Labor and Globalization

Kateryna Yarmolyuk-Kröck

The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine
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Labor and Globalization

Volume 13
Edited by Christoph Scherrer
Kateryna Yarmolyuk-Kröck

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<td>AA</td>
<td>Association Agreement</td>
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<td>CCJE</td>
<td>Consultative Council of European Judges</td>
</tr>
<tr>
<td>CEACR</td>
<td>Committee of Experts on the Application of Conventions and Recommendations</td>
</tr>
<tr>
<td>CEE</td>
<td>Central and Eastern Europe</td>
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<tr>
<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<td>DCFTA</td>
<td>Deep and Comprehensive Free Trade Agreement</td>
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<td>DWCP</td>
<td>Decent Work Country Programme</td>
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<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
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<td>European Community</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>ECSR</td>
<td>European Committee of Social Rights</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ECTS</td>
<td>European Credit Transfer System</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<td>ENP</td>
<td>European Neighbourhood Policy</td>
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<td>ETF</td>
<td>European Transport Workers' Federation</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EURATOM</td>
<td>Europäische Atomgemeinschaft</td>
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<tr>
<td>GSP</td>
<td>Generalized System of Preferences</td>
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<tr>
<td>IARC</td>
<td>International Agency for Research on Cancer</td>
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<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ILC</td>
<td>International Labour Conference</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>ILS</td>
<td>International Labour Standards</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IOM</td>
<td>International Organisation for Migration</td>
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<tr>
<td>JHA</td>
<td>Justice and Home Affairs Council</td>
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<tr>
<td>LAB/ADMIN</td>
<td>Labour Administration and Inspection Programme (ILO)</td>
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<tr>
<td>MNC</td>
<td>Multinational Corporation</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>ODIHR</td>
<td>Office for Democratic Institutions and Human Rights</td>
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<tr>
<td>OSCE</td>
<td>Organisation for Security and Co-operation in Europe</td>
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<tr>
<td>OSH</td>
<td>Occupational Safety and Health</td>
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<tr>
<td>PCA</td>
<td>Partnership and Cooperation Agreement</td>
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<td>SLIC</td>
<td>Senior Labour Inspectors Committee</td>
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<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TNC</td>
<td>Transnational Corporation</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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<tr>
<td>WHO</td>
<td>World Health Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Introduction

The correct implementation and application of international norms within the national legal order is essential to ensure compliance with universal and European standards. During the last few decades, the problem of implementing international law has been of major importance for Ukraine, as the country began to move away from its Soviet past, announcing a course for European integration.

The growing number of international agreements adopted by various international organisations requires different implementation measures by states. In order to understand how an international norm is applied in the national legal order, it is necessary to consider different types of international law and the legal nature of states’ obligations.

For these reasons, Ukraine’s participation in international organisations, such as the UN, the ILO and the Council of Europe, means that the state is bound by numerous international agreements that have to be implemented into its national legal order. Pursuant to the Constitution of Ukraine of 1996, international treaties duly ratified by the Parliament become part of national legislation. This means that ratified international treaties are binding for Ukraine, and that violations of the provisions of international treaties in force can be brought up in domestic courts.

EU law, on the other hand, is not binding for Ukraine as the country is not an EU Member State. However, the close neighbourhood with the EU may also influence the law and practice of Ukraine, especially in the long run. The course of the European integration of Ukraine, which formally began with the signing of the Partnership-Cooperation agreement between the EU and Ukraine in 1994, envisaged a “soft” obligation of Ukraine to bring its national legislation into line with EU standards. The EU-Ukraine Association Agreement signed in 2014 appears to contain more stringent obligations for Ukraine to approximate its legislation closer to that of the EU. It seems that the developments in the EU-Ukraine relations will unavoidably have an effect on Ukraine’s legislation and the level of its conformity to European standards.

In practice, Ukrainian national legislation in the field of labour is far from meeting all the current challenges and addressing the issues of the modern world of work. This is especially so with regard to safety and health legislation. Indeed, many of the instruments in force were inherited by Ukraine from the Soviet times. Even though numerous amendments to the relevant legislation have taken place during the last years, many of the legal acts are outdated. This is certainly the case with the Labour Code of Ukraine, adopted in 1971, as well as many normative and technical regulations in the area of labour protection, including occupational safety and health (OSH). It is therefore necessary to bring the respective laws and regulations into conformity with international and European standards.
Even when the respective legislation is in place, however, it is essential that it is complied with. In this regard, labour inspection institution plays a fundamental role, especially with regard to safety and health at the workplace. In Ukraine, the level of industrial accidents and occupational diseases is high compared to other states in Europe and worldwide. According to official statistics, in 2015 around 4260 workers suffered from accidents at work in different industry sectors in Ukraine, 375 of whom died. During 2016 a total of 4428 work accidents were registered, with 400 fatal cases. In 2017 there were 4313 accidents at work and 366 fatal cases registered in Ukraine. These figures however, are only recorded when an industrial accident is officially registered. Due to the widespread nature of the informal economy in Ukraine, many accidents and occupational diseases, if not the majority, go unnoticed and unrecorded. Therefore, in order to improve the situation concerning OSH, it is vital that a powerful labour inspectorate is in place. However, in Ukraine, the labour inspectorate is also far from meeting the respective standards adopted at the international level. The biggest problem lies in the scope and powers of labour inspection. In addition, the legislation that regulates the functioning of the labour inspection in Ukraine contradicts international norms, in particular the ILO Labour Inspection Convention, 1947 (No. 81), ratified by Ukraine in 2004.

Another important issue when it comes to the application of international norms lies in the proper function of the country’s judiciary. Domestic courts play a significant role in the application of international treaties. In Ukraine, the use of international norms in the decisions of domestic courts of different instances is a relatively new issue, especially given the country’s Soviet past, when no attention was paid to the application of international law. Nowadays, the courts are bound to apply ratified international treaties as part of the national legislation of Ukraine, and to give precedence to international norms over contrary domestic legal provisions. Moreover, the courts are also free to apply the EU acquis in their decisions. The critical issue here is the willingness of the national courts to apply international as well as EU legal standards.

It is therefore important to assess the role and place of international law in Ukrainian legal order as well as the level of implementation and conformity of Ukrainian national legislation to the international and European legal instruments, particularly regarding OSH. Moreover, the effect that EU law might have on national legislation, given its non-binding character for Ukraine, should also be analysed. Furthermore, in order to assess the effective functioning of labour inspection in Ukraine, its legal scope needs to be scrutinised. Finally, the examination of judicial practice should provide some insight into whether and to what extent national courts apply international law.

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1 According to the statistics provided by the State Labour Service of Ukraine. Data available in Ukrainian at: http://ds.gov.ua/statystychni-dani-vyrobnycьoho-travma-2 (last accessed 15 November 2017)
Objectives of the Research

Given the range of issues to be addressed in this study, its objectives are manifold and therefore led by several research questions:

(1) What types of international (labour) law exist and how do they correspond to one another? What is the role of “soft” legal norms and regulations in the enforcement of laws by a state?

