consequences of non-compliance with the procedure for compulsory pre-trial settlement of a dispute – the statement of claim is returned if it has not been accompanied by evidence of the implementation of measures for the pre-trial settlement of disputes.

Thus, there are good prospects for legislative consolidation of alternative dispute resolution in Ukraine. However, some social features can hinder the active use of alternative forms of resolution of civil and economic disputes. First, participants lack trust not only in the court but also in each other. Some participants also believe that they can get any decisions in their favour in court, even illegal ones. Ukraine is still in the early stages of the formation of the system of non-contentious settlement of civil and commercial disputes.

b) Simplified proceedings

The new edition of the Civil Procedure Code provides an expanded list of demands for mandatory proceedings⁷⁰ and the option of considering such demands through simplified proceedings.

Cases for claims for the recovery of funds in amounts up to one hundred times the minimum cost of living will be considered in simplified proceedings too. Any other case will be considered in simplified proceedings by the agreement of the parties except cases in disputes (Article 274): 1) arising out of family relations, in addition to disputes about alimony and division of

⁷⁰ The court order may be issued if: 1) the claim is for the recovery of an accrued but unpaid amount of employee wages and average earnings during the delay of pay-outs; 2) the claim is for compensation for the costs of the investigation for the defendant, debtor, child or vehicles of the debtor; 3) the claim is for the recovery of debts for housing and utilities, telecommunication services, or television and radio broadcasting services, taking into account the inflation index and a three per cent annual accrued amount owed to the claimant; 4) the claim is for the conferment of child support in the amount of thirty per cent of the minimum cost of living for a child of age if this requirement is not related to establishing or contesting paternity (maternity) or the need to involve other stakeholders; 5) the claim is for a refund for defective goods if there is a court decision which came into force on the affirmative sale of defective goods, which was adopted in favour of an undefined group of consumers; 6) the claim is to a legal entity or individual entrepreneur concerning debt collection under a contract (other than the provision of utility services, telecommunications services, television and radio) concluded in written (including electronic) form if the amount of claims does not exceed one hundred times the minimum cost of living for able-bodied persons.

marital property; 2) of inheritance; 3) on the privatization of public housing; 4) for non-conviction-based asset forfeiture; 5) in which the cost of a claim exceeds ten thousand times the minimum cost of living; 6) concerning other demands that combine the demands listed above. The simplified proceeding was introduced in the Civil Procedure Code for the first time.

After considering the claim for a court order, the court issues an order or decides to refuse to issue an order. The court order cannot be appealed through an appeal order, but may be cancelled at the request of the respondent. The respondent may, within fifteen days of delivery of a copy of the court order, apply for cancellation to the court that issued it. The application for cancellation of a court order may also be submitted by bodies and persons that have the legal right to apply to the court for the benefit of others. If there is no reason to return an application for cancellation of a court order, the judge decides on cancellation of the court order no later than two days after its submission, and informs the claimant (plaintiff) of his right to go to court with the same requirements for summary proceedings.

The mandatory and simplified proceedings will be included in the Economic Procedure Code. The mandatory proceedings are intended to consider cases on the recovery of small sums for which there is no dispute or for which no dispute is known to the claimant. The mandatory proceeding will be used to consider claims about recovery of debts under written (including in electronic form) contracts if the amount of the claim is up to one hundred times the minimum monthly cost of living⁷¹ and there are signs that this debt is undisputed. Recognition of the respondent is not necessarily an indication that the claim is undisputable. A person shall be entitled to apply to the court with such claims in a mandatory or simplified proceeding by their choice. Cases for the recovery of money in which the cost of the action is up to one thousand times the minimum cost of living may also be considered in a simplified proceeding upon the request of the claimant. Any other case will be considered in simplified proceedings by agreement of parties except in cases of disputes: 1) arising from corporate relations and regarding transactions with corporate rights and shares; 2) regarding intellectual property protection; 3) concerning the privatization of state and municipal property; 4) between legal persons and their officers (including officers whose powers are suspended) for damages caused to a legal person by the actions (or inaction) of such officials; 5) in which the cost of the action is up to one hundred thousand times the minimum monthly cost of living; 6) with other demands combining the demands listed above. The court may also refuse to consider the case in a simplified proceeding if:

⁷¹ The minimum monthly cost of living for able-bodied persons has been UAH 1,600 (about 55 euros) since 1 January 2017 according to Article 7 of the Law of Ukraine “On the State Budget”, <<http://zakon3.rada.gov.ua/laws/show/1801-19/print1479235203759857>>.

1) the court has approved a petition to join the case by a third party which claims independent demands on the subject of the dispute; 2) the court has taken into consideration a counterclaim or filed claims related to other requirements, including for other persons; 3) a forensic exam is apposite; 4) the court has concluded it is unreasonable to consider the case in a simplified proceeding due to the circumstances of the case. The court has to refuse to consider the case in a simplified proceeding or decide to consider the case in general proceedings if, after increasing the size of the claim (except increasing demands concerning rates, penalties, or other similar payments depending on the amount of time before making a decision on the case), or after changing the subject of the dispute, the cost of the action exceeds one hundred thousand times the minimum cost of living.

The concept of saving procedural resources in insignificant cases is also seen in the reduction of the specific composition of the court which considers such cases. Appeals against decisions by the general and economic courts in the cases are considered in simplified proceedings, and appeals of the decrees of courts of first instance are considered in the court of appeal by a single judge.

Appeals proceedings in civil and economic proceedings will be conducted as simplified proceedings with calling of parties. Appeals of judgments in matters of civil justice in which the cost of the action is less than one hundred times the minimum monthly cost of living will be considered by the court in a hearing without notifying the participants in the case.

c) Witnesses in economic procedure

Another constitutive change in economic proceedings is the expansion of the range of evidence with the introduction of witnesses. The previous edition of the Economic Procedure Code of Ukraine did not provide for the examination of witnesses except on the orders of a foreign court. The Economic Procedure Code of Ukraine now provides that the Economic Court may only use witness testimony as a basis to establish the circumstances that are not supported or refuted by other evidence gathered in the case. The law may also determine the circumstances that cannot be established on the basis of witness testimony. Witness testimony will have to be submitted to the court in a statement. In this case, the signature of a witness must be certified by a notary. The court calls a witness to be examined at the court's initiative or at the request of a party to the case if circumstances set forth in the witness statement conflict with other evidence or the court has doubts about their authenticity. The introduction to the economic procedure of testimony as a source of evidence in such a form and with such restrictions is fully within the scope of relationships that are included in economic jurisdiction, and should not significantly affect the length of economic proceedings.

Participants in economic and civil proceedings will have the right to submit expert testimony as evidence. This testimony should indicate that the expert has been forewarned about their responsibility for knowingly false testimony. Amendments to the Civil Procedure Code established that the testimony should indicate that it has been prepared for submission to the court. Now the parties may submit extrajudicial expertise as written evidence.

The biggest positive change in the approved proposed amendments is the introduction of the court's duty to assess all the evidence available from the case and for its decision to reflect all of this evidence. The court had no such duty before the reform.

d) Concept of abuse of procedural rights

One of the main reasons for the violation of the right to a hearing by an independent and impartial tribunal within a reasonable time, as established by law in Ukraine, is that parties use their procedural rights to delay consideration of the case or to manipulate the system of automatic distribution of cases. For example, a person may, in a knowingly unreasonable way, appeal all decisions made by a court to an appellate court, including those which satisfy that person's petition. The plaintiff can file a number of identical lawsuits without payment of a court fee to manipulate the automatic distribution of cases. Each of the judges selected by the system of automatic distribution of cases leaves the lawsuit motionless and gives the plaintiff time to pay the court fee. The plaintiff can then send the documents of payment of the court fee to the judge whom he prefers.

The drafters of the new editions of the procedural codes therefore proposed rules to prevent the abuse of procedural rights. Such rules should facilitate, among other things, the prevention of artificial protraction of the case. In general, an attempt to prevent the abuse of procedural rights is another area of improvement of procedural law. In accordance with the new editions of procedural codes, the court can recognize as the abuse of procedural rights actions which contradict the task of civil proceedings, including: 1) a complaint about a court decision that is not subject to appeal, is not applicable or the effect of which has ended (been exhausted), an application for a petition for rehearing a case unless new circumstances have arisen, a declaration challenging a judge in a knowingly groundless way, or any other similar actions aimed at the groundless delay or prevention of proceedings or enforcement; 2) the submission of multiple claims against the same defendant (respondent) with one subject and the same grounds, or submission of multiple claims on the same subject and for similar reasons, or any other actions aimed at the manipulation of the automated system of case distribution; 3) the submission of a knowingly groundless claim or a claim with no substance of the dispute or about a dispute that is obviously artificial; 4) the unreasonable or artificial

joining of claims aimed at changing the jurisdiction of the case, or the obviously unfounded inclusion of a person as a defendant (the co-defendant) for the same purpose; 5) the conclusion of a settlement agreement aimed at harming the rights of third parties, the deliberate failure to report about individuals who should be involved in the case, etc. (Article 44). The court is to take measures to prevent abuse of procedural rights.

Such forms of procedural sabotage have been tried and tested in practice, and were used very often by the parties to delay court proceedings for unjust acquisition of civil rights to ensure that the automatic distribution of cases was bypassed. It seems that some of these forms of abuse of the law can be overcome by other methods. For example, interlocutory appeals brought for the purpose of delaying proceedings do not justify a stay of proceedings. Increased court fees and full and fair reimbursement of costs can also prevent such appeals and the submission of knowingly groundless claims, claims with no substance of the dispute, claims about a dispute that is obviously artificial, unreasonable or artificial joining of claims aimed at changing the jurisdiction of the case, or the obviously unfounded inclusion of a person as a defendant (the co-defendant) for the same purpose. Concerning the failure to report about individuals who should be involved in the case, it seems that this could not be an abuse of procedural rights because there is no such right, only an obligation. In any case, it should be noted that all these actions may only be considered an abuse of law at the discretion of the court, while the Code does not contain rules that would prevent abuse of discretionary powers by the judges. Therefore the enactment of regulations on countering the abuse of procedural rights may result in more negative consequences than the actual abuses. But the development of tools to combat such negative phenomena without introducing rules on the abuse of procedural rights is not the subject of this study.

The amended procedure codes for the first time provide that abuses of procedural rights, along with actions or omissions to obstruct justice, are grounds for imposing on that person a penalty of between 0.3 and 3 times the minimum cost of living in civil procedure and between 1 and 10 times the minimum cost of living in economic procedure. Repeated or systematic abuse of procedural rights may be punished by a fine of between 1 and 10 times the minimum cost of living in civil procedure (Article 148) and between 5 and 50 times the minimum cost of living in economic procedure (Article 135).

e) Novelties in enforcement of judgments

In 2016, new approaches to regulating the enforcement of judgments were introduced. The current Laws of Ukraine “On Enforcement Proceedings”⁷²

⁷² Zakon Ukraïny “Pro vykonavče pro vadžennja” [The Law of Ukraine “On Enforcement Proceedings”] of 2 June 2016, No 1404-VII, <<http://zakon4.rada.gov.ua/laws/show/1404-19>>.

and “On the Bodies and Persons Engaged in the Enforcement of Judicial Decisions”⁷³ were adopted on 2 June 2016. The main novelty is the introduction of private enforcement. Natural or legal persons have the right to free choice among the private executors who are included in the Unified Register of Private Executors of Ukraine, given the place of execution according to the Law of Ukraine “On Enforcement Proceedings”. The private executor receives remuneration for execution. This consists of primary and additional remuneration. The primary remuneration depends on the kind of enforcement: 1) a fixed amount in cases of non-property enforcement; and 2) a per cent of the amount to be recovered, or the value of assets to be transferred. The Cabinet of Ministers of Ukraine sets the basic remuneration rate of the private executor. The main remuneration of the private executor is a percentage of the amount recovered from the debtor together with the amount to be recovered by the executive document. The basic remuneration is established in a fixed amount recovered after full implementation of the decision. The Law “On Enforcement Proceedings” introduced the advance payment of costs of execution. The advance payment is 2 per cent of the amount to be recovered but not more than 10 times the minimum cost of living, and in cases of non-property one time the minimum cost of living if the respondent is a natural person and two times the minimum cost of living if the respondent is a legal person.

Applicants are exempted from paying advance payments in labour disputes and proceedings relating to pension payments or social benefits; compensation for damage caused by injury or other damage to health, as well as the death of an individual; alimony; or compensation for the loss of property and/or non-pecuniary damage caused by a criminal offense.

Moreover, state institutions, invalids, legal representatives of disabled children and incapacitated persons with certain disabilities, and certain citizens who have suffered as a result of the Chernobyl disaster are released from the payment of the advance payment.

There is no requirement for an advance payment in the case of an execution of a decision of the European Court of Human Rights.

The introduction of an advance payment for execution at the current levels of enforcement of judgments can be another barrier to judicial protection of subjective private rights. However, it should be noted that Ukraine has made some steps towards improving the efficiency of enforcement of judgments. The first of these is the development of a system in which the courts can automatically arrest funds in the accounts of respondents. This change was envisaged in the draft of amendments to the Civil Procedure Code and the

⁷³ Zakon Ukraïny “Pro orhany ta osib, jaki zdijsnjut’ prymusove vykonannja sudovyh rišen” [The Law of Ukraine “On the Bodies and Persons Engaged in the Enforcement of Judicial Decisions”] of 2 June 2016, No 1403-VII, <<http://zakon4.rada.gov.ua/laws/show/1403-19>>.

draft of the Economic Procedure Code, and was developed by the Council for Judicial Reform, but the amended codes do not contain such provisions.

III. Conclusions

Thus, even though the Association Agreement does not contain specific obligations concerning the content of judicial reform as a whole, the legislature aims to secure fundamental approaches to the rule of law, which is reflected in all the draft legislation that has been developed and adopted as part of judicial reform.

The above provisions of the amended procedure codes clearly show the focus on the unification of civil procedural and economic procedural legislation. In Ukraine for some time, there has been a discussion of whether the system of specialized economic courts is necessary.⁷⁴ However, economic courts will continue to exist at this stage of the development of the Ukrainian judicial system. There will be also a special Commercial Procedure Code, which will determine the procedure for procedural activities of such courts. The unification of procedural law not only makes the system of legal proceedings more comprehensible and accessible, but also creates the preconditions for further elimination of such specialization of courts while preserving specialization of judges. This is because it looks rather strange that the general courts in Ukraine consider civil and criminal cases, which by their very nature are completely different. At the same time, civil and commercial affairs, which are often similar in content, are examined by various courts.

Significant changes have been made in order to save judicial resources, which should relieve the judicial system and improve the quality of judgments. The implementation of the court's duty to evaluate all the evidence available in the case and take it into account in the judgment, which is expected in drafts of the procedural legislation, should positively affect the quality of justice. However, the increase in the cost of legal proceedings at a time of economic crisis may have negative effects on access to justice for a large proportion of subjects of private law. The function of the High Court on Intellectual Property and its role in the judicial system and legal proceedings

⁷⁴ *Venhrynyak*, *Hospodars'ki sudy: lamaty – ne buduvaty* [Economic courts: break down – do not build], *Yurydychna Gazeta* online, 16 October 2014, <<http://yur-gazeta.com/publications/actual/gospodarski-sudi-lamati--ne-buduvati.html>>; *Bilec'ka*, *Vlada hotujet'sja likviduvaty hospodars'ki sudy vsupereč jevrops'kij praktyci* [The government is preparing to liquidate economic courts against European practice], *Zakon I bisnes*, December 2014, <http://zib.com.ua/ua/113464-vlada_gotuetsya_likviduvati_gospodarski_sudi_vsuperech_evrop.html>; *Likvidacija hospodars'kyh sudiv ne na časi* [Elimination of commercial courts is not on time], *Legal Weekly*, 22 January 2015, <<http://legalweekly.com.ua/index.php?id=16061&show=news&newsid=123673>>.

are still not fully understood. But one undeniably positive aspect of the Association Agreement is that it has significantly stepped up the pressure on Ukrainian lawmakers and experts to reform the judicial system and legal proceedings.

Given the fact that constitutional changes in the justice system and the new law on the judicial system have entered into effect, but the relevant procedural legislation came into force only in December 2017, it is difficult to speak of its use in practice or the consequences of judicial reform, even the interim consequences. Real changes have not yet occurred directly in the minds of judges and trial participants. Also, the system of private executors is not yet operational. But it may increase the level of enforcement of court decisions. An electronic justice system will be created in Ukraine later. The only indicator that can be linked to the law on restoring trust in the judiciary and the introduction of procedures for the selection of judges is a certain increase in trust in the judiciary. In 2015, trust in the judiciary was at 5%, in 2016 at 10%⁷⁵, and in 2017 at 9.3%⁷⁶. However, all these sociological studies were carried out before the entry into force of the new procedural law and do not reflect its consequences.

Consequently, judicial reform in Ukraine continues.

⁷⁵ *Serdyuk/Ogay*, National public opinion survey on democratic, economic and judicial reforms, including implementation of the law on the purification of government – Summary of the 2016 data and comparison with 2015 survey, Kyiv 2016, p. 5, <http://www.fair.org.ua/content/library_doc/FAIR_LustrSurvey_Summary_2016_ENG.pdf>.

⁷⁶ Zvit za rezul'tatamy sociolohičnoho doslidžennja “Stavlennja hromadjan Ukrainy do sudovoï systemy” [Report according to the results of sociological research “Attitude of Ukrainian Citizens to the Judicial System”], Kyiv 2017, p. 25, <<https://rm.coe.int/doc-1/168078f22b>>.

Beyond Legal Amendment

The Ukrainian Judiciary Needs More Than a Change of Laws

Caroline von Gall

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I. Introduction

In general, the imperative to reform the Ukrainian judiciary is undisputed. State organs are obliged to implement the rule of law not only by the Ukrainian Constitution but also by international treaties such as the European Convention of Human Rights (ECHR). And only recently the Ukrainian government confirmed its commitment to European values with the ratification of the Association Agreement alongside the Deep and Comprehensive Free Trade Area with the European Union.¹ Judicial reform was also a demand of Ukrainian society, articulated through mass protests during the “Orange Revolution” in 2004 and the “Euromaidan” in 2013.

But over the past few years, implementation has failed. The shortcomings are comprehensively documented. In its decision on Judge Volkov, the European Court of Human Rights (ECtHR) noted in 2013:

“[T]he present case discloses serious systemic problems as regards the functioning of the Ukrainian judiciary. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine has not been organized in a proper way, as it does not ensure sufficient separation of the judiciary from other branches of State power. Moreover, it does not provide appropriate guarantees against abuse and misuse of disciplinary measures to the detriment of judicial independence, the latter being one of the most important values underpinning the effective functioning of democracies.”²

¹ Association Agreement with the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3.

Many other ECtHR decisions prove the poor quality of jurisprudence and the inefficiency of the legal system in Ukraine.³ The reasons for this are numerous. Over the last decades, Ukrainian elites have deliberately misused the judiciary as an instrument in their political struggles, even though laws had in many respects been brought in line with European law.⁴ Judges were used in this system as the backbone of the government. Most of the current judges were trained and appointed during Soviet times or soon thereafter. They still rely on legal positivism, based on the supremacy of the written law with little regard for human rights or case law authored by judges. An arbitrary and corrupt selection process and the bad reputation of judges have not attracted people with the desired knowledge and mentality.⁵

Therefore, trust in the Ukrainian judiciary is dramatically low. Before Euromaidan, trust in Ukrainian courts was at one of the lowest levels in the world.⁶ According to the OECD, in terms of confidence in courts, Ukraine is ranked last among its member states.⁷

An independent judiciary is not just an end in itself, but rather a precondition for the long-awaited reform of the Ukrainian state as a whole: in the fight against corruption and kleptocracy as well as for the defence of human rights and independent media, independent courts are a *conditio sine qua non*.

Unfortunately, in terms of legal reform, Euromaidan was not a political watershed. Although the structural shortcomings of the Ukrainian judiciary have long been known and routes to legal reform were documented in numerous opinions by the Venice Commission⁸ and in decisions passed by the

² ECtHR 9 January 2013, Oleksander Volkov *.l.* Ukraine, No. 21722/11.

³ ECtHR 9 January 2013, Oleksander Volkov *.l.* Ukraine, No. 21722/11; ECtHR 3 July 2012, Lutsenko *.l.* Ukraine, No. 6492/11; ECtHR 16 December 2014, Tymoshenko *.l.* Ukraine (no. 2), No. 65656/12.

⁴ Cf. *Popova*, Politicized Justice in Emerging Democracies, A Study of Courts in Russia and Ukraine, Cambridge 2012; *Trochev*, Meddling with Justice: Competitive Politics, Impunity, and Distrusted Courts in Post-Orange Ukraine, in: *Demokratizatsiya: The Journal of Post-Soviet Democratization*, Spring 2010, Vol. 18, No. 2, pp. 122–147; *von Gall*, Die Entwicklung der ukrainischen Justiz unter Präsident Janukovič, in: *Jahrbuch für Ostrecht* 2011, Vol. 52, No. 2, pp. 207–227.

⁵ *Zhernakov*, Judicial reform in Ukraine: Mission Possible?, DeJuRe Foundation, 2017, p. 6, <<http://www.dejure.foundation/en/judicial-reform-in-ukraine-mission-possible/>> (23 July 2018).

⁶ *Rochelle/Loschky*, Confidence in Judicial Systems Varies Worldwide, Gallup News, 22 October 2014, <<http://news.gallup.com/poll/178757/confidence-judicial-systems-varies-worldwide.aspx>> (23 July 2017).

⁷ OECD, Public Governance: A matter of trust, <<http://www.oecd.org/governance/public-governance-a-matter-of-trust.htm>> (23 July 2018).

⁸ Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No. CDL-AD(2016)034-e; Opinion No. CDL-A(2015)027-e; Opinion No. CDL-AD(2015)026-e; and Office for Democratic Institutions and Human Rights,

ECtHR,⁹ these proposals were not implemented during the first years following the Euromaidan protests. Fundamental constitutional reform was, for a very long time, not undertaken. Extensive lustration acts were adopted instead, which for their part massively violated European law. These acts have failed in political terms too. Judges have not gained the protection necessary for their personal independence.¹⁰ Finally, in 2016, constitutional and legislative amendments passed Parliament, but unfortunately their implementation is already showing serious flaws.

The question of how to enforce the rule of law in Ukraine is crucial not only to Ukraine but also to the Council of Europe and the European Union, as the rule of law is a central value of the European Union. This is expressed not only in Article 2 Treaty of the European Union (TEU) but also in Article 21 TEU, obliging the European Union to enforce its values in relation to third countries, which includes the Eastern Partnership as part of the European Neighbourhood Policy of the EU. The European Neighbourhood Policy sets out to create a “ring of friends”¹¹ to ensure stability, prosperity and peace in Europe’s neighbourhood. Experiences with legal reform in Ukraine show that it is highly problematic to enforce values unless they are shared by the leadership of the neighbouring country.¹² It is even well justified to argue that value-based conditionality is non-operational with reluctant neighbours that do not wholeheartedly embrace the European Union’s values.¹³

This article discusses the Ukrainian government’s efforts so far and comes to the conclusion that even though officials have launched a multitude of measures, Ukrainian legal reform has not been successful up to now. The reason for this are numerous obstacles, of which the reluctance of the political elite to submit to the rule of law is the most crucial.

Opinion on the Procedure for Qualification Assessment of Judges of Ukraine, 12 November 2015, Opinion No. JUD-UKR/278/2015 (RJU), <<http://www.legislationline.org/documents/id/19877>> (23 July 2018).

⁹ ECtHR 9 January 2013, Oleksander Volkov *.l.* Ukraine, No. 21722/11; ECtHR 3 July 2012, Lutsenko *.l.* Ukraine, No. 6492/11; ECtHR 16 December 2014, Tymoshenko *.l.* Ukraine (no. 2), No. 65656/12.

¹⁰ *von Gall*, Towards the Rule of Law?, An Analysis of the Lustration in Ukraine in the Light of European Law, in: Baller/Breig (eds.), *Justiz in Osteuropa*, Berlin 2017, pp. 47–69; *id.*, Der Richter als Verbrecher – eine Anmerkung zur Lustrationsgesetzgebung in der Ukraine, in: Lecke/Zabirko (eds.), *Verflechtungsgeschichten – Konflikt und Kontakt in osteuropäischen Kulturen*, Münster 2016, pp. 402–428.

¹¹ Speech by *Barroso*, President of the European Commission, The European Union and the Emerging World Order – Perceptions and Strategies, 30 November 2004, <http://europa.eu/rapid/press-release_SPEECH-04-499_en.htm> (23 July 2018).

¹² See *Kochenov/Basheska*, The ENPs value conditionality, in: Poli (ed.), *The European Neighbourhood Policy – Values and Principles*, Abingdon, Oxon 2016, pp. 145–166.

¹³ *Kochenov/Basheska*, The ENPs value conditionality, previous note, p. 155.

II. Obstacles to reform

Ukrainian judicial reform is blocked by a large number of internal and external hurdles. First, there is overall corruption. According to the data provided by Transparency International, Ukraine ranks 131st out of 176 global countries in its corruption rate.¹⁴ Western donors have persistently criticized the Ukrainian leadership's reluctance to tackle corruption. The power struggle between the National Anti-Corruption Bureau (NABU) established in 2014 and state officials culminated in autumn 2017, when NABU came under pressure from Prosecutor General Lutsenko and the government.¹⁵

A second obstacle is the low level of knowledge on good governance in the administration. But it remains up to the administration to develop the underlying reform agenda and implement the associated reforms.¹⁶ The process for passing, applying and enforcing laws has to be transparent, just and efficient. Instead, there is a striking lack of professionalism in the law-making process. Laws are changing all the time, are enacted under pressure, and are badly drafted and poorly implemented.¹⁷ The Parliament lacks a culture of debate and compromise. The approach to the reform of Ukraine's administration to date must be described as rather unsystematic. The implementation of decisions of the European Court of Human Rights finding a violation of the European Convention of Human Rights by the Ukrainian state is unsatisfactory. In the recent *Burmych and others v. Ukraine*¹⁸ judgment of 12 October 2017, the ECtHR once more noted systematic problems as regards the enforcement of binding decisions by Ukrainian courts. The reluctance of the Ukrainian government to implement the decisions led the ECtHR to a rigorous but also arguable decision: Over 12,000 similar pending applications were struck from the Court's case list and absorbed into the execution process of the Committee of Ministers of the Council of Europe. This unique step shows the Court's despair in the face of Ukraine ignoring the Court's judgments.

¹⁴ Transparency International, Fact Sheet Ukraine, <<https://www.transparency.org/country/UKR>> (23 July 2018).

¹⁵ *Kellermann*, Der Kampf gegen die Korruption stagniert, Deutschlandfunk, 24 November 2017, <http://www.deutschlandfunk.de/ukraine-der-kampf-gegen-die-korruption-stagniert.795.de.html?dram:article_id=401462> (23 July 2018).

¹⁶ See *Stewart*, The Rule of Law in Contemporary Ukraine, Stiftung Wissenschaft und Politik, German Institute for International and Security Affairs, 10 February 2016, <https://www.swp-berlin.org/fileadmin/contents/products/comments/2016C10_stw.pdf> (23 July 2018).

¹⁷ See as an example of the laws on lustration *von Gall*, Towards the Rule of Law?, supra n. 10, pp. 47–69; *id.*, Der Richter als Verbrecher, supra n. 10, pp. 402–428.

¹⁸ ECtHR 12 October 2017, *Burmych and others v. Ukraine*, Nos. 46852/13 et al.

Another major obstacle to state reform is Russia exploiting opportunities to hamper the reform process and the successful integration of Ukraine into Western structures by engaging Ukraine in the war in Donbass, thus resulting in a monopolization of a large amount of financial and political resources.¹⁹

What is more, the political situation in Ukraine is far from stable, and different interest groups are still competing for power.²⁰ Even though former President Yanukovich was deprived of power through the Euromaidan protest, political and economic power has remained partly in the hands of interest groups and corrupt networks that are not open to a change in the rules of the game. This leads the ruling elite to take a very ambivalent approach towards judicial reform: politicians have an interest in presenting quick solutions that satisfy society as well as international donors rather than a comprehensive master plan with the aim of limiting their own power. Instead, in the struggle for power, the government monopolizes reform and presents itself as a primary initiator of reform despite being unwilling to relinquish control.²¹ This approach excludes the opposition, NGOs and the judges from the process. A particularly good example of the reluctance of President Poroshenko to obey the law can be seen in his recent political battle with former Georgian President Mikheil Saakashvili, who served as Governor in Ukraine's Odessa oblast after Euromaidan. As a result of their political break-up, President Poroshenko deprived Saakashvili of his Ukrainian citizenship. But a deprivation of the citizenship openly contradicts Article 25 of the Ukrainian Constitution. Saakashvili had been granted Ukrainian citizenship only a short time earlier, when he started his political activities in Ukraine. As human rights defender Evgenij Zarachov rightly pointed out, this incident shows that President Poroshenko still uses the law as dictated by political convenience.²²

At the same time, the whole process of judicial reform is quite formalistic, perceiving the rule of law as something strictly related to a "particular set of legal arrangements"²³ while the social and political conditions for the legal

¹⁹ von Gall, *Die Logik des Krieges: eine Anmerkung zur ukrainischen Verfassungsreform*, *Verfassungsblog*, 19 September 2015, <<http://verfassungsblog.de/die-logik-des-krieges-eine-anmerkung-zur-ukrainischen-verfassungsreform>> (23 July 2018); Stewart, *The Rule of Law in Contemporary Ukraine*, supra n. 16.

²⁰ See Stykow, *Innenpolitische Gründe der Ukraine-Krise – Gleichzeitige Demokratisierung und Staatsbildung als Überforderung*, *Osteuropa* 2014, No. 5–6, pp. 41–60.

²¹ *Kuybida*, *Umsetzung der Justizreform in der Ukraine: Fortschritt oder verpasste Chance?*, *Ukraine-Analysen* Nr. 191, 15 November 2017, <<http://www.laender-analysen.de/ukraine/pdf/UkraineAnalysen191.pdf>>, pp. 2 f. (23 July 2018).

²² Zacharow, *Der Fall Saakaschwili: Politiker töten das Recht*, *Ukraine-Analysen* Nr. 189, *Bundeszentrale für politische Bildung*, 16 October 2017, <<http://www.bpb.de/internationales/europa/ukraine/258178/kommentar-der-fall-saakaschwili>> (23 July 2018).

²³ Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in: Palombella/Walker (eds.), *Re-locating the Rule of Law*, Oxford 2008, pp. 45–69.

institutions remain unexamined.²⁴ From the side of the European Union and the Council of Europe, cooperation in the field of legal reform is still based on the transformation paradigm and the assumption that the Ukrainian government shares basic values such as human rights, democracy and the rule of law, and only needs assistance regarding how to transpose them into law.²⁵ Euromaidan and the subsequent rhetoric of the Ukrainian leadership raised hope that the transition to democracy was now underway. It was regarded as an unprecedented window of opportunity with a committed Ukraine as an easier partner for legal transfer. But as the reform process shows, this impression was false. The Ukrainian political elite is led by a different rationality. Developments so far have shown that the hope for an acceptance of a limitation of power was unfounded. In any event, the transfer of formal institutions encouraging the rule of law will not be successful without supporting circumstances. The notion of the rule of law requires advantageous social and political structures, a corresponding legal culture and a high level of compliance.

This is especially true for the independence of the judiciary. Laws alone cannot ensure the difficult balancing of the independence and accountability of judges, which took decades to evolve in other legal cultures. Corruption, political trials and a low level of quality of case law make the accountability of judges quite important. But disciplinary norms always leave room for interpretation and thus can be misused. Therefore, to guarantee judicial independence, accountability has to be limited to severe violations. Rather, ethical behaviour and self-limitation are preconditions for independence. To guarantee independence, judges have to obey informal rules. This requires a code of conduct that cannot be imposed from outside, but that has to be followed by the judges voluntarily. A new attitude is required, one that involves respect for judicial independence on the part of politicians and society.²⁶ The legalistic European approach towards legal reform does not take this into account.

This leads to what the German political scientist *Claus Offe* has described as a “dilemma of simultaneity” (*Dilemma der Gleichzeitigkeit*),²⁷ namely that there are too many different and urgent reform goals in the area of the economy and governmental administration at one time. What is more, the success of the different reforms is interdependent.

²⁴ See *Blokker*, EU Oversight and Domestic Deviation From Rule Of Law, in: Ciosa / Kochenov (eds.), *Reinforcing Rule of Law – Oversight in the European Union*, Cambridge 2016, p. 254.

²⁵ See *Kochenov/Basheska*, The ENPs value conditionality, supra n. 12, pp. 145–166.

²⁶ Cf. *Popova*, Politicized Justice in Emerging Democracies, supra n. 4; *Trochev*, Meddling with Justice, supra n. 4, pp. 122–147.

²⁷ *Offe*, Das Dilemma der Gleichzeitigkeit – Demokratisierung und Marktwirtschaft in Osteuropa, in: *Merkur* 1991, Vol. 4, No. 505, pp. 279–292.

III. History of reforms

The consequences result in a multitude of legal reforms without a master plan or signs of success.²⁸ The history of Ukrainian legal reform is complex and confusing. It is noteworthy that comprehensive judicial reform had already been undertaken by the Yanukovich regime in 2010 after years of discussion under “Orange” rule. The legal amendments followed the recommendations of the Venice Commission and were welcomed and praised by the representatives of the Council of Europe.²⁹ But implementation failed completely. Even worse, the political elite used the courts as instruments of power, and political justice was not infrequent.³⁰ Judges were placed under political pressure.³¹ From that time on, the Venice Commission argued that the most important changes could only be implemented through constitutional reform. Constitutional amendments were regarded as a precondition because the appointment and dismissal of judges, immunity, the composition of the High Council of the Judiciary and the assignments of the Public Prosecutor’s Office are all regulated by the Constitution. But for a long time, efforts at constitutional reform failed.

Finally, an extensive constitutional amendment that was supported by the Venice Commission was introduced to the Verkhovna Rada shortly before the Maidan protests in 2013.³² However, these legislative proceedings were stopped after the change in government in June 2014. The parliamentary majority voted against the amendments; only the Party of Regions supported it.³³ Apparently the fact that the proposal dated from the era of the deposed President Yanukovich was reason enough to justify refusing support for the planned amendments.

²⁸ *Nußberger/von Gall*, Rechtsstaat ohne Masterplan, Recht und Gerichtswesen in der Ukraine, Osteuropa 2010, No. 2–4, pp. 89–104; *von Gall*, Towards the Rule of Law?, supra n. 10, pp. 47–69; *id.*, Die Entwicklung der ukrainischen Justiz unter Janukovič, supra n. 4, pp. 207–227.

²⁹ *von Gall*, Das neue ukrainische Justizgesetz, Ukraine-Analyse Nr. 87, Länder-Analysen, 22 February 2011, <<http://www.laender-analysen.de/ukraine/pdf/UkraineAnalyse87.pdf>> (18 December 2017); *id.*, Die Entwicklung der ukrainischen Justiz unter Janukovič, supra n. 4, pp. 207–227.

³⁰ See ECtHR 3 November 2012, *Lutsenko ./. Ukraine*, No. 6492/11; see the comment by *von Gall*, Osteuropa Recht 2012, No. 3, pp. 116 f.; ECtHR 16 December 2014, *Tymoshenko ./. Ukraine* (no. 2), No. 65656/12.

³¹ See ECtHR 9 January 2013, *Oleksander Volkov ./. Ukraine*, No. 21722/11.

³² See: Projekt zakonu “Pro vnesennja zmin do Konstytucii Ukraïny ščodo posylennja garantij nesaležnosti suddiv” [Legislative Project “On Amendments to the Constitution of Ukraine to Strengthen the Guarantees of Judicial Independence”], 4 July 2013, No. 2522a, <<http://portal.rada.gov.ua/search/>> (18 December 2017).

³³ Results of the voting, 3 July 2014, <http://w1.c1.rada.gov.ua/pls/radan_gs09/ns_arh_golos?g_id=580407&n_skl=7> (23 July 2018).

New approaches were not successful until 2016: An amendment introduced by President Poroshenko in 2014 failed shortly after the abandoned proceedings described just above.³⁴ Another constitutional amendment introduced on 16 January 2015 only included a reform of Article 126 para. 3 and Article 129,³⁵ relating to the immunity of judges. On 12 February 2015, Act No. 1656 “On Ensuring the Right to a Fair Trial”³⁶ was adopted at high speed.³⁷ It had not been introduced until the end of December 2014 by the Council on Judicial Reform under the President of Ukraine, and it contained a completely new version of the Act “On the Judicial System and the Status of Judges” as well as amendments to the law of Ukraine “On the High Council of the Judiciary”. The opinion of the Venice Commission was not waited for. The Ukrainian presidential administration praised the Act as a major step towards reform,³⁸ but in fact it contained few innovations for the independence of the judiciary as compared with the 2010 judicial reform.

In spring 2015, constitutional reform finally gained momentum. This was actually due to Ukraine’s obligation under the Minsk II Treaty to solve the conflict in Eastern Ukraine. The treaty obliged Ukraine to enact a new Constitution by the end of 2015; decentralization was a key element, and the treaty also endorsed permanent legislation on the special status of the particular districts of Donetsk and Luhansk. Constitutional reform thereby became part of the peace process. With the Ukrainian obligation to implement the Minsk Treaty, constitutional reform became a condition of further support by Western donors. But coupling war and constitutional reform was a crucial mistake.³⁹ Through this dynamic, Ukrainian democratic organs lost control over constitutional reform. It was understood that neither Moscow nor even

³⁴ Proekt zakonu “Pro vnechennja zmin do Konctytucii Ukraïny (ščodo povnovažen’ organiv deržavnoï vlady ta miscevoho camovrjaduvannja)” [Legislative Project “On the Amendment of the Constitution of Ukraine (pertaining to the authority of government bodies and local administration)”], 26 June 2014, No. 4178a, <<http://portal.rada.gov.ua/>> (23 July 2018).

³⁵ See: Proekt zakonu “Pro sudoustrij i status suddiv” [Legislative Project on the Amendment of the Law On the Judicial System and the Status of Judges], <<http://portal.rada.gov.ua/>> (23 July 2018).

³⁶ See: Proekt zakonu “Pro zabezpečennja prava na spravedyvyj sud” [Legislative Project on Ensuring the Right to a Fair Trial], 12 February, No. 1656, <<http://portal.rada.gov.ua/>> (23 July 2018).

³⁷ *Zhernakov*, Judicial Reform in Ukraine: Mission Possible?, supra n. 5.

³⁸ *Filatov*, Draft law on ensuring the right to fair court is a real beginning of the judicial reform in Ukraine, Website of the President of Ukraine, 19 December 2014, <<http://www.president.gov.ua/en/news/ofilatov-zakonoproekt-pro-zabezpechennya-prava-na-spravedliv-34407>> (23 July 2018).

³⁹ *von Gall*, Die Logik des Krieges, supra n. 19; *Sasse*, Constitution Making in Ukraine, Refocusing the Debate, 12 April 2016, Carnegie Europe, <http://carnegieendowment.org/files/Constitution_Making_in_Ukraine_Sasse.pdf> (23 July 2018).

Western partners could dictate constitutional reform as including rights to Donetsk and Luhansk. In this regard, Minsk II turned out to be a test of endurance for President Poroshenko. While Poroshenko initially tried to give the impression that the constitutional process was staying under control to please its internal opponents, the process culminated in serious protests during the first reading in Parliament in August 2015. The overnight approval of the amendment on decentralization that was intended to please Western donors by fulfilling the Treaty of Minsk obligations was accompanied by an Opinion of the Venice Commission certifying that the law was “well-drafted” and included “very positive features”,⁴⁰ however, the amendment had not been subject to a democratic debate and could not claim approval at the political or societal levels. At the same time, the discussion on decentralization outshone and displaced a debate on judicial reform.⁴¹

Lustration. – Instead, the focus of legislative work to reform the judiciary in the initial period after Euromaidan was on lustration, i.e. the purge of government officials that was characteristic of the Communist and Yanukovich regimes. The law “On restoring trust in the Judiciary” was adopted on 8 April 2014, only months after the protest.⁴² It included the automatic dismissal of the top level in the courts and a screening of all judges who had taken decisions that restricted freedom of assembly as of 21 November 2013, i.e. during the protests on the Maidan, or who had violated the ECHR with their decisions. The results were published on the official website of the High Council of the Judiciary.⁴³ Since the first lustration was considered to have failed after only a few months, a second act, the Law “On government cleansing”,⁴⁴ came into force on 16 September 2014. Today, there is agreement that the second lustration failed as well. The laws were badly drafted and heavily in violation of European standards. It was obvious that the laws sought to satisfy demands to punish and dismiss corrupt and arbitrary judges, but they failed to comply with European rule-of-law principles.⁴⁵ Judges had not gained the protection necessary for their personal independence.

⁴⁰ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion No. CDL-AD(2015)028.

⁴¹ *von Gall*, *Die Logik des Krieges*, supra n. 19.

⁴² Zakon Ukraïny “Pro vidnovlennja doviry do sudovoï vlady v Ukraïni” [Law of Ukraine “On the Revitalization of Trust in the Judicial Power in Ukraine”], 8 April 2014, No. 1188-VII, Vidomosti Verchovnoï Rady, No. 23, pos. 870, <<http://zakon1.rada.gov.ua/laws/show/1188-18>> (23 July 2018).

⁴³ High Council of Justice, <http://www.vru.gov.ua/add_text/35> (18 December 2017).

⁴⁴ Zakon Ukraïny “Pro očyščennja vlady” [Law of Ukraine “On the Cleansing of Power”], 16 September 2014, No 1682-VII, Vidomosti Verchovnoï Rady Ukraïny, 2014, No. 44, pos. 2041, <<http://zakon2.rada.gov.ua/laws/show/1682-18>> (23 July 2018).

Legal Reform in 2016. – The long-discussed constitutional reform of the judiciary finally passed the Ukrainian Parliament⁴⁶ in June 2016 and entered into force in September 2016. It was followed by a reform of the laws on the judiciary.⁴⁷ Most of the recommendations made by the Venice Commission in previous years⁴⁸ were followed, and the reform was therefore welcomed by the President of the Venice Commission, Gianni Buquicchio, as a major step towards the rule of law in Ukraine.⁴⁹ Most civil society representatives as well as other international institutions, such as the Office for Democratic Institutions and Human Rights, found the law generally in line with international standards.⁵⁰ Yet while the law includes several positive features, its implementation shows serious flaws.

IV. Court system

The new law simplified the court system. Now the law stipulates a three-tier setup. This reversed the reform of 2010.⁵¹ In 2016, the Supreme Court was again strengthened through the abolition of the High Administrative Court and other higher specialized courts that were created in 2010 to weaken the then strong Supreme Court, which was mainly composed of judges supporting the Orange Revolution.

⁴⁵ See for a comprehensive analysis *von Gall*, *Der Richter als Verbrecher*, supra n. 10, pp. 402–428; *id.*, *Towards the Rule of Law?*, supra n. 10, pp. 47–69.

⁴⁶ Zakon Ukraïny “Pro vnesennja zmin do Konstytucii Ukraïny ščo do pravosuddja” [Law of Ukraine “On Amendments to the Constitution pertaining to the judiciary”], 2 June 2016, No 1401-VIII, Vidomosti Verchovnoi Rady, 2016, No. 28, pos. 532, <<http://zakon3.rada.gov.ua/laws/show/1401-19/paran2#n2>> (23 July 2018).

⁴⁷ Zakon Ukraïny “Pro vnesennja zmin do Konstytucii Ukraïny ščo do pravosuddja” [Law of Ukraine “On Amendments to the Constitution pertaining to the judiciary”], 2 June 2016, No 1401-VIII, Vidomosti Verchovnoi Rady, 2016, No. 28, pos. 532, “Pro sudoustrij i status suddiv” [Law of Ukraine “On the judiciary and the status of Judges”], 2 June 2016, No 1402-VIII, Vidomosti Verchovnoi Rady 2016, No. 31, pos. 545, <<http://zakon3.rada.gov.ua/laws/show/1401-19>> (23 July 2018).

⁴⁸ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion No. 803/2015.

⁴⁹ Council of Europe, Ukraine – Adoption of the constitutional amendments on the judiciary, 2 June 2016.

⁵⁰ Office for Democratic Institutions and Human Rights, Opinion on the Law of Ukraine and the Judiciary and the Status of Judges, 30 June 2017, <http://vkksu.gov.ua/userfiles/doc/perelik-dokumentiv/osce_visnovok.pdf> (23 July 2018).

⁵¹ *von Gall*, *Die Entwicklung der ukrainischen Justiz unter Präsident Janukovič*, supra n. 4, pp. 207–227.

The High Council of Justice. – Positive features include the new composition of the High Council of Justice, as demanded by the ECtHR⁵² and the Venice Commission. Pursuant to Article 131 of the Ukrainian Constitution, the High Council of Justice is now predominately comprised of judges. Members shall “not belong to political parties, [belong to] trade unions, take part in any political activity [or] hold a representative mandate”.

At the same time, the position of the High Council of Justice has been strengthened. The President of Ukraine may appoint judges only after their selection by the High Council of Justice (Article 128 of the Ukrainian Constitution). The role of the President in this procedure is designed to be rather ceremonial. The powers of the Verkhovna Rada to appoint judges have also been removed.

Pursuant to the new Article 126, “a judge shall not be detained or kept under custody or under arrest without the consent of the High Council of Justice until a guilty verdict is rendered by a court, except for detention of a judge caught committing a serious or grave crime or immediately after it.”

But this positive development has a negative side: The Council in its new composition will only be working from 2019 on. Until that date it will work in its old composition. Expert Roman Kuybida criticizes the fact that at least three members of the current Council have close ties to President Poroshenko.⁵³ This raises serious doubts as to whether the government is ready to relinquish control of the selection of judges.

Dismissal of Judges. – The High Council of Justice also decides on the dismissal of judges. According to the new amendments, a “breach of oath” is no longer a ground for the dismissal of a judge. In the past, this provision had often been misused.⁵⁴ On the other hand, it is now regulated that all judges must undergo a qualification evaluation reviewing their competence, integrity and adherence to ethical standards. The transitional provisions of the constitutional amendments provide for dismissal of judges on the basis of non-conformity regarding criteria of “competence, professional ethics and honesty”. Judges who were appointed to a five-year term under the previous law, as well as appellate court judges, had to undergo this assessment in 2017. A failure to produce an asset declaration justifying the legal origin of the judges’ property is a ground for dismissal. This requirement fuelled concerns that the reform may be used as a new legal basis for mass dismissals. According to Serhiy Koziakov, Head of the High Qualification Council of Judges (HQCJ), 1,600 judges resigned voluntarily from June until September 2016,

⁵² ECtHR 9 January 2013, Oleksander Volkov *./.* Ukraine, No. 21722/11.

⁵³ *Kuybida*, Umsetzung der Justizreform in der Ukraine, *supra* n. 21, p. 3.

⁵⁴ See *von Gall*, Die Entwicklung der ukrainischen Justiz unter Präsident Janukovič, *supra* n. 4, pp. 207–227.

when the assessment started.⁵⁵ The circumstances of the resignations have not been evaluated yet.

Open competition at the Supreme Court. – Another instrument to reform the judiciary was the organization of an open competition procedure for judges at the Supreme Court, Ukraine's new key judicial institution. The competition was maintained by the High Qualification Council of Judges with the involvement of the general public as represented by the newly created Public Integrity Council (PIC).⁵⁶ But the implementation failed. While the selection process was praised by the President and officials like HQJC Head Serhiy Koziakov,⁵⁷ the Public Integrity Council criticized the appointment of 24% of the new judges. The Public Integrity Council considered the *result of the new competition for positions on the Supreme Court to be unfair and not correspond to the expectations of society*. One of the selected judges was, inter alia, sitting in the case against Yuriy Lutsenko, a case that has been criticized by the ECtHR and is symbolic of a politicized judiciary.⁵⁸ Other judges could not prove the origin of their assets.⁵⁹ Nevertheless, on 11 November 2017 President Poroshenko appointed all 113 judges of the Supreme Court. Poroshenko praised the transparent competition, completely ignoring the on-going protests of the Public Integrity Council⁶⁰ and other representatives of civil society.⁶¹

Constitutional Court. – For the last twenty years, the Constitutional Court as an institution has been incapable of securing its independence from political

⁵⁵ *Shara*, Ukraine finally to have independent judiciary – Interview with Head of Qualification Commission of Judges, EuromaidanPress, 27 July 2017, <<http://euromaidanpress.com/2017/07/27/ukraine-finally-to-have-independent-judiciary-interview-with-head-of-qualification-commission-of-judges/#arvlbdata>> (23 July 2018).

⁵⁶ See their website: Gromads'ka rada dobročesnost [Public Integrity Council], <<https://grd.gov.ua/>> (23 July 2018).

⁵⁷ *Shara*, Ukraine finally to have independent judiciary, supra n. 55.

⁵⁸ ECtHR 3 July 2012, Lutsenko ./ Ukraine, No. 6492/11.

⁵⁹ Reanimation Package of Reforms (RPR) warns against adopting the Law on the High Council of Justice without considering the demands of the civil society, <<http://rpr.org.ua/en/news/rpr-warns-against-adopting-the-law-on-the-high-council-of-justice-without-considering-the-demands-of-the-civil-society/>> (23 July 2018).

⁶⁰ Official statement by the Public Integrity Council, <<https://grd.gov.ua/news/93/zvernennia-hromadskoi-rady-dobrochesnosti-do-prezydenta-u-zviazku-iz-pryznachenn>> (23 July 2018).

⁶¹ *Makarenko*, Civic watchdog in Ukraine: we were used to legitimize dishonest Supreme Court appointments, EuromaidanPress, 17 November 2017, <<http://euromaidanpress.com/2017/11/15/public-integrity-council-ukraine-we-were-used-to-legitimize-dishonest-supreme-court-appointments/>> (23 July 2018); *Zhernakov*, The Old New Supreme Court, Reanimation Package of Reforms, 31 May 2017, <<http://rpr.org.ua/en/news/myk-hailo-zhernakov-the-old-new-supreme-court/>> (23 July 2018).

interests.⁶² President Poroshenko signed new legislation on the Constitutional Court on 31 July 2017. While the President praised the law as a major step towards reform, experts have doubted this. The main positive change is the introduction of a right for all citizens to file an appeal to the Constitutional Court. The new law stipulates that special bodies that are dependent on the President and Parliament will select Constitutional Judges. The President will approve candidates selected by the commission, whose members he appoints himself. A special parliamentary committee will select candidates appointed by Parliament. The legislation does not stipulate how candidates will be selected. Kuybida argues that the law continues the tradition of political control over the Constitutional Court. In his view, the new law does not bring qualitative changes to the appointment of Constitutional Court judges.⁶³

Anti-Corruption Court. – A new law introducing an Anti-Corruption Court whose judges are of impeccable reputation and are selected on a competitive basis in a transparent manner was enacted in February 2017 to generate more trust in the fight against corruption. Experts had demanded a separate court, which was supported by the Venice Commission.⁶⁴ But again, Poroshenko blocked the reform for a long time, preferring chambers in the existing courts that are to deal with corruption.⁶⁵

V. Education

An important part of the reform is aimed at a renewal of the personnel of the judiciary. A precondition is a sufficient number of new, well-educated judges with integrity. Otherwise, the dismissal of old judges is meaningless. However, the introduction of European standards in legal education has been postponed. Experts criticize that reform of legal education has not been given enough attention.⁶⁶

⁶² See inter alia von Gall, Die Entwicklung der ukrainischen Justiz unter Präsident Janukovič, supra n. 4, pp. 207–227.

⁶³ Goncharova, Kyiv Post, Poroshenko signs controversial law on appointment of Constitutional Court judges, 31 July 2017, <<https://www.kyivpost.com/ukraine-politics/poroshenko-signs-controversial-law-new-constitutional-court.html>> (23 July 2018).

⁶⁴ Kuybida, Umsetzung der Justizreform in der Ukraine, supra n. 21, p. 5.

⁶⁵ Kuybida, Umsetzung der Justizreform in der Ukraine, supra n. 21, p. 5.

⁶⁶ Kuybida, Umsetzung der Justizreform in der Ukraine, supra n. 21, p. 5.

VI. Conclusion

The reluctance to take judicial reform forward after Euromaidan and the flaws during the implementation of reforms prove that the Ukrainian political elite is not ready to relinquish control over the judiciary. Lustration laws must be regarded as mere populist actions against judges.

However, this situation cannot be surrendered to. Civil society and its NGO representatives have shown that there is a demand for independent courts, an end to corruption, and protection of human rights. Compared to other post-Soviet countries, Ukraine has a strong civil society with the capacity to critically monitor ongoing reform through excellent experts and NGOs and expert groups specialized in the field.⁶⁷ There is a vital discourse on shortcomings and problems that is bringing together different stakeholders within civil society. A second positive feature is the longstanding strong involvement of international organizations, above all the Council of Europe and its Venice Commission, the latter of which has given a large number of opinions⁶⁸ at the request of Ukrainian officials over the last decade. Since the Orange Revolution, there has been an ongoing dialogue between these institutions and the country's officials. Thus, existing problems are well known. The problems are also well documented by rulings of the ECtHR.

But international institutions should widen the approach to the informal dimension of the rule of law and the meaning of social circumstances for the transformation of judicial institutions. As Kim Lane Scheppele pointed out, the “checklist approach”⁶⁹ of international organizations ticking off all the elements of a list after a given law has been enacted – and not monitoring its implementation – is not helpful. The wish for elite renewal and a renewal of the judiciary has to regard judicial transformation as part of a huge transformation of the state from patrimonial rule of man to the rule of law. Against this backdrop, judicial reform needs a comprehensive road map that acknowledges that legal reform is not finished after a couple of legal amendments, understanding instead that implementation with the effect of a groundbreaking transformation of legal institutions takes years or even decades. A

⁶⁷ Most of them are united within the *Reanimation Package of Reforms (RPR)*, the largest coalition of leading non-governmental organizations and experts from all over Ukraine, <<http://rpr.org.ua/en/en/about-us/who-we-are/>> (23 July 2018).

⁶⁸ Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion No. CDL-AD(2016)034-e; Opinion No. CDL-A(2015)027-e; Opinion No. CDL-AD(2015)026-e; and Office for Democratic Institutions and Human Rights, Opinion on the Procedure for Qualification Assessment of Judges of Ukraine, 12 November 2015, Opinion No. JUD-UKR/278/2015 (RJU), <<http://www.legislationline.org/documents/id/19877>> (23 July 2018).

⁶⁹ *Scheppele*, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, *Governance* 2013, Vol. 26, pp. 559–562, 560.

tailor-made master plan for judicial reform must be grounded in a comprehensive analysis of the current legal culture in Ukraine. Such a road map needs to involve all stakeholders, the government, judges, civil society and international organizations. For a change of legal culture to be durable, legal education and training must be key features of it. A reform has to overcome Soviet approaches of reproduction of knowledge and learning the legislation, teaching instead a consistent application of the laws and the Constitution as well as binding international laws – inter alia the European Convention of Human Rights and the judgments of the European Court of Human Rights. Legal education has to qualify lawyers to independently maintain fair and clear judicial proceedings, thus achieving a proper implementation of the Constitution that creates unity of the law and short-term predictability. The independence of the judiciary cannot be guaranteed by formal rules only. Instead, judges need an informal code of conduct that goes beyond constitutional reform. A consensual definition of judicial ethics has to be agreed on.

All these steps have to be maximally transparent. While political leaders have used social and traditional media to promote their reform efforts, even providing videos of the assessment procedures for judges at the Supreme Court,⁷⁰ most steps were decided behind closed doors and did not allow for the public to engage in the debate.

What is more, constant unbiased monitoring by public and international organizations of the implementation of reform, as well as the implementation of the judgments of the ECtHR, is crucial.

Finally, the effectiveness of conditionality can and should be used by Western partners in a more targeted and visible manner.⁷¹ Western support should depend not only on legal amendments but also on their implementation.

⁷⁰ High Qualification Commission on Judges of Ukraine, An unprecedented competition to the Supreme Court of Ukraine, Video Material, <<http://vkksu.gov.ua/en/all-video/>> (23 July 2018).

⁷¹ See *Stewart*, The Rule of Law in Contemporary Ukraine, *supra* n. 16.

III. Modernisation of Ukrainian Private Law

Development of Ukrainian Private Law in the Context of its Europeanization

Roman Majdanyk

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I. Development of Ukrainian private law

1. Transition from socialist to post-socialist law

Ukrainian law is the law of a state that is now in the stage of transitioning from the traditions of modified socialist law to the post-socialist law of a

liberal society. Ukrainian law was formed mainly by the socialist law traditions and normativism of the former Soviet Union. The recent evolution of Ukrainian law in the context of its Europeanization reflects a complicated journey – one leading back to the Western tradition – as made by an Eastern European state that for hundreds of years was a part of authoritarian empires, belonging in particular to the Russian Empire and the Soviet Union. Conceptually, Ukrainian law still has to master its formal break from Soviet law in order to advance the values of a liberal understanding of law. On the other hand, Ukraine is a transition economy, one in great need of reforming its traditional understanding of law. This requires an adaptation of legal rules to the dynamics of actually existing social relations so as to ensure human rights, this for the benefit of creating a single European commercial space and strengthening European cultural unity.

After the collapse of the Soviet Union and the weakening of the administrative-command management system, law in Ukraine as an instrument of conflict resolution has worked poorly for the following reasons: an ineffectiveness of legal institutions in terms of the absence of state property reform; a monopolized private sector of the economy; absence of an independent judiciary; and a complicated economic situation in the country. This has led to unequal and selective protection of ownership, an insecurity of possessory interests, abuses of rights, and systematic corruption.

2. Formation of Ukrainian law in the period of independence

The law of Ukraine is at a stage of transition from the administrative-legal supervision of the state over the development of social relations to the recognition of state and territorial communities as legally equal participants in private relations, including the establishment of civil society as an equal partner of the state.¹

After Ukraine's proclamation of independence in 1991, the development of Ukraine private law may be defined by its division into the following five periods:

The first stage (1991–1996) was marked by a consolidation of the private law of Ukraine as a part of the national law of an independent state and by securing core values in the Constitution of Ukraine of 1996 – respect for human rights, supremacy of law, inviolability of private property.

