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GUIDELINES

FOR UKRAINIAN GOVERNMENTAL ADMINISTRATION ON APPROXIMATION WITH EU LAW

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LIST OF ABBREVIATIONS

ACRONYMS	MEANING
AA	Association Agreement
CETA	Canada – EU Trade Agreement
CJEU	Court of Justice of the European Union
CFSP	Common Foreign and Security Policy
CMU	Cabinet of Ministers of Ukraine
COM	Commission documents for the other institutions
DCFTA	Deep and Comprehensive Free Trade Agreement
EEA	European Economic Area
EEC	European Economic Community
EC	European Community
EFTA	European Free Trade Association
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
PCA	Partnership and Cooperation Agreement
RIA	Regulatory Impact Assessment
SAA	Stabilisation and Association Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax
WTO	World Trade Organisation

INTRODUCTION

The present Guidelines on Law Approximation have been developed in order to assist the Ukrainian civil servants in implementation of the EU-Ukraine Association Agreement (AA), in particular its parts devoted to harmonisation of Ukrainian legislation with European Union (EU) law. One of the obligations resting on the shoulders of the Ukrainian law-makers is timely and comprehensive approximation of the domestic law with dozens of EU legal acts listed in the annexes to the Association Agreement as well as other international treaties between EU-Ukraine and policy documents.

On the whole, Ukraine has the obligation to harmonise at least partly its existing domestic legal order with hundreds of EU legal acts (the so-called "*EU acquis*") spreading across many areas of law. This includes fundamental areas as customs law, employment law, financial services, consumer protection, environmental protection and many others. A legislative effort of such proportions cannot be done haphazardly and hastily and needs sound and proper planning. It also requires very good knowledge of EU law, its origins, aims and foundational principles, as well as proper understanding of structure and interpretation of EU law. The present Guidelines provide such an insight, presented in an easy to follow way with numerous examples and practical advice for daily work.

They are tailor-made for the Ukrainian public administration and also all those, who are involved in the legal harmonisation. The present document was developed to serve persons who are already familiar with EU law, legal approximation, legislative processes and law-making in Ukraine, as well as for those who are at the beginning of this journey and face its challenges. As always with such guiding documents, some readers will find them useful and interesting in their entirety, some will, however, refer only to selected parts.

The Guidelines consist of the main text and several annexes. Section 1 comprises a quantum of information about the law approximation related obligations resting on Ukraine. It looks at the evolution from the Partnership and Co-operation Agreement to the currently applicable Association Agreement. Particular attention is paid to "dynamic approximation" envisaged by the latter as it requires constant monitoring of developments in EU law. This is followed by section 2, which provides background information on EU law, its sources and principles governing its application at national level. In section 3 the Guidelines return to the main theme, that is law approximation. The structure reflects the order of key law approximation related activities. Firstly, the analysis focuses on planning, including an overview of the Ukrainian practice. As next step the readers are taken through preparation of legal gap assessments, inventories of relevant EU and domestic law as well as other preparatory steps that need to be done before and legal drafting should begin. Principles governing legal drafting are also included in section 3. Furthermore, special attention is paid to compliance checking, both at the early and at the final stages of law-making process. The main part of the Guidelines is supplemented with the following Annexes:

Annex I contains an overview on the current organisation of the EU legal approximation process in Ukraine

Annex II contains useful information about preparing and using tables of concordance and statements of compliance in the format required by Ukrainian law.

Annex III (separate document) comprises a case-law review covering a list of jurisprudence, which is relevant for the Ukrainian authorities as well as summaries of the most important judgments.

Annex IV comprises detailed information on the application of EU law in the EU Member States (which is not, as such, applicable for Ukraine)

Annex V (separate document) contains a Manual on EU Legal Databases. It is addressed to civil servants, who are not yet fully familiar with the Eur-lex website and the website of the Court of Justice of the European Union (CJEU).

The Guidelines have been developed in the framework of the EU funded Project "Support to the implementation of the EU-Ukraine Association Agreement" (hereinafter 'Association4U'), **implemented by a consortium led by GFA Consulting Group**, in cooperation with EU-UNDP Project "Rada for Europe: capacity-building in support of the Verkhovna Rada of Ukraine" and consulted with the Governmental Office for European and Euro-Atlantic Integration by the Cabinet of Ministers of Ukraine.

The content of these Guidelines does not reflect the official opinion of the European Union. Responsibility for the information and views expressed in the Guidelines lies entirely with the authors.

1. Approximation of Ukrainian Law with EU acquis

One of the most important requirements imposed by the Association Agreement (AA) is approximation of Ukrainian law with EU legislation. This is not a novelty as Ukraine was also required to align its legal order with EU *acquis* under the predecessor Partnership and Co-operation Agreement (PCA). However, the breadth of approximation currently envisaged is unprecedented and goes well beyond what PCA provided for.

Before proceeding into further detail, it is essential to clarify several terms and phrases used in EU jargon and also frequently employed by the authors of the present Guidelines. To begin with, many EU official documents use the phrase "EU *acquis*". This is an updated version of an older phrase "*acquis communautaire*". The latter stood for Community legislation in its entirety, which – as explained further in the sections that follow - comprised many different legal acts and jurisprudence of the Court of Justice of the European Union. Since the European Community was taken over by the European Union (as of 1 December 2009, the date of entry into force of the Treaty of Lisbon) this term lacks precision as the Community ceased to exist. Hence, it has been replaced by the notion "EU *acquis*", meaning the entire legal heritage of the European Union.

The AA between the EU and Ukraine requires alignment of Ukrainian legislation with that of the European Union. In this respect quite a few different terms are used in the AA itself as well as in various policy documents (whether EU or bilateral EU-Ukraine). The most typical notions include: "harmonisation", "alignment", "approximation". Furthermore, the AA imposes an obligation on Ukraine "to make domestic law gradually compatible", "to adapt its legislation", "to undertake to align its legislation".

While in the World of academia one would draw distinctions between all those terms and phrases, for the purpose of law drafting and actual compliance with the AA one may be at liberty to treat most of those terms interchangeably. The obligation stemming from the AA is twofold.

Firstly, Ukraine needs to conduct necessary changes to its legislation to make it fully compatible with EU legislation listed in the AA and other documents. This requires changes in the existing legal acts or adoption of new acts. To determine such actions, the drafters of the present Guidelines use mainly the notion of "approximation". Secondly, Ukrainian authorities also need to make sure that the newly adopted approximated rules are effectively implemented in practice. Such an obligations stems, for instance, from Article 475 (2) of the AA. It provides that "Monitoring shall include assessments of approximation of Ukrainian law to EU law as defined in this Agreement, **including aspects of implementation and enforcement.**"

This requires that the drafting of new rules always ensures the applicability of these rules in daily practice. It may include a plethora of non-legislative actions, including securing budgetary appropriations, enhancement of existing state apparatus or creation of new institutions, capacity building exercises for staff of those institutions as well as all other actors involved in law enforcement. All these factors have to be taken into account at the planning stage, when Ukrainian authorities take decisions as to the priorities. They also need to be at the heart of short and mid-term planning and implementation of national road maps and sectoral plans.

At the end of the day, parts of Ukrainian law will be based and modelled on solutions developed in the European Union. Details and deadlines for approximation per area are provided in the AA as well as in other sources, including other bilateral EU-Ukraine agreements.

Although the time framework for approximation is largely determined by the provisions and Annexes of the AA itself, detailed plans and priorities are set in a plethora of road maps and action plans approved by the Ukrainian authorities. The approximation tasks cover not only EU legal acts but frequently also other sources including soft-law instruments as well as jurisprudence of the Court of Justice of the European Union (CJEU).

As explained later in this section, similar requirements may be imposed by sectoral agreements between the EU and Ukraine. Furthermore, Ukraine may resort to so-called "voluntary approximation", that is to proceed with approximation with selected pieces of the EU *acquis* although it has no obligation to do so.

1.1. Approximation of Ukrainian Law with EU acquis under the Partnership and Co-operation Agreement

For the first time Ukraine's commitment to approximation of legislation to EU law was enshrined in the Partnership and Cooperation Agreement (PCA) between Ukraine and the European Communities and their member states (in force since 1 March 1998). Article 51(1) PCA made the approximation a precondition for strengthening links between the two sides. It was a typical provision also used in PCAs concluded with other former Soviet Union countries.

It should be noted that the provision in question provided for a "soft" approximation of Ukraine's legislation to EU law. It was merely a best endeavours clause or, to put it differently, an obligation to act, not to achieve a particular result. Furthermore, the PCA did not establish clear requirements regarding the degree of approximation of Ukrainian legislation and did not specify specific acts of EU law and the terms for their implementation by Ukraine. However, Article 51(2) PCA provided a list of priority areas for approximation, which comprised: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.

To organize the process of approximation of legislation within the framework of the PCA, the Law of Ukraine "On the National Program of Adaptation of Ukrainian Legislation to the Law of the European Union" of March 18, 2004, No. 1629-IV 9 was adopted (hereinafter – the Program). The Program defined the essence of approximation of Ukrainian legislation to EU law, the notion of EU law sources (*acquis communautaire*) and peculiarities of the organization of the process of approximation, including the institutional mechanism.

In the absence of clear commitments and requirements regarding the results of approximation in the PCA, the Program only identified the purpose and tasks of the first stage of the process of approximation. The focus of the PCA concentrated on the implementation of mainly organizational measures (the development of a glossary of terms, the creation of a centralized database of translations of EU law acts, organization of preparation of adaptation plans and monitoring schedules and the creation of a national information network on EU law issues).

1.2. Approximation of Ukrainian Law with EU acquis under the Association Agreement

The Association Agreement (AA) between the EU and Ukraine fully entered into force on 1 September 2017. Already as of 1 November 2014 some parts of the AA became provisionally applicable, which has particular relevance for the deadlines set in Annexes, as most of them have started to run from that date. In relation to DCFTA, the relevant provisions have started to apply provisionally as of 1 January 2016.

The AA has taken the political, legal and economic relations between the parties to completely new levels. It should be noted that the AA seeks to achieve much more ambitious goals than the PCA. In particular, it establishes more demanding commitments for Ukraine when it comes to approximation of national legislation with EU *acquis*.

The overarching aims of the AA are listed in the preamble and include, among others, creation of a deep and comprehensive free trade area. It is clear that the deepening of political and economic ties between Ukraine and the EU directly depends on progress in fulfilling the obligations of the AA on the approximation of Ukrainian legislation with EU law. To achieve the objectives, the Agreement lists acts of EU law and / or parts of the acts that Ukraine has the obligation to approximate with and to implement.

The conditions set in the respective chapters of the AA determine, in particular, the timing of implementation, as well as required level of approximation. The relevant obligations are contained both directly in the body (articles) of the Agreement, and in its annexes.

Many provisions of the AA, which deal with law approximation, vary both in terms of contents, degree of detail as well as level of approximation that is required. Before going any further it is essential to look at a few examples.

The provisions dealing with approximation in the consumer protection area give an example for the design and language used for many approximation clauses throughout the chapters of the AA:

Article 415

The Parties shall cooperate in order to ensure a high level of consumer protection and to achieve compatibility between their systems of consumer protection.

Article 417

Ukraine shall gradually approximate its legislation to the EU *acquis*, as set out in Annex XXXIX to this Agreement, while avoiding barriers to trade.

ANNEX XXXIX TO CHAPTER 20

CONSUMER PROTECTION

Ukraine undertakes to gradually approximate its legislation to the following EU legislation within the stipulated timeframes:

Product Safety

> Directive of the European Parliament and of the Council of 3 December 2001 on general product safety (2001/95/EC)
>
> Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
>
> Council Directive of 25 June 1987 on the approximation of the laws of the Member States concerning products which, appearing to be other than they are, endanger the health or safety of consumers (87/357/EEC)
>
> Timetable: the Directive's provisions shall be implemented within 3 years of the entry into force of this Agreement.
>
> Commission Decision of 21 April 2008 requiring Member States to ensure that magnetic toys placed or made available on the market display a warning about the health and safety risks they pose (2008/329/EC)
>
> Timetable: the Decision's provisions shall be implemented within 3 years of the entry into force of this Agreement.
>
> Commission Decision of 11 May 2006 requiring Member States to take measures to ensure that only lighters which are child-resistant are placed on the market and to prohibit the placing on the market of novelty lighters (2006/502/EC)
>
> Timetable: the Decision's provisions shall be implemented within 3 years of the entry into force of this Agreement.
>
> […]

The provisions in question merit attention for several reasons. To begin with, they are a good exemplification of law approximation clauses in the AA. A general provision contained in the main body of the Agreement is followed by a detailed annex with lists of EU *acquis* and deadlines for approximation (which may be different for selected provisions of EU legal acts). In this particular case, the deadlines started to run on 1 January 2016 as parts of the AA were applied on provisional basis. It should be emphasised that the list of EU legal acts in the area of consumer protection that need to be approximated with is much longer than the one reproduced above. The latter covers only product safety legislation. It is notable that in this case Ukraine has the obligation to approximate with the listed legal acts **in their entirety**.

This is not the case in other areas such as, for instance, the competition law area, where – as explained below - the situation is more nuanced:

Article 256

> "Ukraine shall approximate its competition laws and enforcement practices to the part of the EU *acquis* as set out below:
>
> 1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
>
> Timetable: Article 30 of the Regulation shall be implemented within three years of the entry into force of this Agreement.
>
> 2. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of

concentrations between undertakings (the EU Merger Regulation).

Timetable: Articles 1 and Article 5(1) and (2) of the Regulation shall be implemented within three years of the entry into force of this Agreement.

Article 20 shall be implemented within three years of the entry into force of this Agreement

3. 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.

Timetable: Articles 1, 2, 3, 4, 6, 7 and 8 of the Regulation shall be implemented within three years of the entry into force of this Agreement.

4. Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81 (3) of the Treaty to categories of technology transfer agreements.

Timetable: Articles 1, 2, 3, 4, 5, 6, 7 and 8 of the Regulation shall be implemented within three years of the entry into force of this Agreement."

This provision lists several EU legal acts dealing with EU competition law, however **it requires implementation of only selected provisions contained therein.** It is interesting to note that in the example above the list of legal acts for approximation is provided in the main body of the AA. The timetable agreed to by the negotiators is relatively short – three years from the entry into force (which in fact is from 1 January 2016 when this part of the AA started to apply on provisional basis).

It should be noted that approximation of Ukrainian legislation with EU competition law is full of peculiarities as EU competition law is an autonomous area of law that is directly applicable at EU and national level, while the Member States maintain their competition laws that apply when breaches of competition law do not affect the internal market (see further on the concept of direct applicability of EU legislation in the Annex to the present Guidelines).

In that context, EU Member States do not have to bring their laws into compliance with EU law as both systems apply in parallel and independently. Yet, frequently the national competition laws are modelled on the EU standard. As explained in section 1.4, the Ukrainian authorities may on voluntary basis approximate the domestic law with many others legal acts, not listed in the AA, but falling under the EU competition law umbrella.

Another interesting example is approximation of Ukrainian law with EU energy *acquis*. In this case two complementary regimes apply: on the one hand, the AA and, on the other hand, the Energy Community Treaty.

Annex XXVII to Section V of the Agreement

ANNEX XXVII TO CHAPTER 1

ENERGY COOPERATION, INCLUDING NUCLEAR ISSUES

Ukraine undertakes to gradually approximate its legislation to the following EU legislation within the stipulated timeframes:

Electricity

Directive 2003/54/EC concerning common rules for the internal market in electricity

> Timetable: the Directive's provisions shall be implemented by 1.1.2012 as indicated in the Protocol concerning the Accession of Ukraine to the Energy Community Treaty.
>
> Regulation (EC) 1228/2003 on conditions for access to the network for cross-border exchanges in electricity, as amended by the Commission Decision 2006/770/EC Timetable: the Regulation's provisions shall be implemented by 1.1.2012 as indicated in the Protocol concerning the Accession of Ukraine to the Energy Community Treaty.
>
> Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment
>
> Timetable: the Directive's provisions shall be implemented by 1.1.2012 as indicated in the Protocol concerning the Accession of Ukraine to the Energy Community Treaty.

As the provision reproduced above proves, both regimes are synchronised. While the Association Agreement constitutes a general framework, the Energy Community Treaty is *lex specialis*. To put it differently, detailed commitments in the area of energy are laid down in the latter. The AA plays only a supplementary role and provides a general umbrella framework. Moreover, in the event of a conflict between the provisions of AA and the provisions of the Energy Community Treaty, or the provisions of the relevant EU legislation made applicable under that treaty, the latter shall prevail (Art. 278(1) AA).

It should be noted that not all provisions of the AA provide for an obligation to approximate with pinpointed pieces of EU legislation. In some cases, the AA contains a more general obligation to synchronise the general standards. Article 350 of the AA, reproduced below, is a good example.

Article 350 of the Association Agreement

> With reference to Article 349 of this Agreement, the Parties recognise and commit themselves to implementing the principles of good governance in the tax area, i.e. the principles of transparency, exchange of information and fair tax competition, as subscribed to by Member States at EU level. To that end, without prejudice to EU and Member States competences, the Parties will improve international cooperation in the tax area, facilitate the collection of legitimate tax revenues, and develop measures for the effective implementation of the abovementioned principles.

Article 350 AA provides for a general obligation to implement the good governance principles in the taxation area. It should be emphasised that theses good governance principles are not thoroughly regulated in EU law, hence no list of legal acts is provided in the AA.

1.3. Dynamic approximation

Unlike many other association agreements, the EU-Ukraine AA provides for "dynamic approximation". This means that approximation never really comes to an end: whenever a relevant piece of EU legislation is amended or replaced by new legislation, Annexes to the AA may be subject to a revision. It should be noted that the AA itself provides for a few different regimes in this respect. The general rules are provided in Article 463 AA:

> "The Association Council may update or amend the Annexes to this Agreement, taking into account the development of EU law and applicable standards as defined in international instruments and, in the opinion of the Parties, directly affect this, without prejudice to any specific provisions included in Section IV ("Trade and Trade-related Issues") of this Agreement."

Without such explicit update / amendment Ukraine has some discretion when and how to take into account pieces of new EU legislation which were not explicitly mentioned in the AA.

For instance, according to Article 363 and Annex XXX, Ukraine shall harmonise its legislation with requirements from the Directive 96/82/EC as amended on the control of major accident hazards involving dangerous substances (so-called Seveso II Directive). However, this Directive was repealed by the new Directive 2012/18/EU (the so-called Seveso III Directive). Formally, Ukraine may still align its legislation with the benchmarks of the Seveso II Directive but it is strongly advisable to read and interpret the very few requirements from Annex XXX already in the light of the new Seveso III Directive so that Ukraine can bring its laws closer to the existing EU legislation.

Furthermore, tailor-made *modi operandi* for dynamic approximation are provided in DCFTA part of the AA. For instance, Article 3 of Annex XVII envisages almost automatic adaptation of the Annex by the Trade Committee:

> "2. In order to guarantee legal certainty, the EU Party will inform Ukraine and the Trade Committee regularly in writing on all new or amended sector-specific EU legislation.
>
> 3. The Trade Committee shall add within three months any new or amended EU legislative act to the Appendices. Once a new or amended EU legislative act has been added to the relevant Appendix, Ukraine shall transpose the legislation into its domestic legal system in accordance with Article 2(2) of this Annex. The Trade Committee shall also decide on an indicative period for the transposition of the act."

Consequentially, Ukraine has less room for manoeuvre in this area, than for instance on the example shown above on the amended versions of the Seveso Directives in the environmental area.

It should be emphasised that the Ukrainian authorities do not have to wait for information from the EU institutions or a request for revision of the AA as per Article 463 AA. The Ukrainian government may decide on unilateral basis to proceed with approximation extending to more recent EU legislation. This, however, should be done with caution and after an in-depth analysis of legal, economic and political aspects of such a decision.

For instance, approximation with newly adopted EU legislation may not be a desired solution if it would prove to be costlier for the Ukrainian business community than the *acquis* listed in the AA. At the same time, one may imagine a situation whereby approximation with new EU Regulation or Directive will bring political benefits in negotiations with the European Union. Either way, it is necessary for the domestic authorities to follow developments in EU law to be in position to make an early assessment how pending revisions of EU law may affect the implementation of the EU-Ukraine AA.

1.4. EU legal approximation outside the scope of the Association Agreement

The approximation of Ukrainian legislation is not only limited to the implementation of EU legal acts, which are clearly mentioned in the AA or bilateral plans/roadmaps adopted on its basis. Approximation is also required by the already mentioned Energy Community Treaty and covers some areas. This includes, for instance, energy resources. The same will apply to EU air transport *acquis* once the EU-Ukraine Civil Aviation Agreement enters into force. For instance, Ukraine will then have the obligation to approximate its domestic law with Regulation 261/2004 on compensation for flight delays and cancellations.

As already alluded to, approximation of Ukrainian law to EU *acquis* does not have to be limited to legal acts (or, in some cases, selected provisions) envisaged in the AA or flanking agreements. Article 476(1) of the AA provides with broad obligation to take any general or specific measures required to fulfil obligations under this Agreement as well as to ensure that the objectives set out in it are attained.

Ukraine may also use EU legislation as a blueprint in other areas of law but it would do so on voluntary basis. Such practice is not unheard of. For instance, the Swiss Confederation has been voluntarily using EU secondary law to develop its own domestic rules. If Ukraine was to resort to such practice it would have to be done very prudently, bearing in mind the economic implications of such legislation for the economy and for the society at large. At the same time, such practice would have two particular advantages. First, it would allow enhancing the compliance of Ukrainian law with European standards. Second, it would give Ukraine political leeway in relations with the European Union and, possibly, a bargaining argument in cases where it would not be beneficial for Ukraine to accept revisions of the AA. A good example of an area where Ukraine could rely on voluntary approximation is – as already mentioned - EU competition law. In the latter case, only selected provisions of several EU legal acts have to be approximated with. However, formally there is nothing stopping Ukraine from modelling its domestic competition law on the remainder of EU *acquis* in this area.

1.5. Requirements for approximation

Law approximation is a complex exercise that requires careful planning, resources, diligent law drafting, co-ordination of relevant activities as well as monitoring of compliance with commitments laid down in the AA. All of these are briefly, and in general terms, touched upon in this introductory chapter and they form a necessary systemic background for the analysis that follows. In the last section of the Guidelines the readers will find more in-depth information, focusing on the specificities of rules, which are currently applicable in Ukraine.

1.5.1 Planning of approximation

As already mentioned, the AA provides deadlines for approximation with each and every piece of EU legislation listed therein. Additional deadlines may be provided in bilateral documents, for instance, in the area of Sanitary and Phytosanitary (SPS) Measures, Chapter 4 of AA. Therefore, law approximation requires robust and coherent planning. It cannot be done last minute or on a whim.

The deadlines laid down in the AA are supposed to be the point of reference for Ukrainian law and policy makers for approximation of the relevant EU *acquis*. What they should do, is to plan carefully when the law approximation efforts in each area and sub-area is due to commence and how it should develop.

As explained above, approximation may be conducted in stages in order to phase in new legislation, which may constitute a burden and a challenge for the business community. Furthermore, as law approximation most often has significant budgetary implications, this too should be considered carefully when policy and law planning is made. Various approximation plans and roadmaps have been developed in Ukraine. Apart from a more general plan for law approximation, the Ukrainian authorities have also developed dozens of sectoral plans. As part of planning it is absolutely essential to allocate each and every piece of EU *acquis* to a relevant line ministry or any other state authority in charge. Further information is provided in section 3 of the present Guidelines.

The annexes to the AA as well as accompanying documents provide for deadlines, which in some cases span for years. It allows Ukraine to prepare its economy and the business community for the new regulatory regime. Furthermore, as Article 474 AA explicitly states: "Ukraine will carry out **gradual approximation** of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement" meaning that Ukrainian authorities shall do the approximation process in well-planned and prepared stages.

Such step by step approach is a perfectly agreeable method as long as the required level of compliance is achieved by the deadlines set in the AA or any of the accompanying documents (for instance, in decisions of the Association Council). Bearing this in mind the person conducting the AA/EU law compliance check should be aware that partial approximation envisaged in a draft piece of legislation may not be accidental but rather a part of a longer process. Naturally, the approximation process will be done through drafting and adoption of different types of domestic legal acts. A draft act of parliament may provide for partial approximation, while full approximation would be achieved at a later stage *qua* by-laws.

1.5.2 Law approximation technique

National provisions approximating domestic law with EU *acquis* should be drafted in accordance with national rules on writing legal acts. It should be emphasized that numerous legal acts of the EU can be approximated within one piece of national legislation; but a single legal act of EU legislation may also well require its integration into more than just one piece of Ukrainian legislation. This is a standard *modus operando*, typical also for the Member States of the EU.

An issue that deserves attention is the drafting methodology. Copy-paste method is generally not recommended as it may lead to adoption of national laws that will never leave the law-book. Copy-pasted provisions may be alien bodies in the system, not understandable to those implementing and enforcing them. This is particularly the case with EU Directives (for the difference between Regulations and Directives see below, section 2.2.4).

Copy-pasting may be an option in case of approximation with EU Regulations, which – as explained below – are aimed to produce a uniform standard and are directly applicable in EU Member States. This, of course, is not the case in Ukraine as long as it remains outside of the EU. Ukraine has to give effect to EU Regulations in its national law, just as it does so in relation to EU Directives.

So far the readers may be under the impression that approximation required by the AA extends

only to legislation *per se*. However, the jurisprudence of the CJEU is also of fundamental importance in the EU legal order and, thus, also for the third countries engaged in the law approximation exercise, such as Ukraine.

In many respects, EU law is a case-law driven regime, which frequently surprises those who deal with it. Judgments of the CJEU clarify how EU law shall be interpreted and applied at the national level and also when the Member States are in breach of it. Drafters of the AA took that factor into account. For instance, Article 6 of Annex XVII to Chapter IV AA, provides:

> *"To the extent that the provisions of this Annex and the applicable provisions set out in the Annexes are identical in substance to the relevant rules of the Treaty on the Functioning of the European Union and the acts adopted in accordance with this Treaty, such provisions, when implemented and applied, shall be interpreted in accordance with the relevant decisions of the Court of the European Union. "*

This is an important provision, which makes it clear that jurisprudence of the CJEU has to be taken into account by the Ukrainian law-makers. It should be emphasised, though, that even when the AA itself does not explicitly require considering the case-law, it should be done on voluntary basis to make sure that full approximation is achieved. Further in the present Guidelines the reader will find more information about the typology of judgments and their role in the EU legal system (see section 2.2.5) In Annex readers will find the Review of Case-law of the CJEU, with lists of relevant judgments and summaries of selected decisions of the Court.

1.5.3 Compliance checking

One of the most important procedural issues in law approximation is compliance checking. It is a very tedious exercise that should be conducted throughout the stages of law-making. The first gap assessment ideally should be conducted as early as at the stage of planning of law approximation. At that point in time it aims to give those in charge of planning a rough idea how much work will be needed to approximate domestic legislation with the EU *acquis*. By the same token the aimed level of approximation is determined. One option is full approximation "in one go", another, a gradual approximation whereby the first revisions of national legislation will amount to partial approximation to be followed by further approximation measures in stages as outlined above, section 1.5.1.

Compliance checking should not be a "one- off" exercise. As a matter of principle, it is necessary to set-up a procedural mechanism to ensure compliance checking before a domestic legal act is adopted. For that purpose, law approximation units are traditionally established either in the authority in charge of EU policy or, for instance, at the Ministry of Justice.

Legal acts should not be adopted, in case of bills, not transferred to the Parliament for approval unless they cleared by the approximation unit. Draft laws of Ukraine should be accompanied by detailed tables of concordance (ToC) to facilitate compliance checking before the adoption, including at the Parliamentary stages of the decision-making. In this respect, there is no one-size-fits-all approach. Each and every country engaged in law approximation before accession, or law approximation without a membership prospect, has its own *modus operandi* for compliance checking. The current situation in Ukraine is discussed in detail in section 3 of the present Guidelines.

2. Basics of the EU legal system

Before we start working on approximation with a particular piece of EU *acquis* it is essential to appreciate the systemic background in which EU law develops. It is also important to understand how EU legal acts apply in the EU Member States.

The European Union is a unique international organisation, which is underpinned by its own legal order. The origin, aims and objectives of an EU Regulation or an EU Directive should be always taken into account by the Ukrainian civil servants and law-makers when they proceed with approximation of domestic law with the EU *acquis*. Familiarity with them is a pre-condition to appreciate and to understand the meaning of particular provisions of EU legal acts. It simply allows the Ukrainian law drafters to put them in a proper context.