For this, it is necessary to analyse the nature and sources of the ILO as public international law, the law of the EU as supranational law, and the law of the Council of Europe as a “regional” type of international law paying attention to the implementation measures of these types of law by states. It is also important to distinguish the unique features of EU law from general public international law, such as that of the ILO and the law of the Council of Europe. This thesis will examine the effect that international norms produce on the legal order of states, as well as the application of public international law and EU norms by domestic courts. In addition, due to the widespread presence of soft legal instruments at the international level, it is also necessary to assess the issue of soft law and non-binding norms in enforcing laws and compliance.

(2) What is the relevance of ILO law, EU law and Council of Europe law for national legislation of Ukraine?

The relevance of international law for Ukraine is one of the central issues addressed by this research. An examination of Ukraine’s obligations under ratified international treaties (e.g. ILO conventions, Council of Europe instruments) will help to assess the effect and role of international law in the Ukrainian legal order. It is therefore necessary to analyse national constitutional provisions and their general conformity to international norms in the field of human rights, and particularly in the field of labour. Furthermore, the legal foundation of EU-Ukraine relations must be taken into consideration; to do this, the study pays particular attention to the EU-Ukraine Association Agreement and the nature of Ukraine’s obligation to bring its legislation in line with that of the Union. The question here is whether EU law could have the effect of a “quasi-soft law” for Ukraine; precisely due to the fact that Ukraine is not an EU Member State and is not bound by the law of the Union.

(3) How are occupational safety and health (OSH) issues reflected in the law of the ILO and EU law? To what extent does the national labour legislation of Ukraine correspond with international labour standards and the EU norms in the field?

One of the aims of this study is to examine the normative conformity of national laws to international and the EU standards in the field of OSH. Here, this means examining the sources of labour law of Ukraine and its national policy on OSH. Furthermore, national legislation on labour protection will be assessed in terms of its general conformity to international conventions of the ILO that Ukraine has ratified.
Given the large range of occupational safety and health issues covered by the OSH Framework Directive of 1989 and the various EU individual directives supplementing it, as well as the numerous national legal acts and technical regulations in the field, it is necessary to provide a more detailed analysis of the conformity of national legislation to respective instruments.

(4) What is the role and scope of labour inspection under the law of the ILO? Does current national legislation on the labour inspectorate conform to international and European standards? What is the legal scope of labour inspection institution and its role in ensuring compliance with international labour standards (ILS) in Ukraine?

In order to assess the role of labour inspection in enhancing labour legislation at work, it is necessary to assess the institutional framework of labour inspection in Ukraine as well as to analyse its legal scope and the conformity of national legal provisions regarding the powers and duties of inspectors to the international standards. Here, the ILO Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Administration Convention, 1978 (No.150) are of particular interest.

(5) How do the national courts of Ukraine apply international and European standards? Do Ukrainian judges apply the EU acquis in their decisions?

The final aim of the research is to examine the application of international legal norms by the Ukrainian judiciary. In order to assess the level of application of international norms, it is necessary to look at the case law of the national courts of different instances. In particular, this study analyses how the courts apply ratified ILO conventions, specifically the ILO Labour Inspection Convention, 1947 (No. 81), and whether precedence is given to an international norm rather than a contradicting national legal provision. In addition, in light of the European integration of Ukraine, another matter of interest that will be considered here is whether it is possible that the EU acquis might have a positive side effect on judicial practice, given that its application is not obligatory for Ukrainian courts.
Outline

This PhD project first focuses on different types of international labour law, specifically the law of the ILO, EU law, and the law of the Council of Europe as well as their implementation in the national legislation of states, with a particular example of Ukraine.

Chapter I presents examination and analysis of the implementation of these types of international law by states and their application by courts, as well as their sources. In addition, the notion and characteristics of “soft” legal instruments, and whether they can enforce compliance with “hard” law is considered in the chapter.

In Chapter II, the study further examines the relevance of the types of international law for Ukraine. It draws on the country’s participation in international treaties as well as its path towards European integration. Here, this means an analysis of the state’s commitments under ILO law and the relatively “soft” commitment of Ukraine regarding the approximation of the national legislation to the EU acquis. In addition, recent developments in the EU-Ukraine relations with the signing of the Association Agreement are examined.

Chapter III focuses on the labour law of Ukraine, its sources, and the conformity of Ukrainian constitutional provisions to international norms. Furthermore, this chapter provides an analysis of the conformity of national legislation to the ILO and the EU standards in the field of occupational safety and health.

Chapter IV examines the role and legal scope of labour inspection as the major means of enhancing labour standards at the workplace, as well as the conformity of Ukrainian labour legislation to the requirements of international standards.

Finally, Chapter V analyses the application of international instruments by the Ukrainian judiciary. This chapter draws on the country’s judicial system and the ongoing legal reform. This is followed by a case law analysis of the courts’ decisions of different instances, with specific attention directed to the application of the ILO Labour Inspection Convention, 1947 (No. 81).

The findings of the research are formulated in the Final Conclusions.

Comparative tables of international labour standards and EU directives on OSH and corresponding national legislation of Ukraine are contained in Annexes I and II respectively.

Understanding the implementation of international labour norms into domestic legislation of states requires an assessment and analysis of different types of international law. This is because different types of international law produce different legal effects, and they also play a distinctive role in national legislation. This chapter looks at the role and place of international law in the domestic legal order of states and their constitutional provisions as regards the relationship between national and international law. Furthermore, the chapter also takes the application of international treaties by national courts into consideration.

Differences in the implementation and place of international law in the national legal order make it necessary to consider the particularities of each type of international law separately. This chapter thus draws on the following types of international law:

(1) Public international law (the law of the International Labour Organization (ILO)). This section assesses the standard-setting mechanism of the ILO, its instruments, the effect of ratification, and the impact of the international labour standards on the national legislation of states. In addition, this section takes a more granular look at the ILO supervisory machinery, including its relations and co-ordination with other international organisations, specifically with regard to standard-setting activities;

(2) Supranational international law (European Union (EU) law). Here, the text discusses the legal nature of the EU and the sources of the Union law, the role of the European Court of Justice (ECJ), the effect of EU law on national legal orders of Member States, and the implementation and application of EU law by Member States. The text also directs particular attention to the distinction between direct and indirect effects of EU law;

(3) Regional international law (the law of the Council of Europe). This section draws on the structure and standard-setting activities of the Council as well as the legal commitments of its Member States. Furthermore, the European Convention on Human Rights and the role of the European Court of Human Rights are considered.

Finally, the chapter examines the correspondence between different types of international law and the cooperation between respective international organisations in their standard-setting activities.
1. The Role and Place of International Law in the National Legal Order

1.1. The Implementation of International Law into National Legislation

The conclusion of international treaties by states does not mean that international legal norms are automatically implemented into domestic legal orders. It is the basic law of a state, normally a constitution, that allows international law to flow into the national legal order. Hence, states are free to decide on the way in which their national legal systems incorporate international law.