At the time of Ukraine's proclamation of independence, done by the decision of the Verchovna Rada on 24 August 1991, private relations in the state were governed by a large number of legislative acts issued during the time of

¹ Lotjuk, Konstyucijno-pravovi osnovy rozvytku ta formuvanja hromadjans'koho suspil'stva v Ukraini: avtoref. dySSERTACII [Constitutional law foundations on the development and functioning of civil society in Ukraine: abstract of dissertation], Kyiv 2015, pp. 1, 5, 17.

the existence of the USSR and the Ukrainian SSR. After the proclamation of independence, the legislative acts of the former USSR remained in force insofar as they did not contradict the legislation of Ukraine; and the legislative acts of the Ukrainian SSR, including the central place of the Civil Code of the Ukrainian SSR of 1963, continued to operate practically in full. Since the Civil Code of the Ukrainian SSR of 1963 was based on outdated legal doctrine and did not take into account the need for regulation of commodity-money relations in market conditions, there was a danger of a legislative vacuum in this field, which in fact occurred already in the first years after the proclamation of independence.

During this period, a number of new laws were adopted in the areas of property, corporate law, investment, and health, in particular the following Laws of Ukraine: "On Ownership" in 1991, "On Enterprises in Ukraine" in 1991, "On Business Associations" in 1991, "On Securities and Stock Exchanges" in 1991, "On the Commodity Exchange" in 1991, "On the Pledge" in 1992, the Code of Ukraine on Subsoil of 1994, the Water Code of Ukraine 1995, "On Investment Activities" in 1991, "On the Regime of Foreign Investment" in 1996, "Fundamentals of the Legislation of Ukraine on Health Care" in 1992, "Basic Legislation of Ukraine on Culture" in 1992. These laws contributed to the regulation of private relations, the freedom and free development of creativity of individuals in the transition from a planned to a market economy, and the weakening of excessive state interference in economic activity and other areas of private life. The general trend reflected in them was also a gradual return to humanistic values: legal protection for the autonomy of a private person; establishing guarantees of a private person's rights; attempts to equalize the legal status of the individual and the state; and providing individuals with the opportunity to freely dispose of their rights except in cases explicitly specified in the law.

At the same time, legislation in the Ukraine was largely unsystematic in character, this mostly due to the continuing validity of many laws that had been in force in Soviet times. Thus, at the level of codified acts in the field of private law, Soviet law continued to operate as a transitional law at the stage of forming a market economy society. In particular, during this period the Civil Code of the Ukrainian SSR of 1963 remained in force, as well as the Dwelling Code of the Ukrainian SSR of 1983 and the Labour Code of the USSR of 1971.

Therefore, in 1994, the development of a new concept for the development of Ukrainian legislation began, based on new ideas about the law, based on the ideas of civil society, and based on the supremacy of law. According to this concept, the improvement of civil legislation could be carried out through its codification, which was to be prepared on the basis of the new Constitution as an integral part of the constitutional reform. By the decision of the Cabinet of Ministers of Ukraine in 1992, a special workgroup was created to

prepare the draft of the Civil Code of Ukraine, based on the principles of respect for human dignity, the protection of human rights, the functioning and development of civil society, and the development of a new Civil Code as a code of private law.² This shows that the European civil law rules certainly influenced the scope of the relevant norms of the new Civil Code of Ukraine.

The second stage (1996–2003) was characterized by the process of evolutionary development and the institutionalization of constitutional provisions on private non-property rights, rights of private ownership, and other subjective civil rights of individuals, this process being reflected in the adoption of the Constitution 1996 and such basic laws in the field of private law as the Civil Code of 2003 (CC), the Economic Code of 2003 (EC), and the Land Code of 2001.

In general, the 1990s turned out to be an extremely favourable period for the sublime and romantic perception of law and law-making. This is confirmed in the development of the new Civil Code of Ukraine by leading Ukrainian scholars, based on ideas embodying the concepts of morality, justice, and the self-worth of each individual under the law.³

The third stage (2004–2010) was marked by establishing traditions for the application of codified acts, the enactment of other laws in the area of private law (the CC and the EC of Ukraine of 16 January 2003, the Law of Ukraine “On international private law” of 1 September 2005, etc.), recognition of the state as a legally equal participant in private legal relations, the formation of a system for legal persons under private and public law, and the adoption of other important stability instruments for civil transactions.

The fourth stage (2010–2013) was characterized by attempts to apply private law institutions in a state-private partnership that was based on an agreement between public and private partners on the implementation of an investment project in socially important sectors of the economy for the state.⁴ This included carrying out reforms in the field of medical services that provided for: the differentiation of primary, secondary, and tertiary levels of medical care; the definition of a list of services in accordance with the level of assistance; and financing on the basis of contracts for the provision of medical care to the population.⁵ This was all done by rather declarative promises for the development of free trade and integration with the European Union.

² *Dovhert (ed.)*, *Kodyfikazija pryvatnoho (cyvilnoho) prava Ukrainy* [Codification of the private (civil) law of Ukraine], Kyiv 2000, pp. 17 f., 68–71, 307.

³ *Kuznjecova/Kohanovska*, *Sučasne pryvatne pravo Ukrainy: vektory jevropejs'koho rozvytku* [Modern private law of Ukraine: Vectors of European development], *Visnyk Nacionalnoi akademii pravovykh nauk: Pravo* 2016, No. 3, p. 52.

⁴ See: *Zakon Ukrainy “Pro derzavno-pryvatne partnerstvo”* [Law of Ukraine “On Public-Private Partnership”], 1 July 2010, No. 2404-VI.

⁵ See: *Zakon Ukrainy “Pro poriadok provedennia Reformuvannia systemy okhrony zdorovia u Vinnytskii, Dnipropetrovskii, Donetskii oblastiakh ta m. Kyiv”* [Law of

However, these measures did not produce the expected results due to the formalization of civil society involvement in public administration, the strengthening of administrative-legal instruments regulating private relations, the refusal to sign the Association Agreement with the European Union, and the introduction, starting in 2010, of the authoritarian regime of V. Yanukovich.

The current stage (2013 – present day) is characterized by a modification of private law institutions under the influence of the Ukraine-European Union Association Agreement, by the anti-terrorist operation in certain areas of Donetsk and Luhansk regions, and by the temporary occupation of Crimea by Russia.

II. Basic concepts of Ukrainian private law

1. *Values and interpretation of statutes*

Ukrainian law is defined by the general social and legal values of liberal society. However, it is impossible to form a Ukrainian law of the liberal type without determining strategies for state legal policy, developing scholarly concepts for the development of national legislation, and bringing this law in line with the rules of international law. Recently, a trend has been observed towards the formation of new Ukrainian law mechanisms supporting a liberal understanding of the law, as found in legal positions adopted by the Supreme Court of Ukraine that provide for the application of principles of justice, good faith, and reasonableness as a ground for supplementing rules of law and altering established court practice.⁶ Such an approach of the highest court of Ukraine sets aside the old Soviet approach which allowed only a very narrow interpretation of statutory provisions by the courts. The new doctrine determines the conditions and order of interpretation with the aim of the court's clarifying, supplementing, or amending the law. The interpretation of law as an occasion of construction that goes beyond the limits of the wording of a statutory provision refers to situations when the provision is regarded as an unfair norm, when it is obscure or the legislator has refrained from offering a comprehensive solution.⁷ The idea of allowing the development of law by courts is consistent with the constitutional norm that the court must be subor-

Ukraine "On the Procedure for Reforming the Health Care System in Vinnytsia, Dnipropetrovsk, Donec'k Oblast and the City of Kyiv", 7 July 2011, No. 3612-VI.

⁶ See: Postanovy Verhovnoho Sudu Ukraïny [Resolutions of the Supreme Court of Ukraine] of 18 March 2015, case No. 6-250; of 7 October 2015, case No. 6-1622; of 20 January 2016, case No. 2808; of 20 January 2016, case No. 6-2940.

⁷ *Vatamanjuk*, *Sudove tumačennja jak zasib pošuku prava pry rozhljadi konkretnych sprav* [Court interpretation as a means of determining the law when considering particular cases], *Juryst Ukraïny* 2013, p. 26.

dinate to the law and not only to a statutory provision. In particular, the recently adopted amendments to the Constitution of Ukraine contain rules (Article 129) that the judge is independent and governed by the rule of law (Article 129 of the Constitution in the edition of Law of Ukraine No. 1401-VIII of 6 February 2016). This should be viewed as obliging the court to comply with the principle of lawfulness as an element of the principle of rule of law.

2. System of Ukrainian private law

a) General scope

‘Private law’ is understood in Ukrainian scholarship as a system of legal norms regulating civil relationships and other private relationships based on the grounds of legal equality, free expression of the will, and pecuniary (property) independence; where natural persons, legal entities, and other participants are subjected to the private relationships. It includes both ‘civil law’ and other areas of private law relating to commercial activities, the use of natural resources, and environmental protection; also included are labour and family relationships, which are regulated by other codified legal norms. In particular, relevant regulations are found in the Family, Economic, Subsoil, and Water Codes of Ukraine. In Ukrainian legal scholarship, the ‘civil law’ is treated as a system of legal norms regulating property and personal non-property relationships based on legal equality, free will, and property independence of the participants. Participants in civil relationships include natural persons and legal entities, the State of Ukraine, the Autonomous Republic of Crimea, territorial communities, foreign states, and other bodies of public law.

The Civil Code (CC) contains a sort of general part, a nucleus, of private law. This implies an extension of its provisions to both general civil relations and other (special) private law relations in areas relating to commercial activity, the use of natural resources and environmental protection, labour, and family relationships. Therefore, under the Article 9.1. CC Ukraine, the provisions of the CC of Ukraine apply to the regulation of relationships arising in the sphere of use of natural resources and environmental protection, as well as to labour and family relationships unless these relationships are regulated by other legislative acts. Furthermore, other laws should be in conformity with the CC of Ukraine. This rule is reflected in Article 4.2. CC, according to which a draft law that regulates relations in a way other than as prescribed by this Code must be voted on together with a corresponding draft law amending the CC of Ukraine.

b) Branches of law

In Ukrainian scholarship, the concept of private law is mainly based on the idea of multilevel and relatively independent branches of law that govern

civil, family, economic, labour, and other property and personal non-property relations based on the principles of the legal equality and property independence of the participants.

The current system of Ukrainian law with its combination of basic branches of law (civil administrative, criminal, constitutional) and complex branches of law (economic, land, labour) largely owes its existence to the methodology of Soviet law. The relationship between these branches is mostly controlled by the distinction between special and general norms. Accordingly, provisions of such complex codified acts, such as an economic, land, or labour code, are considered to be special norms, whereas the provisions of the CC of Ukraine are treated as general norms. Unfortunately, this approach leads to an artificial separation of the complex branches of law (economic, land, labour) from the civil law and from provisions of the CC, which in practice creates a permanent legal conflict (contradiction) between the provisions of the CC and such complex codified acts as the Economic Code, the Land Code, the Water Code etc. The system of contemporary Ukrainian private law comprises branch formations in the part regulating relations among legally equal private persons,⁸ which undoubtedly include the fields of civil law and PIL and, according to some scholars, family law (see more below).

Economic law, labour law, and land law, with their own codified acts (codes), are compound acts where private and public law are consciously mixed, and hence they are a curiosity that is incomprehensible for developed European legal orders. They constitute a substantial obstacle on Ukraine's path to European integration and to the formation of a liberal understanding of law. Codified acts of complex branches of law (Land Code, Water Code, Economic Code, and others) often contain general rules or reference rules, which are not regulatory in their nature and which conflict with special laws and codified acts of basic branches of law.⁹

⁸ *Majdanyk*, *Cyvilne pravo: Zahalna častyna – Pidručnyk* [Civil law: General part – Textbook], Kyiv 2012, pp. 57, 66.

⁹ Thus, for example, the passages of the Economic Code of Ukraine with provisions on the basic principles of economic activity (Section I, Articles 1–54), rules on business entities (Section II, Articles 56–72, 79–131), property basis of management (Section III, Articles 133–166), economic obligations (Section IV, Chapters 19–23, Articles 173–215), responsibility for offenses in the sphere of economic activity (Section V, Articles 216–237, 251–257), features of legal regulation in certain branches of economic activity (Section VI, Articles 258–376), and the provisions of Section VII on foreign economic activity (Articles 377–389) are not regulative due to their excessive nature and are often ancillary, duplicative, or contradictory to the relevant provisions of the Civil Code of Ukraine and special laws (in particular, the Laws of Ukraine “On Business Associations”, “On Joint-Stock Companies”, “On Cooperation”, “On Agricultural Cooperatives”, “On Consumers”, “On Public Associations”, “On Freedom of Conscience and Religious Organizations”, “On Farmers”, “On the Mode of Foreign Investments”, and “On Charity Activities and Charitable Organizations”). – It can be stated that out of the 418 articles of the Economic Code of

At present, special laws (on consumer law, securities and the stock market, economic entities and other legal persons, health care, transportation, etc.) are being further differentiated and refined.¹⁰ This makes the system of laws unreasonably complicated due to this unnecessary chain/level of laws.

III. Economic law

1. Basics

Ukrainian law distinguishes civil law and what is referred to as commercial law (Ukr. “господарське право”, Rus. “хозяйственное право”), which is reflected in the coexistence of the Civil Code and the Economic Code.

Economic law is a set of legal norms which regulate economic relationships, that is, relationships arising in the process of organizing and exercising economic activity between business entities, as well as between these entities and other parties to economic activity.¹¹

The Ukrainian Economic Code regulates legal relationships between entrepreneurs as well as between entrepreneurs and state authorities (such as public and municipal administration) and non-commercial organizations (such as associations, foundations, etc.). These reflect two kinds of legal relationships, which are different in their nature, namely: relationships between equal parties (here we are referring to so-called asset-related economic and public obligations; other economic and production relationships; organizational-economic obligations featuring the participation of private individuals; and internal economic relationships), and relationships between such parties and parties subject to public law (these including the organizational-economic and social-municipal obligations existing between state authorities).¹²

Ukraine, only 15 articles have regulatory meaning, that is, less than 4% of their total number. These are namely: the norms on state and communal unitary enterprises (Chapter 8, Articles 73–78), on the rights of economic jurisdiction and on operative management (Articles 136, 137), and corporate law and corporate relations (Chapter 18, Articles 167–172).

¹⁰ See: Laws of Ukraine “On Consumer Rights Protection”, “Fundamentals of Ukrainian Legislation on Health Care”, “On Securities and the Stock Market”, “On Oil and Gas”, “On Housing and Communal Services” “On the Association of Co-Owners of a Multi-apartment House”, “On the Peculiarities of Realization of the Right of Ownership in an Apartment Building”.

¹¹ *Ščerbyna*, *Hospodars’ke pravo – Pidručnik* [Economic law – Textbook], 6th ed. Kyiv 2013, p. 13.

¹² These two relationships include four groups of social relations: entrepreneurial relationships (entrepreneurial activity by business entities); relationships with an organizational nature (creation, reorganization and liquidation of organizations, obtaining certificates, etc.); relations which arise in the process of state regulation of entrepreneurship; and inter-

2. Theoretical background of economic law

The theoretical background of the regulation of economic activity is highly controversial. In particular, Ukrainian legal scholarship has two main concepts: the monistic and dualistic variations.

a) Monistic concept

The monistic concept deals with economic law as an independent branch of law having its own substantive unity. Proponents of the monistic conception of economic relation regulation usually consider economic law to be “[...] a branch of law that regulates relations that arise in the process of the organization and realization of economic activity”.¹³

For systemic regulation, it is proposed that economic activity be considered in the light of unity of property and organizational elements: in order to produce and sell products, realize work, or provide a certain economic service, the owner (entrepreneur or another entity) organizes, at his own discretion, the use of the property necessary for this. Thus, economic relations by their nature are organizational-property relations.¹⁴

This thesis became the methodological basis of the three-part classification of economic relations enshrined in the Civil Code of Ukraine, depending on the scope of such relations, by their division into the categories of economic-production, organizational-economic, and internal-production.

Economic-industrial relations arise between economic entities in the direct realization of economic activity. Organizational-economic relations as found in this Code refers to relations between business entities and entities of organizational and economic powers in the process of the management of economic activities (Article 3.6. of the Economic Code). In accordance with clause 1 of Article 4.1. EC, property and personal non-property relations are not subject to regulation under this Code but are regulated by the Civil Code of Ukraine. Thus, the property obligations that arise between the participants of economic relations are regulated by the Civil Code of Ukraine, taking into account the features provided by the Economic Code (Article 175.1.EC).

Proceeding from the fact that the subject of regulation of the Economic Code is the relations arising in the process of organizing and implementing economic activity between economic entities, as well as between these persons and other participants in relations in the field of management (i.e. eco-

commercial relationships (relations that structural divisions of an organization have with each other and with the organization).

¹³ See Ščerbyna, supra n. 11, p. 6; Mamutov/Znamenskiy/Chahulin et al., *Chozjajstvennoe parvo – Učebnik* [Economic law – Textbook], Kyiv 2002, p. 9.

¹⁴ Beljaneyč/Vinnyk/Ščerbyna et al., *Naukovo-praktyčnij kommentar Hospodars'koho kodeksu Ukraïny* [Academic and practical commentary on the Economic Code of Ukraine], 3rd ed. Kyiv 2012, p. 9.

conomic relations), the fundamental criteria for the demarcation of economic and civil relations are the sphere of relations and the structure of the participants. The Economic Code does not cover legal relationships between non-economic entities, i.e. citizens. This also applies to legal relationships between citizens and economic entities. However, the property relations of economic entities with legal entities (including those that are not business entities) fall within the scope of the Economic Code. Thus, transportation of cargoes and the general provision of energy are regulated by economic legislation, whereas the transportation of passengers and baggage or the provision of energy supply to citizens-consumers is regulated by civil law.¹⁵

b) Dualistic concept

The dualistic concept deals with economic relations from the standpoint of civil and administrative law: horizontal relations of equal participants in the field of commodity-money transactions should be governed by civil law, whereas vertical relations are governed by administrative law and rules of closely related branches of public law (financial law, tax law, etc.).

This approach has been reflected in the provisions of Article 1 of the Civil Code of Ukraine:

“1. Civil law regulates personal non-property and property relations (civil relations), based on legal equality, free expression of will, and the property independence of the participants.

2. As to property relations based on the administrative or other subordination of one party to the other party, as well as to tax and budgetary relations, civil law shall not apply unless otherwise provided by law.”

At the same time, Article 9.2. CC stipulates that the law may provide special terms of regulation for property relations in the sphere of economic activity.

Proponents of the dualistic concept of regulating economic relations reject the allocation of civil and administrative law norms as governing the economic activity of individuals and legal entities, and they reject the corresponding formation of a new independent branch of law, i.e. economic law. Admitting these proposals would mean that the system of property relations in the state, premised on the unity of the whole economy and social relations in the field of management, would have been artificially disunited, thereby violating the harmonious combination of the interests held by society and individuals.

Relationships in the field of the economy combine two types of relations that are different by their nature – private (civil) and public relationships: private, where all individuals (including the state) are private law participants; public, where the main participant in the legal relationship is the state with its power functions. In the field of economic activity, both types of rela-

¹⁵ *Beljanevyč/Vinnyk/Ščerbyna et al.*, supra n. 14, p. 13.

tionships are needed, as well as other regulation, but the methods and content of legal regulation are different in each case. In civil law, which is the pillar of private law, methods of legal regulation are based on discretion (actions at its discretion), the initiative is equivalent to a paid action, and the main legal form is the contract. Public-legal regulation provides for the implementation of power and administrative functions and, in accordance with this, the publication of resolutions, instructions, decisions, etc. The public-legal regulation of economic activity in the country is not rejected at all, as argued by the proponents of the monistic approach. It should exist in the form of separate laws on taxes, on registration of legal entities, on other types of registration, on licensing, on antimonopoly activities, etc. State regulation in the economy should contribute to the development and establishment of market relations, and not to the revival of centralized state influence on the regulation of those property relations that arise in economic circulation at the will of the parties. Taking into account the transitional nature of the Ukrainian economy, this state regulation should be subordinated to the objective of replacing the methods of state regulation in the economy with the methods of its market regulation – with a certain preservation of state influence. To accomplish such tasks, the Economic Code is inappropriate – it only “assumes” the possibility of the existence of some elements of a market economy, and the main thing in it is the principle of management.¹⁶

In this regard, the Civil Code of Ukraine was created as a code of civil society, as a codification act of private law, covering its entirety of property rights and personal non-property relations with its regulation on the common private law principles, regardless of which areas of private life they consist of and exist in. Since one of the foundations of civil society is a market-based economy, the Civil Code incorporates norms regulating property and personal non-property relations in the economic sphere. These norms form an integral part of the Civil Code. Entrepreneurship is an integral part of it, an economic basis, an environment where people are particularly active in identifying themselves.¹⁷

In view of this, supporters of the dualistic concept of regulation of economic relations consider economic law to be a complex branch of legislation regulating private and public relations in the field of economic activity with the help of two sub-sectors: 1) public economic law (mainly administrative in nature), the subject of which is economic property-organizational relations between legally unequal entities, and 2) civil economic law, which is a sub-

¹⁶ *Dovhert (ed.)*, *Kodyfikacija pryvatnoho (cyvilnoho) prava Ukraïny* [Codification of private (civil) law of Ukraine], Kyiv 2000, p. 104.

¹⁷ *Dovhert (ed.)*, *supra* n. 16, p. 104.

system of civil law that regulates entrepreneurial and non-entrepreneurial relations between legally equal participants in economic relationships.¹⁸

3. Discussion on the decodification of economic law

The simultaneous existence of the Civil Code and the Economic Code has led to the emergence of numerous legal conflicts and an imbalance of legislation.¹⁹ Thus, the Civil Code and the Economic Code offer different approaches to the settlement of identical relations, as a result of which, in the resolution of similar litigations, courts prefer the Civil Code in one case and the Economic Code in the other. And this is not the only problem that has arisen with the application of two codes.

The discussion on the possibilities regarding how to resolve the contradictions of these two legal acts reflects the controversy between the dualistic and the monistic approach towards commercial law. The two suggestions are either to abolish the Economic Code or to eliminate existing conflicts by amending the Civil Code and the Economic Code.

The idea that the conflicts between the norms of the Civil Code and the Economic Code should be eliminated by amending these codes, rather than by the abolition of the latter, is generally supported by those scholars who belong to commercial law divisions of law faculties or who work at economic courts.²⁰ They point out that that the Civil Code and the Economic Code are the laws of equal force. When parliament drafted the Civil Code, it had the option to enact the Code as a so-called constitutional law, so that it would have taken precedence over the Economic Code. While this approach was ultimately rejected, it was acknowledged that private-law relations cannot thrive without a constitutional underpinning. On the other hand, the economic legislation found in the EC does precisely this. It balances the influence of the state (public-law norms) against private-law relations. Therefore, individual judges-economists warn that it would be dangerous to say that everything can be regulated by the Civil Code and that the economic legislation, as codified or even as a branch of legislation, has no right to exist. In their opinion, this tendency can unbalance not only the legislation but also the state's economy.

In support of this thesis, reference is made to the importance of market and competitive relations as the driving force of the economy. In the context of the economic crisis, without state influence and state regulation, the economy

¹⁸ *Majdanyk*, *Rozvytok pryvatnoho prava Ukraïny* [Development of private law of Ukraine], Kyïv 2016, pp. 39 f.

¹⁹ See below for examples of types of obligations and the doctrine of economic contract.

²⁰ See *Soljanik*, *Posle nas hot' potop* [Après nous, le déluge], *Legal Practice* 2008, No. 50, p. 572; *Zeldina*, *GK: nado "oblegčit'sja"* [CC: it should "be relieved"], *Legal Practice* 2009, No. 8, p. 583.

of any country, even the most powerful, will not survive. It is about the refinancing of banks and about support of the coal industry, etc. That is why the value of economic legislation as a regulator is constantly increasing.²¹

Conversely, the idea of the simultaneous existence of the Civil Code and the Economic Code is generally negatively assessed by scholars who specialize in civil law. They underline the understanding of civil law as the primary (basic) branch of law, having its own independent subject matter and method of legal regulation, which in aggregate are not inherent in other branches of law. One or another separate sphere of relations among the public may be the subject of only one branch of law. Economic entities operate in the sphere of property relations on the principle of dispositivity, that is, the equality of parties, which is characteristic of the subject and method of the branch of civil law. Therefore, economic entities in relations of legal equality are subjects of civil law.²²

The activities of economic entities cannot be regarded as a sufficient criterion for the recognition of economic law as a branch of law, since such a criterion actually contains heterogeneous social relations (civil, administrative, etc.) that are regulated by methods of legal equality and power and subordination, respectively. Thus, critics argue that the Economic Code should be abolished due to the need for regulation of civil relations, including in the sphere of economic activity, in one single, comprehensive statute. Attempts at excessive differentiation and “systematic” codification of economic relations in a single act resulted in an Economic Code with an eclectic scope of regulation. The Code has elements of a private and public law, which led to the loss of a true understanding of the act and actually transformed the Economic Code into an assemblage of laws in the economic sphere. In spite of many attempts to reconcile the Civil Code with the Economic Code, it is proposed in academic literature that the Economic Code be repealed and replaced by a Code of laws on economic commercial activity, or the Law of Ukraine “On the basics of economic commercial activity”.²³ Such a new compilation of the laws of Ukraine on economic activity should reflect the idea of regulating and balancing the influence of the state (public-law norms) on civil relations in the sphere of economic activity, with the provisions on the basic (fundamental) branch of law being extended to these relations. A new statutory substitute for the Economic Code would also include public-law norms in the sphere of economic activity. At the same time, the inclusion in the Civil Code of Ukraine of norms regarding legal status and the legal regime for property of unitary state/communal enterprises remains questionable. In this regard, it

²¹ *Editorial note*, Dekodyfikacija hospodars'koho zakonodavstva [Decodification of economic legislation], *Pravovyj tyzden* [Legal week] 2009, No. 40, p. 13.

²² *Sidorenko*, GK i HK: Est' svet v konce tunnelja [CC and EC: there is light at the end of the tunnel], *Legal Practice* 2009, No. 33, p. 13.

²³ *Sidorenko*, supra n. 22, p. 13.

should be noted that the actual law-regulating function in the present Economic Code of Ukraine provides rules on public law legal entities, in particular regarding legal status and the legal regime governing property belonging to them. Other issues are adequately regulated by special legislative acts in the sphere of public or private commercial law. In such circumstances, the abolition of the Economic Code of Ukraine would lead to the expediency of adopting a law “On Legal Persons of Public Law” and the Law of Ukraine “On the Public-Legal Basis of Economic Activity”.

IV. Contract law

1. Types of obligations: contradictions between the Civil Code and the Economic Code

One of the problems of Ukrainian law of obligations arises from competition between the rules of the Civil Code and the Economic Code of Ukraine governing debtor-creditor relations.

The CC of Ukraine regards an obligation as a legal relationship between a creditor and a debtor who is bound to render or to refrain from rendering a performance in favour of the creditor (Article 509.1.).

The EC defines an economic obligation as an obligation arising between the obligor (including the debtor) and the obligee (including the creditor). The main types of economic obligations are property-economic obligations and organizational-economic obligations (Article 173 EC).

The theory of economic law also classifies as economic internal-economic obligations, i.e. debtor-creditor relations that exist among structural units of an undertaking and relations of an undertaking with its structural units.

The CC and other laws do not provide for the division of economic obligations into types.

According to Article 175.1. of the EC, property-economic obligations mean civil law obligations arising between participants of economic relations when engaging in economic activity.

Property obligations arising between participants of economic relations are governed by the CC subject to specifics established by the EC.

Property-economic obligations are therefore governed by the norms of the CC regarding civil obligations as general rules and by special rules of the EC.

Thus, the norms of the CC are to be applied to the relations not governed by the EC.²⁴

²⁴ *Znamenskij (ed.)*, *Naukovo-praktyčnij kommentar Hospodars'koho kodeksu Ukraïny* [Academic and practical commentary on the Economic Code of Ukraine], Kyïv 2012, p. 347.

The CC and the EC provide for different priority structures with respect to imposing penalties. The EC provides for reimbursement of damages only in excess of penalties within the meaning of Article 232.1. On the other hand, the CC allows for reimbursement of damages in addition to penalty (Article 624.1. CC). However, the parties may derogate from this CC rule (Article 624.2. CC).

These and other differences between general provisions of the EC on contracts, obligations, and liability, on the one hand, and the provisions of the CC on obligations and separate types of contracts, on the other hand, result in complex conflicts between these legislative acts.

Two main approaches have been adopted in the theory and court practice for resolving such legal conflicts, namely identifying general and special rules in accordance with the scope of normative regulation of this or that issue or in accordance with specifics of the mechanism of regulation.

In the latter case, reference is made to the provision of Article 9.2. of the CC of Ukraine, according to which the law may provide for the specifics of regulation of property relations in the economic area, and to the provision of Article 4.2. of the EC of Ukraine, according to which the specifics of regulation of property relations of undertakings are established by this code.

Therefore, the main point of such an approach is to identify the subjective nature of the participants. Supporters of this position consider that for undertakings or participants in economic relations in the meaning of the EC of Ukraine (Articles 2, 8, 23, 55, 176, etc.), provisions of the EC of Ukraine are to be applied under the general rule. If one of the subjects of these relations is another person, provisions of the CC of Ukraine are to be applied.

2. *Economic contracts*

One of the fundamental legal constructions of the EC is an economic contract. Chapter 20, “Economic contracts” (Articles 179–188), is devoted to this type of contract and sets forth general terms, rules on concluding such contracts, specifics regarding the conclusion of certain types of economic contracts, and rules on the modification and termination of economic contracts. Neither the EC nor the CC defines the term economic contract.

It has been substantiated about laying down in Article 179 EC the concept of an economic contract as an agreement between two or more undertakings or subjects and bodies of state power (local self-government) vested with economic competence that is aimed at the determination of rights and obligations in the economic area.²⁵ However, the construction of an economic con-

²⁵ See: Pro vnesennja zmin do Gospodars'koho kodeksu Ukraïny ta dejakych inšykh zakoniv (ščodo uzgodžennja položen' zakonodavčich aktiv) [Draft Law of Ukraine “On amending the Economic Code of Ukraine, the Civil Code of Ukraine and some other laws (regarding harmonization of provisions of legislative acts)”], available at <<https://eco>

tract is not in complete accord with the provisions of the CC on civil law contracts, in particular in terms of subject matter and the criteria of classification. Under the Draft Law amending the EC, there are two groups of economic contracts: civil law economic contracts (that give rise mainly to property-economic contractual obligations) and administrative law economic contracts (that give rise to public, organizational-economic, etc. economic obligations based on the principles of administrative or other authoritative subordination of one party to the other).

The first group of economic contracts falls in the area of civil law, the second in that of public (e.g. administrative) law.

Therefore, the latter group of economic contracts (essentially administrative contracts) may not even theoretically be implemented in the CC.

The incorporation into the CC of a group of economic contracts which give rise to economic obligations (property-economic, organizational-economic) between legally equal parties (participants) becomes complicated due to the application of classification criteria for economic contracts that are not inherent to civil code provision.

In contrast to the CC, which provides for the classification of contracts mainly based on their subject matter, an economic contract is based on two criteria, namely the area of activity (economic area) and the subject composition (undertakings, bodies of state power or bodies of local self-government) vested with economic competence.

An economic contract, by its nature, is a (combined) heterogeneous legal construction that covers all possible types of civil law contracts in an economic area (purchase-sale, provision of services, performance of works, etc.) as well as so-called administrative contracts in an economic area.

The question of whether administrative contracts are in fact contracts or a legal fiction is rather controversial since such agreements are based on relations of legal inequality and hence are the basis of a public duty rather than an obligation.

At the same time, suggestions as to the existence of civil law contracts that are “woven” into the fabric of public law relations (administrative, budget, tax, etc.) seem to be insufficiently substantiated.

In particular, surety contracts and agreements for payment of tax liability in instalments provided by the Law of Ukraine “On the order of discharge of obligations of taxpayers to budget and state specialized funds” of 2001 may not be regarded as such types of contracts. These cases are, rather, about a special analogous application of civil law to public law relations. Such a trend seems insufficiently substantiated and will result in a “dilution” of the subject and method of civil law under the principle of expediency applicable

in this case due to the absence in financial law of adequate constructions similar to the developed private law construction of a contract.²⁶

The trend toward application of a civil law contract to financial relations may be justified only as long as legal equality between the participants of legal relations is preserved with regard to the conclusion and performance of a juristic act as essential conditions for the existence of this private law phenomenon.

At the same time the construction of a civil law contract does not exclude the possible presence of public law elements that to some extent burden the exercise of private subjective rights but at the same time prevent these relations from being transformed into relations of legal inequality that are based on power and subordination.

Examples of such a penetration of public law into civil law relations are concession contracts and production sharing agreements where state authorities or bodies of local self-government participate as subjects of private law who are burdened with restrictions of a public law character imposed by relevant regulatory legal acts.

Despite the existence of public law elements, these constructions preserve the legal equality of parties, required for civil law contracts, as a condition for the existence and exercise of a private right, and the constructions do not envision a public law function (competence) inherent in subjects of public law.

Therefore, as prescribed by legislation, various “public law agreements between a state body and an undertaking regarding performance by the former [...] of public law function” are not contracts.²⁷

Another example of similar “agreements” is contained in the Law of Ukraine “On Oil and Gas” that provides for the possibility of making agreements between specially authorized central bodies of executive power (as one party) and an applicant for a special permit for the use of oil and gas bearing subsoil (as the other party) regarding obligations of the parties and the ordering of relations between them in the course of using a particular subsoil plot (Articles 1, 10, 11, 5, 7, 20, 22, 23, 26–28, etc.).²⁸

Such types of “agreements” also involve “pre-contractual agreements between a prospective licensor and a prospective licensee ascertaining the expression of will of each of them [...], concerning the terms of obtaining various information about the object of concession and about prospective partners”.²⁹

²⁶ *Berveno*, Teoretyčni problemy dohovirnoho prava Ukraïny [Theoretical problems in the contract law of Ukraine], Kyïv 2006, p. 271.

²⁷ *Šapovalova*, Publično-pravovi uhody pro stratehiju hospodarskoho pryrodokorystuvannja [Public law partnership agreements on the strategy of commercial use of nature], *Pidpryjemnytstvo, hospodarstvo i pravo* 2005, No 2, p. 79.

²⁸ Law of Ukraine “On Oil and Gas”, *Vidomosti Verhovnoï Rady* 2000, No. 50, pos. 262.

²⁹ *Šapovalova*, Public law partnership agreements on the strategy of commercial use of nature, Kyïv 2005, p. 82.

The mentioned preliminary agreements between prospective parties of concession relations may not be considered as agreements since the latter do not create contractual legal relations, instead aiming at their establishment for the implementation of economic development strategies as defined in the agreement.

According to their legal nature, such “agreements” must be recognized strictly as a public law act of administrative-procedural character. Therefore, the use in such cases of the term “agreement” is unnecessary and does not contribute to an adequate reflection of the public law character of relations that are governed by such (quasi) contractual constructions.³⁰

The aforementioned facts give grounds to conclude that the introduction of the category of an economic contract into the system of contracts laid down by the CC is premature and that it is expedient to statutorily enshrine particularities of civil law contracts in an economic area rather than economic contracts.

In any case, the aforementioned conflicts between the provisions of the CC and the EC on obligations do not facilitate definiteness of law and stability of civil transactions, and hence they are to be resolved by a systemic unification of the relevant provisions of the mentioned legislative acts.

V. Property law

1. General

Ukrainian property law is mainly regulated in a socialist way. The main object of real rights is plots of land, of which almost 50%³¹ are in state ownership – as they used to be before – and they are mostly governed by the rules of land legislation, i.e. the rules of public law under the Soviet model.

In fact, we do not have in place a system of limited real rights in plots of land other than ownership and lease. Servitudes are formally named, but in practice their share is not significant.³²

Ukrainian legal researchers have not yet formulated uniform concepts, principles, and types concerning property rights; also the question regarding interpretation of the character of the list of property rights is not resolved

³⁰ *Majdanyk*, supra n. 8, pp. 114 f.

³¹ *Zemelnyj fond Ukrainy stanom na 1 sičnja 2011 roku ta dynamika joho zmin u porivnjanni z danymy na 1 sičnja 2006 i 1 sičnja 2010 rokov*. Materialy Deržavnogo ažhenstva zemelnych resursiv Ukrainy [Land Fund of Ukraine as of 1 January 2011 and the dynamics of its changes from 1 January 2006 and 1 January 2010. Proceedings of the State Agency of Land Resources of Ukraine], available at Official Website of the State Agency of Land Resources of Ukraine, <<http://dazru.gov.ua>>.

³² *Majdanyk*, supra n. 18, p. 146.

(whether it is closed or open); furthermore, the legal nature of some subjective rights is not defined yet: in particular, rights for pledges, retaining, leases, trusts, and the right for a prevailing purchase of property.

The Civil Code of Ukraine recognizes the right of ownership, the right of possession, the right of use (servitude), the right to use land for agricultural purposes (emphyteusis), and the right to build on a land (superficies) (Third Book of the CC “Right of ownership and other real rights”, Articles 316–417).

On the list of substantive rights, the legislation and scholarship also include the right of economic jurisdiction and the right of operative management (the Civil Code of Ukraine, Articles 136 and 137),³³ the right of permanent use of land and the right to land lease (sublease) (Land Code of Ukraine, Article 92), and the right to use (hire, lease) a building or other capital structure (their separate part) arising on the basis of the contract of hiring (lease) a building or other capital structure (their separate part) concluded for a term of not less than three years; mortgage; right of trust; ownership of incomplete construction;³⁴ and the right to a land parcel (share)³⁵ in the lands transferred to the collective ownership of agricultural enterprises³⁶

Further real rights, so-called “hidden” real rights, comprise: a) real rights inferred from the content of CC rules, other laws of Ukraine regarding such rights which are not expressly referred to as real rights, such as secured ownership rights, the right of first refusal to purchase property, pledges, mortgages, and the right of retention; b) real rights provided by special laws and found in the CC of Ukraine in the system of obligatory rights (leases of real property, trust administration of property, etc.).³⁷

These rights under the Civil Law of Ukraine are traditionally treated mostly as obligations and not as a property rights and are located in the CC of Ukraine among the obligations (they are located in the book on obligatory rights).

³³ *Znamenskij (ed.)*, supra n. 24, pp. 255–257.

³⁴ Article 4 of the Law of Ukraine “On state registration of property rights in immovable property and their encumbrances”, 1 July 2004, No. 1952-IV.

³⁵ *Mirošničenko*, *Zemelne pravo Ukrainy: Navčalnyi posibnyk* [Land Law of Ukraine: Manual], Kyïv 2007, pp. 155, 201.

³⁶ See: Laws of Ukraine dated 5 June 2003 “On the procedure for allocation of land plots to owners of land shares (in shares)”; dated 6 October 1998 “On the lease of land”; Decrees of the President of Ukraine: of 10 November 1994 “On urgent measures to accelerate land reform in the field of agricultural production”; of 8 August 1995 “On the order of sharing of land plots transferred to the collective ownership of agricultural enterprises and organizations”; of 15 December 1998, No. 1353 “On guaranteeing the protection of economic interests and improving the social security of peasant pensioners who are entitled to a land parcel share”; Resolution of the Cabinet of Ministers of Ukraine dated 4 February 2004, No. 122 “On the organization of works and the methodology of distribution of land plots between owners of land shares”.

³⁷ *Majdanyk*, supra n. 18, p. 148.

At the same time, the question of the legal nature of these rights is the subject of academic discussion in Ukrainian civilistics. Thus, the obligatory nature of the pledge is justified by the fact that ensuring the fulfilment of the obligation, including the pledge, essentially creates a new obligation, which is accessory (additional), which always arises in connection with the main obligation, and which depends on the will of the other.³⁸

Another approach concerning the real law nature of a pledge is proposed by scholars who consider that a pledge is in general a real right to the exchange value, and not a right to the thing itself, which gives rise to a direct relationship between the person and the property about satisfaction of the creditor's claims at the expense of the realization of the pledged property.³⁹ In view of this, the mortgage, despite the recognition of it by law as existing in the binding legal relationship (Articles 1, 11–14, 16 of the Law of Ukraine “On the Pledge”, Articles 1, 3 and 9 of the Law of Ukraine “On Mortgage”), should generate in a mortgagee a limited real right to the subject of a pledge and has a derivative accessory character from the obligation secured by it.⁴⁰

2. *Disintegration of single ownership right*

Implementation in Ukraine of the policy of economic liberalism is reflected in the trend towards disintegration of single ownership rights by legally recognizing things and other property as objects of an ownership right, extending the regime of ownership rights to individualized obligatory, corporate, and other subjective property rights, and identifying legal interests as objects of civil transactions.

In the sense of Article 316.1. of the Civil Code of Ukraine, the object of property rights can be both a thing and property. In accordance with Article 190.1. CC, property as a special object is a separate thing, a set of things, as well as property rights and obligations.

In view of this, in court practice and legal writing the question of whether the property right may belong to a person based on the right of ownership is resolutely ambiguous.⁴¹

³⁸ *Dzera/Kucnjecova/Lutsya (eds.)*, *Naukovo-praktyčnyi kommentar cyvilnoho kodeksu Ukrainy* [Academic and practical commentary of the Civil Code of Ukraine], Kyiv 2010, p. 44.

³⁹ *Majdanyk*, *Pravova pryroda instytutu ipoteky* [Legal nature of mortgage], *Legal Bulletin* 2009, p. 34.

⁴⁰ *Skidanov*, *Zvernennja stjagnennja na predmet ipoteky za dogovorom ipoteky, ukladenym podruszjam: teoriija i praktika* [Seizure of the subject of mortgage under the mortgage agreement concluded by a spouse: theory and practice], Kyiv 2015, Nos. 4–5, p. 94.

⁴¹ *Postanova Verhovnoho Sudu Ukrainy vid 30.01.2013 u spravi 6-168cs12* [Resolutions of the Supreme Court of Ukraine of 30 January 2013, case No. 6-168zc12], Unified State Register of Court Decisions of Ukraine, available at <<http://reyestr.court.gov.ua/Review/29620575>>.

The Supreme Court of Ukraine noted that the property rights to the real estate which is the object of construction (investing) are not real rights to someone else's property, since the object of these rights is not "someone else's property". They are also not a property right, since the object of construction (investing) does not exist at the time of the establishment of the mortgage, and therefore there can be no ownership of it. At the same time, the Supreme Court of Ukraine has identified a property right as the "right of expectation", which is an integral part of the property as an object of civil rights. At the same time, it clarified that a property right is a limited real right, according to which the owner of this right has certain, but not all, rights to the property, while retaining the privilege to acquire full ownership of an immovable property or other property rights in the future.

Somewhat differently, but retaining the same idea, the Supreme Court of Ukraine defines a property right that is the subject of a mortgage (mortgage) as a right to receive property rights to immovable property in the future (right under a deferral), which occurs when certain, but not all, prerequisites are fulfilled, are necessary, and are sufficient for the acquisition of property rights. In legal teachings, the particularity of property law is that it is both a subjective right and an object of law. Property law as an object of law concerns the issue of the circulation of property rights and the limits to the extension of the concept of ownership. The legislature makes the transfer of property rights a function of the transfer of things (Article 334.1. CC): when a thing is transferred, ownership passes. If this is an immovable object, the valid transfer of the property depends on the state registration.

Another situation arises from the rights to other things (which are also real rights). They can be alienated, that is, they are trafficked objects in themselves. For example, there is a sale of emphyteusis or superficies. However, the sale of a servitude without a land plot on which it is attached is impossible.

Unlike real rights, obligatory legal relationships are usually negotiable. Exceptions are those rights that are inextricably linked to the identity of the creditor, as well as a number of other rights.

The transfer of negotiable property rights may be made by way of retreat or by the rules of alienation of things (that is, they can, like things, be bought and sold, given and exchanged. In other words, property rights are capable of transfer by committing transactions, the subject of which will be the property rights, which follows from the content of Articles 513, 147.2. and 656 of the Civil Code of Ukraine. In this regard, the question arises as to whether it is permissible to admit such rights to the right of ownership of an alienated property right.⁴²

⁴² See *Penner*, *The Idea of Property in Law*, Oxford 2000, p. 115; *Reich*, *The New Property*, Yale 1964, pp. 733 ff.; *Alexander*, *The Concept of Property in Private and Con-*

In this regard, it should be borne in mind that the modern dogma and doctrine of Ukraine did not receive the concepts of “new ownership” and “constitutional ownership”, which allow the recognition of non-tangible objects as objects of ownership.

Therefore, if the subject of the contract is property rights, then it cannot be established that they have passed to the acquirer based on the right of ownership.⁴³

Under Article 190 of the Civil Code of Ukraine, property rights are equated to things for the needs of civil transaction turnover, although their essence is completely different. Such an approach to the division of ownership rights evidences that Ukrainian civil law and legal writing is moving towards a broad understanding of ownership and property rights based on the ideas of “property”, which allows the recognition of tangible object and alienated property rights as a subject matter of property rights.

VI. Inheritance law

1. Principles and place of inheritance law in the system of Ukrainian law

Ukrainian inheritance law is regarded as a sub-branch of civil law, regulating the succession relation in the estate of the deceased. Ukrainian legal thought has developed an approach in which the law of inheritance also regulates other conditions which cannot be directly attributed to the inheritance, for example, the composition of the testament, as well as its amendment and annulment.⁴⁴ However, this approach is the subject of academic discussion. In this context, it is logical that the rules on the form of contracts are an element of contract law. If testamentary freedom is part of inheritance law, the rules on the form of the testament, which by its legal nature is a unilateral authority, should also be included as a part of contract law, as the general rules on obligations and contracts are to apply to the legal relations that have arisen from unilateral authorities in accordance with Article 202.5. of the CC of Ukraine.

Determinative features of inheritance law are reflected in the principles of freedom of will (of the testator and his heirs), universality of hereditary succession, the family nature of inheritance, the sequence under intestate succes-

stitutional Law: The Ideology of the Academic Turn in Legal Analysis, Columbia 1982, pp. 1570 ff.

⁴³ *Spasibo-Fateeva/Krat/Pečenyi*, *Ob’'ekety graždanskich prav* [Objects of civil rights], Charkiv 2015, p. 476.

⁴⁴ *Zaika/Rjabokonj-Soltys*, *Spadkove parvo – Navčalnjy posibnyk* [Inheritance law – Tutorial], Kyiv 2009, p. 8.

sion, the securing of rights and interests of compulsory heirs, and equality of hereditary shares under intestate succession.⁴⁵

Article 1216 of the CC of Ukraine defines inheritance as the transfer of a set of rights and obligations from the deceased to the heirs of the estate. According to the inheritance law principle of universal succession that is recognized by Ukraine, all rights and obligations of the deceased pass in their entirety to the heirs, except for those rights and obligations that are inextricably linked to the personality of the testator.

Under Ukrainian inheritance law, although the executor of the will, the keeper of the estate, the manager of inheritance, and the administrator of estate do take part in hereditary relations, they are not granted the same powers as the previous deceased holder of such rights, i.e. the testator.

The testator's rights and obligations may pass only to his heirs, not to the executor of the will.

In the situations established by the law, singular succession is applied in Ukrainian inheritance law, typical examples of which are succession through testamentary bequest (Articles 1237–1239 CC) and testamentary burden (Article 1240.2. CC).⁴⁶

The essence of the legate consists of a right or a set of rights to be passed on to a particular person or persons. The fulfilment of the legate in accordance with the testament falls on the heir.⁴⁷

Inheritance law logically completes the system of Ukrainian civil law. In this regard a separate final book of the CC of Ukraine is devoted to domestic inheritance law.

2. *Contract of inheritance as a form of quasi-testamentary disposition*

One particular form of a quasi-testamentary disposition is a contract of inheritance as provided by Chapter 90 of the CC of Ukraine (Articles 1302–1308).

Under Ukrainian law a contract of inheritance may only be for consideration, since the alienee is always under the obligation to perform certain acts either before or after the death of the alienor (Articles 1302, 1305 CC).

⁴⁵ See *Zaika/Rjabokonj-Soltys*, *Sučasni tendenziji rozvytku spadkovoho prava (porivnyalnopravove doslidchennja)* [Current trends in the development of inheritance law (comparative legal study)], Kyïv 2015, pp. 22–26; *Zaika*, *Stanovlennja i rozvytok spadkovoho prava v Ukraini* [Establishment and development of inheritance law in Ukraine], Kyïv 2007, p. 46.

⁴⁶ *Annenkov*, *Sistema russkogo graždanskogo prava – T. VI.: Pravo nasledovanija* [The system of Russian civil law – Vol. VI: Inheritance right], St. Petersburg 1902, pp. 1 f.

⁴⁷ *Ryabokon*, *Spadkove pravovidnošennja v cyvil'nomu pravi* [Hereditary legal relationships in civil law], Kyïv 2002, pp. 58 f.

Under a contract of inheritance, the alienee acquires the right to the property of his legal predecessor not during the lifetime of the alienor, but after his death.

Under a contract of inheritance, property passes to the ownership of the alienee (Article 1302 CC). Thus, only property over which the alienor has an ownership right may constitute its subject.

The rules of inheritance law are not applicable to a contract of inheritance.

When determining the legal nature of a contract made between the parties, it is the clause relating to the moment of transfer of the ownership right in property that courts will pay attention to.

In particular, if the parties conclude a contract of inheritance but according to the terms of such contract the ownership right in the subject matter of the contract passes at the time of signing the contract, the form and nature of this juristic act evidence that under the requirements of Article 744 of the CC the alienor and the alienee have entered into a contract for lifelong maintenance (care) and not a contract of inheritance.⁴⁸

Thus, Ukrainian law (Article 1302 of the CC of Ukraine) regards a contract of inheritance as a contract aimed at the transfer of property into the ownership of another rather than as a contract which gives rise to a right of inheritance. This implies that the alienee is subject to the norms of inheritance law, these including: liability for the debts of the testator to the amount of the value of the property (asset) received under the contract of inheritance; deduction of a compulsory share from the property; the necessity of accepting inheritance within a prescribed period of time and in accordance with the prescribed rules in order to become a legal heir; and issuance of a certificate of inheritance in the cases specified in the German Civil Code.⁴⁹

The German legal approach treats an inheritance contract as a special legal instrument (*negotium sui generis*). Its subject matter is not the alienation of property but the right to inheritance, which may concern all the property of the testator (universal succession) or part of the property (singular succession).

In Ukrainian legal writing, a contract of inheritance is usually regarded as an atypical real-obligatory juristic act for alienation and service. The alienee has to provide services for the benefit of the alienor or a third party in exchange for the transfer of property into the ownership of the alienee upon the death of the alienor.⁵⁰

⁴⁸ See, for example: *Rišennja Korolëvskoho rajonnoho sudu m. Shtomyra vid 12 bezreznja 2008 roku (sprava No 2-485/08)* [Decision of Korolovsk District Court of Zhytomyr city of 12 March 2008 (case No. 2-485/08)], available at <<http://www.reystr.court.gov.ua>>.

⁴⁹ *Kurdinovskij, Dogovori o prave nasledovanija* [Contracts on inheritance right], Odessa 1913, pp. 80 f.

⁵⁰ *Majdanyk, Spadkovyj dohovir u cyviljnomu pravi Ukrainy* [Contract of inheritance in the civil law of Ukraine], *Časopys Chmel'nitskoho universytetu upravlinnja ta prava* 2007, p. 98.

What makes the understanding of a contract of inheritance even more difficult is that despite being placed in the book “Inheritance Law”, it nevertheless does not constitute a ground for the alienee to acquire a right of inheritance.

The institution has a closer connection with a sub-branch of the law of obligations, rather than with inheritance law, since it serves as a type of contract for the transfer of property into the ownership of the alienee. For the right of inheritance to arise out of the contract of inheritance, there must be some other facts which are extrinsic to this contract – e.g. being in a relationship of marriage or kinship, living as one family with the testator, or being supported by the testator – which give grounds for choosing a certain person for an inheritance or for making a will for the benefit of this person.

In contrast to the rules on acceptance of an inheritance (Articles 1268–1270 of the CC of Ukraine), under a contract of inheritance the alienee acquires ownership of the alienor’s property immediately after his death and does not have to perform any additional actions.

Under this contract, it is not all the rights and obligations of the testator but only the ownership right in property that passes to the alienee.

In other words, inheritance intermediates relations of universal succession, while the contract of inheritance intermediates relations of singular succession. An inheritance is gratuitous, whereas a contract of inheritance is a juristic act made for consideration.⁵¹

Ukrainian court practice similarly does not recognize the contract of inheritance as a form of inheritance.

In particular, a compulsory share is not withheld from property that passes to the ownership of the alienee upon the death of the alienor and the alienee is not under an obligation to satisfy claims of the alienor’s creditors.⁵²

Thus, the construction of a contract of inheritance under Ukrainian law, a contract which found its place among the norms of inheritance law but which does not constitute an independent type of inheritance (unlike an inheritance under a will or as a matter of law), significantly differs from the traditions of inheritance law of some European countries.

VII. Family and labour law: Controversial branch formation

In Ukrainian legal scholarship, family law is regarded as a system of legal norms governing non-property and property relations arising from marriage, family, relationships, adoption, taking children to the family for upbringing. There are basically two approaches to the place of family law in the Ukrainian

⁵¹ *Zaika/Rjabokon’-Soltys*, supra n. 45, p. 156.

⁵² See Section 28 of the resolution of the Plenum of the Supreme Court of Ukraine “On court practice in inheritance cases” of 30 May 2008, No. 7.

legal system: according to the first approach, family law is a sub-branch of private law,⁵³ and according to the second, family law is an independent branch of Ukrainian law that has its own – distinct from private law – subject matter and methods of legal regulation.⁵⁴ It is expedient to treat family law as a special private law formation to which norms and institutions of civil law apply, considering particularities provided for by the provisions of family law.

Another example of a branch of law is labour law, which considers labour relations as an independent area of law,⁵⁵ primarily as part of public law. An exception is when civil law norms extend to labour relations in circumstances directly provided by legislative acts regarding labour. The legislation recognizes individual (contractual) labour relations as a type of private relations and as an area of private law.

In the Ukrainian legal scholarship, however, the theoretical reasoning of a public law regulation of labour relations prevails. Such an approach is largely based on – as formed in the Soviet legal era – the disavowal of, first, a hiring nature being associated with work and, second, any identification of an employment agreement as an agreement for the purchase and sale of a workforce, i.e. with a property-based juristic act.

What deserves support is the understanding of an employment agreement as a non-gratuitous two-party juristic act, a mutual agreement between an employer and an employee regarding employment on certain terms and conditions.⁵⁶

An autonomous (contract) legal regulation of labour relations is based on private law foundations and is determined by the activity of participants in a legal relationship on the basis of their independence and equality.⁵⁷

⁵³ See *Charytonov (ed.)*, *Simejne pravo Ukraïny – Pidručnyk* [Family law of Ukraine – Textbook], Kyïv 2011, p. 264; *Majdanyk*, supra n. 8, p. 472; *Simejne pravo Ukraïny – Pidručnyk* [Family law of Ukraine – Textbook], Kyïv 2010, p. 320; *Charytonov*, *Do pytannja misca simejnogo zakonodavstva u pravovij systemi Ukraïny* [As to the issue of the place of family legislation in the legal system of Ukraine], *Visnyk Charkivskoho nac. Universytetu imeni V.N. Karazina* 2010, pp. 399–404; *Djakovyč*, *Simejne pravo Ukraïny – Navčalnyj posibnyk* [Family law of Ukraine – Tutorial], Kyïv 2012, p. 552.

⁵⁴ See *Červonyj (ed.)*, *Simejne pravo v systemi prava Ukraïny – Pidručnyk* [Family law in the legal system of Ukraine – Textbook], Kyïv 2004, p. 400; *Bodnar*, *Simejne pravo v systemi prava Ukraïny* [Family law in the legal system of Ukraine], *Pryvatne pravo* 2013, pp. 129–134.

⁵⁵ See *Pylypenko (ed.)*, *Trudove pravo Ukraïny – Pidručnyk* [Labour law of Ukraine – Textbook], Kyïv 2014, p. 552; *Dmytrenko*, *Trudove pravo Ukraïny – Pidručnyk* [Labour law of Ukraine – Textbook], Kyïv 2009, p. 39.

⁵⁶ *Lebedev*, *Trudovoe pravo: Problemy obščej časti* [Labour law: Problems of the general part], Tomsk 1998, available at <http://www.pravo.vuzlib.org/book_z546_page_20.html>.

⁵⁷ *Diveeva*, *Častnopravovye osnovy regulirovanija trudovykh otnošenij: Monographija* [Private law foundations of labour relations regulation: Monograph], Barnaul 2010, p. 152.

Today there is a growing trend towards introduction into labour relations of general civil constructions, including aspects like penalty, invalidity of an employment contract, and combination of civil and employment contracts in certain areas of labour relations (e.g. professional sports and the recruitment of seamen).

At the same time, the pragmatic reason behind the special position of labour law likely lies in the fact that its system comprises individual contract law, including the right to strike as a special method of negotiating.

These trends evidence a gradual approximation of the legal regimes of civil and labour relations as an objective prerequisite to a doctrinal understanding of the system of labour law as a combination of two of its sub-branches, specifically private/individual contract labour law and public/collective contract labour law.

VIII. Corporate law

1. System of legal persons

In terms of methodology, there are two different systems of legal personage in Ukrainian law: the system provided for by the CC and the system under the EC of Ukraine.⁵⁸

Under the CC of Ukraine, legal persons are divided into public law legal persons and private law legal persons (Article 81 of the CC). Legal persons may be set up in the form of companies, institutions, and other forms established by the law (Article 63 of the CC).

Under the EC of Ukraine, depending on the manner of formation in general (foundation) and the formation of the authorized capital, legal persons are divided into unitary and corporate enterprises. Unitary enterprises mean state and communal enterprises as well as enterprises based on the property of association of citizens, on the property of religious organizations or on private property of the founder (Article 63.3.–63.5. EC).

Other laws provide for other forms (types) of legal persons (charity organizations, credit unions, pension funds, religious organizations, collective agricultural enterprises, farms, private farms, associations of enterprises, etc.).

Ukrainian law does not contain an exhaustive list of the types of legal entities (persons). As a result, the Ukrainian system of legal persons has been formed under economic and legal criteria, which is reflected in the recognition of an enterprise as an independent form of a legal person along with companies and institutions.

⁵⁸ *Vasyl'ovyč (ed.)*, *Korporatyvne pravo Avstrii ta Ukraïny: Monohrafija* [Corporate law of Austria and Ukraine: Monograph], Kyïv 2015, p. 150.

At present, according to the classification of organizational forms of participants in the economy, there are more than 80 legal forms of entrepreneurship,⁵⁹ which impedes legal definiteness and sustainable development in the economic area.⁶⁰

The main remnant of the Soviet past in the system of legal entities that is provided by the Economic Code of Ukraine are unitary enterprises (state and communal). Each represents an independent organizational and legal form different from corporate legal entities, which the Ukrainian legislature constantly refuses to transform into economic associations. The legislature has not even agreed to recognize that there is a need to create new unitary enterprises. As a result, most of the existing unitary enterprises are inefficient.