The EU does have extensive powers to legislate but they are not unlimited. This means, it can only legislate in the areas where it has a competence to do so. Furthermore, even if it has the powers to legislate, it may be limited by the *principle of subsidiarity*. This means that the EU institutions may only legislate when, and to the extent, that the Member States cannot achieve particular aims acting alone. This explains why, in some instances, the Ukrainian authorities will face EU legal acts, which are very detailed and aimed at creation of a complete set of rules. In other cases, EU *acquis* may be general, sometimes even vague or patchy, regulating only selected aspects of a matter in question, leaving filling of the gaps to the domestic legislator.

Another important preliminary issue to be considered at the outset, is the legal character of law of the European Union. From the point of view of the Ukrainian Constitution, the AA as well as EU legislation listed in its annexes is treated as part of public international law. However, in the European Union itself, EU law operates as a so-called **supranational legal order**, which not only is supreme over national law but also benefits from direct enforcement by domestic authorities.

In that sense, it is a hybrid between public international law and federal law. As explained by the CJEU in ground-breaking case 26/62 Van Gend en Loos, (see the Annex 'Application of EU law in the EU Member States') it is a new legal order, which creates rights and obligations not only for the states but also for individuals. These rights are enforced by national authorities, in particular domestic courts of all kinds. The method of enforcement differs, however, depending on the type of EU legislation that is at stake.

For instance, when the Ukrainian law-makers approximate domestic law with Regulation (EC) No 178/2002 laying down the general principles and requirements of food law they need to bear in mind that the provisions of that Regulation apply directly in all EU Member States. It means that there exist no national laws mirroring provisions of the Regulation and, should disputes arise, the litigants can rely directly on the Regulation, as if it were the national law. This will not be the case in Ukraine as provisions of this Regulation have to be harmonised with in domestic law. As explained later in this section, the situation is slightly different with EU Directives, which in the EU always need to be converted into domestic law. However, in certain circumstances, even EU Directives may be invoked directly in national courts in the EU Member States (see Annex).

Knowledge of basics of EU law is essential for law approximation. Therefore, this section contains an overview on fundamental issues underpinning EU law. Section 2.1. looks at the competences of the EU. It is followed by a detailed presentation in section 2.2. of different sources that make up the legal order of the EU.

2.1. Competences of the European Union

2.1.1. Introduction

The EU has powers, which have been transferred to it by the Member States. This is traditionally referred to as the **principle of attributed powers**. The key rule is that the EU can legislate only when permitted to do so under the EU founding treaties, which make up the primary legislation of the EU. To put it differently, it cannot legislate in the areas where it has no competence. Should the EU exceed its powers, the CJEU could strike down such legislation. Having said that, it needs to be emphasised that the Member States have transferred to the EU the execution of powers in many areas, like commercial issues, social protection or consumer rights.

In order to clarify the situation, and to make the EU more understandable to its citizens, the drafters of the Treaty of Lisbon decided to include the catalogues of EU competences. Consequentially, as of 1 December 2009 (date of entry into force of the Lisbon Treaty amending the Treaty on the Functioning of the European Union, TFEU), one can easily verify in which areas the EU has competences to act. For more details, see below, section 2.1.2.

It should be noted that the fact that the EU has competence, it does not mean it is limitless and does not vary depending on the area of law. This translates into the choice of legal act by the EU legislator and the actual contents of the legislation. We will return to this issue later in these Guidelines (see Section 2.2.4). The EU competences are divided into three main groups listed in Articles 3 and 4 of the TFEU, that is:

- exclusive,
- shared,
- supporting.

The main difference between these categories of competences is the scope of powers given to the EU, from the broadest – exclusive competences – reserved for the Union, to very limited powers in the area of supporting competences.

These are the main three categories, which, however, are not exhaustive as some areas where the EU has the powers to legislate escape any classifications. A good example in this respect is Common Foreign and Security Policy, which is a *sui generis* category of competence and falls under neither of three broad categories listed above.

2.1.2. Exclusive competences

Article 3 TFEU provides a catalogue of exclusive competences. They include:

- customs union,
- the establishing of competition rules necessary for the functioning of the internal market,
- monetary policy for the Member States whose currency is Euro,
- conservation of marine biological resources under the common fisheries policy,
- common commercial policy.

At first sight, one may get the impression that the list provided above is rather modest and, consequentially, the EU has exclusive competences only in few selected areas. While partly it is true, it is also necessary to appreciate that behind the general labels used in the catalogue we have many sub-areas, where the EU has proven to be - in terms of the legislative output - far going.

Examples:

For instance, in the first listed area, that is the customs union the EU adopted, *inter alia*, *Regulation (EU) No 952/2013 of the European Parliament and of the Council on the European Union Customs Code*. It is supplemented by *Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code* as well as *Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code*.

These legal acts form a core of EU Customs Law and, in many ways, constitute a complete and comprehensive set of rules. They are applied directly at the external EU borders by the customs authorities of the EU Member States.

When it comes to the second category listed in Article 3 TFEU, EU legislation on competition law is very prolific. This includes, for instance, *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* or *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*.

Also, the monetary policy for the countries in the Eurozone falls under the exclusive competence of the European Union as well as selected aspects of the Common Fisheries Policy. Finally yet importantly, the common commercial policy belongs to the EU exclusive competence. This comprises a plethora of international treaties concluded by the European Union with third countries (including the DCFTA part of the EU-Ukraine Association Agreement) as well as EU autonomous instruments, including Regulations on preferential trade and trade defence mechanism. In case of the latter, a very good example is *Regulation 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union*.

It should be added that in the realm of external relations, the EU also has exclusive competence for the conclusion of international agreements when their conclusion is:

- provided for in a legislative act of the Union, or,
- is necessary to enable the Union to exercise its internal competence, or,
- in so far as its conclusion may affect common rules or alter their scope.

This frequently causes disputes, whether a particular international treaty should be concluded by the EU acting alone or, the EU together with its Member States.

Example

Recent opinion of the CJEU on the Free Trade Agreement between the EU and Singapore (*Opinion 2/15*) is a very good example of legal challenges faced when determining the competence to conclude an international treaty. In this Opinion the Court of Justice held that although many matters regulated in the EU-Singapore FTA fell within the exclusive competence of the EU, the indirect foreign investment belonged to the shared competence. Consequentially, the agreement in question could only be concluded as a mixed agreement (just like EU-Ukraine Association Agreement).

In the areas falling under the exclusive competence the Member States can legislate only if so empowered by the Union or for the implementation of Union acts. The most obvious scenario is when a provision in a piece of EU legislation imposes an obligation on the Member States to act by adopting measures filling in gaps intentionally left by the EU legislator for domestic action. This frequently is the case with provisions regulating remedies and procedures for enforcement of EU Regulations. Otherwise, the legal acts adopted under the exclusive competences are usually very detailed and provide for a complete set of rules. To make them effective, the EU mainly legislates through directly applicable Regulations, although Directives can also be adopted in the realm of exclusive competence.

All the above should be considered when Ukrainian authorities proceed with approximation with some of the EU legal acts, which belong in the EU to exclusive competence.

2.1.3. Shared competences

A great majority of EU legal acts fall under the category of shared competences. The list is provided in Article 4 TFEU, it comprises:

- internal market,
- social policy,
- economic, social and territorial cohesion,
- agriculture, fisheries (excluding the conservation of marine biological resources),
- environment,
- consumer protection,
- transport,
- trans-European networks,
- energy,
- area of freedom, security and justice,
- common safety concerns in public health matters (for the aspects defined in TFEU).

Even a very brief assessment of the list above leads to the conclusion that a great majority of EU secondary legislation (see below, section 2.2.4, on “secondary legislation”) that Ukraine has the obligation to approximate its laws with, falls under one of those headings. Hence, it is crucial to appreciate how the shared competences operate in practice and how key principles underpinning division of competences between the EU and its Member States determines and affects the contents of Regulations and Directives listed in the EU-Ukraine AA.

Both the EU and its Member States may legislate in the area of shared competence (Article 2(2) TFEU). The Member States may exercise their competence to the extent that the Union has not exercised its competence. At the same time, the Member States may again exercise their competence to the extent that the Union has decided to cease exercising its competence. This provision envisages, therefore, that the competences are not only transferred from the Member States to the EU, but also they may be returned back to the Member States. This has implications for the law approximation effort made by the Ukrainian authorities.

It basically means that in many areas, to which the obligation to approximate applies, the legal landscape will be patchy. EU legal acts will frequently comprise general provisions with a lot of gaps to

be filled by the national legislator. It may, therefore, mean that the Ukrainian authorities will have to develop a lot of domestic provisions filling in such gaps. Without it, the legislative framework would be incomplete.

One should remember, though, that not always a legislative action will be required. In some cases, the existing Ukrainian legislation may be fit for purpose. As explained in detail later in these Guidelines (see section 3.1) planning of law approximation should be preceded by comprehensive legal gap assessment with the view of verifying which provisions of Ukrainian law are already EU legislation compliant. This should be done in relation to any single piece of EU legislation that Ukraine has to approximate its laws with.

In the areas of shared competence, the EU is governed by the principle of subsidiarity. It means that it will only legislate if, and to the extent, a particular objective cannot be achieved by the Member States acting alone. Compliance with the principle of subsidiarity is checked at many stages of the EU decision-making process and involves not only several EU institutions but also the national parliaments, which are empowered to proceed with subsidiarity checks. As a consequence of the principle of subsidiarity, the level of detail of EU secondary legislation will vary from one area of EU law to another, from one legal act to another.

Example

For instance, the secondary legislation (EU Directives) regulating consumer protection is traditionally rather general. A good example is *Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*. The other end of the spectrum will be agriculture and fisheries as both areas are heavily regulated through legislative and non-legislative regulations. To exemplify this one can use *Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products*. Both legal acts are covered by the EU-Ukraine AA and, consequentially, Ukrainian legal acts need to be approximated with them.

2.1.4. Supporting competences

The final category is the supporting competence. As per Art. 6 TFEU, it includes:

- protection and improvement of human health,
- industry,
- culture,
- tourism,
- education, vocational training, youth and sport,
- civil protection,
- administrative co-operation.

In these areas, the EU may carry out actions to support, coordinate or supplement the actions of the Member States, however without superseding their competence in these areas. Article 2(5) TFEU makes it clear that legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. Therefore, it is clear, that the competence of the EU in the areas in question is rather limited.

2.2. Sources of EU law

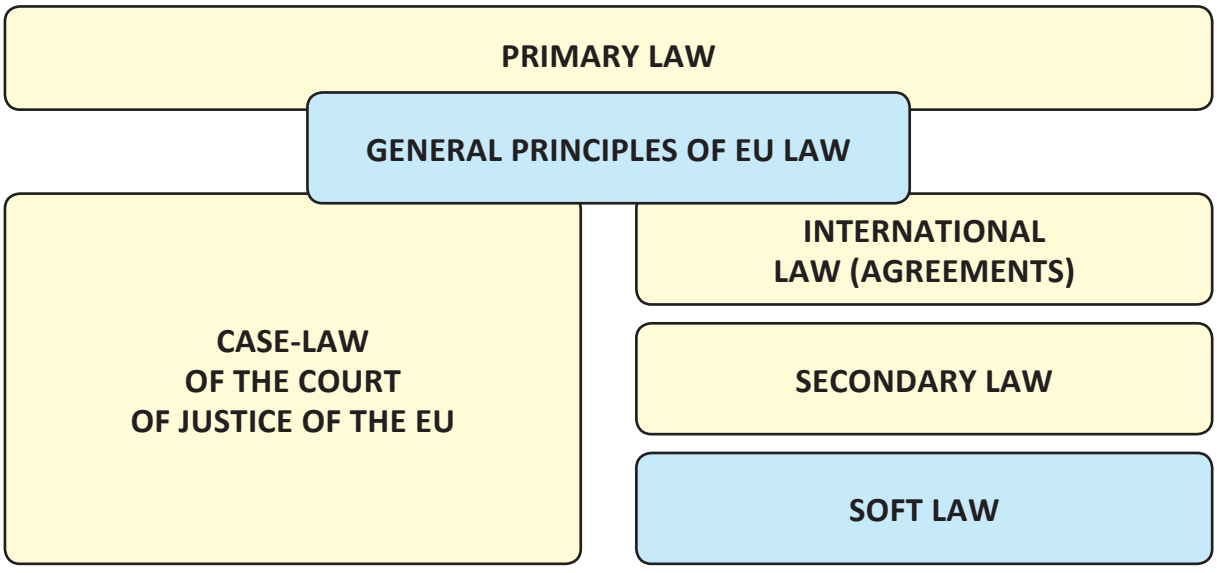
2.2.1. Introduction

Law of the EU, like any legal order, comprises a plethora of sources. For anyone dealing with legal approximation it is essential to appreciate what types of legal acts the EU produces, what is their hierarchy and how they are applied in the Member States. This knowledge forms necessary background information, which is crucial for a robust law approximation exercise.

A non-exhaustive list of sources of EU law includes:

- primary law,
- international treaties concluded by the EU with third countries and international organizations,
- secondary law,
- soft law,
- general principles of EU law,
- case-law of the Court of Justice of the European Union (CJEU).

Graph № 1 Sources of EU Law



Sources of EU law may originate from the Member States or the EU itself. Furthermore, rules stemming from public international law also penetrate the legal order of the European Union. At the top of the pyramid we shall find the primary law, which comprises, among others, the so-called EU Founding Treaties:

- Treaty on European Union (TEU),
- Treaty on Functioning of the European Union (TFEU) and
- Euratom Treaty.

These three Treaties have the same legal value. The primary law also includes the Charter of Fundamental rights, which - as of entry into force of the Treaty of Lisbon - is binding and has the same legal status as the Founding Treaties. Primary law also includes the treaties amending the trio of EU Founding Treaties as well as accession treaties regulating the terms of membership of new EU states. With the exception of the Charter, all other sources of primary law stem from the EU Member States, which formally negotiated and approved the Founding Treaties, their subsequent revisions as well as the accession treaties. This will not change in the future.

Next in the hierarchy is public international law, in particular, international agreements concluded by the EU with third countries. As well-known, the EU is an important actor on the international arena. It is not only empowered to take political actions but also it benefits from *ius contrahendi*, which is the power to conclude international treaties itself. This, of course, remains within the limit of powers attributed to it. In general terms, international treaties concluded by the EU need to be compatible with TEU, TFEU, Euratom Treaties as well as with the Charter of Fundamental Rights.

In everyday practice the bulk of EU's legislative output form legal acts falling under the umbrella category of secondary legislation. This is of highest relevance for the present Guidelines, as most of EU legal acts that Ukraine has the obligation to approximate with fall under this category. The categories of secondary legislation, that is the legal acts which originate from the EU institutions, are listed in Article 288 TFEU (Regulations, Directives, Decisions) and Article 25 TEU (CFSP Decisions). The types of legal acts, which form secondary legislation, are not presented in Article 288 TFEU in any kind of hierarchical order. They also differ considerably when it comes to their legal character. Finally, Article 288 TFEU envisages non-binding acts that are the so-called "soft law". It provides for adoption of recommendations and opinions, however in practice the suite of soft law instruments is much richer.

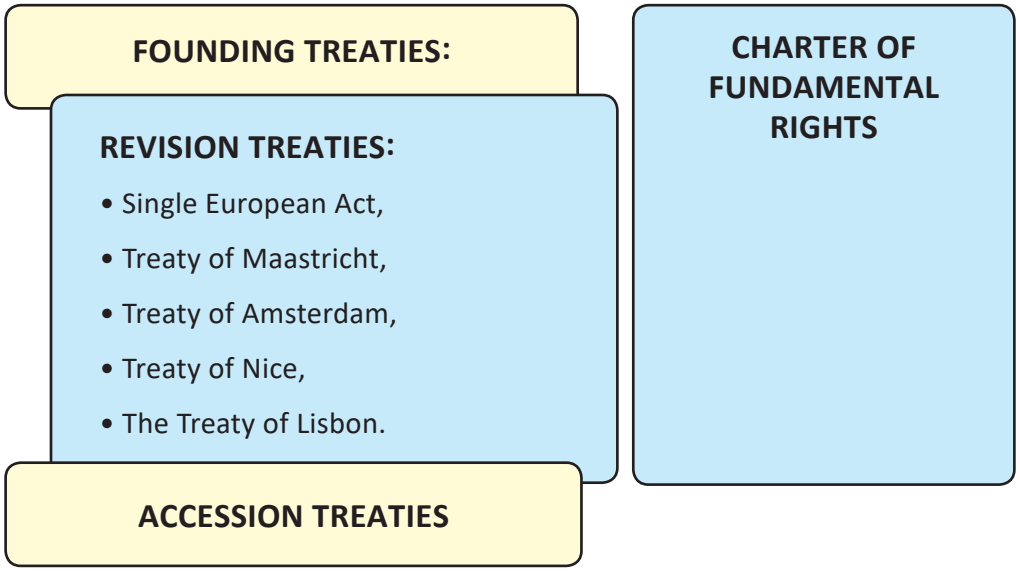
General principles of EU law also constitute an important source of EU law. Partly they have been developed in the jurisprudence of the CJEU and derive from public international law as well as constitutional traditions of the Member States. Some of the general principles of EU law have been afterwards codified in the EU Founding Treaties and in the already mentioned Charter of Fundamental Rights (also see below, section 2.2.6). For instance, the so-called "polluter-pays", "preventive" and "precautionary" principles are provided for in Article 191 TFEU on environmental policy, or the principle of non-refoulement in Article 78 TFEU concerning immigration.

Finally yet importantly, jurisprudence of the CJEU forms an important source of EU law. The judgments of the Court are not only binding for the parties. Although formally they do not carry the weight of precedents, in practice they operate in such a way and are widely respected by national courts of the EU Member States.

All types of sources of EU law summarized in this section are described in more detail below.

2.2.2. EU primary law

Graph № 2 **Primary law of the European Union**



2.2.2.1. Treaty on European Union

The **Treaty on European Union** (TEU) is relatively short and forms a mini-Constitution for the European Union. It developed considerably since its approval by the Member States in 1992. As this Treaty was signed in a Dutch city of Maastricht, it is frequently referred to as Maastricht Treaty. In its original shape, the Treaty on European Union governed mainly the Common Foreign and Security Policy (the so-called Second Pillar of the EU) and Area of Freedom, Security and Justice (the so-called Third Pillar of the EU). Furthermore, it was partly a revision treaty as it provided for a plethora of amendments to the then Treaty establishing the European Economic Community (now TFEU, see further below in this section) as well as the Euratom Treaty and the Treaty establishing the European Steel and Coal Community.

The Treaty of Amsterdam quite heavily revised the TEU. For instance, the rules on immigration, visas and asylum were moved to – what was then – the Treaty establishing the European Community (now TFEU, see further below section 2.2.2.2). The latest major revision of the Treaty on European Union was done by the Treaty of Lisbon in 2009.

The Treaty on European Union starts with provisions on the values and aims of the European Union (Articles 2-3 TEU). It is followed by Article 4(3) TEU, which lays down a foundational principle for the EU legal order: the principle of loyal co-operation. It provides that the Member States shall take all appropriate measures to ensure fulfillment the obligations stemming from EU law, they shall facilitate achievement of EU tasks and also refrain from taking measures that could jeopardize that. Article 4 TEU also serves as a legal basis for the already mentioned principle of attributed powers. Furthermore, it guarantees that the EU respects the equality of Member States and their national identities. When it comes to EU decision-making and different categories of competences that the EU has, Article 5 TEU

is of paramount importance. It, once again, confirms that the EU has only competences which have been granted to it by the Member States. Furthermore, it lays down foundations for the principles of *subsidiarity* and *proportionality*.

Article 6 TEU deals with fundamental rights. Firstly, it gives the Charter of Fundamental Rights binding character (see below in section 2.2.2.5). Secondly, it gives the EU a competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This, however, for the time being has been blocked by the Court of Justice, which in Opinion 2/13 ruled that the negotiated agreement on accession to ECHR was in breach of the EU Founding Treaties. Thirdly, Article 6(3) TEU recognizes the general principles as a source of EU law. It is followed by Article 7 TEU, which establishes a procedure for suspension of membership rights, should a country act in breach of the EU values listed in Article 2 TEU.

The TEU contains several provisions dealing with the democratic principles (Articles 9-12) and the institutional set-up of the EU (Articles 13-19 TEU). Furthermore, many provisions contained in the TEU, deal with external relations of the EU with the outside world: Article 8 TEU deals with relations of the EU with neighboring countries. Articles 21-46 TEU cover the general principles of external action as well as detailed rules on Common Foreign and Security Policy (including the Common Security and Defense Policy).

The Treaty on European Union ends with very general provisions on accession to the EU (Article 49 TEU) and withdrawal from the European Union (Article 50 TEU).

2.2.2.2. Treaty on the Functioning of the European Union

The **Treaty on the Functioning of the European Union** is of fundamental importance for everyday functioning of the European Union. Since its adoption in 1957, this Treaty has had many reincarnations and has been revised many times. In the period 1957-1993 this legal act was titled Treaty on European Economic Community (frequently referred to as the Treaty of Rome). Following revisions introduced by the Treaty on European Union (see further below), it was rebranded into Treaty establishing European Community. Finally, with the takeover of the European Community by the Treaty of Lisbon, this Treaty was accordingly rebranded into the "Treaty on Functioning of the European Union" (TFEU).

In terms of substance, key provisions on division of competences between the EU and its Member States are laid down in Articles 3-6 TFEU (see above). TFEU also contains detailed rules on EU institutional set-up, which supplement a more general set of rules provided in the TEU (see Articles 223-287 TFEU). This includes not only detailed rules on the functioning of the EU decision-making bodies (the Council, the European Commission and the European Parliament) but also the jurisdiction of the Court of Justice. As discussed in detail in section 2.2.4 of the present Guidelines, the TFEU also provides for basic rules on EU secondary legislation and decision-making procedures (Articles 288-299 TFEU).

Furthermore, the TFEU comprises dozens of provisions which constitute legal bases for adoption of EU secondary legislation. They determine the scope of competence, institutions empowered to act and a decision-making procedure that should be followed. In some cases, a general rule will be followed by an exemption.

The TFEU also provides for fundamental provisions on substantive law of the EU, including the freedoms of internal market: free movement of goods (Articles 30-36 TFEU), free movement of persons (Articles 21 and 45 TFEU), freedom of establishment (Article 49 TFEU), free movement of services

(Article 56 TFEU), free movement of capital and payments (Article 67 TFEU). Furthermore, the TFEU lays down foundations for EU competition law (Articles 101-102 TFEU), including state aid (Article 107 TFEU), as well as the prohibition of gender discrimination (Article 157 TFEU) and the foundations of the Area of Freedom, Security and Justice (Articles 67-89 TFEU).

Most of these provisions benefit from the doctrine of direct effect, meaning, they can be enforced by individuals in national courts of EU Member States. This is further discussed in the Annex to the present Guidelines.

2.2.2.3. Treaty establishing European Atomic Energy Community

The **Treaty establishing European Atomic Energy Community [Euratom]** serves as the legal basis for functioning of the European Atomic Energy Community, which formally is a separate international organization, yet inextricably linked to the EU. Just like the other two EU Founding Treaties it has been amended several times. Euratom Treaty was signed alongside the Treaty establishing European Economic Community (now TFEU) in 1957. It, too, was originally referred to as Rome Treaty. Its latest major revision was done by the Treaty of Lisbon in 2009. It repealed most of the institutional provisions and provided that the functioning of the Euratom Community is governed by TEU/TFEU.

In its current shape, Euratom Treaty contains substantive rules dealing with peaceful use of nuclear energy. In detail, it deals with promotion of research in this respect (Articles 4-11 Euratom), dissemination of information (Articles 12-29 Euratom), health and safety (Articles 30-39 Euratom), investment (Articles 40-44 Euratom), joint undertakings (Articles 45-51 Euratom), supplies (Articles 52-76 Euratom), safeguards (Articles 77-85 Euratom), property ownership (Articles 86-91 Euratom), nuclear common market (Articles 92-99 Euratom) as well as external relations of Euratom Community (Articles 101-106 Euratom).

It should be noted that Euratom Community, being a separate entity to the EU, is also a party to international treaties either together with the EU (for instance EU-Ukraine Association Agreement) or on its own (for instance Euratom-Ukraine Agreement on nuclear safety).

2.2.2.4. Charter of Fundamental Rights

The Charter of Fundamental Rights is another source of primary law although, from a purely formal point of view, it is not part of the Founding Treaties. As already mentioned above, Article 6(1) TEU gives it binding force and makes it clear that the Charter has the same legal status as TEU, TFEU and Euratom. This provision was added by the Treaty of Lisbon to remedy an anomaly that existed ever since the Charter was proclaimed in 2000, mainly the fact that the Charter was merely a piece of soft law. Since 1 December 2009 the Charter is binding and very frequently referred to in the jurisprudence of the CJEU.

The Charter contains a very rich suite of fundamental rights, which are divided into rights, freedoms and principles. It should be noted that some of those originate in the Founding Treaties of the European Union, while a great majority was inspired by the European Convention for the Protection of Human Rights and Fundamental Freedoms. A set of Guidelines on interpretation of the Charter it attached to it. They must be followed by those who apply the Charter. Those provisions of the Charter, which originate from ECHR, should be interpreted exactly in the way ECHR is interpreted by the European Court of Human Rights in Strasburg which is not an institution of the European Union.

The Charter of Fundamental Rights applies to all EU institutions and bodies, organs as well as agencies of the Union. This means that all their actions must be compatible with the Charter. For instance, all legal acts adopted by the EU institutions or acts of individual character must fully comply with the Charter. In case of non-compatibility the CJEU has the jurisdiction to annul a piece of secondary legislation either through a direct action for annulment (Article 263 TFEU) or indirectly via the preliminary ruling procedure (Article 267 TFEU).

Example:

For instance, the CJEU annulled Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. In joined cases C-293/12 and C-594/12 Digital Rights Ireland the Court held that the Directive in question entailed a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary. Consequentially, it was in breach of the Charter of Fundamental Rights and therefore annulled. In similar vein, the Court held in Opinion 1/15 that the Agreement envisaged between the European Union and Canada on the transfer of Passenger Name Record data could not be concluded in its current form as it was in breach of the Charter.

In practice many controversies were raised as to the application of the Charter of Fundamental Rights to the EU Member States. This is partly due to rather imprecise wording of Article 51 of the Charter, which determines its scope of application. As per provision in question (in its English version), the Charter applies when Member States implement EU law. In many other official languages of the EU the same provision of the Charter provides that it applies to the Member States when they "apply" EU Law. This term is obviously broader. The CJEU clarified these matters in case C-617/10 *Fransson*. The Court ruled as follows:

> *"Since the fundamental rights guaranteed by the Charter must [...] be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."*

It is now an accepted interpretation of Article 51 of the Charter that it applies when the Member State act in scope of EU law. Still, however, this may be subject to controversy and more jurisprudence of the CJEU is very likely to follow.

2.2.2.5. Revision Treaties

Primary law comprises also revision treaties that are Treaties, which amend the Treaty on European Union, the Treaty on Functioning of the European Union and the Euratom Treaty. They are negotiated and adopted in accordance with the procedure laid down in Article 48 TEU. The most important revision treaties approved so far include:

- Single European Act (1986);
- Treaty on European Union (1992);

- Treaty of Amsterdam (1997);
- Treaty of Nice (2001);
- Treaty of Lisbon (2007).

The Single European Act was signed in 1986 and entered into force in 1987. It was the first major revision of the Founding Treaties since their entry into force in 1950s. The Single European Act provided, *inter alia*, for increased role of the European Parliament in EU decision-making, a legal basis for development of internal market (from common market), a legal basis for the environmental policy and European Political Co-operation (a predecessor of what is now known as the Common Foreign and Security Policy).

In the early 1990s the Member States of the European Communities negotiated and approved the Treaty on European Union. As mentioned in section 2.2.2.1. above, the Treaty on European Union had a double character. On the one hand, it contained provisions on creation of the European Union and its new policy areas. On the other hand, it was a revision treaty amending the then existing treaty framework.

The next major treaty revision came towards the end of 1990s with adoption of Treaty of Amsterdam. It provided, *inter alia*, for a comprehensive reform of the Area of Freedom, Security and Justice, strengthening of the Common Foreign and Security Policy as well as streamlining of the EU decision-making procedures. Once again, the role of the European Parliament was strengthened.

At the turn of the century the EU Member States proceeded with the Treaty of Nice, which focused merely on preparation of EU's institutional framework for imminent enlargement and (almost) doubling of the number of Member States. This was followed by a failed attempt to equip the European Union with a single treaty as the Treaty establishing a Constitution for Europe was rejected in a referendum in France and in the Netherlands. However, the key features of that reform were subsequently incorporated into the Treaty of Lisbon, which after a series of ratification setbacks, entered into force on 1 December 2009.