In order to identify the specific conditions of incorporation of international law into domestic law in a given country, one has to examine both constitutional texts and judicial practice. Monist systems allow for “automatic incorporation.” A number of Eastern European constitutions adopted after the collapse of the Soviet Union state that human rights treaties have overriding force over national law, which is an expression of these countries’ commitments to respect fundamental rights, at least de jure.2 However, countries following the monist system approach regularly legislate on issues contained in the treaties that they have ratified, or ratify a particular treaty only when they consider that existing national legislation already gives effect to the provisions of the treaty in question. This need to legislate could be due to the nature of the treaty provisions, which may not be self-executing and therefore require additional action to be implemented, or it could be due to a preference for a particular national drafting style.3

In this regard, it is important to distinguish self-executing treaties from non-self-executing treaties. This is a subject of intense discussion among many legal scholars.4 While there is no common definition of what a “self-executing treaty” is, it can be generally defined as a treaty that may be enforced in the courts without the prior need to adopt implementing legislation. Conversely, a “non-self-executing treaty” is a treaty that may not be enforced in the courts without prior adoption of implementing legislation.5

3 Ibid., p. 258.
5 Vazquez, C.M., 1995, op. cit., pp. 695, 696; as explained by Vazquez, the doctrine of self-executing treaties “serves to distinguish those treaties that require an act of the legislature to authorize judicial enforcement from those that require an act of the legislature to remove or modify the courts’ enforcement power”; See also Buergenthal, T., 1992, supra note 4, pp. 320-321.
One of the essential principles of the law of treaties is that every treaty in force is binding upon the relevant parties and must be performed by them in good faith (*pacta sunt servanda*). In addition to legislative compliance with international legal norms, the principle of *pacta sunt servanda* obliges states to implement such obligations effectively. Pursuant to Article 27 of the Vienna Convention on the Law on International Treaties, 1969, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

Moreover, states are responsible for fulfilling, in good faith, their obligations arising from other sources of international law, such as customary law or general principles of law, and in doing so states are free to decide on the measures that they will take in order to comply with their obligations, except as otherwise provided in a particular rule of international law. Such measures usually include the adoption of constitutional provisions, legislation or administrative rules and regulations.

For these reasons, numerous issues on the role of international law in internal law arise. In particular, how does international law become effective in domestic law? Should an international treaty abolish subsequent and prior national legislation in case the latter does not confirm with it? What legal norm should be applied in case of a collision between international and national norms? What role do domestic courts play in this regard? These issues are regulated to a greater or lesser extent in national constitutions.

1.2. National Constitutions and International Law in Central Eastern European States

The increasing interdependence of states and peoples, and the expansion of inter-state institutions has led to the “internationalisation” of modern constitutions. International concern for human rights, which has resulted in a number of international legal instruments, has also led to the recognition of international legal norms within national legal systems, and even of their supremacy over national laws. It can be argued, however, that the primacy of international law is relative since it is subject to the provisions of the highest domestic law, namely the constitution.

Nevertheless, at least objectively, interdependence processes have led to a *de facto* affirmation of the primacy of international law. This was followed by a gradual process of *de jure* recognition in the respective stipulations of new constitutions.

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9 Ibid., p. 41.
10 Vereshchetin, V. S., 1996, supra note 8, p. 41.
The “opening” of state constitutions to international law was examined by Antonio Cassese. Back in 1985, Cassese sought to explain the relationship between the defeat of authoritarian rule in a revolution or war followed by the establishment of a democracy, and, on the other, the opening of state constitutions to international law during four historic stages: 1) from 1787 to World War I; 2) from the Weimar Constitution of 1919 to World War II; 3) from the French Constitution of 1946 to the late 1950s; and 4) the early 1960s.\textsuperscript{11} However, Cassese wrote before the collapse of the Soviet Union, and therefore the subsequent historic stage is not reflected in his analysis.

In this regard, Eric Stein has posed the question of whether the developments in Central-Eastern Europe “confirm the parallelism between post-revolutionary democratic reform and the “opening” towards international law in post-communist constitution making.”\textsuperscript{12} He notes that in European communist regimes, the legal effect of treaties and international law in general was not viewed as worthy of constitutional treatment; the idea of an individual asserting his or her rights directly under international law, particularly against his or her own government, had no place in a regime guided by “socialist legality.”\textsuperscript{13} Also, Bruno Simma described the problem faced by constitution makers in these countries as an “identity crisis” of customary law in the absence of effective standards for “customary law making.”\textsuperscript{14}

Hence, the reformers of the new constitutions were faced with two major developments in international law: first, the recognition of the individual as an “international person”, with respective international guarantees of fundamental individual rights embodied in treaties and in the evolving customary law; and, second, the integrated structure in Western Europe (the European Union), since EU law determines its effect in the national legal orders of the Member States.\textsuperscript{15}

The result of the internationalisation of constitutions in Central-Eastern European states was that they now had enshrined provisions regarding the place of international law within the national legal order. However, the practice of introducing references to international law in national constitutions has not yet produced any single form of wording for general adoption.\textsuperscript{16}

For instance, the Constitution of Bulgaria states that ratified international treaties are part of internal law and, in cases of conflict between internal law and a treaty, the latter prevails.\textsuperscript{17} The Constitutional Court of Bulgaria reviews international treaties for constitutionality before their ratification and has the authority to enforce these rules. With regards to the effect of general principles of international law and customary rules, the Constitutional Court of Bulgaria has the competence to review the consistency of internal

\textsuperscript{11} Cassese, A., Modern Constitutions and International Law, Recueil Des Cours t. 192, 1985, pp. 331-476, at p. 331, 351
\textsuperscript{12} Stein, E., 1994, supra note 7, p. 448.
\textsuperscript{13} Ibid.
\textsuperscript{15} Stein, E., 1994, supra note 7, p. 430
\textsuperscript{17} Art. 5 (4), the Constitution of the Republic of Bulgaria of 1991.
law “with accepted standards of international law.”\textsuperscript{18} According to the Constitution of Romania, ratified treaties are part of domestic law.\textsuperscript{19} The Constitution of Poland provides that the state “shall respect international law binding upon it.”\textsuperscript{20} Additionally, the Republic of Poland “may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.”\textsuperscript{21} The Constitution of Slovenia provides that treaties are applied directly and laws and regulations must be in compliance with generally accepted principles of international law and valid treaties.\textsuperscript{22} In accordance with the Constitution of Croatia, treaties that are properly ratified and published are part of the Republic’s internal legal order and “are in respect of their legal effect above the law.”\textsuperscript{23}

Stein asserts that there is a move towards the recognition of the effect that international law has on internal law because the subject is not entirely ignored in any of the respective constitutions. He further expresses the view that the model of interaction between post-revolutionary democratisation and the “opening” of the new constitutions to the international system, as Cassese discussed, may be readily applied to post-communist Central Eastern Europe. Hence, most of the constitutions in this area incorporate treaties as an integral part of the domestic order. In most cases, treaties have the status of ordinary legislation. In a few states, treaties are superior to both prior and subsequent national legislation, while in some other states this only concerns human rights treaties. Out of fifteen constitutions in Central European states, in only one state does the constitution accord its priority over international law, three states expressly declare it a part of the international legal order, and other instruments are ambiguous as regards its direct effect. In few instances, there is a relatively elaborate procedure for accession to international organisations or alliances.\textsuperscript{24}