European law does not provide for such types of non-commercial legal entities as in Ukraine. In Europe, there are eight types, and in Ukrainian law there are more than thirty. But from the point of view of civil law, there is no difference between them.

It was supposed that with the adoption of the Civil Code of Ukraine these thirty forms would be reduced to one or a maximum of two (non-entrepreneurial societies, institutions). However, this was not achieved due to the simultaneous adoption of the Economic Code of Ukraine, which provides for a virtually limitless range of types of enterprises.

The need for a logically defined, non-contradictory system of legal entities is a prerequisite for meaningful private law transactions. Counterparties need transparency with respect to the identity, the property and the liability regime.⁶¹

2. Trends in Ukrainian corporate law

In the past few years there have been attempts⁶² to harmonize Ukrainian company law with EU company law, in particular with the provisions of the

⁵⁹ Statystyčnyj klasyfikator orhanisazijnych form subjektiv ekonomiky (SKOF), zatverdženyj Nakazom Deržavnoji Služby statystyky Ukraïny vid 29.09.2014 r. No 271 [Statistical classification of organizational forms of subjects of the economy (SCOF), approved by the Order of the State Statistics Service of Ukraine of 29 September 2014, No. 271].

⁶⁰ See *Kochyn*, Non-Entrepreneurial Legal Entities in Ukraine: Application of the European Experience, pp. 221 ff. (in this book).

⁶¹ *Suchanov*, Tol'ko sud'i i učenye v sostojanii napisat' ob'ektivnyj zakon [Only judges and scholars are able to write objective laws], available at <[⁶² Law of Ukraine "On amendments to some legislative acts of Ukraine regarding protection of investors' rights" of 7 April 2016, No. 289-VIII \(which came into force on 1 May 2016\).](https://legal.report/article/03022016/tolko-sudi-i-uchenye-v-sostoyanii-napisat-obektivnyj-zakon#st_refDomain=www.facebook.com&st_refQuery=/>>.</p>
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European Model Company Act (EMCA), which is an instrument of so-called soft law and contains a set of standards in the area of company law.⁶³

Ukrainian company law is defined by three main directions of development: a) introduction of the concept of corporate social responsibility; b) enhancement of standards of corporate governance in joint-stock companies prescribed by the Law of Ukraine “On amendments to some legislative acts of Ukraine regarding protection of investors’ rights” of 7 April 2016, No. 289-VIII (which came into force on 1 May 2016); c) enactment of a separate law on limited liability companies.

a) Concept of corporate social responsibility

The rights of companies have to be assessed in the light of the provisions on corporate social responsibility. For the purpose of ensuring sustainable economic development, American and European company law regulates the activities of companies so as to require an optimal balance of social, environmental and economic influence during the decision-making process. Ukrainian law of companies is at an initial stage of recognizing the role of legal regulation as a means of promoting corporate social responsibility, along with economic, ethical, and philanthropic responsibilities. Currently, the law defines mandatory rules of conduct that aim to ensure corporations will pursue rules and conduct promoting profitability as well as adherence to basic environmental and ethical standards. In particular, the law cannot force a corporation to engage in charity, but it may encourage it.

With respect to corporate charity, a number of issues remain in spite of the attention devoted by legislators and scholars. Ukrainian legislation does not contain rules that regulate the reduction of taxation for business partners who carry out charitable actions. The idea of introducing a presumption of tax rebates deserves support, especially in corporate law, to encourage and inform investors and to provide them with guarantees.⁶⁴

Today in Ukraine, there are no standards for evaluating the degree of completeness and the complexity of investment processes within the framework of social programmes. Usually, one encounters three groups of criteria for a qualitative assessment of social investments. These address in particular: a) the institutional design of social policy; b) a system of accounting for social programmes and measures for their implementation; c) the complexity of the social investment process. As to the latter topic, there are five lines of in-

⁶³ *Jurhelevyč*, *Evropejskij modelnyj zakon pro kompaniji: najkrašča jevropejska praktyka ta uroky dlja Ukraïnu* [European Model Company Act: best European practice and lessons for Ukraine], *Bulletin of the Centre of Economic Law* 2016, p. 16.

⁶⁴ *Ivaščenko*, *Teoretyčni aspekty rozvytku socialno vidpovidalnoho investuvanna v Ukraïni* [Theoretical aspects of the development of socially responsible investment in Ukraine], available at <http://nbuv.ua/j-pdf/Oif_apk_2014_3_16.pdf>.

quiry: the development of company staff; the health and working conditions of personnel; environmental activities and resource saving; support of fair business competition; and development of the local community.

Ukrainian company law must implement the statement found in paragraph 3.1 of the European Commission Communication titled “The renewed EU strategy for 2011–2014 on corporate social responsibility”, setting out a new definition of corporate social responsibility as “the responsibility of enterprises for their impacts on society”.⁶⁵

In Ukraine, the main actors as regards corporate social responsibility will be joint-stock companies (JSC) and limited liability companies (LLC) because they are the largest and most widespread participants in economic relations that directly affect social, innovative, environmental, and other aspects of the life of the state and society.

b) Enhancement of standards of corporate governance in joint-stock companies

Law No. 289-VIII foresees the introduction of a mechanism regarding the duty of minority shareholders of joint-stock companies to sell at the request of a shareholder, who is the owner of 95% of the shares; conversely, the rights of such minority shareholders require the redemption of their shares (so-called sell-out and squeeze-out).

This approach is based on the relevant provisions of the EU Bonding Directive (2004/25/EC – Shareholder), whereby a shareholder who owns more than 90% of a company’s shares and a corresponding share of votes has the right to require other shareholders to sell shares at a fair price. Minority shareholders are required to sell their shares within four weeks. A key instrument for protecting minority shareholders is the presence of a balancing rule on sell-out, i.e. the shareholder’s right to demand redemption of their shares from the owner of more than 90% of the shares. Unlike the Directive, EMSA extends squeeze-out/sell-out rules not only to public but to all limited liability companies.

Law No. 289-VIII provides for new instruments for the protection of investors (foreign and national) and minority shareholders. It has been proposed to introduce a rule that significant agreements and agreements of personal interest will require agreement at the level of the supervisory board or meeting participants. In addition, in the case of a change in the control of the company, and in some other cases, the minority participant will be protected by the right to demand the redemption of its share, the so-called sell-out (one of the Doing Business criteria).

⁶⁵ Brussels, 25 October 2011, COM(2011) 681 final; see *Lukač*, Teoretýčni problémy pravovoho rehluvannja korporatyvnych vidnosyn v Ukraïni [Theoretical problems associated with legal regulation of corporate relations in Ukraine] Kyïv 2015, p. 90.

The National Securities and Stock Market Commission will have the right to decide on limiting the right of owners of a controlling or significant shareholding, as well as persons affiliated to such an owner, regarding the enjoyment of the right to vote for ordinary shares that they acquired on the basis of an agreement that led to their acquisition of ownership of these shares and regarding their taking part in the management of a joint-stock company in any way.

In addition, Law No. 289-VIII contains other progressive norms, these including an obligation to pay dividends, elimination of the rules that allow an unfair participant to block the work of the partnership, and various mechanisms for negotiating significant deals.

In the event of a decision of the state authority to limit the rights of the owner of a controlling or significant shareholding, the ordinary shares of such shareholders shall not be taken into account when determining the quorum and when voting in the organs of a joint-stock company.⁶⁶

Ukrainian company law does not contain clear and practically applicable provisions about corporate agreements, which in foreign jurisdictions have been termed as agreements between shareholders (shareholders agreements).

Ukrainian legislation establishes a right to enter into joint-stock agreements. According to Article 29 of the Law of Ukraine “On Joint-Stock Companies”, the conclusion of an agreement between shareholders is possible if it is stipulated by the charter of JSC. However, the provisions of this law are fuzzy and in practice are not used because of the risk of an ambiguous interpretation of this rule.⁶⁷

The current Ukrainian legislation does not allow agreements between the members of the LLC (the so-called corporate agreement) to be concluded because of their inflexibility. The draft law on LLCs grants the right to apply a corporate agreement, which is an effective means of protecting the rights of investors in many foreign jurisdictions.

The above-mentioned changes allow shareholders and participants of Ukrainian companies to regulate relations between themselves, relying on the principle of freedom of contract. Ukrainian law does not provide such a possibility to the shareholders, and therefore they are looking for it in other jurisdictions.

c) Enactment of a separate law on limited liability companies

The main form of business associations in Ukraine is a limited liability company. According to statistics, there are now about 500,000 LLCs in the coun-

⁶⁶ *Babyč*, *Iniciativnyj chod* [Initiative move], *Juridičeskaja praktika* 2016, p. 15.

⁶⁷ Draft Law “On Amendments to Certain Legislative Acts of Ukraine on Increasing the Level of Corporate Governance in Joint-Stock Companies”, available at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=5591>.

try (as a basis of comparison, there are 16,000 JSCs). For the regulation of limited liability companies, a separate law is envisaged. Ukraine has never had (and still does not have) a separate law on LLCs, and the issue of setting up and operating the LLC was regulated by an article of the Law of Ukraine "On Economic Associations" (Article 15).

Regulation in this area is outdated and does not meet modern market requirements, above all the expectations of foreign investors and high-performing Ukrainian businesses.⁶⁸

IX. State and economic activity

1. Historical background

Unlike the Civil Code of Ukraine 2003, according to which the state acts in civil relations on equal terms with other participants in these relations (Article 167.1.), Soviet civil law recognized the state as a special participant in civil law with a privileged legal status in civil relations.

This principle found expression in Article 20 of Fundamentals of the Civil Legislation of the Union of Soviet Socialist Republics and the Union Republics of 1961 (Fundamentals of Civil Law 1961), according to which socialist property (i.e. state, collective-cooperative, and trade union-social property) was recognized as the economic basis of the Soviet system. Private property, which was recognized as a derivative of socialist property, was one of the means of fulfilling needs of citizens, and while moving towards communism these needs were increasingly satisfied at the expense of public funds.⁶⁹

Since according to Article 21 of the Fundamentals of Civil Law 1961, the right of ownership in land, its subsoil, water, and forests could belong only to the state itself, they were considered inalienable objects: they could not be owned by cooperative collective farms and public organizations and citizens.

Unlike the property of individuals and legal entities of private law, it was virtually impossible to draw charges on the property of the state, state bodies, or state organizations so as to recover the debts of the state and state organizations to the benefit of their creditors.

Thus, according to Part III of Article 22 of the Fundamentals of Civil Law 1961, property which constitutes the main means of state-owned organizations is not subject to alienation to citizens, except for certain types of property, the sale of which to citizens was allowed by law.

⁶⁸ *Babyč*, supra n. 66, p. 15.

⁶⁹ *Ioffe/Tolstoy*, *Osnovy sovetskogo graždanskogo zakonodatel'stva* [Fundamentals of Soviet Civil Legislation], Leningrad 1962, p. 10.

When distinguishing between basic and working capital, their cost and service life were taken into account. Basic means were recognized as items which served at least one year and cost at least the amount specified by law. In fact, all of the most valuable assets of organizations, in particular buildings, structures, equipment, and vehicles, were categorized as basic assets.⁷⁰

Enterprises, buildings, structures, equipment, and other property that related to the basic means of state-owned organizations could not be the subject of a pledge, and they could not be recovered through the claims of creditors (Part IV of Article 22 of the Fundamentals of Civil Law, 1961).

Under Soviet law, creditors were prohibited from drawing charges not only on basic assets, but also on a wide range of the working capital of self-supporting state organizations. The property of state budget institutions was completely blocked from the collection of creditors.⁷¹

Today, the Economic Code of Ukraine establishes diverse types of legal persons, which have their roots in the Soviet doctrine of different ownership forms. Following this doctrine, legal persons are divided into private enterprises, enterprises based on private ownership of a citizen or the subject of entrepreneurship (legal entity), enterprises of collective ownership, communal enterprises, state enterprises, and enterprises founded on the basis of association of property of various forms of ownership (Article 63.1. EC).

2. State enterprises under the Economic Code of Ukraine

a) Unitary state enterprises

Article 73 of the Economic Code of Ukraine provides for unitary state enterprise as one type of unitary enterprises. Under this provision, a unitary state enterprise is formed by the competent authority of state power. It is a separate legal entity, but does not constitute a corporate legal person. The assets of the state unitary enterprise remain in state ownership. This organizational form has its roots in Soviet law, where the majority of legal entities were created and managed by the state. Under such a scenario, quasi-legal entities did not qualify as the owners of property. All the property they administered remained state property. Thus, the state-owned enterprises were confined to exercising a right of operative management or a right of economic jurisdiction, which represented the legal title to property, similar to the real property rights to someone else's property.

⁷⁰ Regulations on accounting reports and balances of state, cooperative (except collective farms) and public organizations, Approved by the decision of the Council of Ministers of the USSR of 12 September 1951, No. 3447, available at <http://www.libussr.ru/doc_ussr/ussr_4826.htm>.

⁷¹ See: List of types of property that cannot be levied on execution sheets and documents equivalent to them – Approved by resolution of the Council of Ministers of the RSFSR on 28 July 1947.

The above-mentioned Soviet methodology of a state-owned enterprise is generally preserved in the law of Ukraine and reflected in the provisions of the Economic Code of Ukraine in respect of the legal regime governing the property of unitary state-owned enterprises.

The state authority whose sphere of management includes the enterprise is the representative of the owner and performs its functions within the limits defined by the Economic Code and other legislative acts (Article 73.2. EC). The creation of a unitary state enterprise in the regulatory order presupposes publication by the state authority – whose sphere of management includes the enterprise – of the administrative act regarding the establishment of the enterprise.

A unitary state enterprise is a juridical person and has separate property, an independent financial balance, accounts in banking institutions, a seal with its name, and an identification code (Article 62.4. EC). A unitary state enterprise is not responsible for the obligations of the owner and the authority in whose sphere of management it is included (Article 73.5. EC).

b) The right of economic jurisdiction and the right of operative management

The right of economic jurisdiction and the right of operative management are the real rights that form the basis of the legal regime governing the property of state unitary enterprises.

The right of economic jurisdiction is a real right held by the state enterprise which possesses the property and may dispose of it, subject to statutory constraints specified in the Economic Code. Although the owner of the property has to refrain from interfering with the operational and economic activities of the enterprise, he may nonetheless control the use and preservation of the property. Moreover, the enterprise's power to dispose of the property applies only to certain types of property and transactions. Disregard for these constraints or failure to seek the owner's consent – where required by law – triggers a finding of nullity. The owner of the property, subject to the right of economic jurisdiction, exercises control over the use and preservation of the property without interfering in the operational and economic activities of the enterprise.

As to the protection of the right of economic jurisdiction, the provisions of the law established for the protection of property rights apply. The state enterprise which carries out economic activities on the basis of the right of economic jurisdiction is entitled to having its rights protected against any interference, including that by the owner (Article 136.1.–136.3. EC).

Unitary state enterprises act as state commercial enterprises or state-owned enterprises (Ukr. “казенне підприємство”; Rus. “казенное предприятие”; Article 73.8. EC).

The right of operative management is a right of an entity that possesses, uses, and disposes of the property conferred to it by the owner (or the body

authorized by him) for carrying out non-commercial economic activities, within the limits established by the Economic Code and other laws as well as by the owner of the property (or the body authorized by him).

The owner of the property has the right to remove from the entity surplus property, unused assets, and property used for other purposes as originally stipulated.

The right of operative management is protected by law in accordance with the provisions established for the protection of property rights (Article 137.1.–137.3. EC).

c) Further forms of state enterprises

A state commercial enterprise (Articles 74, 75 Economic Code) is a subject of management that acts on the basis of a statute or model statute and that is responsible for the consequences of its activities for all its property rights under economic law, in accordance with the Economic Code and other laws adopted in accordance with the specified code (Article 74.1. EC).

The property of a state-owned commercial enterprise is secured by it on the right of economic jurisdiction (Article 74.2. EC).

The state and the authority to whose sphere the state commercial enterprise belongs is not liable for its obligations, except in cases stipulated by the Economic Code and other laws (Article 74.5. EC).

State-owned enterprises (Article 76 EC) are created in the branches of the national economy in which: the law authorizes the carrying out of economic activity only by state enterprises; the main (more than fifty per cent) consumer of products (works, services) is the state; free competition of producers or consumers is impossible under the prevailing conditions; production is predominantly (more than fifty per cent) of socially necessary products (works, services) which, according to the prevailing conditions and the nature of the need the product satisfies, cannot, as a rule, be cost-effective; or the privatization of property complexes held by state-owned enterprises is prohibited by law.

A state-owned enterprise is created by a decision of the Cabinet of Ministers of Ukraine. Reorganization and liquidation of state-owned enterprises are carried out by a decision of the body whose competence includes the creation of this enterprise (Article 76.2. EC). The state-owned enterprise exercises the right of operative management over its assets to the extent specified in the statute of the enterprise (Article 76.3. EC). The body in whose sphere of management a state-owned enterprise falls approves the statute of an enterprise, appoints its manager, grants permission for the execution of a state enterprise's economic activity, and defines the types of products (works, services) whose production and sale is subject to the permit at issue (Article 76.5. EC).

A unitary state enterprise (commercial and government enterprise) is a unitary enterprise which is created by one founder, specifically a state authority in whose sphere of management the enterprise falls.

Unlike a unitary enterprise, a corporate enterprise is created, as a rule, by two or more founders by means of a joint decision (contract).

Corporate enterprises refer to cooperative enterprises, enterprises set up in the form of commercial companies, and other enterprises, including those based on the private property of two or more persons (Article 63.5. EC).

X. Summary

The conducted analysis of the development of Ukrainian private law allows the following conclusions:

1. The Europeanization of Ukrainian private law should be considered as a formation process balancing the originality of Ukrainian law and the influence of European law on its development.

2. Ukraine is a nation whose law and legal system are in post-socialist transition. Ukrainian private law is also at the stage of transition from socialist to post-socialist law, inherent to which is a forced combination of mechanisms for a planned administrative normativism of the law alongside a liberal understanding of the law.

Substantial portions of Ukrainian private law institutions remain unreformed and operate under the methodology of socialist law, especially when it comes to the interpretation of legal rules, remedies, the system of legal persons, real and contractual law, etc.

3. The introduction – as caused by globalization and European integration – into Ukrainian law of methodologies and legal constructions designed for a real functioning of the principle of rule of law (not only of its legality component) often conflicts with the traditions of law formed during the period of socialist law.

As a result, the expected positive effect of the use of mechanisms that are traditional for countries with a liberal understanding of law is often levelled.

4. Ukrainian private law requires the introduction of European legal methodology and application, where dualism of law is seen as a basic criterion for the division of the system of law into private and public law spheres.

The dualism of law requires replacement of the socialist system of branches of law (which inherently combines basic and complex branches of law as

well as the recognition of the subject and method as a criterion of a branch of law) with a liberal system of law featuring private and public law structures (areas, branches, and institutes).

5. The implementation of European legal tradition in Ukrainian private law must be carried out with regard for a comparative analysis of the most efficient and acceptable foreign private law models as well as the historical and cultural traditions of the Ukrainian legal order in order to achieve a greater flexibility and stability of law with the help of appropriate legal constructions.

Modernisation of Ukrainian Cross-border Litigation and Conflict Law Relating to Contractual Disputes in Commercial Matters

On the Path Towards the European Area of Justice

*Volodymyr Korol**

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I. Introduction

Located between the regional economic centres of the European Union and the Eurasian Economic Union, Ukraine understands itself as an integral part of modern Europe, both geographically and culturally.

Although it is potentially attractive for competitive European companies, Ukraine remains *terra incognita* for a vast majority of them, who consider it to lie on the periphery of Europe and to bear great trade, investment, and legal risks. In such a context, it is important to create a predictable legal environment for the cross-border business transactions of European and Ukrainian

* All internet sources cited were available on 15 June or 6 August 2018.

companies to help avoid, or at least minimise, the legal risks of exercising external-market access strategies.

This requires institutional and legal modernisation, including the reception of European private law scholarship and legislative approaches as a whole, and regarding cross-border contractual obligations in the field of private international law in particular.

Either before or after disputes arise from or in connection with international commercial contracts (named “foreign economic contracts” in Ukrainian legislation)¹ between European and Ukrainian counterparties, with the prospect of involvement in judicial proceedings in Ukraine, a wide range of important questions for European business entities arise, including:

- procedural law issues concerning the legislative grounds of Ukrainian courts’ international jurisdiction, the legal consequences of parallel proceedings (*lis pendens*), and the recognition and enforcement of foreign judgments in Ukraine;
- conflict-of-law issues concerning the law applicable to contractual obligations (general aspects and specificities of contracting parties’ private autonomy, an overall rule of thumb for courts to determine the law governing a contract in the absence of parties’ choice of law, scope of the law governing a contract).

The present paper addresses these and other closely connected questions for the purpose of analysing Ukrainian law in the fields of cross-border litigation and conflict law relating to contractual disputes in commercial matters.

In order to properly address all of the aforementioned issues, attention will be focused on the most relevant sources of law, notably including key legal acts and Ukrainian international treaties at the multilateral and bilateral levels, which will be researched in depth in the appropriate context.

¹ “Foreign economic contract” is a term inherent to the legislative and conceptual framework of legal scholarship in Ukraine and other post-Soviet states, where the term international commercial contract is gaining ground. Although the two terms are somewhat synonymous, they are characterised by certain individual characteristics. – The term foreign economic contract is also familiar to Chinese legislation. Specifically, it was a cornerstone of the special Foreign Economic Contract Law (known according to an alternative English translation as the Law of the People’s Republic of China on Economic Contracts Involving Foreign Interests). This law and two others – The Economic Contract Law of the People’s Republic of China and the Law of the People’s Republic of China on Technology Contracts – were simultaneously annulled when the Contract Law of the People’s Republic of China came into effect.

II. International jurisdiction in contractual disputes and related matters

1. European–Ukrainian treaties regarding legal cooperation and international jurisdiction

a) International law framework for associated legal cooperation

The Association Agreement between the European Union, the European Atomic Energy Community and their Member States on the one side, and Ukraine on the other side, is considered to establish the international law preconditions for, among other things, the further development of mutually beneficial cooperation between European and Ukrainian business entities.

Pursuant to provisions of the Association Agreement, the development of EU–Ukrainian relations in different fields, including trade relations in the Deep and Comprehensive Free Trade Area (DCFTA), which became operative on 1 January 2016, is expected to be carried out in compliance with the principles of the rule of law (Art. 2) and the free-market economy (Art. 3).² Along with the set of rules in Title IV, “Trade and trade-related matters,” which concern the DCFTA, important consensus was reached concerning legal cooperation. This includes judicial cooperation on the basis of bilateral and multilateral legal documents, particularly the Conventions of the Hague Conference on Private International Law,³ *inter alia*, in the field of litigation (Art. 24 of Title III, “Justice, Freedom and Security”).⁴

The Association Agreement contains a set of rules referring to specified EU acts of secondary legislation, including regulations in different fields.⁵

² Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3.

³ As a sovereign state, Ukraine has acceded to some Conventions of the Hague Conference on Private International Law, for instance: the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=41>>; the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, <<https://www.hcch.net/en/instruments/conventions/specialised-sections/evidence>>.

⁴ *Supra* n. 2.

⁵ For instance, in the field of competition, Art. 256 of the Association Agreement stipulates that the following provisions shall be implemented:

- Art. 30 of the Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty;
- Art. 1 and Art. 5(1) and (2) of the Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation);
- Arts. 1, 2, 3, 4, 6, 7 and 8 of the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices;

Nevertheless, this Agreement is silent regarding implementation of the EU instrument on the unification of procedural law rules, Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation (recast)),⁶ which is applied with some exceptions from 10 January 2015. Given that this Regulation repealed the Brussels I Regulation,⁷ it is important to pay attention to the provision of Art. 73(3) of the Brussels I Regulation (recast) relating to, among others things, Ukraine as a third State. It stipulates that the Brussels I Regulation (recast) shall not affect the application of bilateral agreements (treaties) between an EU Member State and a third State that were concluded before the date of entry into force of the Brussels I Regulation and which concern the same matters governed by the Regulation in force.

Taking into account that the Lugano II Convention concerning issues of jurisdiction as well as the recognition and enforcement of judgments in commercial matters⁸ is legally binding for almost all EU Member States (all except Denmark), it is worth noting that one cannot exclude the accession of Ukraine to this Convention. Indeed, Ukraine is also vested with a right to accede according to the provisions of Art. 70(1)(c) under fulfilment of the conditions stipulated in Art. 72 of this Convention, including obtaining the unanimous agreement of the Contracting Parties.

b) Bilateral treaties on legal assistance between EU Member States and Ukraine

Given that accession to the multilateral international instrument remains a future prospect, bilateral treaties between Ukraine and EU Member States currently play a significant role in a wide range of important aspects in the fields of cross-border litigation and conflict law. They specifically contain procedural law rules concerning international jurisdiction, the recognition and enforcement of foreign judgments, as well as conflict-of-law rules relating to contractual obligations.

Two groups of EU Member States can be identified: the first kept international treaties of the Soviet Union operational in their bilateral relations with

– Arts. 1, 2, 3, 4, 5, 6, 7 and 8 of the Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Art. 81(3) of the Treaty to categories of technology transfer agreements.

⁶ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1.

⁷ Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

⁸ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2007 L 339/3.

Ukraine but subsequently concluded new bilateral treaties in the twenty-first century,⁹ while the second concluded appropriate bilateral treaties with Ukraine as a sovereign state as far back as the 1980s.¹⁰

None of these bilateral treaties, nor the Association Agreement, can establish rights and duties for European and Ukrainian business entities because they do not project a direct legal effect in Ukrainian legislation. These treaties are implemented in Ukrainian legislation by means of their individual incorporation through the adoption of separate laws on ratification.¹¹

According to provisions of the Vienna Convention on Succession of States in respect of Treaties (1978), in particular the rules in its Part III, “Newly Independent States”, concerning Multilateral Treaties (Section 2) and Bilateral Treaties (Section 3), and the Law of Ukraine “On Succession of Ukraine” of 12 September 1991, No. 1543-XII, international treaties of the Soviet Union are operative for Ukraine. Such treaties include the Convention of 1 March 1954 on civil procedure of the Hague Conference on Private International Law (which entered into force for the USSR on 26 July 1967) at the multilateral level, and treaties with certain EU Member States at the bilateral level – for example, the treaty with Finland on legal protection and legal assistance in civil, family, and criminal matters as of 11 August 1978.¹²

⁹ For example, Hungary (prior treaty 1958, new treaty 2002); Romania (prior treaty 1958, new treaty 2005); Greece (prior treaty 1981, new treaty 2002); Cyprus (prior treaty 1984, new treaty 2005).

¹⁰ For example, Poland (signed on 24 May 1993, entered into force on 14 August 1994), Lithuania (signed on 7 July 1993, entered into force on 20 November 1994), Estonia (signed on 15 February 1995, entered into force on 17 May 1996), Latvia (signed on 23 May 1995, entered into force on 12 July 1996).

¹¹ Zakon Ukraïny “Pro ratyfikaciju Ugody pro asociaciju miž Ukraïnoju, z odnijeï storony, ta Jevropejs’kym Sojuzom, Jevropejs’kym spivtovarystvom z atomnoï energii i inšymy deržavamy-členamy, z inšoï storony” [Law of Ukraine “On ratification of the Association Agreement between Ukraine on the one side and the European Union, the European Atomic Energy Community and their Member States on the other side”], 16 September 2014, No. 1678-VII, Vidomosti Verchovnoï Rady Ukraïny 2014, No. 40, pos. 2021; one example is Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Respublikoju Kipr pro pravovu dopomogu v cyvil’nych spravach” [Law of Ukraine “On the ratification Treaty between Ukraine and the Republic of Cyprus on legal assistance in civil matters”], 22 September 2005, No. 2910-IV, Vidomosti Verchovnoï Rady Ukraïny 2006, No. 1, pos. 5. Some other similar laws on the ratification of bilateral agreements on legal assistance between Ukraine and EU Member States will be offered in the relevant context within this paper.

¹² Dogovor meždu Sojuzom Sovetskich Socialističeskich Respublik i Finljandskoj Respublikoj o pravovoj zaščite i pravovoj pomoščï po graždanskim, semejnym i ugovnym delam [Treaty between the Union of Soviet Socialist Republics and the Republic of Finland on legal protection and legal assistance in civil, family, and criminal matters], 11 August 1978, available at <http://zakon2.rada.gov.ua/laws/show/246_008>; for infor-

It is important to point out in this context that while it allows for the reception of international law rules, the Constitution of Ukraine does not directly stipulate the primacy of the rules of international treaties over conflicting rules of Ukrainian legal acts. Indeed, pursuant to Art. 9 of the Constitution of Ukraine, international treaties in force, which have been approved by the Parliament of Ukraine as binding, shall be an integral part of the national legislation of Ukraine.¹³

In 2004, the Law of Ukraine “On International Treaties of Ukraine”¹⁴ was adopted. It contains a special Art. 19 stipulating, first, the application of legally binding international treaties of Ukraine approved by the Parliament as a part of national legislation, under the procedure stipulated for rules of national legislation, and second, the application of international treaty provisions if they differ from the provisions of national legislation.¹⁵

Along with the Law of Ukraine “On International Treaties of Ukraine”, a range of other important laws, such as the Civil Procedure Code of Ukraine (Art. 2.2.)¹⁶ and the Law of Ukraine “On Private International Law” (Art. 3) (hereinafter referred to as the Law of Ukraine on PIL),¹⁷ also recognise the priority application of rules in international treaties over conflicting rules of Ukrainian legislation.

The High Specialized Court of Ukraine for Civil and Criminal Cases pointed out that “solving (overcoming) the conflict between a rule in an international Ukrainian treaty and a rule of Ukrainian legislation when hearing

mation on the application of this bilateral treaty by way of succession, see official site of the Ministry of Justice of Ukraine, <<http://old.minjust.gov.ua/9599>>.

¹³ For further information, see *Šib*, Spivvidnošenja mižnarodnogo ta nacional'nogo prava Ukraïny [Correlation of international and national law of Ukraine], *Viče* 2011, No. 4, available at <<http://www.viche.info/journal/2430>>.

¹⁴ Zakon Ukraïny “Pro mižnarodni dogovory Ukraïny” [Law of Ukraine “On International Treaties of Ukraine”], 29 June 2004, No. 1906-IV, Vidomosti Verhovnoï Rady Ukraïny 2004, No. 50, pos. 540.

¹⁵ This Law replaced the Law of Ukraine “On operation of international treaties in the territory of Ukraine” [Zakon Ukraïny “Pro diju mižnarodnyh dogovoriv na terytorii Ukraïny”], 10 December 1991, No. 1953-XII, Vidomosti Verhovnoï Rady Ukraïny 1992, No. 10, pos. 137. The Law of Ukraine “On operation of international treaties in the territory of Ukraine” contained just a single rule providing that international treaties that have been concluded and properly ratified create an integral part of national legislation and shall be applied in the procedure stipulated for rules of national legislation.

¹⁶ *Cyvil'nyj Procesual'nyj Kodeks Ukraïny* [Civil Procedure Code of Ukraine], 18 March 2004, No. 1618-IV, Vidomosti Verhovnoï Rady Ukraïny 2004, Nos. 40–41, 42, pos. 492.

¹⁷ Zakon Ukraïny “Pro mižnarodne pryvatne pravo” [Law of Ukraine “On Private International Law”], 23 June 2005, No. 2709-IV, Vidomosti Verhovnoï Rady Ukraïny 2005, No. 32, pos. 422.

the case is in the competence of the court”.¹⁸ Consequently, courts carry out the important mission of proper implementation in keeping with the principle *pacta sunt servanda* by executing justice to ensure the unified and correct application of Ukraine’s international treaties.

2. *International jurisdiction of Ukrainian courts*

a) *Exclusive, prorogated and special jurisdiction*

Beginning as early as 2005, the international jurisdiction of Ukrainian courts over contractual disputes between Ukrainian and foreign business entities was determined by the rules of the Economic Procedure Code of Ukraine of 1992.¹⁹ Since the Law of Ukraine on PIL came into effect, international jurisdiction has been determined according to its rules.

When concluding a choice of court agreement, Ukrainian and foreign contracting parties shall take into account legislative provisions concerning the exclusive jurisdiction of Ukrainian courts, which can under no circumstances be derogated from. Such jurisdiction includes cases with foreign elements specifically where immovable property subject to dispute is located in the territory of Ukraine; where a debtor has been established according to Ukrainian law in cases on insolvency; where a dispute is related to: (a) intellectual property rights, which are subject to registration or the granting of a certificate (a patent) in Ukraine; (b) the validity of entries in state registers and cadasters; (c) registration or liquidation of foreign legal persons or entrepreneurs (natural persons) in the territory of Ukraine (Art. 77 of the Law of Ukraine on PIL).

Along with the scope of exclusive jurisdiction, the Law of Ukraine on PIL stipulates a set of formalised legal grounds according to which Ukrainian courts are to exercise jurisdiction and hear cases with foreign elements.

¹⁸ Plenum Vyščogo Specializovanogo Sudu Ukraïny z rozgljadu cyvil’nyh ta kryminal’nyh sparav “Pro zastosuvannja sudamy mižnarodnyh dogovoriv Ukraïny pry zdijsnenni pravosuddja” [Plenum of The High Specialized Court of Ukraine for Civil and Criminal Cases “On application of the international treaties of Ukraine by the courts executing justice”], Postanova [Regulation] No. 13, 19 December 2014, available at <http://sc.gov.ua/ua/postanovi_za_2014_rik.html>.

¹⁹ Hospodars’kyj Procesual’nyj Kodeks Ukraïny [Economic Procedure Code of Ukraine], 6 November 1991, No. 1798-XII, Vidomosti Verchovnoï Rady Ukraïny 1992, No. 6, pos. 56. According to the prior wording of Art. 124 of this codified legal act, the jurisdiction of economic courts included hearing cases with foreign enterprises and organisations under the following conditions: a defendant had its seat within the territory of Ukraine; a branch or representative office of a non-resident was located within the territory of Ukraine; a foreign enterprise or organisation had immovable property in the territory of Ukraine which was the subject of a dispute.

There are several legal grounds which may be applied by Ukrainian courts to determine the appropriate jurisdiction in relation to cross-border contractual disputes. These notably include: (a) prorogated jurisdiction: if parties have concluded a choice of court (prorogation) agreement (Art. 76.1. (1));²⁰ (b) special jurisdiction: if the defendant has its seat or movable or immovable property which can be claimed in the territory of Ukraine, if a foreign (legal person) defendant's branch or representative office is located in the territory of Ukraine (Art. 76.1. (2)),²¹ or if an action or event on which a claim is based occurred in the territory of Ukraine (Art. 76.1. (7)).²²

Additionally, Art. 76 of the Law of Ukraine on PIL contains such grounds as "on other occasions constituted by the law of Ukraine and international treaties of Ukraine",²³ thus allowing the list of legal grounds for international jurisdiction to be considered non-exhaustive. These grounds for international jurisdiction were applied by a Ukrainian court hearing a claim of the plaintiff, a buyer from Latvia, against the defendant, a Ukrainian seller, under an international sale of goods contract. Having taken into account the provision of Art. 20(1) of the bilateral treaty between Ukraine and the Republic of Latvia on legal assistance and legal relations in civil, family, labour, and criminal matters,²⁴ the Economic Court of the Rivne Region recognised itself as the court which is competent to hear the case.²⁵

Case law analysis of Ukrainian courts indicates that prorogation agreements predominate among the grounds of international jurisdiction,²⁶ while other grounds are applied much more rarely.

²⁰ On 21 March 2016, Ukraine signed the Convention of 30 June 2005 on Choice of Court Agreements, which entered into force for the European Union on 1 October 2015.

²¹ This provision of the Law of Ukraine on PIL was applied by the court, for example, in the Economic Court of the Cherson Region, *Shipping Agency Poseidon Ltd (Ukraine) v Avenue Transport Inc (USA)*, No. 923/353/13, 3 April 2013, available at <<http://www.reyestr.court.gov.ua/Review/30548807>>.

²² This provision of the Law of Ukraine on PIL was applied, for example, in the Char-kiv Appellate Economic Court, *Natural person-entrepreneur Manuylov M. (Ukraine) v Aramex Autos Société de Personnes à Responsabilité Limitée (Belgium)*, No. 922/5693/14, 15 June 2015, available at <<http://www.reyestr.court.gov.ua/Review/45352684>>.

²³ *Supra* n. 17.

²⁴ This bilateral treaty was signed on 23 May 1995, entered into force on 12 July 1996, and was ratified by Ukraine by Zakon Ukraïny "Pro ratyfikacïju Ugody miž Ukraïnoju ta Latvïjs'koju Respublikoju pro pravovu dopomogu ta pravovi vidnosyny u cyvil'nych, simejnych, trudovyh ta kryminal'nyh spravach" [Law of Ukraine "On the ratification Treaty between Ukraine and the Republic of Latvia on legal assistance and legal relations in civil, family, labour, and criminal matters"], 22 November 1995, No. 452/95-BP, Vidomosti Verhovnoï Rady Ukraïny 1995, No. 44, pos. 326.

²⁵ Economic Court of Rivne Region, *Firm SIA IECAVNIEKS (Latvia) v Private enterprise "Mavioto" (Ukraine)*, Case No. 17/47, 29 May 2008, available at <<http://www.reyestr.court.gov.ua/Review/1701760>>.

b) *Prorogation agreement in light of bilateral treaties on legal assistance*

When concluding international commercial contracts containing a prorogation agreement, sometimes Ukrainian and European counterparties unfoundedly neglect the existence of a bilateral treaty between their states; this creates a legal risk of obtaining results that are different than expected. A decision of the Economic Court of the Ivano-Frankivsk Region illustrates this issue. In 2013, a Ukrainian company and a Czech company concluded a contract containing a prorogation agreement that designated the Ukrainian economic court to be competent on deciding contractual disputes which may arise from or in connection with the contract. At the same time, Art. 48(5) of the treaty between Ukraine and the Czech Republic on legal assistance in civil matters²⁷ recognises as competent a court of that state where a defendant has its seat or where immovable property subject to dispute is located. This provision cannot be derogated from by contracting parties' choice of court agreements. Taking into account that the defendant had its seat in the territory of the Czech Republic, the Ukrainian local economic court refused to accept a claim on the grounds that this contractual dispute is to be decided by a court of the Czech Republic.²⁸

In this context it is worth pointing out that the peculiarity of this case consists in the mandatory nature of the aforementioned rule of the bilateral treaty between Ukraine and the Czech Republic, whereas in contrast the rule of Art. 33(3) of the treaty between Ukraine and Poland²⁹ on jurisdictional com-

²⁶ This conclusion can be confirmed with a number of cases heard by Ukrainian courts, in particular, Economic Court of Lviv Region, *State enterprise Gitomir liqueurs and spirits plant (Ukraine) v Petergrow Limited (United Kingdom)*, Case No. 914/618/16, 4 March 2016, available at <<http://www.reyestr.court.gov.ua/Review/56255411>>; Economic Court of Lviv Region, *Rucom Ltd (Ukraine) v Brennholz Service Blum (Germany)*, Case No. 5015/1102/12, 18 December 2012, available at <<http://www.reyestr.court.gov.ua/Review/28265655>>; Economic Court of Ivano-Frankivsk Region, *SC Tastrom (Romania) v Private Enterprise Lemn-International (Ukraine)*, Case No. 909/495/13, 24 April 2013, available at <<http://www.reyestr.court.gov.ua/Review/30871695>>.

²⁷ This bilateral treaty was signed on 28 May 2001, entered into force on 18 November 2002, and was ratified by Ukraine by Zakon Ukraïny "Pro ratyfikaciju Ugody miž Ukraïnoju ta Čes'koju Respublikoju pro pravovu dopomogu v cyvil'nyh spravach" [Law of Ukraine "On the ratification treaty between Ukraine and the Czech Republic on legal assistance in civil matters"], 10 January 2002, No. 2927-III, Vidomosti Verhovnoï Rady Ukraïny 2002, No. 23, pos. 147.

²⁸ Economic Court of Ivano-Frankivsk Region, *Private company Bio-Impuls (Ukraine) v Lavil Trade s.r.o (Czech Republic)*, Case No. 909/329/13, 21 March 2013, available at <<http://www.reyestr.court.gov.ua/Review/30118155>>.

²⁹ This bilateral treaty was signed on 24 May 1993, entered into force on 14 August 1994, and was ratified by Ukraine by the Parliament Regulation: Postanova Verhovnoï Rady Ukraïny "Pro ratyfikaciju Ugody miž Ukraïnoju ta Respublikoju Poljšča pro pravovu dopomogu ta pravovi vidnosyny u cyvil'nyh ta kryminal'nyh spravach" [Regulation of

petence in contractual disputes is dispositive, allowing parties, by agreement, to change the competence stipulated by the bilateral treaty.

As a matter of judicial practice, parties to contracts containing prorogation agreements designating foreign courts as competent nevertheless file claims in Ukrainian courts. Such a procedural action can be explained easily if it is performed by Ukrainian companies. The explanation for this same procedural action when performed by companies that are not resident in Ukraine is of a controversial nature because of the potential ulterior motive, including quite possible *forum shopping*. In the case of an issue as to the existence of legal grounds to decide a dispute on terminating a credit contract that had arisen out of a contract between Ukrainian and Estonian counterparties, the Economic Court of Kyiv declined to take and hear the case.³⁰ Such a court order adopted on the basis of Art. 62.1. of the Economic Procedure Code of Ukraine (stipulating the non-competence of economic courts where parties have reached an agreement designating another competent body to hear disputes) was legally valid because item 6.2 of this contract contained a choice of the Court of Tallinn (Estonia) as competent to decide contractual disputes between the parties.

3. *Conflicting proceedings (lis pendens)*

A dispute arising from or in connection with a contract between Ukrainian and European parties can appear to be under the jurisdiction of two or more national judiciary systems due to the unilateral determination of the grounds of international jurisdiction by sovereign states (conflict of jurisdiction phenomenon). It creates preconditions for the manifestation of such subjectively determined procedural law issues as *lis pendens*-related actions, that is, proceedings involving the same cause of action, between the same parties, and under the same grounds in the courts of Ukraine and any EU Member State.

Ukraine's existing bilateral treaties on legal assistance with some EU Member States can be considered effective instruments for resolving the *lis pendens* issue. Ukrainian legal scholar *J. Černjak* made a generalisation concerning the implementation of two different approaches to this issue within such treaties. These approaches are: (1) termination of proceedings made pending *after* having initiated legal action before another court, as stipulated in Art. 21(3) of the treaty with Lithuania (Art. 21(3) of the treaty with Estonia

the Verkhovna Rada of Ukraine "On the ratification treaty between Ukraine and the Republic of Poland on legal assistance and legal relations in civil and criminal matters"], 4 February 1994, No. 3941-XII, Vidomosti Verchovnoï Rady Ukraïny 1994, No. 23, pos. 174.

³⁰ Economic Court of Kyiv, *Evro Estate OU (Estonia) v A.T.VA1 Ltd (Ukraine)*, Case No. 910/26297/1, 28 November 2014, available at <<http://www.reyestr.court.gov.ua/Review/41647182>>.

and Art. 20(4) of the treaty with Latvia), or, (2) leaving a claim without consideration by the later-seized court (Art. 21(2) of the treaty with the Czech Republic).³¹ Another Ukrainian legal scholar, *G. Cirat*, identified one more approach, which is represented by a treaty between Ukraine and Romania on legal assistance: dismissal of a case by the later-seized court. *Cirat* concluded that there is no unified approach within bilateral treaties on legal assistance, given that each of these and similar treaties engender different legal consequences from applying the *lis pendens* rule.³²

Without limiting the aforementioned, bilateral treaties on legal assistance should not be considered a panacea given that not all such treaties with EU Member States contain appropriate rules concerning the resolution of conflicts of jurisdiction. This particularly applies to treaties between Ukraine and Finland, Greece, Hungary, and Bulgaria (as well as Poland – this treaty contains the general rule of Art. 20 on exclusion of parallel competence when initiating a case but there is no special rule regarding resolution of the *lis pendens* issue).

Taking into account that Ukraine has bilateral treaties on legal assistance with fewer than half of the EU Member States, it is worth noting that the absence of such a treaty or appropriate rules within existing treaties gives rise to a question of the legal grounds and the prospects of resolving the issue of parallel proceedings as faced by some business entities in the remaining portion of EU Member States (Germany, Spain, Sweden, etc.).

According to the special procedure rule of Art. 75.2. of the Law of Ukraine on PIL, Ukrainian courts shall neither terminate proceedings nor leave an application without consideration, nor terminate a case (as mentioned above regarding the approaches in bilateral treaties with EU Member States), but shall refuse to open proceedings.

When analysing judicial practice, local general courts of Ukraine also pay attention to the *lis pendens* issue in addition to performing a comparative analysis of legislative approaches in Ukraine and European countries. The aforementioned approach of Ukrainian legislation is thought to be different from the legislative approaches and judicial practice of EU Member States (Germany, France, Belgium, Bulgaria) and EFTA States (in particular, Switzerland).³³

³¹ *Černjak*, Mižnarodne pryvatne pravo – Naukovo-praktyčnyj komentar Zakonu [Academic and practical commentary on the law], Art. 75 Zagal'ni pravyla pidsudnosti sudam Ukraїny sprav z inozemnym elementom [General rules of jurisdiction for cases having a foreign element in the courts of Ukraine], Charkiv 2008, p. 301, para. 3.

³² *Cirat*, Pytannja jurydsdykciї v mižnarodnyh dogovorach Ukraїny pro pravovu dopomogu [The issue of jurisdiction in international treaties of Ukraine on legal assistance], Visnyk akademii advokatury Ukraїny 2011, No. 3, pp. 197, 199, available at <http://nbuv.gov.ua/UJRN/vaau_2011_3_29>.

³³ *Mirgorods'kij mis'krajonnyj sud Poltavs'koj oblasti*, Uzagal'nennja sudovoї praktyky protjagom 2013 roku ščodo dotrymannja vymog procesual'nogo zakonodavstva su-

III. Ukrainian and European conflict law relating to contractual obligations

1. Party autonomy as a conflict law institution

a) The evolution of party autonomy as an institution in the conflict law of Ukraine

At the regional European level, “freedom of choice” was constituted as a primary principle within both the Convention on the law applicable to contractual obligations (Rome Convention, Art. 3)³⁴ and the EU Regulation on the law applicable to contractual obligations (Rome I Regulation),³⁵ which replaced this Convention (also Art. 3). Moreover, according to *J. Basedow’s* generalisation, party autonomy is acknowledged in an increasing number of areas of the law by positive conflict-of-law legislation across the globe.³⁶

This principle (“party autonomy” or “autonomy of will”) is familiar to the private international law of Ukraine as well. There are several institutions, including overriding mandatory rules, restricting the free choice of contracting parties as a whole and the application of the rules of the foreign law chosen by them in particular.³⁷

In recognising free choice as a crucial element of Ukrainian conflict law, three stages can be identified.

First, in 1963 a conflict law principle reflecting parties’ freedom in the choice of the law applicable to obligations arising out of foreign (international) trade transactions was introduced by the Civil Code of the Ukrainian Soviet Socialist Republic. The dispositive conflict-of-law rule of Art. 569 of that code (which lost effect in 2004 according to the closing and transitional provisions of the new Civil Code of Ukraine) stipulated that rights and duties of parties to foreign trade transactions should be governed by the law of the place of the transaction’s conclusion (*lex loci actus*) unless otherwise agreed by the parties.³⁸

damy peršoi instancii pry vidkrytti provadžennja u spravach (cyvil’noi jurysdykcii) [Case law analysis concerning compliance with requirements of procedural legislation by first-instance courts (of civil jurisdiction) in commence proceedings during 2013], available at <http://mrm.pl.court.gov.ua/sud1620/an_dov/uz_proz_zak_2013>.

³⁴ Rome Convention on the Law Applicable to Contractual Obligations (consolidated version), OJ 1998 C 27/34–46.

³⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6–16.

³⁶ *Basedow*, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, *Rabel Journal of Comparative and International Private Law* 2011, Vol. 75, pp. 32, 59.

³⁷ See *infra* III.1.b), f).

³⁸ *Cyvil’nyj kodeks Ukraïns’koï RSR* [Civil Code of Ukrainian SSR] of 18 July 1963, No. 1540-VI, available at <<http://zakon5.rada.gov.ua/laws/show/1540-06>>.

Second, the Law of Ukraine “On Foreign Economic Activity” adopted in 1991 dealt with two approximate but not identical terms – “foreign economic deal” (for example, a cross-border unilateral transaction on offsetting a counterclaim) and “foreign economic contract”,³⁹ implementing different approaches to determining the applicable law chosen by the parties. In such a way, Art. 6.8. of this law repeated the connecting factor of the aforementioned Art. 569 of the Civil Code of the Ukrainian SSR regarding foreign trade transactions. In turn, Art. 6.9. of the same law concerning foreign economic contracts directly states the following: “the rights and duties of the parties of foreign economic contacts are governed by the law of the country chosen by the parties either when entering into a contract or at a later point in time”.⁴⁰

Third, unlike a range of other post-Soviet states (Belarus, Kazakhstan, Russia), which have included chapters on private international law in their codified legislation containing substantive law rules (Civil Codes), Ukraine rejected the idea of codification of Ukrainian legislation in the field of private international law in Book VIII of its new Civil Code.⁴¹ Such codification was

³⁹ The legislative definition of a “foreign economic contract” is stipulated by the Law of Ukraine “On Foreign Economic Activity” (1991) where both general and specific attributes are synthesised with the assumption that each of them is certain to be mandatory; their accumulation is considered to be sufficient for a contract to be qualified precisely *per se*, whence a foreign economic contract is an agreement of two or more entities involved in foreign economic activity and their foreign counterparties aimed at acquisition, alteration or termination of reciprocal rights and duties in the field of such activity.

There is a correlation between the terms “international commercial contract” and “foreign economic contract”. Two key concepts – “international” and “commercial” – are detailed in a well-known commentary to the preamble of the Principles of International Commercial Contracts of the International Institute for the Unification of Private Law. They should be understood in the broadest possible sense. The essence of the concept “international” is to exclude only those situations where no foreign element is involved at all. The essence of the concept “commercial” is to exclude from the scope of the Principles so-called “consumer contracts”, available at <<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>>.

International multilateral conventions as instruments of universal unification of substantive rules of contract law also follow the concept “commercial” with the exclusion of “consumer contracts” for personal, family or household use. C.f.: United Nations Convention on Contracts for the International Sale of Goods (Art. 2) and some other conventions that are legally binding for Ukraine after its accession, for instance, the Convention on International Financial Leasing (Art. 1(4)), the Convention on International Factoring (Art. 1(2)(a)).

⁴⁰ Закон України ‘кої RSR “Pro zovnišn’oekonomičnu dijāl’nist’” [Law of the Ukrainian SSR “On Foreign Economic Activity”], 16 April 1991, No. 959-XII, Vidomosti Verchovnoї Rady Ukraїny 1991, No. 29, pos. 377.

⁴¹ Key stages and specificities of the codification process were described in depth as early as 2005 by A. Dovgert, Codification of Private International Law in Ukraine, Yearbook of Private International Law 2005, Vol. 7, pp. 131, 132.

completed in the form of a separate legal act in 2005 – the Law of Ukraine “On Private International Law”.⁴²

The Law of Ukraine on PIL introduced the general term “autonomy of will”, legally defining it as a principle establishing the right of participants in legal relationships with foreign elements to exercise a choice of law governing appropriate legal relationships.

In spite of the adoption of the Law of Ukraine on PIL, one additional legislative problem, consisting in including a set of conflict-of-law rules in the Economic Code of Ukraine⁴³ (which came into effect simultaneously with the Civil Code of Ukraine on 1 January 2004), remained unresolved by Ukrainian lawmakers. Art. 382.5. of this codified legal act integrated the approaches of the Civil Code of the Ukrainian SSR and the Law of Ukraine “On Foreign Economic Activity” in a strange way, stating that the rights and duties of parties to a foreign trade contract (but not a transaction) were subject to the law of the place of its conclusion (*lex loci actus*) unless otherwise agreed by the parties. As recently as 2010, the special Law of Ukraine “On amendments of some legislative acts of Ukraine (concerning Private International Law issues adjustment)”⁴⁴ was adopted, resulting, first, in the deletion of the aforementioned article of the Economic Code of Ukraine, and second, in the introduction of the general provision prescribing that issues relating to foreign economic contracts (including key aspects such as the form, the procedure for concluding them, and the rights and duties of the parties) should be governed by the Law of Ukraine on PIL.

b) General conflict-of-law rules regarding transactions and contracts

Taking into account that “a contract” is legally defined as a bilateral or multilateral transaction (or, synonymously, a “deal”) in the new Civil Code of Ukraine, it is necessary to regard a transaction and a contract as general and particular phenomena from a methodological point of view, resulting in a *sine qua non* application to contracts of conflict-of-law rules regarding the substance of transactions. In such a manner, the general rule of Art. 32.1. of the Law of Ukraine on PIL states that a transaction’s substance may be governed by the law chosen by the parties unless otherwise prescribed by the Law. In turn, special Art. 43 of the Law of Ukraine on PIL implements the following

⁴² *Supra* n. 17.

⁴³ *Hospodars'kyj kodeks Ukraïny* [Economic Code of Ukraine], 16 January 2003, No. 436-IV, *Golos Ukraïny* 2003, No. 49.

⁴⁴ *Zakon Ukraïny “Pro vnesennja zmin do dejakych zakonodavčykh aktiv Ukraïny ščo do reguljuvannja pytan’ mižnarodnogo pryvatnogo prava”* [Law of Ukraine “On amendments of some legislative acts of Ukraine (concerning Private International Law issues adjustment)”), 21 January 2010, No. 1837-VI, *Vidomosti Verchovnoï Rady Ukraïny* 2010, No. 12, pos. 120.

approach: parties may choose the law governing a contract unless a choice of law is directly prohibited by the laws of Ukraine.

An example that can be mentioned in this context is the special mandatory conflict-of-law rule of Art. 46 of the Law of Ukraine on PIL stipulating that the constitutive contract of a legal person with foreign participation is to be governed by the law of the state of that legal person's establishment. It is worth focusing attention on the fact that there is no direct prohibition by law, but at the same time, parties do not have the right to choose the applicable law because the Law of Ukraine on PIL prescribes otherwise.

As a general matter, Ukrainian courts recognise a choice of the applicable law as made by the parties. In this regard, the Supreme Economic Court of Ukraine paid special attention to a case involving disputed decisions made by lower instance courts, providing case law analysis on the adjudication of certain categories of disputes involving non-residents by economic courts. Its peculiarity lies in the fact that the Economic Court of the Donetsk Region, as a first instance court, recognised a choice of Swiss law as made by the parties to a contract; later the Donetsk Appellate Economic Court set aside the lower court decision on the basis of Art. 4 of the Economic Procedure Code of Ukraine, as if permitting foreign law application solely on the basis of international treaties of Ukraine, but not based on a contractual agreement. Finally, the Supreme Economic Court of Ukraine set aside the decision of the appellate instance court.⁴⁵

In such a manner, the Supreme Economic Court of Ukraine confirmed the right of parties to make a choice of law governing a foreign economic contract in compliance with Art. 6 of the Law of Ukraine "On Foreign Economic Activity" as well as with Art. 5 of the Law of Ukraine on PIL, which is considered in detail below.

c) Key modern attributes of party autonomy

The Law of Ukraine on PIL contains a rule (Art. 5.2.) conforming to well-known provisions in the European instruments unifying conflict-of-law rules in respect of contractual obligations (respectively, sentence 2 of Article 3(1) in both the Rome Convention and the Rome I Regulation) regarding the form of a choice of law. Thus, such a choice may be executed by parties either explicitly, that is expressly, or implicitly, that is tacitly. The tacit choice of law should be directly and clearly apparent from the conduct of the parties, the contract's provisions or the circumstances of the case as viewed in their entirety.

⁴⁵ Case *OBST SA (Switzerland) v Express Ltd (Ukraine)*, Pro uzagal'nennja sudovoï praktyky vyrišennja hospodars'kymy sudamy okremych kategorij sporiv za učastju nerezidentiv [On case law analysis of economic courts on adjudication of certain categories of disputes with non-resident participation], Supreme Economic Court of Ukraine, 1 January 2009, available at <<http://zakon4.rada.gov.ua/laws/show/n0001600-09>>.

Pursuant to the alternative provision of the aforementioned article of the Law of Ukraine on PIL (Art. 5.3.), parties may choose the applicable law either for the contract as whole or for only a part thereof. In the latter respect, the choice must be clearly expressed. Such an approach corresponds to identical provisions in the Rome Convention and the Rome I Regulation (Arts. 3(1) sentence 3 of both legal instruments). It is worth pointing out that it might become necessary to determine the law applicable to a part of the contract that is not covered by the parties' choice by means of applying a conflict-of-law rule based on another principle of private international law – namely, the “closest connection”.

A choice of the applicable law or its modification may be made by parties at any time – when entering into a contract or later at different stages of the contract's performance. Presuming a retroactive effect of a post-conclusion choice of law, such a choice is considered to be exercised by entering into a contract. If this is the case, the parties' autonomy is limited by two requirements that are consistent with the relevant provisions of EU legal instruments containing uniform conflict-of-laws rules; they relate to, first, the formal validity of a contract and, second, the inadmissibility of restricting or adversely affecting third-party rights that vested before the choice of law was made.

Case law analysis allows the general conclusion that choices of law by contracting parties from Ukraine and EU Member States have been recognised as proper by Ukrainian economic courts (of all instances) when exercised predominantly in the following manners: (1) explicitly (as a contract's clause); (2) towards a contract as a whole; and (3) in reference to the national law of one of the contracting parties (without choosing the neutral law of a third State as an applicable law not connected with the parties or their cross-border private law relations).⁴⁶

The cases mentioned above concern parties' choice of the applicable law as exercised when entering into a contract; at the same time, nothing creates legal barriers preventing parties from making a choice of law later with further recognition of its retroactive effect by the courts.⁴⁷

⁴⁶ This conclusion can be confirmed by a number of cases, in particular, Supreme Economic Court of Ukraine, *ERG Ltd (Czech Republic) v Ukos Ltd (Ukraine)*, Case No. 18/372-13/162, 28 May 2012, available at <<http://www.reyestr.court.gov.ua/Review/24387756>>; Rivne Appellate Economic Court, *WOG Trading (Ukraine) v Marshall Oil LLP (United Kingdom)*, Case No. 903/403/14, 28 January 2015, available at <<http://reyestr.court.gov.ua/Review/42628166>>; Economic Court of Zakarpatsky Region, *Golc Ltd (Ukraine) v Vogtalandhaustueren LTD (Germany)*, Case No. 907/1138/15, 17 June 2016, available at <<http://www.reyestr.court.gov.ua/Review/58431870>>; Economic Court of Lviv Region, *State enterprise Gytomyr liqueurs and spirits plant v Ronde Holding LTD (United Kingdom)*, Case No. 914/618/16, 11 April 2016, available at <<http://www.reyestr.court.gov.ua/Review/57253782>>.