The Treaty of Lisbon provided for a comprehensive reform of the existing system. Firstly, the European Community has been incorporated into the European Union. Secondly, it provided for a major overhaul of the EU's institutional framework, decision-making rules and sources of secondary legislation. Thirdly, it abolished the so-called Third Pillar of the European Union and, consequentially, decisively strengthened the Area of Freedom, Security and Justice. Finally, the Treaty of Lisbon also revamped the EU's institutional structure and *modi operandi* for external action. All provisions amended or added by the Treaty of Lisbon have been now included in the consolidated versions of the TEU, the TFEU and the Euratom Treaty. Hence, it is very unlikely that the Ukrainian policy and law-makers will venture into the Treaty of Lisbon itself.

2.2.2.6. Accession Treaties

Accession treaties are also part of primary law as they are concluded between the old and new Member States. Accession treaties regulate the terms of membership of EU newcomers, including transitional periods for full application of EU law, institutional aspects of enlargement and phasing in into EU policies, including the Common Agriculture Policy and EU structural funds. Traditionally, there is only one accession treaty per enlargement, irrespective of a number of countries joining. So far, the European Communities (now the European Union) have undergone seven enlargement rounds.

Therefore, in total seven accession treaties were negotiated and ratified. The most recent examples include:

- Treaty of Accession 2003 regulating conditions of membership of 10 new Member States (eight countries of Central and Eastern Europe as well as Malta and Cyprus),
- Treaty of Accession 2005 (dealing with the membership of Bulgaria and Romania) and
- Treaty of Accession 2011 (providing the legal framework for accession of Croatia).

It should be noted that accession treaties are of very limited approximation relevance and therefore – at least until Ukraine formally expresses a desire to join the EU – they do not have to remain on the radars of Ukrainian civil servants.

2.2.3. International Law

The European Union and Euratom are important players on the international arena and, consequentially, international law is a source of EU law (in particular international treaties). In this respect the competences of the EU have developed quite considerably since the early days of European integration. Initially, the European Economic Community was a trade oriented international organization, based on the common market and a customs union. In the latter respect, it had the powers to negotiate and to conclude international trade agreements. However, in the early days it had no competence to engage in political activities on the international arena.

This changed considerably with subsequent enlargements of the European Communities / European Union as well as revisions of the Founding Treaties. As already mentioned, the key provisions on the external action are now included in the TFEU. However, they are supplemented by a set of detailed rules on negotiation of international agreements laid down in a tailor-made section of the TFEU.

The European Union (and Euratom) are parties to hundreds of international treaties with countries around the World and with other international organizations. International agreements concluded by the EU are part of the EU legal order. As already mentioned, in the hierarchy of EU sources, they are positioned under the Founding Treaties. To put it differently, the EU may conclude agreements if it has the competence to do so envisaged in the Founding Treaties and to the extent they are compatible with the Founding Treaties. A special court procedure is envisaged in Article 218 (11) TFEU, which allows *ex ante* control of compatibility, i.e. the Court of Justice may be asked before an international treaty is concluded whether the EU has competence to proceed with such an international agreement.

To provide a comprehensive overview of all international agreements concluded by the EU, would exceed the scope of these Guidelines, therefore the focus of the analysis below is on the most important matters that are expected to be of interest of the Ukrainian officials.

The EU may conclude international agreements with third parties either by itself or together with the Member States. This is a consequence of the already discussed principle of attributed powers. If an international agreement covers dossiers falling only within the exclusive competences of the EU it will be concluded by the EU acting on behalf of the Member States. If, however, the dossiers extend to matters belonging to shared or supporting competences then an agreement will have to be concluded as a mixed treaty. This has considerable procedural consequences as such mixed agreements need to be ratified not only by the EU but also its all Member States. A good example of practical problems

that may arise is the EU-Ukraine AA, which entered into force with a considerable delay following a referendum in the Netherlands.

There is no one size fits all approach when it comes to types of agreements that the EU concludes with third countries. With third states, with which the EU has close trade and political relations it concludes association agreements (as per Article 217 TFEU). They do not create a partial membership in the EU, however they encapsulate the political and economic proximity. This proximity does not necessarily have to be geographic, although the EU pays particular attention to its relations with the neighboring countries.

It is notable that in some cases the EU develops treaty links with third countries by means of similar agreements creating the so-called "families of agreements", in others it develops bespoke international treaties. It should be also noted that there is growing tendency on the EU side to sign framework agreements, covering a wide range of issues. Such international treaties are then, depending on the needs of bilateral relationship between the EU and a third country, supplemented by sectoral agreements.

As a rule, an associated state is not requested to harmonize its law with the agreements concluded by the EU and its member states with third countries and other international organizations. Hence, the agreements discussed in this section of the Guidelines are generally not of law approximation relevance. However, some exceptions stem from the EU-Ukraine AA as it requires Ukraine's accession to some international conventions. Furthermore, EU neighbouring countries frequently associate themselves with actions of the EU on the international arena, including Common Foreign and Security Policy (CFSP) instruments. This includes, for instance, following EU legislation imposing sanctions on individuals and freezing their assets.

Examples:

By far the most comprehensive agreement has been concluded by the European Union (and its Member States) with Norway, Iceland and Liechtenstein. It forms the legal foundation of the *European Economic Area* (EEA) The aim is to stretch the internal market of the EU to these three EFTA countries. The *EEA Agreement* envisages a great deal of regulatory convergence as the countries in question have the obligation to comply with hundreds of EU legal acts listed in the annexes to the EEA Agreement. The EEA has a very complex and sophisticated institutional structure with the EFTA Surveillance Authority and the EFTA Court empowered to scrutinise the application of EU law in the three EFTA countries.

The *EU-Ukraine Association Agreement*, as well as *EU-Georgia Association Agreement* and *EU-Moldova Association Agreement*, are also very comprehensive, yet shy of level of integration envisaged in the European Economic Area. They provide for creation of the Deep and Comprehensive Free Trade Area and envisage a fair degree of regulatory convergence.

Other types of international treaties concluded by the European Union with third countries include Stabilisation and Association Agreements with the Western Balkan countries (for instance *EU-Albania SAA*), the Euro-med Agreements with countries of the Mediterranean (for instance *EU-Israel Agreement*) or the Partnership and Co-operation Agreements with the former Soviet Union countries (for instance *EU-Azerbaijan Partnership and Co-operation Agreement*). *EU-Turkey Association Agreement*, supplemented by decisions of the EU-Turkey Association Council forms a category of its own. It is expected that the Brexit Agreement and agreement on future EU-UK relations will provide for an idiosyncratic legal regime.

Obviously, the European Union reaches for trade and co-operation agreements beyond its immediate neighbourhood. The most recent examples of comprehensive agreements include *EU-Canada Comprehensive Economic and Trade Agreement (CETA)* or *Free Trade Agreement with South Korea*. One should also remember that the European Union can be a member of international organisations. Of particular importance is membership in the World Trade Organisation, meaning that all agreements falling its umbrella are binding on the EU and its Member States. By the same token, they influence the shape of EU secondary legislation (see section2.2.4, below).

Some of the international agreements concluded by the EU need to be reflected in EU secondary legislation (for instance in the Common Customs Tariff). Another good example is Council Regulation on antidumping duties, which – although an autonomous EU instrument – has had to be made compatible with the WTO antidumping rules. One should also remember that many international agreements concluded by the EU are capable of benefiting from the doctrine of direct effect. As explained further in the Annex to the present Guidelines, it means they can be invoked in national courts of the Member States. This is not the case, however, with EU-Ukraine Association Agreement which precludes direct effect.

2.2.4. Sources of EU secondary law

2.2.4.1. Catalogue of sources of EU secondary legislation

The bulk of law approximation covers EU secondary legislation. Therefore, this part of the Guidelines is of paramount importance for the Ukrainian law-makers. In order to proceed with a successful approximation effort, it is crucial not only to be familiar with the substance of EU secondary legislation but of equal importance is the general knowledge of the EU legal order and the way it operates in the European Union. Hence, it is essential to fully appreciate the difference between categories of EU secondary legislation and how they affect the national law.

At this stage of association with the EU, Ukraine has the obligation to approximate its domestic law with a several hundred EU legal acts. Although this amounts to a major legislative effort, one should acknowledge that this number constitutes only a small fraction of the EU secondary legislation. The exact number of EU secondary acts is not established but there is a common agreement that it exceeds 20 000 of Regulations, Directives and other legal acts.

The catalogue of available sources of EU secondary legislation is provided in Article 288 TFEU. They include:

- Regulations,
- Directives,
- Decisions.

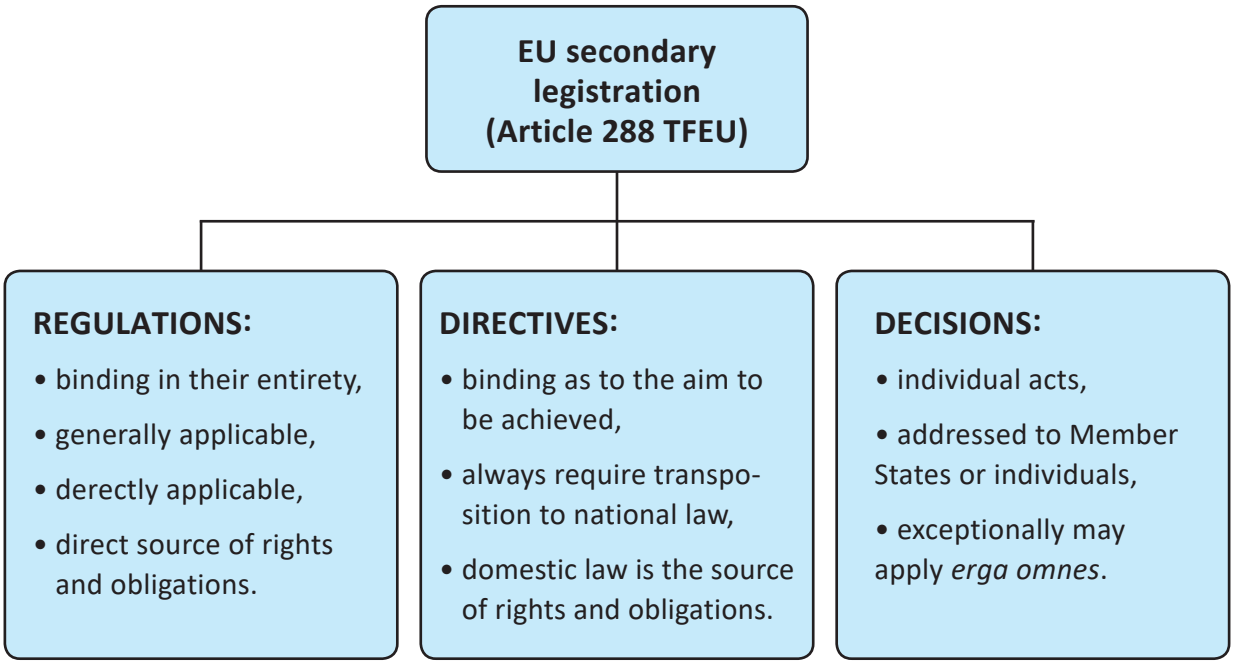
It should be emphasized that there is **no general hierarchical relationship** between these three types of EU secondary legislation. That is, Regulations do not prevail - in the hierarchy of sources - over Directives or Decisions are not subordinate to Directives. While each type of secondary legislation is discussed in detail in the sections of the Guidelines that follow, at this stage it is fitting to provide readers with a brief reminder on their legal character.

Regulations are **directly applicable** in the national legal orders of EU Member States upon their entry into force. This means that they are not transposed to the national legal orders. Quite on the contrary, the Member States are not even allowed to copy Regulations into domestic laws.

Directives are also legal acts applicable *erga omnes*, however, they always require transposition to the domestic legal orders and, by this token, become a part of domestic law. The situation with decisions is quite misleading as the legislative practice of the EU differs from the language of the Treaty. The latter provides that decisions constitute acts of individual character, which are addressed to a particular Member State or individual. In reality, also decisions may sometimes provide generally applicable rules.

For the sake of completeness one should also mention framework decisions, which during the period between the Treaty of Amsterdam and Treaty of Lisbon were the main legal instrument used in Police and Judicial Co-operation in Criminal Matters. Although they have been removed from the catalogue of sources of secondary legislation by means of Treaty of Lisbon, some still remain in force until they are amended, repealed or replaced by Directives. Framework Decisions are very similar to Directives, they are of binding character and always require transposition to national law. The main difference, though, is that unlike Directives, framework Decisions are not capable of producing direct effect.

Graph № 3 Secondary law of the European Union



2.2.4.2. Typology of EU secondary legislation

The internal structure of EU secondary legislation reflects in many ways the structure of national legal orders, where – in general terms – legislation is divided between acts of parliament and bylaws. Such a distinction is formally made in the EU legal order as of entry into force of the Treaty of Lisbon. It introduced a new typology of secondary legislation, which is now regulated in Articles 288-291 TFEU. In principle, they are divided into two main groups:

- legislative acts;
- non-legislative acts, which in turn are divided into:
  - delegated acts;
  - implementing acts;
  - other non-legislative acts

Since legal acts under all these categories may fall under the EU-Ukraine AA it is essential to fully appreciate their peculiarities.

Legislative acts include all Regulations, Directives and Decisions which are adopted in the European Union as per respective legislative procedures. These include the ordinary legislative procedure (whereby the European Parliament and Council of the European Union legislate together, see Article 294 TFEU) as well as by the Council in accordance with one of the special legislative procedures (for instance Article 113 TFEU, whereby the Council is empowered to adopt legislation in the area of taxation. It acts unanimously having consulted the European Parliament and the Economic and Social Committee).

Once a piece of EU secondary legislation is passed, it may be necessary to update it to reflect developments in a particular sector or to ensure that it is implemented properly. Parliament and Council can authorise the Commission to **adopt delegated or implementing acts**, respectively, in order to do this. The difference between the two is not only nominal but - first and foremost - substantive and procedural.

Delegated acts, as per Article 290 TFEU, are of general application and **supplement or amend certain non-essential elements** of the legislative acts. In practice the notions used in Article 290 TFEU frequently raise controversies in course of EU decision-making and lead to political disputes between different EU institutions. It is notable that Article 290 TFEU only lays down basic substantive and procedural parameters of delegated acts. For instance, it provides that the details of the delegation of powers, including the content, scope and duration must be defined explicitly in legislative acts. At the same time an important caveat is provided for; the essential elements of a given area must be reserved for legislative acts. In other words, such essential elements cannot be the subject of a delegation.

In practice it remains highly controversial what shall be understood by the term “non-essential” or “amend” or “supplement”. For instance, in case C-286/14 European Parliament v. Commission the CJEU held that “the delegation of a power to ‘supplement’ a legislative act is meant only to authorise the Commission to flesh out that act. Where the Commission exercises that power, its authority is limited, in compliance with the entirety of the legislative act, adopted by the legislature, to development in detail of non-essential elements of the legislation in question that the legislature has not specified.” At the same time, “the delegation of a power to ‘amend’ a legislative act aims to authorise the Commission to modify or repeal non-essential elements laid down by the legislature in that act”.

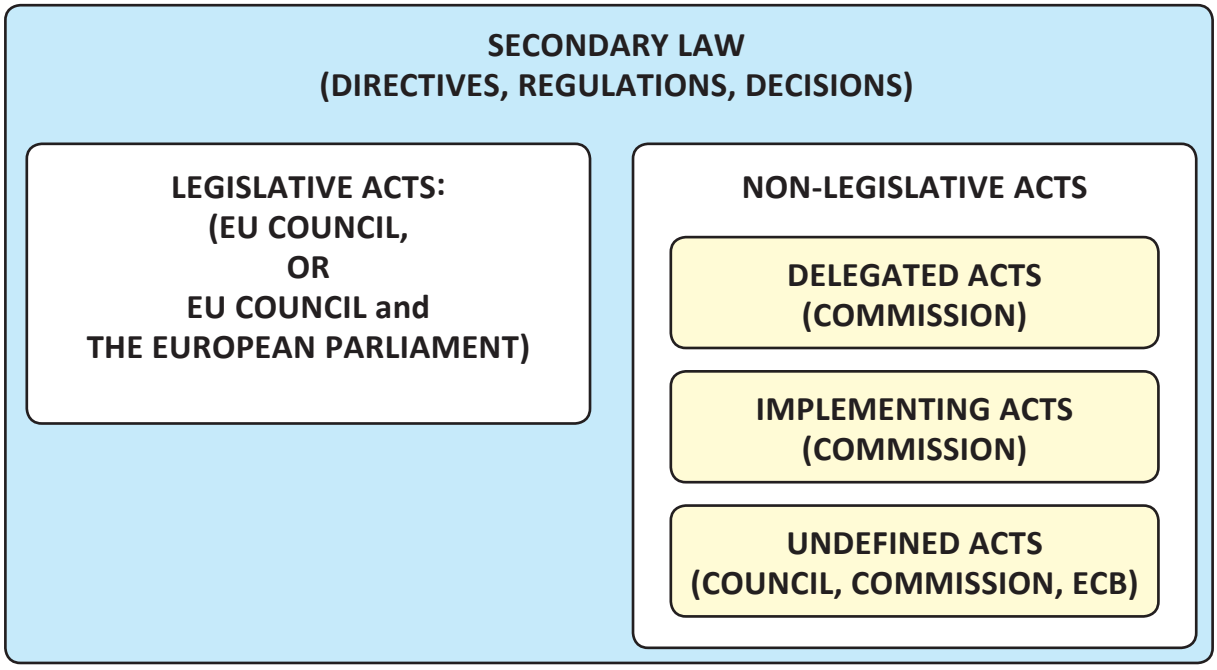
Two important procedural rules stem from Article 290(2) TFEU. First, the European Parliament and the Council may revoke the delegation. Second, delegated acts may only enter into force if no objections are raised by these two institutions within a deadline set in a legislative act on which delegated legislation is based.

Implementing acts are generally dealt with in Article 291 TFEU. They provide uniform conditions for implementing legally binding Union acts. Implementing acts are adopted by the European Commission, which proceeds in accordance with so-called comitology procedures (see Regulation (EU) No 182/2011

of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers) or, in rare cases, by the EU Council.

It should be noted that delegated or implementing acts may take the form of Regulations, Directives or Decisions. In order to emphasize their character, the word "delegated" or "implementing" is included in their title. Other non-legislative acts, not being implementing or delegated acts include for example acts of the European Commission adopted directly on the basis of the EU Treaties, non-legislative acts of the EU Council or legal acts of the European Central Bank.

Graph № 4 Typology of secondary law of the European Union



Finally, one should make a distinction between different types of secondary legislation based on their relationship with previously applicable EU legal acts. The situation is straight-forward when the European Union regulates a particular subject matter for the very first time. A good example is Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

However, things get a bit more complicated when existing EU legal acts are amended or replaced with new legislation. A good example of the first category is Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. As can be seen, the fact that it is an amending Directive is clearly reflected in its title.

It should be noted that EUR-Lex database contains a good inventory of existing EU legislation and equips readers with unofficial consolidated versions of EU secondary legislation comprising of the basic acts and all their revisions. This is the case with Directive 89/665/EEC, which was amended by the mentioned Directive 2007/66/EC. Such **unofficial consolidated** versions come in very handy for state authorities in charge of transposition of EU legislation in the Member States but also in third countries (including Ukraine).

It should be noted, however, that when a piece of EU secondary legislation is amended several times the EU institutions frequently engage in official codification or recasting.

Codification amounts to bringing together the original text of a piece of legislation, together with all its amendments (referred to by the European Commission as vertical codification) or bringing together various pieces of legislation, which regulate different aspects of the same subject matter (referred to by the European Commission as horizontal codification). When this happens, the EU institutions in charge adopt a completely new legal act, which has a new generic number. A good example was Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, which codified Council Directive 75/442/EEC of 15 July 1975 on waste and amendments to it.

Recasting is more complex as it also brings together various pieces of EU secondary legislation, however, unlike in the case of codification, recasting also involves adding new substantive changes to EU legislation. The European Commission distinguishes between vertical and horizontal recasting. A good example of recasting is Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast). In case of recasting EU institutions adopt a new legal act, which receives a new generic number.

Last but not least, in case of major changes to the existing legislation, EU institutions may decide to proceed with a complete overhaul of the legal framework, which replaces previously applicable legal acts. For instance, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement has repealed altogether Directive 2004/18/EC, even though some of the legal concepts laid down in the latter have been rolled-over to the new legislation.

2.2.4.3. Regulations

The first source of EU secondary legislation listed in Article 288 TFEU are Regulations. According to that provision Regulations are binding in their entirety and directly applicable in all Member States. This means that EU Regulations are a direct source of rights and obligations for state authorities and individuals. It should be emphasised that the Member States are not permitted to pick and choose provisions of EU Regulations of their liking. In case 39/72 Commission v. Italy, the CJEU ruled many years ago that: "it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Regulation so as to render abortive certain aspects of EU legislation which it has opposed or which it considers contrary to its national interests."

As mentioned in section 2.2.4.2, Regulations may take the form of legislative, delegated or implementing acts. A reminder is fitting that the first are adopted by the European Parliament and the Council or by the Council acting alone. The other two types of Regulations may be adopted by the European Commission. When it comes to the legislative Regulations it is notable that in some cases the provisions of EU Founding Treaties, providing the legal bases for adoption of secondary legislation in a given field, indicate that the EU legislator may proceed with Regulations. In other instances, a choice between Regulations and Directives may be offered to the EU decision-makers.

The function of Regulations is unification of laws of all Member States. In other words, Regulations are meant to create uniform legal standards all over the EU and this explains why their provisions are frequently very detailed. This also explains why Regulations are the main instruments used in the areas where the EU has exclusive competence as well as in the areas where uniform legal standards facilitate development and implementation of EU policies.

Regulations are the main legal acts used, *inter alia*, in the EU customs law, common commercial

policy, common agriculture policy, common fisheries policy, food law or transport. A good example is the European Parliament and Council Regulation 952/2013 on EU Customs Code.

As a matter of principle, provisions of Regulations shall not be copied or repeated in national legislation of the EU Member States. The jurisprudence of the CJEU leaves no doubts in this respect. For instance, in case 50/76 Amsterdam Bulb the CJEU held that the direct application of a EU Regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law. This means, the judges added, that "the Member States may neither adopt nor allow national organizations having legislative power to adopt any measure which would conceal the Union nature and effects of any legal provision from the persons to whom it applies".

It should be noted, however, that it does not exclude completely domestic competence. In fact, the Member States are allowed to adopt domestic legislation; however only to the extent such provisions supplement and facilitate a direct application of EU Regulations.

For example,

Regulation 261/2004/EC on compensation for flights delays and cancellations provides:

Article 16 Infringements

1. Each Member State shall designate a body responsible for the enforcement of this Regulation as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, this body shall take the measures necessary to ensure that the rights of passengers are respected. The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.

2. Without prejudice to Article 12, each passenger may complain to anybody designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.

As can be seen from this example, the Member States have to designate national authorities in charge of enforcement as well as lay down effective, proportionate and dissuasive sanctions for breach of the Regulation. It should be noted that Article 16(3) of the Regulation contains a typical clause on sanctions. This is further explained in section 2.2.4.7 of the present Guidelines.

Regulations on Common Agriculture Policy may serve as another example. Basic rules are adopted at the EU level; however, provisions dealing with technicalities are frequently created by the national authorities.

It is important to understand that, when it comes to the Member States of the EU, Regulations are not only directly applicable but their provisions may also produce the direct effect. This means that they can serve as a basis for individual claims, both against the Member States as well as individuals.

It should be emphasised that the above rules apply to the EU Member States only. EU Regulations will not apply directly in Ukraine until the date of accession to the EU, which means that in order to comply with the obligations stemming from the AA they have to be aligned with in Ukrainian law. Legal

approximation with Regulations frequently amounts to a copy-pasting exercise. In fact, this might not be enough as the Ukrainian law-makers should also take into account jurisprudence of the CJEU (see Case-Law Overview annexed to the present Guidelines, Annex III).

2.2.4.4. Directives

The second type of legal acts envisaged in Article 288 TFEU are Directives. Their legal character is very much different compared to EU Regulations. To begin with, they are binding as to the aims to be achieved and always require transposition to national law. To put it differently, unlike EU Regulations, Directives are not directly applicable. Their provisions are frequently more general, leaving the Member States some room for manoeuvre. Contrary to Regulations, Directives are tools for harmonisation (but not unification) of Member States' national legislation.

Legislative Directives are adopted by the European Parliament and Council, while the implementing and delegated Directives are adopted by the European Commission. Although theoretically a Directive can be addressed to a single Member State, the practice in this regard is scarce. As a general rule, EU Directives are addressed to all Member States. The only exception may be Directives in the Area of Freedom, Security and Justice where Denmark, Ireland and the United Kingdom have secured opt-outs. This means, that unless they express a desire to be bound by a particular Directive, it will not apply to these countries.

Directives are employed in many areas of EU law, such as: free movement of goods, free movement of persons, right of establishment and free movement of services, free movement of capital, consumer protection, employment and social protection, environment, immigration, intellectual property, public procurement and several other areas.

In some areas, the Founding Treaties limit the legislative competence of the EU institutions to Directives only. It means that the EU legislator has no discretion to choose between different types of legal acts listed in Article 288 TFEU. The only option is adoption of Directives. For instance, Article 83(2) TFEU envisages a legal basis for adoption of Directives harmonising definitions of some criminal offences and sanctions.

Directives always contain a transposition date by when the domestic legislator shall bring the domestic law in full compliance. The transposition date will vary from one Directive to another and depends on decisions made by the institution(s) adopting a particular Directive. The jurisprudence of the CJEU makes it clear that while the transposition period is given to the Member States to comply with a Directive, during that period they may maintain existing provisions. However, domestic authorities must refrain from taking any measures liable seriously to compromise the result prescribed. The CJEU ruled accordingly, *inter alia*, in case C-129/96 Inter-Environnement Wallonie ASBL. One should emphasise that this does not affect the right to transpose in phases if a Directive is fully complied with by the end of transposition period. Lack of timely transposition, as well as incomplete transposition, constitutes a breach of EU law, which in case of the Member States may lead to infringement proceedings as per Articles 258-260 TFEU.

Another crucial issue related to transposition of Directives is the choice of domestic legal acts required to give effect to a Directive. In this respect the Member States, and *mutatis mutandis* third countries approximating their laws with EU *acquis*, have some room for manoeuvre.

One or more Directives may be transposed as one package into one piece of domestic legislation or in several domestic legal acts. For instance, provisions giving effect to a Directive may be split between

an act of parliament and by-laws. Eventually, **the choice of domestic legal instruments employed for transposition of Directives is left to discretion of the Member States.** However, whatever option is chosen, it must guarantee proper transposition and must be in accordance with, for instance, rules on legal certainty and proportionality (see further section 3.4.1).

As the CJEU held in the case 48/75 Royer: "the Member States are [...] obliged to choose, within the bounds of the freedom left to them by Article 189 EEC [now Article 288 TFEU], the most appropriate forms and methods to ensure the effective functioning of the Directives, account being taken of their aims." It is important to note that in case 102/79 Commission v. Belgium the CJEU held that a mere administrative practice will not suffice. In a subsequent judgment in case C-239/85 Commission v. Belgium the CJEU confirmed that transposition by a circular will constitute a breach of the Article 288 TFEU. In the case C-144/99 Commission v. the Netherlands the CJEU held that it will not be sufficient for the purposes of effective transposition if aims of a Directive are achieved by reduction of disparities between a national law and a Directive by courts' interpretation only.

Membership of the EU requires approximation of domestic law with all Directives, unless particular Directives are temporally exempt under transitional periods agreed during the accession negotiations. Thus, it is of fundamental importance that the law-drafters in EU Member States are in compliance with EU standards governing transposition of Directives. The same applies to law-drafters in third countries (including Ukraine), which have the obligation to approximate with EU Directives.

In order to clarify the existing rules, the European Commission developed a set of recommendations elaborating the basic principles governing transposition of Directives. Since a lot of them apply *mutatis mutandis* to Ukraine they are reproduced below.