It is often argued, that the trend towards internationalisation dilutes the concept of “sovereignty” to some extent and intrudes in areas of domestic jurisdiction. However, the constitutional norms that bring international law and institutions into national legislation help to delegitimize the nonconforming conduct of states, enhance respect for international standards and advance the protection of individuals.\textsuperscript{25} There is no precise definition in Stein’s analyses as for which states belong to Central Eastern Europe, while only noting that these countries are being called an “ill-defined area” and “a concept with blurred edges.”\textsuperscript{26} Nevertheless, at least geographically, Ukraine does belong to the Central Eastern European states. It is therefore reasonable to compare the provisions of Ukraine’s

\textsuperscript{18} Article 149 (1), (4), the Constitution of the Republic of Bulgaria of 1991.
\textsuperscript{19} Articles 11 (2), 20, the Constitution of Romania of 1991.
\textsuperscript{20} Article 9, the Constitution of the Republic of Poland of 1997.
\textsuperscript{21} Para. 1, Art. 90 of the Constitution of the Republic of Poland of 1997.
\textsuperscript{22} Articles 8, 153 (2), the Constitution of the Republic of Slovenia of 1991.
\textsuperscript{23} Article 134, the Constitution of the Republic of Croatia of 1990.
\textsuperscript{24} Stein, E., 1994, supra note 7, pp. 447, 448.
\textsuperscript{25} Ibid., p. 450.
\textsuperscript{26} Ibid., p. 429.
national legislation on the status of international law with other post-communist states, some of which are members of the CIS.\textsuperscript{27}

In this regard, another way to categorize post-communist states, albeit mostly with reference to the CIS states, has been proposed by Danilenko, who defines three different groups of states according to the provisions contained in their constitutions concerning international law: \textsuperscript{28}

1) In their constitutions, the first group of states proclaims that the international law, usually treaty law, is a part of the national law. According to these constitutions, international rules are accorded with higher hierarchical status. This is the case of the Republic of Azerbaijan, Georgia, Kazakhstan, Moldova, and the Russian Federation;

2) The second group includes countries whose constitutions expressly state that international law forms part of the national law. However, these constitutions are silent about the hierarchical status of international rules in the domestic legal system. This is the case of Ukraine, where, according to Article 9 of the 1996 Constitution, international treaties in force, ratified by the Parliament of Ukraine, form an integral part of the national legislation.\textsuperscript{29} However, the conclusion of international treaties that contravene the Constitution of Ukraine is possible only after relevant amendments to the Constitution are introduced.\textsuperscript{30} Thus, international law does take priority over the national legislation of Ukraine, but not over the Constitution;

3) In the constitutions of the third group of states, there are vague references to international law. This is, for example, the case of Uzbekistan and Turkmenistan.\textsuperscript{31}

Danilenko points out that the constitutions of the first and second group of states represent an important step towards broader application of international law in the domestic legal orders of these states, although there is no guarantee that international law enjoys the status proclaimed in these constitutions in practice.\textsuperscript{32} Indeed, inconsistency between

\textsuperscript{27} Commonwealth of Independent States, established by the treaty of 8 December 1991 signed in Minsk, Belarus.


\textsuperscript{29} Ukraine has not signed the CIS Statute of 22 January 1993, and therefore \textit{de jure} it is not a member of the CIS, but has the status of a founder as well as participatory status within the CIS.

\textsuperscript{30} Article 9, Constitution of Ukraine of 1996.

\textsuperscript{31} Article 17 of the 1992 Constitution of Uzbekistan states that the foreign policy of the Republic of Uzbekistan “shall be based on the principles of sovereign equality of the states, non-use of force or threat of its use, inviolability of frontiers, peaceful settlements of disputes, non-interference in the internal affairs of other states, and other universally recognized norms of international law.” Similarly, Article 6 of the 1992 Constitution of Turkmenistan states that “Turkmenistan shall acknowledge priority of generally recognized norms of international law.” In both cases, such provisions seem to be solely a statement of foreign policy, without visible impact on domestic legislation.

\textsuperscript{32} Danilenko, G.M., 1999, \textit{supra} note 28, p. 53.
constitutional provisions and their application in practice is common to the post-Soviet states, which still lack democratic institutions and the rule of law.³³

2. The International Labour Organisation and its Instruments

2.1. The Law of the ILO as Public International Law

Before the creation of the ILO, labour issues were a solely domestic concern of states.³⁴ The idea of setting international standards in labour law and social policy originated in the nineteenth century.³⁵ This was triggered by the consequences of the Industrial Revolution, the resulting deterioration in conditions for the working classes, and growing social inequality and injustice. In 1919, the International Labour Organization was established as a part of the Treaty of Versailles, primarily for the purpose of adopting international conventions to cope with problems of “injustice, hardship and privation.”³⁶

The foundation of the ILO in 1919 is also seen as a result of increasingly powerful unions, which emerged after the Industrial Revolution and followed the immense deterioration of working conditions, strikes, social unrest, as well as revolutionary political movements in Europe during and shortly after the First World War.³⁷

Thus, the Preamble to the ILO Constitution calls for improvement in the conditions of labour:

…by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women...³⁸

There are two arguments enshrined in the Preamble as to why such actions were needed. First, if conditions of labour did not improve, there was a risk of “unrest so great that the peace and harmony of the world are imperilled.” Second, as stated in the Preamble, “the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”

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³³ In this regard see also Gaverdovskiy, A. S., Implementation of International Legal Norms, Kyiv, 1980 / Гавердовский, А. С., Имплементация норм международного права, Киев, Выща шк., 1980.
³⁴ Labour standards were first introduced in England in 1802 when George III issued the Moral and Health Act. Later in 1831, the Factory Act was adopted. It set a minimum age for employment, a maximum number of hours of work for children, and health and safety standards in industrial plants.
³⁶ The preamble to the ILO Constitution, 1919, states: “[W]hereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled…”
Hence, with the establishment of the ILO, the responsibility of the world community for dealing with particular matters using quasi-legislative means was recognised.\textsuperscript{39} By formally endorsing and institutionalising the conclusion of international conventions in social matters, the ILO Constitution introduced two fundamental innovations in the domain of international organisations: first, the world community acknowledged its collective interest in concerning itself not only with relations among states but also with the substance of problems affecting the progress, happiness and survival of mankind; second, a type of legislative function was created at the international level.\textsuperscript{40}

In Western Europe, labour law expanded rapidly throughout the twentieth century. Initially, it was aimed at protecting the industrial worker, but later its scope extended to include agricultural and civil service work. Since the beginning of the twenty-first century, the ILO has been actively engaged in labour law reform in over sixty countries. Two major trends have emerged over the last few years. First, much of the legislative action recorded by the ILO has taken the form of new or amended laws designed to give effect to fundamental principles and rights at work, particularly concerning the fight against discrimination at work and child labour. Second, many countries have adopted laws on fundamental principles and rights at work. A number of countries are still in the process of introducing or improving laws on freedom of association and many still allow various exceptions to legal protection – particularly for workers in agriculture and export processing zones, migrant and domestic workers, and those in the informal economy.\textsuperscript{41}

2.2. \textit{The Characteristics of International Labour Standards}

The term “labour standard” has a dual meaning:

- First, it implies the actual terms and conditions of employment, work and the welfare of workers at a particular location and point in time, including the actual situation of the labour force, wages, hours of work, occupational health and safety, statistics on national average level of education and vocational skills etc.\textsuperscript{42} This can be referred to as “labour conditions”;

- The second, normative meaning of the term, is that labour standards stipulate the desired terms and conditions of work. Normative rules are set at both international

\textsuperscript{39} ILO, \textit{The Impact of International Labour Conventions and Recommendations}, Geneva, 1976, pp. 4-104.