⁴⁷ Economic Court of Charkiv Region, *Private enterprise IK Interinvest (Ukraine) v Extralux Development LLP (United Kingdom)*, Case No. 922/3259, 27 October 2015,

d) “Rules of law” as the proper law of the contract

The term “choice of law” is defined in Art. 1 of the Law of Ukraine on PIL as a right of participants in legal relationships to determine what state’s law will govern relationships involving foreign elements. While the bill was being drafted, Ukrainian legal scholars proposed to modernise long-standing approaches by means of legislative support favouring a contracting parties’ right to choose not just the law of some state but also “rules of law” that were developed as non-binding legal instruments, including *lex mercatoria*.

The issue of subjecting contracts to *lex mercatoria* as the law governing the contract instead of the law of a state was understood by *O. Lando* and *P.A. Nielsen* as being controversial. Subsequently, noting that the idea of allowing such a choice has both its supporters (*O. Lando, A. Philip, L. Palsson*) and its opponents (in particular, *P. Lagarde*), *Lando* and *Nielsen* synthesised their approach in the following manner:

“The opponents emphasise that, when the Rome Convention was made, it was the common understanding that only state law should be applied under the Convention. The supporters, on the other hand, argue that the interpretation of the Convention should be dynamic and based on the development and needs of international business for common standards. Furthermore, the supporters argue, since the main development of *lex mercatoria* took place in the 1980s and 1990s, it is outdated to ignore this development and forbid parties to select *lex mercatoria* when interpreting the Rome Convention”.⁴⁸

In this context, it is reasonable to address the modern soft-law instrument developed and published by the Hague Conference on Private International Law in 2015: the Principles on Choice of Law in International Commercial Contracts. It is pointed out in the comments to the Hague Conference on PIL Principles that certain provisions reflect novel solutions, with one such provision being found in Art. 3, “Rules of law”.⁴⁹ To assist lawmakers (in the legislative determination of the “rules of law” recognised as applicable to a dispute) and parties (in identifying appropriate rules that can be chosen as a proper law of the contract), Art. 3 of the Principles states the key criterion that chosen “rules of law” should be rules generally accepted: (a) at an international, supranational, or regional level; and (b) as a neutral and balanced set of rules.⁵⁰

available at <<http://www.reyestr.court.gov.ua/Review/53022894>>; Economic Court of Charkiv Region, *Public JSC Charkiv mechanical-engineering Svitlo Shahtarya (Ukraine) v MMC Poland Spolka z.o.o. (Poland)*, Case No. 922/5881/15, 3 March 2016, available at <<http://www.reyestr.court.gov.ua/Review/56306984>>.

⁴⁸ *Lando/Nielsen*, The Rome I Proposal, *Journal of Private International Law* 2007, p. 31.

⁴⁹ Principles on Choice of Law in International Commercial Contracts, Hague Conference on Private International Law, 2015, p. 26, available at <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>>.

⁵⁰ *Supra* n. 49, pp. 40 f.

In reference to well-known non-binding private-law instruments serving to unify substantive contract law rules and meeting all the necessary requirements mentioned above, it should be noted that analogous provisions formalised in part 3 of the Preamble to the UNIDROIT Principles of International Commercial Contracts (2004 and 2010 editions, as well as 2016 concerning long-term contracts) and in Art. 1:101(3)(a) of the Principles of European Contract Law allow for their applicability when the parties have agreed that their contract is to be governed by general principles of law, the *lex mercatoria* or the like.

e) Specificities in the application of the UNIDROIT Principles of International Commercial Contracts in Ukraine

A positive legislative basis for foreign and Ukrainian parties to international commercial contracts can be found in Art. 28 of the Law of Ukraine “On International Commercial Arbitration”,⁵¹ as well as in Art. 14 of the Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry,⁵² which states that the arbitral tribunal shall settle disputes in accordance with the rules of law which the parties have chosen to apply to the subject matter of a dispute that takes place in practice.⁵³

In 2008, in response to the economic courts’ question about how to understand the term “business-dealing usage” in Art. 7⁵⁴ of the Civil Code of Ukraine,⁵⁵ the Supreme Economic Court of Ukraine pointed out that the

⁵¹ Zakon Ukraïny “Pro mižnarodnyj komercijnyj arbitraž” [Law of Ukraine “On International Commercial Arbitration”], 24 February 1994, No. 4002-XII, Vidomosti Verchovnoï Rady Ukraïny 1994, No. 25, pos. 198.

⁵² The Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry are available online in English at <<http://arb.ucci.org.ua/icac/en/rules.html>>.

⁵³ UNILEX, which is a database of international case law as well as a bibliography on the UNIDROIT Principles of International Commercial Contracts and on the UN Convention on Contracts for the International Sale of Goods, contains a list of relevant cases considered by institutional and *ad hoc* International Commercial Arbitrations all around the world. In particular, a sales contract between a foreign buyer and a Ukrainian seller containing an arbitration clause in favour of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Trade provided that the law applicable to the contractual relations would be the UN Convention on Contracts for the International Sale of Goods (CISG), the *lex mercatoria* and the UNIDROIT Principles of International Commercial Contracts (1994 edition), available at <<http://www.unilex.info/case.cfm?id=1099>>.

⁵⁴ Art. 7.1. Civil Code of Ukraine: “Civil relations may be regulated by usage, in particular, the business-dealing usage. A rule of conduct not established by civil legislation acts but applied to a certain sphere of civil relations shall be usage. Usage may be specified in the respective document”.

⁵⁵ Vyščyj Hospodars’kyj Sud Ukraïny “Pro dejaki pytannja praktyky zastosuvannja norm Cyvil’nogo i Hospodars’kogo Kodeksiv Ukraïny” [Supreme Economic Court of

UNIDROIT Principles of International Commercial Contracts (1994 edition)⁵⁶ are among the documents containing business-dealing usages applicable in Ukraine. Having researched the specificities of the judicial practice of the application of the UNIDROIT Principles by economic courts, Ukrainian legal scholar *A. Smitjuh* identified two key trends. The first of these is the application of the UNIDROIT Principles in the absence of their selection by the contracting parties, and the second is the application of the UNIDROIT Principles relating to disputes arising from contracts which are domestic.⁵⁷

In this context, it is worth focusing attention on a case heard by the economic courts of Ukraine (all instances) relating to a cross-border dispute between business entities from Ukraine and Poland. The parties had concluded an international commercial contract that did not refer to the application of the UNIDROIT Principles. The essence of the issue was that the first-instance court, the Economic Court of the Lviv Region, and the Lviv Appellate Economic Court⁵⁸ adopted their decisions without considering the UNIDROIT Principles in any sense. However, the Supreme Economic Court of Ukraine, as a court of cassation, set aside the lower courts' decisions, pointing out in particular that "a court shall consider circumstances, taking into account the general basics of justice regarding good faith and fair dealing as defined in Art. 1.7 of the UNIDROIT Principles stipulating general rules for international commercial contracts".⁵⁹

This approach by the Supreme Economic Court of Ukraine was not implemented by the local economic court on remand.⁶⁰ The local court adopted

Ukraine "On certain issues of practice in the application of rules of the Civil and Economic Codes of Ukraine"], Information letter No. 01-8/211, 7 May 2008, available at <http://zakon5.rada.gov.ua/laws/show/v_211600-08>.

⁵⁶ In spite of the existence of the 2004, 2010 and 2016 editions of the UNIDROIT Principles of International Commercial Contracts, Ukrainian economic courts have been applying the 1994 UNIDROIT Principles.

⁵⁷ *Smitjuh*, O praktike primeneniya principov mezhdunaronykh kommercheskikh dogovorov sudami Ukrainy [On the practice in the application of the Principles of International Commercial Contracts by Ukrainian courts], 25 November 2015, available at <<http://hozpravo-odessa.com/index.php/nashi-avtory/19-smityukh-a-v/337-smityukharticle16>>.

⁵⁸ Economic Court of Lviv Region, *Firm Novatech (Poland) v Obriy Ltd (Ukraine)*, Case No. 4/1060-26/181, 18 June 2007, available at <<http://reyestr.court.gov.ua/Review/837958>>; Lviv Appellate Economic Court, *Firm Novatech (Poland) v Obriy Ltd (Ukraine)*, Case No. 4/1060-26/181, 4 December 2007, available at <<http://reyestr.court.gov.ua/Review/1188150>>.

⁵⁹ Supreme Economic Court of Ukraine, *Firm Novatech (Poland) v Obriy Ltd (Ukraine)*, Case No. 4/1060-26/181, 4 March 2008, available at <<http://reyestr.court.gov.ua/Review/1454409>>.

⁶⁰ Economic Court of Lviv Region, *Firm Novatech (Poland) v Obriy Ltd (Ukraine)*, Case No. 5/132 (4/1060-26/181), 20 December 2011, available at <<http://reyestr.court.gov.ua/Review/30986735>>.

a decision applying neither the conflict-of-law rules of Ukrainian legislation nor the substantive law rules of the UNIDROIT Principles.

What was in turn applied were, first, the dispositive rules of a bilateral treaty between Ukraine and Poland on legal assistance in civil matters, which allows parties, by agreement, to change the competence of the courts stipulated by this treaty, and, second, the procedural law rules of the Economic Procedure Code of Ukraine relating to substantive claims before a court and arbitration agreements.

The second aspect arose in practice in 2012 when the competent local court for the first time referred to paragraph 9.2 of contract No. 01/2004 of 20 May 2004. It stipulated that, in the event that negotiation efforts fail, all legal disputes caused by or related to this contract shall be considered by the Court of Arbitration at the Polish Chamber of Commerce according to its rules. It is worth noting that in 2007, the same Economic Court of the Lviv Region, when considering the same contract between these parties, had not made any reference to an existing arbitration agreement that was valid, operative and capable of being performed.

As the final result, in 2012 the Economic Court of the Lviv Region adopted a decision to stay proceedings, taking into consideration the existence of an arbitration clause in the contract and referring the parties to the Court of Arbitration at the Polish Chamber of Commerce.⁶¹

f) Freedom to choose the applicable law and prohibition of the evasion of law

Implementation of the conflict-of-law principle of freedom of choice cannot be unlimited from the point of view of PIL doctrine. Consequently, European and Ukrainian contracting parties can find themselves in unexpected and problematic legal situations in which a competent court will either limit the application of the law chosen by the parties or will not totally recognise a choice of the applicable law.

Several legislative novelties were introduced within the Law of Ukraine on PIL, exercising limiting functions in the field of conflict-of-law regulation. Two of these are the public policy (*ordre public*) clause and the application of compulsory norms (overriding mandatory rules). European Union legislation, specifically the Rome I Regulation (Arts. 9, 21)⁶² and the Rome Convention (Arts. 7, 16),⁶³ similarly contains rules on these legal institutions.

It can be observed that the Hague Conference on PIL Principles places a greater focus – representing a conceptually significant approach – on recog-

⁶¹ Economic Court of Lviv Region, *Firm Novatech (Poland) v Obriy Ltd (Ukraine)*, Case No. 5/132 (4/1060-26/181), 20 December 2012, available at <<http://www.reyestr.court.gov.ua/Review/30986735>>.

⁶² Rome I Regulation, *supra* n. 35.

⁶³ Rome Convention, *supra* n. 34.

nising overriding mandatory rules and public policy as the only limitations upon the application of the law chosen by the parties within the framework of those Principles.⁶⁴

In such a context, it is necessary to pay attention to another specificity of Ukrainian legislation in the field of PIL, which is aimed at preventing the abuse of the law by contracting parties when making a choice of law. Indeed, one further legislative novelty was introduced by Ukrainian lawmakers, which relates to the party autonomy (“autonomy of will”) concept known as “evasion of law” both as a general provision of the Law of Ukraine on PIL and as a special one concerning contracts directly (Art. 43 of this law). In general, “evasion of law” is to be understood as the “application of a law other than that stipulated by appropriate legislation to relationships with a foreign element” pursuant to the legal definition in Art. 1.1. (9) of the Law of Ukraine on PIL.

Concerning the consequences of evasion of law, Art. 10 of this law states that deals and other actions of participants in private law relationships that are intended to subject such relations to a law which differs from that which is determined according to the Law of Ukraine on PIL shall be null and void. In similar cases, the law to be applied should be determined in accordance with the conflict-of-law rules of the Law of Ukraine on PIL.

“Evasion of law” cannot objectively be considered a Ukrainian innovation. While this legal concept has remained unaccepted in EU and Russian (The Civil Code of the Russian Federation, Part Three, Chapter VI “Private International Law”) legislation, the civil codes of other key Member States of the Eurasian Economic Union that contain chapters on private international law – Kazakhstan (Art. 1088) and Belarus (Art. 1097) – include conflict-of-law rules stipulating identical consequences for evasion of law, particularly the invalidity of agreements.

Having prepared an academic commentary on Art. 10 of the Law of Ukraine on PIL, Ukrainian legal scholar *V. Kysil*’ underlined that this fundamental novelty was connected to the rights of persons who are exercising their rights according to *lex voluntatis*. He reached the following conclusion, which can be supported:

“Provisions on evasion of law come into conflict with a broad party autonomy regarding contracts. These two terms are mutually exclusive, especially from a methodological viewpoint of conflict-of-law solutions. The existence of these institutions – party autonomy and evasion of law – within the law is indicative not so much of constituting a general rule and exclusion, but rather of a certain legislative eclecticism, an attempt to involve as many instruments as possible in conflict-of-law regulations which, conversely, can obstruct the proper functioning of this mechanism”.⁶⁵

⁶⁴ Hague Conference on PIL Principles, *supra* n. 49, p. 70.

⁶⁵ *Kysil*’, *Mižnarodne pryvatne pravo. Naukovo-praktyčnyj komentar k Zakonu Ukraïny “Pro mižnarodne pryvatne pravo”* [Academic and practical commentary on the

Although the evasion of law issue does not hold pride of place, finding a path to its solution has been a focus of European and Ukrainian legal scholars for a long time.

As early as 1990, Professor of Law *J.J. Fawcett* of the University of Leicester expressed an opinion that

“[t]he best way to take account of unfairness and the national interest in evasion cases involving contracts [...] is to adopt and develop the continental concept of mandatory rules. [This] [...] makes it possible to stop the practice in those cases where it should be stopped”.⁶⁶

Without delivering an intermediate review of the issue within this paper, it is worth noting that this idea was both accepted and further developed in the latest research in Ukraine devoted to restrictions on the application of conflict-of-law rules, which has been presented in a monograph published in December 2016. The essence of the categorical conclusion made by Ukrainian legal scholars is that the prohibition of evasion of law in international private law is ensured collectively by public policy clauses, overriding mandatory rules, and unilateral conflict-of-law rules. Hence, the authors offered to delete all of the evasion of law rules in the Law of Ukraine on PIL as well as to amend its Art. 43 as part of a legislative requirement to make a choice of the applicable law without evading the law, thus legislatively preventing abuse.⁶⁷

The aforementioned conclusion regarding the cumulative application of several conflict-of-law institutions is supported by a judgment of the Kyiv District Court of Odessa, which collectively applied Art. 10 on evasion of law, Art. 12 on public policy, and Art. 14 on mandatory (imperative) rules of the Law of Ukraine on PIL in considering a case concerning a guarantee issued by a natural person in relation to a credit contract with a fixed interest rate concluded by legal persons from different states.⁶⁸

Taking into account the existence of arguments *pro et contra* that provide a legislative framework for an evasion of law institution, scholarly discussion is likely to continue. Moreover, there is not currently any draft legislation registered in the Parliament of Ukraine with proposals to amend the Law of

Law of Ukraine “On private international law”, Art. 10 *Naslidky obchodu zakonu* [Evasion of law consequences], Charkiv 2008, p. 88, para. 2.

⁶⁶ *Fawcett*, *Evasion of Law and Mandatory Rules in Private International Law*, Cambridge Law Journal 1990, pp. 57 f.

⁶⁷ *Krupčan/Bojarskyi/Procenko*, *Obmežennja zastosovannja kolizijnych norm u mižnarodnomu pryvatnomu pravi Ukraïny* [Restriction of the application of conflict-of-law rules in the private international law of Ukraine], Kyiv 2016, p. 238.

⁶⁸ Kyiv District Court of Odessa, *APM Company (Netherlands) v a physical person (Ukraine)*, Case No. 2-1269/10, 3 March 2010, available at <<http://www.reyestr.court.gov.ua/Review/9052621>>.

Ukraine on PIL so as to modernise the correlation between parties' freedom to choose the law governing a contract and the prohibition of evasion of law.

2. Determining the applicable law in the absence of a choice by the parties

a) Closest connection principle and the characteristic performance concept

Ukrainian and European parties do not always make a choice of the law governing contracts during a phase of favourable business communications prior to conclusion of the contract or during its performance. When cross-border disputes arise from or in connection with contracts, this can add complexity to agreeing on an applicable law that would be mutually acceptable.

In the absence of an expressed or tacit choice made by the parties, Ukrainian courts determine the law applicable to contractual obligations by applying subsidiary conflict-of-laws rules reflecting the principle of closest connection. This follows from the general rule of Art. 32.2. Law of Ukraine on PIL, which was introduced as an innovative provision stating that in such a case a transaction's substance is governed by the law which has the closest connection with the transaction.

The closest connection principle is certainly well known in international private law as implemented in international bilateral and multilateral treaties as well as in legislation (with some individual characteristics in regard to connecting factors), these including but not being limited to: the EU *acquis* – the Rome I Regulation (Art. 4), preceded by the Rome Convention (Art. 4); the Convention on the Law Applicable to Contracts for the International Sale of Goods of the Hague Conference on Private International Law (Art. 8),⁶⁹ national legislation of the European Free Trade Association states – e.g. Switzerland's Federal Code on Private International Law (Art. 117.2.),⁷⁰ national legislation of the Eurasian Economic Union Member States (e.g. The Civil Code of the Russian Federation (Art. 1211);⁷¹ the Private International Law Act of China (Art. 41).⁷²

⁶⁹ Convention on the Law Applicable to Contracts for the International Sale of Goods (concluded 22 December 1986, not yet in force), available at <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=61>>.

⁷⁰ Switzerland's Federal Code on Private International Law (as of 18 December 1987), available at <<http://www.rwi.uzh.ch/dam/jcr:00000000-14c0-11a6-0000-0000115fcc32/PILA.pdf>>.

⁷¹ Гражданский кодекс Российской Федерации, часть третья, раздел VI “Международное частное право” [Civil Code of the Russian Federation, Part Three, Chapter VI “Private International Law”] of 26 November 2001, No. 146-FZ, with amendments of 3 July 2016 in force since 1 September 2016, available at <<http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=195957&fld=134&dst=100383,0&rnd=0.9997875541843076#0>>.

⁷² Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (Adopted at the 17th session of the Standing Committee of the 11th National

The Ukrainian legislative approach mentioned above is certain to be important, but it could appear to be ineffective without the provision of proper specification within the Law of Ukraine on PIL as a general system for the determination of an applicable law grounded in a concept of characteristic performance. Indeed, Art. 32.3. of this law prescribes in respect of legal persons (as dominant business entities – exporters and importers) that unless otherwise required or implied from the provisions or nature of a transaction or set of circumstances of a case, a transaction is more closely connected with the law of the state where the party required to effect a performance which is of crucial importance to the substance of a transaction (a characteristic performance) has its seat.

The party required to effect characteristic performance is determined by Ukrainian lawmakers for specified contracts in the following manner: a sales contract – a seller; a leasing contract – a lessor; a carriage contract – a carrier; an insurance contract – an insurer; an agency contract – an agent; a commission contract – a commissioner; a factoring contract – a factor; a licensing contract – a licensor; a warranty contract – a warrantor; etc. for a total of twenty-three contracts.

To examine whether the implementation of a systematic approach is an innovation in Ukrainian legislation in the field of private international law, a comparison with the (preceding) Law of Ukraine “On Foreign Economic Activity” is apposite. This law did not stipulate the closest connection principle. It did, however, expressly introduce the characteristic performance concept towards contracts which are not mentioned in its rules.

Alongside this, Art. 6 of that law contained a list comprising fewer types of contracts in comparison with the Law of Ukraine on PIL – just twelve and with a connecting factor for each of them; for example, the seller’s law for a sales contract, the carrier’s law for a carriage contract, the licensor’s law for a licensing contract, etc.

To discover certain additional differences between past and current legislative approaches, it is worth turning our attention to the two following points:

The Law of Ukraine on PIL changed the party effecting characteristic performance for some types of contracts, for example, from a principal to an agent for a contract of agency and from a principal (a consignor) to a commissioner for a commission contract;

The prior approach constituted the connection of a contract with the law of a state where the party effecting a characteristic performance had been established or had its principal place of business; this approach is distinct from modern provisions in regard to the latter aspect, which changed the connection from the principal place of business to the executive body location.

People’s Congress, 28 October 2010, entry into force as of 1 April 2011); *Childress*, China’s First Statute on Choice of Law (translated into English), 12 January 2011, available at <<http://conflictoflaws.net/2011/p-r-chinas-first-statute-on-choice-of-law-translated-in-english/>>.

Pursuant to the rules of the Law of Ukraine on PIL, when determining the proper law for some types of contracts, the law considered to be most closely connected is: for contracts on immovable property – the law where the immovable property is situated; for contracts concluded at a stock exchange – the law of the stock exchange’s location; for contracts concluded at an auction – the law of the state where the auction takes place; for a joint venture contract – the law of the state where such a joint venture is conducted (in this context, a joint venture is defined as an activity without creating a business entity/legal person); this is contrary to prior Ukrainian conflict-of-law rules that specified the law of the state of the joint venture’s establishment and registration.

The application of subsidiary conflict-of-law rules embodying the characteristic performance concept often results in the adoption of judgments on behalf of European business entities. This said, it is an evidentiary application of the substantive law of both Ukraine (the judgment is on behalf of a company from the United Kingdom)⁷³ and foreign states (the law of Germany – the judgment is on behalf of a German company,⁷⁴ the law of Italy – the judgment is on behalf of an Italian company).⁷⁵

b) Presumptions regarding the closest connection and the exception clause

The complicated configuration of the conflict-of-law rule of Art. 32.3. of the Law of Ukraine on PIL⁷⁶ makes uncertain the court’s application of either presumptions reflecting the characteristic performance concept or exception clauses that disregard such presumptions.

In a broad sense, this issue can be considered at different levels, in particular: (1) Acts of national legislation of the EU and EFTA countries; (2) European conflict-of-law instruments in the context of their modernisation within a transition period from the Rome Convention to the Rome I Regulation.

⁷³ Economic Court of Donetsk Region, *Ranmac Associates Limited (United Kingdom) v Euroopt LTD (Ukraine)*, Case No. 43/232pd, 2 August 2007, available at <<http://www.reyestr.court.gov.ua/Review/895441>>.

⁷⁴ Economic Court of Lviv Region, *Bayer CropScience AG (Germany) v Gaben Firm Ltd (Ukraine)*, Case No. 914/3456/14, 25 November 2014, available at <<http://www.reyestr.court.gov.ua/Review/41603901>>.

⁷⁵ Economic Court of Kyiv, *Maschio Gaspardo S.p.a (Italy) v Technic Energy Ltd (Ukraine)*, Case No. 54/259, 16 July 2010, available at <<http://www.reyestr.court.gov.ua/Review/54886306>>.

⁷⁶ Art. 32.3. of the Law of Ukraine “On Private International Law” provides: “Unless otherwise required or implied from the provisions or nature of a transaction or set of circumstances of a case, a transaction is more closely connected with the law of the state where the party required to effect a performance that is of crucial importance to the substance of a transaction has its place of residence or seat”.

According to the Explanatory Note to the Draft of the Law of Ukraine “On Private International Law”,⁷⁷ the legislation in the field of private international law of some European states, in particular Germany and Switzerland, was declared to be the most significant and advantageous in terms of the objective of modernising Ukrainian legislation.

Having authored a comparative analysis of the related provisions of Switzerland’s Federal Code on Private International Law and the Introductory Act to the Civil Code of Germany even before the adoption of the Rome I Regulation, Russian researcher *G. Dmitrieva* drew the debatable conclusion that these legislative acts had constituted different conceptual approaches concerning the priority of applying the principle of the closest connection and corresponding presumptions relating to contractual obligations. The essence of the analysis of Art. 117.1. of Switzerland’s Federal Code on Private International Law consisted in the idea that presumptions as to the closest connection, broadly objectified in the *lex venditoris* (seller’s law) conflict-of-law principle, are to be given primary application; hence, a reference to the closest connection principle should be applied only to contracts not specified in the Swiss law. It was, in turn, pointed out that German law had placed greater emphasis on the closest connection provision. Accordingly, the author insisted that Art. 28 of the Introductory Act to the Civil Code of Germany (subsequently deleted as the Rome I Regulation is to be applied)⁷⁸ had established a similar general approach on the one hand, while on the other hand the consequences of applying Art. 28.5. of the Introductory Act proved to be different. While there is no choice of law by the parties, first and foremost the most closely connected law should be identified; only in the absence of such a real connection is the application of concrete connecting factors – introduced by legislators as presumptions – permitted.⁷⁹

⁷⁷ Pojasnjuval’na zapyska do proektu Zakonu Ukraïny “Pro mižnarodne pryvatne pravo” [Explanatory Note to the Draft of the Law of Ukraine “On Private International Law”], 9 October 2002, available at <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2274&skl=5>. This document was submitted to the Parliament of Ukraine by people’s deputies exercising their right of legislative initiative. As far as the Explanatory Note to the Draft of the Law is obligatory in the legislative process, it cannot consequently be applied within proceedings involving a foreign element either by the court or by the parties for the interpretation of the rules of law.

⁷⁸ Introductory Act to the Civil Code of Germany (In the version promulgated on 21 September 1994), Federal Law Gazette [Bundesgesetzblatt] 1996, I, p. 2494, last amended by Art. 17 of the Act of 20 November 2015, Federal Law Gazette 2015, I, p. 2010, available in English at <https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html>.

⁷⁹ *Dmitrieva*, Kommentarij k Graždanskomu kodeksu Rosijskoj Federacii, časti tret’ej, razdelu VI “Meždunarodnoe častnoe pravo” [Commentary to the Civil Code of the Russian Federation, Part Three, Chapter VI “Private International Law”], Moscow 2002, p. 191.

Generalising the main trends in the privatisation of European international private law, Ukrainian legal scholars *A. Dovgert* and *A. Merežko* concluded that an essence of modified European doctrine was captured in the formula “principle – presumption – back to principle”. This means that all conflicts of laws in private international law are to be resolved under the principle of the closest connection where presumptions are constituted by means of designated conflict-of-law rules. If an application of presumption-based conflict-of-law rules appears to be ineffective, a court returns to the closest connection principle to determine a proper law.⁸⁰

The drafting of the Law of Ukraine on PIL as it refers to contractual obligations was significantly influenced by doctrinal approaches implemented *inter alia* within the Rome Convention. *O. Lando* and *P.A. Nielsen* have pointed out that a concept commission’s proposal in the transition period to the Rome I Regulation was a radical break with the approach of the Rome Convention. The latter’s closest connection test, combined with presumptions and the escape clause, was to be replaced with a system of hard-and-fast rules for most contracts, flexibility for the remaining unspecified contracts and, most importantly, no escape clause.⁸¹ However, having taken into account the position of a large number of Member States in favour of combining the “list system” with a narrow escape clause, such an approach was accepted as a compromise in Art. 4 of the Rome I Regulation.⁸²

Delivering an answer to the European Commission’s Green Paper and specifically as to question 10 regarding a redrafting of the exception clause, the Max Planck Institute for Comparative and International Private Law pointed out in its comments that

“[t]he present wording of art. 4 has led to a considerable divergence in the courts’ practice of the relationship between art. 4(2) and art. 4(5) [...] The Institute approves a change in the wording of the present para. 5 to make it clear that it is to be invoked in exceptional cases only.”⁸³

⁸⁰ *Dovgert/Merežko*, Metodologija mižnarodnogo pryvatnogo prava [Methodology of private international law], in: Krupčan (ed.), Metodologija pryvatnogo prava [Methodology of private law], Kyiv 2003, p. 361.

⁸¹ It is important to emphasise that just that conceptual approach was preserved in the legislation of Ukraine from 1991 to 2005 (before the Law of Ukraine “On International Private Law” came into effect) pursuant to conflict-of-law rules of Art. 6 of the Law of Ukraine “On Foreign Economic Activity” detailed in the previous paragraph of this paper (III.2.a).

⁸² *Lando/Nielsen*, Rome I Regulation, Common Market Law Review 2008, Vol. 45, pp. 1687, 1702.

⁸³ *Max Planck Institute for Foreign Private and Private International Law*, Comments on the European Commission’s Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its

Accordingly, the proposal of the Max Planck Institute on Art. 4 (“Applicable law in the absence of choice”) for a Council Regulation on the Law Applicable to Contractual Obligations (Rome I) was the following: “The presumptions in paragraphs 2 and 3 may exceptionally be disregarded if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country”.⁸⁴

The final wording of Art. 4 of both the Rome Convention and the Rome I Regulation did not embrace an important attribute specifying that presumptions may be disregarded only exceptionally, as was proposed by the Max Planck Institute and as formerly implemented, in particular, in Art. 8(3) of the Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (“by way of exception”) and in Art. 15 of Switzerland’s Federal Code on Private International Law (through the recognition of appropriate situations as “exceptional”).⁸⁵

Applying a systemic interpretation of the special rule of Art. 32.3. of the Law of Ukraine on PIL, it is necessary to take into account a general rule of Art. 4.3. of this law. The latter constitutes a narrow exception (escape) clause disregarding the law determined according to the conflict-of-law rules of this Law if all the circumstances of the case indicate an insignificant connection with the applicable law that has been determined and a closer connection to another law.

Nevertheless, it is worth emphasising that this legislative approach is provided without defining the important aspect that the contract’s closer connection to another law must be manifestly demonstrated.

Hearing a case between a seller, a Hungarian company, and two buyers, both Ukrainian companies, a competent economic court of Ukraine took into account, first, the parties failure to choose the law governing their contract and second, the circumstances of the case (the subject matter and point of dispute, the legal grounds submitted by the plaintiff, the seat of the defendants, and the place of performance of contractual obligations). As a consequence, the court concluded that the contract was more closely connected to the law of Ukraine; what should be applied is not the seller’s law (the law of Hungary), but the buyers’ law, the law of Ukraine.⁸⁶

This case demonstrates an important conceptual aspect, notably, that where the presumptions of the closest connection are considered to be disputable or weak, they may be disregarded by way of exception. Accordingly, Ukrainian

modernisation, *Rabel Journal of Comparative and International Private Law* 2004, Vol. 68, pp. 39, 42.

⁸⁴ *Supra* n. 82, p. 103.

⁸⁵ Switzerland’s Federal Code on PIL, *supra* n. 69.

⁸⁶ Economic Court of Zakarpatskyj Region, *Unimatik KFT (Hungary) Factory v Univer Ltd (Ukraine)*, Case No. 907/598/15, 1 October 2015, available at <<http://www.reyestr.court.gov.ua/Review/51990438>>.

courts are likely to preserve a legislatively supported balance between predictability and flexibility relating to contractual obligations, primarily applying presumptions reflecting the characteristic performance concept. The escape clause will truly be applied as an exception.

3. *Proper law of a contract*

a) *Scope of the law governing a contract*

The law governing a contract with a foreign element is considered to be a set of relevant substantive law rules to be applied as a consequence of either a choice of law by the parties or a subsidiary conflict-of-law rule application by courts. It is necessary to consider the general approach of Ukrainian legislation in the field of PIL as regards non-recognition of *renvoi* relating to cross-border contractual obligations. The governing law may include a variety of issues joined by a common attribute, notably, a strong enough correlation to the rights and duties of the contracting parties.

Ukraine falls within the category of states stipulating the scope of the law governing a contract by legal act directly. A similar approach is in turn implemented within the EU *acquis*, notably, in the Rome I Regulation (Art. 12(1)), an act of secondary legislation. In such a way, pursuant to Art. 47 of the Law of Ukraine on PIL, the scope of the applicable law includes the following: the validity of a contract as well as the consequences of its invalidity; interpretation; the parties' rights and duties; the performance of a contract; the consequences of a default in performance or improper performance; termination of a contract; assignment of a claim and transfer of a debt under a contract.

Ukrainian lawmakers introduced a conflict-of-laws rule in Art. 47.2. of the Law of Ukraine on PIL as a legislative novelty regarding specificities in the performance of a contract, a default of performance, and improper performance, which corresponds to the provision of the EU Rome I Regulation (Art. 12(2)). Thus, in reference to the specificities of a contract's performance, as related to its manner and procedure as well as measures to be taken in the event of a default of performance and improper performance, the subsidiary conflict-of-law rule refers to the law of a state where performance of a contract takes place.

b) *Conflict-of-law issues in regard to the validity of a contract*

aa) *Legal capacity and lex personalis of contracting parties*

(1) *Legal persons.* – To be valid, a cross-border contract should comply with a set of general private law requirements specifically stipulated by the Civil

Code of Ukraine regarding validity of transactions (Art. 203).⁸⁷ Such requirements relate *inter alia* to the “proper scope of civil legal capacity” of persons effecting a transaction. Moreover, the latter aspect can become one of the most important within proceedings when hearing cases.⁸⁸

Accordingly, to determine the civil legal capacity of contracting parties having the legal status of legal persons, it is necessary to apply not the law governing a contract but the personal law of each of the parties, which is to be determined on the basis of appropriate conflict-of-law rules with a connecting factor referring to the law of the legal person’s seat.

In such a manner, the incorporation theory was legislatively supported as dominant to the extent that, pursuant to Art. 25.2. of the Law of Ukraine on PIL regarding the seat of a legal person, the “state of registration or establishment of a legal person” shall be understood in a different way, i.e. according to the legislative requirements of this state. In the absence of such a state or if it is impossible to determine one, a coherent rule of thumb should be applied, including a subsidiary conflict-of-law rule grounded in a *siège social* theory referring to the law of the location of the legal person’s executive body.

Not all of the bilateral treaties of Ukraine on legal assistance with EU Member States concern aspects such as the legal status of legal persons. Indeed, treaties with Bulgaria, Cyprus, Finland, Greece, and Hungary⁸⁹ contain no rules regarding the civil capacity of legal persons (or natural persons).

⁸⁷ The Civil Code of Ukraine is available online in English at <<http://cis-legislation.com/document.fwx?rgn=8896>>.

⁸⁸ This was the case, for example, in Economic Court of Kyiv, *Delta Capital SA (Switzerland) v JSC Unicredit Bank (Ukraine)*, Case No. 32/578, 10 December 2010, available at <<http://www.reyestr.court.gov.ua/Review/13021913>>.

⁸⁹ The bilateral treaty between Ukraine and the Republic of Bulgaria was signed on 21 May 2004, entered into force on 29 December 2005, and was ratified by Ukraine by Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Respublikoju Bolgarija pro pravovu dopomogu v cyvil’nych spravach” [Law of Ukraine “On the ratification Treaty between Ukraine and the Republic of Bulgaria on legal assistance in civil matters”], 22 September 2005, No. 2911-IV, Vidomosti Verchovnoï Rady Ukraïny 2006, No. 1, pos. 6; bilateral treaty between Ukraine and Cyprus – supra n. 11; bilateral treaty between Ukraine and Finland – supra n. 12; the bilateral treaty between Ukraine and Greece was signed on 2 July 2002, entered into force on 23 April 2003, and was ratified by Ukraine by Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Grec’koju Respublikoju pro pravovu dopomogu v cyvil’nych spravach” [Law of Ukraine “On the ratification Treaty between Ukraine and the Hellenic Republic on legal assistance in civil matters”], 22 November 2002, No. 244-IV, Vidomosti Verchovnoï Rady Ukraïny 2003, No. 3, pos. 19; the bilateral treaty between Ukraine and Hungary was signed on 2 August 2001, entered into force on 8 March 2002, and was ratified by Ukraine by Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Ugors’koju Respublikoju pro pravovu dopomogu v cyvil’nych spravach” [Law of Ukraine “On the ratification Treaty between Ukraine and the Republic of Hungary on legal assistance in civil matters”], 10 January 2002, No. 2926-III, Vidomosti Verchovnoï Rady Ukraïny 2002, No. 23, pos. 146.

Other existing bilateral treaties with EU Member States stipulate in turn that the legal capacity of a legal person is determined either according to the law of its place of establishment (Art. 22(2) of the treaty with Estonia, Art. 21(2) of the treaty with Latvia, Art. 22(2) of the treaty with Lithuania, Art. 21(2) of the treaty with Poland) or its seat (Art. 22(2) of the treaty with the Czech Republic, Art. 22(2) of the treaty with Romania).⁹⁰

(2) *Natural persons.* – The civil capacity of a natural person is determined according to the general conflict-of-law rule of Art. 18 of the Law of Ukraine on PIL. As a legislative novelty, it refers to personal law (*lex personalis*), which is considered to be the law of a natural person’s country of citizenship (*lex patriae*) (Art. 16 of this law).

An integral part of the civil capacity of a natural person refers to business (entrepreneurial) activity. Pursuant to Art. 42.1. of the Constitution of Ukraine, everyone shall have the right to entrepreneurial activity that is not prohibited by law.⁹¹

⁹⁰ The treaty between Ukraine and Estonia on legal assistance and legal relations in civil and criminal matters was signed on 15 February 1995, entered into force on 17 May 1996, and was ratified by Ukraine by Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Estons’koju Respublikoju pro pravovu dopomogu ta pravovi vidnosyny u cyvil’nych ta kryminal’nych spravach” [Law of Ukraine “On the ratification Treaty between Ukraine and the Republic of Estonia on legal assistance and legal relations in civil and criminal matters”], 22 November 1995, No. 450/95-BP, Vidomosti Verchovnoï Rady Ukraïny 1995, No. 44, pos. 324; bilateral treaty between Ukraine and Latvia – supra n. 24; the treaty between Ukraine and Lithuania on legal assistance and legal relations in civil, family, labour, and criminal matters was signed on 7 July 1993, entered into force on 20 November 1994, and was ratified by Ukraine by a regulation of The Verkhovna Rada of Ukraine – Postanova Verchovnoï Rady Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Lytovs’koju Respublikoju pro pravovu dopomogu ta pravovi vidnosyny u cyvil’nych, simeynych, trudovych ta kryminal’nych spravach” [The Regulation of The Verkhovna Rada (the Parliament) of Ukraine “On the ratification Treaty between Ukraine and the Republic of Lithuania on legal assistance and legal relations in civil, family, labour, and criminal matters”], 17 December 1993, No. 3737-XII, Vidomosti Verchovnoï Rady Ukraïny 1993, No. 52, pos. 499; bilateral treaty between Ukraine and Poland – supra n. 29; bilateral treaty between Ukraine and the Czech Republic – supra n. 27; the bilateral treaty between Ukraine and Romania on legal assistance and legal relations in civil matters was signed on 30 January 2002, entered into force on 30 November 2006, and was ratified by Ukraine by Zakon Ukraïny “Pro ratyfikaciju Ugody miž Ukraïnoju ta Rumunijeju pro pravovu dopomogu ta pravovi vidnosyny u cyvil’nych spravach” [The Law of Ukraine “On the ratification Treaty between Ukraine and Romania on legal assistance and legal relations in civil matters”], 7 September 2005, No. 2822-IV, Vidomosti Verchovnoï Rady Ukraïny 2005, No. 50, pos. 539.

⁹¹ Constitution of Ukraine, official English translation available at <www.kmu.gov.ua/document/.../Constitution_eng.doc>.

Ukrainian lawmakers introduced the special conflict-of-law rule of Art. 19 stipulating that the right of a natural person to engage in entrepreneurial activity is determined under the law of the state of the person's registration as an entrepreneur. Additionally, a subsidiary conflict-of-law rule has been introduced, referring to the law of the state providing the principal place of business of the natural person.

Ukraine's bilateral treaties with EU Member States on legal assistance, which contain rules on the legal status of persons, provide identical approaches regarding the legal capacity of natural persons, referring to the law of the state of their citizenship.

bb) Requirements concerning the form of a contract

In general, the form of bilateral or multiparty transactions with a foreign element shall comply with the law to be determined under the alternative conflict-of-law rule, including such connecting factors as the law applicable to the transaction's substance. The general conflict-of-law rules of the Law of Ukraine on PIL thus emanate from the cohesion of the transaction's form and substance. Consequently, the form of a transaction should comply with the *lex causae*; however, it is sufficient to adhere to the requirements of the *lex loci actus* in the event that parties are located in different states, which sets forth the *place of residence* of the party making an offer unless otherwise stipulated by a contract.

Given the stipulations mentioned above concerning the form of the transaction, it is reasonable to pay attention to such important aspects as legislative requirements regarding the form of foreign economic contracts. During proceedings, the issue of the form of a foreign economic contract can be called into play by any of the parties as a defensive tactic; here a party attempts to prove the invalidity of a contract based on its non-compliance with the requirements of Ukrainian legislation.

Such a protection strategy was chosen by a Ukrainian private company in its dispute with the plaintiff, a company from Poland, and was considered by the Economic Court of the Kyiv Region as the court of first instance.⁹²

In terms of the facts, a seller from Poland and a buyer from Ukraine had not concluded an international commercial contract as a single document. Rather, in the meantime goods were being delivered according to invoices, which was proved through several CMRs (a consignment note which is issued in order to confirm a contract of carriage for the international carriage of goods by road) containing proper Ukrainian customs stamps and the seal of the Ukrainian buyer on goods received.

⁹² Economic Court of Kyiv Region, *GPS Frozen (Poland) v Private Company Lobyright (Ukraine)*, Case No. 15/001-11, 11 March 2011, available at <<http://www.reyestr.court.gov.ua/Review/14927271>>.

Seeking to protect its economic interests, the Ukrainian company tried to prove the absence of any foreign economic contract as a legal fact prior to court proceedings, this based on non-adherence to the requirements of Ukrainian legislation regarding the form of such a category of contracts, in particular, Art. 31.3. of the Law of Ukraine on PIL.

However, the court considered this statement by the Ukrainian defendant to be incorrect. It recognised that a contract had been concluded between the parties not in the form of a single document, but by adhering to a simplified written form. Such a procedure complies with the provisions of Art. 31.3. of the Law of Ukraine “On Private International Law”, Art. 12 of the United Nations Conventions on Contracts for the International Sale of Goods, Art. 207.1. of the Civil Code of Ukraine⁹³ and Art. 181.1. of the Economic Code of Ukraine.⁹⁴

The Ukrainian defendants’ attempts to prove the absence of a foreign economic contract with the plaintiff from Poland thus appeared to be unsuccessful. The case was considered by the appellate instances and courts of cassation – the Kyiv Appellate Economic Court and the Supreme Economic Court of Ukraine⁹⁵ – and was decided in favour of the non-resident of Ukraine.

The special mandatory rule of Art. 31.3. of the Law of Ukraine on PIL stipulates a written form for a foreign economic contract notwithstanding the place of its conclusion on the specific condition that a Ukrainian legal person is a party to the contract.

Taking into consideration that another provision can have application as a result of international treaties entered by Ukraine, it is worth pointing out the following: When assuming that international legal obligations arise from provisions of relevant conventions allowing contracts to be made in a form other than a written one, Ukraine has heretofore preserved the approach mentioned

⁹³ Civil Code of Ukraine – Art. 207.1 and 207.2. (Requirements for Written Form of Transaction): “1. A transaction shall be considered concluded in writing in the event that its substance is fixed in one or several documents, letters, or telegrams exchanged by the parties. 2. A transaction shall be considered concluded in writing in the event that the will of the parties is expressed by teletype, electronic or any other technical communication facilities.”

⁹⁴ Economic Code of Ukraine – Art. 181.1. (General procedure for concluding economic agreements): “Generally, an economic agreement shall represent one document signed and sealed by the parties. It is permissible to conclude economic agreements in a simplified way, or by correspondence, fax, telegram, phoned telegram, etc., and also by confirmation of acceptance of orders unless special requirements as to the form and procedure of making of certain types of agreements are set forth by the law.”

⁹⁵ Kyiv Appellate Economic Court, *GPS Frozen (Poland) v Private Company Lobyright (Ukraine)*, Case No. 15/001-11, 11 July 2011, available at <<http://www.reyestr.court.gov.ua/Review/14927271>>; Supreme Economic Court of Ukraine, *GPS Frozen (Poland) v Private Company Lobyright (Ukraine)*, Case No. 15/001-11, 15 September 2011, available at <http://vgsu.arbitr.gov.ua/docs/28_3404473.html>.

above, and the prerequisites for ground-breaking changes are absent for the foreseeable future. By way of illustration and not limitation, when joining the United Nations Convention on Contracts for the International Sale of Goods, Ukraine made a declaration regarding the non-application of several of its provisions, including Art. 11 stipulating that a contract of sale need not be concluded in writing and is not subject to any other formal requirements.

The latest novelty of Ukrainian legislation, allowing foreign economic contracts in certain fields to be concluded not just in written form but also in electronic form, was introduced by the Law of Ukraine aimed at eliminating administrative barriers to the export of services, which was put into execution as of 3 January 2017.⁹⁶

c) Proper law (lex causae) as a connecting factor

The law applicable to contractual obligations is primarily considered to be a result of the application of conflict-of-law rules. At the same time, the applicable law can itself have the function of a connecting factor, *lex causae*, as regards certain private law issues that are complicated by foreign elements and which can be connected to a cross-border contractual dispute but not included in the scope of the law governing the contract.

Ad exemplum, countries recognising a limitation of action as an institution of civil substantive law – but not of civil procedure law – prefer to introduce the conflict-of-law rules regarding limitation of action in reference to the law to be applied to rights and duties of the contracting parties, but without excluding an application of mandatory rules regarding claims that are not covered by limitation of action. Under Ukrainian civil legislation, such mandatory rules concern, for example, a depositor's claim against a banking (credit) institution for restitution of a deposit, or a claim by an insured against an insurer to effect an insurance payment.

The same function can alternatively be executed by the law governing a contract regarding the acquisition and termination of an ownership right (in particular regarding movable property) which is the subject matter of a contract, provided that a choice of law is made by the contracting parties with no prejudice to third persons' rights. At the same time, the substance and exercise of such a right as well as its protection should be regulated according to another applicable law, which is notably determined by applying the connecting factor of *lex rei sitae*, i.e. the law of the state where the property is located. Pursuant to Art. 42.1. of the Law of Ukraine on PIL, together with the *lex*

⁹⁶ Zakon Ukraïny "Pro vnesennja zmin do dejakych zakoniv Ukraïny ščodo usunennja administratyvnyh bar'jeriv dlja eksportu poslug" [Law of Ukraine "On amendments of some laws of Ukraine concerning the elimination of administrative barriers to export of services"], 3 November 2016, No. 1724-VIII, Vidomosti Verchovnoi Rady Ukraïny 2016, No. 52, pos. 860.

rei sitae, protection of the ownership right (excluding the rule requiring official registration in Ukraine) can alternatively be executed according to *lex fori* on the grounds of a choice made by an applicant party.

IV. Recognition and enforcement of foreign judgments in Ukraine

1. General approach regarding judgments of EU Member State courts

The legislation of Ukraine does not constitute a special procedure relating to the recognition and enforcement of judgments in commercial matters given by courts of EU Member States.

The Law of Ukraine on PIL contains Section XIII “Foreign Judgments Recognition and Enforcement”, which comprises two articles: Art. 81 on “Foreign judgments which can be recognised and enforced in Ukraine”, including foreign judgments in cases arising from civil and economic legal relationships; and Art. 82 on “Procedure of foreign judgments recognition and enforcement”, referring to the “Law of Ukraine” without stipulating a general framework or the specificities of such a procedure.

“Law of Ukraine” should be understood to mean the Civil Procedure Code of Ukraine, given that the scope of the Economic Procedure Code of Ukraine does not include rules regarding the recognition and enforcement of foreign judgments. According to the structure of Section VIII of the Civil Procedure Code of Ukraine, foreign judgments are divided into two categories: (1) foreign judgments requiring both recognition and enforcement; and (2) foreign judgments which are not subject to enforcement – in such a case, solely a recognition procedure shall be applied.

2. Legislative provisions concerning recognition and enforcement of foreign judgments

a) Ukrainian international treaties

Pursuant to the rule of Art. 390 of the Civil Procedure Code of Ukraine, foreign judgments can generally be recognised and enforced, according to the provisions of international treaties to which Ukraine is a party.

At the multilateral level, Ukraine took an important step in 2016 by signing the Convention on Choice of Court Agreements of the Hague Conference on Private International Law, which has entered into force for the European Union. Ukraine is likely to complete accession to this Convention, which contains Art. 8 on recognition and enforcement of judgments and Art. 9 on the grounds for a refusal of recognition and enforcement.

Bilateral legal assistance treaties entered into by Ukraine that contain rules on the recognition and enforcement of foreign judgments are in force for a number of EU Member States, in particular: Bulgaria (Arts. 19–23), Cyprus (Arts. 20–23), the Czech Republic (Art. 52), Estonia (Arts. 40–43), Greece (Arts. 20–23), Hungary (Arts. 16–20), Latvia (Arts. 46–49), Lithuania (Arts. 42–46), Poland (Arts. 49–52), and Romania (Arts. 40–42). A bilateral treaty with Finland is in force, but it does not contain relevant rules.⁹⁷

The Single State Register of judgments in Ukraine contains EU Member State national court judgments that are recognised and can be enforced on behalf of foreign persons.⁹⁸

b) Principle of reciprocity

Apart from rules of international treaties, foreign judgments can be recognised and enforced within the Ukrainian jurisdiction on the grounds of the principle of reciprocity. Given that this principle was originally introduced within the Civil Procedure Code of Ukraine on an *ad hoc* basis with foreign states, it is important to focus attention on modernisation of the previously limited approach. Since the entry into force of the Law of Ukraine “On amendments of some legislative acts of Ukraine (concerning Private International Law issues adjustment)”,⁹⁹ the effective wording of Art. 390.1. and 390.2. of the Civil Procedure Code of Ukraine has meant that foreign judgments are recognised and enforced within the jurisdiction of Ukraine on the grounds, *inter alia*, of the principle of reciprocity, which is considered to exist unless proved otherwise.

Such legislative improvement resulted in expert assessments regarding the legal preconditions for the recognition of judgments of, in particular, German courts within the jurisdiction of Ukraine to be transformed from negative to positive.

⁹⁷ Bilateral treaty between Ukraine and Bulgaria – supra n. 88; bilateral treaty between Ukraine and Cyprus – supra n. 11; bilateral treaty between Ukraine and the Czech Republic – supra n. 27; bilateral treaty between Ukraine and Estonia – supra n. 89; bilateral treaty between Ukraine and Greece – supra n. 88; bilateral treaty between Ukraine and Hungary – supra n. 88; bilateral treaty between Ukraine and Latvia – supra n. 24; bilateral treaty between Ukraine and Lithuania – supra n. 89; bilateral treaty between Ukraine and Poland – supra n. 29; bilateral treaty between Ukraine and Romania – supra n. 89; bilateral treaty between Ukraine and Finland – supra n. 12.

⁹⁸ For example, the decision of the District Court in Gdynia (Poland) in the Leninskiy District Court of Nikolaev, *Marimpex Sp. Z. o.o. (Poland) v Kernel Ltd (Ukraine)*, No. 1416/2459/12, 23 May 2012, available at <<http://www.reyestr.court.gov.ua/Review/25269688>>.

⁹⁹ Law of Ukraine “On amendments of some legislative acts of Ukraine (concerning Private International Law issues adjustment)”, supra n. 44.

By way of illustration, as far back as in 2007 we can find a quintessential example of the German approach to the issue, as described by Ukrainian lawyer *A. Navrots'kyj*: judgments of Ukrainian courts could not be recognised and enforced in Germany because of the non-recognition of the judgments of German courts in Ukraine under the principle of reciprocity; the justice and legislation of Ukraine raised significant barriers for the recognition and enforcement of German judgments in Ukraine. It was pointed out that foreign judgments could be recognised and enforced on the basis of an available international treaty, but there were no appropriate bilateral treaties between Germany and Ukraine.¹⁰⁰ Following the modernisation of Ukrainian legislation in 2010, judgments of German courts shall be recognised and enforced within the jurisdiction of Ukraine on the grounds of the principle of reciprocity, according to Art. 390.2. of the Civil Procedure Code of Ukraine.¹⁰¹

Expanding the research context modestly, it is worth offering a positive example of European–Ukrainian judicial cooperation as regards compliance with the principle of reciprocity. Moreover, it concerns the second category of cases involving foreign judgments that are not subject to enforcement but only recognition within the jurisdiction of Ukraine. A judgment was delivered by a court of Northern Ireland, which is part of the EU Member State (to this day) of the United Kingdom of Great Britain and Northern Ireland and which does not have a bilateral treaty on legal assistance with Ukraine like Germany does. Thus, a competent Ukrainian court adopted an order to satisfy a motion of the Irish Bank Resolution Corporation Limited on recognition in the territory of Ukraine of a judgment of the High Court of Northern Ireland.¹⁰²

3. Key novelties of national legislation in the field of judgment enforcement

Foreign companies have to take into account the modernisation of Ukrainian legislation in the field of judgment enforcement, which has resulted in the adoption and entry into force of the Law of Ukraine “On Enforcement Proceed-

¹⁰⁰ *Navrots'kyj*, *Osnovni zasady vyznannja ta vykonannja inozemnych sudovych rišen' u Federatyvnij Respubliki Nimeččyna* [Basics of recognition and enforcement of foreign judgments in the Federal Republic of Germany], *Justinian* 2007, No. 1, pp. 31–35.

¹⁰¹ *Feliv*, *Vzajemne vyznannja i vykonannja sudovych rišen': na prykladi Ukraïny ta Nimeččyny* [Reciprocal recognition and enforcement of judgments: case study of Ukraine and Germany], *Justinian* 2010, No. 10, p. 117–120.

¹⁰² Shevchenkivsky District Court of Kyiv, *Irish Bank Resolution Corporation Limited*, interested parties *Lyndhurst Development Trading S.A British Virgin Islands, Public JSC Univermag “Ukraina” (Ukraine), Factoring company Elegant Invest Ltd (Ukraine)*, Case No. 2610/26776/2012 on insolvency, 3 April 2013, available at <<http://www.reyestr.court.gov.ua/Review/30765657>>.

ings”¹⁰³ and the Law of Ukraine “On Authorities and Individuals Carrying Compulsory Enforcement of Judgments and Decisions of other Authorities”,¹⁰⁴ both of 5 October 2016. Ukrainian lawyers outline a range of novelties introduced by these legal acts (items 1–7 in the footnote below), noting that “the new laws are expected to create a strong legal basis for the efficient enforcement of court decisions, timely collection of debts and protection of creditor’s rights.”¹⁰⁵

The Law of Ukraine “On Enforcement Proceedings” (Art. 78) confirmed that international treaties of Ukraine or the principle of reciprocity create proper legal grounds for the recognition and enforcement of judgments of

¹⁰³ Zakon Ukraïny “Pro vykonavče provadžennja” [Law of Ukraine “On enforcement proceedings”], 2 June 2016, No. 1404-VIII, Vidomosti Verchovnoï Rady Ukraïny 2016, No. 30, pos. 542.

¹⁰⁴ Zakon Ukraïny “Pro organy ta osib, jaki zdijsnjut’ prymusove vykonannja sudovych rišen’ i rišen’ inšych organiv” [Law of Ukraine “On authorities and individuals carrying compulsory enforcement of judgments and decisions of other authorities”], 2 June 2016, No. 1403-VIII, Vidomosti Verchovnoï Rady Ukraïny 2016, No. 29, pos. 535.

¹⁰⁵ *Baker & Macenzy*, New Legislation on Enforcement of Court Decisions in Ukraine, July 2016, available at <http://www.eba.com.ua/static/members_reviews/Baker_McKenzie_ENG_26072016.pdf>:

(1) establishment of the institution of private enforcement officers, who are entitled to enforce court decisions and decisions of other competent authorities, except for certain categories of decisions (e.g., decisions rendered against state companies and legal entities, decisions of the European Court of Human Rights, etc.);

(2) introduction of the Unified Register of Debtors, which shall be publicly accessible and shall contain information on debtors against which enforcement proceedings have been commenced (the existence of a record in the named register shall prevent the registration of a transaction on disposal of a debtor’s property by notaries and/or state registration authorities);

(3) introduction of the Electronic System of the Enforcement Proceedings, in which all documents in the proceedings shall be drafted, registered and stored by the enforcement officers, and which shall ensure the impartial allocation of enforcement writs among enforcement officers;

(4) extension of the term for initiation of enforcement proceedings under the enforcement writ for up to three years (instead of one year as set forth by the law currently in effect);

(5) introduction of an obligatory payment to be made by the creditor in advance for commencement of the enforcement proceedings (for monetary claims – in an amount of 2% of the debt but no more than 10 minimum salaries, and for non-monetary claims in an amount of two minimum salaries in cases in which the debtor is a legal entity);

(6) etermination of specific terms within which certain actions can be taken in enforcement proceedings, namely, seizure of funds and property, transfer of payment requests to banks, removal of arrest;

(7) a declaration that enforcement officers shall have direct access to official state databases and registers to obtain information on debtors’ assets, income and funds (including confidential information) and shall have the right to register the imposition and removal of arrests.”

foreign courts competent to hear civil or commercial cases as well as international or foreign arbitration in Ukraine.

V. Summary

In today's era, European business entities have all the proper institutional and legal avenues for protecting their affected, unacknowledged or disputed rights and interests in Ukraine within judicial or arbitral proceedings in disputes arising from or in relation to international commercial contracts concluded with Ukrainian counterparties.

Ukraine has made significant progress towards the European Area of Justice with the modernisation of its legislation in the field of private international law. The Law of Ukraine on PIL has introduced several important novelties regarding party autonomy and conflict-of-law principles concerning the closest connection, which correspond to key provisions of EU instruments unifying the conflict-of-law rules to be applied to cross-border contractual obligations.

Conversely, Ukrainian lawmakers have complicated the conflict-of-law mechanism and the corresponding mission of judges by introducing additional limitations on contracting parties' freedom of choice that go beyond such well-known institutions as a public policy clause and overriding mandatory rules. The point at issue is the institution of evasion of law as stipulated directly for contracts with a foreign element, which is not implemented within European conflict law – neither by the Rome Convention on the Law Applicable to Contractual Obligations nor by the Rome I Regulation that replaced it.