The Member States are expected to:

> 1. Take the steps, organizational or otherwise, that are necessary to deal promptly and effectively with the underlying causes of their persistent breaches of their legal obligation to transpose internal market Directives correctly and on time;
>
> 2. Examine the best practices set out in the Annex and, having regard to their national institutional traditions, adopt those practices that will, or can be expected to, lead to an improvement in the speed or quality of transposition of internal market Directives;
>
> 3. In a timely manner, publish a list of the internal market Directives which have not been fully transposed into national law on time and inform business and citizens that, notwithstanding non-transposition, they may in certain circumstances have legal rights under non-transposed Directives; this information should be made available at least on a Government website;
>
> 4. Ensure that, where draft national implementing provisions are submitted to national Parliaments, they are accompanied by a declaration that they are believed to comply with Community law and that they transpose a particular Directive in full or in part;
>
> 5. Declare to the Commission, when notifying national implementing provisions that, to the best of their knowledge, such provisions comply with Community law and declare whether they transpose the Directive concerned in full or in part;

6. Refrain from adding to national implementing legislation conditions or requirements that are not necessary to transpose the Directive concerned, where such conditions or requirements may hinder attainment of the objectives pursued by the Directive;

7. Ensure, when transposition of a Directive is included in a wider legislative exercise at national level that this does not lead to missing the deadline for transposition.

As already noted, EU legal acts may vary in degree of detail. This particularly applies to EU Directives, which - in most cases - fall under shared competences of the EU and the Member States. This means that they have to comply with the principle of subsidiarity. As explained earlier, they will regulate matters to the extent particular objectives cannot be achieved successfully by the Member States acting alone. Typical or such Directives are so-called "framework Directives", which set only benchmarks for Member States' legislation and leave a wide margin of discretion for transposition within these benchmarks set. A good example is Directive 2009/28/EC on the promotion of the use of energy from renewable sources. We also have a lot of examples of Directives harmonizing the law of the Member States in a quite technical way. This is the case, for instance, with Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

Some Directives provide for so called "minimum harmonization". They lay down a set of minimum common rules which must be implemented, but allow the national legislator to introduce higher standards or other measures to achieve intended objectives provided that they are compatible with a Directive and, generally, EU law. The result of minimum harmonization is that divergences between national laws in the field covered by the Directive continue to exist.

Yet, we also have many examples of Directives providing for full harmonization. If that is the case, the domestic legislation should accurately reflect provisions laid down in a Directive. In such case Member States may only derogate from provisions which envisage complete harmonization, if a Directive explicitly permits that (see example below in box).

Example:

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights

(2) This Directive should therefore lay down standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives whilst allowing Member States to maintain or adopt national rules in relation to certain aspects.

Article 4

Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.

2.2.4.5. Decisions

The third type of a legal act at disposal of EU legislator is Decision. In most cases Decisions have implementing or delegated character and are adopted by the European Commission. However, Decisions of the Council or the European Parliament and Council are also known in everyday practice of the European Union. As per Article 288 TFEU, decisions are individual acts usually addressed to a particular Member State or an individual, in most cases one or several business undertakings, in order to address a specific legal issue. It should be emphasised that EU decisions applicable *erga omnes* (towards all) are not unheard of.

A good example is European Commission Decision 2000/532/EC on the list of waste pursuant to Directive 2008/98/EC of the European Parliament and of the Council. This Decision establishes a uniform list of waste types, directly applicable in all Member States.

A good example of individual Decisions of the European Commission addressed to a particular Member State are decisions adopted in the state aid area. They may deal with approval of notified programmes of aid or recovery of illegally granted aid. Decision of the European Commission 2017/1283 on recovery of state aid granted to Apple may serve as exemplification.

As already mentioned, Decisions of the European Commission may be also addressed to undertakings. This is very frequently the case in EU competition law, which is based, *inter alia*, on public enforcement by the European Commission. It can, for instance, impose penalties on businesses for creation of cartels (which constitutes breach of Article 101 TFEU) or abuse of dominant position (Article 102 TFEU). A good example of the latter was Decision of the European Commission imposing a penalty for breach of Article 102 TFEU on Microsoft. Furthermore, decisions are also used by the European Commission in proceedings concerning approval of mergers as per Regulation 139/2004/EC. A good example is the Decision blocking a merger between Deutsche Börse and London Stock Exchange.

Bearing in mind the nature of EU Decisions it is usually argued that they resemble national administrative Decisions. Although it is largely true – as mentioned above - some Decisions are applicable *erga omnes* and may require national implementing measures. The same goes for the Decisions of the European Commission requesting recovery of the state aid, which had been granted contrary to Article 107 FEU Treaty. They are addressed to Member States which then must require repayment by the beneficiaries.

In some rare cases Decisions need to be transposed in a way similar to Directives. Lack of implementation may lead to the infraction procedure based on Articles 258, 259 or 260 TFEU. This is the case if, for instance, a Member State fails to recover illegally granted aid. A good example is case C-496/09 Commission v. Italy where the CJEU ruled that Italy had to pay the penalty of € 30 million of a lump sum and a periodical payment every six months (€ 30 million multiplied by percentage of unlawful aid that has not been recovered).

2.2.4.6. Structure of EU legal acts

Having analysed all three major types of EU secondary legislation it is worth considering the law drafting technique employed by the EU, in particular the way the legal acts are structured. It should be noted that all Regulations, Directives and Decisions follow the same pattern. For the purposes of these Guidelines we will use as a point of reference Regulation 261/2004 on compensation for flight delays and cancellations.

Each piece of EU legislation, whether it is a Regulation or a Directive (or any other act) has a number comprising the number itself and the year of adoption. Both are essential to conduct searches in EU databases. Right under the title readers will frequently see a phrase: "Text with EEA relevance". This means that a particular piece of EU legislation applies not only in the European Union but also to the European Economic Area - EFTA countries (Norway, Iceland and Liechtenstein). Furthermore, an EU legal act may also apply to Switzerland. Should that happen, readers will find right under the title of a legal act a phrase: "Text with Swiss relevance".

The title of a legal act is followed by a preamble. **Although preambles do not have to be included in the Ukrainian laws approximating with EU *acquis*,** it is worth paying attention to them as some recitals may be useful for shaping of domestic provisions. Preambles play numerous functions but, as a matter of principle, they pinpoint the legal basis in the Treaty, they aim to explain the background of a particular legal act, the meaning of its provisions and reasons behind the legislation. They are frequently used for interpretation of single provisions by the CJEU in its case-law.

As explained earlier (see above, section 2.1), the EU operates under the principle of attributed powers; hence it can only legislate in the areas it is allowed to in the Founding Treaties. A reference to a legal basis indicates which provision of the Founding Treaties served as an anchor for the EU legislator. For instance, Regulation 261/2004 on compensation for flight delays and cancellations, is based on Article 80(2) EC Treaty (now Article 100 (2) TFEU), which deals with the EU competence to adopt secondary legislation in the area of sea and air transport. Besides a reference to the legal basis, the opening paragraphs of the preamble also refer to proposals for that particular piece of legislation (prepared by the European Commission) as well as a legislative procedure that was followed (for instance the ordinary legislative procedure whereby the legal acts are adopted by the European Parliament and the Council).

The substantive part of a preamble starts with a brief explanation of reasons behind particular piece of legislation and, if it exists, why the previous legal framework was no longer fit for purpose. For instance, in Regulation 261/2004 on compensation for flight delays and cancellations, the EU law-maker specified in recital 4 of the Preamble that the Union shall raise the standards of protection to strengthen the rights of passengers to ensure that air carriers operate under harmonised conditions in a liberalised market. In recital 5 the EU legislator explained further why the new Regulation will apply not only to scheduled but also non-scheduled flights. As of recital 9 the rights laid down in the main body of the Regulation are elaborated.

One of the reasons why Preambles need to be taken into account when Ukrainian authorities proceed with approximation is that they - every now and then - contain legislative motivations behind rules in the main body text of the act or ideas, which are not thoroughly regulated or vividly expressed in the main body of a legal act. Although this may not be considered as good law drafting technique such is the reality when it comes to EU law-making.

Example

In case of Regulation 261/2004/EC we will find a good example in recital 15, which elaborates the term "extraordinary circumstances". Alas, it is not included in the list of statutory definitions laid down in Article 2 of the Regulation. This is one of most fundamental issues that has led to a lot of litigation in national courts. This term is linked to Article 5(3) of Regulation 261/2004/EC that exonerates the liability of air carriers should a flight cancellation be caused by such extraordinary circumstances. One can immediately see that such vaguely formulated provision may be a source of problems and quite diverse interpretations. Consumers will prefer a very narrow reading, while airlines will claim extraordinary circumstances whenever possible.

The main body of EU legal acts is most commonly divided into chapters and sections. The rule of thumb is, the longer and the more comprehensive a legal act is, the more internal divisions of the text are provided. The main body of a legal act is sometimes followed by detailed complementary rules and standards and the like laid down in annexes.

In their main body EU legal acts traditionally **start with a provision outlining their substantive aim** and sometimes also legal purpose (for difference see below, section 3.4.3). This is important particularly in relation to Regulations, though it is also quite crucial for Directives and other EU binding legal acts.

Legal acts comprising EU secondary legislation most often contain **statutory definitions**. They are of fundamental importance for uniform interpretation and application of EU legal acts and should be taken on board when Ukrainian approximating provisions are drafted. As a matter of fact, such definitions can be reproduced verbatim, unless they apply to the Member States only.

Definitions may have to be adjusted to meet the requirements of Ukrainian law. Furthermore, if the same definition is used in several acts of EU law it may be so also in Ukrainian law.

Examples

For instance, the definition of package holidays, laid down in Article 2 (e) of Regulation 261/2004/EC contains a reference to *Directive 90/314/EEC on package holidays*. In case of Ukraine, this can be replaced with a reference to relevant domestic law. It should be noted that further definitions may be provided in national law. For instance, the term "extraordinary circumstances", which - as explained above - is clarified in the Preamble to Regulation 261/2004/EC can be included in the list provided in the Ukrainian law.

Furthermore, some of the definitions may be re-written to take into account the jurisprudence of the CJEU. This could apply to the term "denied boarding", which is defined in Article 2(j) of Regulation 261/2004/EC, and has been subject of Court's jurisprudence (for more advice on the drafting of definitions, see below, section 3.4.3.).

In case of Regulation 261/2004/EC the statutory definitions are followed by more detailed provision outlining the scope of legislation. Article 3 clarifies, for instance, that the Regulation in question applies to passengers who depart or arrive at an airport located in one of the Member States of the EU. Article 3(3) provides that it won't apply to passengers who fly free of charge, yet, at the same time, it will apply to those passengers who purchased their tickets with frequent flyer miles. Article 3(6) attends to relationship between this Regulation and *Directive 90/314/EC on package travel*. To cut story short, one does not exclude the other (Regulation 261/2004/EC does not affect the rights laid down in Directive 90/314/EC).

The substantive part of EU secondary legislation, naturally, depends on the issues and details regulated. The closing parts of EU secondary legislation comprise generic final provisions dealing with repeal/amendments to existing legal acts, clauses on entry into force and – in case of Directives – their implementation date.

2.2.4.7. Remedies and sanctions

In general terms, EU law regulates substantive issues only and leaves all enforcement aspects to the Member States. In other words, claims based on E U law should be enforced at the domestic level in

accordance with the provisions of national procedural law. This is usually referred to as the principle of procedural autonomy of the Member States. Most of the existing rules stem from the case law of the CJEU, which took as the starting point the principle of loyal co-operation laid down in Article 4(3) TEU.

However, the Treaty of Lisbon added also a paragraph to what is now Article 19 TEU, which is of crucial importance. It reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." As a general rule EU legal acts contain only general clauses saying that the Member States have an obligation to grant adequate remedies in domestic implementing legislation.

An example is provided below. It includes clauses on enforcement and penalties which can be found with identical text in other EU Directives and sectors as well.

Example:

Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements

Article 24 Enforcement

Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.

Article 25 Penalties

Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.

In addition, the CJEU has set some general standards for remedies. Case-law on principle of the state liability may serve as the excellent example of the latter (see further Annex to these Guidelines).

One important example of legislation dealing with the remedies is Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. Another example is Directive 2004/48 of the EP and the Council of 29 April on the enforcement of intellectual property rights or Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage or Directive 2008/99/EC of the EP and the Council of 19 November 2008 on the protection of the environment through criminal law, which requires the Member States to establish **effective, proportionate and dissuasive legal remedies** in case of violations for natural persons and – in specific cases – even legal persons.

It is up to Ukraine to decide to a certain degree what kind of sanctions should be introduced in each case. They can be of administrative or penal character. **They must, however, be similar to the sanctions securing enforcement of domestic law applicable in comparable situations**. When drafting domestic rules, it may be worth comparing examples from national rules in the Member States. It would allow learning from best practices as well as figure out which solutions should be avoided.

2.2.4.8. Publication of EU secondary legislation

EU secondary legislation is published in the Official Journal of the European Union, which is available on internet at: http://eur-lex.europa.eu. It is available and equally authentic in all official languages of the European Union. The content of Official Journals is the same in all those languages. To put it differently, a particular Regulation or Directive will be published in all languages in the same edition of the Official Journal. Furthermore, since 1 July 2013, the electronic edition of the Official Journal (e-OJ) is authentic and produces legal effects. Paper versions of the OJs are published only in case of an unforeseen and exceptional disruption of the Publications Office's IT systems. In such cases paper versions have legal value.

As per Article 297 TFEU, publication of all Regulations and Directives is compulsory. The same applies to international treaties concluded by the EU with third countries. It should be noted that failure to publish a legal act in the Official Journal makes it unenforceable *vis-à-vis* individuals. This is the conclusion stemming from the judgment of the CJEU in case C-345/06 Gottfried Heinrich.

Official Journal of the EU is published in two series, that is series L and C. Series L comprises the most important legislation, while series C is dedicated to all other legal acts and documents that need to be published. The Manual on databases is annexed to the present Guidelines in Annex V) offers insights how to browse the Official Journal and, in more general terms, how to make good use of the EUR-Lex database.

2.2.5. Case-law of the Court of Justice of the EU

Jurisprudence of the Court of Justice (CJEU) of the EU is of fundamental importance in the EU legal order and, thus, also for the third countries engaged in the law approximation exercise. The main types of judgments are **preliminary rulings** (Article 267 TFEU) and **infringement judgments** (Articles 258 and 260 TFEU). The first category comprises references from national courts on interpretation of EU legal acts and validity of EU secondary legislation. The second include judgments declaring the Member States to be in compliance or in breach of EU law. Both types of judgments may prove to be very useful for Ukrainian law-makers.

Judgments of CJEU play an extremely important role in the implementation and everyday application of EU law. Many fundamental principles of EU law, including the doctrines governing its application at domestic level (supremacy, direct effect and state liability) have been developed in case-law. Some judgments of the Court significantly develop EU law provisions, while others clarify the way they should be applied or implemented. Judgments of the Court clarify when the Member States are in breach of EU and how it should be interpreted and applied at the national level.

The legal status of principles laid down in well-established jurisprudence of the CJEU is more reminiscent of EU primary law than secondary law. Taking the jurisprudence of the CJEU into account is an obligation of national legislators drafting legal acts implementing EU law. In case of some areas covered by the AA, Ukraine is explicitly required to take the case-law of the CJEU into account in the process of legal approximation. Apart from the already mentioned provisions in Annex XVII to the AA, it is worth referring to, for instance, Article 153 AA. It is reproduced below.

Example:

Article 153 of Association Agreement

1. Ukraine shall ensure that its existing and future legislation on public procurement will be gradually made compatible with the EU public procurement *acquis*.

2. Legislative approximation shall be carried out in consecutive phases as set out in Annex (...). In this process, 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.

Annex XVII (regulatory approximation)
Article 6. Interpretation

Insofar as the provisions of this Annex and the applicable provisions specified in the Appendices are identical in substance to corresponding rules of the Treaty on the Functioning of the European Union and to acts adopted pursuant thereto, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Union.

Review of CJEU case-law related to areas covered by the EU-Ukraine AA is annexed to these Guidelines. It is preceded by an introductory chapter explaining the composition of the Court as well as types of procedures and judgments. CJEU case-law is available in the EU official databases, including the website of the Court of Justice (http://curia.europa.eu) as well as EUR-Lex website (http://eur-lex.europa.eu).

2.2.6. General principles of EU law

General principles of EU law have their roots in both national legal orders of the member states and in European Union law. Some general principles are provided for in the EU Founding Treaties themselves (e.g. the principle of proportionality and the principle of non-discrimination on the basis of nationality), some others result from the jurisprudence of the CJEU (e.g. the principle of liability of a member state for infringement of EU law and the principle of non-discrimination on grounds of age).

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, also constitute general principles of the Union's law.

2.2.7. Soft law

Soft law instruments are non-binding measures, but they may influence interpretation of EU law and shall be taken due account of when implementing EU legislation. EU institutions (mainly the European Commission and the Council) adapt various types of soft law measures, among them **recommendations, opinions, communications, guidelines, frameworks and codes of conduct**. Article 288 TFEU only mentions two basic types of soft law that is opinions and recommendations. Some recommendations and guidelines are designed to distribute and promote EU Member States best practices on EU law implementation.

The CJEU in Case C-322/88 Grimaldi held that recommendations cannot be ignored by domestic

institutions interpreting EU law. Soft law instruments are used not only for interpretation of biding EU legislation but also in the areas where the European Union has no competence to adopt binding legislation or when a proposal for binding legislation was not approved by the European Parliament and the Council (or the Council if, in a given area, special legislative procedures apply).

2.3. Multilingual character of EU law

The EU legal order is characterised by its multilingualism. There are 24 official languages of the EU and all legal acts as well as jurisprudence of the CJEU (with a few exceptions; English and French are working languages) are published in all official languages and equally authentic. This means that, at least in theory, there should be no differences between different legal acts or judgments. Alas, this is not always the case and this is for several reasons. Firstly, the language of law differs from one language to another. French and German are traditionally known for their precision, when it comes to law drafting. English, from that point of view, may not be the first choice.

Secondly, EU law sometimes employs words or even concepts which are not known to all legal orders of the EU Member States. This may be the case in the areas where the legal tradition goes hundreds of years back. Selected EU consumer protection Directives may be a good example as they penetrate national civil laws dating back to XVIII century (France and Germany being the prime examples).

Thirdly, EU legislation just like national law is frequently a product of political compromise found at the last stage of the legislative process. This, sadly, often translates into poor law-making standards, inclusion of ambiguous terms, overuse of preambles to Regulations and Directives or approval of optional provisions. At the end of the day it may result in differences between various language versions of approved legal acts.

Fourthly, some of discrepancies and inconsistencies may result from simple human errors done either at the law-making or at the translation stage. Often they are corrected by so-called corrigenda. A good example is a corrigendum to the already mentioned Directive 2006/112/EC on VAT.

The above-mentioned phenomenon has consequences for the law approximation exercise as well as translation of EU *acquis* into Ukrainian. Although it is tempting to rely only on one language version of an EU Regulation or Directive, it is highly recommended to engage into a comparative analysis of an EU legal act. Ideally, this should involve at least English, French and German versions.

3. Approximation process

In this section, we look at a number of crucial factors and processes, which facilitate high quality approximation of domestic law with EU *acquis*. In the sections that follow the readers are given an opportunity to familiarise themselves with best practices and recommendations. A detailed description of rules applicable in Ukraine, including the models of Tables of Compliance (ToC) and compliance statements, is provided in Annex-II of the Guidelines. The material below is organised in such a way as to reflect the logical sequence of steps that need to be taken by those involved in law approximation. It is notable that it is not limited to law-drafting itself, as many preparatory steps are required before drafting of new legislation starts.

3.1. Planning of law approximation

As mentioned earlier, one of the most important aspects of law approximation is its planning. This can be done in general horizontal plans as well as in sectoral planning documents. Furthermore, such documents may comprise short-term priorities covering the following year or mid-term plans, which look further into the future. It should be emphasised that when it comes to planning documents, there is no one-size-fits all approach. Each third country, which engages in law approximation, develops its own model for horizontal and sectoral plans.

The planning process is a complex exercise determined by several factors. To begin with, the deadlines laid down in the EU-Ukraine AA, or accompanying bilateral documents and sectoral agreements, are of fundamental importance. They precisely define when Ukraine is expected to have all relevant national measures in place. If particular pieces of EU secondary legislation are amended / replaced at the EU level, but not yet incorporated into the AA, the deadlines are set by the Ukrainian authorities and can be subsequently negotiated with the EU.

It is crucial for compliance with the Ukraine's international obligations to comply with these deadlines, otherwise the credibility of the Government may be at stake (particularly if delays become a matter of habit). Furthermore, even if deadlines for approximation of Ukrainian laws with EU legislation offer several years of leeway, it should not be treated in a relaxed fashion. Such longer deadlines are very likely to serve a purpose: to allow the Ukrainian authorities and the business community to prepare for new legislation. They may also take into account the amount of preparatory work that is required to fully comply with such obligations. It means that such pieces of EU *acquis* should not be shelved for later but attended to at the stage when still ample time is available for the legal drafting effort.

Planning of law approximation is a task of the Government and, it should be emphasised, it is a collective effort. It is crucial that it is based on a clear allocation of competences between the line ministries and the central co-ordinating unit. It is essential that all pieces of EU *acquis* that require approximation as per EU-Ukraine Association Agreement need to be allocated to line ministries which, from that moment on, take the lead and responsibility. This requires a lot of time and effort.

There is a fundamental difference between short and mid-term planning. The advantage of planning on short-term basis, that is, for the following year, is that the proximity permits a necessary

level of detail, both in terms of contents and budgetary appropriations. At the same time, however, it does not take into account the complexities that underpin the law approximation exercise. The AA envisages hundreds EU legal acts that Ukraine has the obligation to approximate its legal order with. Depending on the area of EU law, they vary in scope, level of detail and financial implications they may have for the Ukrainian economy.

In many cases, preparation of national rules, their drafting, regulatory impact assessment and adoption may take months, if not years. Furthermore, their preparation should be preceded by in-depth studies of consequences for the Ukrainian economy and, in particular, the local business community. Further complexities may arise when decisions are made on the allocation of responsibilities among the state institutions for the enforcement of newly adopted rules. When those factors are considered, the annual mode of planning proves not to be fit for purpose and we need to have a plan comprising both, short and mid-term priorities. This is exactly why multi-annual planning of legal approximation is advised. Further details on current system of legal approximation planning are provided in Annex I to the present Guidelines.

Planning of law approximation requires a lot of preliminary work. Before any plans are made, it is essential to identify clearly which piece of EU *acquis* Ukraine is going to approximate its laws with, any additional *acquis* that needs to be considered (for instance soft-law and jurisprudence of the Court of Justice) and relevant domestic law. For that purpose, inventories of relevant EU and Ukrainian laws and policy documents should be prepared.

3.1.1. Inventory of EU acquis

As already alluded to, law approximation is a complex, time consuming and multifaceted exercise. Bearing this in mind, it is essential to do a lot of preparatory work before the actual planning and law drafting begins. On the one hand, the Ukrainian civil servants are governed by the deadlines stemming from the AA and national road maps/approximation plans prepared by the Ukrainian authorities. On the other hand, the approximation process should not be done hastily but must be based on sound, implementable legal concepts. So, the question is how to balance the pressure to proceed in accordance with predetermined deadlines but, at the same time, engage in approximation as robustly as possible.

It is not advisable to pick a piece of EU secondary legislation – which is pencilled for law approximation effort – and read it out of context. For proper interpretation and analysis of relevant EU rules it is essential to take a more holistic view and to study several types of documents that will shed the light on the exact meaning of EU legislation at stake.

It should be noted that EU law is interpreted in a variety of ways developed by the CJEU. Although literal interpretation is frequently employed, the EU Court of Justice and the national courts are often engaged in axiological, teleological and systemic interpretation of EU law. For instance, the CJEU will usually treat as the point of departure the broad aims of Founding Treaties and competence provisions laid down therein. It will do so even when interpreting a very technical piece of secondary law.

Furthermore, it will venture into preparatory documents, reports on implementation and many other accompanying documents. Even though Ukraine is not a Member State, hence the aims behind approximated rules may be different to those of EU legislation, the law-makers should consider the origins and *raison d'être* of EU legislation they aim to comply with. Thus, it is essential to know how to navigate this labyrinth.

As a starting point, it is worth preparing two inventories: of existing EU *acquis* and of existing Ukrainian legislation.

There is no one-size-fits-all approach as to how such inventories should look like. The example of inventory of EU *acquis* presented below may serve as an inspiration.

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation	
EU-Ukraine AA	Article XXX Ukraine will carry out approximation of its legislation to the EU acts and international instruments referred to in Annex XXX to this Agreement in accordance with the provisions of that Annex. Deadline for Directive 2000/78/EC: within three years of the entry into force of the Agreement
Proposals	Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, COM (1999) 565
Reports	1) Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - The application of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, COM(2008) 225 final 2) Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), SWD(2014) 5 final
Selection of case-law	- C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV, ECLI:EU:C:2017:203 - C-188/15 Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA, ECLI:EU:C:2017:204 - C-548/15 J.J. de Lange v Staatssecretaris van Financiën, ECLI:EU:C:2016:850 - C-539/15 Daniel Bowman v Pensionsversicherungsanstalt, ECLI:EU:C:2016:977 - C-443/15 David L. Parris v Trinity College Dublin and Others, ECLI:EU:C:2016:897 - C-423/15 Nils-Johannes Kratzer v R+V Allgemeine Versicherung AG, ECLI:EU:C:2016:604 - C-406/15 Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control, ECLI:EU:C:2017:198 - C-395/15 Mohamed Daouidi v Bootes Plus SL and Others, ECLI:EU:C:2016:917 - C-258/15 Gorka Salaberria Sorondo v Academia Vasca de Policía y Emergencias, ECLI:EU:C:2016:873 - C-159/15 Franz Lesar v Beim Vorstand der Telekom Austria AG eingerichtetes Personalamt, ECLI:EU:C:2016:451 - C-122/15 Proceedings brought by C, ECLI:EU:C:2016:391 - C-441/14 Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen, ECLI:EU:C:2016:278 - C-432/14 O v Bio Philippe Auguste SARL, ECLI:EU:C:2015:643 - C-530/13 Leopold Schmitzer v Bundesministerin für Inneres, ECLI:EU:C:2014:2359 - C-529/13 Georg Felber v Bundesministerin für Unterricht, Kunst und Kultur, ECLI:EU:C:2015:20 - C-515/13 Ingeniørforeningen i Danmark v Tekniq, ECLI:EU:C:2015:115 - C-417/13 ÖBB Personenverkehr AG v Gotthard Starjakob, ECLI:EU:C:2015:38 - C-416/13 Mario Vital Pérez v Ayuntamiento de Oviedo, ECLI:EU:C:2014:2371 - C-354/13 Fag og Arbejde (FOA) v Kommunernes Landsforening (KL), ECLI:EU:C:2014:2463 - C-20/13 Daniel Unland v Land Berlin, ECLI:EU:C:2015:561 - Joined cases C-501/12 to C-506/12, C-540/12 and C-541/12 Thomas Specht (C-501/12), Jens Schombera (C-502/12), Alexander Wieland (C-503/12), Uwe Schönefeld (C-504/12), Antje Wilke (C-505/12) and Gerd Schini (C-506/12) v Land Berlin and Rena Schmeel (C-540/12) and Ralf Schuster (C-541/12) v Bundesrepublik Deutschland, ECLI:EU:C:2014:2005 - C-492/12 Siegfried Pohl v ÖBB Infrastruktur AG., ECLI:EU:C:2014:12 - C-363/12 Z. v A Government department and The Board of management of a community school, ECLI:EU:C:2014:159 - C-286/12 European Commission v Hungary, ECLI:EU:C:2012:687 - C-267/12 Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, ECLI:EU:C:2013:823 - C-81/12 Asociaţia ACCEPT v Consiliul Naţional pentru Combaterea Discriminării, ECLI:EU:C:2013:275

In such a simple table, all relevant documents and jurisprudence of the CJEU are grouped in one place. This considerably eases the work of a person conducting a compliance check. An inventory may be easily compiled by using EUR-Lex database. A tailor-made Manual on how to navigate it is provided in Annex V to the present Guidelines. Furthermore, a list of jurisprudence that may be of relevance is also provided in Annex III.

Once an inventory is compiled it is essential to familiarize oneself with the relevant information provided there. It will serve as background information facilitating a robust compliance check of proposed legislation as to its compliance with a given piece of EU legislation.

3.1.2. Inventory Ukrainian policy documents and legislation

As already mentioned, it is also worth preparing an inventory of relevant Ukrainian policy documents and legislation, as it would make preparation of legislative gap assessment way easier. It may take a simple shape as suggested below.

Inventory of Ukrainian policy documents and legislation relevant for approximation with Council Directive 2000/78/EC establishing a general framework for equal treatment	
Policy documents	*In this section a list of relevant policy documents is provided. This includes, inter alia, sectoral action plans, roadmaps and strategies.*
Acts of Parliament	*In this section, a list of acts of parliament is provided.*
By-laws	*In this section, a list of by-laws is provided.*
Other relevant sources	*Any other sources that may be of relevance should be included in this section.*

Once compiled, that information would give a full picture of the situation in Ukraine, both in terms of the policy documents as well as relevant legislation. It is absolutely essential to conduct a gap analysis, as further elaborated on in the next section.