International labour standards (ILS) represent the “crystallisation” of a desirable national practice and are referred to as “a form of comparative law.” Furthermore, the provisions of the ILO instruments may constitute standards not only as point of reference and a source of inspiration, but also as a means of harmonizing national measures. In most cases, however, the ILO instruments have a more gradual and diffused effect as elements in the formulation of policy, the drafting of legislation or the conclusion of collective agreements.

ILS are primarily tools for governments that, in consultation with employers and workers, seek to draft and implement labour law in conformity with internationally accepted principles. Indeed, ILS emerge from a concern that global action is needed to tackle the problem of poor working conditions.

In many cases, the formulation of ILS is inspired by the national legislation of individual states. Often, it is possible to detect the national origin of a particular international standard. When a great number of the ILO Member States are confronted with a problem in the field of labour, they can learn from other countries that have already implemented labour policies to successfully resolve the same type of problem locally. Thus, ILS become beneficial for the economic and social development of states, because they embody knowledge and practical experience from all over the world.

ILO instruments are also adopted with the purpose of setting universal standards that could apply throughout the world. The implementation of universal labour standards would create a fairer competitive environment, which would be jeopardised “if any individual state was to undercut these labour standards in order to gain a competitive edge.” Indeed, the potential impact that international inconsistencies in labour standards may have on the wealth of a particular nation has always been a foremost concern, as is proved by the lengthy and intensive debates preceding the adoption of such standards.

Motives behind mandating ILS include not only their contribution to the consolidation of peace, the promotion of social justice, and the social and human objectives for economic development, but also the consolidation of national labour legislation. In addition, ILS are the legal component in the ILO’s strategy for governing globalisation, promoting
sustainable development, eradicating poverty and promoting equal opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity.\textsuperscript{53}

Furthermore, the ILS are designed to serve such functions as participation, protection and promotion.\textsuperscript{54} Thus, ILS provide for the right to freedom of association of workers and employers; the right to bargain collectively; tripartite consultation at the national level and participation and cooperation at the level of the enterprise. Additionally, ILS protect workers from the abuse of power by employers and/or a state and from destructive competition by other workers. Finally, ILS stipulate policies for full, productive and freely chosen employment, human resource development through vocational education and training, vocational rehabilitation and the employment of disabled persons, public employment services, labour statistics, labour inspection and labour administration. Moreover, standards of participation, promotion and protection mutually reinforce one another, because observing one type of standard facilitates the implementation of other standards.\textsuperscript{55}

When examining labour standards, it is important to draw attention to the distinction between what is viewed as fundamental and what is left to the discretion of each country. The key element here is to set minimum standards for all in order to avoid extreme forms of social dumping. However, universal harmonisation of standards may conflict with different levels of economic development, regardless of whether that harmonisation was aimed upward or downward.\textsuperscript{56}

As it follows from the Preamble to the ILO Constitution, which states that: “…the failure of any nation to adopt human conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries,” higher standards in one country should not be accomplished at the expense of lowering standards in another country, or lower international standards. Moreover, according to Article 19 (8) of the ILO Constitution “in no case shall ILO standards be deemed to affect any law, award, customs and agreement which ensures more favourable conditions.”

For this reason, it has been proposed that there is a distinction between “development-dependent” and “development-independent” ILS, so that the different capabilities of countries to ratify and implement the international norms can be taken into consideration. In the view of the ILO, the fundamental ILS involve no cost, and therefore are fully applicable regardless of the state of development of a country, while substantive

\textsuperscript{53} Casale, G. and A. Sivananthiran, 2010, supra note 41, p. 6.
\textsuperscript{55} Sengenberger, W., 2005, supra note 42, pp. 59-60.
standards, such as occupational health and safety or hours of work, are regarded as dependent on development.57

Hence, it appears that the influence of future ILO standards on national legislations will depend mostly on their content and level of protection. It is important to take into account the variety of economic and social conditions of the legal systems of states. At the same time, future international standards must be drafted in a way that will make them capable of exercising influence in ensuring social progress.58

2.2.1. Flexibility of International Labour Standards

The ILO has allowed countries to be exempt from immediate application of a standard, thus permitting flexibility to Member States regarding the implementation of ILS, taking into account the socioeconomic and cultural peculiarities of respective states. Indeed, due to diverse conditions in different states, a minimum level of flexibility is an essential condition for standards to be universal.59 For this reason, Article 19 (3) of the ILO Constitution provides for such flexibility. To achieve flexibility, the ILO standards should lay down generally accepted principles rather than technical details, as well as considering temporary arrangements with respect to either the whole instrument or individual provisions. As Wisskirchen rightly noted, the ILO will not achieve worldwide acceptance if it lays down a maximum number of details for a maximum number of working conditions, with the expectation that they will be valid forever. Rather, the instruments and their contents should be very flexible.60 However, in case of a breach of an ILO standard, no flexibility shall be allowed.61

2.2.2. Universality of International Labour Standards

The ILO upholds the principle of universality of ILS, while it does not endorse regional standards. However, the principle of universality is usually confronted with two main issues: the informal economy and cultural relativism.62 It has been argued that ILS are not applicable to the informal economy, but to the organised sector.63 Some other critics assert that ILS actually contribute to the spread of the informal economy. According to the ILO, however, ILS were established not only for workers in the formal sector, but for all workers; and, the informalisation results not from the application of ILS, but rather from the failure to enact and apply labour standards.64

58 Ibid., p. 49.
61 Ibid., p. 288.
62 Sengenberger, W., 2005, supra note 42, p. 50.
63 Ibid., p. 51.
Critics have also argued that ILS are products of European-centred culture and traditions; they are inconsistent with cultures, traditions and religions in other countries, and therefore should not be imposed upon them. National and cultural values are viewed as inviolate, and therefore concepts of Western cultures should not be permitted to “pollute” them. However, objections to universal ILS on the grounds of cultural diversity are debatable in cases where they involve the denial of workers’ basic rights. Indeed, the objectives of ILS are not culturally specific. One should also recall the fact that the ILO conventions and recommendations are adopted by the ILC, which consists of delegates from all over the world, with the majority of them coming from developing countries. It is therefore can be argued that the reasons for not accepting ILS are not always cultural or economic, but rather political.

2.3. The ILO Standard-Setting Instruments: Conventions and Recommendations

Article 19 (1) of the ILO Constitution states:

when the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with a Conference to determine whether these proposals should take the form: (a) of an international Convention, or (b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.