Thus, effective modernisation of Ukrainian legislation in the fields of cross-border litigation and conflicts of law combines with the reform of the judicial system of Ukraine to create auspicious opportunities for the further development of EU–Ukrainian cooperation in the area of justice. There are some controversial judgments that have been made by Ukrainian economic courts, but they do not appear to create irreversible negative trends or an image of the Ukrainian judicial system as unfriendly for foreign business entities. Accordingly, positive institutional and legal changes have created positive preconditions for raising European business entities' confidence in Ukraine as a jurisdiction that is capable of ensuring their rights and interests within judicial proceedings when deciding cross-border disputes arising from or in connection with international commercial contracts.

Non-Entrepreneurial Legal Entities in Ukraine

Application of the European Experience

Volodymyr Kochyn

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I. Introduction

Subsequent to the opening of the private sector of the economy from 1991 forward, the institution of legal personality has changed its meaning in the civil law of Ukraine, with status as a legal entity now focusing on entrepreneurship. In the Soviet period, research in this area examined the essence and

legal nature of mainly state enterprises,¹ whereas the construction of a new legal system resulted in the study of the entire spectrum of private law entities.² At the same time, neither was the conception of legal entities investigated extensively nor did businesses and profit-seeking organizations receive much legislative help. There has been little scholarly research in this field.³

The conception and constitution of legal entities attracts the attention of researchers in two regards in particular: (1) there is an absence of established academic scholarship concerning the institution of legal personality as regards non-entrepreneurial legal entities; (2) one finds chaos in legislative regulation. Nonetheless, non-business legal entities have significant prospects as they are a form of the realization of private rights and interests.

Building a democratic and socially responsible state that adheres to the rule of law requires a legal framework for the implementation of, inter alia, citizens' economic, social, cultural and environmental rights and interests. However, no state as a social formation is able to fully ensure the implementation of the rights and interests of the population and also cover the entire spectrum of social and individual needs. Civil society is based on a potentially self-governing society, by which citizens can organize themselves based on the identification and implementation of their own interests, which limits any government's claim to a right to exercise comprehensive (total) care of the individual and society.⁴

The political and legal system of the Soviet Union formally featured an extensive system of public associations, which included participating in public relations through the illusion of public policy approval by quasi civil society.⁵

Thus, the implementation of private rights and interests using the institutions of civil society was possible only in a democratic state. As of 1 March 2017, Ukraine had 1,193,694 registered entities, of which 222,170 were non-

¹ *Bratus'*, *Juridičeskie lica v sovetskom graždanskom prave (ponjatiije, vidy, gosudarstvennye juridičeskie lica)* [Legal entities in Soviet civil law (concept, types, state legal entities)], Moscow 1947.

² *Kučerenko*, *Orhanizacijno-pravovi formy jurydyčnyh osib pryvatnoho prava* [Organizational forms of private law legal persons], Kyiv 2004.

³ See *Luc' (ed.)*, *Pravovyj status nepidprijemnyč'kych orhanizacij* [Legal status of non-entrepreneurial organizations], Kyiv 2006; *Spasybo-Fatjejeva (ed.)*, *Pravove rehuljuvannia nekomerciinykh orhanizacij v Ukraïni* [Legal regulation of non-commercial organizations in Ukraine], Charkiv 2013; *Zozuljak*, *Nepidprijemnyč'ki jurydyčni osoby jak sub'jekty cyvil'noho prava: teoretyčni ta praktyčni aspekty* [Non-entrepreneurial legal entities as subjects of civil law: Theoretical and practical aspects], Ternopil' 2017.

⁴ *Cvik (ed.)*, *Zahal'na teoriija deržavy i prava* [General theory of state and law], Charkiv 2011, pp. 50–51.

⁵ For example, during the Soviet period of history, development of the trade union movement was carried out according to the perception of Lenin as schools of communism; *Kuusynen/Arbatov*, *Osnovy marksyzma lenynyzma* [Bases of Marxism Leninism], Moscow 1960, p. 555.

entrepreneurial (18.6%), a figure which is tending to increase according to statistical surveys of the public.⁶ The basis of civil society is organizations which are created by an implementation of the right to freedom of association. Such organizations are non-commercial because they are not directly involved in business and do not distribute profits among the participants.

The impact on the regulation of non-commercial organizations is complex, thus the regulation occurs in both private and public law. The basic constitutional principles of organization and activity of non-commercial organizations comprise: voluntariness, non-subordination to authorities, equality of members, legality and a free choice of activities that is free of any party influence.⁷ These principles are closely aligned with the basic principles stated in the “Fundamental Principles on the Status of Non-governmental Organisations in Europe”,⁸ such as:

- 1) Founding upon the initiative of individuals or groups of persons. The national legal and fiscal framework applicable to them should therefore permit and encourage such an initiative.
- 2) Enjoying the right to freedom of expression.
- 3) Organizations with legal personality should have the same rights and benefits enjoyed by other legal persons and be subject to the same administrative, civil and criminal law obligations and sanctions that are generally applicable to them.
- 4) Any act or omission by a governmental organ affecting an organization should be subject to administrative review and be open to challenge in an independent and impartial court having full jurisdiction.

However, Ukraine still lacks a single unified approach to private law in terms of how it regulates the status of legal entities with restrictions on profit-making. This can be observed even at the level of terminology. Civil law scholarship characterizes such legal entities with the term “non-entrepreneurial”. However, other terms, such as “non-profit”, “non-commercial” and “non-governmental”, are also in use, which creates additional uncertainty. In particular, the term “non-entrepreneurial organization” is used in the

⁶ Number of legal entities by organizational forms on 1 March 2017, <http://www.ukrstat.gov.ua/edrpy/ukr/EDRPU_2017/ks_opfg/ks_opfg_0317.htm>.

⁷ *Luc’ (ed.)*, supra n. 3, p. 10.

⁸ Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe (Adopted by the Committee of Ministers on 10 October 2007 at the 1006th meeting of the Ministers’ Deputies), <<https://wcd.coe.int/ViewDoc.jsp?id=1194609&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>>.

Laws of Ukraine “On securities and the stock market”,⁹ “On non-state pension provisions”,¹⁰ and “On state support of agriculture”,¹¹ and it appears elsewhere as well. However, the term “non-commercial” is found in, among others, the Laws of Ukraine “On television and radio”,¹² and “On cooperation”.¹³ The reason for this different use of terminology stems from the peculiarities in the purpose and subjects as regards the legal regulation of social relations. In particular, let us pay attention to the disparate logical framing of these terms from the point of view of their lexical perception:

- 1) non-commercial – meaning not intended for commercial success or benefit;¹⁴ used in the legislation as a rejection of the concept of “entrepreneurial activity” (Art. 52 of the Economic Code of Ukraine¹⁵) and therefore concerning the relevant sphere of regulation of economic activity;
- 2) non-profit – meaning one who does not bring or is not capable of generating profit (income);¹⁶ income that is connected with the object of taxation and therefore referring to tax relations (Art. 133.4.1 of the Tax Code of Ukraine¹⁷);
- 3) non-governmental – meaning not connected with a government organ that manages the state (government¹⁸).

The legal term “non-entrepreneurial” is used in the Civil Code of Ukraine¹⁹ and covers all these concepts because, firstly, it rejects entrepreneurship as

⁹ Zakon Ukraïny “Pro cinni papery ta fondovij rynek” [Law of Ukraine “On securities and the stock market”], 23 February 2006, No. 3480-IV, Vidomosti Verkhovnoï Rady 2006, No. 31, pos. 268.

¹⁰ Zakon Ukraïny “Pro nederžavke pensijne zabezpečennja” [Law of Ukraine “On non-state pension provisions”], 9 July 2003, No. 1057-IV, Vidomosti Verkhovnoï Rady 2003, No. 47–48, pos. 372.

¹¹ Zakon Ukraïny “Pro deržavnu pidtrymku sil’c’koho gospodarstva” [Law of Ukraine “On state support of agriculture”], 24 June 2004, No. 1877-IV, Vidomosti Verkhovnoï Rady 2004, No. 49, pos. 527.

¹² Zakon Ukraïny “Pro telebačennja ta radiomovlennja” [Law of Ukraine “On television and radio”], 21 December 1993, No. 3759-XII, Vidomosti Verkhovnoï Rady 1994, No. 10, pos. 43.

¹³ Zakon Ukraïny “Pro kooperaciju” [Law of Ukraine “On cooperation”], 10 July 2003, No. 1087-IV, Vidomosti Verkhovnoï Rady 2004, No. 5, pos. 35.

¹⁴ *Busel (ed.)*, Velykij tumačnyj slovnyk sučasnoï ukraïns’koï movy [Large explanatory dictionary of the modern Ukrainian language], Kyiv 2004, p. 765.

¹⁵ *Hospodars’kij kodeks Ukraïny* [Economic Code of Ukraine], 16 January 2003, No. 436-IV, Vidomosti Verkhovnoï Rady 2003, Nos. 18, 19–20, 21–22, pos. 144.

¹⁶ *Busel (ed.)*, supra n. 14, p. 775.

¹⁷ *Podatkovyj kodeks Ukraïny* [the Tax Code of Ukraine], 2 December 2010, No. 2755-VI, Vidomosti Verkhovnoï Rady 2011, Nos. 13–14, 15–16, 17, pos. 112.

¹⁸ *Busel (ed.)*, supra n. 14, p. 1514.

¹⁹ *Cyvil’nyj kodeks Ukraïny* [Civil Code of Ukraine], 16 January 2003, No. 435-IV, Vidomosti Verkhovnoï Rady 2003, No. 40–44, pos. 356.

the main type of economic activity; secondly, it does not provide for the distribution of profits as an object of taxation; and thirdly, it is created as a legal entity of private law and therefore there is no power element in the management of state affairs. Thus, Ukraine has strived to establish a system that sees non-entrepreneurial organizations (as well as their formation and development) through the lens of private legal entities based on the European vector of Ukrainian legislation.

II. The status-regulating acts of non-entrepreneurial organizations: Establishment and development of the concept

1. *The Civil Code of Ukraine as a private legal status regulator of non-entrepreneurial organizations*

Initially, the drafters of the Civil Code of Ukraine faced a common problem – the division of legal entities into public and private spheres and their division into companies and foundations. As a result, Art. 67 of the Draft of the Civil Code of Ukraine (25 August 1996)²⁰ considered non-entrepreneurial companies and foundations as exceptions rather than specific types of legal entities. The next edition of the Draft of the Civil Code of Ukraine (1 January 2000)²¹ envisaged a division of companies into entrepreneurial and non-entrepreneurial varieties, yet some rules that would identify the latter type were not provided. The Civil Code of Ukraine was adopted by Parliament (16 January 2003)²² and already contained a definition of a non-entrepreneurial company, as well as a non-finite list of legal forms of companies.

The basis for the separation of legal entities in the Civil Code of Ukraine has its roots in the German Civil Code, along with its rules on associations (*Vereine*) and foundations (*Stiftungen*). In turn, associations fall under either a non-business (*nicht-wirtschaftlicher Verein*) or a business (*wirtschaftlicher Verein*) classification. Unlike the German Civil Code, the Civil Code of Ukraine somewhat clarified the goal of a non-entrepreneurial legal entity. Focusing instead on the absence of entrepreneurial activities, Ukrainian law restrains companies and foundations from making profits for their subsequent distribution among the participants and beyond the scope of the business.

²⁰ Kartka zakonoprojektu Cyvil'noho kodeksu Ukraïny [Legislative materials for the Civil Code of Ukraine], <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=12096>.

²¹ See previous n.

²² See previous n.

2. *The Economic Code of Ukraine as an economic activity regulator of non-entrepreneurial organizations*

The Economic Code of Ukraine contains in Chapter 5 (Arts. 52–54) another concept concerning activities aimed at achieving economic, social or other results without profit. Under Art. 52 of the Economic Code of Ukraine, non-profit economic activity is defined as an independent systematic economic activity carried out by business entities aiming at the achievement of economic, social and other results without the purpose of generating profit. Non-profit economic activity may be conducted by business entities. In this case, the organizational forms are determined by the owner, or the relevant authority or local authorities (Art. 53 Economic Code of Ukraine). This regulation became applicable in the Economic Code of Ukraine, adopted by the Parliament of Ukraine (16 January 2003)²³ – with the exception of the term “non-profit”, which was at that time part of the Tax Code of Ukraine. However, in accordance with Art. 53 of the Economic Code of Ukraine, the organizational forms of non-commercial activities that are determined primarily by this Code are a sort of Fata Morgana for researchers and practitioners. In practice, there was a gradual erosion of the distinguishing characteristics of economic and civil relations as between commercial and non-commercial activities.²⁴ In particular, the Law of Ukraine “On state registration of legal entities and individuals – entrepreneurs and community groups”²⁵ and the Tax Code of Ukraine do not provide for a commercial or non-commercial registry. As a result, there is no legal definition of a “business entity” that is used in the appropriate contractual structures when acting as a party to an agreement. Consequently, there is no proper regulation of an entrepreneurial (business) relationship in Ukraine.

3. *Tax Code of Ukraine: Its importance for defining the private legal status of non-entrepreneurial organizations*

A separate problem in regulating the status of non-entrepreneurial entities was added by the Tax Code of Ukraine with its introduction of the term “non-

²³ Kartka zakonoprojektu Hospodars'koho kodeksu Ukraïny [Legislative materials for the Civil Code of Ukraine], <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=12098>.

²⁴ For the conflict between the Civil Code and the Economic Code see *Majdanyk*, Development of Ukrainian Private Law in the Context of its Europeanization, pp. 143 ff. (in this book).

²⁵ Zakon Ukraïny “Pro derzhavnu rejestraciju jurydyčnych osib, fizyčnych osib – pidpryjemciv ta hromads'kych formuvan” [Law of Ukraine “On state registration of legal entities and individuals – entrepreneurs and community groups”], 15 May 2003, No. 755-IV, Vidomosti Verhovnoi Rady 2003, No. 31–31, pos. 236.

profit organization” in Art. 133.4.1. Such an organization has the following simultaneous requirements:

- 1) It was formed and registered in the manner prescribed by the law regulating the activities of the non-profit organization.
- 2) It has founding documents which include a ban on the distribution of revenues (profits) to the founders (participants), members of the organization, employees (with the exception of their remuneration and contributions to social insurance), members of management and other entities.
- 3) The constituent documents provide for the transfer of assets to one or more non-profit organization or their being credited to an income budget in the event of termination of the legal entity (as a result of its liquidation, merger, division, amalgamation or reorganization). The provisions of this paragraph do not apply to associations and associations of condominiums.
- 4) The supervisory authority is entered in the register of non-profit foundations and organizations.

In addition, the Tax Code of Ukraine contains in Art. 133.4.6 a list of organizations, which can be registered as non-profit organizations. These are:

- 1) budget institutions;
- 2) community companies, political parties, creative unions, religious organizations, charitable organizations and pension funds;
- 3) unions, associations and other legal entities;
- 4) housing cooperatives, cottages (villa buildings), horticultural societies and garage (garage construction) cooperatives (companies);
- 5) condominiums and associations of owners of residential buildings;
- 6) trade unions, the associations and organizations of trade unions, and employers’ organizations and their associations;
- 7) agricultural service cooperatives and cooperative associations of agricultural service cooperatives;
- 8) other legal entities whose activities meet the requirements of this paragraph.

Consequently, the use of the Tax Code of Ukraine adds a twist to the rules of the Civil Code of Ukraine regarding the status of legal persons and the nature of their economic activity, focusing exclusively on public authorities and the opportunity to make profits. Thus, a legal entity may be created as a non-entrepreneurial enterprise under the Civil Code of Ukraine, may engage in a non-commercial activity (under the Economic Code of Ukraine) and will be awarded non-profit status in accordance with the Tax Code of Ukraine. The Tax Code of Ukraine provides for creation and registration in the manner specified by the law regulating the activities of the non-profit organization, whereas other laws refrain from a reference to profitability and the require-

ment that the entity be entered by a supervisory authority in the register of non-profit foundations and organizations.

Hence, in the Ukrainian legislation there is a problem regarding the proper legal regulation of the same legal phenomena – namely, private law legal entities which are created without the purpose of entrepreneurship and which do not distribute profits between their founders (participants). The reasons for this situation are, firstly, the dualism of private law in Ukraine²⁶ and, secondly, the borrowing of legal regulation elements beyond the system of law established in the state. In the modern era, it is argued that civil legislation should regulate all “horizontal” relations,²⁷ as a result of which economic and tax legislation should become a system of public regulation acts – resulting in state regulation of the economy and taxation, respectively.

III. The system of non-entrepreneurial organizations in Ukraine

1. Fragmentation of types and forms

The most significant characteristic of the Ukrainian typology of non-entrepreneurial organizations is the significant amount of types and forms requiring a proper classification. In this context, the classification of a grouping of legal entities, as set out by the Statistical Branch for Organizational Forms of Economic Entities (hereafter – SBOF) should be noted (approved by the State Statistics Service of Ukraine from 29 September 2014 No. 271).²⁸ This classification relates to the *organizational form* of a legal entity and refers to a set of rules on the manner in which a legal entity organizes the scope of activities and relationships (property, business, management, land, labour, etc.) arising in the course of its existence:

1. *Enterprises*: Farmstead; Private enterprise; Collective enterprise; State enterprise; State-owned enterprise; Municipal enterprise; Subsidiary company; Foreign enterprise; Public associations (religious organizations,

²⁶ There is parallel regulation of the same relations in the Civil Code of Ukraine and the Economic Code of Ukraine, in particular regarding the status of legal persons, contractual relations, corporate relations, etc. See *Spasybo-Fatjejeva (ed.)*, *Cyvil'nyj i Hospodars'kyj kodeksy: 2004–2014 rr.* [Civil and Economic Codes: 2004–2014], Charkiv 2014. See also *Maydanyk*, *Development of Ukrainian Private Law in the Context of its Europeanization*, pp. 143 ff. (in this book).

²⁷ *Borysova/Baranova/Žylinkova et al.*, *Cyvil'ne pravo Ukraïny* [Civil law of Ukraine], Vol. 1, Kyiv 2004, p. 11.

²⁸ Statystyčnyj klasyfikator orhanizacijnyh form sub'ektiv ekonomiky, zatverdženyj Nakazom Deržavnoï služby statystyky Ukraïny [Statistical classification of organizational forms of economic entities, approved by the State Statistics Service of Ukraine], 29 September 2014, No. 271, <http://www.ukrstat.gov.ua/klasf/st_ks/op_skof_2016.htm>.

- trade unions); Enterprise consumer cooperative; Leasing company;* Individual company;* Family enterprise;* Joint venture.*
2. *Economic entities*: Joint stock company; Open joint stock company;* Closed joint stock company;* State joint stock company; State holding company; Holding company; Limited liability company; Additional liability company; General company; Limited company; Lawyers' union; Law bureau.
 3. *Cooperatives*: Production cooperative; Service cooperative; Building cooperative;* Garage cooperative;* Consumer cooperative; Consumer society; Agricultural production cooperative; Agricultural cooperative; Farm service cooperative.
 4. *Authorities and organizations (institutions and establishments)*: Public authority; Judiciary; Local government; State organization (institution, establishment); Communal organization (institution, establishment); Private foundations (institution, establishment); The organization (of the establishment) of public associations (religious organizations, trade unions, consumer cooperatives, etc.); Tenant organization;* Company customers.*
 5. *Association of legal entities*: Association; Corporation; Consortium; Concern; Union of Consumer Societies; Other association of legal entities.
 6. *Separated subdivisions without legal personality*: Branch (other separate subdivision); Representation.
 7. *Non-entrepreneurial entities*: Legal profession; Entities of judicial self-government; High Qualification Commission of Judges of Ukraine; Social insurance funds; Construction financing fund; Creative union;²⁹ Other professional organizations and associations; Self-regulatory organization; Association of local authorities and their voluntary associations; Chamber of Commerce.
 8. *Public associations, trade unions, charities and other similar non-entrepreneurial entities*: Political party; Community organization; Community Groupings; Public association; Religious organization; Trade union; Association of Trade unions; Charitable organization; Organization of employers; Condominiums; Authority of self-organizing citizens.
 9. *Other organizational legal forms*: Individual entrepreneur; Individual advocacy; Commodity exchange; Credit union; Private pension fund; Horticultural society;* Other legal forms.

* The legislation stipulated the creation of such organizational legal forms

2. *The principles of classification of legal entities*

Classification of legal entities can be undertaken based on different criteria (i.e. according to different features) that have legal significance, such as:

²⁹ See *infra*, sub IV.1.a).

- 1) the legal nature of the foundation (Art. 81.2. Civil Code of Ukraine, which allows for a choice between (a) a private law legal entity, and (b) a public law legal entity);
- 2) the form of the foundation (Art. 83 Civil Code of Ukraine);
- 3) the interest pursued by the founders (e.g., Art. 103 Civil Code of Ukraine, Art. 1 of the Law of Ukraine “On public associations”³⁰), which allows determination of the specific requirements for the establishment, management, operation and termination of a legal entity: (a) private benefit; (b) public benefit;
- 4) the purpose of the activity, i.e. directing the results of the activity of a legal person (Arts. 84–85 Civil Code of Ukraine), which allows determination of special conditions for the creation, management and termination of a legal entity: (a) entrepreneurial (commercial); (b) non-entrepreneurial (non-commercial).

However, the classification of non-commercial legal entities is subject to a broad discussion in Ukrainian legal literature.

For example, *Verbitskaja* lists the following groups of non-commercial organizations: (1) consumer cooperatives; (2) associations of property owners; (3) institutions; (4) charitable and other funds; (5) social organizations; (6) bodies of public initiative; (7) social movements; (8) non-profit partnerships; (9) associations of legal entities (associations, unions).³¹

Further, *Kučerenko* specifies the following legal forms of non-entrepreneurial private law legal entities: (1) public and religious associations; (2) non-commercial associations of legal entities and individuals; (3) unions of co-owners; (4) foundations and institutions; (5) tenant organizations, ad-hoc organizations of buyers and non-commercial cooperative societies.³²

Spasybo-Fatjejeva stresses that a common classification of legal persons based on the foundation and the company is not enough, and hence there is a need to apply other legally relevant criteria, especially for non-entrepreneurial entities.³³ We believe that their separation on grounds of interest is quite reasonable, as it defines additional grounds for a private law legal entity, which, in turn, may affect its characteristics and bring forth several types of non-entrepreneurial entities. However, it must first be determined what

³⁰ Zakon Ukraïny “Pro hromads’ki ob’jednannja” [Law of Ukraine “On public associations”], 22 March 2012, No. 4572-VI, Vidomosti Verhovnoï Rady 2013, No. 1, pos. 1.

³¹ *Verbitskaja*, O delenii organizatsij na kommerčeskije i nekommerčeskije [On the division of organizations into commercial and non-commercial], Korporacii i učreždenija, Moscow 2007, pp. 24 f.

³² *Kučerenko*, supra n. 2, pp. 222–290, 159–176.

³³ *Spasybo-Fatjejeva*, Sovremennaja problematika nekommerčeskich organizacij [Modern problems of non-commercial organizations], Aktualni problemy cyvil’noho, žytlovo-gosudarstvennoho zakonodavstva, Charkiv 2012, p. 27.

constitutes an interest. In an Information Letter of 7 April 2008 (No. 01-08/211, “On some issues in the practice of applying the rules of the Civil and Economic Codes of Ukraine”),³⁴ the Supreme Economic Court of Ukraine explained that the terms ‘commercial enterprise’ and ‘non-profit enterprise’ are not identical to the concepts of an ‘entrepreneurial company’ and a ‘non-entrepreneurial company’, respectively. It seems that the approach of the Court is motivated by the different regulatory approaches in statutory law, i.e. branch regulation. Nonetheless, the statutes pursue a common regulatory goal: They want to define entities that do not profit from their activities and that – thus – do not feature a subsequent distribution to their members.

The views on the system of non-entrepreneurial organizations and entities confirm the complexity of the topic and the need to address this problem. In the absence of a single legal act that would regulate the legal status of non-entrepreneurial entities, discussion about a system of legal entities is possible only on a theoretical level.

Thus, we suggest the following procedural grouping of non-entrepreneurial legal entities:

1. Non-entrepreneurial entities:
 - 1.1. Entities which realize private rights and interests (private benefit):
 - 1.1.1. Entities which realize the personal non-pecuniary rights and interests of members:
 - 1.1.1.1. *Private associations.*
 - 1.1.2. Entities which realize the property rights and interests of members:
 - 1.1.2.1. *Unions of co-owners.*
 - 1.1.2.2. *Funds.*
 - 1.1.3. Entities which realize the economic rights and interests of members (exception):
 - 1.1.3.1. *Non-entrepreneurial cooperatives.*
 - 1.2. Entities which realize public rights and interests (public benefit):
 - 1.2.1. Entities which have no delegated authority:
 - 1.2.1.1. *Public unions.*
 - 1.2.1.2. *Political parties.*
 - 1.2.1.3. *Charitable organizations.*
 - 1.2.1.4. *Religious organizations.*
 - 1.2.2. Entities which have delegated authority:
 - 1.2.2.1. *Self-regulated organizations.*
 - 1.2.2.2. *Citizens’ formations.*
2. Foundations.

³⁴ Lyst Vyščogo hospodars’koho sudu Ukraïny “Pro dejaki pytannja praktyky zastosuvannja norm Cyvil’noho ta Hospodars’koho kodeksiv Ukraïny” [Letter of the Supreme Economic Court of Ukraine “On some issues in the practice of applying the rules of the Civil and Economic Codes of Ukraine”], 7 April 2008, No. 01-8/211, Visnyk hospodars’koho sудоçynstva 2008, No. 3, p. 45.

Accordingly, associations, unions of co-owners, funds, non-entrepreneurial cooperatives, public unions, political parties, charitable organizations, religious organizations, self-regulated organizations, and citizens' formations are types of non-entrepreneurial legal entities that may have separate subtypes. For example, funds can be identified among pension funds, charity funds, etc., and non-entrepreneurial cooperatives can distinguish between credit unions, consumer organizations and service cooperative societies. In our view, this understanding can properly form the legislative system governing these organizations and allow its further development in accordance with the EU *acquis*, also allowing for the possibility of a regulation of relations in these organizations.

3. *Public vs. private interest as a criterion for the qualification of non-entrepreneurial legal entities*

The distinction between private and public interests is important for civilian relations. First of all, the interests of a legal entity will influence the means of protecting these interests, relating in particular to the possibility of a protection of public interests by prosecutorial activities.³⁵ Secondly, the realization of public interests affects the interaction of legal entities and the state with regard to joint activities, for example in the scientific sphere.³⁶ Thirdly, the status of a legal entity that implements socially beneficial interests implies the existence of separate regulatory powers, as a result of which they are sometimes considered as public law legal entities,³⁷ although there are still no legal grounds for this.

Defining the role of public and private interests in the economic sphere, *Vinnyk* interprets the concept of "private interests" as the interests of an indi-

³⁵ Rišennja Konstytucijnoho Sudu Ukraïny u spravi za konstytucijnymy podannjamy Vyšchoho arbitražneho sudu Ukraïny ta Heneral'noi prokuratury Ukraïny ščo do oficijnoho tлумachennja položen' statti 2 Arbitražneho procesual'noho kodeksu Ukraïny (sprava pro predstavnyctvo prokuraturoju Ukraïny interesiv deržavy v arbitražnomu sudi) [Decision of the Constitutional Court of Ukraine in the case of the constitutional petitions of the Supreme Arbitration Court of Ukraine and the General Prosecutor's Office of Ukraine regarding the official interpretation of the provisions of Article 2 of the Arbitration Procedural Code of Ukraine (the case of representation by the Prosecutor's Office of Ukraine in the interests of the state in the arbitral court)], 8 April 1999, No. 3-rp/99, *Oficiïnyi visnyk Ukraïny* 1999, No. 15, p. 35.

³⁶ In particular, it is about public-private partnerships. See *Simson*, *Pravova model' deržavno-pryvatnoho partnerstva jak instrument harmonizacii public'nykh i pryvatnykh interesiv v innovacijnij stratehii Ukraïny* [Legal model of state-private partnership as a tool for harmonization of public and private interests in the innovation strategy of Ukraine], Charkiv 2015, p. 42.

³⁷ *Jasečko*, *Pytannja ščo do možlyvosti jurydyčnymi osobamy public'noho prava včynity pravočyny z nematerial'nymy blahamy* [The issue of the possibility for public law legal entities to conduct transactions with intangible benefits], *Jurydyčni osoby public'noho prava: učast' u cyvil'nomu oboroti*, Kyiv 2016, p. 129.

vidual (or individuals), a family, a group of citizens, or an organization (if the latter was created with the participation – direct or indirect – of individual persons and therefore is not within the scope of the public, i.e. under state or municipal ownership).³⁸ The statutory term of “public interest” requires a harmonization and balancing of (i) the interests of the state as an organization of political power and (ii) the interests of society (the common interests of its members). A substantial part of the latter includes local communities and social groups, especially those which are not able to protect their interests through use of their own legal means and therefore need government support (without which the chances of crisis phenomena in society increase, e.g. strikes and other collective forms of protest and self-defence).³⁹ Thus, non-entrepreneurial entities act as elements of civil society; the generic concept of “public interest” should highlight the concept of a “social interest” that is distinct from the activities of public entities (state, local community, autonomous). Finally, private and public interests can distinguish a focus on actions taken by individuals to realize their goals.

In implementing private interests, a person seeks to meet individual needs. This contrasts with the implementation of the public interest – implementing the various needs of others. In academic literature, this circle of persons is defined by the term “end recipients” (Ukr.: *дестинатори*).⁴⁰ It should be observed that the term is used only in Art. 103.2. of the Civil Code of Ukraine in describing the persons who created a foundation. In our view, the focus should be more on the process of implementing the aims of the legal entity and less so on the addressees of the norm. Thus, private interests are realized by private benefit non-entrepreneurial entities. Given the subjects of private law regulation, they can be divided into entities which realize the personal non-pecuniary rights and interests of members, and entities which realize property rights and interests of members. The first category realizes creative, professional, educational, cultural, medical, social and moral interests of the various founders. The second group consists of non-entrepreneurial societies that are based on a property interest and that serve the enjoyment of property and property rights. Non-entrepreneurial organizations are created to protect the rights of both directly interested as well as unspecified persons. These are public benefit organizations that are now subject to a changed approach.⁴¹

³⁸ *Vinnyk*, *Teoretyčni aspekty pravovoho zabezpečennja realizacii publicnyh i pryvatnyh interesiv v hospodars'kyh tovarystvach* [Theoretical aspects of legal support for the implementation of public and private interests in commercial societies], Kyiv 2004, p. 45.

³⁹ *Vinnyk*, previous n., p. 48.

⁴⁰ *Borysova//Baranova/Zylinkova et al.*, supra n. 27, p. 118.

⁴¹ Thus, the “outlaws” were private associations whose activities were aimed only at the interests of their members.

Namely, unlike the basic Law of Ukraine “On citizens’ associations”,⁴² the Law “On public associations” allows these legal entities to be established only where public interests are being pursued, these including economic, social, cultural, environmental and other interests. We believe that protecting the interests of public benefit organizations will also result in the protection of unspecified persons and that judicial procedures will be simplified by instituting class actions. By not focusing on the details of the mechanism of such protection, the legislation emphasizes that it is court decisions rather than legal regulations that are to initiate this practice. In this context, particularly noteworthy is the Resolution of the District Administrative Court of Kyiv of 20 March 2017 in case No. 826/1511/16⁴³ on illegal inaction of the Ministry of Justice of Ukraine. It did not purport to not annul the registration of the joint order of the Ministry of Interior and the State Regulatory Service of Ukraine⁴⁴ of 21 March 2001 No. 53/213⁴⁵ on licensing activities regarding non-military weapons. Rather, the plaintiff in the case was the Ukrainian public organization “Ukrainian Association of Gun Owners”, which was acting as a party of united citizens, gun owners, and other groups of legal entities. One of the main tasks of the claimant was to promote the improvement of the legal framework regulating the circulation of arms in Ukraine. This case proves that the public interest will also be advanced by protecting private interests, especially the private interests of the members of non-commercial entities.

⁴² Zakon Ukraïny “Pro ob’jednannja hromadjan” [Law of Ukraine “On citizens’ associations”], 16 June 1992, No. 2460-XII, Vidomosti Verchovnoi Rady 1992, No. 34, pos. 504.

⁴³ Postanova Okružnogo administratyvnoho sudu mista Kyïva [Decision of the District Administrative Court of Kyiv], 20 March 2017, case No. 826/1511/16, <<http://www.reyestr.court.gov.ua/Review/65436743>>.

⁴⁴ The State Regulatory Service of Ukraine (Держкомпідприємництво) (DRS) is a central executive body, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine and which implements state regulatory policy, policy on supervision (control) of economic activity, the licensing and permitting system in economic activity and deregulation of business activity.

⁴⁵ Licenzijni umovy provadžennja hospodars’koi dijāl’nosti z vyrobnyctva, remontu vohnepalnoi zbroi nevijskovoho pryznačennja ta bojeprypasiv do nej, cholodnoi zbroi, pnevmatyčnoj zbroi kalibru ponad 4,5 milimetra i švydkistju politu kuli ponad 100 metriv na sekundu, torhivli vohnepal’noju zbrojeju nevijskovoho pryznačennja ta bojeprypasamy do nej, cholodnoju zbrojeju, pnevmatyčnoju zbrojeju kalibru ponad 4,5 milimetra i švydkistju politu kuli ponad 100 metriv na sekundu [Licensing conditions for the production and repair of non-military firearms and ammunition for them, cold weapons, and pneumatic weapons with a caliber more than 4.5 millimeters and a bullet speed of more than 100 meters per second, and for the sale of non-military firearms and ammunition for them, cold weapons, and pneumatic weapons with a caliber more than 4.5 millimeters and a bullet speed of more than 100 meters per second], Oficijnyj visnyk Ukraïny 2001, No. 14, p. 338.

IV. Selected types of non-entrepreneurial legal entities

1. Entities which realize private rights and interests (private benefit)

a) Private associations.

Today, the activities of creative associations, trade unions and associations of legal entities are legally regulated as associations. We believe that the term “union” (Ukr.: спілка) is identical to the term “association” (Ukr.: асоціація), but given that the more accurate term is “association” (Ukr.: об’єднання), we suggest its use as a kind of last legal form of a non-entrepreneurial company. The legal definition of certain associations is in the Law of Ukraine titled “On professional creative workers and creative unions”.⁴⁶ Thus, the legislature is singling out moral interests (rights or benefits) that are pursued by these associations in the field of culture and art. Moreover, a special legislative act has classified the benefits accruing to these entities as private benefits despite the underlying public relations. It should be noted that, in pursuing their activities, some organizations have taken to building vertically integrated corporate structures. Nonetheless, this does not affect their status as entities acting for non-business purposes.⁴⁷ *Džurynskyj* states that the legislation established only model lists of legal forms of business associations (Art. 120.1. Economic Code of Ukraine), which the author covers under the concept of a “business association”.⁴⁸ The specific types of associations are: (a) banking associations; (b) cooperative associations; (c) associations of farmers; (d) associations of insurers; (e) associations of professional stock market participants; and (f) non-profit associations of financial institutions.⁴⁹ The remaining entities are in the form of public associations which, pursuant to Art. 1 of the Law of Ukraine “On public associations”, exist for the realization and protection of rights and freedoms, including social, economic, cultural and other public interests.

b) Unions of co-owners

Regarding a union of co-owners (Ukr.: об’єднання співвласників) as a separate legal form of private law legal entities, *Kučerenko* looked at the example of

⁴⁶ Закон України “Про професійних творчих працівників та творчі спілки” [Law of Ukraine “On professional creative workers and creative unions”], 7 October 1997, No. 554/97-BP, *Vidomosti Verchovnoï Rady* 1997, No. 52, pos. 312.

⁴⁷ *Tisunova*, *Evoljucija vertykal’no-intehrovanyh korporatyvnyh struktur* [Evolution of vertically integrated corporate structures], *Pidpryjemnyctvo, hospodarstvo i pravo* 2011, No. 7, pp. 74–75.

⁴⁸ *Džurynskyj*, *Pravove stanovyšče hospodar’skych ob’jednan’ v Ukraïni* [The legal status of business associations in Ukraine], Kyiv 2009, pp. 43–44.

⁴⁹ *Džurynskyj*, previous n., pp. 51–54.

condominiums by drawing an analogy to the regulatory ‘trial-and-error approach’ towards legal entities in Ukraine and in the CIS.⁵⁰ It concentrates on individuals’ motivation – availability of real estate – and allows for the creation of associations of owners of houses, garages, and residential (non-residential) buildings.⁵¹ A union of co-owners of blocks of apartments (condominiums) is a legal entity established for the owners of apartments and/or non-residential premises of an apartment building for the promotion of their own assets and for the management, maintenance and use of common property (Art. 1 of the Law of Ukraine “On unions of co-owners of a block of apartments”⁵²).

The amendments introduced to the Civil Code of Ukraine on the possibility of creating other unions of co-owners do not expressly provide for the establishment of such an entity for non-blocked apartments. There is a legislative gap regarding the possibility of creating a non-entrepreneurial society that unites the owners of land, houses, garages and other property.

2. *Entities which realize public rights and interests (public benefit)*

a) *Public union.*

In the Law of Ukraine titled “On public associations”, a public association is defined as a voluntary association of individuals and/or private law legal entities for the implementation and protection of rights, freedoms and social satisfaction, these including economic, social, cultural, environmental and other interests (Art. 1.1.). This definition corresponds almost entirely with Art. 1.3. of the Law of Ukraine “On citizens’ associations”, which focuses on associations designed to meet and protect citizens’ legitimate social, economic, creative, national, cultural, sports and other interests. As a result of changes in the current legislation, there are two concepts: public organizations as a public association, the founders and members (participants) of which are individuals; and public unions as a public association, founded by private law legal entities, where members (participants) are private law legal persons and natural persons (Art. 1.3.–1.4.).

How are public unions and associations of legal entities related (Chapter 12 of the Economic Code of Ukraine)? Obviously, the introduction of the concept of a “public union” and the term “public organization” is a purely political decision because the bill obviously wanted to preserve the existing conceptual-categorical apparatus.

⁵⁰ *Kučerenko*, supra n. 2, pp. 252–253.

⁵¹ *Kučerenko*, supra n. 2, p. 269.

⁵² Zakon Ukraïny “Pro ob’jednannja spivvlasnykiv bahatokvartyrnoho budynku” [Law of Ukraine “On unions of co-owners of a block of apartments”], 29 November 2001, No. 2866-III, Vidomosti Verkhovnoi Rady 2002, No. 10, pos. 78.

b) Political party

A political party (Art. 2 of the Law of Ukraine “On political parties in Ukraine”)⁵³ is an association of citizens – supporters of a national program of social development – which has as its main objective participation in policy-making and the formation of the government (local and regional governments). The issue in respect of political parties is that each single organization has cells that have the status of being legal entities. Consequently, political parties in Ukraine are legally corporations. As a result, there may be a problem due to the elimination of such a ‘corporation’s’ sub-entities given that that statutory legislation provided for such an opportunity.

c) The charity (or charitable) organization

A charity (or a charitable organization) is a private law legal entity whose founding documents specify as the main objective a charitable aim in one or more areas defined by law. We believe that charities were aptly regulated by the Law of Ukraine “On charity and charity organizations”.⁵⁴ That Law aimed at supporting relations in society for the purposes of developing philanthropy, establishing humanism and charity, and providing favourable conditions for the formation and activities of charities. Unfortunately, the existing provisions on the types of charities do not correlate with the norms of Art. 83 Civil Code of Ukraine on forms of legal entities. In particular, the Law of Ukraine “On charity and charity organizations” provides for the establishment of charity societies, charity funds and charity foundations (Art. 13). This regulatory text does not define them as legal forms and focuses only on the procedure of conducting acts of organization and management. Thus, the legislature is trying to implement the view of academic opinion (e.g. Čepurnov⁵⁵) that there are two main legal forms of charitable organizations – societies and foundations. In accordance with Litvina,⁵⁶ we prefer to classify a ‘charity fund’ as a systematic allocation of assets instead of defining it as an organization without membership.

⁵³ Zakon Ukraïny “Pro polityčni partiï v Ukraïni” [Law of Ukraine “On political parties in Ukraine”], 5 April 2001, No. 2365-III, Vidomosti Verkhovnoï Rady 2001, No. 23, pos. 118.

⁵⁴ Zakon Ukraïny “Pro blahodijnu dijaj’nist’ ta blahodijni orhanizacij” [Law of Ukraine “On charity and charitable organizations”], 5 July 2012, No. 5073-VI, Vidomosti Verkhovnoï Rady 2013, No. 25, pos. 252.

⁵⁵ Čepurnov, Pravovyj status blahodijnyh ustanov ta tovarystv za zakonodavstvom Ukraïny [The legal status of charitable foundations and societies under the laws of Ukraine], Kyiv 2004, p. 4.

⁵⁶ Litvina, Pravove položennja blahodijnyh orhanizacij v Ukraïni [The legal status of charitable organizations in Ukraine], Kyiv 2003, p. 3.

d) Religious organization

A religious organization, in accordance with Art. 7 of the Law of Ukraine “On freedom of conscience and religious organizations”,⁵⁷ is created to meet the religious needs of citizens to profess and propagate their faith and to act according to their hierarchical and institutional structure as well as to elect, appoint and replace their personnel in accordance with the entity’s statutes (regulations). Religious organizations are functional types of non-entrepreneurial entities.⁵⁸ Given the views analysed in the literature, *Bykov* concludes that religious organizations should be understood as a system of voluntary religious associations, formed to meet the religious needs of citizens to profess any faith. The author also claims that a religious organization should: (1) possess a hierarchical and institutional structure; (2) meet the religious needs of citizens by profession and dissemination of faith; and (3) ensure a legitimate mechanism and the proper behaviour of its members by internal means, primarily of a non-pecuniary nature.⁵⁹

e) Self-regulated organizations

The study of the institution of self-regulated organizations in civil law began only recently. This institution was borrowed from US and British law, which give legal entities the right to regulate relations outside of state influence (termed as privatization of management⁶⁰). Such regulation allows the state to grant more freedom in the regulation of private relations and, accordingly, to designate the status of a separate type of legal entity – a self-regulatory organization (SRO). This term was first secured in accordance with the Model Law of the CIS⁶¹ and found its proper understanding in modern academic literature.⁶²

In the legislation SROs are defined as including:

- SRO administrators of private pension funds (Law of Ukraine “On private pension provision”);

⁵⁷ Zakon Ukraïny “Pro svobodu sovisti ta relihijni orhanizacii” [Law of Ukraine “On freedom of conscience and religious organizations”], 23 April 1991, No. 987-XII, Vidomosti Verhovnoi Rady 1991, No. 25, pos. 283.

⁵⁸ *Piddubna*, Relihijni orhanizacii yak sub’jekty cyvil’nych pravovidnosyn [Religious organizations as subjects of civil relations], Charkiv 2008. p. 10.

⁵⁹ *Bykov*, Relihijni orhanizacii yak sub’jekty prava na svobodu virospovidannja v Ukraïni [Religious organizations as the subjects of freedom of religion in Ukraine], Naukovyj visnyk NUBiP Ukraïny 2011, No. 157 (45), <<http://elibrary.nubip.edu.ua/8555>>.

⁶⁰ *Savas*, Privatization. The Key to Better Government, New Jersey 1987, p. 6.

⁶¹ Model’nyj zakon pro kooperatyvy ta ïch ob’jednannja (sojuzy) [Model law on cooperatives and their associations (unions)], <http://zakon1.rada.gov.ua/laws/show/997_a12>.

⁶² *Filatova*, Samorehulivni orhanizacii yak sub’jekty cyvilnoho prava [Self-regulated organizations as subjects of civil law], Charkiv 2016.

- SRO in respect of credit unions (Law of Ukraine “On credit unions”⁶³);
- SRO in the financial services market (the Law of Ukraine “On financial services and state regulation of financial services”⁶⁴);
- SRO in respect of appraisers (the Law of Ukraine “On the assessment of property, property rights and professional valuation activities in Ukraine”⁶⁵);
- SRO in the valuation of land (Law of Ukraine “On land valuation”⁶⁶);
- SRO in respect of the stock market (Law of Ukraine “On securities and the stock market”).

There are also de facto SROs not explicitly classified as such by the law. For instance, (i) the Chamber of Commerce, a non-profit self-governing organization assembling legal entities, established and operating under the laws of Ukraine (including citizens of Ukraine registered as entrepreneurs and their associations), and (ii) commodity exchanges. These entities are organizations composed of professional market participants – those working in the “liberal professions”, i.e. individuals engaging in a set of activities that ensure the specific needs of society in the field of humanitarian and socio-economic relations by providing skilled and socially important services, thus being individuals carrying special personal responsibility.⁶⁷ The impact of these so-called “non-territorial governmental structures”⁶⁸ can be comprehensive or at the corporate level (codes of ethics, internal rules, etc.) or based on legislative support (the relevant legal act).

f) Citizens’ formations

Citizens’ formations in Ukraine are envisaged in the forms of citizens’ environmental formations (the Law of Ukraine “On environmental protec-

⁶³ Zakon Ukraïny “Pro kredytni spilky” [Law of Ukraine “On credit unions”], 20 December 2001, No. 2908-III, Vidomosti Verhovnoï Rady 2002, No. 15, pos. 101.

⁶⁴ Zakon Ukraïny “Pro finansovi posluhy ta derzavne rehljuvannja rynkiv finansovykh posluh” [Law of Ukraine “On financial services and state regulation of financial services”], 12 July 2001, No. 2664-III, Vidomosti Verhovnoï Rady 2002, No. 1, pos. 1.

⁶⁵ Zakon Ukraïny “Pro ocinku majna, majnovykh prav ta profesjnu ocinočnu dijal’nist’ v Ukraïni” [Law of Ukraine “On the assessment of property, property rights and professional valuation activities in Ukraine”], 12 July 2001, No. 2658-III, Vidomosti Verkhovnoï Rady 2001, No. 47, pos. 251.

⁶⁶ Zakon Ukraïny “Pro ocinku zemel’” [Law of Ukraine “On land valuation”], 11 December 2003, No. 1378-IV, Vidomosti Verhovnoï Rady 2004, No. 15, pos. 229.

⁶⁷ *Koliuško/Ukraïnskyi*, Vil’ni profesii: ponjattja ta specyfika [Liberal professions: concept and specifics], Zbirnyk materialiv Vseukraïnskoï konferencii z pytan’ zakonodavstva dlja nepidpryjemnych orhanizacij, Kyiv 2004, p. 58.

⁶⁸ *Koliuško/Ukraïnskyi*, Vil’ni profesii: ponjattja ta specyfika [Liberal professions: concept and specifics], Zbirnyk materialiv Vseukraïnskoï konferencii z pytan’ zakonodavstva dlja nepidpryjemnych orhanizacij, Kyiv 2004, p. 62.

tion”⁶⁹) and of citizens’ formations for the protection of public order and the state border (the Law of Ukraine “On citizens’ participation for the protection of public order and the state border”). Citizens’ formations regarding public order and protection of the state border (which under Art. 3.4.–3.5. of the Law of Ukraine “On citizens’ participation for the protection of public order and the state border”⁷⁰ have no right to engage in business or any other activity for profit) and the use of public forces for the purposes of protecting public order and the state border of Ukraine can occur only for tasks under this law. This formation is created on a voluntary basis at work, at school or in the residences of citizens. The members may be invited representatives of labour collectives, schools, law enforcement agencies, units of the State Border Service of Ukraine and the public. A social formation for the protection of public order and the state border is to consist of not less than ten persons (Art. 4).

3. Cooperatives

a) General

A separate group of non-entrepreneurial societies is constituted by non-entrepreneurial cooperatives (Ukr.: кооператив). The reason for their separate treatment is the feature of a cooperation constituting an economic activity. Thus, such a cooperative is an association of individuals engaged in joint activities of common interest for themselves. The main purpose of non-entrepreneurial cooperatives is promoting economic, social and cultural development and progress in developing countries.⁷¹ Thus, these organizations occupy an intermediate position between entrepreneurial and non-entrepreneurial companies, and as a result they are assigned to the latter group due to the exhaustive list of entrepreneurial entities. However, the legislative characterization of cooperatives in Ukraine is rather inconsistent, since one of them – production cooperatives – is entrepreneurial (Art. 84 Civil Code of Ukraine) whereas others are non-entrepreneurial societies (Art. 85 Civil Code of Ukraine), of which the most often mentioned are consumer cooperatives, housing construction cooperatives, garage cooperatives and credit unions. It

⁶⁹ Zakon Ukraїny “Pro ochoronu navkolyšn’oho pryrodnoho seredovyšča” [Law of Ukraine “On environmental protection”], 25 June 1991, No. 1264-XII, Vidomosti Verchovnoi Rady 1991, No. 41, pos. 546.

⁷⁰ Zakon Ukraїny “Pro ucast’ hromadjan v ochoroni hromads’koho porjadku i deržavnogo kordonu” [Law of Ukraine “On citizens’ participation for the protection of public order and the state border”], 22 June 2000, No. 1835-III, Vidomosti Verkhovnoi Rady 2000, No. 40, pos. 338.

⁷¹ Rekomendacija ščo do roli kooperatyviv u ekonomičnomu ta socialnomu rozvytku krajn, ščo rozvyvajut’sja [Recommendation on the Role of Cooperatives in the Economic and Social Development of Developing Countries], No. 127, 21.06.1966, <http://zakon2.rada.gov.ua/laws/show/993_249>.

should be added that cooperatives represent the legal structure that need to be reviewed in terms of their appropriateness in civil law. Supporting *Kučerenko*, the role of cooperatives should be rethought in relation to the civil law.⁷² Thus we believe that a cooperative must comply with the characteristics of a non-entrepreneurial society; otherwise it is appropriate for its founders (participants) to select a different form of a legal entity.

In terms of their public benefit, a non-entrepreneurial society implements socially useful interests of unspecified persons or entities united by certain characteristics (age, social and economic status, etc.). These interests, which are pursued by such non-entrepreneurial societies, are closely related to the public interest that is implemented primarily by the state. In this regard, the decisive criterion is whether a public benefit non-entrepreneurial society exercises state power or not.

Some powers are implemented by a so-called citizens' formation; at issue here are powers provided, in fact, to legal entities or members⁷³ that allow them to assist state authorities or local governments. In this context, it should be discussed whether these organizations are of a public nature due to the specific manner in which they are established and whether they still can maintain their private law status.

*b) Non-entrepreneurial cooperatives on the basis of the Law of Ukraine
"On cooperation"*

Non-entrepreneurial cooperatives allow for the development of cooperations (general Law of Ukraine "On cooperation", special Laws "On agricultural cooperation",⁷⁴ "On consumer cooperation",⁷⁵ "On credit unions").

Under terms of the statute, a 'cooperation' (Ukr.: кооперація, Art. 1 of the Law of Ukraine "On cooperation") is a system of cooperative organizations that is established to meet the economic, social and other needs of its members. Non-entrepreneurial cooperatives are divided into the areas of:

- service – formed by an association of individuals and/or entities to provide services mainly to members of the cooperative and others (at an amount not exceeding 20 per cent of the total turnover of the cooperative) in relation to the economic activity in question;

⁷² *Kučerenko*, supra n. 2, p. 141.

⁷³ *Kablov*, *Vydy hromads'kykh formuvan' z ochoronyhromads'koho porjadku* [Types of community groups to protect public order], *Pravo Ukraïny* 2007, No. 10, p. 103.

⁷⁴ *Zakon Ukraïny "Pro sil's'kohospodars'ku kooperaciju"* [Law of Ukraine "On agricultural cooperation"], 17 July 1997, No. 469/97-BP, *Vidomosti Verkhovnoï Rady* 1997, No. 39, pos. 261.

⁷⁵ *Zakon Ukraïny "Pro spožyvču kooperaciju"* [Law of Ukraine "On consumer cooperatives"], 10 April 1992, No. 2265-XII, *Vidomosti Verkhovnoï Rady* 1992, No. 30, pos. 414.

- consumer (consumer society) – formed by uniting individuals and/or entities for the organization of trade services and for the preparation of agricultural products, raw materials, production and other services to meet the consumer needs of its members.

The first feature of a cooperation is the accumulation of efforts of participants to achieve certain goals. For example, there was a common cooperation of residential construction and related savings institutions (i.e. housing cooperatives and housing construction and savings banks). Typical functions of saving banks are the accumulation of funds for a down payment for a mortgage; calculation of fixed and below-market interest on loans and savings; assistance in the form of bonuses for contributions of participants and/or deposit guarantees for participants; establishing the credit history for borrowers of mortgaged loans; and creating favourable conditions for mortgage citizens with an average income.

Another aspect of cooperation is the need for flexible organizational instruments facilitating the sale of property without typical business risks. We have already drawn attention to the role of cooperatives in achieving goals and conducting activities, but we should not forget that these organizations can also conduct business.

Pursuant to Art. 1 of the Law of Ukraine “On credit unions”, a credit union is a non-profit organization founded by individuals, trade unions and associations on a cooperative basis to meet the needs of its members through reciprocal lending and the provision of financial services based on the combined financial contributions of members; further, a credit union is a financial institution whose sole activity is the provision of financial services.

4. Funds and foundations

a) *The problem of correlation between the concepts of foundations and funds*

In legislation, the term “fund” Ukr.: фонд) is used in two ways: (1) as an organization, such as charitable fund (Art. 13.4. of the Law of Ukraine “On charity and charitable organizations”); (2) as a set of assets, such as a reserve (insurance) fund (Art. 14 of the Law of Ukraine “On economic societies”⁷⁶). In addition, legislation has used the term “foundation” (фундація) (Art. 12-1 Law of Ukraine “On citizens’ associations”), which, in our opinion, is an adjacent concept.

The term “fund” as found in Ukrainian legislation should be understood, first of all, in the sense of property, i.e. relating to the allocation of property (as either a foundation) or a combination of property (as a society). Currently,

⁷⁶ Закон України “Pro hospodars’ki tovarystva” [Law of Ukraine “On economic societies”], 19 September 1991 No. 1576-XII, Vidomosti Verkhovnoi Rady 1991, No. 49, pos. 682.

there is no research on the proper delimitation of these legal concepts regarding non-entrepreneurial organizations as private law legal entities in Ukraine. Reference should, however, be made to a first academic attempt at a systematic analysis of the private law status of funds, a legal entity of public law,⁷⁷ as well as regarding funds in corporate investment relations.⁷⁸

The concept of a foundation (Ukr.: *установа*) embodied in the Civil Code of Ukraine is used also in other legislation governing the special status of organizations as legal entities and in cases not involving that status, such as: financial institutions (Ukr.: *фінансова установа*)⁷⁹, academic institutions (Ukr.: *наукова установа*)⁸⁰ and penal institutions (Ukr.: *установа виконання покарань*)⁸¹. *Zozuljak* outlines this legal position as the “conventional name (designation) of separate legal entities”⁸² but does not explain further. We believe that this is not a conventional name (designation) and that it reflects the use of false and outdated legal terminology that needs to change according to the modern understanding of legal phenomena and their relationship to the level of general legal and industry generalizations. An example of such a change can be recalled in the understanding of “advocacy” in Ukraine, which was transformed from a “voluntary professional public association” (Law of Ukraine “On advocacy” (1992))⁸³ into a “non-governmental self-governing institution” (Law of Ukraine “On advocacy and advocacy activity” (2013)),⁸⁴ this being a result of a delimited concept of both “advocacy” as a legal phenomenon and the legal entities operating in this sphere. The organization mentioned above should not be construed as an institution within the meaning of certain organizational and legal forms nor in the meaning of relevant institutions in the broad sense.

⁷⁷ *Voicikhovs'ka*, *Fond harantuvannja vkladiv fizyčnych osib jak učasnyk cyvil'nych pravovidnosyn* [Deposit guarantee fund for individuals as participants in civil legal relations], Kyiv 2016.

⁷⁸ *Sušč*, *Pravove rehuljuvannja korporatyvnoho investuvannja: cyvil'no-pravovyj aspekt* [Legal regulation of corporate investments: the civil law aspect], Kyiv 2014.

⁷⁹ *Zakon Ukraïny “Pro finansovi posluhy ta deržavne rehuljuvannja ryнкiv finansovyh posluh”* [Law of Ukraine “On financial services and state regulation of financial services”], 12 July 2001, No. 2664-III, *Vidomosti Verkhovnoi Rady* 2002, No. 1, pos. 1.

⁸⁰ *Zakon Ukraïny “Pro naukovu i naukovo-tehničnu dijal'nist'”* [Law of Ukraine “On scientific and scientific-technical activities”], 26 November 2015, No. 848-VIII, *Vidomosti Verkhovnoi Rady* 2016, No. 3, pos. 25.

⁸¹ *Kryminal'no-vykonavčyj kodeks* [Criminal-executive code of Ukraine], 11 July 2003, No. 1129-IV, *Vidomosti Verkhovnoi Rady* 2004, No. 3–4, pos. 21.

⁸² *Zozuljak*, *supra* n. 3, p. 313.

⁸³ *Zakon Ukraïny “Pro advokaturu”* [Law of Ukraine “On advocacy”], 19 December 1992, No. 2887-XII, *Vidomosti Verkhovnoi Rady* 1993, No. 9, pos. 62.

⁸⁴ *Zakon Ukraïny “Pro advokaturu ta advokac'ku dijal'nist'”* [Law of Ukraine “On advocacy and advocacy activity”], 5 July 2012, No. 5076-VI, *Vidomosti Verkhovnoi Rady* 2013, No. 27, pos. 282.

The civil law model of a foundation relates to private law legal entities (Art. 81.3. Civil Code of Ukraine). The provisions of the Civil Code of Ukraine on private law legal entities may not be applied to public law legal persons unless otherwise provided by law (Art. 82 Civil Code of Ukraine).⁸⁵

Pursuant to the provisions of the Civil Code of Ukraine, foundations have the following features: (1) founders are not involved in the management of the foundation; property has a targeted character (Arts. 83.3., 102 Civil Code of Ukraine); (2) along with their main economic activity, foundations may do business unless otherwise provided by law and if the activity meets the purpose for which they were created and contributes to its achievement (Art. 86 Civil Code of Ukraine); (3) they are created on the basis of an individual or joint founding act drawn up by the founder (Art. 87.3. Civil Code of Ukraine) which indicates its purpose and specifies the property being transmitted to the institution needed to achieve the goal management structure of the foundation (Art. 88.3. Civil Code of Ukraine); (4) they are subject to special management procedures prescribed in Art. 101 of the Civil Code of Ukraine; (5) there is a special procedure for changing the purpose of the foundation and its management structure (Art. 103 Civil Code of Ukraine). As to other issues, they are not defined, so that the general provisions of these entities expressing the civil status of a foundation require additional regulation.⁸⁶

The term “institution” is used for the purpose of giving legal status to the entity (e.g. a school, health facilities or a restaurant management facility) without the features of a legal form. For example, municipal research institutions (Ukr.: комунальні наукові установи) are founded in the form of municipal enterprises (Ukr.: комунальних підприємств) (Art. 7.1. subpara. 2 of the Law of Ukraine “On scientific and scientific-technical activities”), and in the case of training researchers at the third level of higher education (education and research) there is an educational institution (Ukr.: заклад освіти) (point 2.1. of the “License conditions regarding educational activities of educational institutions”, approved by the Cabinet of Ministers of Ukraine, 30 December 2015, No. 1187⁸⁷). Thus, “institution” is not a legal form as is a “foundation”, even if it is named with the same word in Ukrainian (Ukr.:

⁸⁵ *Kočyn*, Osoblyvosti učasti publichnykh ustanov u cyvil'nykh vidnosynakh [Specifics on the participation of public institutions in civil relations], Aktualni pytannja pravovoho rehuljuvannja učasti sub'ektiv publichnoho prava v pryvatnykh vidnosynakh, Kyiv 2013, pp. 60–84.