3.1.3. Gap analysis

With inventories of EU *acquis* and relevant Ukrainian legislation and policy framework in place it is time to engage in a basic gap analysis. It is essential as it allows an assessment, even if at rather general level, of what exactly needs to be done to approximate with a given piece of EU *acquis* and how to do it. Furthermore, it is fundamental to make a general assessment how much legislative work will be required to bring the Ukrainian law in line with EU law.

A number of factors will have to be taken into account at such an early stage:

- is there any Ukrainian policy framework in the given area, if so, is it fit for purpose?
- is there any Ukraine legislation in a given area of law?
- can it be tweaked to make it compatible with EU *acquis* or a major overhaul is necessary to comply with the Association Agreement?
- what kind of a domestic legal act will be necessary?
- does this piece of EU legislation contain cross-cutting issues that would require involvement of more than one line ministry?

- what are the likely implications for the legal system and the Ukrainian economy and society of the new legislation?
- which state institutions should be empowered to enforce newly prepared legislation?
- what is the experience of the EU Member States in compliance with a particular EU Regulation or Directive?

In order to answer all those questions, it is crucial to use the inventories of EU and Ukrainian policy documents as well as relevant legislation prepared as per suggestions made above. In case of EU law, it is also essential to compile a list of jurisprudence of the CJEU. Once this is done a basic gap assessment is crucial as its results would determine the scope of work required.

1. Identification of relevant short-term and mid-term obligations of Ukraine under the EU-Ukraine Association Agreement, including potential decisions of Association bodies amending them	As the first step the personnel involved in planning of law approximation should verify the existing obligations under the AA. This should cover not only the AA itself but also relevant decisions of the Association Council, Association Committee and the text of Association Agenda. Matters to be verified include: - whether a piece of EU legislation listed in the AA (or any other relevant instrument) is still in force, - should the listed legal act of the EU be repealed, or subject to a pending revision, a verification is required if: i. as per AA the option for dynamic approximation and revision of the AA or any other instrument has been chosen, ii. a decision was made to proceed with approximation with the old piece of legislation - scope of the obligation to approximate (entire EU legal act or only parts of it), - type of the obligation to approximate: the best endeavours clause or a straight-forward obligation to approximate, - deadline for approximation and, consequentially, whether a particular piece of EU legislation should be pencilled in as a short-term or mid-term priority.
2. Identification of other relevant obligations of Ukraine in the field of European Integration	Furthermore, it should be also verified if other bilateral or multilateral agreements between the EU and Ukraine (alone or with other countries) require approximation with EU law. This should extend to, for example, - Energy Community Treaty, - Agreements on Civil Aviation (bilateral or multilateral), - WTO obligations. These obligations should be also taken into account when short and mid-term planning is conducted.
3. Identification of all relevant Ukrainian legal acts and draft legal acts, including bylaws	Once we identify all obligations resting on the shoulders of the Ukrainian authorities as per the AA (or any other acts listed above) it is fitting to proceed with identification and collection of all relevant domestic rules. This is crucial in order to make an early assessment of compatibility of existing Ukrainian legislation with EU *acquis* and to prepare the ToCs.

Checklist for staff involved in planning of law approximation	
Step	**Comments, examples**
4. Preparation of Table of Compliance (ToC)	At the stage of planning it is fitting to prepare the first draft ToC. This is for a number of reasons: - it allows an assessment if domestic rules are already compatible, at least partly, with EU *acquis* (for instance they may have been already approximated with under the PCA or following voluntary decision of Ukrainian authorities), - it facilitates a general assessment as to how much work will be needed in order to fully approximate Ukrainian law with EU *acquis*, - based on the above, it allows to plan the approximation and, should the deadline in the AA be fast approaching, it gives the ground for a fast track treatment of a particular piece of legislation. In addition to the table required as per Ukrainian legislation (see earlier in this Methodology) it may be worth to prepare a provision-by-provision table.
5. Comparison of Ukrainian provisions and relevant provisions contained in an EU legal act	Once a ToC is put together it is time to make an early assessment of compatibility. This should be done on provision-by-provision basis.
6. Planning of approximation	Based on the conducted analysis, planning of approximation should be made. Depending on the area covered, this requires a contribution to relevant plan, road map or strategy. It is essential to ensure horizontal consistency across different policy documents and plans of action.

3.2. Development of policy framework

Before any legal drafting is initiated, the focus of work should be on the development of a realistic and consistent policy framework serving as political basis for legal approximation.

3.2.1. Linkage between legal approximation and policy formulation

Legal approximation does not take place in a vacuum. Government is tasked with organizing and managing policy sectors and the delivery of public tasks, goods and services within those policy sectors. Government organizes various public entities such as ministries, agencies, regional government institutions etc. as well as occasionally through special arrangements private companies and civil society organizations to conduct specific activities needed to deliver these public tasks, goods and services.

The decisions on how to organize the delivery of public services and goods, which organization delivers them, how to fund them and even what services and goods to provide are part of what is known as the policy framework for a particular sector. The policy framework is the combination of government priorities, strategies, decisions, established practices and actual activities of various organizations. Ministries, and within the ministry, specific departments, as well in some cases government agencies, are tasked with the management and organization of their assigned policy sector and thus to maintain and develop the policy framework of their assigned policy sector.

Part of such policy frameworks will have been codified in the specific legal frameworks that

apply to particular policy sector. In addition, other non-sector specific laws will apply, for example, laws regarding the behaviour of government entities (e.g. administrative procedure code) or laws regarding the behaviour of non-government market entities (e.g. competition law). These specific legal frameworks as well as other relevant laws and regulations form the backbone for the organization of the government's activities in a particular policy sector.

The implementation of EU *acquis* will have a significant impact on what public services and goods are delivered in what manner and to what extent and by which entities. In other words, the requirement of EU *acquis* implementation will have very significant impact on the policy frameworks related to the sectors listed in the AA. Government will have to rethink how it can organize and manage such sectors in order to deliver public services and goods in accordance with the requirements of the EU *acquis*.

It is for this reason that **legal approximation should ideally be done within the context of a wider review of the policy framework of that particular policy sector**. This will allow government to formulate an integrated and coherent policy framework for the sector based both on the requirements of the EU *acquis* and on needed supporting measures and policies to change the reality in the policy sector to implement the EU *acquis*. This updated policy framework will be, where needed, codified in the new legal framework that reflects both legal approximation needs as well as the legal and regulatory needs for government to deliver public tasks, goods and services effectively in line with the updated policy framework.

3.2.2. Typical policy formulation process and the role of legal professionals in this process

The line ministries are responsible for the development and/or updating of the policy frameworks for the sectors under their authority. This policy framework development work is normally carried out by the civil servants of the relevant directorate (department, unit), who are experts in the organization and management of that particular policy sector. This role may be shared with the directorates (departments, units) responsible for strategic planning, policy coordination and European integration.

Typically, the policy development process will contain a number of steps, which can be briefly summarized as follows:

- Problem analysis;
- Policy option generation;
- Consultation (stakeholders within and outside government, including use of green papers);
- Preparation of policy proposals (including white papers);
- Policy proposal approval;
- Implementation planning.

During this process, it is useful for legal staff from the ministry's legal department (directorate, unit) to cooperate with the civil servants responsible for policy development at an early stage as the legal framework will have a big impact on available policy options and the choice for policy instruments. It is furthermore of importance that the policy developers are fully aware of the legal approximation needs early on as this will also impact on available policy options and instruments.

Finally, the need for additional legislative and regulatory change for government be able to carry

out needed supporting policies and activities to implement the updated policy framework, should be known to the legal staff involved in the legal approximation and reform efforts.

While conducting policy framework reviews and reforms, both the policy developers and the legal staff will have to ensure to actively engage with respective experts and civil service staff from other ministries, agencies and regional governments etc. This is to ensure that any cross-cutting policy issues are properly analysed and that policy options developed to form integrated and coherent policy frameworks with seamless cooperation between government entities delivering cross-cutting public tasks, goods and services. This would also have to take place with regards to the legal framework for such cross-cutting issues and policy sectors.

In order to increase the quality of both the policy framework and the legal framework development activities, it is customary to conduct regulatory and other impact assessments if needed and justified. Guidelines for conducting an impact assessment can be found for example in the European Commission Better Regulation Guidelines (Brussels, 7.7.2017 (SWD (2017) 350).

Such quality enhancing activities can be very beneficial, but they do need significant time to be conducted properly. The planning of the overall process for policy and legal framework reform will have to accommodate such time requirements.

It should be noticed that policy formulation is a comprehensive area of public policy making not covered by these guidelines. The above introduction to this topic has been presented as an important context and optimally preceding stage of legal approximation effort.

3.3. How to prepare for drafting stage of law approximation

Leaving the planning behind, it is essential to discuss how to put the law approximation itself into motion. The preparatory stage should start with analysis of the legal act, or if that is applicable, a set of EU legal acts. Furthermore, other documents compiled in the inventory of EU *acquis* should be taken on board. Their importance is elaborated in turn.

3.3.1. Proposals and explanatory memoranda

In the Manual on EU legal databases, which is annexed to the present Guidelines, the readers will find instructions how to find EU legal acts in the Official Journal and in the EUR-Lex database. Furthermore, the ways of finding consolidated versions of EU secondary legislation are also explained. However, this is where the journey only begins. In order to verify the aims of particular piece of legislation, it is important to reach for preliminary documents of the European Commission, published when a proposal for the legal act in question was tabled.

To begin with, all proposals for EU secondary legislation are made public when the legislative process is launched. Furthermore, comprehensive and/or controversial reforms of EU secondary legislation are often preceded by public consultations. Should that be desired, the European Commission would publish white papers or green papers outlining the aims of a given reform, its main objectives and proposed solutions. Analysis of such consultation documents may be a very useful starting point for the law approximation exercise in a given field. Furthermore, particular pieces of legislation may be proposed in the context of broader reforms aiming at strengthening of the internal market of the EU.

Example:

A good **example** is Commission's strategic paper Single Market Act: Twelve levers to boost growth and strengthen confidence "Working together to create new growth".

In implementation of Single Market Act, the EU adopted, *inter alia*, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. For its interpretation, the Commissions policy papers on the Single Market Act will be of paramount importance as they give the systemic background to this legislation.

When it comes to EU legislative acts, the decision-making process properly starts with publication of a proposal for Regulation / Directive / Decision. In most cases the package will comprise several documents, not only a proposal itself. One can expect an explanatory memorandum as well as regulatory impact assessment. All will be made public and published in COM (Commission documents for the other institutions) and SWD (Staff and joint staff working documents) series. Readers are encouraged to seek guidance as how to access such documents, which is provided in the Manual on Databases (4.4) annexed to the present Guidelines.

The explanatory memorandums are a very useful read as they:

- indicate general purpose and detailed goals of the EU legal act,
- indicate the legal bases and the competence of the Union for the adoption of the act,
- describe reasons for legislative activity at the EU level in said area (problems that are to be solved and why they cannot be solved well enough by the Member States themselves – so called subsidiarity principle test),
- summarize results of earlier EU laws, if there were any and experience of the Member States with their implementation,
- summarize the process leading to the adoption of the draft legal act (European Commission green and white papers, its consultations with stakeholders and experts, etc.).

The explanatory memoranda are always attached to proposals for EU secondary legislation. As much as the explanatory memoranda are useful, one word of warning is fitting at this stage. They relate to drafts and not to final versions of Regulations, Directives and Decisions. One should bear in mind that particular provisions contained in the proposals for legislation, and thus covered in the explanatory memoranda, may be significantly amended during the EU legislative process.

Furthermore, it is a standard practice of the European Commission to revisit the original proposals and explanatory memoranda when the position of the European Parliament on a given proposal becomes clear. In such case the European Commission is likely to publish a second proposal incorporating at least some of the proposals made by the European Parliament.

3.3.2. Reports on implementation

The European Commission is frequently obliged by the EU secondary legislation to present reports on implementation of a given Regulation, Directive or Decision. These reports are a very useful read as they shed the light on the way the Member States handled the transposition and application of EU rules (including experience in direct application of EU Regulations). Such reports are frequently split into two documents: a short summary report published in the COM series and a more comprehensive staff working document released in the SWD series.

Both may give Ukrainian civil servants and law-makers good insights into nuts and bolts of EU secondary legislation and thus assist with preparation of domestic provisions aiming at approximation with EU *acquis*. They will be of particular use when provisions contained in EU legislation are vague or ambiguous. In such cases knowledge of domestic experience of the Member States may prove to be very instructive, even to the point when national provisions may serve as models.

3.3.3. Relevant case-law of the Court of Justice of the EU

The importance of case-law of the CJEU has been already explained in section 2.2.5 of the present Guidelines. It is one of the peculiarities of the EU legal order and, by the same token, an essential component of the law approximation exercise.

In the early stages of approximation, that is before the law drafting commences, it is essential for the Ukrainian civil servants to familiarise themselves with the jurisprudence of the CJEU in a given field. Annexed to the present Guidelines the readers will find the Review of relevant jurisprudence organised in a convenient – legal act by legal act – way. It should be noted that in some areas covered by the AA there is either very little, or no jurisprudence at all. In others, however, the CJEU has been very prolific (following the requests for interpretation of EU law submitted by national courts as per the preliminary ruling procedure or actions against the Member States submitted by the European Commission).

Such areas include, *inter alia*, consumer protection, environmental protection, employment, intellectual property and taxation. In the latter area, dozens of judgments are delivered every year by the CJEU, particularly in relation to Directive 2006/112/EC on VAT tax. Many times the Court has clarified the meaning of provisions of this Directive, sometimes in a rather creative way. These judgments must be taken into account when relevant provisions of the Ukrainian tax law are drafted.

3.3.4. Relevant soft law

As already noted, soft law also plays an important role in the EU legal order and, consequentially, has an important place in the law approximation exercise. After the adoption of EU legal acts the European Commission (in rare cases other EU institutions) frequently publishe(s) soft law documents on their transposition and implementation by the Member States. It is especially common in the case of Directives. Recommendations, guidebooks and communications are aimed to facilitate proper implementation of EU legal acts.

It should be noted that the European Commission has been particularly prolific in the area of competition (including state aid). Dozens of soft law instruments of sorts clarify the scope of Articles 101-102 TFEU (respectively, the prohibition of anticompetitive agreements and abuse of dominant position), the public enforcement of EU competition law, the basis parameters of merger control governed by Regulation 139/2004 as well as the foundations of the EU state aid regime. All of these documents have to be taken into account by the Ukrainian authorities when they approximate the domestic law with EU competition regime.

3.4. Legal drafting in the context of EU legal approximation

This section deals with some of the key questions, which are relevant to achieving a higher level of quality and consistency of both primary and secondary legislation in Ukraine when conducting legal approximation of EU law. As a starting point, it is essential to choose in what kind of domestic legislation approximated provisions should be included. In this respect experience of the current EU Member States may be of use. Traditionally, the EU countries fill the gaps left in EU Regulations and transpose Directives using a combination of acts of parliament and bylaws. The choice is determined by a number of factors, which include, *inter alia*:

- constitutional requirements,
- law drafting requirements,
- a standard set by existing domestic legislation,
- complexity of an EU legal act (or legal acts) that will be approximated with,
- political preferences,
- deadline for transposition of EU legal act.

When it comes to law drafting itself, there already exist a number of documents dealing with standards for "good legal drafting" in Ukraine, for instance the "Guidelines on legislative drafting and complying with the rule-making requirements" of the Ministry of Justice (No. 41 / 2000 of 21 November 2000), and the "Rules for drafting laws and basic requirements of legislative technique" (Guidelines) of the apparatus of the Verkhovna Rada of Ukraine. These documents set standards to be taken into account by law-drafters; their title "guidelines" implies that they have a non-binding character. It should be noted that this is also the case in most EU Member States which have similar guidance documents in place on "good legal drafting".

Obviously, these guidelines should also be taken into account in legal approximation processes. However, they do not address a number of important aspects which are essential in order to achieve good quality legislation that is approximated with EU legislation and also complies with international Rule of Law standards. Therefore, this section complements the existing guidelines – and does not replace them.

3.4.1. Rule of Law standards

When proceeding with approximation of domestic law with EU legislation all legal acts should be drafted in line with basic Rule of Law standards. Rule of Law means that any action of a governmental body is legitimately exercised only in accordance with written, publicly disclosed laws adopted. The Rule of Law principle is intended to be a safeguard against arbitrary governance, meaning that random, unfair and inconsistent decisions by individual governmental officials are avoided through the high quality legislation.

High quality of legislation implies that it **every single legal provision is drafted in conformity with a number of basic principles** on law-making as explained in the subsections that follow.

3.4.1.1. Meaning of “accuracy” and “predictability”

Accuracy or transparency of law means that all rules that impose duties and obligations or confer rights on natural or legal persons must not only be published but also be drafted in a way that the potential addressee directly recognizes and can understand that he/she falls under the respective provision and has to behave accordingly. It is one crucial test of the quality of legislation that, as far as the context allows, any person affected by it can follow it, read and understand it. So, the drafter should express the law as simply, clearly and concisely as is consistent with legal accuracy.

Accuracy also means that precise legal terminology and legal techniques are used as further explained below. For instance, an individual must exactly know when, from whom, under which conditions and how he/she may obtain a license or permit for an activity and what he/she has do in order to obtain it.

Predictability means that a rule is drafted in a way that stakeholders know what the competent authority will do if the rule applies.

Legal provisions should be expressed in terms that are as concrete as possible in order to leave less room for alternative interpretations. This is particularly true of provisions which empower the state to interfere with the rights of the citizen (e.g. in the form of a penalty, confiscation, withdrawal of authorisation, levying taxes, fees, chares etc.). For instance, a person should know exactly what may happen in case of non-compliance with legal requirements or when the authority is obliged to grant a license or permit. As for a public civil servant who makes a decision it means that he/ she acts in strict compliance with his / her legal rights and obligations in order to make decisions predictable for the recipient and other persons concerned by such decision.

The opposite of “predictability” and “accuracy” is the vagueness of norms (also called sometimes “the principle of ambiguity”) – which, unfortunately, is quite often found in the existing Ukrainian legislation.

Example from Ukraine

Article 32 draft Law on Construction Works and Construction Products

(5) The manufacturer shall carry out:

verification of a construction product based on sample testing or calculation, or tabulated values of steady application, or based on relevant specific technical documentation;

factory production control.

Comment:

This provision leaves out virtually all relevant details: When shall a verification be based on sample testing or any of the other methods mentioned, what are tabulated values , what is relevant specific technical documentation and who decides when it is relevant, what means factory production control, who decides which verification means are to be taken and how often. The provision is kept in such general terms that it is not predictable at all and hence gives space for its misuse.

Accuracy of legislation is the most important aspect when drafting legal provisions. Approximating with EU law without using accurate wording and techniques often leads to non-applicability of a provision or its arbitrary use as it cannot be understood properly by its implementers.

3.4.1.2. Meaning of "practicability" (applicability)

Legislation shall be practical, meaning that any legal act should be drafted in a way that it can be implemented / applied in daily practice by all parties involved in the implementation and within the foreseen time frames. The most ambitious and advanced law is not worth anything if it cannot be implemented due to high demands, complexity, unrealistic targets, financial implications or low institutional capacity.

Closely related to applicability is the issue of **"enforceability",** meaning that a legal provision can be enforced by authorities without unrealistic efforts if this is necessary.

A particular challenge of legal approximation is that often EU law requires some rules which may not be (easily) applied in Ukraine given a lack of human or financial resources needed for proper implementation. In such case, the mechanism of the AA should be used in order to approximate legislation only as far as an EU law provision can be realistically implemented in practice. As alluded to earlier in the present Guidelines, a longer transitional period can be introduced into national legislation allowing some time for the addressee of a norm to adjust to the intended behaviour. Also, one should bear in mind that the approximation shall, and can be, done gradually (see Article 474 AA).

Approximation with a piece of EU legislation is only achieved if a national law is not only formally in coherence with EU *acquis* but it is also **applied and enforced in practice.** Note that the AA states explicitly in Article 475 (2) that monitoring of assessment of approximation of Ukrainian law to EU law "includes aspects of implementation and enforcement". Consequently, the approximation under the AA "includes the setting up of an effective and transparent administrative system required for implementation" (see Article 56 (3) AA)).

3.4.1.3. Meaning of "proportionality"

Proportionality is another key element of legislation. It means that all obligations and restrictions and in particular financial tools such as fees, charges (but also fines and penalties) are always in proportion to the goal to be achieved and can be complied with realistically by the target group (along the lines of the saying "don't crack a nut with a sledgehammer").

The standard proportionality test a law-maker should undertake is to ask the following:

1. Is the measure inserted by means of a legal clause in an Act **suitable (= appropriate) to achieve the desired goal**?
2. Is the burden imposed by the measure **necessary to achieve the objective sought**? (or: are there less stringent measures to achieve the goal sought?)
3. Are the **disadvantages of the measure proportionate to the advantages achieved**? (balance all advantages and disadvantages, especially in the light of constitutional requirements)

3.4.1.4. Meaning of “coherence” and “consistency”

Legislation shall be **consistent and coherent**. Consistency and coherence are directly referring to the quality of legislation – it means that particular provisions as well as entire pieces of legislation do not contradict each other and that they are not redundant and instead properly linked so that useless repetitions are avoided. These requirements are best met by applying uniform drafting techniques that can provide clearly defined, consistent and predictable guidance for the structure and expression of legislation.

As already mentioned, EU Directives and Regulations never stand alone as can be seen by references between legal acts; the same goes for national legislation. Therefore, it is essential at the beginning of the approximation process to take a “legal package” approach, meaning to identify not only interrelated EU legislation but also to collect all (potentially) affected Ukrainian legislation. For instance, if EU law requires the establishment of a new permitting or licensing system, the impact on existing national permits must be assessed so that are no procedural or content related contradictions.

Besides, there must be accurate references not just within a law but also between different laws as illustrated below, section 3.4.7.3, so that the connection between the various national legal acts is clear to everybody.

3.4.2. Structure of legal acts and provisions within legal acts

Laws should have a clear structure and format, which improve their readability. This goes also for legislation which approximates national legislation with EU law.

Articles are the basic structural divisions of a law. The design of an article should assume that the article is to be read as a unit. Each article should be kept to a manageable length. Articles should be numbered consecutively with Arabic numerals, thus: “Article 1”, “Article 2” etc. This rule should be followed even when the law is composed of only one article, to facilitate any subsequent amendment to the law that may add further articles. It is advisable to provide a title for an article to facilitate the identification of the content of a provision.

Paragraphs are the principal divisions of an article. As a general rule, an article should not have more than max. 10 paragraphs. Where more paragraphs than that are needed, the drafter should consider dividing the text into two or more articles. Individual paragraphs of an article should be numbered with Arabic numbers like “1), 2), 3)” or “1., 2., 3.” and so on. If an article has just one paragraph this should not be numbered. A paragraph should comprise at least one full phrase and not just a word. It is also considered as a single paragraph when it starts with introductory words followed by sub-paragraphs.

Sub-paragraphs should be numbered with letters “a), b), c)” or other numbers (like (1), (2), (3) etc.).

Sub-paragraphs are used to clarify the text of a paragraph and to dispense with conditions. However, there can be a danger that using sub-paragraphs may tempt the drafter into what is in fact a long sentence. The drafter should be alert to this and contemplate dividing the text into a number of shorter sentences rather than using excessive sub-paragraphing.

The use of further **sub-sub paragraphs** is, of course, also legally possible but it is not advisable to use sub-sub-paragraphs excessively as it complicates the reading of a legal text. Its use may be helpful when short coherent lists are being drafted after a sub-paragraph reading “the government agency has the following legal powers”, “to appoint its own chairman”, “to issue licences”, “to own property”, “to report directly to the Minister”, “to meet monthly”.

Sub-paragraphs should relate both grammatically and logically to the introductory words. The same goes for a potential further division into sub-sub-paragraphs as illustrated in the example below:

Example:

"(2) The annual Report on XX prepared by XX pursuant to Article XX shall in particular

a) summarize data on XX,

b) evaluate the effectiveness of XX measures implemented,

c) give an overview on the use of financial resources for XX measures as regards

(aa) spending from the national budget and

(bb) subsidies granted from XX."

3.4.2.1. Numbering

If laws have either no numbers for paragraphs / sentences or no indents, this makes them not only hardly readable; it also disallows precise references within an act or to other pieces of legislation and – last but not least – no proper quoting in judgements of the deciding national court (See for instance decisions of the CJEU, which always quote the exact part of a norm in questions by reference to its paragraphs / sub-paragraph or even indent).

3.4.2.2. Structure of legal acts

The structure of legal acts should not be a logical puzzle but it should follow a certain coherent structure. This does not mean that all laws shall have an identical structure, but key elements should be regulated in the same fashion.

A legal act, as a rule, shall consist of the following parts:

- title;
- general provisions;
- content provisions (substantial part of a legal act);
- final and transitional provisions;
- annexes.

In lengthy pieces of legislation, it is advisable to provide a **table of contents,** listing all chapters and sub-chapters and, preferably, also the headings of all provisions. One should bear in mind that laws are made for the public and not only for legal specialists. A table of contents substantially improves the readability as it helps the reader to find the relevant provisions. In EU Member States at least the electronic versions of laws and regulations often contain a table of content. Although providing a table of contents is not part of Ukrainian law-making tradition, it is recommendable; and it is not against Ukrainian law. One should bear in mind, however, that a table of contents does not become normative part of a legal act but merely a guidance tool to help finding provisions in lengthy texts.

3.4.3. General provisions

General provisions of national legislation approximating domestic law with EU law usually consists of clauses on the objective and/or purpose of a legal act, the scope of application, necessary definitions and sometimes also general principles and competence norms.

It is often advisable to approximate a particular piece of EU legislation by drafting first a purpose and/or an objective clause. As noted earlier, frequently such clauses are also included in EU Regulations / Directives.

"Purpose" should be understood as "legal purpose" whilst "objective" on the other side, means the goal to be achieved by a legal act. The use of purpose clauses is an option particularly for framework laws, which serve as bases for numerous subsequent pieces of legislation to make this specific purpose of the law clear to the reader. Purpose clauses could be introduced in the following manner:

> *"This Law establishes the legal basis for . . ." or "This Law regulates the . . ." or "This Law determines the power and duties of . . ." or "This Law amends . . .".*

A clause, which defines the objective of legislation, usually reads in the following way: "this law shall aim at" or "the overall objective of this law is to".

The example below illustrates the difference between purpose and objective clause.

Example:

Draft Public procurement law of Ukraine

"This Law aims to ensure efficient and transparent procurement, create a competitive environment in the field of public procurement, prevent corrupt practices in this field, and develop fair competition." *(preamble)*

Corresponding Text of Article 1 of EU Directive 2014/24/EU on Public Procurement:

This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

- - -

Comment:

Whilst Art. 1 of the EU Directive in Article 1 sets a legal purpose clause (with elements of "scope of application", the preamble of draft Ukrainian law is formulated as objective clause. This is not wrong but the drafter should be aware of the differences and legal implications.

A purpose and objective clause may also be merged, for instance:

> *"This Technical Regulation lays down requirements on the restriction of the use of hazardous substances in electrical and electronic equipment with a view to ensuring the protection of human health and environment, including the environmentally sound recovery and disposal of waste electrical and electronic equipment." (Example from draft Ukrainian by-law)*

The legal value of "objective" clauses is that the rules of the law in question shall be interpreted always in accordance with its objective and not against it. Therefore, the drafting of an objective clause

has much stronger effect that the use of "preambles" which is not common practice in EU Member States. A preamble can include information on the background and purpose of the law, when because of its significance and drafting history, it is necessary to convey that information to the reader first-hand. Acts that typically contain a preamble are bilateral or multilateral agreements. As elaborated on earlier in these Guidelines, acts comprising EU secondary legislation always contain lengthy preambles.

However, national laws address issues whose background, indication of purpose and solemnity are not relevant for the implementation of that law: "they have no legal effect". Therefore, information on motives, public and political, economic or other reasons for adoption is usually not incorporated in the text of the law but in its explanatory memorandum.

3.4.3.1. Scope of application

The scope of application provision delimits the field of action of the law including the subjects of the law and potential limitations on the application of the law. The use of such provisions is highly advisable if there is a need to clarify which actors/areas are included or excluded by the provisions of the law.

Example from draft Law of Ukraine on Rail Transport

Article 2

2. This Law shall not apply to technological rail transport, i.e. railway tracks and vehicles, other property located on the territory of enterprises and intended for transportation for production purposes within the territory of such enterprises of raw materials, materials, equipment, means, products and productions wastes without going to the tracks of public use and connecting tracks

- - -

Comment: *The essence on the exemption from the scope of application remains unclear:*

What if people are transported on enterprise territory? What is the difference of raw materials and materials and what is the difference between equipment and means? What if goods are transported on private territory but the tracks are connected with tracks of public use? Is this then an exemption from the exemption?