The ILO regularly adopts conventions and recommendations under clearly established procedures. This is one of the specific features of the ILO’s standard-setting system, unlike other international organisations, where the standard-setting is done on an ad hoc basis, following different procedures. The body of ILS has been formed gradually and without a predetermined plan, but instead in response to priority needs as perceived by the Governing Body when determining the issues discussed at the annual Conference. The ILO conventions and recommendations together form what is called the “International Labour Code.”

2.3.1. ILO Conventions

One of the basic characteristics of ILO conventions is that they stipulate minimum standards and do not prescribe economically unrealistic levels of provisions. Article 19 of the ILO Constitution explicitly states:

[In framing any Convention or Recommendation of general application, the conference shall have regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions

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68 Sengenberger, W., 2005, supra note 42, p. 49.
substantially different and shall suggest modifications, if any, which it considers may be required to meet the case of such countries.

The adoption of a convention (or a recommendation) by the Conference requires a majority (two-thirds or more) of the votes cast by the delegates present.\(^\text{69}\) It is important to note that the majority of such delegates come from developing countries.

Article 17 (3) of the ILO Constitution provides for a so-called “quorum rule”, stating that voting is void unless the total number of votes cast is equal to half of the number of delegates attending the Conference. In addition, according to Article 3 (1) of the ILO Constitution, in order to balance the single votes of employer and worker representatives, government has two votes in each delegation.

With the inclusion of the rule on the adoption of international labour conventions by a two-thirds majority into the Constitution of the ILO, the rule of unanimity has been abandoned. Since then, the system whereby collective decisions are taken by a qualified majority vote has been extensively used for other types of international conventions, while at the same time emphasising their character as collective decisions of a legislative nature.\(^\text{70}\) Furthermore, the provisions of Articles 19 and 17 of the ILO Constitution safeguard against a minority of delegates pushing their views onto others.\(^\text{71}\)

The ILO conventions are binding for the states that ratify them. There is an ongoing international discussion on the legal nature of the ILO standards when they take the form of conventions. The ILO conventions are, on one hand, like laws because of the way in which they are adopted and the obligations that they place on Member States vis-à-vis the ILO. On the other hand, they possess the typical elements of international treaties, in that they impose substantive obligations on the ILO and other contracting States, which become effective only after the voluntary ratification of an agreement.\(^\text{72}\)

Therefore, one view is that the adoption of a convention is an international law-making act. Indeed, delegates to the ILC may vote individually and can shape the content of the proposed drafts. Also, they may decide whether an instrument will take the form of a convention, a recommendation or another instrument, in accordance with Article 4 (1) and Article 19 (1) of the ILO Constitution. From this perspective, the whole ILC decides, in a similar way to a parliament, on the acceptance or rejection of an agreement.\(^\text{73}\)

On the other hand, the ILO conventions have all the essential characteristics of international treaties between states. The very term “convention” implies an agreement that is characteristic of a treaty. Also, the standard final provisions embodied in all conventions characterise them as international treaties. The obligations arising from the contents of a convention apply to a Member State only when it has committed itself to their

\(^{69}\) Article 19 (2) of the ILO Constitution.


assumption by ratification, rather than from the time when the agreement is adopted by
ILC, or when the agreement enters into force twelve months after two Member States send
notice about their ratification of the instrument.\footnote{Wisskirchen, A., 2005, supra note 35, p. 254.}

Since conventions are international treaties, interpretation by reference to Article 31
(General rule of interpretation)\footnote{See Article 31, paras. 1-4 of the Vienna Convention on the Law of Treaties of 1969.}
and in some circumstances Article 32 (Supplementary means of interpretation)\footnote{In accordance with Article 32 of the Vienna Convention, 1969, “Recourse may be had to supplementary
means of interpretation, including the preparatory work of the treaty and the circumstances of its
conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the
meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.”}
of the Vienna Convention on the Law of Treaties 1969, is
applicable.\footnote{Wisskirchen, A., 2005, supra note 35, p. 277; See also Heintzen, M. and S. Eilers, Die
Völkerrechtskonformität der geplanten Änderung des Neutralitätsparagraphen des AFG, DB, 271 (273),
1986; Heintzen, M., Die Neuregelung des Para. 116 AFG und das internationale Recht, DB, 482 (483),
1987.}
The ban on retroactivity enshrined in Article 4 of the Vienna Convention does
not prevent the application of the same Convention, for that ban explicitly excludes rules to
which treaties would be subject under international law. These rules include the
aforementioned rules and means of interpretation \textit{qua} codified international customary
law.\footnote{Heintzen, M. and S. Eilers, 1986, supra note 77.}
In addition, Article 5 of the Vienna Convention, which establishes precedence in the
rules of interpretation of international organisations, does not hinder the application of the
rules of interpretation of the Vienna Convention. Moreover, Article 37 of the ILO
Constitution stipulates who is competent to give an interpretation, but it does not contain
any rules for interpretation whatsoever.\footnote{Wisskirchen, A., 2005, supra note 35, p. 277; See also Heintzen, M. and S. Eilers, Die
Völkerrechtskonformität der geplanten Änderung des Neutralitätsparagraphen des AFG, DB, 271 (273),
1986; Heintzen, M., Die Neuregelung des Para. 116 AFG und das internationale Recht, DB, 482 (483),
1987.}
In fact, the ILC itself pointed out that the 1969
Vienna Convention is applicable to the interpretation of the ILO conventions.\footnote{ILC, 88th
Session, 2000, Record of Proceedings, Vol. I, pp. 5/2-5/3, paras. 7 and 11.}
In addition, while the main source of ILS are treaties and non-binding recommendations, it does not
exclude the fact that some of these standards may also be binding upon states as
international customary law or general principles of law.\footnote{Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 254; see Article 38 (b) and (c) of the
Statute of the International Court of Justice.}

For these reasons, the system of international labour conventions represents a major
innovation in the nature of collective international instruments. Unlike traditional treaties
between states, international labour conventions are the outcome of collective international
decisions of a quasi-legislative character. In this respect, the ILO has provided a model for
international action, although some features of the ILO remain largely unique and its rules,
practices and traditions cannot be transplanted elsewhere.\footnote{ILO, The Impact of International Labour Conventions and Recommendations, 1976, supra note 39.}

\subsubsection*{2.3.2. ILO Recommendations as Unique \textit{“Soft Law”} Instruments}
The ILO recommendations are non-binding instruments, which serve as guidelines and do
not require ratification by Member States. Recommendations in many cases supplement
the ILO conventions by providing more detailed guidelines on the application of the relevant conventions. Recommendations can also be autonomous and not linked to any of the ILO conventions.

Some have argued that the ILO recommendations represent a unique type of “soft” legal instruments, as they may have nearly the same effect as binding ILO conventions. Thus, Maupain notes that, as such, international labour recommendations are an atypical variety of soft law, differing radically from other types of ILO instruments, such as resolutions, which have no specific legal basis in the ILO Constitution and do not constitute “international labour standards.”