⁸⁶ *Leščenko*, Ustanovy jak učasnyky cyvil'nykh vidnosyn [Foundations as participants of civil relations], Dnipro 2007, p. 28; *Žyhalkin*, Ustanovy jak yurydni osoby [Foundations as legal entities], Charkiv 2010. p. 140.

⁸⁷ Licenzijni umovy provadžennja osvitnoi dijal'nosti zakladiv osvity, zatverdženych postanovju Kabinetu Ministriv Ukraïny [License conditions for educational activities of educational institutions, approved by the Cabinet of Ministers of Ukraine], 30 December 2015, No. 1187, Oficiinyi visnyk Ukraïny 2016, No. 7, p. 23.

установа or заклад). It is just a group of norms structured within different legal, social or economic spheres.⁸⁸

A fund (Ukr.: фонд), in turn, is built on the basis of an absence-of-membership-entity acting for the purpose of accumulating funds for charitable, educational, environmental, medical or other socially useful purposes.⁸⁹ However, given the objective, the difference between a fund and a foundation as defined in the Civil Code of Ukraine remains an open question, as does the aim of the legal distinction under civil law.

b) Funds

Regarding a charitable fund, certain reservations should be noted. Thus, the current Law of Ukraine “On charity and charitable organizations” identifies the following types of charities: charity societies, charity funds and charitable foundations (Art. 13). In particular, under Art. 13.4. a charitable fund is a charitable organization that operates under the charter and is managed by members who are not required to transfer to this organization any assets for the purposes of the charity. This definition raises the question of what the significant difference is between a charity society and a charity fund.

Another type of fund is the pension fund – a legal entity established under the law which has the status of a non-profit organization (non-entrepreneurial society), operates and carries out activities solely for the accumulation of pension contributions for the pension fund (followed by management of pension assets), and provides pension benefits to the participants in the fund.

c) Foundations

A foundation (Art. 83.3. Civil Code of Ukraine) is an organization created by one or more persons (founders) who combine property to achieve the objectives (as defined by the founders) but who do not manage the foundation. This type of legal entity was borrowed from European legislation, but it was not an entity that was either regulated or found in practice within the USSR. Given the corresponding gap in Ukrainian law, it was private foundations that were mainly involved in charity work. Because of this understanding, the Law of Ukraine “On charity and charitable organizations” defines a charity as a charitable organization whose founding act defines the assets that one or more founders transfer for the purpose of conducting charitable activities by use of such assets and/or income derived from those assets.

However, this understanding of a charity implies the need for it to focus its activities on socially useful purposes, and it thereby loses the ability to create private utility facilities. Nevertheless, an example of a useful form of a pri-

⁸⁸ *Spasybo-Fatjejeva (ed.)*, supra n. 3, p. 319.

⁸⁹ *Zozuljak*, supra n. 3. p. 368.

vate foundation is the National High School of the Bar Association of Ukraine,⁹⁰ which is an academic and educational foundation established by a decision of the Council of Advocates of Ukraine.

V. Law enforcement problems related to the civil status of non-entrepreneurial legal entities

1. General comments

The absence of a legally regulated system of non-entrepreneurial legal entities causes problems of an academic, regulatory and law enforcement nature. This prevents an appropriate adaptation of Ukrainian legislation to the EU *acquis* because there is no conceptual justification for the mechanisms used to regulate legal relations. Thus we focus instead on the general civil law mechanisms regulating the civil status of non-entrepreneurial legal entities.

The system of interaction between law and legislation is provided by an academically grounded mechanism of legal regulation, i.e. a composition and structure of legal phenomena that allow the law to work in practice. It involves three stages: (1) legal regulation; (2) legal implementation; (3) legal application. The analysis of legislative changes and the theoretical model of legal regulation allows establishing the validity of legislative regulation given that we can observe a correspondence of purpose, object and means of regulation as specified in the law.⁹¹ In addition, understanding the mechanism of legal regulation allows one to assess the effectiveness of the law, that is, to measure the effectiveness between the expected and actual results in terms of how legal relations are influenced.⁹²

Problems with regulatory mechanisms inevitably become the subject of Ukrainian scholars. Thus, doctoral studies have raised problems with the mechanism of contractual regulation,⁹³ with the mechanism regulating civil

⁹⁰ Jedynyj deržavnyj rejestr jurydyčnych osib, fizyčnych osib-pidpryjemciv ta hromads'kych formuvan' [Uniform state register of legal entities, individual entrepreneurs and public associations], <<https://usr.minjust.gov.ua/ua/freesearch>>.

⁹¹ In particular, in accordance with Art. 4 of the Civil Code of Ukraine, where a legislative draft initiative submitted to the Parliament would regulate civil relations differently from the Civil Code, a draft law amending the Civil Code of Ukraine must be simultaneously submitted. The submitted draft law is considered by the Parliament at the same time as the corresponding draft law amending the Civil Code of Ukraine.

⁹² *Cvik (ed.)*, supra n. 4, p. 223.

⁹³ *Pohribnyi*, *Pryncypy ta mehanizm rehuljuvannja dohovirnych vidnosyn* [Principles and mechanisms of regulation of contractual relations], Kyiv 2009.

tort liability,⁹⁴ with the relevance of legal facts in the mechanism regarding the suspension of property relations⁹⁵ and with other issues as well.

The stage of legal implementation is based on legal norms and, accordingly, provides consequences for both lawful actions (e.g. for realization of subjective rights, the fulfilment of duties and the protection of rights and interests) as well as for unlawful actions (any reasons to protect violated rights and interests and the conditions of civil liability⁹⁶).

As a result, legal implementation occurs under a legal act (e.g. a judgment, a decision of the self-regulating organization or a decision of the public authorities), an act that not only covers direct responsibility elements but also protects rights and interests. This stage is mainly procedural and is based on substantive rules. Next, we will look at some immediate problems.

2. *The problem of “proper” legal forms in charitable organizations*

The legal regulation of “new” types of non-entrepreneurial legal entities is not always consistent with the principles of the Civil Code of Ukraine. Thus, in contrast to the basic rules on societies and foundations, the Law of Ukraine “On charity and charitable organizations” defines types of charities:

- a) charity society (Ukr.: благодійне товариство) – a charitable organization set up by at least two founders and acting under a statute (Art. 13.2.);
- b) charity foundation (Ukr.: благодійна установа) – a charity constituent act which defines the assets that one or more founders provide with the objective of conducting charitable activities through the use of such assets (Art. 13.3.);
- c) charity fund (Ukr.: благодійний фонд) – a charitable organization which operates on the basis of a statute and is managed by members. They are not required to transfer to this organization any assets to achieve the charitable objectives (Art. 13.4.).

Thus, it is impossible to delimit a charity society and a charity fund. Moreover, in Ukraine there are charities that are not legal entities. Thus, the Ministry of Education and Science approved the Regulations on parents’ committees (councils) for general educational institutions No. 440 of 2 June 2004,⁹⁷ under

⁹⁴ *Otradnova*, Mechanizm cyvilno-pravovoho rehljuvannja deliktnych zobovjazan’ [The mechanism for regulation of civil tort liability], Kyiv 2014.

⁹⁵ *Kostruba*, Jurydyčni fakty v mehanizmi pryvynennja cyvil’nych majnovych vidnosyn [Legal facts in the mechanism for termination of civil property relations], Kyiv 2015.

⁹⁶ Please note that the violation of private rights and interests may be the basis for more than merely civil liability. Thus, depending on the nature of the act, the violation can be used in public law proceedings for the prosecution of crimes or administrative offences.

⁹⁷ Prymirne položennja pro bat’kivski komitety (rady) zahalnoosvitnich navčalnych zakladiv, zatverdženo Nakazom Ministerstva osvity i nauky Ukraïny [Exemplary regulations on

which parent committees are voluntary public formations that are legalized (officially recognized) by notification of establishment (registration) with the management of the educational institution. However, such a committee may, without legal personality, create charitable funds, which in practice are not registered. As an example of this practice, we find illustrative litigation before the Kyiv District Court of Odessa, 9 June 2015 in case No. 520/1394/15a.⁹⁸

The dispute relates to the fact that during the audit of the financial activities of the educational complex “Nadiia”, authorities received personal information about parents who provided charitable assistance to the relevant fund at an educational establishment. The chairman of the parent committee opined that the committee’s ‘fund’ constituted a legal entity. But the court distinguished a fund that has been duly established as a legal entity from assets held by a (voluntary) committee: Since the committee did not qualify as a legal entity, the assets held by the fund could not either. Accordingly, the donations did not form a fund in a legal sense.

Further problems arose with the types of public associations. In accord with the new Law of Ukraine “On public associations”, there are (1) public organizations (whose founders and members are individuals) and (2) public unions (whose founders are private law legal persons and whose members (participants) are private law legal persons and natural persons). Thus, the distinction hinges exclusively on the status of the respective founders (participants).

Moreover, today the status of a non-entrepreneurial organization and the mode of its participation in legal relations have interrelated legal effects. An example would be the public union “Samopomich”, which participates in public activities as a public organization (registered 29 December 2005⁹⁹) and at the same time participates in elections as a political party (registered 24 January 2013¹⁰⁰). Such participation in public relations results in a “Janus Bifrons” appearance, although essentially it is the same legal entity being given different statuses so as to participate in certain respects.

3. *Types of economic activities and forms of legal entities.*

We note that in practice the courts often do not differentiate between economic activity and entrepreneurial activity. Non-commercial activity, which can be economic activity as well, is often seen as an exception, a subset of entre-

parent committees (councils) for general education institutions, approved by the Order of the Ministry of Education and Science of Ukraine], 2 June 2004, No. 440 (repealed on 21 December 2017), <http://search.ligazakon.ua/l_doc2.nsf/link1/MUS2320.html>.

⁹⁸ Postanova Kyïvs’oho rajonnoho sudu m. Odesy [Resolution of the Kyiv District Court of Odessa], 9 June 2015, Case No. 520/1394/15-a, <<http://www.reyestr.court.gov.ua/Review/45059256>>.

⁹⁹ See supra n. 90.

¹⁰⁰ See supra n. 90.

preneurial activity.¹⁰¹ This makes it difficult to provide for legal protection of the interests of non-entrepreneurial entities, as the courts are often not capable of developing reasonable solutions in the absence of academic concepts.

The ruling of the Zaporizhzhya Regional Administrative Court (12 October 2015) in case No. 808/7148/15 provides an illustration of this problem.¹⁰² The Melitopol United State Tax Inspectorate filed action for liquidation of a legal entity, namely the charity fund “Democratic Yakimovka”. The grounds for the liquidation of the legal entity was its failure to submit 2012 tax returns to the tax authority. In making the decision, the court referred to subparagraph 20.01.37 of Art. 20 of the Tax Code of Ukraine, which allows for the liquidation of a legal person in such a case. However, the court stated that not filing a tax return is grounds for terminating the business of the defendant, not for liquidation of the legal person. Therefore the court equated the charity fund, a non-entrepreneurial legal entity, with an entrepreneurial legal entity without further examination into its activities and the possible taxes that it might be liable for. The Civil Code and the Economic Code of Ukraine actually create a very inconsistent set of regulations. The Economic Code of Ukraine defines an economic entity as a legal person which has to fulfill the requirements for the appropriate organizational and legal form as defined in the Civil Code of Ukraine (Art. 55.2. Economic Code). At the same time, it is the Economic Code of Ukraine that should determine the particular aspects of state regulation of the relevant economic activity, but not the status of participant in these relations as to the organizational and legal form. Moreover, in practice, the term “economic entity” is understood solely as an entrepreneur, since the current code is perceived as having an “entrepreneurial” focus.

However, in the Economic Code of Ukraine, the term “non-economic entity” (Ukr.: негосподарюючий суб’єкт) is used as well (Arts. 3.3., 175.2 and 175.3, 179.1., 256.6.),¹⁰³ which gives rise to a scholarly discussion regarding economic and non-economic entities. In our opinion, this debate is resolved quite successfully by *Paškov*. He characterizes non-economic entities by defining them as public law legal entities that (i) are financed from the national budget and (ii) have public responsibility and provide public services.¹⁰⁴ Thus, such entities take part in public relations. In economic or civil law relations they take part

¹⁰¹ See *Kočyn*, *Vydy hospodarskoi dijāl’nosti jurydychnych osib: problemy teorit ta praktyky* [Types of economic activities of legal entities: problems of theory and practice], *Jurydychnyi visnyk* 2016, No. 1 (38), pp. 139–144.

¹⁰² *Postanova Zaporiz’koho okružnogo administratyvnoho sudu* [Ruling of the Zaporizhia Regional Administrative Court], 12 October 2015, Case No. 808/7148/15, <<http://www.reyestr.court.gov.ua/Review/53059521>>.

¹⁰³ See Art. 3.3. of the Economic Code of Ukraine: Activity of non-business entities, aimed at creating and maintaining the required material and technical conditions for their functioning, conducted with or without involvement of business entities, shall be deemed economic support of non-business entities.

only¹⁰⁴ indirectly, but even this does not give them the status of non-entrepreneurial organizations as opposed to entrepreneurial organizations.

Hence, legislation and jurisprudence in no way take into account the status and activities of non-entrepreneurial legal entities. The above approach entails understanding the controversial concept of a “non-economic entity”. An example of this approach can be seen in the decree of the Supreme Economic Court of Ukraine (28 April 2009).¹⁰⁵ The court did not recognize a trade union as a legal person, declaring it instead as a non-economic entity.

As a result, the court recognized the trade union as an organization with a “dual” status, which in accordance with the Economic Code of Ukraine is impossible. Although non-entrepreneurial activity is defined as economic activity (Art. 3.2. Economic Code of Ukraine), the activities of non-economic entities do not fall under this concept, an exception to the general rule existing only for public entities (e.g. territorial communities, public authorities). Hence, the court decision suffers from an internal contradiction regarding the more serious question of whether the trade union is a legal entity.

These trends of ignoring the status of non-entrepreneurial organizations continue to be practised, despite the fact that Art. 88 of the Civil Code of Ukraine grants non-entrepreneurial organizations the right to conduct business while pursuing their purpose. Moreover, in legal literature there are proposals to extend to non-entrepreneurial organizations the right to register trademarks, given the experience of the EU. Thus, *Michajljuk* argues that a legal entity’s name should be recognized as synonymous with the company name and the name of the person for the protection of trade names in the same manner as has been done for the protection of names of charitable organizations, foundations, public associations and other entities.¹⁰⁶ We believe that this position is questionable, as the distinction routinely adopted in literature is appropriate.¹⁰⁷ Theoretically, a non-entrepreneurial legal entity may have a commercial name only if it is registered as a business entity, something that cannot be the case in the absence of the appropriate register.¹⁰⁸

¹⁰⁴ *Paškov*, Dijal’nist’ subjektiv hospodarjuvannja jak ob’jekt pravovoho rehuljuvannja: problema kvalifikacii [Activity of economic entities as an object of legal regulation: the problem of characterization], *Visnyk Akademii pravovykh nauk Ukraïny* 2011, No. 1, p. 133.

¹⁰⁵ *Postanova Vyščoho hospodarskoho sudu Ukraïny* [Resolution of the Supreme Economic Court of Ukraine], 28 April 2009, No. 13/178, <http://www.arbitr.gov.ua/docs/28_2325565.html>.

¹⁰⁶ *Mychajljuk*, *Pravo Jevropejs’koho Sojuzu z komercijnykh poznačen’* [European Union law on commercial designations], Kyiv 2016, p. 316.

¹⁰⁷ *Fedjuk*, *Osobysti nemajnovi prava jurydyčnykh osib* [Moral rights of legal entities], Ivano-Frankivs’k 2013, pp. 200–207.

¹⁰⁸ However, attention should be given to an interesting dispute concerning the registration of the charitable organization “UKRAÏNA PONAD USE” [Ukraine above all] as regards a trademark for goods and services “UKRAÏNA PONAD USE” (case No. 826/

4. *The problem of settlement of disputes between members of non-entrepreneurial legal entities*

Within studies about the civil status of non-entrepreneurial legal entities, hardly any attention is paid to the relationships between the members. However, these relationships form the features of the legal form of the legal entity and according to *Kočerhina* create appropriate sub-system relationships between the participants and the same entity.¹⁰⁹ To solve this problem, one should first establish the nature of relationships among the membership in a non-entrepreneurial organization.

Membership relations in non-entrepreneurial organizations are directly interconnected with those of its founders and the types of entities involved, such that the relationship can be moral (private association), property-based (union of co-owners, funds) or private-public (public benefit organizations). However, all participants (members) take part in organizational relations (regarding the management entity), property relations (regarding property management, contributions, etc.) and regarding moral rights (the right to inform and to be informed, the right to be recognized as a member, etc.). However, unlike the corporate rights of economic companies, such rights and interests are not identified as constituting a separate independent group. Given the characteristics of legal equality, property autonomy and free will, these relationships have yet to find a proper place among civil relations.

Today there is no uniform judicial practice concerning disputes between members of non-entrepreneurial legal entities. The reason for this is not only the problem of parallel jurisdiction exercised by civil and economic courts, but also the peculiarities of the status of some of these entities. Regarding compulsory dispute resolution, we should cite to the Supreme Court of Ukraine (28 April 1991) No. 5 “On the practice of civil cases related to the activities of garage-construction cooperatives”.¹¹⁰

Examples of an unequal judicial understanding of the nature of membership relations can be offered concerning the most common categories of disputes regarding membership fees. Thus, in the decision of the Economic Court of the Charkiv Region (20 December 2010) on case No. 29/82-

1845/17); situated in the proceedings of the District Administrative Court of Kyiv, the case potentially indicates the judicial view on the possibility of such a phenomenon.

¹⁰⁹ *Kočerhina*, *Zmist orhanizacijno-pravovykh form pidprijemnych tovarystv: interesy, funktsii, pravovi zasoby* [The substance of legal forms of entrepreneurial societies: interests, functions, legal means], Charkiv 2005, p. 12.

¹¹⁰ *Postanova Verhovnoho Sudu Ukraïny “Pro praktyku rozhljadu sudamy cyvil’nykh sprav, pov’jazanych z dijal’nistju haražno-budivel’nykh kooperatyviv”* [Resolution of the Supreme Court of Ukraine “On the practice of consideration of civil cases involving the activity of garage-construction cooperatives”], 28 June 1991, No. 5, <<http://zakon3.rada.gov.ua/laws/show/v0005700-91>>.

10,¹¹¹ the court concluded that under the provisions of the Association “First Stock Trading System”, all members of the Association undertake to comply with the charter of the Association as to rules, regulations and standards. Then, referring to the court rules on both civil liability and commercial commitments, the court decided to uphold member fees that had been paid by the defendant for the benefit of the Association.

In another decision, the Supreme Court of Ukraine (Chamber of Civil Cases, case No. 752/12003/13-c, 19 October 2016)¹¹² ruled on the legitimacy of the decisions of a cooperative on the size of the membership fees and the exclusion of the plaintiffs for failure to pay arrears. Referring to Art. 15 of the Civil Code of Ukraine, the court noted that, pursuant to Art. 15 Civil Code, every person is entitled to protection of their civil rights in the event of a violation. The court held a cooperative assembly decision to exclude members of the cooperative unlawful on the ground that it constituted an improper management body. However, it dismissed the further claims, especially regarding the membership fees, as, pursuant to Art. 16.2 Civil Code,¹¹³ there is no way to protect the rights of the claimant in this case. Art. 16 does not provide for a right to sue in order to have a corporate governance decision of a cooperative declared illegitimate. This case shows the problem of selective jurisdiction, as according to the court the corporate governance relationship of a non-economic entity is not a legal relationship. We believe that this conclusion of the court is unlawful because it mainly runs counter to the principle of extending court jurisdiction to all legal disputes (Art. 124.1. of the Constitution of Ukraine¹¹⁴).

¹¹¹ Rishennia Hospodars’koho sudu Charkivs’koi oblasti [The decision of the Economic Court of the Charkiv Region], 20 December 2010, Case No. 29/82-10, <<http://www.reyestr.court.gov.ua/Review/13086083>>.

¹¹² Rišennja Verhovnoho Sudu Ukraïny (sudova palata u cyvil’nykh spravakh) [Decision of the Supreme Court of Ukraine (the court chamber in civil cases)], 19 October 2016, Case No. 752/12003/13-ц, <<http://www.scourt.gov.ua/clients/vsu/vsu.nsf/%28documents%29/C42A76FD2FDF2245C225805D0042E2C7>>.

¹¹³ Art. 16.2.: “Ways to protect civil rights and interests are: 1) recognition of rights; 2) recognition of the transaction as null and void; 3) termination of the transaction in violation of law; 4) restore the situation that existed before the violation; 5) enforcement of the obligation in kind; 6) changing the relationship; 7) termination of the relationship; 8) compensation and other means of compensation for property damage; 9) compensation for moral (non-property) damage; 10) recognizing the illegality of decisions, actions or omissions of a state authority, the authority of the Autonomous Republic of Crimea or local self-government, their officials and officers.”

¹¹⁴ Konstyucija Ukraïny [Constitution of Ukraine], 28 June 1996, No. 254к/96-ВР, Vidomosti Verhovnoï Rady 1996, No. 30, pos. 141.

IV. EU and Eastern Europe

Eastern Neighbourhood of the EU

Alternatives for Integrative Projects

*Natalia Pankevich**

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I. Post-Soviet polities in global system dynamics

The integration process is rooted in a *longue durée* of European history;¹ it features a consecutive consolidation of European institutions that strives to better provide for legal and administrative congruence in order to meet the necessities of regulating an enlarged economy and to lead to a comprehensive

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¹ In 1917 V. Lenin observed: “[...] the creation of ‘Central Europe’ is still a matter for the future, it is being born in the midst of a desperate struggle”; *Lenin, Imperializm, kak vysšaja stadija kapitalizma* [Imperialism, the highest stage of capitalism], *Polnoe sobranie sočinenij* [Complete works], vol. 27, 5th ed. Moscow 1969, p. 393. Twenty years later Carl Schmitt articulated the *Mittleuropa* concept as a core for future integration. See *McCormick, Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923–1955*, in: Joerges (ed.), *Darker Legacies of Law in Europe*, Oxford 2003, pp. 167–192. – For more on the history of thought on European integration see *Joerges, Europe a Großraum? – Shifting Legal Conceptualisations of the Integration Project*, in: Joerges (ed.), *ibid.*, pp. 133–142.

Union. Though many fundamental questions remain to be settled² – with a number of contradictions having been internalized³ and with the EU facing the exit of members⁴ – the history of converting the European economic space into a more robust social and political structure can be generally recognized as a story of success. It has significantly tamed its internal political conflicts and turned former foes into contributing partners. Moreover, it has provided a barrier-free common economic space that has, for its part, delivered higher interconnectedness and fostered the growth of wealth. The result is an outstanding quality of life in comparison with global standards. Even the poorest EU Member State (Bulgaria) remains in the upper third in the world, ranking 66th in an IMF assessment.⁵ Thus, the EU eventually assumed the role as a “centre of gravity” for neighbouring states, providing an attractive and versatile model of development.

The tendencies towards closer integration provide a fundament for a set of ideas which suggest that the sovereign nation-state has ceased to be an institution that properly serves to achieve the mentioned values and is no longer adequate as the engine of peoples’ wealth, security, prosperity, social progress and fundamental freedoms.⁶ This also suggests these goals are better achieved and secured supra-nationally.

² For a comprehensive list of problem issues see *Cinelli*, Europe and its (Tragic) Statelessness Fantasy, Lake Mary, Fl. 2014, p. 41.

³ A failure of constitutionalization of the EU and thus the substitutive character of Lisbon provisions provoked a discussion about institutional development in relation to a federation of nation-states (thus acquiring a form of federalism similar to the USSR in its composition as a union of sovereign states, exposed to similar failures). As concerns general structure, a need to establish a more balanced institutional form for the EU is observed. See *Pelinka*, The European Union as an Alternative to the Nation-State, *International Journal of Politics, Culture, and Society* 2011, Vol. 24, No. 1/2, pp. 21–30. At the level of common values, the question in dispute is whether the Member States found to meet the *Copenhagen criteria* really do share the fundamental values of the EU, taking as an example the internal policies of Eastern European Member States. See: Venice Commission, 95th Plenary Session, Opinion on the 4th Amendment of the Fundamental Law of Hungary, Venice, 14–15 June 2013, available at <<http://www.venice.coe.int/webforms/documents/default.aspx?pdfFile=CDL-AD%282013%29012-e>>; *Ganev*, Post-accession Hooliganism: Democratic Governance in Bulgaria and Romania after 2007, *East European Politics and Society* 2013, Vol. 27, pp. 26–44.

⁴ The triggering factor is Britain’s exit decision in 2016 along with the rising popularity of anti-NATO and anti-EU sentiments on the eve of presidential elections in France as well as other countries at the European core; *Lyons/Darroch*, Frexit, Nexit or Oexit? – Who will be next to leave the EU, *The Guardian*, 27 June 2016, available at <<https://www.theguardian.com/politics/2016/jun/27/frexit-nexit-or-oexit-who-will-be-next-to-leave-the-eu>>.

⁵ International Monetary Fund – World Economic Outlook Database, October 2016, available at <<http://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx>>.

The major development of building a united Europe – encompassing the creation of a comprehensive social, political and legal entity, the EU, along with its successful enlargement wave of 1990–2000 – has obscured other important issues of global dynamics. Disintegration processes are occurring in European space parallel to and simultaneously with integration. The dissolution of the USSR, the “velvet divorce” of the Czech and Slovak republics and the violent war in the former Yugoslavia are processes that have contributed to the proliferation of newly independent states. Still more importantly, disintegration continues with regional uprisings and leads to the emergence of de-facto or “quasi-states”, unrecognized or only partly recognized by the international community. Such regions of irregular “stateness” are frequently carved out of the post-Soviet republics⁷ and become a factor in regional and general European instability.

The post-Soviet states were trapped by these controversial dynamics. In spite of the independence rush of 1990, the post-Soviet countries of today face the same needs of enlarging their economies and promoting trade as an engine of wealth, though the mode of surplus production and distribution are alternative to a market approach. Having acquired independence, after the dissolution of the USSR, and the corresponding opportunities to establish (i) new social contracts between their peoples and authorities (in some cases for the first time in history – as is the case for Kazakhstan) and (ii) the normative orders that supposedly better secure particular national needs and interests, these states immediately faced challenges and were provided incentives for integrating into novel economic and political configurations.

Most controversial is the trajectory of development in those newly independent states which have been influenced by concurrent “centres of gravity”, providing competing visions of future spatial division in the respective regions.⁸ This is the case for a majority of the post-Soviet republics, which con-

⁶ *Appadurai*, Sovereignty without Territoriality: Notes for a Post-national geography, in: Low/Lawrence-Zuniga (eds.), *The Anthropology of Space and Place: Locating Culture*, Oxford, UK, 2003, pp. 337–349; *Lacher*, Beyond Globalization: Capitalism, Territoriality and the International Relations of Modernity, London/New York 2006, 228 pp.; *Krasner/Thompson*, Global Transactions and the Consolidation of Sovereignty, in: Czempiel/Rosenau (eds.), *Global Changes and Theoretical Challenges*, Lexington, Mass. 1989, p. 198.

⁷ With the exception of Belarus, all post-Soviet Eastern European countries have experienced the threat of regional secessions (the Russian Federation, Georgia, Moldova and, most recently, Ukraine have all encountered this problem; Armenia and Azerbaijan continue to be involved in a serious national-territorial dispute).

⁸ *Vernygora/Troitino/Västa*, The Eastern Partnership Programme: Is Pragmatic Regional Functionalism working for a Contemporary Political Empire?, in: Kerikmäe/Chochia (eds.), *Political and Legal Perspectives of the EU Eastern Partnership Policy*, Cham/Heidelberg/New York/Dordrecht/London 2016, p. 16: “[...] the EU’s direct competition with Russia is of unavoidable and, until one of the two collapses, permanent nature”.

stitute a “shared neighbourhood area”⁹ of the EC and a “near-abroad”¹⁰ for the Russian Federation in Europe or the Russian Federation and China in the East.¹¹ While the Russian Federation and China are expressing a significant mutual interest in cooperation, the integrative projects currently promoted by these countries do not present such sophisticated structures as the European Union and are, in a number of cases, at the initial stages of development (thus being fragile and uncertain); still, they catch the attention of the post-Soviet states and represent alternatives.

Potentially, these projections lead to a consolidation of the enlarged economically self-sufficient identities that are founded less on national differentiation and more on civilization cleavages.¹² Thus the choice of “peripheral” states becomes one of the most important outcomes in this macro-level competition, defining the identities not only of satellite-states but also of core polities.¹³

This article addresses the issue of the strategic choice to be made by post-Soviet states. Two aspects of this problem will be analysed: First, the capacities of the “core” polities to promote integration projects as factors compri-

⁹ *Flavier*, Russia’s Normative Influence over Post-Soviet States: the Examples of Belarus and Ukraine, *Russian Law Journal* 2015, Vol. 3, No. 1, p. 12.

¹⁰ In Russia the term “near abroad” refers to the former Soviet republics and is conventional for public and private communication. It connotes the notion of a tight allegiance between Russia and these states both historically and currently.

¹¹ *Vernygora/Troitino/Västa*, supra n. 8, p. 8.

¹² *Huntington*, *The Clash of Civilizations and the Remaking of World Order*, New York 1996, 354 pp.

¹³ In the Russian political and academic discussion, preserving integration with particular post-Soviet states has been declared an important factor for future Russia’s own future development. The role of Ukraine is seen as critical for Russia as the integration of this country preserves the possibility of remaining a Europe-wide power, while without Ukraine, Russia is doomed to move to the periphery and become more “Asian”. See *Pantin/Lapkin*, *Tendencii političeskogo razvitija sovremennoj Ukrainy: osnovnye riski i al’ternativy* [Political development trends in modern Ukraine: fundamental risks and alternatives], *Polis* 2013, No. 5, pp. 133–144. The initiatives of Western countries towards integrating the post-Soviet states are often defined as aggressive strategies, depriving Russia of its neighbourhood. See *Komleva*, *Ukrainskij krizis – èlement “taktiki anakondy”* [The Ukrainian crisis – element of “anaconda tactics”], *Vestnik rossijskoj nacii* 2014, No. 3, pp. 191–206; *Orlov*, *Krizis na Ukraine: strategičeskaja ošibka Zapada ili zakonornost’?* [Crisis in Ukraine: a strategic mistake of the West or a regularity?], *Meždunarodnaja žizn’* 2014, No. 6, pp. 48–56; *Fursov*, *Tridcat’ dneĭ, kotoryje izmenili mir – Ukrainskij krizis, jego podžhigateli i skrytyje šifry* [Thirty days that changed the world – The Ukrainian crisis, its *Pyros*, and hidden codes], *Svobodnaja mysl’* 2014, No. 2, pp. 32–48; *Šarven*, *Ukrainskij vopros: ètap v processe razrušenija osnov meždunarodnogo prava zapadnymi deržavami* [The Ukrainian question: a step in the process of the destruction of the international law foundations by the Western Powers], *Meždunarodnaja žizn’* 2014, No. 4, pp. 116–129.

sing an external dimension for integration and, second, the internal factors determining and facilitating the choice of direction of enjoining countries. Further, the integrative projects beyond and alternative to the European vector that involve post-Soviet states under the direct influence of the Eastern Neighbourhood Policy will be described. The article will conclude with assessments of particular failures of European politics towards Eastern post-Soviet states.

II. Neighbourhood policies of the EU and Russia: leadership factors in a shared environment

1. The European Union's obligatory and values-inspired commitment

The European Union (EU) joined the race for integration of the post-Soviet states, possessing the constitutional means to influence neighbouring states' legal development. For the EU, external action is compulsory and proactive, and it is not reduced to a goal of incorporating certain states and containing them within an embracing political union. Viewed from an official perspective, with reference to the Lisbon Treaty, Europe can be described as a unitary world player,¹⁴ one equipped

- institutionally (through establishment of competent offices – President of the European Council, High Representative for Foreign Affairs and Security Policy and Vice-President of the Commission);
- instrumentally (European External Action Service);
- legally (single legal personality for the Union);
- and ethically, by self-recognition of its having a moral duty to undertake external action.

Pursuant to Art. 3(5) of the Treaty of European Union (TEU), the EU has an obligation to promote its values (as specified by Art. 21 TEU) and interests outside the EU. Article 8 TEU directly provides the competence for the EU as an international actor to develop relationships with neighbouring countries with a goal of developing an area of prosperity and good neighbourliness, based on peaceful cooperation. Thus, under the TEU, external action is one of the means available to the EU in its pursuit of common policies. A failure to perform this

¹⁴ European Union, Treaty of Lisbon – The treaty at a glance, available at <http://ec.europa.eu/archives/lisbon_treaty/glance/external_relations/index_en.htm>: “Maintaining freedom, security and prosperity in Europe requires that Europe fulfil its potential as a global player. In a globalised world, challenges such as securing energy, climate change, sustainable development, economic competitiveness and terrorism cannot be tackled by a single country, but need an answer that only the EU as a whole can provide”.

function can potentially be contested in the European Court of Justice.¹⁵ Together these articles provide the EU with a direct mandate to pursue a “neighbouring state-building policy”¹⁶ with the aim of creating a favourable environment.

The choice of strategy in this field as regards Europe is generally restricted by two major paradigms: containment of designated states within the overarching structure (i.e. the EU strategy of enlargement) and engagement of the countries and indirect influence by means of targeted legal and governmental reforms. Given the inability¹⁷ and/or realistic unwillingness¹⁸ of the EU to incorporate every theoretically eligible polity as a Member State (the EU is potentially open for any country on the continent), the general strategy of today’s EU is engagement. Here, the use of massive legal export represents a “deliberate strategy which is now an integral part of its (EU) identity on the international stage [...] without excluding unilateralism”.¹⁹

Prospective partner-states are supposed to be proactively invited and provided incentives to engage in a comprehensive process of importing and properly implementing the European *acquis*²⁰ in order to meet the *Copenhagen criteria*. This goes even beyond the enlargement process (the latter is narrower and is mainly defined by Art. 49 TEU), and the *Copenhagen criteria* are addressed to those countries that are not entitled or are not unanimously and warmly welcomed to become Member States. The case of the EU–Ukraine Association Agreement ratification process is very illustrative in light of the position of the Netherlands, the country which initiated a special clause stating that the Agreement is not a step towards membership of Ukraine.²¹

¹⁵ Hillion, Anatomy of EU Norm Export, in: Van Elsuwege/Petrov (eds.), Legislative Approximation of EU Law in the Eastern Neighbourhood of the European Union, New York/London 2016, p. 17.

¹⁶ Hillion, supra n. 15, at p. 18.

¹⁷ Oguz, The Absorption Capacity in the European Union, Review of International Law and Politics 2013, Vol. 9, pp. 123–147.

¹⁸ Pihl, Prodi: EU enlargement must stop somewhere, EU Observer 27 November 2002, available at <<https://euobserver.com/institutional/8530>>: Proposing that Europe has to be given a natural size>.

¹⁹ Flavier, Russia’s Normative Influence over post-Soviet States: The Examples of Belarus and Ukraine, Russian Law Journal 2015, Vol. 3, No. 1, p. 8.

²⁰ The proactive character of European policies towards the post-Soviet neighbourhood becomes plain to see in the example of EU–Belarus relations. While the official Belarusian regime long expressed minimal interest in engagement with the Eastern Partnership, Europe proactively allocated funds which could be provided in exchange for reforms and gave support to civil society, thus advancing and consolidating pro-European insiders. See: European Commission, European Neighbourhood Policy and Enlargement Negotiations, Belarus, 6 December 2016, available at <http://ec.europa.eu/enlargement/neighbourhood/countries/belarus/index_en.htm>.

²¹ European Council Conclusions on Ukraine, 15 December 2016, available at <www.onsilium.europa.eu/en/meetings/european-council/2016/12/15-euco-conclusions-ukraine/>.

The practical instrument for the EU to exercise its external action competence is the European Neighbourhood policy, established in 2004; particularly relevant for this article is the regional Eastern Partnership Programme, launched in 2009. The latter was especially developed in order to distinguish six post-Soviet states (Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine). At the moment, this group of six appears to be split: Georgia, Moldova and Ukraine have more or less consistently made a European choice by signing Association Agreements as well as special national acts.²²

Here, however, it must be said that this present choice is not secure, at least as regards particular regions. All three republics face the problem of regional uprisings. But it is also important to note that the countries in this group oscillate between the EU and Russia. For Ukraine, the permanence of the choice in a deeply polarized society is at doubt.²³ As for Moldova, taking into account the latest (2016) presidential elections, there may be a new trend with regard to the EU, with the new administration expressing a greater willingness to cooperate with Russia. Especially important is the popular disappointment with the results of cooperation between Moldova and the EU.²⁴ Though the orientation of Georgia towards Westernization is the most certain, the increase of pro-Russian sentiments is also distinct.²⁵

The remaining three countries show less pro-European dynamism. Azerbaijan repeatedly avoids negotiations and meetings under the Partnership and Cooperation Agreement with the EU and did not make much progress towards association. Instead of the standard form of Association Agreement it opted for individual strategic partnership in particular sectors.²⁶ Belarus has frozen almost all activity towards European integration or cooperation initia-

²² Postanova Verkhovnoï Radi Ukraïni pro zajavy Verkhovnoï Radi Ukraïni “Pro Jevropejskij vibir Ukraïni” [Resolution on the statement of the Verkhovna Rada of Ukraine “On the European Choice of Ukraine”], issued 16 September 2014, Vidomosti Verkhovnoï Radi Ukraïni [Bulletin of the State Parliament of Ukraine] 2014, No. 41–42, pos. 2029.

²³ *Pankevich*, EU–Ukraine Association: An Asymmetrical Partnership, pp. 33 ff. (in this book).

²⁴ *Olaru*, Oproș: Mnenija građdan Moldovy po vnešnemu vektoru razdelilis’ [Opinion poll: The views of the citizens on Moldova’s external development path have split], Panorama 25 August 2016, available at <http://www.noi.md/ru/news_id/89956>; *Volkov*, Vostok ili Zapad? [East or West?], RG 13.11.2016, No. 7125 (257), available at <<https://rg.ru/2016/11/13/v-moldavii-chislo-storonnikov-integracii-s-es-snizilos-do-37-procentov.html>>.

²⁵ See, for instance, *Cecire*, Yes, Putin may be starting to win Georgia away from the West, Washington Post 25 January 2016, available at <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/25/yes-putin-may-be-starting-to-win-georgia-away-from-the-west-heres-why-that-matters/?utm_term=.e6df9fdeae90>. The article attracts attention to the increase in public support for the Eurasian Union, the increase in votes received by pro-Russian elected officials, and the great importance of trade with Russia as a factor of economic stability.

tives.²⁷ Armenia declined to enter the EU Association Agreement in 2013, deciding not to pursue the creation of a free-trade area with the EU and instead opting in 2015 to join the Russia-led treaty “On Eurasian Economic Union”. This decision is precedential since this integrative project establishes, *inter alia*, a customs union. Since Armenia has no common borders with the other members of the customs union, this choice is an assured commitment to follow common rules without there being physical proximity or a necessity to join.

Thus Euro-integration is not the only possible approach, and the countries designated for European policies under the Eastern Neighbourhood Policy may in fact see other options as being more favourable for their future. The free-trade area with Europe has appeared not to be the only (or major) incentive for at least some of the post-Soviet countries proactively influenced by the EU. This also means that the EU does not hold a monopoly as the sole promoter of progress on this terrain.

2. The Russian Federation as provider of integration alternatives: path dependencies and contemporary interconnectedness

Former Soviet republics participate in a significant number of international organizations offering integrative opportunities. Only three of them withdrew themselves from post-Soviet space. The Baltic republics together with a number of former socialist economics (Warsaw Block countries) became Member States of the European Union, thus demonstrating a commitment to the values of “market democracy” proposed by European integration and showing trust in the underlying economic institutions of the common market. The rest are experimenting with various regional and sometimes decidedly Europe-alternative integration projects.

Unlike the EU, the Russian Federation appeared not to be constitutionally empowered for the “progressor’s” mission. External action towards neighbouring countries was performed under a subdivision of the para-legal Concept of Foreign Policy of the Russian Federation.²⁸ Thus there was no clearly speciali-

²⁶ *Ostapenko*, Azerbajdžan i Evrosojuz: 25 let sotrudničestva i vzgljad v buduščee [Azerbaijan and the EU: 25 years of cooperation and looking to the future], 1News.az 27 June 2016, available at <<http://www.1news.az/authors/oped/20160627105403260.html>>.

²⁷ European Commission, *supra* n. 20.

²⁸ Concept of Foreign Policy of the Russian Federation (approved by the President of the Russian Federation V. Putin on 12 February 2013) (not in force since 30 November 2016), Ministry of Foreign Affairs of the Russian Federation, 18 February 2013, text in English available at <http://www.mid.ru/foreign_policy/official_documents/-/asset_publisher/CptICkB6BZ29/content/id/122186?p_p_id=101_INSTANCE_CptICkB6BZ29&_101_INSTANCE_CptICkB6BZ29_languageId=en_GB>.

zed institution established, and the competence to act was divided incrementally between various organs and institutions serving other duties as well.

However, a direct Russian presence (by ownership of the enterprises, by direct investments, and by the location abroad of military bases and – above all – people) and an indirect Russian presence (by normative and legal exports) make the Eastern Europe environment highly contested.

The decline of the USSR was, first of all, a political divorce that immediately created separate power units on the basis of already existing republican governments that were staffed with the representatives of regional elites.

However, the further process of separation was extremely difficult. The newly sovereign countries inherited:

– *A common economy* that was developed over decades as one coordinated and inseparable complex.²⁹ The enterprises within this complex complemented each other and experienced hardships in the diversification of their providers (of energy and supplies) and consumers. The severing of economic connections among the enterprises within this complex has led to a sharp decline in productivity and has complicated the generation of knowledge and technology-intensive products. This has cost the countries an average loss of 30 to 40% of their respective economics. Presently, Russia has only reached a level of development equalling the pre-independence period. Ukraine has, to date, lost nearly one-third of its economy as compared to the eve of sovereignty.³⁰

– *Distributed military assets* providing for Russian troop presence in the near-abroad (Transnistria, Belarus, Ukraine, Abkhazia and South Ossetia, Armenia, Kazakhstan, Kyrgyzstan and Tajikistan).³¹

– *Mixed populations*: significant contingents of Russians who find themselves abroad, in many cases steadily deprived of citizen rights, present a strong pro-Russian factor in the policies of post-Soviet countries.³² Russia is

²⁹ Konstitucija SSSR [Constitution of the USSR], adopted 7 October 1977, Vedomosti Verhovnogo Soveta SSSR [Bulletin of the Supreme Council of the USSR] 1977, No. 41, pos. 617: Title II, Art. 16.

³⁰ International Monetary Fund, supra n. 5.

³¹ *Zgirovskaja*, Mirovoje prisutstvije [Global Presence], Gazeta.ru 16 December 2015, available at <<https://www.gazeta.ru/army/2015/12/16/7972523.shtml>>.

³² *Vavilova/Kajgorodova/Korotaeva/Mjalenko/Panov*, Politizacija russkich men'sinstv v stranach postsovetskogo prostranstva [The politicization of Russian minorities in post-soviet countries], Vestnik Permskogo Universiteta – Serija: politologija 2014, No. 1, pp. 125–145: data on fourteen of fifteen post-Soviet states provides evidence of a high degree of politicization of Russian diaspora communities and their active involvement in state politics, especially as regards language rights, education and the protection of minority rights. This activity is found to have accelerated due to restrictive state policies within newly independent states. And this fact makes Russian minorities rely more and more on Russian support.

conscious of this factor,³³ though it has continuously failed to develop and implement a comprehensive policy towards these populations. That produced much disappointment among members of the Russian diaspora and criticism inside Russia.³⁴ However, a recent revival of the federal law on state policy towards compatriots abroad, 99-FZ,³⁵ is providing more active and comprehensive support.

– *Russian language* that still maintains its function as a language for official international communication³⁶ and for communication among people,³⁷ this despite its having been shrinking widely over time, mainly due to educational policies restricting access to schooling in Russian.³⁸

– *A common legal system based on Soviet law.* Though Soviet law was regarded as obsolete, outdated and unsuited for regulating the new economic model based on market relations as opposed to state regulation and regulation by plan, this was the law that in fact organized life in the years following independence.³⁹ As concerns international trade, certification is regulated by

³³ *Putin*, Interv’ju amerikanskomu žurnalistu Čarli Rouzu dlja telekanalov CBS i PBS [An interview with American journalist Charlie Rose for the CBS television network and PBS], President of Russia official website 29 September 2015, available at <<http://kremlin.ru/events/president/news/50380>>: 25 million Russians in CIS countries can facilitate the establishment of a united humanitarian space for citizens’ communication and economic development.

³⁴ *Filippov*, Formirovanije gosudarstvennoj politiki Rossii v otnošenii sootečestvennikov za rubežom [Making the state policy of Russia towards compatriots abroad], *Vlast’* 2010, No. 12, pp. 46–49; *Baskakova*, Sootečestvenniki za rubežom [Compatriots Abroad], Monitoring obščestvennogo mnenija: jekonomičeskie i social’nye peremeny [Public opinion monitoring: economic and social changes] 2009, No. 6, pp. 81–94.

³⁵ Federal’nyi zakon RF No. 99-FZ “O gosudarstvennoj politike RF v otnošenii sootečestvennikov za rubežom” [Federal Law of the RF “On the State Policy of the Russian Federation towards Compatriots Abroad”], issued 24 May 1999, SZ RF 31 May 1999, No. 22, pos. 2670.

³⁶ Ustav Sodružestva Nezavisimych Gosudarstv [Charter of CIS], issued 22 January 1993, *Bulleten’ međunarodnyh dogovorov* [Bulletin of International Treaties] 1994, No. 1. Article 35 establishes that Russian is a working language of the Commonwealth.

³⁷ *Egorov/Boltovskij*, Russkij jazyk na post-sovetskom prostranstve [The Russian Language in the Post-Soviet Space], *Obozrevatel’* [Observer] 2011, No. 11, at p. 61: Russian remains the spoken language for 77% of the Belarussian population; for 65% of Ukraine; for 63% of Kazakhstan; for the majority in Kyrgyzstan and Moldova; and for nearly a third of the population in Armenia, Azerbaijan, Georgia and Tajikistan.

³⁸ *Nijazova*, Osobennosti jazykovej politiki stran postsovetskogo prostranstva (na primere russkogo jazyka) [Features of the language policy of post-Soviet countries (On the example of the Russian language)], *Vestnik akademii prava i upravlenija* 2011, No. 25, pp. 158–168.

³⁹ The Constitution of the Russian Federation was adopted two years after independence, in Ukraine after five years (in 1996). The first codifications that introduced commitments to a market economy were adopted in 2003 (Ukraine), 2006 (Russia).

“GOST”s of CIS – i.e. “state standards”⁴⁰ that are mainly based on previous common Soviet norms and testing methodologies. The CIS Member States recognize GOSTs certified goods without any additional national certification (Belarus), or simply assure authenticity of the certificate (other countries). Thus, technical non-tariff barriers are avoided and the markets are open for all the participants.

It is worth mentioning that the EU Association Agreement is in direct opposition to the CIS technical standards.⁴¹ The reasoning behind such provisions is understandable: providing European market access to goods from post-Soviet states requires ensuring they meet European standards. But the most probable immediate result for the partner countries will be the loss of Russian and CIS markets, a subsequent decline of particular industries and a collapse of the social sphere. In this sense, European policy becomes counter-productive since it provides more for an economic crisis than for a boosting of prosperity, while simultaneously giving no remedies to overcome the instability of particular enterprises.

The experiences of post-Soviet states in establishing and regulating market economies are also of a shared nature. Better congruency among the post-Soviet states was supposed to be achieved by so-called “Model Codes” and “Model Laws” developed within the CIS Interparliamentary Assembly⁴² that served as a kind of a common frame of reference for the participating countries.

– *A compatible social model.* All post-Soviet states depart from one and the same Soviet social model, this based upon society being deprived of basic freedoms and major economic assets, attributing them to the state instead.⁴³

⁴⁰ Soglašenje SNG “O provedenii soglasovannoj politiki v oblasti standartizacii, metrologii i sertifikacii” [CIS Agreement “On conducting a coordinated policy in standardization, metrology and certification”], issued 13 March 1992, *Bulleten’ mezhdunarodnykh dogovorov* 1994, No. 4; Soglašenje SNG “O primenenii edinogo znaka dostupa produkcii na rynek gosudarstv-učastnikov sodružestva nezavisimych gosudarstv” [CIS Agreement “On the use of the single mark of access of products on the market states – members of the Commonwealth of Independent States], issued 23 May 2001, *Vestnik Rossijskogo informacionnogo centra* [Bulletin of the Russian Information Centre] 2001, No. 2.

⁴¹ Pursuant to art. 56.8. of the EU–Ukraine Association Agreement, “[s]imultaneously with such transposition [of the corpus of European standards (EN)], Ukraine shall withdraw conflicting national standards, including its application of interstate standards (GOST/ГОСТ), developed before 1992”; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3.

⁴² CIS Interparliamentary Assembly official website, Model codes and laws, available at <http://iacis.ru/activities/documents/modelnye_kodeksy_i_zakony/>. The website reports 370 model laws.

⁴³ Konstitucija SSSR [USSR Constitution] of 1977, supra n. 29, Arts. 10–13, establishing the state regime of property ownership; Art. 6, establishing state ideology and a single-party system.

The rebuilding of the polities according to a Western-type model of “market democracy” premised upon popular sovereignty and suffrage, transparent government and free markets was at the centre of the reforms in post-Soviet states.⁴⁴ The founding principle of the Western model is an institutional separation between political and economic powers; it is characterized by a division between public and private spheres, with the state being assigned to pursue the common good and the market generally operating in private.⁴⁵ This key distinction provides for a private sector as the trusted sphere of free interaction and association of individuals, with the pursuit of individuals’ interests empowered by initiative and privately disposed assets. A society featuring property tends to accumulate wealth, and the state is obliged to preserve and protect this sphere. The state, therefore, is restricted in its initiatives towards the private sector and is controlled by the population.⁴⁶ Thus, there emerges (i) a cyclical positive relationship between competition and the association of property owners, (ii) growth in wealth and (iii) a democratic state.

Here, a more focussed consideration taking into account tendencies in legal development is needed. The institutionalization of autonomy between public and private domains is reflected not only by legal developments but goes further. Being a general organizing principle of the social model, it transcends the clear-cut dichotomy between “private” and “public” in law and provides a kind of imprint that is reproduced by the entire institutional framework, and it is considered in legislative practice and governance. Thus it is important not to equate this distinction with the separation of public and private law as separate sets of norms governing respective areas. In fact, this equation was contested on many grounds. For a long time it was repeatedly said that the difference between public and private law is obscure and that it retains significance in European legal theory merely as an intellectual principle of classification,⁴⁷ that it is of little practical use and practical im-

⁴⁴ A detailed exposition of the key ideologies of transformation by then leaders of the process can be found in: *Gaidar (ed.)*, *Jekonomika perechodnogo perioda: Očerki ékonomičeskoj politiki postkommunističeskoj Rossii 1991–1997* [Economy in transition: essays on economic policy in post-communist Russia 1991–1997], Moscow 1998, 1114 pp. Deserving special attention in this volume: *Mau*, *Vvedenje* [Introduction], pp. 7–38; *Gaidar*, *O neizbežnosti kracha socialističeskoj ékonomiki* [On the inevitability of the collapse of socialist economy], pp. 39–55; *Sinel’nikov*, *Programma liberal’nych rynočnych reform* [Programme of liberal market reforms], pp. 80–111.

⁴⁵ *Sassen*, *Territory, Authority, Rights*, Princeton 2006, pp. 61–67.

⁴⁶ *Friedman*, *The Role of Government in a Free Society*, in: *Friedman*, *Capitalism and Freedom*, Chicago 1962, pp. 22–36.

⁴⁷ *Mallory*, *Philosophical Classification of Law*, *The American Law School Review* 1902–1906, Vol. 1., No. 5, p. 140: “For all practical purposes, these philosophical classifications may be taken merely as convenient methods of arranging the topics of law for the purpose of discussion”.

portance in other legal families,⁴⁸ that it can be premised on alternative doctrinal and institutional foundations,⁴⁹ or that it is itself an ideologically fuelled concept capable of legitimating a particular regime of domination and exploitation.⁵⁰ Further, this differentiation, earlier seen as a “mighty cleavage”,⁵¹ was challenged as it was seen as being derived from the distinction between public and private. This has its roots in the presumed distinctions between the state and society and the autonomy of political power vis-a-vis economic and social life,⁵² with such an autonomy being altered by changing the perceptions of the role of the state in shaping the economy and social processes. The state today is actively intervening in the private domain by introducing public interests and norms into private agendas. This development has blurred the public/private distinction in law, making them difficult to separate in practice, and it has stripped the private/public cleavage of its academic purity.

Yet the convergence of private and public in their normative reflections does not challenge the value-fuelled foundations of the social model. The autonomy of administrative and economic powers, and the institutionally restricted capacity of the state to dominate a society characterized by inbuilt legal arrangements and mechanisms, preventing private take-overs of the state, are seen as major achievements of advanced societies.⁵³ The integrity of core values in the foundation of the entire social model still considers this distinction and preserves public and private as two core interrelated organizing principles. This distinction, on one hand, keeps the private as the resort of individual autonomy and, on the other, posits a conceptual boundary for the state. The state is conceived as an institution of common interest and common will that cannot be equated with the interests of the actor, dominating the state apparatus. Deemed inherent to the Western model, the distinction of public and private is reiterated then by the entire institutional and normative framework and is supported by practices.⁵⁴

⁴⁸ *Merryman*, *The Public Law–Private Law Distinction in European and American Law*, *Journal of Public Law* 1968, Vol. 17, No. 3, pp. 4, 14.

⁴⁹ *Michaels/Jansen*, *Private Law beyond the State? – Europeanization, Globalization, Privatization*, *American Journal of Comparative Law* 2006, Vol. 54, No. 4, pp. 843–890.

⁵⁰ For a discussion of Marx’s critique of private and public differentiation, see *Turkel*, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, *Law & Society Review* 1988, Vol. 22, No. 4, pp. 801–823.

⁵¹ *Holland*, *The Elements of Jurisprudence*, London/New York 1910, p. 108.

⁵² *Tay/Kamenka*, “Public Law – Private Law”, in: Ben/Gaus (eds.), *Public and Private in Social Life*, New York 1983, pp. 67, 82 f.

⁵³ For an at-length consideration of the discussions regarding the abstraction of “political” from production and exchange and the role of this abstraction toward the modern society, see *Lacher*, *supra* n. 6, pp. 45–60.

⁵⁴ As G. Teubner rightfully posits: “The traditional private/public duality is dissolved into a plurality of social segments. The ‘public’ then reappears within each social system – now

The autonomy and multi-site interaction of public and private as distinct and separate spheres is precisely what is lacking today in post-Soviet polities. The absence of this autonomy sanctions both private take-overs of the state apparatus and massive interference of the state as a dominant force in the private sphere. After 25 years of reforms, post-Soviet states still employ a social and institutional model that sharply differs from the Western societal complex. Conversely, in post-Soviet countries the model of power/property as an inseparable complex dominates.⁵⁵ A state is still empowered to own and govern all major economic assets and people by subordinating a social structure, this based upon slightly modernized “estates”. Empirically this means that the scope of rights and the access of an individual to economic assets will be mediated by the status of the group he or she belongs to and the position of the group within the state.⁵⁶

Such a social and institutional environment imperils the creation of the two key elements of open society that independency was supposed to establish in post-Soviet states – namely, the market and democracy. The outcomes of the post-Soviet period show two most likely paths of development equally different from that intended. The first and most common is empowerment of a state that dominates the economy and society by means of an autocratic regime (Belarus, Kazakhstan, Russia and Asian post-Soviet states), thus depriving the nation (as an assembly of empowered individuals) of political and economic participation and substituting democratic legitimacy with approval from subordinated groups.⁵⁷ The market is replaced with an authoritative

in a different sense – as that system’s expression of its intrinsic normativity, which private law legitimately takes into account”. He also importantly notes: “Constitutional rights in the ‘private’ sphere are not transfers of state constitutional rights from the vertical relation state – citizen to the horizontal relation between citizens; instead, they protect the integrity of individual and social autonomy against anonymous social processes within different sectors of society”. *Teubner*, *State Policies in Private Law? – A Comment on Hanoch Dagan*, *American Journal of Comparative Law* 2008, Vol. 56, No. 3, pp. 835, 842 f.

⁵⁵ On the Russian Experience, see *Kordonskij*, *Resursnoe gosudarstvo* [Resource state], Moscow 2007, 216 pp.; *Bessonova*, *Razdatočnaja ěkonomika kak rossijskaja tradicija* [Distributive economy as the Russian tradition], *Obščestvennyje nauki i sovremennost’* 1994, No. 3, pp. 37–48. – On Kazakhstan and Asian republics, see: *Schatz*, *Modern Clan Politics: the Power of “Blood” in Kazakhstan and Beyond*, Washington 2013, 280 pp; *Olcott*, *Central Asia’s Second Chance*, Washington 2010, 389 pp; *Pomfret*, *Central Asia since the Dissolution of the USSR: Economic Reforms and their Impact on State-Society Relations*, in: Amineh (ed.), *The Greater Middle East in Global Politics*, Leiden/Boston 2007, pp. 301–332. On Ukraine, see *Pankevich*, *EU–Ukraine Association: An Asymmetrical Partnership*, pp. 33 ff. (in this book).

⁵⁶ *Kordonskij*, *Soslovnaja struktura postsovetsoj Rossii* [Estates structure of post-Soviet Russia], Moscow 2008, 216 pp.