3.4.3.2. Use of definitions

Definitions specify the meaning of important terms used in the text of the law which are not self-explanatory. Definition provisions are placed near the beginning of the law because it is important to have early knowledge of what the words and phrases used in a particular piece of legislation mean.

However, a balance must be struck between using definitions for these purposes and over-using the technique of definition that may complicate the life of the reader. This means that the number of definitions in the general part should not go beyond of what is reasonably necessary.

Only terms should be defined and not entire lengthy phrases. Naturally, only those terms shall be defined that later appear in the legal act.

In the approximation process it is strongly advisable to stick as close as possible to the definitions

use by EU law (copy-paste where it fits into Ukrainian law) and not to define to many additional terms. A definition is particularly useful not only where the word or phrase may have several uncertain meanings (example: “waste producer”, “waste holder”), but also where they may have a number of different meanings.

Definitions can be used to extend or narrow the accepted usage of a word or phrase, and this can be achieved by compounds of positive or negative language. For example, ““horse” includes donkey and mule”, ””animal” does not include bird or fish”.

Non-conventional definitions which will mislead the reader should not be used. For instance, it is not recommended to define “animal” as “cats and dogs only” or to define ”food” as “drink, chewing gum and other products of a like nature”.

Sometimes the definition refers to another definition used in the same legislation or even in other legal acts. For example:

> *““zoo” means an establishment where wild animals (as defined by Article X) are kept for exhibition to the public otherwise than for purposes of a circus (as defined in this law) and otherwise than in a pet shop (as defined in this law.)”*

Definitions should be as precise and concise as possible. Sometimes, though, it might to use to provide in the definitions examples by means of using the word “includes”. “Includes” is intended to provide an incomplete meaning of a definition; even a lengthy list may still “leave the door open” on other meanings (If such list becomes too long, it may be put in an Annex to which the definition refers to).

Generally, defined terms should not contain the same term for which the definition is constructed, i.e. do not state: “Motor Vehicle” means any motorized vehicle.

3.4.3.3. Use of principles

In many laws principles are stipulated within their general part. There exist a number of some very common general principles in law such as “proportionality principle”, “shared responsibility principle”, “polluter pays principle” or “cost recovery principle” to name just a few which are often found in public law.

The value of most principles is that they should serve the policy, law and decision maker as background for determining policies, laws and decisions. However, principles, as the name implies, mostly have no directly legally binding normative effect on anybody, as they are rather underlying legal fundaments to be taken into account when making decisions on concrete obligations and rights.

Like preambles they are often used in the EU for the interpretation of norms; in that respect they are much stronger though than preambles. However, the use of principles cannot in any sense replace normative provisions determining right and obligations.

3.4.3.4. Implementation competence clauses

Provisions that set implementing competences set out what government institution(s) are responsible for implementing the law. As for implementation competences, in most EU Member States the name of the competent authority is often not mentioned explicitly in the law but in secondary legislation only. The reason for this is quite simple: Names of authorities often change or competences are moved from one to the other authority. Consequently, both cases would require an amendment

of the law – therefore it is often referred to the "authority in charge of" and the authority in charge is then regulated in secondary legislation.

Besides, in many EU Member States implementing competences are regulated mostly not in separate articles but in the context of regulating the specific matter in question. Such approach avoids the "summarized" listing of competences in the beginning of a law as most of them appear later in the text of the law anyway when precise rights and obligations are determined.

One rule shall be obeyed when drafting competences in any case, namely the **precise reference to the activity** where this is possible, i.e. if this is regulated in the law, by means of stating the number of the provision as shown below:

1) "the authority XX shall be in charge of

a) issuing permits pursuant to Article XX"

b) informing the public on emergency situations in accordance with Article XX

c) supervise the activities XX in accordance with the procedure set in Articles X-X

When competences are very broad instead of formulating lists as shown in the example, a comprehensive competence should be provided using the word "unless" for diverging competence norms.

An open provision as "and other competences" makes the listing of competences somewhat obsolete. If certain competences shall be given explicitly because they are very relevant, the law drafter may state: "the authority XX is in charge of all aspects related to "aa", in particular "bb" and "cc" so that it is clear that the list is not exhaustive.

3.4.4. Substance of a legal act

Naturally, the essence of the national legislation approximating with EU law is in the substantive parts of the national legislation. Here, one basic advice can be given to law drafters, namely that an accurate legal provision approximating with EU law should always answer at least in parts the following questions:

Who – is the addressee of a provision (which group of natural / legal persons or institution, etc.)?

What – shall or may the addressee of a provision do?

When –is the addressee required (or allowed) to do something?

How – is the addressee required / mandated (discretion) to act?

One should bear in mind, that EU law primarily regulates rights and corresponding obligations of addressees of a norm and relevant procedures. Aspects related to why (explanation, motivation) are normally not to be addressed in the main body of a legal act but, if it is part of a legal tradition, in a preamble to a legal act, as well as in official guidelines or in legal commentaries. Observing these benchmarks will substantially contribute to accurate national legislation in line with Rule of Law standards.

Substantive provisions should follow a logical order starting with the principal proposition, followed

by exceptions. If the legal act is to include a principal rule and exceptions to this rule, the principal rule should be placed before the exceptions and the latter should be placed after the principal rule in the following paragraphs or articles.

For instance, if different forms of permits and licenses are regulated in a legal act, as shown in the example below, the most ambitious could be regulated first and other "simpler" forms of the permit/license in subsequent articles in which deviations or exceptions are regulated stating that "the provisions XX (those in former chapters) remain untouched / applicable)". This helps to avoid useless repetitions.

Example

The logical structure for introduction of a permit and control system could be done as follows:

1. Comprehensive permit (with provisions regulating the requirement to obtain such permit for certain activities, the permit conditions, the scope and legal effect of the permit and its relation and effect to other permits)
2. Procedural aspects for obtaining such permit (application, review of application, participation of other authorities and the public, permit granting)
3. Withdrawal, reconsideration and updating of permit conditions (when, why, how)
4. Simplified forms of the permit (which should make reference to chapters 1-3 if certain aspects regulated there are also applicable here)
5. Permit compliance control (monitoring, inspections, record keeping, orders in case of non-compliance, sanctions)

As for the provisions in the substantive parts of a legal act not much can be said in these general guidelines on the content as it really depends on the complexity of the matter to be regulated.

3.4.4.1. Use of declaratory provisions

Declaratory provisions or provisions which have a mere explanatory or descriptive meaning without any legal consequences should be avoided. Explanations to provisions should be either given in explanatory notes or memorandums to a law or become part of the definitions or, as described above, inserted in preambles or objective clauses.

They shall not become an element of the substantive normative part of a law, if this can be avoided or drafted in a way, that they include normative regulating aspects.

Example from draft Law of Ukraine on Rail Transport

Article 13

(1) Rail transport infrastructure (hereinafter - infrastructure) is a set of objects …

(2) Infrastructure by operating modes is divided into categories, technical requirements for operation of which shall be approved by the central executive authority that ensures the development and implementation of state policy in the field of rail transport

- - -

Comment:

Paragraphs (1) and (2) are purely descriptive and should not be incorporated as such into a legal act – they could well become parts of a teaching book or commentary on the Rail Transport Law

3.4.5. Final and transitional provisions, annexes

When drafting final and transitional provisions approximating to EU law particular attention should be given to the drafting of sanction provisions ("violations" and "fines") and to transitional provisions.

3.4.5.1. Provisions dealing with sanctions

In recent years the EU started to focus more on a necessary improvement of national enforcement of EU legal acts. For instance, in Directive 2008/99/EC on the protection of the environment through criminal law, Article 5 states that Member States:

> "shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties".

In addition, according to Article 7, the Member States:

> "shall take the necessary measures to ensure that legal persons held liable pursuant to Article 6 are punishable by effective, proportionate and dissuasive penalties".

An identical clause can also be found, for instance, in Article 24 of the Directive 2011/83/EU on consumer rights. The same goes for EU Regulations. Despite the direct applicability of EU Regulations, it is up to the Member States to decide how to enforce compliance through the use of national sanctioning mechanisms. In order to secure enforcement some Regulations require the Member States to put in place proper mechanisms. For instance, Article 29 of the Regulation 1005/2009 on substances that deplete the ozone layer requires:

> "Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive."

The issue of drafting "sanction provisions", including those transposing EU laws' provisions requiring "effective, proportionate and dissuasive penalties", is problematic. Generally, laws regulate a number of duties and obligations for specific actors which, naturally, are violated when the addressee does not comply with an obligation (or the decision issued pursuant to that provision that causes this obligation). Rarely such misbehaviour may lead to a criminal offence as codified in the national Criminal Code.

A breach of a legislative provision may lead to an administrative sanction (it basically "mirrors" obligations regulated in the law). Such provisions must be phrased as precisely as possible in

accordance with the principle of legality and they should be regulated at the end of the substantive part of a law – and not outside the respective law. This is new for Ukraine where most (but not all) kinds of administrative violations are "listed" in the Code of Ukraine on Administrative Offences (Law No 8073-X of 07.12.1984).

This will not work in the long term as approximating to EU law means also the introduction of thousands of new potential violations mirroring new obligations set by law. This is why in all (!) EU Member States the substantive parts on what constitutes a violation is always found in the respective law itself, usually in combined Articles listing potential violations (and often also range of fine) at the end of a law or by-law. The *procedural* details on the identification, proof and sanctioning of all administrative violations are usually set in a horizontal law – as it is done in Ukraine as well.

As for the determination of an offence this should include whether commission of the offence requires a subjective mental element (intention, gross negligence, simple negligence) or whether it is an absolute offence (also see Article 7 of the European Convention on Human Rights).

The violation and sanction provision should always contain a precise reference to the provision violated so that there is no doubt when a violation exists. It may include a range of fines "from XX up to XX UAH" and leave some discretion on the penalty to the competent authorities to decide case-by-case.

As with the other provisions in the law, violation and sanction clauses shall be formulated as accurate and precise as possible and in a manner that it is predictable what may happen in case of non-compliance.

3.4.5.2. Transitional and expiry provisions

Transitional provisions lay down the procedure for the transition from the previous legal regime to the new one. There is a particular need for a transition provision where, for instance, specific rules will be in force at a later time then the rest of the law. Such clauses shall also clarify which rules apply to existing or abolished institutions and newly created ones only. Given the implementation challenge often caused by EU law it is advisable to make use of transitional provisions where immediate compliance with the new legal system seems unrealistic. However, not entire new legislation should be subject to such transition clauses but only those parts which are really difficult to be implemented in time.

Expiry provisions should be used when it is known from the outset that the law is only to be applicable for a certain period of time. This will usually arise where the law has been enacted to regulate special circumstances which are only expected to pertain for a specific anticipated period, or where it is considered for political reasons that the terms of the legislation require to be reconsidered after a specific period.

3.4.5.3. Repeal provisions

Repeal provisions should specify laws, or provisions of laws, that are repealed and cease to have effect, normally on the entry into force of the law.

There must always be a precise reference to a law, or provision of a law, that is to be repealed. General provisions repealing unspecified laws or provisions (such as, for example: "all laws contrary to (or inconsistent with) this law are repealed") are not in line with Rule of Law requirements.

3.4.5.4. Annexes

Most of EU Regulations or Directives contain technical annexes, which are an integral part of the respective legal acts. These annexes should also be approximated with in Ukrainian legislation. Often this can be done by partly copy-pasting of purely technical parts of annexes. Annexes to EU legislation may include also drawings, charts and tables or even guidance notes.

Unfortunately, there is no legal tradition and practice yet in the Ukraine to use annexes to laws and by-laws. This is different from many EU Member States where you find annexes in laws as well as by-laws. Using annexes has two main advantages: lengthy technical parts are not included into the main body of the legal acts (which would make them unreadable) whilst they are directly linked to specific provisions of the legal text and hence keep the character as integral part of a legal act. The only disadvantage is that, whenever an annex has to be amended, it requires the procedure applicable to amendments of the entire legal act.

Nevertheless, it is strongly recommendable not to incorporate lengthy annexes into the main body of national law (by-law) as this will then become un-readable. Instead, annexes of EU Regulations or Directives should also become annexes to Ukrainian laws, or, if this is legally or politically not feasible, they should be adopted in separate legal acts directly linked to the primary act.

3.4.6. Language and legal technique

Legislation should be drafted in as a rule in plain language as long as it does not hamper accuracy of legislation. Plain language drafting assists efficiency; it is easier and faster to read and queries are reduced.

Ideally, laws should be both accurate and clear, but it is not always possible to achieve this, especially when dealing with complicated subjects. If there is a conflict between accuracy and the use of plain language, **accuracy must still be the primary objective** of any approximated provision.

3.4.6.1. Language

Words shall be used consistently in the national legal acts which transpose EU law; the same word should be used throughout for the same concept and the same word should not be used for two or more different concepts (the principle of terminological unity). Also, words shall be used in a way that is consistent with their use elsewhere in legislation, unless different definitions of the same word exist in different acts (fields) of EU law for different purposes. This will reduce legal uncertainty, textual ambiguity and the prospect of misinterpretation.

When using **legal terms** (e.g. “administrative act”, “decision”, “permit”, “application”, “notification”) the drafter should take into consideration their legal meaning under EU law as well as Ukrainian law not to mix terms.

It is essential to consistently use verbs to indicate mandatory requirements/obligations which are expressed with “shall” in the sense of “must do”, on the one hand, and matters which confer some discretion to the decision maker, on the other. Provisions which confer a right to an authority or person or grant a high level of discretion in EU laws and in EU Member States are expressed with “may”. In Ukraine, discretion requires the explicit determination of the scope of discretion, e.g. through lists of

alternative measures to be taken on a case-by case basis. An inconsistent use of such verbs creates confusion over whether a matter is mandatory or discretionary.

Foreign words or phrases can also be used when they are a convenient and recognised means of expressing something briefly and accurately (e.g. scientific names in Latin). Whenever foreign words or expressions are used, they should be written in italics. Example: "*ultima ratio*" or "*acquis communautaire*".

Sometimes there appear terms in existing Ukrainian laws that should be repealed, such as "agent" which is rather a "natural person" or an "operator of an installation" or the like. Also, laws should not refer to "objects" and "subjects" but to "legal" or "natural persons" and to "facilities", "installations" "businesses" etc. Insofar the terminology used by EU law can be instructive and should be used also to the extent feasible in contemporary Ukrainian law.

When it is necessary to repeat something that could be abbreviated in the same law text, the abbreviation can be used provided that it is explained when it is used for the first time by adding: "xyz means, or "hereinafter referred to as… (simplified)". This technique should be used in the provision on definitions where. For example, "'EU' means the European Union".

3.4.6.2. Use of conjunctions

The proper use of conjunctions is another important aspect of law-drafting. If the content of a list provided in sub-paragraphs is to have a cumulative effect, this should be indicated by the use of "**and**" between the last two sub-paragraphs, b) and c); using both techniques simultaneously is not necessary. Some drafters would place "and" between each sub-paragraph for certainty, but this is also a little clumsy.

If the content of sub-paragraphs shall have an alternative effect this should be indicated by the use of "or" between the last two sub-paragraphs.

Example (for use of conjuntions)

"Non-routine inspections shall be carried out as soon as possible in order

(a) to investigate complaints from the public,

(b) to examine accidents, incidents and occurrences of non-compliance, **and**

(c) before the granting, reconsideration or update of a permit."

"When concluding public service, supply or works contract, governmental authorities are encouraged to

(a) include XX requirements in technical specifications for such contracts,

(b) request XX conditions for the performance of contracts, **or**

(c) apply contract award criteria based on XX characteristics."

Another option, which seems more in the legal tradition of the Ukraine, is to state precisely in the introductory clause if all sub-paragraphs need to be applied "in all cases/cumulatively" or if the sub-paragraphs can be applied alternatively, like: "on the basis of any of these criteria" to be followed by criteria a, b, c and d.

3.4.7. Good law drafting technique

Good law drafting comprises of the understanding of certain legal techniques that one has to be aware of and make proper use when it seems advisable. This goes in particular for the approximation process.

One key element of good law drafting is the **use of legal references** between paragraphs, articles and laws. Using cross-references means that the relationship between provisions and laws is clear and leads to a consistent picture of the legislation in place. They also serve to unnecessary repetition of provisions. References may be used within one article, between different articles in the same law and between an article in one law and provisions in other laws.

The lack of use and the poor quality of references is a shortcoming which can be observed frequently in Ukrainian legislation.

Example from draft Law of Ukraine on Rail Transport

Article 19

(1) The carriage of passengers, goods, luggage and freight luggage by rail shall be made in accordance with this Law and other Laws, rules of equal access to the rail transport infrastructure, rules of carriage of goods by rail, rules of rail transport service of citizens, rules of carriage of passengers, […] , other normative and legal acts and contracts on carriages concluded in accordance with the legislation.

- - -

Comment:

General references to "this law" and "other laws" or to "legislation" do not comply with basic Rule of Law standards. They are not concrete and accurate for the addressee – instead, references should be made to specific provisions or at least chapters of a legal act applicable.

3.4.7.1. References within an article

The relationship of paragraphs to one another in the same article is normally fairly clear, if the article has been well ordered. Internal cross-references may be used to make this clearer. However, if the drafter finds that there is extensive use of this technique, the structure of the provision should be re-examined in order to make the provision more reader-friendly.

Situations where it is necessary to clarify the relationship between paragraphs 1) and 2) are:

- "subject to paragraph 1)" meaning that paragraph 1) prevails over paragraph 2)
- "notwithstanding paragraph 1)" paragraph 2) applies even though it provides for rules different from those provided in paragraph 1)
- "in accordance with paragraph 1)" paragraphs 1) and 2) are of equal status and contain consistent approaches, but paragraph 1) is broader and the drafter wishes to clarify that paragraph 2) falls within.

3.4.7.2. References between articles within a legal act

An internal reference should always indicate, as appropriate, the exact article, paragraph or sub-paragraph to which reference is made. In rare cases, it may be necessary to include a reference to an entire title or chapter of the legal act. This is only appropriate where the reference is to all the provisions of the title or chapter.

3.4.7.3. References to provisions in other legal acts

Laws hardly ever standalone especially not in most areas affected by EU legislation. On the contrary, regularly provisions in one law do not have a legal itself but need to provide for a link to other pieces of legislation.

Where a reference is made to another legal act, that law must be identified as precise as possible by a full citation of its title, including its number or its publication source (e.g. official journal). An external reference to a law that has been amended should only cite the original law and not the laws that have amended it.

Where a reference is made to specific provisions of another law, it should additionally always indicate, as appropriate, the exact article, paragraph and sub-paragraph to which reference is made.

If a text has references to a significant number of other laws for reasons other than amending or repealing them, to assist the user, consideration could be given to giving each law a so-called "label" in the definition section. For example: "Tax Law" means… or "Companies Law" means… would allow the drafter to use a more free-flowing style in the text, like: "The Tax Law applies to anyone who is subject to the Companies Law".

3.4.7.4. Use of lex specialis clauses

The statement of a general legal rule should not be overloaded with exceptions, limitations or deviations. Where there is a need for the general rule to be qualified, the main rule should be clearly expressed first and the so-called qualifications (exceptions, limitations) should be expressed in subsequent paragraphs of the same article or in subsequent separate articles.

The use of so-called *lex generalis* and *lex specialis* provisions can help to clarify the relation between general rules and exceptions and also avoid unnecessary lengthy provisions or repetitions.

The use of such clauses is of particular help when it comes to the determination of competences of specific authorities. If there are far reaching competences to be set in the law, it is advisable to use an opening close and restrict it with the term "unless" or "as far as" instead of drafting endless lists of single competences – which also bears the risks that one or the other competence may be forgotten.

Example of properly drafted competence clause:

"The central public administration authority shall be in charge of tasks and activities in all areas of XX in accordance with the provisions of this Law, as far as no specific competences have been regulated explicitly by law or based on law assigned to other competent authorities on national, regional or local level."

The use of such "*lex specialis*" clauses is also relevant for the scenario that the newly drafted law shall exempt the application of general rules set in another law. The example below illustrates how to link newly drafted special provisions to the more general existing rules set in another law, without amending the other law.

Example

"Health inspections shall be carried out by the competent authorities in accordance with the provisions of the [Law on State Control] unless determined differently in Articles X-X of this Law."

3.5. Statement of compliance and table of compliance

Compliance check has a straight-forward aim, that is to verify if a proposed piece of domestic legislation is compatible with the AA and, in more detail, with a particular piece of EU legislation (or several EU legal acts). The most important tools for that activity include the inventories prepared as a preparatory stage and the statements of compatibility, including tables of concordance, developed by the drafters of legal acts. In Annex to the present Guidelines the readers are guided through relevant requirements currently imposed by Ukrainian law on legal drafters working in the governmental administration.

As already mentioned, the tables of compliance (ToC) are tools, employed especially in the new EU Member States, which help to transpose EU law fully and correctly. They also facilitate scrutiny of implementation, planning and reporting. A legal drafter responsible for a draft legal act shall fill in the ToCs gradually from the very beginning of legislative work, ideally even at the stage of planning law approximation. As an EU legal act can be implemented in many domestic acts, a ToC annexed to a draft legal act should indicate all of them (both those already adopted or planned).

After adoption of all implementing acts, the responsible line ministry should prepare one final version of the ToCs that should be stored by a designated authority for planning future legislative works and for reporting purposes. Updated ToCs are the basic tool showing the level of compliance of domestic legislation with EU law.

The correct use of this tool greatly simplifies transposition and enhances the possibility of assessing gaps between domestic and EU law. The ToCs also allow early identification of EU legal compliance problems that can be discussed at higher decision-making levels and possible tackled by the Association institutions.

ToCs also help identifying gold-plating (e.g. higher standards, more obligations to businesses / citizens) when implementing EU law and taking – at the political level – decisions whether it is justified or not. Thus, ToCs shall also indicate provisions of the draft that are not required by EU law and are proposed for domestic reasons. This is of special importance for draft laws combining provisions implementing EU law with provisions implementing purely domestic policies.

The ToCs shall be presented to the Parliament together with drafts of all by-laws implementing EU law. They help the parliamentary services and the members of the parliament to identify the limits of parliamentary amendments in bills implementing EU law a fulfilling association obligations of Ukraine.

In the sectors concerned by so called "Regulatory Approximation" according to the Annex XVII

to the AA (Financial Services, Telecommunication Services, Postal and Courier Services, International Maritime Transport Services), Ukraine is also obliged to draft and submit to the European Commission transposition tables after implementing EU legal acts concerned to Ukrainian legislation. Relevant provisions of the AA read as follows:

> "Once Ukraine is of the view that a particular EU legal act has been properly implemented, it shall inform the EU thereof. Ukraine shall transmit to the competent Commission service the internal act with a cross-comparison table ('transposition table') showing in detail the correspondence with each article of the EU legal act as well as, if applicable, a list of Ukrainian legal acts that has to be amended or annulled in order to fully implement the EU legal act." (Appendix XVII-6)

1. Identification of relevant obligations of Ukraine under the EU-Ukraine Association Agreement, including potential decisions of Association bodies amending them	As the first step the drafters should verify the existing obligations under the Association Agreement. It should be based on documents prepared by members of the state administration, who were involved in planning of law approximation. A reminder is fitting, that this should cover not only the AA itself but also relevant decisions of the Association Council and the text of Association Agenda. Matters to be verified include: - whether a piece of EU legislation listed in the Association Agreement (or any other relevant instrument) is still in force, - should the listed legal act of the EU be repealed, or subject to a pending revision, a verification is required if: i. as per AA the option for dynamic approximation and revision of the AA or any other instrument has been chosen, ii. a decision was made to proceed with approximation with the old piece of legislation - scope of the obligation to approximate (entire EU legal act or only parts of it), - type of the obligation to approximate: the best endeavors clause or a straight-forward obligation to approximate, - compliance with relevant plan for law approximation/road map/action plan, - deadline for approximation.
2. Identification of other relevant obligations of Ukraine in the field of European Integration	Furthermore, it should be also double checked if other bilateral or multilateral agreements between the EU and Ukraine (alone or with other countries) require approximation with EU law. This should extend to, *inter alia*, - Energy Community Treaty, - Agreements on Civil Aviation (bilateral or multilateral), - WTO obligations.
3. Identification if the Ukrainian authorities are proceeding with voluntary approximation not required by the Association Agreement or any other instrument	As explained earlier in these Guidelines, Ukraine may also proceed with voluntary approximation. This happens when the drafters use EU *acquis* as a model, although it is not covered by any of the instruments listed in paras. 1-2. Even in such a case it is worth having and inventory as well as a table of compliance. It may serve the transparency of the law-making process as well as facilitate political gains in relations with the EU, when such a move may be used to demonstrate a political will.

Checklist on EU law compliance (drafting stage)	
Step	**Comments, examples**
4. Identification of all relevant EU legal acts and accompanying documents (among others, soft law, jurisprudence of the Court of Justice of the European Union, guidelines or reports on transposition by the Member States)	In the next step, it is crucial to identify all relevant EU *acquis*. This is necessary even if the Association Agreement, or any other bilateral document, lists only EU Regulations or EU Directives. It may be handy to develop an inventory of EU *acquis*, in the format provided earlier in these Guidelines.
5. Identification of all relevant Ukrainian legal acts and draft legal acts, including bylaws	Once we identify all obligations resting on the shoulders of the Ukrainian authorities as per the Association Agreement and all relevant EU *acquis* it is fitting to proceed with identification and collection of all relevant domestic rules. Documents prepared by the staff involved in planning of law approximation may be of use. This is crucial in order to make an assessment of compatibility of existing Ukrainian legislation with EU *acquis* and to work further on the tables of compliance prepared by staff involved in planning of law approximation.
6. Preparation of table of compliance	An early draft of table of compliance should be prepared by staff involved in planning of law approximation. However, at the stage of drafting, this should be taken much further and include: - an update to the existing table of compliance, - coverage of relevant EU *acquis* including a preamble, - coverage of other sources of EU law, including soft-law and jurisprudence of the Court of Justice of the European Union.
7. Comparison of draft Ukrainian provisions and relevant EU *acquis*	The comparative analysis should cover: - the legal act itself, including its preamble, - soft law and relevant jurisprudence of the Court of Justice of the European Union, - in case of more general provisions of EU legal acts (including the rules on remedies and enforcement) an explanation how the drafted domestic rules comply with the general rules of EU law.
8. Preparation of statement of compatibility	As the last step, the drafters of a Ukrainian legal act should prepare the statement of compatibility (as required by the relevant domestic legislation, see further above).

3.6. Regulatory impact assessment of draft EU approximation laws

Regulatory impact assessment (RIA) is generally considered to be an essential element of policy-making, allowing verification of implications of newly drafted/proposed legislation on the economy, public administration as well as the business community. RIA is not required by the EU law or any association obligations, but should be carried out also for EU approximation laws for the sake of national interest, as it is practiced in the case of purely domestic legislation.

While these Guidelines do not cover the specifics of RIA, some of the rudimentary aspects of it deserve general coverage as RIA plays a crucial role in the European Integration process. In particular, it has to be taken into account in implementation of the AA, including the law approximation exercise.

The RIA has a role to play in law approximation as well as re-negotiations of lists of EU *acquis* that Ukraine has to comply with.

As discussed in detail earlier, the AA requires Ukraine to approximate its domestic law with a plethora of EU legal acts. Either the AA itself or other EU-Ukraine bilateral instruments provide deadlines for completion of that task. These deadlines were agreed to during the negotiations of the AA and, as a matter of principle, cannot be amended. More importantly, Ukraine cannot - without breaching the AA - decide not to approximate with a given piece of EU legislation if it had agreed to do so.

Bearing this in mind the role of the RIA m ay be, in such a case, perceived to be limited. The question is why conduct it at all if, irrespective of its results, Ukraine has the obligation to proceed with approximation even with the most disadvantageous piece of EU *acquis*. However, as explained below, Ukraine may use RIA as a tool to mitigate partial or delayed approximation. Furthermore, it may be the point of reference for policy choices, should the EU legislation at stake require minimum harmonisation or leave the Member States (and *mutatis mutandis* Ukraine) room for manoeuvre.

Either way, RIA should be conducted at the very early stages of the drafting process and continuously as revisions are being proposed during different stages of the decision-making process. Furthermore, RIA should take as a point of reference the EU legislation that domestic legislation, which is being drafted, aims to approximate with.