In practice, the decline in the ratification rate of ILO conventions in the post-Cold War period have posed a challenge to the ILO to make its standards more effective and relevant to the global economy. Such decline can be explained by the reluctance of states to assume new long-term commitments in the social field because of the increased competition resulting from globalisation, or difficulties for governments in “digesting” the various international instruments and reporting obligations attached to them. This has been referred to as “administrative congestion” as Virginia Leary puts it. Another reason could lie in the impact of emerging federalism, as whenever the EU has exclusive or shared competence over the matters covered by an ILO convention, its members are no longer free to ratify it at their discretion. Hence, these challenges have attracted more attention to non-binding instruments.

Already in 1994, the Director-General of the ILO at the time, Michel Hansenne, suggested in his report to the ILC that greater use be made of soft law instruments, such as codes of conduct, which are designed to give guidance on specific follow-up to Member States, employers and workers in a technical field. In his 1997 report, the Director-General concentrated on ILO recommendations, drawing attention to the fact that although ILO recommendations cannot create international legal obligations, they have some significant features in common with international labour conventions. The point was made that recommendation could, under the ILO Constitution, have exactly the same impact as non-ratified conventions on states not party to the convention.

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84 Maupain, F., 2000, supra note 83.
According to Maupain, international labour recommendations differ from other soft law instruments by two main features: 1) the legitimacy in the labour field of the authority which adopts them, and, 2) the specific means to promote and verify their implementation. These features are interrelated, as the legitimacy of the source contributes to the impact of the standard. Therefore, such features could be characterised by the institutional capacity to exercise some verifiable influence on the state behaviour. From such a perspective, ILO recommendations seem to share the same basic function as hard law conventions.  

Similarly, Hepple states that the artificial distinction between conventions and recommendations should be abolished.  

Indeed, ILO recommendations are drawn up through the same lengthy and careful procedure as conventions. Recommendations and conventions are discussed in the tripartite forum of the ILC, which is a competent body to adopt recommendations as well as conventions. Furthermore, the majority required for the adoption of both types of instruments (two-thirds) are also the same. 

In addition, ILO recommendations are subject to the same follow-up requirements as conventions, apart from those designed to monitor the application of ratified conventions. According to Article 19.6 (a), (b), and (c) of the ILO Constitution, a recommendation must be submitted to the competent authority in each Member State “for enactment of legislation or other action.” This should be done within one year after the adoption of the recommendation. The ILO members are to inform the Director-General on the measures taken to bring the recommendation to the said competent authority and on the action taken by such authority. In addition, ILO members shall report, “the position of the law and practice” in their country in regard to the matters dealt with in the recommendation to the Director-General at appropriate intervals as requested by the Governing Body, showing the extent to which effect has been given to the provisions as it has been found necessary to make in adopting or applying them. In respect to unratified conventions, Article 19 (5) (e) provides for similar requirements. The only difference is, however, that in case of conventions, the Member State that has not ratified the convention is required to explain the way in which effect may be given to it by “legislation, administrative action and collective agreement or otherwise, and stating the difficulties which prevent or delay ratification of such Convention.” As regards recommendations, Member States need not specify the mechanism by which it is proposed to give effect to the provisions of a recommendation, but must specify “such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.” 

Despite the potential of Article 19 of the ILO Constitution, measuring compliance with ILS still remains a difficult task even in the case of ratified international labour conventions. However, an analysis of some surveys made under Article 19 of the ILO Constitution appears sufficient to conclude to a certain degree that ILO recommendations, like

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unratified conventions, can exercise a real influence on national law and practice. The shortcomings, however, are those related to methodology and to resource constraints.  

Generally, it may be stated that international labour conventions and recommendations enjoy an equivalent status from the point of view of “legitimacy” or “representativity” reflecting the will of the international community.

2.4. The Effect of Ratification of ILO Conventions on National Legislation of Member States

It is argued that the ILO standards have had a significant influence on national law and practice of both industrialised and developing countries. Yet there are not many thorough empirical studies on the effects of the ratification of the ILO conventions. Also, it is quite difficult to see how ILO instruments take effect within the legal systems of individual states because of the existing methods of the ILO’s work and because of the structure and mode of operation of international law.

The authors of the ILO Constitution expressed the hope that “regular, automatic and public discussion of the proposals of the Conference by the authorities competent to take the necessary national implementary action would...contribute powerfully to the general ratification of Conventions and the effective implementation of both Conventions and Recommendations.” Thus, the entire legislative machinery procedure of the ILO has tended towards securing maximum effect for the instruments adopted. Therefore, the implementation of standards is their raison d'être and remains a fundamental task for the ILO.

Furthermore, in the view of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the ratification of conventions constitutes “a means for improving social and working conditions” and serves as “an important guarantee of the implementation of conventions because they provide a basis for international supervision.”

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90 Ibid., p. 374.
92 Sengenberger, W., 2005, supra note 42, p. 50.
96 Ibid., p. 86.
The implementation procedure consists of encouraging Member States to ratify conventions and to translate them into national laws and regulations. In accordance with Article 19 (5) (b) of the ILO Constitution, each Member State shall, within the period of one year, or if it is impossible due to exceptional circumstances, then no later than 18 months from the closing of the session of the Conference “bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.” Article 19 (5) (d) states that a Member State “will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention.” Article 22 of the ILO Constitution requires governments to report regularly to the International Labour Office on the measures that they have taken to make the ratified conventions effective.

The effect of ratification within a state depends on its constitutional law, and is often felt both before and after the formal decision to ratify. However, opinions on this topic vary greatly in international law.

Hence, ratification sometimes has an immediate effect on national legislation, because under the constitutional law of some countries or under special provisions of ratification laws, ratified conventions automatically become part of the law of the land and are therefore directly enforceable by the courts. Hence, an implementing law can be dispensed with only in rare cases of provisions being self-executing. Nevertheless, most of the provisions of ILO conventions are not self-executing, and special legislative or other action is needed to make them effective. Most of the individual conventions mention legislation, court ruling, collective agreements and arbitration as alternative means of implementation. In other cases, the legislative measures are taken some time after ratification, since in most cases a convention does not enter into force for the country concerned until one year after the ratification.

Furthermore, the possibility of immediate ratification of various conventions depends largely on their content and on the degree of economic and social development in each country. States ratify ILO conventions at different stages of their development. Some states undertake to ensure that domestic legislation is in accordance with a convention before it is ratified, thus making a ratification merely a symbolic act, while others ratify early in order to achieve the standards set in the respective international instrument.

104 Ibid., p 33.
When examining the possibility of ratifying a convention, governments must ascertain whether their law and practice need to be amended first. Here, the findings of the ILO supervision can play a useful role. Indeed, comments made by supervisory bodies can lead to positive results at the time of the adoption or revision of national legislation.  

Even in cases where a Member State had achieved the standards laid down in a convention before the actual ratification, it is argued that subsequent ratification of a convention still serves several purposes. First, by ratifying a convention, a state strengthens the position of its domestic legislation and provides a national and international safeguard against reversion to lower standards. Moreover, it gives other states an incentive to attain the same standard because it provides both an example and an assurance of widespread implementation, and emphasises the fact that conventions constitute positive rules of international law. However, sometimes states whose legislation was in conformity with a convention at the time of ratification have subsequently lowered the standards. In such cases, the existence of an international obligation and the action taken by the ILO supervisory bodies have ensured that the national legislation was again brought into conformity with respective conventions.