⁵⁷ *Rozov*, *Neopatrimonial’nye režimy: raznoobrazie, dinamika i perspektivy demokratizacii* [Neo-patrimonial regimes: Diversity, Dynamics and Prospects for Democratization],

distribution of the assets by the state,⁵⁸ generally by state budgeting. Yet a social contract of this type proves to be robust despite its damaged (if compared with the Western normative model) character in terms of the lack of resources available to the society beyond the state, and it provides for an anti-modernist social consensus.⁵⁹

The second possible outcome is the privatization of state and power resources by oligarchic self-interested groups (Russia before 2000⁶⁰ and Ukraine⁶¹). This situation produces a more competitive regime as concerns elites, but again it is inconsistent with a democratic and market society. Here the scope of an individual's rights and possibilities for economic access are shaped by two factors, by belonging to the oligarchic group and by this group's position in relation to the state.⁶² From a comparative perspective the results of this situation are even more devastating for economic development since the insecure character of the group's domination inspires the decline of the public sphere and an increase in short-term strategies for self-enrichment.⁶³

In both cases the resulting model hardly suits the needs of an open market and democratic society, which are themselves hardly evident. This could explain the major failures of Western advice provided to post-Soviet states and the poor success in transplanting the models and subsequent norms and entire codes. Though the post-Soviet countries were active in searching for appropriate legal approaches for a number of reasons, especially to fill regulatory gaps for previously non-existent rights – such as the newly introduced civil and property rights⁶⁴ – the impact of legal engineering was at best mode-

Polis – Političeskie issledovanija 2016, No. 1., pp. 139–156; Nisnevič/Rjabov, *Sovremennyj avtoritarizm i političeskaja ideologija* [Contemporary authoritarianism and political ideology], Polis – Političeskie issledovanija 2016, No. 4, pp. 162–181.

⁵⁸ *Pliskevič*, “Vlast’–sobstvennost’” v sovremennoj Rossii: proishozhdenije i perspektivy mutacii [“Power–property” in modern Russia: origin and prospects for mutation], *Mir Rossii* 2006, No. 3, pp. 62–113.

⁵⁹ *Mart’janov*, *Rossijskij političeskij porjadok v rentno-soslovnoj perspective* [Russian political regime in the rent-estate perspective], Polis – Političeskie issledovanija 2016, No. 4, pp. 81–99.

⁶⁰ *Pappè*, *Oligarchi: Èkonomičeskaja chronika 1992–2000* [Oligarchs: Economic chronicle of 1992–2000], Moscow 2000, 232 pp.

⁶¹ *Markus*, *Property, Predation and Protection. Piranha Capitalism in Russia and Ukraine*, Cambridge 2015, 243 pp.

⁶² *Eppinger*, *Property and Political Community: Democracy, Oligarchy, and the Case of Ukraine*, *George Washington International Law Review* 2015, Vol. 47, pp. 869–874; *Markus*, previous n.

⁶³ *Pavlenko*, *Bor’ba s korrupciej vmesto strategii razvitiija* [Fight against corruption instead of development strategy], *Rossija v global’noj politike* 2013, No. 4, pp. 124–133.

⁶⁴ *Pankevich*, *Phenomena of Legal Transplants Related to the Social Model of the Post-Soviet Countries*, in: *Kurzynsky-Singer* (ed.), *Transformation durch Rezeption?*, Tübingen 2014, pp. 39–64.

rate. This was due to a very obvious reason: The relevant values and their institutional framework comprise the core of the Western model, but they remain at the periphery of the institutional order of post-Soviet states. This shared characteristic of post-Soviet states produces common patterns of governmentality, sociality and a non-market economy, making these states more compatible with each other than with the other partners.

Thus, due to various path dependencies and comparable achievements in development, post-Soviet states continue to be similar and stay close to each other, despite differences in language, culture or religion. With few exceptions (e.g. Armenia and Azerbaijan, which are in territorial conflict), these factors of differentiation play a minor role in the interstate relations between the post-Soviet states and are more important internally than externally. The effective compatibility of social models found in post-Soviet states with the model found in the EU is severely problematic since they are founded on different premises of economic and social order. Owing to advantages that the persisting social model produces for elites of post-Soviet countries, this model may be implicitly supported even during the course of reforms.

III. Integrative projects by post-Soviet states

Accordingly, a number of weighty factors leading to integration within the post-Soviet space can be observed. Despite numerous controversies, the integrative processes in the region are fully apparent, and in some cases present successive stages towards a more intensive cooperation. As these enlarged arrangements become stronger and as common legal regimes take on a more regular and disciplined institutional form, the implementation of a successful European Neighbourhood Policy becomes more complicated. Here one needs to take into account not only the individual state but also its embeddedness in a complex of Eurasian interrelations.

1. *The Union of Russia and Belarus*

The deepest instance of integration is that between the Russian Federation and Belarus. Pursuant to a number of successive treaties⁶⁵ (of which the *Treaty of Establishing the Union State*⁶⁶ is the most recent and comprehensive), a *Union State* has been established. In perspective, this state is supposed to have a common Constitution and coordinated foreign and security policies (Art. 2.1.), common borders (Art. 7), joint citizenship (Art. 14), a single sys-

⁶⁵ For an overview of the treaties see: Information analytical portal of the Union State, available at <<http://www.soyuz.by/about/docs/>>.

⁶⁶ Dogovor o sozdanii sojuznogo gosudarstva [Treaty Establishing the Union State], adopted 8 December 1999, SZ RF 2000, No. 7, pos. 786.

tem of state authority and a supreme judiciary (title 5), and a united legal system (Art. 2.1.), including unified civil law and tax law (Art. 20).

The construction of this entity supposes a gradual approximation process resulting in a common economic (Art. 2.1.) and customs space with a single set of laws regarding customs procedures, common standards and non-tariff barriers (quotas, licenses and lists of prohibited positions) (Art. 29). Thus the *finalité* of the Treaty is clearly aimed at producing a supranational state and a common economic space. This Union State also should be open for other participants to join (Art. 65).

Though the attractiveness of this Union for the others is in doubt, and the two participants have not proceeded far in achieving many of the goals – such as realising a single currency (Arts. 13, 22) – this semi-hibernating treaty embodies a deep commitment of the two to joint and coordinated policies and provides for a significant unity of their spaces socially, politically and economically. Furthermore, the Treaty can be invoked easily if a need for more active integration arises.

For Belarus, participating as a Union State member also allows it to avoid European initiatives and remain closed to dialogue; moreover, its participation generally makes financial incentives offered by the EU insignificant. At the moment, the republic has almost unrestricted access to a Russian market that can absorb nearly the entire volume of Belarussian export, and in turn it enjoys the most favourable regime of import from Russia. For instance, the supply of gas is governmentally subsidized,⁶⁷ and Belarus pays the lowest possible price at which Russian gas is traded internationally. No later than 2025, when a common energy-space is to be fully launched for the Eurasian Union, Belarus and other participants are expected to pay for gas at the rate of the internal Russian market.

Current events have exposed a certain tension between the two countries: Recently, Belarus unilaterally introduced a visa regime (operating via the Minsk airport) that would apply to the nationals of eighty states as regards visitors who did not intend to spend more than five days in the republic.⁶⁸ The new

⁶⁷ Soglašenje meždu Pravitel'stvom Respubliki Belarus' i Pravitel'stvom Rossijskoj Federacii o porjadke formirovanija cen (tarifov) pri postavke prirodnogo gaza v Respubliku Belarus' i ego transportirovke po gazoprovodam, raspoložennym na territorii Respubliki Belarus' [Agreement between the Government of the Republic of Belarus and the Government of the Russian Federation on the formation of prices (tariffs) in the supply of natural gas to the Republic of Belarus and transmission via gas pipelines located on the territory of the Republic of Belarus], adopted 16 May 2012, *Bulleten' meždunarodnyh dogovorov* 2012, No. 9.

⁶⁸ Belarus' vvodit pjatidnevnyj bezvizovyj režim dlja graždan 80 stran [Belarus introduces a five-day visa-free regime for citizens of 80 countries], President of Belarus official website, 9 January 2017, available at <http://president.gov.by/ru/news_ru/view/belarus-vvodit-pjatidnevnyj-bezvizovyj-rezhim-dlja-grazhdan-80-stran-15342/>.

visa regime was adopted by Presidential Decree within one month of its official publication,⁶⁹ resulting in the regime coming into force in February 2017. Russia responded to this unilateral move by adopting three decrees re-establishing border check-points in the oblasts of Smolensk, Bryansk and Pskov.⁷⁰ But notwithstanding such events demonstrating apparent contradictions in bilateral relations, it is too early to speak of a deep crisis. Belarus continues to participate actively in major integrative processes in the post-Soviet region.

2. *Commonwealth of Independent States (CIS)*

While the Russia-Belarus Union State is unique in that it is bilateral and combines a relative independence of the two nations and it is productive in creating a common space for trade, migration and settlement, the Union also creates a situation where a nation that is not formally a member of WTO in fact secures the benefits of membership while being exempted from the risks. Trade between Russia and Belarus is not restricted by customs or any technical barriers.

The other agreements are multilateral. Along with abolishing the USSR, the *Belovežskie Agreements* of 1991⁷¹ immediately established a substitute integrative structure – the Commonwealth of Independent States – which was supposed to be open to each of the post-Soviet republics. With the exception of the three Baltic republics and Georgia, all of them opted to join this Commonwealth by signing the Declaration of Alma-Ata (Kazakhstan).⁷²

⁶⁹ Ukaz Prezidenta Respubliki Belarus “Ob ustanovlenii bezvizovogo porjadka v’vezda i vyezda inostrannykh graždan” [Decree of the President of the Republic of Belarus “On establishing a visa-free order of entrance and departure of foreign citizens”], issued 8 January 2017, No. 8, Nacional’nyj pravovoj Internet-portal Respubliki Belarus’ [National legal Internet portal of the Republic of Belarus], 11 January 2017, 1/16855.

⁷⁰ Prikazy Federal’noj služby bezopasnosti Rossijskoj Federacii [Orders of the Federal Security Service of the Russian Federation]: “O predelach pograničnoj zony na territorii Smolenskoj oblasti” [On the limits of the border zone on the territory of the Smolensk region]; “O predelach pograničnoj zony na territorii Pskovskoj oblasti” [On the limits of the border zone on the territory of the Pskov region]; “O predelach pograničnoj zony na territorii Brjanskoj oblasti” [On the limits of the border zone on the territory of the Bryansk region], issued 29 December 2016, Nos. 801–803, all published in: Oficial’nyj internet-portal pravovoj informacii [Official web portal of legal information], 27 January 2017, Nos. 0001201701270026; 0001201701270040; 0001201701270027, all available at <<http://publication.pravo.gov.ru/SignatoryAuthority/foiv054>>.

⁷¹ Soglašenje “O sozdanii Sodružestva Nezavisimych Gosudarstv” [Agreement “On establishing a Commonwealth of Independent States”] of 8 December 1991, Vedomosti Soveta Narodnykh Deputatovi Verhovnogo Soveta RF [Bulletin of the Council of Peoples’ Deputies and the Supreme Soviet of the Russian Federation], 19 December 1991, No. 51, pos. 1798.

⁷² Alma-atinskaja deklaracija [Declaration of Alma-Ata], issued 21 December 1991, Sodružestvo: Informacionnyj vetnik SNG [Commonwealth: Information Herald of the CIS] 1992, No. 1.

The centrifugal dynamics of the USSR were partly inherited by the CIS, and they precluded the Commonwealth from acquiring the stability necessary for establishing a new integrative project. Shortly after its initial formation, Ukraine and Turkmenistan declined to sign the CIS Charter,⁷³ neither on 22 June 1993 nor later, though Turkmenistan still keeps the status of an associated member of the CIS. Georgia, by contrast, joined the CIS in 1993 only to later terminate its membership in 2009.

As for Ukraine, despite being one of the founders of the CIS, it can only be qualified as an observer and not a full member. Today a number of national leaders favour quitting all connections with this organization.⁷⁴ On 9 November 2016, the Ukrainian State Parliament (Verkhovna Rada) registered a draft of a decree titled “On the Legal Status of Ukraine in the CIS”, an instrument ruling out CIS membership on account of not having ratified the Charter.⁷⁵

This scenario is very probable since Ukraine has already withdrawn its representative from the Executive Committee of the CIS⁷⁶ and quit participation in the CIS investigation database.⁷⁷ An escalation in conflict has seen Ukraine also repeal or suspend a number of treaties signed within the CIS or bilaterally with the Russian Federation,⁷⁸ but not including the Free-Trade Treaty of

⁷³ Ustav Sodružestva Nezavisimych Gosudarstv [Charter of the CIS], adopted 22 January 1993, *Bulleten' meždunarodnyh dogovorov* 1994, No. 1.

⁷⁴ Ukraina izučaet vopros vychoda iz SNG – Pavel Klimkin (ministr inostrannyh del) [Ukraine is examining the issue of withdrawal from the CIS – Pavlo Klimkin (Minister of Foreign Affairs)], 112UA, 10:10, 10 October 2016, available at <<http://112.ua/politika/ukraina-izuchaet-vopros-vyhoda-iz-sng-klimkin-344716.html>>.

⁷⁵ Projekt Postanovi pro pravovij status Ukraïni v Spivdružnosti Nezaležnich Deržav [A draft Decree on the legal status of Ukraine in the Commonwealth of Independent States], adopted 9 November 2016, No. 5377, available at <http://w1.c1.rada.gov.ua/wpls/zweb2/webproc4_1?pf3511=60464>.

⁷⁶ Ukaz Prezidenta Ukraïni pro vidklikannja A. Dronja z Vikonavčogo komitetu Spivdružnosti Nezaležnich Deržav [Presidential decree on revocation of A. Dron from the Executive Committee of the Commonwealth of Independent States], issued 12 November 2014, No. 869/2014, available at <<http://zakon5.rada.gov.ua/laws/show/ru/869/2014>>.

⁷⁷ Soglašenje ob obmene informacij v sfere bor'by s prestupnost'ju [Agreement on information exchange in the sphere of the fight against crime], adopted 22 May 2009, *Edinyj reestr pravovyh aktov i drugih dokumentov Sodružestva Nezavisimych Gosudarstv* [Unified register of legal acts and other documents of the Commonwealth of Independent States], No. 02645, available at <<http://cis.minsk.by/reestr/ru/index.html#reestr/view/summary?doc=2645>>; Soglašenje o vzaimootnošenijach ministerstv vnutrennih del v sfere obmena informacij [Agreement on the relationship of the ministries of internal affairs in the sphere of information exchange], adopted 3 August 1992, *Edinyj reestr pravovyh aktov i drugih dokumentov Sodružestva Nezavisimych Gosudarstv*, No. 00133, available at <<http://cis.minsk.by/reestr/ru/index.html#reestr/view/summary?doc=133>>.

⁷⁸ The Laws of Ukraine, 21 May 2015, Nos. 463-VIII – 467-VIII: “Pro denonsaciju Ugodi miž Urjadom Ukraïni ta Urjadom Rosijskoï Federacii pro tranzit čerez teritoriju Ukraïni vijskovich formuvan' Rosijs'koï Federacii, jaki timčasovo znahodjat'sja na

the CIS⁷⁹ nor the so-called *Big Treaty*⁸⁰ on cooperation with Russia. The term of the Big Treaty expires in 2018; it renews automatically for a period of ten years if no party expresses in writing the wish to terminate participation six months before the end of the current ten-year period (Art. 40). Thus, termination is possible in the near future without the need to employ any extraordinary methods.

Russian policies towards the CIS were defined by the Concept of Foreign Policy of the Russian Federation 2013.⁸¹ This strategy document placed integration within the CIS among other regional priorities (Arts. 34(h), 42–50), showing Russian Federation commitment to a neighbourhood, but only as a part of a “larger game”. In the recently adopted new Concept of Foreign Policy,⁸² however, cooperation with CIS countries is more detailed. Integration within the CIS by means of bilateral and multilateral cooperation with Russian participation is defined as the Russian state’s priority (Art. 49); and there

teritorii Respubliki Moldova” [“On denunciation of the Agreement between the Government of Ukraine and the Government of the Russian Federation on the transit of Russian Federation military personnel and equipment temporarily stationed on the territory of the Republic of Moldova through the territory of Ukraine”]; “Pro denonsaciju Ugodi miž Kabinetom Ministriv Ukraïni ta Urjadom Rosijskoï Federacii pro vzajemnu ochoronu sekretnoi informacii” [“On denunciation of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on mutual protection of classified information”]; “Pro denonsaciju Ugodi miž Urjadom Ukraïni ta Urjadom Rosijs’koï Federacii pro organizaciju vijs’kovich mižderzhavnich perevezem’ ta rozrachunki za nich” [“On denunciation of the Agreement between the Government of Ukraine and the Government of the Russian Federation on the organization of military interstate transportations and settlements for them”]; “Pro denonsaciju Ugodi miž Ukraïnoju ta Rosijs’koju Federacijeju pro spivrobitnictvo v galuzi vojennoi rozvidki” [“On denunciation of the Agreement between Ukraine and the Russian Federation on cooperation in the field of military intelligence”]; “Pro denonsaciju Ugodi miž Urjadom Ukraïni ta Urjadom Rosijs’koï Federacii pro spivrobitnictvo u vijs’kovij galuzi” [“On denunciation of the Agreement between the Government of Ukraine and the Government of the Russian Federation on cooperation in the military field”], *Vidomosti Verhovnoi Radi* [Bulletin of Verhovna Rada] 2015, No. 30, pos. 279; 280; 281; 282; 283.

⁷⁹ Dogovor o zone svobodnoj trgovli SNG [CIS agreement on free-trade zone], adopted 18 October 2011, *Bulleten’ meždunarodnych dogovorov* 2013, No. 1.

⁸⁰ Dogovor o družbe, sotrudničestve i partnėrstve meždru Rossijskoj Federaciej i Ukraïnoj [Treaty on friendship, cooperation and partnership between the Russian Federation and Ukraine], adopted 31 May 1997, *Bulleten’ meždunarodnych dogovorov* 1999, No. 7.

⁸¹ Concept of Foreign Policy of the Russian Federation, 18 February 2013, *supra* n. 28.

⁸² Ukaz Prezidenta Rossijskoj Federacii “Ob utverzhenii koncepcii vneshnej politiki Rossijskoj Federacii” [Decree of the President of the Russian Federation “On approval of foreign policy Concept of the Russian Federation”], issued 30. November 2016, No. 640, *SZ RF* 5. December 2016, No. 49, pos. 6886.

is a declaration of comprehensive cooperation in economics, culture, security and common international affairs (Arts. 53–55).

Despite being fragile, the CIS gave rise to a number of integration efforts which are regarded as successive stages in a deepening process. In 2006, the Customs Union was established by Russia, Belarus and Kazakhstan and participation followed by Armenia and Kyrgyzstan. According to the respective corpus of treaties and agreements (that comprise over forty acts),⁸³ internal custom borders between the partners were abolished. Syria⁸⁴ and Tunisia⁸⁵ have also expressed interest in joining the Customs Union.

Subsequently, in 2011 a free-trade area among the Member States of the CIS was established⁸⁶ (this came into effect in 2012 after ratification by the Russian Federation, Belarus and Ukraine). At the time of writing, this structure unites nine post-Soviet states, including Moldova and Ukraine and, under a special protocol, Uzbekistan. Within this Treaty, exports of the Member States are subject to an almost 100% duty-free regime.⁸⁷ The restrictions are few and comprise mainly three groups of exported goods: alcohol, tobacco and sugar. Due to the recent events in the region, the free-trade agreement between Russia and Ukraine was suspended,⁸⁸ with an exemption for trade in natural gas.⁸⁹ But bearing in mind that gas represented 24% of Ukrainian imports from Russia in 2015,⁹⁰ the real suspension has not produced as signi-

⁸³ Dogovorno-pravovaja baza Tamožennogo sojuza. [Legal base of the Customs Union], Electronic Database Garant, available at <<http://base.garant.ru/5754455/>>.

⁸⁴ Sirija chočet vstipit' v Tamožennyj sojuz [Syria wants to join the Customs Union], Regnum News Agency, 4 February 2013, available at <<https://regnum.ru/news/polit/1621001.html>>.

⁸⁵ Samofalova, Tunis chočet bystro popast' v Tamožennyj sojuz [Tunisia wants to quickly join the Customs Union], Vzgljad, 14 January 2015, available at <<http://vz.ru/economy/2015/1/14/724368.html>>.

⁸⁶ Dogovor o zone svobodnoj trgovli SNG [CIS agreement on free-trade zone], supra n. 79.

⁸⁷ WTO, World Tariff Profiles, Geneva 2016; relevant are pp. 40, 42, 47, 102, 106, 120, 142, 162, 173.

⁸⁸ Federal'nyj zakon "O priostanovlenii Rossijskoj Federaciej dejstvija Dogovora o zone svobodnoj trgovli v otnošenii Ukrainy" [Federal law "On the Russian Federation's suspension of the Treaty of a free-trade area with Ukraine"], adopted 30 December 2015, No. 410-FZ, SZ RF 2016, No. 1 (part 1), pos. 30.

⁸⁹ Ukaz Prezidenta RF "O častičnom vozobnovlenii Rossijskoj Federaciej dejstvija dogovora o zone svobodnoj trgovli v otnošenii Ukrainy" [Decree of the President of the Russian Federation "On the Russian Federation's partial reopening of the Treaty on a free-trade area with Ukraine"], issued 30 December 2015, No. 681, SZ RF 2016, No. 1 (part 2), pos. 210.

⁹⁰ Nacional'nij bank Ukraïni, Zovnishn'otorgovel'ni vidnosini Ukraïni z Rosijs'koju Federacijeu [The National Bank of Ukraine, Foreign trade relations of Ukraine with the Russian Federation], 2016, p. 2, available at <<http://www.bank.gov.ua/doccatalog/document?id=19208344>>.

ficant an effect on both economies as it could have done. In fact, this suspension means a return to the rules of the WTO that bind conflicting sides, since both of them are WTO members.

3. *Eurasian Economic Union (EAEU)*

Finally, the less politically and more economically oriented integrative project for post-Soviet space is the *Eurasian Economic Union* established by the Treaty⁹¹ of Belarus, Kazakhstan and Russia on 29 May 2014 (which came into force on 1 January 2015). To date, this Union has attracted Armenia and Kyrgyzstan as full members.

The 2013 Concept of the Foreign Policy of the Russian Federation⁹² commits to establishing Eurasian Economic Union as a “model of association open to other states [...] The new union that is being formed on the basis of universal integration principles and is designed to serve as an effective link between Europe and the Asia-Pacific region” (Art. 44). However, in the Concept of Foreign Policy of the Russian Federation of 2016,⁹³ the Union is described more in economic terms as a free-trade association – an instrument for technology transfer and modernization, for cooperation and for achieving an increase in the partner-economies’ competitiveness as well as the living standards for those people governed by it (Art. 51). This shift appears to show a transition from aspiration to implementation as resulting from the three years of negotiations.

The Treaty establishing the EAEU directly provides for: free movement of goods, services, capital and labour; coordinated, agreed or unified policies towards economic regulation in the sectors covered by the Treaty (Art. 1.1.); the establishment of a common market and enhanced competitiveness of member economies (Art. 4); the creation of a joint customs regime towards third parties (Art. 25); and other components of a comprehensive free-trade agreement. On 26 December 2016, a joint customs regime was equipped with the Customs Code of the Eurasian Economic Union that was signed by four member countries as the next step towards integration.

⁹¹ Dogovor o Evrazijskom ekonomičeskom sojuze [Treaty on the Eurasian Economic Union], adopted 29 May 2014, Pravovoj portal Ervrazijskogo Ekonomičeskogo Sojuza [Legal portal of the Eurasian Economic Union], available at <<https://docs.eaeunion.org/en-us>>.

⁹² Concept of Foreign Policy of the Russian Federation, 18 February 2013, supra n. 28.

⁹³ Foreign Policy Concept of the Russian Federation (approved by the President of the Russian Federation, Vladimir Putin, on 30 November 2016), The Ministry of Foreign Affairs of the Russian Federation, 1 December 2016, text in English available at <http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2542248?p_p_id=101_INSTANCE_cKNonkJE02Bw&_101_INSTANCE_cKNonkJE02Bw_languageId=en_GB>.

The Union today constitutes an economic actor which ranks first in the world hierarchy for oil extraction, second for gas extraction (after the USA) and first as a gas exporter.⁹⁴ Based on its own estimate, it is second as a producer of mineral fertilizers, third for iron smelting, fifth for steel making, third in milk production and fifth in grain production.⁹⁵

The composite market power and significant population of the Union produce an entity that can attract various states in different regions to join. On 29 May 2015, Vietnam entered a Free-Trade Agreement under the EAEU.⁹⁶ Free-trade regimes with Serbia and Montenegro on the basis of pre-established treaties with Russia, Belarus and Kazakhstan⁹⁷ are going to be modernized, unified and extended to the rest of the participants of the EAEU. Membership negotiations have been launched with Egypt, Thailand, Mongolia and Iran. The media has reported interest from a number of other states to establish relationships (Tunisia,⁹⁸ Singapore,⁹⁹ Pakistan,¹⁰⁰ Israel,¹⁰¹ India¹⁰² and China¹⁰³).

⁹⁴ OPEC, Annual Statistical Bulletin, 2015, pp. 28, 98, 100, available at <http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2015.pdf>.

⁹⁵ Eurasian Economic Union, About the Union, see <<http://www.eaeunion.org/#about-info>>.

⁹⁶ Vysšij Evrazijskij Ėkonomičeskij Sovet, Rešenije "O vstuplenii v silu soglašenija o svobodnoj trgovle meždu Evrazijskim Ėkonomičeskim sojuzom i ego gosudarstvami-členami, s odnoj storony, i Socialističeskoj respublikoj V'etnam, s drugoj storony" ot 29.5.2015 [Supreme Eurasian Economic Council, Decision on the entry into force of the free-trade agreement between the Eurasian Economic Union and its Member States, on the one hand, and the Socialist Republic of Vietnam, on the other hand, of 29 May 2015], issued 31 May 2015, No. 3, Pravovoj portal Ervrazijskogo Ėkonomičeskogo Sojuza, available at <https://docs.eaunion.org/docs/ru-ru/01410318/scd_01062016_3>.

⁹⁷ EAĖS načnet peregovory s Serbiej ob unifikaciji trgovovogo režima [EAEU will start negotiations with Serbia on the unification of a trade regime], Interfax, 31 May 2016, available at <<http://www.interfax.ru/business/510974>>.

⁹⁸ Tunis zainteresovan vo vstuplenii v EAĖS [Tunisia is interested in joining the EAEU], RIA Novosti [Russian Information Agency News], 11 August 2016, available at <<https://ria.ru/world/20160811/1474128607.html>>.

⁹⁹ Singapur poobeščal sozdat' zonu svobodnoj trgovli s EAĖS [Singapore has promised to establish a free-trade zone with the EAEU], Forbes, 19 May 2016, available at <<http://www.forbes.ru/news/320645-singapur-poobeshchal-sozdat-zonu-svobodnoi-torgovli-s-eaes>>.

¹⁰⁰ Posol: Pakistan zainteresovan v soglašenii o svobodnoj trgovle s EAĖS [Ambassador: Pakistan is interested in free-trade agreement with the EAEU], Regnum, 29 August 2015, available at <<https://regnum.ru/news/1959152.html>>.

¹⁰¹ Ministr: Izrail' zainteresovan v podpisanii soglašenija o zone svobodnoj trgovli s EAĖS [Minister: Israel is interested in signing agreement on free-trade zone with the EAEU], TASS, 28 October 2015, available at <<http://tass.ru/ekonomika/2384049>>

¹⁰² Evrazijskaja Ėkonomičeskaja komissija: Indija zainteresovana v razvitii trgovli so stranami Evrazijskogo Ėkonomičeskogo sojuza [Eurasian Economic Commission: India is interested in developing trade with the countries of the Eurasian Economic Union], 18 No-

4. *Non-European path: beyond CIS*

a) *Shanghai Cooperation Organization (SCO)*

The projects that provide an alternative to Europe in a broader geographic space include moving post-Soviet countries eastwards within such organizations as the *Shanghai Cooperation Organization (SCO)*, which was launched in 2001 by the Russian Federation, four other post-Soviet states,¹⁰⁴ China, India and Pakistan. There are six more countries as observing partners in the SCO and six are dialogue partners. Of these, three are included in the European Eastern Partnership, where their participation has, predictably, been evaluated as unsuccessful.

By estimates of both the World Bank¹⁰⁵ and the International Monetary Fund,¹⁰⁶ the SCO includes the world's biggest economies: China (1), India (3), the Russian Federation (6) and Pakistan (25/26). The immediate focus of cooperation of this organization is primarily the energy sector, but there is a proposal for a comprehensive free-trade area in a period of twenty years,¹⁰⁷ although it is highly problematic due to significant disproportions in economic structures and legal regimes.

But there are clear signs of infrastructure integration. An important development project, the "Silk Road Economic Belt" was initiated by China in 2013.¹⁰⁸ Its goal is a restructuring of the entire transport and logistics system in Eurasia by establishing highly effective transport corridors, thus reducing the delivery times from China to Europe. The participation of the SCO as a dialogue and decision-making body to support this project is important. Still more important is the Eurasian Economic Union involvement. By estab-

vember 2016, available at <<http://www.eurasiancommission.org/ru/nae/news/Pages/18-11-2016-4.aspx>>.

¹⁰³ Edovina, EAĖS vydvinulsja v kitajskom napravlenii [EAEU moved towards China], *Kommersant*, 17 May 2016, No. 84, p. 2.

¹⁰⁴ Deklaracija o sozdanii Šanhajskoj Organizacii Sotrudničestva [Declaration on establishment of the Shanghai Cooperation Organization], issued 15 June 2001, *Diplomatičeskij Vestnik* [Diplomatic Bulletin] 2001, No. 7.

¹⁰⁵ World Bank, International Comparison Program database, 2016, available at <<http://data.worldbank.org/indicator/NY.GDP.MKTP.PP.CD>>.

¹⁰⁶ International Monetary Fund, *supra* n. 5.

¹⁰⁷ Programma mnogostoronnego torgovo-ekonomičeskogo sotrudničestva gosudarstv-členov Šanhajskoj Organizacii Sotrudničestva [Program of multilateral trade and economic cooperation of the Member States of the Shanghai Cooperation Organization], issued 23 September 2003, Ministerstvo ekonomičeskogo razvitija RF, Portal vneshne-ekonomičeskogo informacii [Ministry of Economic Development of the Russian Federation, Portal of foreign economic information], available at <http://www.ved.gov.ru/rus_export/partners_search/torg_exp/?action=showproduct&id=1722>.

¹⁰⁸ *Campos*, *One Belt & One Road: Between Cooperation and Geopolitics in the Silk Road*, *Contacto Global* (December 2015), Vol. 6, pp. 18–25.

lishing a common border and customs regime and employing unified logistics procedures and measurements, the Member States have created favourable conditions to become the most important branch of the new *Silk Belt* that will link the economies of Belarus, Russia, Kazakhstan and Kyrgyzstan as a single line of transport between China and Europe. On the way to Europe via the EAEU, the goods will be subjected to only three customs regimes and no waterways. In comparison, the other routes (via Georgia and Ukraine, or Georgia and Turkey, or through the Caspian or Black Sea) have up to five customs regimes and require multi-modal transportation.

Thus, the development of a new transport system would likely stimulate a further enlargement of customs regimes within the post-Soviet states and motivate particular states towards closer cooperation with the EAEU in the East, or with the EU in the West.

b) BRICS

Another less formal integrative project involves the fastest growing economies of the world – *Brazil, Russia, India, China and South Africa* – referred to as BRICS. The project was launched in 2006¹⁰⁹ and aimed to provide better conditions for trade in goods and services, investment and cooperation among the participants. Though this institution was initially deemed artificial by experts and unlikely to be coherent,¹¹⁰ the cooperation has already brought success. Coordinated action made it possible to hold a “voice reform” of the IMF in November 2010. It has enhanced the positions and negotiating power of emerging economies: China became the third largest shareholder (after the USA and Japan); India, Russia, and Brazil moved into the top ten,¹¹¹ thus revealing the capacity of BRICS to reshape international aid formulas.

Later, BRICS proceeded to create common financial institutions, namely the New Development Bank in 2014 as a potential alternative to the IMF and the World Bank. The latter two were highly criticized by BRICS nations and by other countries (also in Europe, most explicitly in Hungary¹¹²) for producing rather negative effects with regard to economies and societies. The goal of this new institution is to pool governmental resources to support the major infrastructure projects in the partner countries. BRICS has also announced the

¹⁰⁹ See generally: Joint Site of Ministries of Foreign Affairs of BRICS Member States, available at <<http://infobrics.org/>>.

¹¹⁰ *Panova*, BRICS: problemy vzaimodejstvija i potencial sotrudničestva [BRICS: problems of interaction and potential cooperation], *Obozrevatel'* 2013, No. 1, pp. 39–54.

¹¹¹ *Vestergaard*, Voice Reform in the World Bank, *Danish Institute of International Studies* 2010, pp. 26 f., 31, 38.

¹¹² Hungary Wants to Throw Out IMF, *Spiegel Online*, 15 July 2013, available at <<http://www.spiegel.de/international/europe/hungary-calls-on-imf-to-close-its-budapest-office-a-911250.html>>.

creation of a reserve fund. As an alternative, non-cash support is provided for partner projects as a means of circumventing corruption.

In the field of economic support, the BRICS nations explicitly avoid the conditionality principle¹¹³ (the cornerstone of European Eastern politics). Doing so, BRICS nations are expressing their commitment to the principle of non-interference in internal affairs. This vision also precludes the usage of the “funds in exchange for reforms” formula as well as targeted legal exports.

Though BRICS is again not obviously a project designated for success, it does appear to be speeding up bilateral relations between its members and acquiring a better presence for partners’ goods and services in geographically remote markets.¹¹⁴ This is very attractive for those vulnerable spheres in post-Soviet space where economic connections were damaged by both the split of the USSR and later conflicts. More significant damage has also been inflicted by the war of sanctions between the Russian Federation and a number of other world actors, including the USA and the EU before and immediately after the Ukrainian crisis in 2014. In the food market, the losses of European and above all Ukrainian products, banned by Russian “responsive sanctions”,¹¹⁵ were immediately replaced by imports from China and Brazil.¹¹⁶

¹¹³ *Rolland*, The BRICS’ Contributions to the Architecture and Norms of International Economic Law, Proceedings of the Annual Meeting of the American Society of International Law 2013, Vol. 107: International Law in a Multipolar World, p. 166. – For specific examples, see the comments, relating to Russian-Ukrainian relations before the conflict: Azarov: Kompromiss po cene na gaz ne budet svjazan so vchodom Ukrainy v Tamožennyj sojuz [Azarov: Compromise on the price of gas will not be associated with the entrance of Ukraine into the Customs Union], Regnum, 28 October 2011, available at <<https://regnum.ru/news/polit/1460975.html>>; *McElroy*, Ukraine receives half price gas and \$15 billion to stick with Russia, The Telegraph, 17 December 2013, available at <<http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10523225/Ukraine-receives-half-price-gas-and-15-billion-to-stick-with-Russia.html>>. On non-conditionality of the Silk Road Economic Belt, see *Zhigang*, Promote One Belt and One Road Initiative with Pragmatic Measures, China Development Bank 2015, pp. 6, 12, available at <http://carecprogram.org/uploads/events/2015/2-%20CI-Launching-Workshop-Urumqi/Presentation-Materials/009_101_209_2-Jiang-Zhigang.pdf>.

¹¹⁴ BRICS mutual trade up 70% in 6 years – South Africa President, RT-news, 7 August 2015, available at <<https://www.rt.com/business/311830-brics-trade-increase-bank/>>.

¹¹⁵ Ukaz Prezidenta RF “O primenenii otdel’nykh special’nykh ekonomičeskikh mer v celjach obespečenija bezopasnosti Rossijskoj Federacii” [Decree of the President of Russian Federation “On applying certain special economic measures to ensure the security of the Russian Federation”], issued 6 August 2014, No. 560, RG, 7 August 2014, No. 176, and subsequent decrees; Postanovlenie Pravitel’sstva RF “O merach po realizacii ukazov Prezidenta Rossijskoj Federacii ot 6.8.2014 No. 560, ot 24.6.2015 No. 320 i ot 29.6.2016 No. 305” [Resolution of the Government of the Russian Federation “On measures for implementation of decrees of the President of the Russian Federation of 6 August 2014 No. 560, of 24 June 2015 No. 320 and of 29 June 2016 No. 305”], issued 7 August 2014, No. 778, with subsequent changes, RG, 8 August 2014, No. 178.

Moreover a coordinated policy in highly divisive political matters is viable. Russian withdrawal of its signature from the founding document that established the International Criminal Court¹¹⁷ in November 2016 followed a week after a withdrawal from the ICC by a number of African nations, these including South Africa (as is mentioned in a statement of the Russian Federation's Ministry of Foreign Affairs).¹¹⁸

IV. Conclusion and possible projections

Taking into account proceedings in the CIS and on a broader scope, it becomes clearer that the European Neighbourhood and especially the Eastern Partnership Policy necessarily rely on a wider spectrum of factors that serve to condition the policies of the relevant nations. This is especially important if the goal of these programmes is really to go beyond being solely an approximation of legal texts – which is not an “aim in itself” – and is instead to seek “transformation and adaptation of [neighbouring countries'] respective administrations, justice systems and societies to the conditions necessary to ensure that the legislation is effective and well implemented”.¹¹⁹

The EU Neighbourhood Policy is now addressed to particular post-Soviet states as if they were isolated from the rest of a region that has the capacity to act fully independently. Additionally, the post-Soviet states are approached as being closely similar in nature vis-à-vis western polities, as if they already possess market-driven economies and are in need of approximation. But to make the policies effective it is necessary to admit that, though not inexistent, the market in post-Soviet countries has a peripheral position and produces limited effects on society. This is the very reason why the incentives, as well

¹¹⁶ *Nikolaev*, Sankcii protiv Rossii vygodny Latinskoj Amerike [Sanctions against Russia are beneficial for Latin America], Inosmi, 14 August 2014, available at <<http://inosmi.ru/overview/20140814/222364371.html>>.

¹¹⁷ Rasporjaženie Prezidenta RF “O namerenii ne stat' učastnikom Rimskogo statuta Meždunarodnogo ugolovnogogo suda” [Order of the President of the Russian Federation “On the intention not to become party to the Rome Statute of the International Criminal Court”], issued 16 November 2016, No. 361-rp, SZ RF 2016, No. 47, pos. 6630.

¹¹⁸ Zajavlenie MID RF [Statement of the Ministry of Foreign Affairs of the Russian Federation], issued 16 November 2016, available at <http://www.mid.ru/ru/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNlr/content/id/2523566http://thebripost.com/russia-withdraws-signature-from-icc/#.WDhG5bnCqtw>.

¹¹⁹ Euronest Parliamentary Assembly, Resolution on Approximation of the National Legislation of Eastern Partnership Countries with EU Legislation in the Economic Field, 28 May 2013, Preamble A and para. 4, OJ 2013 C 338/10.

as the sanctions, targeted towards markets are altogether ineffective and only strengthen the anti-Western consensus inside post-Soviet states.¹²⁰

Since these economies are built on other foundations and organizational principles, they do not need approximation; rather, they require comprehensive and evolutionary reform undertaken on a long-term horizon as achieved by cultivating demand for modernization inside the countries. It is also significant that the demand produced by peripheral insiders like “civil society groups” or “individual entrepreneurs” or “private business” is not of a significant systemic importance and provides almost no signals to the authorities that the reforms are really needed. Thus allocating funds to support civil society initiatives, which is a significant part of the Eastern Partnership Policy,¹²¹ will be regarded by ruling elites as hostile policies intended to raise an internal opposition and will be met with a closing of the cooperation activities (as in the case of Belarus or Azerbaijan).

Importantly, the European initiatives providing for individual incentives are always politically conditioned due to the inherent requirement that the EU is obliged to promote not only interests but also values. Dual purpose policy makes Europe a less attractive partner for a number of states where elites have managed to establish non-modernist consensuses in their respective societies and, despite ineffectiveness in economic terms, feel confident in maintaining a future stability (Eastern Partnership countries: Armenia, Azerbaijan and Belarus; beyond the Eastern Partnership: Russia¹²²).

¹²⁰ According to the results of a public opinion poll by the Levada-Center in August 2016, despite 72% of respondents having admitted that sanctions harm Russia, 70% support the policy of the Russian government and support its prolongation; Levada-Center, 18 August 2016, available at <<http://www.levada.ru/2016/08/18/sanktsii-zapada-i-produkt-ovoe-embargo-rossii/>>.

¹²¹ The threshold for funding directly allocated in support of various NGOs’ initiatives is at least 5% for each of the Eastern Neighbours. The share of support directly allocated to private actors reaches up to a half or more of the total funding for Armenia and Belarus, this by assigning the funding to “social inclusion” or “private sector development”. See: European External Action Service, Strategy Paper and Multiannual Indicative Programme for EU support to Belarus (2014–2017), p. 18, available at <http://eeas.europa.eu/archives/docs/enp/pdf/financing-the-enp/belarus_2014_2017_programming_document_en.pdf>; Single Support Framework for EU support to Armenia (2014–2017), p. 7, available at <http://eeas.europa.eu/archives/docs/enp/pdf/financing-the-enp/armenia_2014_2017_programming_document_en.pdf>.

¹²² Russia is very explicit in evaluating the import of liberal values as a mistake of the West and as an over-estimation of its capacity to influence other countries. See: Lavrov: Moskva ne priemlet absoljutzacijju liberal’nych cennostej Zapada [Lavrov: Moscow does not accept the West’s absolutization of liberal values], Vzgljad, 17 January 2017, available at <<http://vz.ru/news/2017/1/17/853699.html>>: “The Minister of Foreign Affairs considered it *indecent* to demand from Russia and other countries that they adopt new values”.

A less ideologically inspired and more pragmatic approach (as provided by Chinese offers of partnership or cooperation within BRICS) could be more productive in creating common projects and efforts, establishing contact points and building real needs for a future and gradual approximation: first economic, then legal and finally of values.

To date, European policy is also blind to global and regional dynamism and to the deep involvement of targeted countries in the nets of agreements, interconnections, interests, traditions and path dependencies. In a world “with only a few regulatory models”,¹²³ approximating countries still have a choice of direction. And though the European *aquis* brought wholesale to Eastern partners might be an attractive option, perhaps potentially producing a better structured state and a wealthier society without extra-costs associated with the invention of norms and their internal coordination, it is not easy to extract a country from very complex contexts by simply advertising attractive European values and market access as the pivotal achievement and by demanding the replacement of national (or commonly shared) regulations with those of European systems in order to join the prestigious club. Further, the process is poorly served by turning a blind eye to the numerous cases where the adoption of superior standards and norms can be exhausting – since they attempt to regulate currently non-existent relations – and may even be destructive.

Europe has to initiate reforms that produce very tangible results for economies and societies. However, the outcomes of deep integration are sometimes controversial in a given regional neighbourhood or within the EU and may present “mixed blessings”¹²⁴ (as seen in the economic and social decline in Bulgaria or the depopulation in Baltic countries). Moreover, at least a part of the proposed initiatives may presently have devastating effects. This refers, namely, to the displacement of technical and metrology standards common to post-Soviet states and to their corresponding replacement with European standards. The real and immediate loss of traditional markets will not be compensated by European market access, immediately or even in the near future. Such approximation programmes have not only a legal dimension but also require resource allocation for each industrial unit, complete modernization of equipment, enhancement of the labour force and management quality. Though all these goals lead potentially to development, this is a long-term effort, for today no national economy in the post-Soviet terrain, especially the industrialized economies, can afford such inputs. Thus, macro-institutional change must be backed by micro-economic security. Otherwise accelerated modernization in the legal sphere can result in a sharp decline in the real economy.

¹²³ Communication from the European Commission, Taking Stock of the European Neighbourhood Policy, 12 May 2010, COM(2010) 207 final, p. 6.

¹²⁴ Jovanović/Damjanović, Economic Effects on New Members 2000–2012, Journal of Economic Integration 2014, Vol. 29, No. 2, pp. 210–243.

It is also impossible to discount the influence of other players or, especially, to neglect the Russian factor in Neighbourhood policies. The post-Soviet countries are experiencing multiple contradictions and conflicts, and centrifugal tendencies are still obvious in a number of post-Soviet states. They are all still attached to the Russian core not only by history but also by pragmatic interests. In turn, Russia still has the ambition and potential to be not only a regular state but at least a regional hegemon. Thus it will make efforts to nurture its own neighbourhood and produce incentives opposing European offers.

A further problematic situation emerges in the territorial integrity of those post-Soviet states that are exposed to regional insurgencies which threaten statehood by producing quasi-states carved out of existing state jurisdictions. These are a result of regional opposition to a move towards Europe and reflect also a regional orientation towards Russia. Such problems are conceivable in all three countries that have proceeded further toward association with Europe (Georgia, Moldova and Ukraine). The production of quasi-states on the border of Europe places the effectiveness of European politics further in question, not only in economic terms but also fundamentally, thereby contesting the principle of good neighbourliness.

Today, Europe bears the greatest reputational risk due to its very explicit commitment to the core values and *finalités* of Neighbourhood politics. The inconsistency of goals and results will lead to the loss of moral leadership not only in a country under fire – such as one that made a very clear choice in favour of Euro-integration, namely Ukraine – and not only within the community of post-Soviet countries, but also generally.

(Private) Law in Transition

The *Acquis Communautaire* as a Challenge for East European Lawmakers

Rainer Kulms

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I. The *acquis communautaire* – A challenge for rational accession-seekers

1. Introduction

In view of Ukraine, the European Neighbourhood Policy¹ has evolved into the EU-Ukraine Association Agenda.² The EU-Ukrainian Association Ag-

¹ See the official homepage of the European External Action Service on the EU Neighbourhood Policy, available at <https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en>, and *Van Elsuwege/Petrov*, in: Van Elsuwege/Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union – Towards a Common Regulatory Space?*, Abingdon 2004, pp. 1 et seq., on the export of the *acquis communautaire* to the EU's East European neighbours.

² See EU-Ukraine Cooperation Council, EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, Luxembourg 24 June 2013, available at <https://cdn4-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/rI4Tjq_6fO-UOiDPO9UeI7F8IHqJmh7x-u17p2WR3LA/mtime:1471517765/sites/eeas/files/eu_ukr_ass_agenda_24jun2013.pdf>.

reement³ is committed to “progressively closer links between the Parties”, based on common values, the rule of law and the principles of a free-market economy. The instrument for paving Ukraine’s way towards gradual integration in the EU is “progressive approximation” of legislation,⁴ guided by the principle of conditionality. “Conditionality”⁵ translates the EU’s Copenhagen criteria into a sequence of Progress Reports⁶ and Association Implementation Reports on integrating the *acquis communautaire* into national legal orders.⁷ But there are also ad hoc conditions attached to specific loans from the International Fund (IMF) or the EU’s macro-financial assistance programme, both of which go beyond the mere transposition of EU law.⁸

Accession and association agreements are based on the assumption that both the entrant country and the EU have a joint interest as, respectively, “rational accession-seeker” and “rational accession-provider”.⁹ Nonetheless, the bargaining power is asymmetric.¹⁰ This asymmetry has enabled the EU to insist on far-reaching reforms during the pre-accession phase although it is unclear to what extent a potential political backlash in the applicant countries will be accommodated. Negotiators of accession agreements tend to emphasise the gains

³ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3 of 29 May 2014.

⁴ Art. 1(2)(d) of the Agreement.

⁵ For a survey see *Papakostas*, Deconstructing the Notion of EU Conditionality as a Panacea in the Context of Enlargement, *L’Europe en Formation* 2012/2, No. 364, p. 215 (221 et seq.) (Centre international de formation européenne).

⁶ See European Commission Press Release, Enlargement package: Commission publishes reports on the Western Balkans partners and Turkey, Brussels 17 April 2018, IP/18/3342, available at <http://europa.eu/rapid/press-release_IP-18-3342_en.htm>; and European Commission, 2018 Communication on EU Enlargement Strategy, Strasbourg 17 April 2018, COM(2018) 450 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417_strategy_paper_en.pdf>.

⁷ See, e.g., European Commission, High Representative for the Union for Foreign Affairs and Security Policy, Joint Staff Working Document, Association Implementation Report on Ukraine, Brussels 14 November 2017, SWD(2017) 376 final, available at <https://eeas.europa.eu/sites/eeas/files/association_implementation_report_on_ukraine.pdf>.

⁸ See, e.g., European Commission, Report on the implementation of macro-financial assistance to third countries, Brussels 29 June 2018, COM(2018) 511 final, sub-sections 2.2. and 2.3., discussing the international financial package for Ukraine, available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0511&from=EN>>.

⁹ See *Bakardijeva Engelbrekt*, in: Weatherill/Bernitz (eds.), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29*, Oxford and Portland 2007, p. 47 (81 et seq.) on rational “accession-seekers” and the rational “accession-provider” in the context of EU enlargement, and *Bakardijeva Engelbrekt*, in: Cafaggi/Muir Watt (eds.), *Making European Private Law – Governance Design*, Cheltenham 2008, p. 98 (129 et seq.).

¹⁰ *Schellbach*, Why the EU Should Differentiate More Within the Eastern Partnership, *C A Perspectives* 2014, No. 1, p. 1 (2), available at <<https://www.files.ethz.ch/isn/184855/CAPerspectives-2014-01.pdf>>.

after joining the EU.¹¹ A cost-benefit analysis informs the adjustment policies of the applicant country.¹² Politicians and public officials of the “accession-seeker” want to demonstrate rapid progress as the European Commission has an interest in measuring and monitoring the pre-accession period.¹³ Ultimately, the technique of conditionalities supports a rewards-based system where accession is the prize for accelerating adjustment policies in the applicant country.¹⁴

Under the Stabilisation and Associations Agreements (SAA’s), the EU’s approach has added sophistication to its Western European accession templates:¹⁵ The Commission has refined its conditionalities,¹⁶ tailored to the specific needs of post-Communist transition economies and the adaptation costs of the *acquis communautaire*.¹⁷ This appears to exclude a generalising approach towards the analysis of the current generation of SAA’s as the motives of rational accession-seekers and rational “accession-cheaters” are likely to vary from country to country. Closer inspection suggests that compliance with a conditionality is more complicated. An OECD study on the “conditionality in practice”¹⁸ illustrates the shortcomings of a mere cost-benefit methodology which imposes policy choices on the recipient of international loans. In fact, the scrutiny of the costs and benefits of implementing the *acquis communautaire* is meaningless unless the institutional framework in the applicant country is assessed.¹⁹ What looks like rational “accession-cheating” might be the outcome of (institutional) deficiencies in the decision-making processes within the political system of the applicant country. In this context, the expe-

¹¹ See, e.g., *Vilpišauskas*, The Final Stage of the EU-accession Game: The Baltic States – the likely victims of their own success?, Draft Paper 2003, available at <<http://aei.pitt.edu/2967/1/169.pdf>>.

¹² *Ibid.*, and *Vilpišauskas*, The management of economic interdependencies of a small state: assessing the effectiveness of Lithuania’s European policy since joining the EU, Paper Vilnius 2011, available at <<https://ams.hi.is/wp-content/uploads/old/Vilpisauskas%20Lithuania%20economy.pdf>>.

¹³ *Bakardijeva Engelbrekt*, in: Cafaggi/Muir Watt, supra n. 9, p. 130.

¹⁴ *Schimmelfennig/Sedelmeier*, Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe, *Journal of European Public Policy* 2004, Vol. 11, No. 4, p. 661 (663 et seq.).

¹⁵ *Sedelmeier*, After conditionality: post-accession compliance with EU law in East Central Europe, *Journal of European Public Policy* 2008, Vol. 15, No. 6, p. 808.

¹⁶ See on the concept of political conditionalities: *Goss*, Generous or Just? – An Introduction to and Examination of the Consequences of Political Conditionality in the Accession of Serbia to the European Union, *Tulane Journal of International and Comparative Law* 2012, Vol. 21, p. 159 (172 et seq., case study on Serbia).

¹⁷ *Schellbach*, supra n. 10.

¹⁸ OECD, Conditionality in practice: Emerging lessons for public investment, 2018, on the risks of conditionality (pp. 12 et seq.) and the case studies (pp. 25 et seq.).

¹⁹ See the assessment by *Kochenov*, in: Van Elsuwege/Petrov, supra n. 1, p. 45 (52 et seq.), of “values versus rules”, claiming that the *acquis* will not guarantee the enforcement of values and their promotion.

riences of South-East European SAA countries might be instructive as the EU and Ukraine embark on a journey towards approximation and implementation of the *acquis communautaire*.

Under the current SAA's, the European Commission applies a policy mix of suasion and sanctions. This calls for an analysis asking under what circumstances conditionalities are enforced or, if applicable, relaxed in order to accommodate institutional problems of the applicant country. As soon as compliance with an SAA has produced approximation and as soon as a rational accession-seeker has been received into the club of Member States, monitoring turns into ex-post scrutiny. The EU Commission will have to ascertain whether legal transplants remain dead-letter law and to what extent further institutional reforms are apposite. As adherence to EU standards no longer produces additional rewards, there appears to be a disincentive to comply with the *acquis communautaire*. At first sight, EU law seems to employ reputational mechanisms in order to sanction breaches of pro-Union discipline. It is an empirical exercise to assess whether the European Commission is able to maintain a credible threat by policing breaches of EU law by infringement proceedings in spite of potential political backlash. Moreover, requests for a preliminary ruling from the Court of Justice of the European Union (CJEU) originating from a new Members State might indicate how well EU law has become rooted among the judiciary of the (former) "rational accession-seeker".

2. *The Copenhagen criteria after 25 Years*

a) *The EU's post-1989 approach is consolidated*

Late in 1991, the European Community and Hungary, Poland and then Czechoslovakia concluded "Europe Agreements" which included an express reference to a future accession.²⁰ A year later, these countries lodged a joint request with the Community to commence formal accession negotiations.²¹ In May 1993, the European Council adopted formal criteria for determining whether an applicant country is ready to initiate formal membership negotiations (the "Copenhagen criteria").²² With the benefit of hindsight, these criteria foreshadowed²³ what has become Arts. 2 and 49 of the Lisbon Treaty.²⁴

²⁰ European Commission Press Release Database, IP/91/1033, available at <http://europa.eu/rapid/press-release_IP-91-1033_en.htm?locale=en>; Hillion, in: Hillion (ed.), *EU Enlargement: A Legal Approach*, Oxford and Portland 2004, p. 1 (fn. 2).

²¹ *Id.*

²² European Council in Copenhagen 21–22 June 1993, Conclusions of the Presidency (sub "Relations with the Countries of Central and Eastern Europe"), available at <<https://www.consilium.europa.eu/media/21225/72921.pdf>>.

²³ Hillion, *supra* n. 20, pp. 3 et seq.

²⁴ Art. 2 of the Lisbon Treaty acknowledges that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for

The original Copenhagen criteria condition membership on political stability, including democratic structures and the rule of law, the existence of a functioning market economy and the ability to withstand competitive pressures from other Member States.²⁵ Fulfilment of this conditionality will pave the way into the European Union while, as the Council openly states, “maintaining the momentum of European integration”.²⁶ The political, economic and legal thinking behind the original Copenhagen criteria is informed by a cost-benefit analysis.²⁷ It is also unclear whether a cost-benefit analysis – properly applied to accession- or association-seeker – will induce the Commission to relax some of the Copenhagen criteria if the political and economic costs of strict adherence are too high.

b) Copenhagen – As modified by Zagreb and Thessaloniki

Late in 2002, the European Council met in Copenhagen to reflect, inter alia, on the criteria for enlarging the European Union after ten years of implementing the “Copenhagen criteria”.²⁸ While there was agreement that the criteria were politically still viable, there was also acknowledgment that the terms of their implementation needed to be modified.²⁹ The Commission introduced cooperation models with “rational accession-seekers” and other partners, allowing for a much longer adaptation phase.³⁰ As a negotiator from an East

human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. – Art. 49 of the Lisbon Treaty stipulates that any European State which respects the aforementioned values and is committed to promoting them may apply to become a member of the Union. ... The conditions of eligibility agreed upon by the European Council shall be taken into account.

²⁵ For a survey over the EU Commission’s attitude towards implementing the Copenhagen criteria see EU Commission, Communication on the Enlargement Strategy and Main Challenges 2013–2014, Brussels 16 October 2013, COM(2013) 700 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/strategy_paper_2013_en.pdf>.

²⁶ European Council in Copenhagen 21–22 June 1993, Conclusions, supra n. 22.

²⁷ For a cost-benefit analysis with respect to Serbia’s and Montenegro’s Stabilisation and Association Agreements: *Simidjijaska*, From Milosevic’s Reign to the European Union: Serbia and Montenegro’s Stabilization and Association Agreement – Note, Temple International and Comparative Law Journal 2007, Vol. 21, p. 147 (151 et seq.).

²⁸ See Council of the European Union, Presidency Conclusions on the Copenhagen Council 12 and 13 December 2002, Brussels 29 January 2003, 15917/02, available at <<https://www.consilium.europa.eu/media/20906/73842.pdf>>.

²⁹ See also the address of the Danish Statsminister on “Priorities of the Danish Presidency – From Copenhagen to Copenhagen” of 14 June 2002, foreshadowing the assessment of the original Copenhagen criteria, available at <http://www.stm.dk/_p_7374.html>.

³⁰ For an assessment of the underlying theory of pre-accession conditionality: *Veebel*, Relevance of Copenhagen Criteria in Actual Accession: Principles, Methods and Shortcoming of

European accession-country put it, the Commission had come to practise a strategy of “increasing asymmetry, complexity and differentiation”.³¹ The recalibration of enlargement policies produced a strategy for the Western Balkans which combines the distribution of the *acquis communautaire* with a specific regional policy.³² The Final Declaration of the November 2000 summit in Zagreb had already endorsed a stabilisation and association process which relied, inter alia, on reconciliation and cooperation on the Western Balkans and on regional aid. With respect to the long-term perspective of association, the Zagreb Declaration expressly calls for an “individualised approach” in accordance with the needs and specificities of the potential candidate country.³³ The EU–Western Balkans summit in Thessaloniki conditioned rapprochement with the Union on the development of regional cooperation.³⁴ It would seem that the Thessaloniki Summit Declaration adds a political conditionality to the conditionality under the Copenhagen criteria: The Thessaloniki Declaration reiterates adherence to the values of democracy, the rule of law, the respect for human and minority rights and the market economy. Moreover, it provides for enhanced cooperation in the areas of political dialogue, a Common Foreign and Security Policy, parliamentary cooperation, support for institution building and financial support.³⁵ Although the Declaration does not part with the *acquis communautaire*, it envisages a gradual (slower) approximation towards European Union standards.³⁶ What is described as “preparation for integration into European structures and ultimate membership into the European Union through adoption of European standards”³⁷ is obtained at the expense of ongoing controls by European Union

EU Pre-accession Evaluation, Studies of Transition States and Societies 2011, Vol. 3, No. 3, p. 3 (6 et seq.), available at <https://www.ssoar.info/ssoar/bitstream/handle/document/36378/ssoar-stss-2011-3-veebel-Relevance_of_Copenhagen_Criteria_in.pdf?sequence=1>.