If results of RIA prove that adoption and entry into force of new Ukrainian legislation is not beneficial to the economy, state budged or the business community then RIA may be employed as important evidence in discussions with the EU counterparts and, by the same token, serve as the backing for one of the following options. The first option is to adopt the legislation and make it fully compatible with the relevant EU *acquis* but defer its entry into force for a specified period of time (possibly going beyond the deadline laid down in the AA). The second option is partial approximation, leaving the formal full compliance for later stages of approximation. The third option could be excluding certain categories of stakeholders (for example small and medium enterprises) or certain regions concerned from the scope or application of new EU approximated rules or introducing special measures for them. In formal terms such options amount to a breach of the AA. However, to avoid being on a collision course with the European Union institutions it is advisable to employ RIA as a tool to prove that it is impossible, or too costly, to approximate in the time limit provided in the AA or any other bilateral instrument.

Another outlined scenario is that the RIA is used to verify numerous solutions that may be available under EU secondary legislation. Should that be the case, such leverage should be treated with caution and results of RIA would be then used as the basis for a decision.

The results of RIA could also justify introducing supporting measures helping stakeholders concerned to comply with new rules approximated with EU law, thus, facilitating their implementation and enforcement.

As noted in section 1.3 of the present Guidelines, the AA envisages dynamic approximation. This translates, at least in theory, into regular revisions of the Annexes to the AA and, in more general terms, the lists of EU *acquis* that Ukraine is required to approximate with. The idea is simple: the AA is a living instrument and should follow the developments in EU law, in particular adoption of new legal acts.

However, not all changes to EU law would be beneficial for Ukraine, hence any revision of the AA is subject to negotiations between Ukraine and the EU. In this context the RIA deserves to be considered

essential as it should form the basis for the negotiating positions of the Ukrainian Government. In particular, a robust RIA is necessary, should the Ukrainian government claim that the complying with a new piece of EU legislation would be too cumbersome or financially demanding for the Ukrainian economy, in particular its business community.

It should be noted that EU RIA prepared by the European Commission before proposing a Regulation or Directive may also be of use. Although it would be prepared in the EU context, hence many variables would be EU specific, still some elements of it may apply to Ukraine *mutatis mutandis*.

The simplest RIA should identify impacts of draft regulation by issue type:

- economic (e.g. small businesses, competition);
- financial (public expenditure at central, regional and local levels);
- social (e.g. human rights, access to professions or services, equality);
- environmental.

RIA shall indicate estimated costs and benefits of the implementation of a legal act for main groups falling within the scope of its application as well as public finance costs and administrative burden. Thus, RIA also enables the identification of economic/financial, social or other problems justifying conscious delays in approximation or a long phase-in period of harmonization (approximation in stages).

RIA can be carried out by many different methods depending on the sector to be regulated and on the draft legal act, but the RIA related methodological questions fall out of the scope of these guidelines. In many cases preparation of a complex RIA requires specific, even scientific expertise.

3.7. Goldplating and overregulation

As explained in the present Guidelines, law approximation is not a straight-forward affair. Quite to the contrary, it is a complex effort which has legal and economic implications. It must be based on merit-based planning, backed up by a thorough regulatory impact assessment. Civil servants involved in law approximation must take into account not only the legal factors but also the economic implications of the approximated legislation on the business community and, in more general terms, on the state's economy.

One of the practices that one is usually warned against is something called "gold-plating". This term was coined many years ago to describe a drive to overregulation or, in the same vein, over-transposition of EU legislation. "Gold-plating" is, in fact, an umbrella term, which brings together a number of different practices that may lead to undesired outcomes. Some examples are presented below.

The first example of "gold-plating" is extending the scope of application of EU provisions beyond what is required. For instance, Directive 86/653/EEC on self-employed commercial agents is limited in scope to agents, who sell goods. However, in the contemporary business practice of equal importance are also commercial agents, who sell services. Such an extension was provided, for instance, in Dutch law. While there is nothing stopping the Member States from taking such steps, it is worth doing so after a thorough impact assessment of legal and economic consequences.

The second example of "gold-plating" is not using derogations or options available in EU secondary

legislation. For instance, EU secondary legislation may comprise provisions, which are not compulsory for the EU Member States. Ukraine is free to approximate with them as well, however, this should not be done without a prior assessment of that would be to the benefit of Ukraine, its economy and business community.

The third example of "gold-plating" is keeping existing stricter Ukrainian standards or developing new one although they may not be required by EU law. This, in itself is not a bad thing but one should always have in mind that having such rules may be beneficial for some addresses but not for others. For instance, by having higher consumer protection standards, one may create a straight-jacket for the economic operators.

The fourth example of "gold-plating" may, in some cases, be approximation with EU legislation ahead of deadline laid down in the AA or with newly adopted EU legislation, ahead of changes to the annexes with lists of EU *acquis*. This, however, is not a straight-forward affair and there is no one size fits all approach. One should not exclude that approximation ahead of schedule may be beneficial to Ukraine and its business community. In some cases, however, it may not necessarily be so. If such rushed approximation would materialise, it would amount to "gold-plating".

Another kettle of fish is approximation with a newly adopted EU legislation instead of the one listed in the AA. Sometimes it may be a good way forward. For instance, if the legal acts in question are recommended by the EU, and if they would bring benefits to the Ukrainian economy, they could be approximated with instead of the ones listed in the AA. However, we may also envisage a scenario whereby a new EU legal act is opted for unilaterally by the Ukrainian authorities but, at the same time, it introduces new rules that would be less beneficial to the business community. Should that happen it would be a good example of "gold-plating".

ANNEXES

Annex I. Organization of EU legal approximation process in Ukraine

Процес наближення (адаптації) законодавства України до права ЄС охоплює перед усім діяльність урядових інституцій та Верховної Ради України (далі – ВРУ). Він передбачає застосування звичайної процедури прийняття рішень урядовими органами, однак реалізація цієї процедури на урядовому рівні має певні особливості. У цьому додатку представлено огляд процесу наближення законодавства з урахуванням поточної практики його реалізації. Наближення законодавства України до права ЄС має відбуватися на основі урядових документів, передусім Програми діяльності Кабінету Міністрів України, Середньострокового плану пріоритетних дій Уряду до 2020 року та відповідних річних планів, Плану заходів із виконання Угоди про асоціацію, який на сьогодні є головним урядовим інструментом планування та моніторингу виконання Угоди про асоціацію (дивіться нижче). Крім того, важливу роль відіграють стратегії діяльності відповідного міністерства або інших центральних органів виконавчої влади, а також концепції галузевих політик. Результати діяльності Уряду в цьому напрямі тісно пов'язані з роботою у Комітеті ВРУ з питань європейської інтеграції, інших парламентських комітетах з метою подальшого прийняття відповідних євроінтеграційних законів.

На політичному рівні планування та моніторинг процесу наближення законодавства до права ЄС належить до компетенції Кабінету Міністрів України (далі – КМУ), зокрема Прем'єр-Міністра України та Віце-прем'єр-міністра з питань європейської та євроатлантичної інтеграції. На операційному рівні основним органом виступає Урядовий офіс координації європейської та євроатлантичної інтеграції Секретаріату КМУ (далі – УОКЄЄІ).

Віце-прем'єр-міністр з питань європейської та євроатлантичної інтеграції (далі - Віце-прем'єр-міністр)

- забезпечує адаптацію законодавства України до законодавства ЄС, організацію проведення моніторингу результатів роботи з такої адаптації (Постанова КМУ «Про визначення питань, що належать до компетенції Першого віце-прем'єр-міністра України та віце-прем'єр-міністрів України» від 18.04.2016 р. № 296) ;
- спрямовує роботу КМУ в процесі наближення законодавства України до права ЄС;
- очолює роботу Урядового комітету з питань європейської інтеграції (Додаток 3 Постанови КМУ № 330 від 11.05.2016);
- може надавати доручення заступникам міністрів, відповідальних за питання євроінтеграції (цей механізм надає можливість прямої взаємодії із заступниками міністрів, відповідальними за сферу європейської інтеграції);
- доповідає на засіданнях Уряду про пріоритетні задачі на поточний рік та результати моніторингу виконання Угоди про асоціацію;
- здійснює координацію роботи Уряду з питань імплементації Угоди про асоціацію, тому бере участь у співробітництві з Комітетом ВРУ з питань європейської інтеграції. Завдяки спільним зусиллям сторін визначаються пріоритетні євроінтеграційні законопроекти, які вже зареєстровані у Верховній Раді (так, у 2018 році була схвалена Дорожня карта законодавчого забезпечення виконання Угоди про асоціацію на 2018-2019 роки, яка

була сформована на основі урядового Плану заходів з виконання Угоди по асоціацію).

Урядовий комітет з питань європейської інтеграції (далі – Урядовий комітет) є платформою для обговорення відповідності проектів нормативно-правових актів та інших документів праву ЄС на урядовому рівні. До його складу входять:

- члени Кабінету Міністрів відповідно до компетенції;
- заступники міністрів з питань європейської інтеграції, керівники державних колегіальних органів, центральних органів виконавчої влади, діяльність яких спрямовується та координується Кабінетом Міністрів через відповідних міністрів, та центральних органів виконавчої влади, що не належать до сфери спрямування і координації міністрів (можуть входити)
- Віце-прем'єр-міністр з питань європейської та євроатлантичної інтеграції (очолює Урядовий комітет).

У засіданнях комітету беруть також участь представники УОКЄЄІ. На практиці зустрічі відбуваються з періодичністю від 2 тижнів до 1 місяця.

Урядовий комітет може надати доручення центральним органами виконавчої влади щодо виконання зобов'язань у сфері європейської інтеграції або розглянути проект нормативно-правового акта, який не відповідає зобов'язанням у сфері європейської інтеграції. У своїх висновках він надає зауваження та пропозиції щодо усунення суперечливих положень. Обговорення таких питань може тривати впродовж декількох засідань Урядового комітету. Зазвичай, такі засідання супроводжуються проведенням двосторонніх зустрічей між розробником(-ми) проекту акта та УОКЄЄІ. У разі позитивного рішення за результатами розгляду нормативно-правових актів Урядовим комітетом надається відповідний висновок. Розглянутий та схвалений на засіданні Урядового комітету та завізований проект акта включається до порядку денного чергового засідання КМУ. До проекту акта додаються витяг з протоколу засідання і довідка про розбіжності щодо проекту акта, якщо їх не врегульовано після розгляду Урядовим комітетом.

У разі винесення Урядовим комітетом висновку про невідповідність праву ЄС, проект акта направляється на доопрацювання головному розробнику (міністерству) із зауваженнями та рекомендаціями. Залежно від обсягу документа та його пріоритетності (наприклад, відповідно до Плану заходів з виконання Угоди про асоціацію, Дорожньої карти забезпечення виконання Угоди про асоціацію) обговорюється строк його доопрацювання. Ця процедура дозволяє залучати експертну допомогу УОКЄЄІ через консультації та проведення неформальних зустрічей. Необхідно максимально уважно опрацьовувати проект акта на цьому етапі, із залученням зацікавлених сторін та УОКЄЄІ, адже у подальшому відповідний акт буде розглядатися на засіданні Урядового комітету.

Також Урядовий комітет з питань економічної, фінансової та правової політики, розвитку паливно-енергетичного комплексу, інфраструктури, оборонної та правоохоронної діяльності може розглядати проекти нормативно-правових актів, що належать до сфери європейської інтеграції. Представники УОКЄЄІ також беруть участь у роботі над такими проектами, їхні висновки щодо відповідності Угоді про асоціацію та праву ЄС, як правило, беруться до уваги Комітетом. Як наслідок, такий проект нормативно-правового акта, що не відповідає праву ЄС, може бути повернутий його розробнику на доопрацювання, що сповільнює законотворчу діяльність. Тому ми рекомендуємо проводити попередні консультації щодо пріоритетних євроінтеграційних проектів актів з профільною експертною групою УОКЄЄІ перед офіційним внесенням проектів

до Уряду.

Після внесення до КМУ проекту акта проводиться його опрацювання в Секретаріаті КМУ. Одним із елементів цього процесу є надання висновку на відповідність зобов'язанням у сфері європейської інтеграції УОКЄЄІ (Додаток 8 Регламенту КМУ). КМУ має право вирішувати, чи враховувати зауваження та негативні висновки УОКЄЄІ.

УОКЄЄІ є самостійним структурним підрозділом Секретаріату Кабінету Міністрів України та основним органом, який, серед інших обов'язків, на операційному рівні здійснює координацію діяльності урядових органів в процесі адаптації законодавства України до права ЄС. Він прямо підпорядковується Віце-прем'єр міністру з питань європейської та євроатлантичної інтеграції. Загальними завданнями Урядового офісу є організаційне, експертно-аналітичне, інформаційне забезпечення діяльності у сфері європейської інтеграції. До компетенції УОКЄЄІ належить:

- планування, моніторинг та оцінка результативності виконання завдань у сфері європейської інтеграції, у тому числі з виконання Угоди про асоціацію;
- проведення експертизи проектів нормативно-правових актів, інших документів, внесених на розгляд Уряду, на предмет їх відповідності зобов'язанням України у сфері європейської інтеграції та праву Європейського Союзу;
- забезпечення проведення спільних засідань двосторонніх органів асоціації;
- організація роботи з підготовки орієнтовного плану перекладу актів acquis ЄС та забезпечення його подання на розгляд Уряду.

Процес адаптації законодавства передбачає проведення правової експертизи нормативно-правових актів та інших документів щодо їх відповідності Угоді про асоціацію та праву ЄС. На початковому етапі розробки нормативних актів відповідальним секторальним підрозділам у міністерствах та інших центральних органах виконавчої влади слід залучати та консультуватись з експертами директоратів стратегічного планування та європейської інтеграції (якщо такі директорати вже існують у відповідних міністерствах), або підрозділів, які відповідають за європейську інтеграцію. Вони мають бути першим контактним пунктом для відповідних секторальних підрозділів щодо питань планування наближення українського законодавства до права ЄС, перевірки на відповідність праву ЄС. Ми також рекомендуємо міністерствам та іншим центральним органам виконавчої влади залучати експертів УОКЄЄІ до роботи на початкових стадіях їхрозробки для надання методологічної підтримки з метою уникнення суперечностей або недоліків впродовж подальшої роботи над такими проектами (пп. 3 п. 4, пп.12 п. 4 Положення про УОКЄЄІ). Це допоможе скоротити робочий час та уникнути повторного опрацювання актів та додаткового розгляду Урядовими комітетами. У середньому така експертиза займає до 10 робочих днів. За її результатами надається позитивний або негативний висновок. У разі негативного висновку можуть існувати декілька процедур. Перший варіант усунення недоліків акта може включати неформальні консультації урядового органу з УОКЄЄІ. Другий варіант може застосовуватись у разі неврахування рекомендацій УОКЄЄАІ щодо усунення недоліків проекту акта та у подальшому призвести до його розгляду на засіданнях Урядового комітету.

План заходів з імплементації Угоди про асоціацію у чинній редакції містить перелік завдань, здійснення яких є необхідним для виконання зобов'язань за Угодою про асоціацію, індикатори (заходи) та строк виконання завдань, а також перелік органів влади, відповідальних за виконання кожного відповідного завдання. Кожне завдання передбачає чіткий перелік заходів, що можуть мати як нормативно-правовий (розроблення проекту та прийняття НПА), так і організаційний характер (створення органу влади, запровадження курсів підвищення кваліфікації в певній

сфері, відкриття нових пунктів пропуску через кордон тощо). Виконання цих заходів можна зафіксувати та перевірити, відтак вони одночасно виконують роль індикаторів ступеню виконання відповідного завдання. Строки виконання завдань визначаються з урахуванням термінів, встановлених в додатках до Угоди про асоціацію, а також строків, встановлених у затверджених стратегіях та дорожніх картах. План заходів є гнучким інструментом планування та моніторингу імплементації Угоди про асоціацію, який дозволяє належним чином реагувати на зміни обсягу зобов'язань. Постанова КМУ № 447 закріплює виключний перелік підстав для внесення змін до плану заходів, а саме:

- внесення змін до Угоди про асоціацію;
- прийняття рішення двосторонніх органів, утворених відповідно до Угоди про асоціацію;
- зміни обсягу завдань, необхідних для імплементації акта права ЄС відповідно до зобов'язань у рамках Угоди.

Основна ідея гнучкості інструменту базується на можливості вносити зміни у план заходів та систему моніторингу по спрощеній процедурі. Для внесення змін у додатки Угоди про асоціацію, міністерствам необхідно подати відповідний лист до УОКЄЄІ зі своїми пропозиціями. Наприклад, це може бути необхідність оновлення списку директив у Додатку до Угоди про асоціацію у зв'язку з їх втратою чинності у ЄС та прийняття нових актів (директив, регламентів, рішень). У результаті отримання позитивного рішення у вигляді операційного висновку двостороннього органу дані вносяться у систему моніторингу Угоди про асоціацію. Ця система має умовну назву «Пульс Угоди», доступ до якої мають всі уповноважені урядові органи (за допомогою введення ключа, який надається УОКЄЄІ).

На практиці можуть мати місце випадки, коли міністерство або інший центральний орган виконавчої влади пропонує внести нові зобов'язання до Плану заходів з виконання Угоди про асоціацію. Правовою основою для цих завдань можуть бути секторальні угоди України – ЄС, окремо визначені на двосторонньому рівні секторальні напрямки поглибленої інтеграції з ЄС (наприклад, поступова інтеграція України до Єдиного цифрового ринку ЄС). У такому разі міністерство або інший урядовий орган мають право звернутися до УОКЄЄІ для погодження оновленого обсягу зобов'язань та внесення відповідних змін до системи моніторингу виконання Угоди про асоціацію. Рекомендуємо чітко зазначати обсяг зобов'язань, які бере на себе відповідний урядовий орган. Пропозиції урядових органів щодо оновлення плану заходів розглядаються на засіданні Урядового комітету, з урахуванням висновку УОКЄЄІ.

Моніторинг виконання плану заходів здійснює Урядовий офіс, який щоквартально (до 10 числа наступного місяця) отримує від урядових органів, відповідальних за реалізацію конкретного напряму виконання Угоди про асоціацію, комплексний звіт за підписом заступника керівника органу виконавчої влади, до компетенції якого належать питання європейської інтеграції (Постанова від 31 травня 2017 р. № 447 про питання проведення планування, моніторингу та оцінки результативності виконання Угоди про асоціацію).

Комплексний звіт складається з:

- переліку індикаторів (заходів) у рамках кожного завдання, здійснених за звітний період;
- інформації щодо прогресу у виконанні індикаторів (заходів) за звітний період;
- пропозицій щодо оновлення плану заходів (у разі потреби);

- інформації про результати співпраці з партнерами з ЄС та іншими міжнародними партнерами в разі отримання фінансової та/або технічної допомоги для реалізації заходів.

Рекомендуємо міністерствам посилатись на відповідний пункт Плану заходів по виконанню Угоди про асоціацію. При наданні інформації бажано зазначати, який актом виконано завдання, якщо мова йде про прийняття закону, постанови або іншого документу. Всі комплексні звіти опрацьовуються представниками УОКЄЄІ, які перевіряють виконання завдань та їх відповідність зобов'язанням у Плані заходів. У разі погодження урядовими органами інформації, викладеної у звіті, відбувається оновлення даних у системі моніторингу Угоди про асоціацію «Пульс Угоди» представниками УОКЄЄІ. Якщо завдання включає розробку законопроекту, рекомендуємо отримати правовий висновок УОКЄЄІ про відповідність проекта праву ЄС та зобов'язанням за Угодою про асоціацію.

За результатами щоквартального та щорічного моніторингу виконання плану заходів УОКЄЄІ готує рекомендації урядовим органам для врахування та підготовки відповідних пропозицій. Пропозиції урядових органів щодо оновлення плану заходів розглядаються на засіданні Урядового комітету з урахуванням висновку УОКЄЄІ.

Важливу роль у процесі наближення українського законодавства до права ЄС відіграє взаємодія урядових органів із Комітетом з питань європейської інтеграції та іншими комітетами ВРУ. У більшості випадків Комітет ВРУ з питань європейської інтеграції направляє запит до УОКЄЄІ для проведення правової експертизи проекту закону на відповідність зобов'язанням за Угодою про асоціацію та праву ЄС. Варто відмітити, що відповідно до своєї компетенції УОКЄЄІ є самостійним структурним підрозділом Секретаріату КМУ, який здійснює координацію у сфері європейської інтеграції, а основна функція супроводу проектів законів лежить у площині відповідальності міністерств та урядових органів, які визначені відповідальними у Плані заходів по виконанню Угоди про асоціацію. Рекомендуємо активно долучатися до процесу супроводження актів, які сприяють наближенню законодавства України до права ЄС, проведення зустрічей та консультацій з відповідними депутатами, які можуть ініціювати розгляд законопроекту, забезпечувати експертну підтримку та постійну взаємодію до остаточного прийняття закону.

Переклад на українську мову актів права Європейського Союзу

Однією з передумов наближення законодавства до права ЄС є переклад українською мовою актів ЄС, що підлягають імплементації, а також відповідних супровідних документів. Порядок здійснення перекладу на українську мову актів acquis ЄС регулює § 671 Регламент КМУ та Постанова КМУ від 31 травня 2017 року №512 «Про порядок здійснення перекладу на українську мову актів Європейського Союзу acquis communautaire». Організацію, планування та здійснення перекладу актів ЄС забезпечує УОКЄЄІ.

Переклад здійснюють відповідно до орієнтовного плану перекладу актів acquis ЄС, який формує Урядовий офіс та затверджує КМУ. Щоб той чи інший акт acquis ЄС був включений до орієнтовного плану перекладів, заінтересовані ЦОВВ, державні колегіальні органи, місцеві органи виконавчої влади подають УОКЄЄІ пропозиції за формою, викладеною в додатку 12^1 до Регламенту КМУ. УОКЄЄІ узагальнює пропозиції, отримані від відповідних органів і на їх основі та з урахуванням строків імплементації актів права ЄС формує орієнтовний план перекладу актів acquis ЄС на рік та забезпечує його подання до 30 січня на розгляд КМУ. Далі, упродовж року, УОКЄЄІ організовує та забезпечує переклад актів acquis ЄС відповідно до затвердженого КМУ орієнтовного плану.

Після того, як акт acquis ЄС перекладено, УОКЄЄАІ надсилає його первинний переклад до ініціатора звернення, який подав запит на здійснення такого перекладу, для проведення термінологічної перевірки та, у разі потреби, надання пропозицій щодо внесення редакційних змін із урахуванням особливостей фахової термінології. Такий ініціатор зосереджує свої зусилля на правильності, адекватності й доречності перекладу українською мовою відповідних термінів, понять, технологічних процесів, характеристик і параметрів тощо.

Термінологічна перевірка покликана забезпечити перевірку відповідності термінології документа специфіці сфери застосування. Зокрема, необхідно перевірити додатки, якщо такі є, що містять багато технічних деталей, про які перекладачі як нефахівці відповідних галузей можуть не мати достатніх знань чи досвіду, щоб викласти їх переклад правильно.

Термінологічна перевірка не охоплює стилістику і не повинна переробляти юридичний текст іншої правової системи під норми і сучасний стан української мови права. Недоцільно підбирати терміни та приблизні структурні відповідники з українського законодавства, якщо їхнє номінальне значення і законодавче означення не збігається з оригіналом. При цьому, не потрібно вносити редакційні виправлення, що жодним чином не впливають на розуміння змісту, якщо не помічено грубих помилок.

Виконавець термінологічної перевірки забезпечує надання узгодженої відповіді.

З дотриманням зазначених вище вимог, за результатами термінологічної перевірки перекладу акта acquis ЄС ініціатор звернення надає УОКЄЄІ пропозиції щодо внесення редакційних змін стосовно вживання термінів у перекладі акта acquis ЄС. Ці пропозиції Урядовий офіс розглядає на предмет їхньої адекватності, обґрунтованості та відповідності.

Після термінологічної перевірки та остаточного редагування перекладу акта acquis ЄС Урядовий офіс офіційно затверджує переклад та вчиняє такі дії:

- включає інформацію про перекладені акти acquis ЄС до порядку денного засідання Урядового комітету з євроінтеграції;
- протягом 15 робочих днів забезпечує публікацію перекладу на Єдиному веб-порталі органів виконавчої влади та надсилає його ініціатору в електронному вигляді;
- забезпечує збереження перекладу в електронному вигляді в Урядовому офісі.

УОКЄЄІ уповноважений вносити зміни, доповнення та виправлення до затвердженого перекладу акта acquis ЄС за обґрунтованим поданням виконавців перекладу.

Annex II. Guidelines on Tables of Compliance and statements on EU law compliance

In this Annex to the Guidelines the readers are guided through the requirements imposed by Ukrainian law as to use and models of Tables of Compliance. The Statement of Compatibility employed below is required as per paragraph 35 of the Rules of Procedure of the Cabinet of Ministers of Ukraine and its Annex 1 (Додаток 1 (до пункту 3 § 35)).

STATEMENT

on compliance of the draft act [insert a title of the legal act] with the obligations of Ukraine in European integration area and with *acquis communautaire*

Draft Act prepared by

[insert details of the institution that prepared the draft]

1) Belonging of a draft act to the areas where legal relationships are regulated by *acquis communautaire*.

Information if a draft legal act falls within the scope of EU law. This information should be provided by the drafter of a legal act. The role of the person conducting a compliance check is to verify if the information is provided and, if so, whether it is correct. Note that in some areas, although the EU has no competence, the Member States are not permitted to adopt/keep legislation, which is in breach of freedoms of internal market (for instance direct taxation). If there is no acquis in a given area, this section of the Statement should include a statement: "not applicable". For example:

"This draft does not fall within the scope of EU law."

OR

"This draft falls within the scope of EU law, however it remains outside the scope of the Association Agreement therefore Ukraine has no obligation to fully approximate with EU law in this respect."

OR

"This draft falls within the scope of EU law. It covers matters of non-discrimination, which is governed by Article 19 TFEU and EU secondary legislation. In particular, it is regulated in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation."

2) Obligations of Ukraine in European integration area (including international legal obligations).

This section is of paramount importance. It allows readers to verify if a draft legal act falls under the Association Agreement or any other treaty between Ukraine and the European Union. This section, too, should be filled by the drafters of a legal act. The role of a person conducting a compliance check is to verify if the statement is accurate and complete and to provide the decision-makers with independent legal opinion. This is where the inventory developed as per section 3 of this Methodology may become very handy. This section should include references to relevant

provisions of the Association Agreement (including its Annexes) or any other relevant legal acts. This could include, for instance, the Energy Community Treaty or any other sectoral agreement. This section does not have to be very elaborate, it is enough if it contains a detailed reference to a particular provision(s) of the Association Agreement or any other legal act). For instance:

"This draft gives effect to Directive 2000/78 establishing a general framework for equal treatment in employment and occupation. Approximation with it is required by the Association Agreement in Annex XL to chapter 21. Ukraine has the obligation to approximate with the Directive in question within four years from entry into force of the Association Agreement."

3) Program documents in European integration area

This section should be filled by the drafters of a legal act. As with sections 1-2, the task of the person conducting a compliance check is to make sure this section is filled properly and the information provided is as accurate as possible. It is necessary to include references to relevant law approximation plans, road maps or strategies. For instance:

"This draft is envisaged by Road Map on xxx, section xxx, page xxx"

4) Comparative legal analysis

Detailed information on compliance of a draft act with the relevant provisions of EU law and international legal obligations of Ukraine in European integration area is provided in one of the two tables of compliance as reproduced below. The choice of the table depends on the content of the draft Act and priorities or terms for implementation of international legal obligations in European integration area. Table No 1 is prepared if the deadline for approximation envisaged in the Association Agreement (or any other relevant international agreement between Ukraine and the EU) exceeds 2 years from the time of drafting. The table should be prepared by the drafters of a legal act. The key reason of drafting compliance tables is to ensure a user-friendly overview of the way of transposition of all relevant EU law provisions and, at the same time, an overview of the degree of compliance of all relevant provisions of Ukrainian law with EU legislation.

The role of the person conducting a compliance check is to check if the table is filled correctly and comprehensively. Furthermore, the task is to check if the statement of compatibility is accurate. This will require a good knowledge of EU law, in particular, all sources listed in the inventory prepared in the preliminary stages.

Table No 1

1	2	3	4	5	6

Column 1 is straight-forward, it includes a reference to a number of provision contained in the draft Ukrainian legal act.

Column 2 contains the text of a domestic provision. It is important to divide the text into small sections as this would give a clear picture as to the contents of particular norms.

Column 3 contains the text of relevant EU provision regardless their implementation is obligatory for Ukraine or not. Where applicable, it should also contain information as to interpretation of the provision in question in soft law instruments as well as jurisprudence of the CJEU.

Column 4 contains information as to the level of compliance with pieces of EU legislation mentioned in Column 3. The options available to the drafters are:

- compatible,
- not contradicting,
- partially compatible,
- not compatible,
- not regulated by EU law.

Column 5 contains information international legal obligations of Ukraine in the scope of regulation of the draft Ukrainian act under consideration.

Column 6 contains information as to compatibility of relevant provision with international obligations of Ukraine mentioned in the Colmn 5. The options available to the drafters are:

- compatible,
- not contradicting,
- partially compatible,
- not compatible,
- not regulated by international law.

Bearing the above in mind a sample table may look as follows:

Table No 1 Draft xxx on rights of passengers [fictitious]

Art. 3	In case of delay passengers shall be offered free of charge meals and refreshments in a reasonable relation to the waiting time.	Regulation 261/2004 Art. 9 1. Where reference is made to this Article, passengers shall be offered free of charge: (a) meals and refreshments in a reasonable relation to the waiting time; (b) hotel accommodation in cases; - where a stay of one or more nights becomes necessary, or - where a stay additional to that intended by the passenger becomes necessary; 2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails. 3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.	Partly compliant with Article 9 of Regulation 261/2004. It does not take into account Art. 9.1(b) and Article 9.2-9.3.	Art. 137 of AA and Art. XXX of EU-Ukraine Common Aviation Area Agreement	Partial compliance with Art. XXX of EU-Ukraine Common Aviation Area Agreement

No	Provisions of draft act	Relevant provisions of *acquis communautaire*	Assessment of compliance with *acquis* (complies, does not contradict, partially takes into account, does not comply, not regulated)	Relevant provisions of the sources of international legal obligations of Ukraine in European integration area	Assessment of conformity with international legal obligations (complies, does not contradict, partially takes into account, does not comply, not regulated)
1	2	3	4	5	6
Art. 4	a. "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation. b. Denied boarding covers cases of overbooking as well as boarding is denied on other grounds, including operational reasons. c. Denied boarding includes a situation where, in the context of a single contract of carriage involving a number of reservations on immediately connecting flights and a single check-in, an air carrier denies boarding to some passengers on the ground that the first flight included in their reservation has been subject to a delay attributable to that carrier and the latter mistakenly expected those passengers not to arrive in time to board the second flight	(j) "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;	Full compliance with Article 2 para. j of Regulation 261/2004. It takes into account not only the text of the Regulation but also the jurisprudence of the Court of Justice. Point b takes on board judgment of the Court of Justice in case C-22/1 *Finnair Oyj v. Timy Lassooy*. Point c takes into account judgment of the Court of Justice in case C-321/11 *Germán Rodríguez Cachafeiro, v Iberia, Líneas Aéreas de España SA*.	Art. 137 of AA and Art. Xxx of EU-Ukraine Common Aviation Area Agreement (full compliance)	Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (ICAO Doc No 4698).

Table No 2 *has to be produced if approximation is required under the Association Agreement or any other international treaty in the field of European Integration and the deadline is two years away at the time of drafting. In such case the point of reference is EU law, not Ukrainian legislation. Hence, if one draft law envisages approximation with several pieces of EU acquis, the drafters should prepare one ToC per one EU legal act. They should reproduce EU legal acts in their entirety and include references to Ukrainian provisions which are already in force as well as the newly drafted ones.*

Table No 2

No	Provisions of the EU act and\or other sources of *acquis* (provisions are given article-by-article)	International legal obligations in European integration area (it is necessary to specify the norms relating to the provisions given in Column 2)	Conformity assessment (assessment of Ukrainian legislation compliance with the provisions set out in columns 2 and 3 (complies, does not contradict, partly complies, does not comply, not regulated), it's necessary to specify the norms Ukraine with reference to the legal acts regulating the relevant subject and with relevant provisions implemented)	Further measures required for a proper approximation of legislation (necessary draft laws, regulations, guidelines, etc.)
1	2	3	4	5

Column 1 is straight-forward, it includes a reference to a number of provision contained in the draft Ukrainian legal act.

Column 2 contains the text of an EU provision. Where applicable, it should also contain information as to interpretation of the provision in question in soft law instruments as well as jurisprudence of the Court of Justice.

Column 3 contains references to the Association Agreement and/or any other international treaties in the field of European Integration.

Column 4 contains reference to the proposed domestic legislation as well as information as to the level of compliance with relevant pieces of EU legislation. The options available to the drafters are:

- compatible,
- not contradicting,
- partially compatible,
- not compatible,
- not regulated by EU law.

Column 5 contains information as to future plans regarding a given piece of EU legislation, that is – if relevant - steps that need to be taken in order to achieve full compliance.

Bearing the above in mind a sample table may look as follows:

Table No 2 Regulation 261/2004 [fictitious]

Art. 9 (1a)	1. Where reference is made to this Article, passengers shall be offered free of charge: (a) meals and refreshments in a reasonable relation to the waiting time;	Art. 137 of AA and Art. Xxx of EU-Ukraine Common Aviation Area Agreement (partial compliance).	Article 3 of the Draft: partly compatible.	As per Road Map XXX full compliance planned for 2019.
Art. 9 (1b)	(b) hotel accommodation in cases; - where a stay of one or more nights becomes necessary, or - where a stay additional to that intended by the passenger becomes necessary;	Art. 137 of AA and Art. Xxx of EU-Ukraine Common Aviation Area Agreement (partial compliance).	No relevant provision of Ukrainian law.	As per Road Map XXX full compliance planned for 2019.
Art. 9 (2)	2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.	Art. 137 of AA and Art. Xxx of EU-Ukraine Common Aviation Area Agreement (partial compliance).	No relevant provision of Ukrainian law.	As per Road Map XXX full compliance planned for 2019.
Art. 9 (3)	3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.	Art. 137 of AA and Art. Xxx of EU-Ukraine Common Aviation Area Agreement (partial compliance).	No relevant provision of Ukrainian law.	As per Road Map XXX full compliance planned for 2019.

5) Expected results

In this section the results of economic, social and political analysis of act implementation and, if necessary, justification of the ways selected for implementation of relevant EU act provisions should be presented. This should include elaboration on, inter alia:

- *the choice of domestic legal act,*
- *reasons behind particular solutions, in particular if they are not fully compatible with EU law,*
- *if the subject area covers measures required to liberalize trade between Ukraine and the EU this should also be explained.*

Results of regulatory impact assessment should also be presented (or reference to such assessment should be given).

6) General conclusion

The final section should comprise summarized information on compliance of draft act with the obligations of Ukraine in European integration area, including international legal obligations, and with EU acquis. If the draft act does not comply with the obligations in European integration area (excluding international and legal obligations), program documents of the CMU or the acquis, the necessity of act adoption and its validity shall be justified by the drafter.

Annex III. Review of case-law of the CJEU relevant to the areas covered by the EU-Ukraine Association Agreement

Available as a separate file on the eu-ua.org website

Annex IV. Application of EU law in the EU Member States

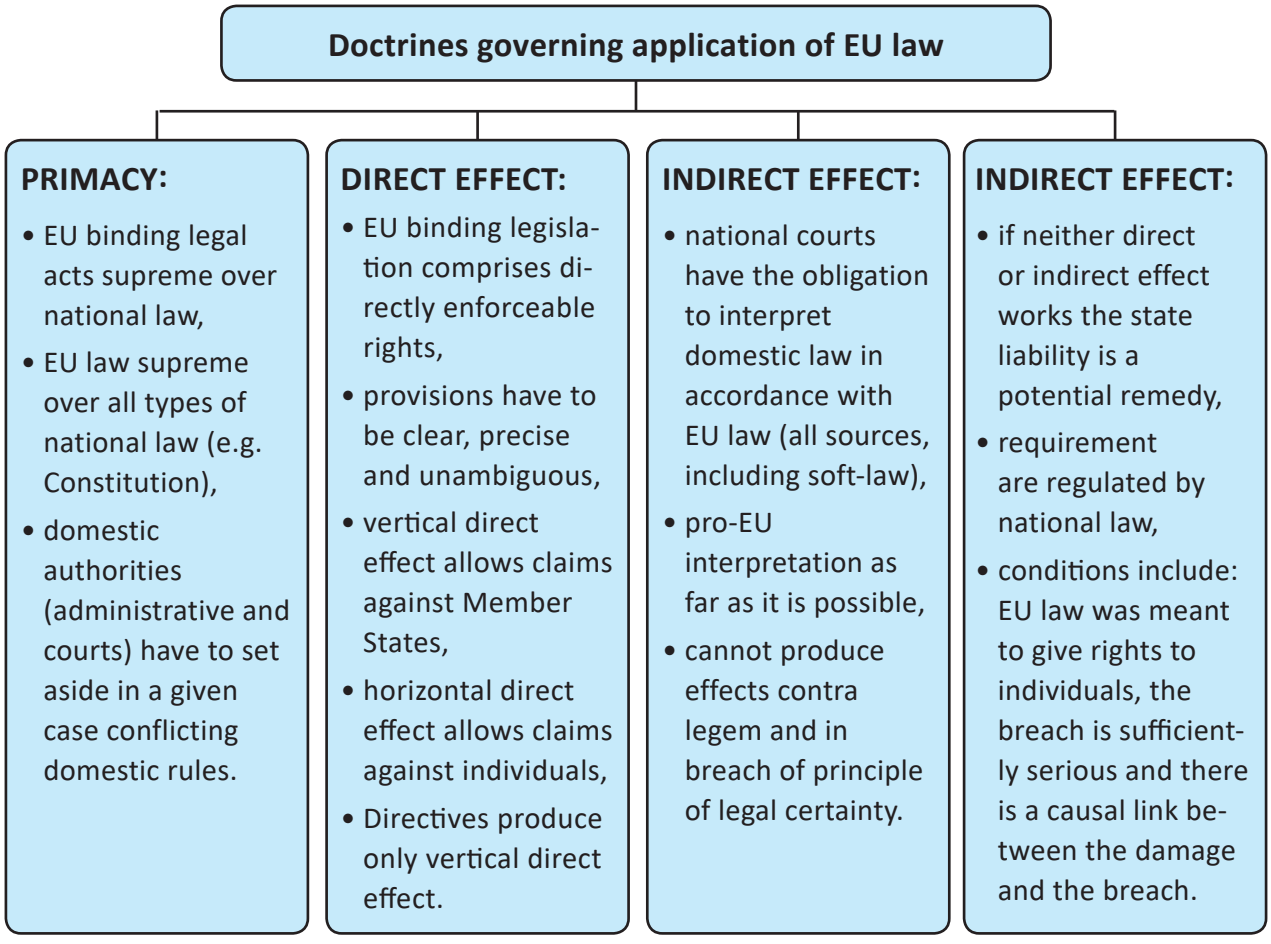
Application of EU law in the Member States is governed by an idiosyncratic set of rules developed in the jurisprudence of the CJEU over the last sixty years. In a nutshell, the enforcement is governed by four key principles:

- primacy,
- direct effect,
- indirect effect,
- state liability.

All of these principles operate in sync and are regularly used in front of national courts. It should be emphasised, the EU law – unlike public international law – is directly enforceable at the national level. Both, administrative and judicial authorities have the obligation to apply EU law and, should conflicts arise, set aside domestic rules which are not compatible with EU law. These principles do not apply to third countries, including Ukraine. For such countries, EU law is perceived as public international law and applied accordingly. However, it is essential to appreciate how EU law is enforced in the EU Member States as it gives the readers a proper contextual background. All these principles are elaborated on in turn.

However, bear in mind that none of these key principles is applicable in non EU Member States such as Ukraine. Annex IV only serves for a better understanding of EU law as such.

Graph № 5 Application of EU law at national level



Primacy of EU law

The doctrine of **primacy** is frequently referred to also as **supremacy** and, for the purposes of the present Guidelines, both terms will be used interchangeably. This doctrine tells us how to handle conflicts between the law of the Member States and EU legislation. Neither EU Treaty, nor TFEU contain provisions explicitly dealing with supremacy.

However, the Declaration No 17 annexed to the Founding Treaties confirms its existence. The principle of supremacy originates in jurisprudence of the CJEU, which came in response to questions referred to it by national courts called to adjudicate on EU law based claims. National judges did not know how to resolve conflicts of domestic legislation with EU law therefore they used the mechanism of preliminary ruling (Article 267 TFEU) in order to get a helpful hand from the CJEU.

The Court found grounds for its development in principle of loyal co-operation enshrined in Article 4(3) TEU (previously Article 5 EEC Treaty; Article 10 EC Treaty). A reminder is fitting that it creates a twofold obligation for the Member States. On one hand, it obliges them to take all measures to reach the aims of the Treaties; on the other it prohibits actions that may impede these aims. Since one of the major aims of the EU is creation of the internal market the CJEU has concluded that this objective cannot be realised when the Member States give supremacy to their national laws and indirectly create different standards. Only the absolute supremacy of EU law is a guarantor of a coherent legal standard (principle of uniformity).

The CJEU made this clear in the case 14/68 *Walt Wilhelm and Others v. Bundeskartellamt*. It held the following:

> *"The EEC Treaty [now TEU and TFEU] has established its own system of law, integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow Member States to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in application of it must not differ from one state to another as a result of internal measures, lest the functioning of the Community [now Union] system should be impeded and the achievement of the aims of the Treaty placed in peril. Consequently, conflicts between the rules of the Community [now Union] and national rules in the matter of the law on cartels must be resolved by applying the principle that Community law [now Union law] takes precedence."*
>
> *(para 6 of the judgment).*

In the Court's view the supremacy of EU law is absolute and extends to all domestic legislation, including the constitutions of the Member States. The starting point for the principle of supremacy was case 6/64 Costa v. ENEL. In that case, an Italian court asked the CJEU the question whether Italian law that on nationalization of a utility was consistent with the then EEC Treaty (now TFEU).

The CJEU laid down the general concept of supremacy. Further issues connected with the scope of supremacy and obligations of national courts in this respect have been developed in subsequent jurisprudence of the CJEU. Even though the principle of supremacy is broad, and was radical at the time, the national courts have - in general - accepted the discussed principle and they do apply it in practice.

The principle of supremacy applies whenever there is a conflict between any binding act of EU law and national legislation. This includes in particular provisions of:

a) TEU and TFEU;

b) Charter of Fundamental Rights;

c) international treaties concluded by EU with third countries;

d) Regulations;

e) Directives.

The jurisprudence of the CJEU is very consistent, as the Court has ruled many times that primacy extends to all sources of national law, including domestic constitutions. Not surprisingly, the latter aspect of primacy is very controversial. The leading judicial authority is judgment in case 11/70 Internationale Handelsgesselschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

Here the CJEU was faced with the reference from the German court on validity of EEC secondary legislation. According to the referring court, the latter conflicted with the German Constitution (Grundgesetz) and fundamental rights enshrined therein. The CJEU concluded the following:

> *"[…] the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules on national law, however framed, without being deprived of its character as Community law [now Union law] and without the legal basis of the Community [Union] itself being called in question. Therefore the validity of a Community [Union] measure or its effect within a Member States cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. "*

In other words, the CJEU held that EU law takes precedence, hence the validity of EU legislation may only be judged against the EU law background. The EU law is supreme in case of conflicts with domestic law of any kind. This does not only include acts producing *erga omnes* effects, but also individual administrative decision. To this end the leading judicial authority is the judgement in case C-224/97 Ciola, where the question of supremacy of EU law in relation to domestic administrative decisions was considered.

The CJEU ruled that "[…] provisions of national law which conflict with […] a provision of Community law [now Union law] may be legislative or administrative". In other words, the Court confirmed that principle of supremacy is applicable equally to national legislation as well as administrative decisions.

The decision on application of doctrine of primacy lies in the hands of a national judge. The basic principle of what to do is clear: when the national judge is confident of non-conformity she/he shall ignore the conflicting national legislation and make a decision on the base of supreme EU legislation. It does not have to wait for the national legislator to amend the conflicting legislation or the constitutional court to repeal it. This principle stems out from the judgment in case 106/77 Simmenthal. The same rule applies also to other state authorities, including tax, immigration and competition authorities.

Doctrine of direct effect

In modern member state court practice, it has become rather common that a party will argue that a provision of EU law is "directly effective" or "has direct effect". At its most simple level, arguing that EU law has direct effect means that the party is entitled to use that provision of EU law as the basis for his claim. This has profound impact on the case. For example, applying the doctrine of supremacy, any local law that is not consistent with a directly effective provision of EU law should be ignored. But when do provisions of EU law have "direct effect"?

Neither TEU nor TFEU contains any provisions on the principle of direct effect of EU law. It is solely based on jurisprudence of the CJEU. At first the principle developed in relation to the old EC Treaty (now TFEU) only. With a growing number of secondary legislation and practical challenges connected with its application the CJEU extended the application of this principle to other sources of EU law. Once again, the preliminary ruling procedure regulated in Article 267 TFEU was pivotal.

Before we analyse the application of the principle of direct effect to particular sources of the EU law it is important to make sure the core idea of this principle is clear. The principle of direct effect relates to the nature of the norms contained in the EU legislation. If provisions of a piece of binding EU legislation are **clear, precise and unambiguous** individuals are allowed to submit claims based on them. If there is a conflict between a directly effective provision of EU law and domestic legislation the domestic judges as well as national administrative authorities have the obligation to set aside domestic law and entertain claims directly on the basis of EU legislation.

Ultimately, the CJEU has the final word on the direct effectiveness, however national courts may also take decisions in this respect following prior CJEU judgments. In case of doubt they can always seek a preliminary ruling from the CJEU.

Many binding sources of EU law are capable of producing direct effect for EU Member States. This particularly includes numerous provisions of the TFEU. The long saga of the judicial developments has started with the case 26/62 *Van Gend en Loos*. In this landmark judgment the CJEU held that the European Communities have created a new legal order, whose subjects are not only the Member States but also individuals. The Court added that the EU law creates rights and obligations for individuals, which have to be protected by national courts.

When analysing the scope of the then Article 12 EEC the CJEU held that it is clear and precise enough to produce direct effect. It was irrelevant that *prima facie* the provision in question dealt with the obligations of the Member States. The plaintiff had a right to argue before the Dutch court that the decision imposing the duty should be annulled based on the then Article 12 EEC Treaty.

In a number of subsequent judgments the CJEU has declared selected provisions of the TFEU to be directly effective. Initially all those developments arose where individuals asserted rights against the Member States. These claims involved so called "vertical" direct effect (from the individual going up to the state). Until mid 1970s the question was whether provisions of the EEC Treaty (now TFEU) may also produce the direct effect in horizontal relations (between individuals).

This issue was raised in the case 43/75 Defrenne v. Sabena. In reply to the preliminary ruling request submitted by the Belgian Court, the CJEU held that provisions such as Article 119 EEC (now Article 157 TFEU) are fully capable of producing the direct effect in both, vertical and horizontal relations. The CJEU based its argumentation on the nature of prohibition enshrined in the then Article 119 EEA. It held that "in fact, since Article 119 (now Article 157 TFEU) is mandatory in nature, the prohibition

on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals" (Para. 19 of the judgment).

The issue of the horizontal direct effect came back in the case C-281/98 Angonesse v. Cassa di Risparmio di Bolzano. On that occasion, the Court held that Article 39 EC (now Article 45 TFEU) fulfils all the necessary requirements and is capable of being invoked by workers who express the desire to protect their rights when discriminated against on the base of nationality when exercising the free movement of workers' rights.

Another case then horizontal effect of TFEU provision was mentioned is CJEU judgement in C-309/99 J.C.J. Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten. The CJEU concluded, *inter alia*, that *"compliance with Articles 52 and 59 (now Articles 49 and 56 TFEU) of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services".*

The situation is slightly more nuanced when it comes to direct effect of EU Regulations. Mainly, the principle of direct applicability must be distinguished from the principle of direct effect. The first deals with the formal side of an EU regulation becoming part of national legal system. The latter concentrates on nature of the norm contained therein and rights of individuals. All Regulations are *ex lege* directly applicable, however that does not mean that their provisions always produce the direct effect. Although it is almost always the case, nevertheless such provisions must fulfil the standard set of conditions.

It is clear from the case-law of the CJEU that provisions of the Regulations may be both, vertically and horizontally directly effective. The leading judicial authority in this respect is the CJEU judgment in case C-253/00 Antonio Muñoz y Cia SA and Superior Fruiticola SA v Frumar Ltd and Redbridge Produce Marketing Ltd. The dispute was based around application of EU Regulations fixing standards on production of vegetables and fruits. The parties to the dispute were two companies involved in import and sale of grapes in the United Kingdom. The CJEU confirmed that individuals may rely on the directly effective provisions of Regulations against other individuals.

Direct effect of Directives has caused and continues to cause particular problems. This is due to the fact that – as already mentioned - Directives are addressed to the Member States and always require transposition to national law. Hence, in principle individuals' claims are submitted on the basis of national law implementing EU Directives.

However, delays in transposition are the inevitable feature of the everyday practice in the EU; therefore the CJEU had to find a way for individuals to enforce directly their rights enshrined in the Directives. The starting point is the CJEU judgment in case 41/74 Yvonne van Duyn v. Home Office, where the Court – albeit in general terms – held that Directives can produce direct effect. In subsequent jurisprudence the two key questions were whether provisions of Directives are capable of producing the direct effect in both, vertical and horizontal relations and whether implementation periods are relevant when it comes to direct effect.

As far as the first is concerned the CJEU has continuously taken a strict approach by refusing the direct effect in horizontal relations. In the judgment C-91/92 Paola Faccini Dori v. Recreb Srl the CJEU in very straight forward terms precluded it. However, in order to relax this approach it has developed the concept of state and emanation of the state, hence allowing more claims based directly on the Directives.

The Court did so, for instance, in case 152/84 M.H.Marshall v. Southampton and South-West Hampshire Area Health Authority and case C-188/89 A. Foster and Others v. British Gas. As to the second issue the CJEU made it clear that provisions of Directives may only produce the direct effect upon expiry of the transposition period.

Summing up, the following factors shall be remembered about the direct effect of the Directives in EU Member States:

1) Member States have an obligation to transpose Directives into their national laws in accordance with the transposition date fixed in every single Directive,
2) Only in cases of delays (incomplete or partial transposition) individuals may rely on directly effective provisions of EU Directives,
3) Such claims may be submitted only against the state or the body that can be considered as the emanation of the state, hence horizontal direct effect of Directives is excluded.

Other binding sources of EU law can also produce direct effect. This includes decisions, which – as already mentioned - are individual acts addressed to particular Member States or economic operators. It is very rare that decisions are applicable *erga omnes*. In case 9/70 Franz Grad v. Finanzamt Traunstein the CJEU held that decisions can also produce direct effect. The Court concluded that *"it would be incompatible with the binding effect attributed to decisions by Article 189 (now Article 288 TFEU) to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision".*

It added that *"although the effects of a decision may not be identical with those of a provision contained in a Regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a Regulation".* In that particular case, the provision of the Decision combined with a Directive produced direct effect.

It is clear from the jurisprudence of the CJEU that, the principle of direct effect is fully applicable to both, provisions of the international treaties themselves as well as legal acts adopted on their basis. This, however, will not be the case with EU-Ukraine AA which – as per EU decision on its conclusion – cannot produce direct effect.

Doctrine of indirect effect

The third doctrine developed by the CJEU is indirect effect. The leading judgment comes from case 14/83 Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, where the Court ruled that existing case law proves that the interpretative obligation extends to all sources of EU law, including soft law instruments (that by definition cannot produce direct effect).

For instance in case 157/86 Mary Murphy and others v. An Bord Telecom Eireann the CJEU held that the interpretation of domestic law should be conducted in the light of Article 157 TFEU (the prohibition of gender discrimination). More controversially the CJEU in case C-105/03 Criminal Proceedings against Maria Pupino extended the application of the doctrine of indirect effect also to the third pillar framework decisions. This was despite the fact that the then Article 34 TEU excluded the direct effect of this category of legal acts.

In another interesting case C-322/88 Salvatore Grimaldi v. Fonds des maladies professionnelles

the CJEU was asked whether the doctrine of indirect effect stretched also to non-binding pieces of EU *acquis*. The Court held that this was the case, however seemingly the obligation is a bit softer (to reflect the legal character of these instruments). The CJEU held that judges cannot ignore soft law *acquis*.

However, the most interesting and controversial remains the case law on the application of the doctrine of indirect effect to Directives. Two questions emerged in the practice of national courts: can parties rely on the doctrine of indirect effect in horizontal cases that is when the plaintiff and defendant are individuals and at what point in time the duty to interpret emerges. In case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA the CJEU held that domestic courts have the obligation to conduct interpretation in accordance with EU law also in cases where both parties to the dispute at hand were individuals.

Since in such cases the claims are based on domestic law giving effect to EU Directives (not EU Directives themselves) the problems outlined in Faccini Dori line of case law do not exist. Note that with this approach some of the negative consequences of the lack of horizontal direct effect could be offset. As far as the second issue is concerned the answer came in case C-212/04 Adeneler i in. v. Ellinikos Organismos Galaktoz (ELOG).

The Court held that domestic judges have different types of obligations before and after expiry of the transposition period. As of the date of entry into force of a Directive the judges have a negative obligation to refrain from interpretation that would run contrary to an EU Directive. This corresponds to a negative obligation resting on other domestic authorities. On the one hand, they have the obligation to transpose Directives to domestic law but, on the other hand, they have also an obligation to refrain from adopting domestic legislation running against the aims of Directives. The positive obligation to interpret domestic law in accordance with EU Directives applies only when the transposition period expires.

In case of the doctrine of indirect effect the sky is not the limit. In numerous cases the CJEU has acknowledged the fact that there is limit to what domestic judges do by means of interpretation. This was particularly visible on cases when the preliminary ruling was sought during criminal proceedings.

The case 80/86 Criminal proceedings v. Kolpinghuis Nijmegen BV is very instructive. Here, the Court, relying on a previous case 14/86 Pretore di Salò v. Unknown people, confirmed that Directives themselves, without domestic rules giving effect to them cannot be the basis of criminal liability. Consequentially, conforming interpretation may not lead to such results. In more general terms, such pro-European interpretation of national law may not lead to results contrary to the general principles of law. This includes in particular the principles of legal certainty and non-retroactivity. The CJEU ruled that: *"[…] a Directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that Directive."* This line of case-law is now very well established.

Doctrine of state liability

The doctrine of state liability provides that the EU Member States may be liable in damages for breach of EU law attributable to a broad catalogue of domestic authorities, including - under certain circumstances - also their courts. Since the legal order of the EU is governed by the general principle of procedural autonomy of the Member States it is their task to provide for adequate remedies for

the enforcement of EU law. However, every now and then the CJEU tends to step in to secure the effectiveness of EU legislation. The case law on the doctrine of state liability for breach of EU law is a very good example in this respect.

It is fitting to start with the origins of the state liability doctrine, that is the judgement of the Court in joined cases C-6 and 9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic. Since the provisions of a Directive that the plaintiffs relied on could not produce direct effect, the CJEU ventured into state liability. The Court argued that the full effectiveness of EU law would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of EU law for which the Member State is responsible.

The CJEU also highlighted the well-established obligation of national courts to give full effect to EU law and, by the same token, protect the rights EU law confers on individuals. In the case-law that followed the CJEU modified the criteria for state liability and the scope of its application. For instance, in joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, the Court made it clear that the Member States can be liable for breaches of EU law attributable to national parliaments.

Unlike the Francovich case, where the Italian authorities simply failed to transpose a Directive, in the case at hand the German and UK parliaments adopted domestic legislation which was in breach of two fundamental principles of the internal market (respectively the free movement of goods and the right of establishment). The CJEU created a set of conditions that have to be complied with in order for individuals to submit successful state liability claims. They are as follows:

- provision of EU law is intended to confer rights upon individuals,
- the breach is sufficiently serious,
- there is a direct causal link between the breach and the damage sustained by the individuals.

It is also important to note, that unlike with the European Court of Human Rights, there is no direct possibility of individual to submit a claim against the Member State to the CJEU if it breaches EU law.

As already noted EU law is based on the principle of procedural autonomy, thus it is the task of the Member States to provide adequate remedies for EU law claims. Since the state liability doctrine is an exception to this rule the CJEU had to strike a balance between the prerequisite of effectiveness of EU law on the one hand, and the regulatory autonomy of the Member States, on the other.

This explains why the CJEU only laid down the conditions for the state liability, while leaving all the remaining points to the domestic law. It held that the Member States must make good the consequences of the loss or damage caused by the breach of Union law as per national legislation on liability. This is subject to a caveat that the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation. The CJEU also clarified that liability for breach of EU law may not be conditional upon fault. Furthermore, the reparation itself must be commensurate with the loss or damage sustained.

Annex V. Manual on EU legal databases

Available as a separate file on the eu-ua.org website