³¹ *Maniokas*, Methodology of the EU Enlargement: A Critical Appraisal, Paper prepared for the Lithuanian Foreign Policy Review (2015), available at <<http://lfr.lt/wp-content/uploads/2015/07/LFPR-5-Maniokas.pdf>>.

³² See generally on the EU’s enlargement policy with respect to the Western Balkans: *Letica*, Europe’s Second Chance: European Union Enlargement to Croatia and the Western Balkans, *Fletcher Forum of World Affairs* 2004, Vol. 28, No. 2, p. 209 (211 et seq.), and *Mišović*, in: Popović (ed.), *Legal Implications of Trade Liberalization under SAAs and CEFTA*, Belgrade 2018, p. 261 (264 et seq.).

³³ European Commission, Zagreb Summit 24 November 2000, Final Declaration, available at <<https://www.esiweb.org/pdf/bridges/bosnia/ZagrebSummit24Nov2000.pdf>>.

³⁴ EU–Western Balkans Summit, Declaration, Thessaloniki 21 June 2003, 10229/03 (Presse 163), available at <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/press_data/en/misc/76291.pdf>.

³⁵ *Ibid.*

³⁶ This will invariably lead to a differentiated integration of neighbouring countries: *Gstöhl*, in: Van Elsuwege/Petrov, *supra* n. 1, p. 87 (97 et seq.).

³⁷ *Ibid.*

officials. The progress reports³⁸ reflect a specific type of evaluating legislative work, from both an ex-ante and ex-post perspective.³⁹ Although the European Union controls the pace of accession of the Western Balkan states, the incentive structure is likely to change dramatically if the reward for approximation becomes too distant.⁴⁰

II. Stabilisation and Association Agreements⁴¹

1. Regulatory technique

On 1 April 2016, the Stabilisation and Association Agreement with Kosovo was as yet the latest instrument in the EU's agenda for the Western Balkans to enter into force. The EU commissioner for enlargement policies emphasised that the Agreement "will keep Kosovo on the path of reform and create trade and investment opportunities".⁴² Under art. 74 of this Stabilisation and Association Agreement, Kosovo endeavours "to ensure that its existing law and future legislation will gradually be made compatible with the EU *acquis*".⁴³ Moreover, Kosovo undertakes to "ensure that existing law and future legislation will be properly implemented and applied".⁴⁴

³⁸ See supra n. 20 and infra sub II.2.

³⁹ See generally: *Bozzini/Hunt*, Bringing Evaluation into the Cycle: CAP Cross Compliance and the Defining and Re-defining of Objectives and Indicators, *European Journal of Risk Regulation* 2015, Vol. 6, No. 1, p. 57 (59 et seq.); *van Golen/van Voorst*, Towards a Regulatory Cycle? – The Use of Evaluative Information I Impact Assessments and Ex-Post Evaluations in the European Union, *European Journal of Risk Regulation* 2016, Vol. 7, No. 2, p. 388 (393 et seq.); *Bussmann*, Evaluation of Legislation: Skating on Thin Ice, *Evaluation* 2010, Vol. 16, No. 3, p. 279 (282 et seq.) (on evaluations of statutes in Switzerland); European Commission, DG Market Guide to Evaluating Legislation, Brussels March 2008, pp. 8 et seq.

⁴⁰ Cf. *Mišović*, in: Popović, supra n. 32, p. 265.

⁴¹ For a survey over the EU's enlargement processes in the context of Stabilisation and Association Agreements: *Marko/Wilhelm*, in: Ott/Inglis (eds.), *Handbook on European Enlargement – A Commentary on the Enlargement Process*, The Hague 2002, pp. 165 et seq.

⁴² See European Commission Press Release, Stabilisation and Association Agreement (SAA) between the European Union and Kosovo enters into force, Brussels 1 August 2016, IP/16/1184, available at <http://europa.eu/rapid/press-release_IP-16-1184_de.htm>.

⁴³ Council of the European Union, Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community and Kosovo, Brussels 2 October 2015, Interinstitutional file 2015/0095 (NLE), available at <<http://www.consilium.europa.eu/en/press/press-releases/2015/10/27-kosovo-eu-stabilisation-association-agreement/>>.

⁴⁴ *Ibid.*

The regulatory technique of the Stabilisation and Association Agreements with Western Balkan states is unique.⁴⁵ They seek to enact the Copenhagen criteria, especially the principles of a free market economy,⁴⁶ with a firm focus on the rule of law. The SAA's are committed to the free exchange of merchandise without tariff barriers, but they do not automatically grant freedom of movement for workers and freedom of establishment. Instead, a transition phase is applicable before individuals, companies and self-employed persons can enjoy the privilege of unrestricted work or business activities.⁴⁷ The concept of an "internal rule of law" includes an institutional approach which goes well beyond the mere judicial protection of rights.⁴⁸ In view of the approximation of national legal systems towards the *acquis communautaire*, the SAA's allow for various legislative and regulatory techniques. This includes a pro-European interpretation of an existing law, but it may also mean enactment of new legislation.

The EU Commission has explained that it will scrutinise the impact of legislation, its potentially beneficial effects and the impact on the addressees of legislation.⁴⁹ While positive welfare effects are to be expected, they will materialise neither evenly nor immediately.⁵⁰ It is as yet an open question whether the side effects will push national legislators on the West Balkans towards a temporary relaxation of the approximation process in order to reduce the immediate political cost of the *acquis communautaire*.⁵¹ In devising a meaningful approximation strategy, both accession-seekers and the Commission

⁴⁵ *Stafaj*, From Rags to Riches: Croatia and Albania's EU Accession Process through the Copenhagen Criteria and Conditionality, *Fordham International Law Journal* 2014, Vol. 37, p. 1684 (1695 et seq.).

⁴⁶ See, e.g., on the Competition provisions in the EC-Croatia Stabilisation and Association Agreement: *Vrcek*, Croatian and EC Competition Law: state aid and problems of the adjustment process, *European Business Organization Law Review* 2004, Vol. 5, No. 2, p. 363 (383 et seq.).

⁴⁷ Cf. *Jevremović Petrović*, in: Popović, supra n. 32, p. 61 (62 et seq.).

⁴⁸ Cf. *Appicciafuoco*, The Promotion of the Rule of Law in the Western Balkans: The European Union's Role, *German Law Journal* 2010, Vol. 11, p. 741 (766).

⁴⁹ See supra n. 39.

⁵⁰ See for Albania: *Zahariadis*, The Albania-EU Stabilization and Association Agreement: Economic Impact and Social Applications, Overseas Development Institute London – Economic and Statistics Analysis Unit Working Paper 17 (February 2007), available at <<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2527.pdf>>.

⁵¹ This is likely to re-ignite the debate on a Europe "à deux vitesses": see the prescient report presented to the French Assemblée Nationale at the time of the 2002 Copenhagen Council: *André*, Rapport d'information déposé la Délégation de l'Assemblée Nationale pour l'Union Européenne sur l'élargissement de l'Union européenne à dix pays candidats, No. 773, Douzième Législature, Paris 8 April 2003, pp. 8, 80, <available at <http://www.assemblee-nationale.fr/12/pdf/Europe/rap-info/i0773.pdf>>.

are facing economic, institutional and cultural constraints.⁵² Obviously, there is also the risk of capture by vested interests.⁵³ Ill-designed privatisation processes have entrenched legal monopolies and other dominant players with bargaining power.⁵⁴ Approximation processes are hampered by political constraints.⁵⁵ Approximation processes will also be disturbed if corruption equilibria are stable and law enforcement is weak.⁵⁶

The SAA's provide for warning mechanisms by establishing Association Councils which are to monitor whether the obligations under the agreements are faithfully observed.⁵⁷ The Association Council is supported by an Association Committee which drafts Council decisions and, after approval, implements them.⁵⁸ Neither the Association Council nor the Committee is explicitly charged with developing a leniency scenario. But they appear to offer sufficient discretion in addressing the need of a rapprochement country which might be facing negative costs in implementing the *acquis*. Similarly, the progress reports⁵⁹ constitute a warning system when unforeseen institutional deficiencies occur during the rapprochement or when political costs for the accession-seeker increase.⁶⁰

⁵² See *Buccirossi/Ciari*, in: Begović/Popović (eds.), *Competition Authorities in South Eastern Europe – Building Institutions in Emerging Markets*, Heidelberg 2018, p. 7 (17 et seq.) on the design of effective competition law in Western Balkan countries.

⁵³ *Buccirossi/Ciari*, supra n. 52, p. 24.

⁵⁴ *Buccirossi/Ciari*, supra n. 52, p. 18.

⁵⁵ This may mean that the creation of a market as such has a greater priority than the protection of competition: *Buccirossi/Ciari*, *ibid.*, p. 19.

⁵⁶ *Rose-Ackerman*, *The Law and Economics of Bribery and Extortion*, Annual Review of Law and Social Science 2010, Vol. 6, p. 217 (226 et seq.). See on “state capture” in Eastern Europe the study by the World Bank: *Trends in Corruption and Regulatory Burden in Eastern Europe and Central Asia*, Washington, D.C. 2011, pp. 16 et seq., available at <<https://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8671-2>>.

⁵⁷ See the description of the functions of the EU–Ukrainian SAA council (“Bilateral institutions of the Association Agreement between Ukraine and the EU”) on the homepage of the Ukrainian government, available at <<https://www.kmu.gov.ua/en/yevropejska-in-tegraciya/ugoda-pro-asociacyu/dvostoronni-ustanovi-ugodi-pro-asociacyu-mizh-ukrainoy-u-ta-yes>>.

⁵⁸ Cf. Government of the Republic of Macedonia, Secretariat for European Affairs, Press Release of 15 June 2016, 13th Meeting of the Committee for Stabilisation and Association between the Republic of Macedonia and the European Union, available at <<http://www.sep.gov.mk/en/content/?id=1949>>; Albanian Ministry of Foreign Affairs, Press Release of 13 July 2010 on the Stabilization and Association Agreement, available at <http://arkiva.mfa.gov.al/index.php?option=com_multicategories&view=article&id=5599%3Amsa-ja&Itemid=65&lang=en>.

⁵⁹ For details see *infra* sub II.2.

⁶⁰ See on Croatia's public opinion during the accession negotiations: *Letica*, supra n. 32, *Fletcher Forum of World Affairs* 2004, Vol. 28, No. 2, p. 209 (213 et seq.).

2. Institutional analysis – The progress reports

At the outset, the concept of conditionality is to generate cooperative efficiency between the European Union and an SAA or Association country.⁶¹ However, the Copenhagen criteria are by far too general to assure a meaningful assessment.⁶² The progress reports build on a list of specific criteria which translate into an institutionalist attitude towards the political and judicial governance structure of a rapprochement country.⁶³ Arguably, this allows for an assessment methodology which balances the interests of “gainers” and “payers” and costs.⁶⁴

a) Albania⁶⁵

In November 2016 the Commission cleared the way for accession negotiations but also requested that Albania should comply with “five key priorities”.⁶⁶ In analysing Albania’s progress under the SAA, the Commission has emphasised the need to de-politicise the country’s public administration and to enhance professionalism in merit-based public service.⁶⁷ The Commission’s 2018 report devotes considerable attention to the implementation of the justice reform.⁶⁸ Fighting corruption and a re-evaluation of Albania’s judiciary are of utmost importance. This extends to scrutinising the personal assets of high-ranking judges and prosecutors.⁶⁹ The Commission’s assessment focuses on not only the introduction of the necessary legislative framework but also its day-to-day

⁶¹ *Veebel*, supra n. 30, *Studies of Transition States and Societies* 2011, Vol. 3, No. 3, p. 3 (7).

⁶² *Ibid.*, p. 5.

⁶³ This includes a compatibility analysis under the standards of the Venice group, i.e. the European Commission for Democracy through Law, which was established by a committee of ministers from member states of the Council of Europe (see the Revised Statute of the European Commission for Democracy through Law of 21 February 2002, available at <http://www.venice.coe.int/WebForms/pages/?p=01_01_Statute>).

⁶⁴ See *Veebel*, supra n. 30, *Studies of Transition States and Societies* 2011, Vol. 3, No. 3, p. 3 (12).

⁶⁵ For a survey of Albania’s rapprochement with the EU from the perspective of the Albanian government see the homepage of the Ministry for European Integration at <<http://historiku.integrimi.gov.al/en/program/eu-albania-history>>.

⁶⁶ Specifically, public administration reform, assuring independence and efficiency of the judicial institutions, the fight against corruption, the fight against organised crime and the protection of human rights: see Albania’s National Plan for European Integration (2014), available at <<https://shtetiweb.org/wp.../L2-National-Plan-for-European-Integration-2014-2020.doc>>.

⁶⁷ European Commission Staff Working Document, Albania 2018 Report, Strasbourg 17 April 2018, SWD(2018) 151 final, available at <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-albania-report.pdf>>, pp. 3, 7 et seq.

⁶⁸ *Ibid.*, pp. 16 et seq.

⁶⁹ *Ibid.*, p. 3.

application.⁷⁰ In this context, the Commission insists on a solid track record of proactive investigations and convictions in the fight against organised crime.⁷¹ On a fundamental rights level, the Commission has emphasised the crucial importance of anti-discrimination and property rights.⁷² While some progress is noted, Albania has been admonished to further the enforcement of human rights.⁷³ With respect to the general business climate, progress is acknowledged, but the Commission is concerned about the scope of the informal economy.⁷⁴ Moreover, despite enacting a new bankruptcy law, business activities are still suffering from cumbersome regulations and a lack of certainty for investments.⁷⁵ The Commission classifies Albania as moderately prepared for membership so that a considerable effort will have to be made to approach implementation of the *acquis communautaire*.⁷⁶

b) Bosnia and Herzegovina

The SAA with Bosnia and Herzegovina entered into force on 1 June 2015.⁷⁷ As early as November 2003, the Commission had issued a report on the country's "preparedness ... to negotiate a Stabilisation and Association Agreement" with the EU.⁷⁸ At that time, the EU Commission noted that the complicated constitutional structure of the country rendered approximation processes towards the *acquis communautaire* difficult.⁷⁹ The rule of law needed reinforcement.⁸⁰ A competition law regime had been enacted, but it was inoperative because the country's entities had not established units to liaise with the national Competition Council.⁸¹ The 2003 Commission Report regrets widespread forgery and piracy, partly due to the absence of qualified enforcement personnel. With respect to representatives from civil society, the Report refers to consumer organisations emerging after the state had enacted

⁷⁰ Ibid., p. 24.

⁷¹ Ibid., pp. 22 et seq.

⁷² Ibid., pp. 24 et seq.

⁷³ Ibid., pp. 25 et seq.

⁷⁴ Ibid., pp. 47 et seq.

⁷⁵ Ibid.

⁷⁶ Ibid., p. 7.

⁷⁷ European Commission Press Release, Stabilisation and Association Agreement with Bosnia and Herzegovina enters into force today, Brussels 1 June 2015, IP/15/5086, available at <http://europa.eu/rapid/press-release_IP-15-5086_en.htm>.

⁷⁸ European Commission, Report from the Commission to the Council on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, Brussels 18 November 2003, COM(2003) 692 final, available at <https://europa.ba/wp-content/uploads/2015/05/delegacijaEU_201112143014088eng.pdf>.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

consumer protection legislation.⁸² After the Stabilisation and Association Agreement had been ratified, the EU Commission started assessing whether the country had embarked on approximation efforts to comply with the Copenhagen criteria and the political conditionality.⁸³

In February 2016, Bosnia and Herzegovina applied for EU membership.⁸⁴ The Commission is currently evaluating the country's answers to an EU questionnaire on the ability to meet the accession criteria.⁸⁵ Due to the fragmentation of the decision-making regime of Bosnia and Herzegovina, the Commission notes major shortcomings in developing coherent policies, based on quality assessment and affordability studies.⁸⁶ As a consequence, the Commission has criticised the lack of a comprehensive scrutiny of government work. The 2018 report on Bosnia and Herzegovina refers to some progress in the functioning of the judiciary.⁸⁷ On the other hand, court proceedings experience massive delays. By the end of 2017, there was a backlog of 2.1 million cases.⁸⁸ Utility cases in particular have led to this backlog, and the enforcement of judgments generally remains a problem against the backdrop of incidences of political influence being exerted on the courts. Although the country has established an Anti-Corruption Agency, it suffers from extensive vacancies in key areas.⁸⁹ The country still has to address political-party financing as well as conflicts of interests, and it needs to intensify the fight against organised crime.⁹⁰ The Commission describes the creation of a functioning market economy as a major challenge for Bosnia and Herzegovina. Contract enforcement through court proceedings is problematic.⁹¹ Moreover, the informal economy remains strong while direct state influence on the economy remains substantial in the face of incomplete privatisation processes.⁹²

⁸² *Ibid.*

⁸³ See European Commission, European Neighbourhood Policy and Enlargement Negotiations, Bosnia Herzegovina, sub "Progress Reports", available at <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en>.

⁸⁴ European Commission Staff Working Document, Bosnia and Herzegovina 2018 Report, Strasbourg 17 April 2018, SWD(2018) 155 final, available at <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf>>.

⁸⁵ *Ibid.*, p. 2.

⁸⁶ *Ibid.*, pp. 6 et seq.

⁸⁷ *Ibid.*, pp. 9 et seq.

⁸⁸ *Ibid.*, p. 17.

⁸⁹ *Ibid.*, p. 14.

⁹⁰ *Ibid.*, pp. 14 et seq.

⁹¹ *Ibid.*, p. 32.

⁹² *Ibid.*

c) Kosovo⁹³

Kosovo is at an early stage of creating conditions for a functioning market economy.⁹⁴ With respect to the *acquis* on competition law, the country is underperforming in the sense that secondary legislation to implement the *acquis* has still to be enacted.⁹⁵ Central to the drawbacks in Kosovo's rapprochement towards the Copenhagen criteria and the political conditionality of the stabilisation and association process are the perceived deficiencies in the administration of justice and insufficient funding.⁹⁶ There are still serious concerns about the independence, accountability, impartiality and efficiency of judges and prosecutors.⁹⁷ In a country where considerable backlogs in dossiers have accumulated, an insufficient institutional capacity for legal enforcement, court delays and pervasive corruption constitute a formidable barrier to business development.⁹⁸ The latest progress report for 2017 diagnoses a slow implementation of the SAA and alignment with European standards. Kosovo continues efforts to develop a functioning market economy, but it still has to contend with the informal economy and tax evasion.⁹⁹

d) Macedonia¹⁰⁰

Macedonia was the first country to have signed a Stabilisation and Association Agreement with the EU.¹⁰¹ The progress reports which the European Commission has published since 2012 demonstrate that the country has advanced fairly well in its rapprochement towards the *acquis*. But they also demonstrate that there is a considerable credibility gap between what is on

⁹³ See European Commission Staff Working Document, Kosovo 2018, Strasbourg 17 April 2018, SWD(2018) 156 final, available at <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-kosovo-report.pdf>>. (The Commission's designation in its Communication is without prejudice to positions on status and is in line with UNSCR 1244/1999 and the ICJ opinion on the Kosovo declaration of independence.)

⁹⁴ Ibid., pp. 38 et seq.

⁹⁵ Ibid., pp. 55 et seq.

⁹⁶ Ibid., pp. 13 et seq.

⁹⁷ Ibid.

⁹⁸ Ibid., pp. 41 et seq.

⁹⁹ Ibid., pp. 4 et seq.

¹⁰⁰ The EU's SAA refers to the former Yugoslav Republic of Macedonia.

¹⁰¹ Council of the European Union, Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the former Yugoslav Republic of Macedonia of the other part, Brussels 26 March 2001, 6726/01, available at <https://eeas.europa.eu/sites/eeas/files/saa03_01_en.pdf>, and Government of the Republic of Macedonia – Secretariat for European Affairs, Homepage, Stabilisation and Association Agreement, available at <<http://www.sep.gov.mk/en/content/?id=17>>.

the statute books and its actual enforcement.¹⁰² In 2017, the European Commission appointed a group of independent experts to assess Macedonia's progress with respect to systemic rule-of-law issues.¹⁰³ Although the group took notice of the enactment of statutes in accordance with European and international standards, it criticised the lack of meaningful implementation.¹⁰⁴ The judicial system was found to be under the control of a small number of powerful judges serving and promoting political interests.¹⁰⁵ A lack of compliance by junior judges is "policed", amounting to "the capture of the judiciary and prosecution by the executive power".¹⁰⁶ Abuse of the judicial system is facilitated by the absence of an automated system for assigning judges to cases. Instead, there are indications that sensitive files will still be entrusted to particular judges.¹⁰⁷ Moreover, disciplinary instruments should not be used as to penalise judicial mistakes or differences in legal interpretation.¹⁰⁸

e) *Montenegro*

As Montenegro continued implementing the SAA accession, negotiations were opened in June 2012.¹⁰⁹ Previously, the European Union had determined that Montenegro had made sufficient progress in the area of the rule of law to approach the various negotiating chapters for accession.¹¹⁰ Nonetheless, the 2018 progress report notes that the country's public administration and judiciary require improvement.¹¹¹ The EU's current approach towards benchmarking Montenegro's approximation efforts focuses on institution-building. Rule-of-law weakness and unfair competition from the informal economy translate into a negative business climate.¹¹² The supervision system for

¹⁰² See the general remarks in: The former Yugoslav Republic of Macedonia: Assessment and recommendations of the Senior Experts' Group on systemic Rule of Law issues 2017, Brussels 14 September 2017, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2017.09.14_seg_report_on_systemic_rol_issues_for_publication.pdf>.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ See chronology of Montenegro and EU relations, published by the Montenegrin government at: <<https://www.eu.me/en/key-dates-text>>.

¹¹⁰ European Commission Press Release of 12 October 2011, European Commission recommends moving onto next stages towards EU entry, IP/11/1182, available at <http://europa.eu/rapid/press-release_IP-11-1182_en.htm?locale=en>.

¹¹¹ European Commission Staff Working Document, Montenegro 2018 Report, Strasbourg 17 April 2018, SWD(2018) 150 final, available at <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>>, pp. 10 et seq., 14 et seq.

¹¹² Ibid., pp. 43 et seq.

banks is in need of reinforcement.¹¹³ The functioning of the Agency for Competition should be more vigorously supported.¹¹⁴ Legal proceedings suffer from a lack of legal certainty and predictability.¹¹⁵ Moreover, Montenegro's legislature, which is crucial for transposing the *acquis communautaire* into domestic law, is hampered by opposition boycott.¹¹⁶ Although progress has been made in strengthening the independence and professionalism of the judiciary, political interference remains a problem.¹¹⁷ Cases are now randomly allocated to judges, but smaller courts find it difficult to observe this practice. To a certain extent, randomised allocation is imperilled by the ad hoc redistribution of cases due to substantial backlogs.¹¹⁸ Judicial independence still needs reinforcement as disciplinary sanctions should be confined to scenarios where the judge has failed to recuse himself at least three times.¹¹⁹ The Commission's 2018 assessment demands a stepping up of anti-corruption measures, which should also extend to public procurement.¹²⁰

f) Serbia

Serbia's accession negotiations began in January 2014.¹²¹ The EU Commission conditions the pace of these negotiations on the country's progress on the rule of law and the normalisation of its relations with Kosovo.¹²² Since 2013, the Commission has been supervising Serbia's compliance with the SAA.¹²³ The 2018 progress report notes some progress in Serbia's judicial system. While the backlog of cases was reduced and evaluation criteria for the judiciary became more professional, the potential for political influence over the judiciary has remained unabated.¹²⁴ The 2018 report is critical of the operational capacity of anti-corruption authorities as they need to police high-level

¹¹³ Ibid., p. 44.

¹¹⁴ Ibid., pp. 57 et seq.

¹¹⁵ Ibid., p. 43.

¹¹⁶ Ibid., p. 3.

¹¹⁷ Ibid., pp. 15, 27, 43.

¹¹⁸ Ibid., p. 15.

¹¹⁹ Ibid.

¹²⁰ Ibid., p. 55.

¹²¹ See European Commission Staff Working Document, Serbia 2018 Document, Strasbourg 17 April 2018, SWS(2018) 152 final, available at <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>>, p. 3.

¹²² Ibid.

¹²³ See first report: European Commission Staff Working Document, Serbia 2013 Progress Report, Brussels 16 October 2013, SWD(2013) 412 final, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/sr_report_2013.pdf>.

¹²⁴ European Commission, Serbia 2018 Report, supra n. 121, pp. 3, 13, 17, 43.

approximation triggers a negative assessment from the Commission and delays the accession process.¹³³ Alternatively, the Commission might urge the signatory under the Stabilisation and Association Process to adopt institutional changes to comply with the conditionality.

1. *Infringement of the acquis*

a) *From reputation mechanisms to formal proceedings*

In support of its ex-post monitoring approach, the Commission publishes annual “Single Market Scoreboards”. These scoreboards are based on empirical data on potential delays in transposing Directives into national law and on infringement proceedings initiated by the European Commission. The scoreboards for the new Member States in Eastern Europe demonstrate how these countries have fared in the aftermath of joining the Union. The scoreboards do not incorporate empirical data on proceedings before the Court of Justice where a Member State court requests a preliminary ruling on the compatibility of national law with the *acquis communautaire*. These proceedings for a preliminary ruling typically originate in litigation brought by private citizens who assert the non-conformity of a Member State statute before a national judge.

During the 2016/2017 period, Estonia was below the EU threshold for transposition deficits with an average delay of 6.9 months.¹³⁴ With respect to the compliance deficit, Estonia was still among the top four Member States in terms of having the fewest incorrectly transposed Directives. As a corollary, Estonia was the Member State with the Union-wide minimum of formal infringement proceedings. With four pending cases Estonia was below the Union average of twenty-four Member State infringement cases. As for infringement cases settled before the initiation of formal proceedings before the Court of Justice, the average duration of Estonian cases was 39.2 months whereas the Union average was slightly higher at 39.8 months. There has been one infringement case which went up to the Court of Justice. It took Estonia 16.5 months to comply with the Court’s ruling whereas the Union average was 23.6 months.

¹³³ With respect to the transposition of the competition law *acquis*: Popović, in: Popović, supra n. 32, p. 175 (183), notes the “sanction” for slow transposition is a delay in the general negotiation process with the EU.

¹³⁴ The data on Estonia are taken from the European Commission Single Market Scoreboard (Performance per governance tool) – Infringements (Reporting Period 12/2016–12/2017), available at <http://ec.europa.eu/internal_market/scoreboard/_docs/2018/infringements/2018-scoreboard-infringements_en.pdf>, and the European Single Market Scoreboard (Performance per governance tool) – Transposition (Reporting Period 12/2016–12/2017), available at <http://ec.europa.eu/internal_market/scoreboard/_docs/2018/transposition/2018-scoreboard_transposition_en.pdf>.

With respect to speed of transposition and compliance, Hungary is still among the top Member States, although the number of incorrectly transposed Directives has slightly increased. In 2017, Hungary's transposition delay¹³⁵ was at an average of 6.8 months, whereas the EU average was 8.7 months. From December 2016 to December 2017, Hungary had twenty-two pending infringement cases. The average duration of infringement proceedings was 31.1 months, still below the EU average of 39.8 months. In four cases the CJEU ruled against Hungary, which needed an average of 17.7 months to comply with the court rulings.

According to the latest scoreboard Croatia's transposition delay is now at 7.9 months.¹³⁶ During the 2016/2017 period there was a 0.3% increase in incorrectly transposed Directives with three Directives overdue for transposition and an average transposition delay of 9.2 months. Although Croatia has the shortest duration of infringement proceedings in the EU, there was a modest three-month increase in the average duration. From December 2016 to 2017 no case was sent to the Court of Justice.

Slovakia experienced a stable backlog with respect to transposition delays.¹³⁷ In the 2016/2017 period Slovakia's transposition delay was at an average of 9.8 months, thus slightly above the Union average. Conversely, the country's conformity deficit (incorrectly transposed Directives) was 0.2%. Slovakia has witnessed the biggest increase in infringement proceedings, 5% up from the previous reporting period, with infringement proceedings taking on average 26 months. It took Slovakia an average of 8.3 months to comply with the two rulings handed down by the CJEU.

Lithuania's transposition deficit had increased since 2014. But in the 2016/2017 period the country's transposition deficit fell below the Union threshold.¹³⁸ In the same period, Lithuania's transposition delays were at 5.7 months, with a conformity deficit of 0.7%. There were no infringements proceedings nor rulings by the CJEU against the country.

In 2016/2017 Latvia's transposition deficit¹³⁹ was as low as Lithuania's. Latvia's transposition delays were at 5.6 months. The conformity deficit was at 0.3%. The infringements proceedings lasted an average of 31.7 months, and it took the country 8.5 months to implement a judgment from the CJEU.

Bulgaria's record is less positive.¹⁴⁰ The country has still not met the Commission's target criteria for transposition deficits. There were thirteen overdue Directives. The average delay for transposition was 13 months. Bul-

¹³⁵ The data on Hungary are taken from the most recent scoreboards (see *supra* n. 134).

¹³⁶ The data on Croatia are taken from the most recent scoreboards (see *supra* n. 134).

¹³⁷ The data on Slovakia are taken from the most recent scoreboards (see *supra* n. 134).

¹³⁸ The data on Lithuania are taken from the most recent scoreboards (see *supra* n. 134).

¹³⁹ The data on Latvia are taken from the most recent scoreboards (see *supra* n. 134).

¹⁴⁰ The data on Bulgaria are taken from the most recent scoreboards (see *supra* n. 134).

garia had fifteen infringement cases with an average duration of 49.3 months. The CJEU ruled twice against the country, which needed an average of 9.9 months to comply with the judgments.

In 2016/2017, Romania had a total of sixteen overdue Directives.¹⁴¹ The average transposition delay was 9.1 months and there were twenty-one pending cases. Infringement proceedings lasted for an average of 31.5 months, but the CJEU had not ruled against the country during the reference period.

Slovenia's negative transposition record has improved.¹⁴² In 2016/2017 the transposition deficit was at twelve Directives. The average transposition delay was at 9.3 months with a conformity deficit of 0.6%. Infringement proceedings lasted for an average of 28.1 months. It took Slovenia an EU-maximum average of 46.7 months to comply with two rulings of the CJEU.

b) Requests for preliminary rulings

A 2007 study on the Court of Justice subsequent to the enlargement of the European Community towards Eastern Europe analyses the role and the impact of the Court on the legal orders of the new Member States.¹⁴³ The study finds that in the early post-accession years there was a significant disproportion between the population size of the new Member States and the number of cases brought before the Court of Justice.¹⁴⁴ The courts in the new Member States were reluctant to request preliminary rulings, and the infringement proceedings were relatively scarce during the initial years of EU membership.¹⁴⁵ When the Commission did bring infringement proceedings to the Court of Justice, it chose the larger new Member States (Hungary, Poland and the Czech Republic) as defendants.¹⁴⁶ However, the most recent single-market scoreboards reveal that there is now less tolerance of non-conformity by new entrants than during the initial phase. It is unclear, though, whether the Commission in initiating formal proceedings before the Court of Justice pursues a certain policy agenda, thus exercising its discretion to settle other cases amicably or to disregard them by applying a *de-minimis* approach.

¹⁴¹ The data on Romania are taken from the most recent scoreboards (see *supra* n. 134).

¹⁴² The data on Slovenia are taken from the most recent scoreboards (see *supra* n. 134).

¹⁴³ S. Fischer, *Der Europäische Gerichtshof nach der Osterweiterung – Institutionelle Reformen nach der Osterweiterung und die Rolle der neuen Mitgliedstaaten*, Diskussionspapier, November 2007, Deutsches Institut für Internationale Politik und Sicherheit, available at <https://www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/EuGH_Endfassung_KS_formatiert.pdf>.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

The statistics published by the Court of Justice show that there has been an increase in requests for a preliminary rulings.¹⁴⁷ But it is unclear whether the courts in the new Member States (in Eastern Europe) have learnt “to talk”.¹⁴⁸ In view of the total number of references for a preliminary ruling, Hungary, Poland, Bulgaria and Romania are now the “leaders”.¹⁴⁹ However, if penetration of EU law in Eastern Europe is measured by comparing the absolute number of references to the CJEU with the size of the population of the respective country, the Baltic Member States and Hungary are in the lead.¹⁵⁰ Admittedly, a request for a preliminary ruling does not automatically allow a conclusion on the “market penetration” of EU law.¹⁵¹ Lower courts in the new Member States have been seen to employ a reference to the CJEU as a mechanism for challenging a superior court with which they disagree.¹⁵²

2. Messages for lawmakers

After 1989, “old” Member States had been accused of designing a model Member State as a one-size-fits-all template as a basis for authorising the Commission to embark on accession negotiations.¹⁵³ As the Copenhagen criteria came to be modified by the Zagreb and Thessaloniki Declarations, this was intended to accommodate the growing differences between accession and association candidates.¹⁵⁴ From a purely economic perspective, this turned some applicant countries into admissible “admission-seekers”; others were just eligible “admission-seekers”.¹⁵⁵ Although this distinction translates into different conditionalities, any “rational accession-seeker” will still have to comply with the *acquis communautaire*. The progress reports on West Balkan countries demonstrate that “rational accession-seekers” who have barely mastered the “eligibility” threshold will have to undertake a cost-benefit analysis dramatically different from those (former) accession-seekers

¹⁴⁷ See, e.g., the Annual Reports by the CJEU on Judicial Activity, 2016, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf>, and 2015, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf>.

¹⁴⁸ See the title of the article by *Bobek*, Learning to Talk: Preliminary Rulings, The Court of the New Member States and the Court of Justice, Common Market Law Review 2008, Vol. 45, pp. 1611 et seq., and the survey over the initial years of references for a preliminary ruling, *ibid.*, pp. 1612 et seq.

¹⁴⁹ *Bobek*, Talking Now? – Preliminary Rulings in and from the New Member States, Maastricht Journal of European and Comparative Law 2014, Vol. 21, No. 4, p. 782 (784).

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*, p. 786.

¹⁵² *Ibid.*, p. 788.

¹⁵³ *Hillion*, in: *Hillion*, supra n. 20, p. 1 (12).

¹⁵⁴ Cf. *Hillion*, *ibid.*, p. 19.

¹⁵⁵ *Hillion*, *ibid.*

where (impending) membership was an almost foregone conclusion. Where establishing a free market becomes more important than administering competition, a conditionality to operate an independent competition control agency might be seen as unhelpful, or at least premature.¹⁵⁶ Where the judiciary is exposed to capture by vested interests, the protection of judicial independence and job security is more vital than the transposition of a minimum stock of the EU's Directives. Once problems of regulatory capture have been overcome, politicians in an accession or association country still have come to terms with the fact that the political and monetary costs of approximation keep accruing whereas the "reward" (i.e. accession or a meaningful association) is unlikely to occur in the near future.¹⁵⁷

"Conditionality" is devised to induce governments of the accession or association applicants into action. It is obvious that transition countries are striving for a new equilibrium. But in order to engineer transition and the implementation of the *acquis*, governments also have to disrupt existing equilibria (including corruption equilibria).¹⁵⁸ The traditional equation of the EU's enlargement policy whereby the abolition of traditional, pre-transition equilibria will rapidly pay off does not necessarily ring true in the West Balkans or in Ukraine, where the informal economy is still strong. In the context of international structural adjustment programmes, long-term compliance has produced mixed results.¹⁵⁹ Monitoring has been found to be weak,¹⁶⁰ and sometimes compliance was more cosmetic than real.¹⁶¹ Frequently, persuasion and social learning in the recipient country might produce better effects.¹⁶² This would also seem to apply to those accession or association-seekers where the EU's traditional reward structure will be overtaken by politics and economics.

Legal approximation and the integration of the *acquis communautaire* into the respective national legal order of a prospective accession or association country are also likely to disrupt pre-existing regulatory equilibria. This may translate into the preservation of pre-transition patterns for approaching legal issues. It may also mean that judges in reacting to the modernisation of the

¹⁵⁶ See *Buccirossi/Ciari*, supra n. 52.

¹⁵⁷ See passim: *Mišović*, supra n. 32, p. 270, on the different types of incentives under the EU's approximation instruments, and *The Economist*, 23 March 2017, Reverse Balkanisation – With EU accession, Balkan countries find a substitute, available at <<https://www.economist.com/europe/2017/03/23/with-eu-accession-distant-balkan-countries-find-a-substitute>>.

¹⁵⁸ See supra n. 56.

¹⁵⁹ See OECD, Conditionality in practice, supra n. 18, pp. 12 et seq., and *Angelova/Dannwolf/König*, How Robust Are Compliance Findings?, A Research Synthesis, *Journal of European Public Policy* 2012, Vol. 19, No. 8, p. 1269 (1273 et seq.).

¹⁶⁰ OECD, Conditionality in practice, supra n. 18, pp. 12 et seq.

¹⁶¹ *Ibid.*, p. 14.

¹⁶² *Ibid.*, pp. 15 et seq.

judiciary stay faithful to positivistic thinking in order to protect themselves.¹⁶³ Moreover, citizens of transition countries may prefer administrative action over private enforcement as courts have been found to be inefficient in reducing the considerable backlog of cases. There is a risk of duplication in policing breaches of law. But there is also a need for assuring the independence of administrative agencies lest politicians become too powerful.

The statistics of the CJEU reveal that the courts of the new Member States required some time to appreciate the impact of EU law on their respective legal orders and to initiate requests for preliminary rulings.¹⁶⁴ This delay might also be due to the fact that EU legal templates were copied into national laws during the accession process whereas the real impact has gone unnoticed up to that point. In this context, the transposition statistics may not reflect the exact picture of the *acquis communautaire* since compliance is difficult to measure and varies in terms of subject from country to country. It is noteworthy, though, that even after accession the EU Commission applies a policy of persuasion and learning before it initiates formal infringement proceedings before the CJEU. As an aside, this approach also assumes that Member States will continue to pay heed to the CJEU's jurisprudence and shy away from the negative reputational effects of losing an infringement case.¹⁶⁵

The current state of EU enlargement and rapprochement policies holds a complicated message for those who supervise compliance and those who have to comply either as national legislators or as members of the Association Councils under the SAA's. Although national legislators may be inclined to comply with the approximation and the *acquis* requirements, they will nonetheless have to calculate the costs of compliance if accession is unlikely to happen soon. Experience from South-East European accession has shown that the EU's *acquis* brings a degree of regulatory sophistication which legislators, legal practitioners and scholars find difficult to appreciate in the immediate aftermath of accession.¹⁶⁶ This may trigger calls for leniency raised within the framework of

¹⁶³ For an analysis of the practice of the Croatian Constitutional Court: *Rodin*, in: Bodiroga-Vukobrat/Sander/Rodin (eds.), *Legal Culture in Transition – Supranational and International Law Before National Courts*, Berlin 2013, p. 75 (86 et seq.). See also on the discrepancy between law and reality: *Mader*, *L'évaluation législative – Pour une analyse empirique des effets de la législation*, Lausanne 1985, pp. 155 et seq.

¹⁶⁴ See the case lists accessible via the homepage of the CJEU, *supra* n. 147, and *Bobek*, *supra* n. 148 and n. 149.

¹⁶⁵ See the compliance study undertaken by *Hofmann*, *Resistance against the Court of Justice of European Union*, *International Journal of Law in Context* 2018, Vol. 14, p. 258 (262 et seq.), and *passim* on judicial disobedience in Member States: *De Werd*, *Dynamics at Play in the EU Preliminary Ruling Procedure*, *Maastricht Journal of European and Comparative Law* 2015, Vol. 22, No. 1, p. 149 (156).

¹⁶⁶ See the country studies in: *Jessel-Holst/Kulms/Trunk* (eds.), *Private Law in Eastern Europe*, Tübingen 2010.

the Association Councils under the SAA's. So far, however, the Commission has not succeeded in finding a credible policy which relaxes the *acquis* standards while maintaining the impetus for a rapprochement towards the EU. Lawmakers in the future accession or association countries will only be willing to disrupt pre-transition equilibria in favour of sophisticated EU rules if the EU offers credible incentives for eventually obtaining the prize – namely, full accession or a special association regime.

EU Harmonization of Private Law as Exemplified in South-East European Countries

Christa Jessel-Holst

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I. Introduction

The focus of the following presentation is on those countries of South-East Europe which had been part of the socialist camp but later transitioned to a democratic system and a free-market economy.

Today, these countries find themselves in different positions vis-à-vis the European Union. Five of them are already Member States – namely, Hungary and Slovenia (since 1 May 2004), Bulgaria and Romania (1 January 2007), and Croatia (1 July 2013). Another four countries (Albania, Macedonia, Montenegro, and Serbia) have reached the status of candidate countries; it should be added that also Turkey belongs to this category. In contrast, Bosnia and Herzegovina and Kosovo are still classified as potential candidates for EU accession.

EU accession presupposes transposing or integrating the *acquis communautaire* (the existing EU legislation) into the national law of the country wishing to join the Union. This is a highly complex and challenging task. The Max Planck Institute for Comparative and International Private Law in Ham-

burg has followed closely and in some cases even actively supported the process of EU harmonization as undertaken in South-East European countries embarked on the path to membership, whereby experts from accession states were invited to Hamburg to develop strategies for dealing with the *acquis* or, alternatively, members of the Institute's academic staff participated in missions abroad. In what follows, the author aims to share some of her personal experiences with EU harmonization in countries of the region.

II. EU harmonization of company Law in Bulgaria and Romania

1. *EU Directives as regulatory instruments*

European company law is intended to create uniform minimum standards for businesses throughout the Union. This is for the most part done by means of Directives. Directives do not apply directly, instead requiring the Member States to transpose their content into national law in a manner which each State deems appropriate for its own legislative environment.¹ Countries wanting to accede to the Union must, in advance, transpose all EU Directives into their national legal systems.

2. *Co-operation with the Ministries of Justice of Bulgaria and Romania*

In the case of Bulgaria, the Ministry of Justice in Sofia contacted the German Federal Justice Ministry in 1996 with a request for expert help as regarding the transposition of six company law Directives. Support was organized by the German Foundation for International Legal Cooperation (IRZ), together with the Max Planck Institute in Hamburg and the Bavarian Chamber of Notaries.

The reform of Romanian company law had its origin in a corporate governance reform project which was conducted on the initiative of the World Bank in cooperation with the Max Planck Institute in Hamburg. At request of the Ministry of Justice in Bucharest, that project was on short notice extended to include the transposition of the same six company law Directives.

3. *The starting point*

The initial situation was similar in both countries insofar as – after the end of socialism – they were confronted with the task of having to undertake com-

¹ See Art. 288(3) of the Treaty on the Functioning of the European Union, consolidated version OJ 2012 C 326/47–390: “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”

prehensive legal reforms so as to build and strengthen not only democratic structures but also a free-market economy. The obligation of EU harmonization posed yet another heavy burden on two countries which could rely on only rather limited domestic resources.

In the case of Bulgaria, no commercial law existed until 1991, when a (rudimentary) Commercial Act was adopted. For its part, Romania, in 1990, adopted through an accelerated procedure Act No. 31 on Commercial Companies, legislation basically shaped on models pre-dating the Second World War. Integrating six EU Directives into these Acts proved to be a challenge because the existing company law acts were not sufficiently developed to serve as a good basis. To give just two examples: Romanian Act No. 31/1990 on joint-stock companies established neither a developed two-tier system nor a one-tier system. In Bulgaria, integration of the Third and Sixth Company Law Directives on mergers and on division of companies² was made difficult by the circumstance that the authors of the 1991 Company Act had omitted to regulate transformation law with the result that the project had to start from scratch.

4. Some characteristic features of the cooperative partnership with Bulgaria and Romania

a) Bulgaria

The success of legal advice projects depends to a large extent on whether the participants are able to work together closely and confidently. For the drafting of a law amending the Bulgarian Company Law Act, a working group was established which included the Bulgarian Deputy Minister of Justice, leading Bulgarian scholars and practitioners, and German experts. Most of the Bulgarian participants were already known in Hamburg from preceding research stays or from other forms of cooperation. The working group held its meetings in the Ministry in Sofia, but also in Munich and Hamburg. It made ample use of comparative law. In doing so, the focus was not only on Western European EU Member States, such as Germany or France; rather, the reform legislation in other post-socialist countries that had already harmonized their law (namely Hungary and Poland) proved very useful for finding solutions which could be deemed suitable for Bulgaria. In the process of cooperation, the crucial issues were also discussed in a wider circle with Bulgarian judges, representatives from the commercial register, auditors, stakeholders, etc. Preparation of the initial draft was done by two Bulgarian scholars working on the premises of the Max Planck Institute in Hamburg.

² Third Company Law Directive 78/855/EEC on mergers of public limited liability companies, repealed by 2011/35/EU; Sixth Company Law Directive 82/891/EEC on division of public companies, amended by 2007/63/EC.

The Directives were not simply carried over by way of “copy and paste” but were fully integrated in a harmonious manner into the Bulgarian legal order.

A Bulgarian Act concerning the amendment and supplementation of the Commercial Code,³ integrating the First Company Law Directive of 1968 (disclosure), the Second Directive of 1976 (capital), the Eleventh Directive of 1989 (disclosure in respect of branches), and the Twelfth Directive of 1989 (single-member private limited liability companies),⁴ was adopted by the Bulgarian Parliament on 28 September 2000. A second Act concerning the amendment and supplementation of the Commercial Code,⁵ integrating the Third Directive of 1978 (mergers) and the Sixth Directive of 1982 (divisions), was adopted on 12 June 2003.⁶

The adoption of these two reform Acts did not mark the end of the work. The task remained to familiarize the Bulgarian legal community with the amendments to the Commercial Act and to facilitate the proper application of the new provisions, in line with the practice in the EU Member States. For this purpose, three publications were prepared. The Ministry of Justice published a Bulletin which was distributed free of charge and contained the Bulgarian translations of all company law Directives as well as synopses (tables of concordance) which had been prepared by the working group for each of the six Directives mentioned above. The tables indicated, first, which provisions in the Directives already had a counterpart in Bulgarian law before the reform; and, second, the table showed exactly where new provisions were located and indicated the provision of the corresponding Directive that the new provision was transposing.⁷ In a German/Bulgarian collaboration, Prof. Klaus Hopt, Director at the Max Planck Institute in Hamburg, and Dr. Tania Buzeva, from the Kliment Ohridski University’s Faculty of Law in Sofia, edited a book which contained not only all the legislative Acts and draft Acts of the EU in the field of company law but also a collection of relevant articles

³ Dăržaven Vestnik [State gazette] No. 84/2000, pp. 1–13.

⁴ First Company Law Directive 68/151/EEC, on co-ordination of safeguards [...] for the protection of the interests of members and others, repealed by 2009/101/EC; Second Company Law Directive 77/91/EEC, on formation of public companies and the maintenance and alteration of capital, updated by 2006/68/EC and 2009/109/EC, repealed by 2012/30/EU; Eleventh Company Law Directive 89/666/EEC, on disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State; Twelfth Company Law Directive 89/667/EEC, on single-member private limited-liability companies, repealed by 2009/102/EC.

⁵ Dăržaven Vestnik No. 58/2003, pp. 2–25.

⁶ See also *Jessel-Holst*, EU-Harmonization and Corporate Governance Reform in Bulgaria – Some Legal Reform Projects in Retrospect, in: Milisavljević/Jevremović Petrović/Živković (eds.), *Law and Transition – Collection of Papers*, Belgrade 2017, pp. 205–214.

⁷ Ministerstvo na pravosādiето i pravna evrointegracija [Ministry of Justice and Legal European Integration], *Pravna evrointegracija/Legal European Integration*, Bulletin (Sofia, November/December 1998), 128 pp.

from well-known German professors, each of which was translated into Bulgarian; the book appeared in Sofia in 1999.⁸ Last but not least, a group of Bulgarian scholars published a book in Bulgarian containing the revised text of the Commercial Act, comparisons of the old and new versions of the amended provisions, and detailed commentary.⁹

b) Romania

At the start of the project for integrating the six above-mentioned company law Directives into Romanian law, Romania's EU accession was already imminent. The participants to the project therefore found themselves under a severe time-constraint. Here again, the previous contacts of the Max Planck Institute's South-East European department with leading Romanian scholars proved crucial in establishing excellent cooperation with the domestic authorities (especially the Ministry of Justice and the Commercial Register). Officials were ready to work until late in the evening and, in the end, at times even through the night without ever complaining. A small core working group consisted of representatives of the Ministry and the Commercial Register, a commercial law expert from the Faculty of Law at the University of Bucharest, a Romanian doctoral candidate,¹⁰ and, for the Max Planck Institute, the author of this paper.¹¹ Once again, every possible effort was made to involve a broader public in the early stages of the project. Thus, every single issue was discussed with leading company law professors from the Bucharest Law Faculty, representatives from the chamber of auditors, owners of major law firms, and stakeholders.

Transparency was considered a priority. Therefore, the individual project steps were documented on the website of the Ministry of Justice. On that same website, the working group published not only the full text of the Directives in English and French, but also the company law Acts of many European countries (again in English or French) in order to demonstrate possible models for reform. In the end, also the Draft Act for amending Act No. 31/1990 on Commercial Companies was published there by the Ministry.

⁸ *Hopt/Buzeva (eds.)*, *Evropejsko družestveno pravo: Direktivi na Evropejskata Obšt-nost v oblastta na družestveno pravo – Tekstove i komentar, izbrani studii i statii* [European company law: Directives of the European Community in the area of company law – Texts and commentary, selected studies and articles], Sofia 1999, 358 pp.

⁹ *Gerdžikov (ed.)*, *Novite položenija v tãrgovskoto pravo, promenite v tãrgovskija zakon* [Revision of company law, the amendments to the Commercial Act], Sofia 2000, 544 pp.

¹⁰ See *Rådulețu*, *Der Schutz von Minderheitsaktionären nach rumänischem und deutschem Aktienrecht unter Berücksichtigung des EU-Acquis*, Frankfurt/Main 2010.

¹¹ See also *Jessel-Holst*, *Reforma dreptului românesc al societăților comerciale și armonizarea cu acquis-ul comunitar* [Reform and EU harmonization of Romanian company law], in: *Ad honorem Stanciu D. Cârpenaru – Studii juridice alese*, Bucharest 2006, pp. 34–42.

It must be mentioned that the working group received welcome support from the United States Agency for International Development (USAID) in Bucharest. Inter alia, USAID made it possible to send the initial draft which had been prepared by the working group to hundreds of recipients all over Romania (law faculties, law firms, auditors, associations, etc.) for comments, proposal, and criticism. The feedback was rather impressive. Each statement which arrived at the Ministry was discussed by the working group and received a reasoned reply. A number of comments could be used to improve the draft.

Act No. 441/2006 to amend and supplement Act No. 31/1990 on Commercial Companies and Act No. 26/1990 on the Commercial Register¹² was adopted unanimously by both chambers of the Romanian parliament.

III. Private international law reforms under the influence of the *acquis communautaire* in Albania, Bulgaria, and in Yugoslavian successor states

The following remarks refer to Albania, Bulgaria, Kosovo, Macedonia, Montenegro, Serbia, and Slovenia, these being countries which the Max Planck Institute has in one way or the other supported in the process of EU harmonization in the field of private international law.

1. *EU Regulations as regulatory instruments*

In contrast to European company law, European private international law consists mostly of Regulations. Regulations are directly applicable.¹³ For new Member States they enter into force automatically on the date of accession, without any need for transposition. What is needed, however, is a mechanism for making the Regulations work. For this purpose, implementing provisions have to be adopted which (i) designate the competent authorities for fulfilling certain tasks, (ii) determine language issues, and (iii) regulate other technical aspects. These implementing provisions should be in force at the time of accession and should therefore be prepared in advance.

2. *EU Regulations as models for reform in South-East European countries*

Although the countries aspiring to membership are not obliged to harmonize their private international law with the EU Regulations, many of them have taken steps to do so voluntarily well in advance of accession. There are vari-

¹² Monitorul Oficial No. 955/2006, pp. 1–25.

¹³ See Art. 288 (2) of the Treaty on the Functioning of the European Union: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

ous reasons for this. Bulgaria, until 2005 (i.e. two years before accession to the Union) had never codified private international law. For the elaboration of the Bulgarian Draft Private International Law Act, it appeared appropriate to follow the EU standards as closely as possible since they would apply in the near future in any event.

Yugoslavia had in 1982 adopted an Act concerning the resolution of conflicts of laws with the provisions of other countries in certain matters. After the country's break-up, the successor states, recognizing a need for comprehensive reform, oriented themselves on EU law, not only because it set the standards in Europe but also as a means of expressing their desire to join the EU as early as possible. An additional advantage is that the legal community can familiarize itself with an important part of the *acquis communautaire* in advance of accession.

Albania, during its era of socialism, had adopted in 1964 an Act titled "On the enjoyment of civil rights by foreigners", which consisted of only rudimentary provisions. In drafting Law No. 10428/2011 on Private International Law, orientation towards the European *acquis* was considered an obvious choice.

3. Cooperation with the Ministries of Justice

The drafting of new legislation was done in various cooperative efforts undertaken between, on one side, Ministries of Justice and other institutions in the target countries and, on the other, the Max Planck Institute. Thus, the Bulgarian Private International Law Act of 2005 was elaborated in close cooperation with experts from Hamburg, and the actual drafting was done by Bulgarian scholars on the premises of the Max Planck Institute. The author of this paper was invited to participate in the working group drafting the Montenegrin Private International Law Act of 2014 as well as in the groups working on the 2015 Macedonian draft law and the 2018 Kosovo draft law. Scholars from Slovenia and from Serbia¹⁴ were invited to perform their own research in Hamburg and received active support for their work in different ways.

The work was supported by the German Foundation for International Legal Cooperation (IRZ) as well as by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

4. Conceptual issues

At the moment of EU accession, national law provisions of the acceding state which served to transpose the content of EU Regulations into the national law

¹⁴ For an English translation of the Serbian (Draft) Private International Law Act of 2014 see *Basedow/Rühl/Ferrari/de Miguel Asensio (eds.)*, *Encyclopedia of Private International Law*, Vol. 4: Legal Instruments A–Z, Cheltenham 2017, pp. 3717–3764.

will automatically cease to be in force. In their stead, the relevant Regulations will apply directly.

In all countries, the focus was on harmonizing the provisions governing the determination of the applicable law. From European procedural law, only a small number of rules could be used as models for reform in non-Member States.

As compared to the transposition of Directives, verbatim transposition was employed more often as regards efforts to achieve harmonization with EU Regulations.

Countries aspiring to EU membership will harmonize their private international law with Regulations which exist already at the time of drafting the relevant Act. It would be unrealistic to expect candidate countries to amend their national private international law legislation every time new Regulations are adopted by the EU. Therefore, the earlier the national reform is completed, the more reduced the impact of European law. In other words, the degree of harmonization to a large extent depends on the time when drafting has been done.¹⁵

Once a country has acceded to the EU, it should purge the national law of provisions which were formulated after (or are in contradiction to) EU Regulations. Unfortunately, this step is often omitted. Thus, the Bulgarian Private International Law Code of 2005 still contains provisions on the law applicable to contractual and non-contractual obligations which were initially taken from the draft version of the Rome I and II Regulations, although the relevant provisions now constitute dead law subsequent to the entry into force of Rome I and II. The Slovenian Private International Law and Procedure Act of 1999 still contains provisions which were modelled after the Rome Convention on the law applicable to contractual obligations of 1980, provisions which long ago became irrelevant. As a positive example, reference can be made to the recent Croatian reform. With the adoption of the new Croatian Private International Law Act of 2017,¹⁶ all earlier provisions which were not in compliance with the *acquis* have been formally repealed.

¹⁵ For more details see *Jessel-Holst*, The Reform of Private International Law Acts in South East Europe, With Particular Regard to the West Balkan Region, in: *Anali pravnog fakulteta univerziteta u Zenici*, Vol. 9, No. 18 (November 2016), pp. 133–145; *Jessel-Holst*, Dilemmas in Application of EU International Family Law in Most Recent EU Member States, in: Župan (ed.), *Međunarodno privatno pravo u praksi europskih sudova – obitelj u fokusu* [Private international law in the jurisprudence of European courts – family at focus], Osijek 2015, pp. 59–69.

¹⁶ Narodne novine 2017 No. 101.

5. Remedies for the lack of legal literature

The application of harmonized legislation is greatly facilitated when the involved legal actors, e.g. judges, can refer to relevant legal literature in their native language. Therefore, cooperation with South-East European countries on EU harmonization has also included initiatives aiming to generate such literature. Examples regarding the Bulgarian company law reform have already been mentioned above. As far as private international law is concerned, a Bulgarian scholar who had been involved in the drafting was invited to Hamburg and prepared a commentary on the 2005 Code.¹⁷ A textbook on the Montenegrin 2014 Private International Law Act was prepared by a Max Planck Institute scholarship recipient who came from Podgorica.¹⁸ In cooperation with a professor from the University of Zagreb Faculty of Law, a bilingual (English–Croatian) collection of sources of private international law, especially European law, was published for use in the whole region.¹⁹ For the proper understanding of European law, one must also take into account the practice of the EU Court of Justice (CJEU) in Luxemburg. Here also, in cooperation with Zagreb-based scholars, a bilingual (English–Croatian) collection of CJEU decisions in the field of private international law was published in 2014.²⁰ Additionally, with support from the Konrad Adenauer Foundation, a team of authors from Tirana and Hamburg has prepared an Albanian-language commentary on the 2011 Albanian Private International Law Act, a resource which is about to be published and which will, *inter alia*, serve as teaching material for the Academy of Judges of Albania.

IV. Closing remarks

As demonstrated above, EU harmonization constitutes a complex task. The present contribution could only highlight certain aspects based on the experience of the Max Planck Institute with its South-East European partners.

¹⁷ *Stančeva-Minčeva*, Komentar na kodeksa na međunarodnoto častno pravo [Commentary on the Private International Law Code], Sofia 2010, 607 pp.

¹⁸ *Kostić Mandić*, Međunarodno privatno pravo [Private international law], Podgorica 2017, 471 pp.

¹⁹ *Babić/Jessel-Holst*, Međunarodno privatno pravo – Zbirka unutarnjih, europskih i međunarodnih propisa [Private international law – Collection of national, European and international acts], Zagreb 2011, 1621 pp.

²⁰ *Jessel-Holst et al.*, Međunarodno privatno pravo – Zbirka odluka suda Europske Unije [Private international law – Collection of decisions of the Court of Justice of the European Union], Zagreb 2014, 775 pp.

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