Generally, measuring the influence of ILS is easier in the case of ratified conventions because their implementation is the subject of systematic and continuing supervision. On the other hand, it is also argued that the ratification of conventions can be to some extent hindered by the very existence of the ILO supervisory machinery that makes states to consider the consequences before they ratify a convention.

While ratification alone is an insufficient indicator of impact, it usually leads to at least legislative conformity with conventions. In fact, ILO instruments serve as a basis for relevant regulations in a large number of countries, both ratifying and non-ratifying. The majority of labour codes in different countries mostly conform to the ILO standards. Often, the main provisions of ratified conventions are reproduced word for word in national legislation. In several countries, labour codes lay down the general principle that cases not covered by any specific legislative provision shall be determined by reference *inter alia* to ILO conventions, whether ratified or not, and recommendations. In fact, the ratification of certain conventions have had a positive effect on the development of national legislation of Member States, especially in fields such as health and safety, social security, paid annual leave and equal remuneration.

However, ratification does not necessarily mean that ILS are respected or implemented. Although ratification could be a starting point for application of ILS, it also could be a culmination, or enforcement may take place without ratification. In this regard, Jean-

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107 Ibid., pp. 44, 45.
111 Sengenberger, W., 2005, supra note 42, p. 7.
Maurice Verdier asserts that the time lag between ratification and enforcement is a difficult issue. Consequently, a number of governments are still struggling to eliminate substantial divergences between conventions that they have ratified and current national practices.

Indeed, vast disparities exist between some industrial states with stable governments that comply with a relatively high number of conventions, and some developing countries, with weak governments and high levels of non-compliance. Furthermore, some states cannot ratify certain conventions for technical reasons, although the application takes place. In addition, there are states that fully implement standards that they have not ratified, as well as others that do not enforce standards that they have ratified.

For instance, the majority of European countries have ratified most of the ILO conventions. However, the United States, which has ratified very few conventions, Canada and Switzerland apply quite high labour standards, but because they are federations they are not in a position to ratify most ILO conventions on a federal level. Also, the United States and Canada, in addition to a low level of ratifications, occasionally do not have any supporting legislation, although it cannot be concluded that standards are not enforced in these countries. Labour standards may still be applied through the mechanism of collective agreements or simply because market forces require it. On the contrary, many of the Central Eastern European states, including Ukraine, have ratified a relatively high number of conventions. However, the question here is whether the ratified conventions are supported by enforcement legislation in those countries, given existing constraints.

To sum up, the decisive factors in the ratification of the ILO instruments include the political will of governments as well as the active interests of employers’ and workers’ organisations. When the ratification of a convention takes place with a view to improve existing law and practice, ratification becomes a real instrument of social progress rather than merely the confirmation of an existing situation.

2.5. The Application of International Labour Standards by Domestic Courts

As ratified ILO conventions form part of national law in various ways depending on the country in question, the application of instruments can also be diverse. Despite a relatively high number of ratifications of respective conventions by the ILO Member States, many ILS are not implemented, nor are they correctly applied in practice. A substantial shortfall in the application of standards occurs either because the states concerned do not consider it possible to ratify and apply certain conventions, or to give effect to

116 Ibid., pp. 19, 20.
recommendations due to certain national conditions, or because they have not yet given full effect to conventions that they have ratified.\textsuperscript{119}

When analysing the application of conventions, it is therefore important to look at practices rather than solely at the regulations in place. While states are legally bound to implement ratified international treaties, judicial decisions are therefore an important means to ensure state compliance with international law.\textsuperscript{120} Scholars in the field of international law have pointed out the trend towards “judicial globalization” and the increased use of international law in domestic courts.\textsuperscript{121} In fact, a growing number of national courts cite ILO conventions to interpret national legislation.\textsuperscript{122} Thus, the Vienna Declaration on the Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms, 2003, stresses the obligation of the domestic justice system to ensure the observance of the international obligations of states.\textsuperscript{123} According to the Declaration, a judiciary that is familiar with international norms and standards, including relevant case law, “can best articulate and activate the normative framework for the protection of human rights.”\textsuperscript{124}

In recent years, the role of courts in promoting and ensuring the application of international treaties has increased, albeit with regard to human rights treaties and not necessarily to international labour conventions. In this regard, the Committee of Experts (CEACR) has consistently emphasised the importance of courts as a means of enforcing ILS at the national level and stressed the importance of directly involving judges and labour inspectors in applying the law at the national level.\textsuperscript{125} Moreover, in accordance with Article 22 of the ILO Constitution, states are requested to provide information on whether courts or tribunals have made decisions involving questions of principle in relation to the application of the conventions, for example that a specific court decision was in accordance with a particular convention or contributed to better application of a convention.

There are three main types of usage of international labour instruments and reports of supervisory bodies of the ILO by courts:

1. “statute-like” or direct application;
2. use for the purpose of interpretation of national law; or,
3. as a source for the development of judicial principles.

\textsuperscript{120} Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 256.
\textsuperscript{123} The Vienna Declaration on the \textit{Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms} was adopted as the outcome document of the symposium entitled “The role of judges in the promotion and protection of human rights – strengthening their inter agency cooperation” that took place at the Vienna International Center on 24 November, 2003; See also \textit{Human Rights Year Book 2010}, ed. By Pravin H. Parekh, New Dehli, Universal Law Publishing Co. Pvt. Ltd, 2010.
\textsuperscript{124} Para. 2 of the Vienna Declaration on the \textit{Role of Judges in the Promotion and Protection of Human Rights and Fundamental Freedoms}, 2003.
\textsuperscript{125} Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, pp. 250-252.
1) **Statute-like** or direct application of international treaty provisions is the most obvious form of using international treaties in the courts of monist-type systems. Leary’s study in this regard deals specifically with countries following the monist theory of incorporation of international treaties.\(^{126}\) Direct application may be used when no legislation exists on the issue covered by an ILO convention or when there is no detailed legislation on the respective issue. This can also be the case when international instruments are used as a source of law in addition to existing national legislation in order to strengthen a court’s decision primarily based on national regulations. However, where national and treaty provisions conflict, or where constitutional questions are involved, direct application of international treaty is more difficult. Thus, in some cases, the ordinary courts have the competence to resolve conflicts of norms, while in others only the highest courts can solve the issue. In some cases, the highest courts strike down national laws considered to be contrary to international obligations, rather than holding them unconstitutional *per se*.\(^{127}\)

Unlike monist-system states, in dualist states, direct application is not possible due to the requirement of statutory incorporation, which is mandatory for an international treaty to acquire the force of law. Hence, the determination of whether a provision in a treaty is self-executing or not is less important, since an enacting law is required in either case. The provisions of the international treaty are used as an interpretative tool in case of ambiguity when drafting an incorporating statute. In fact, judicial practice in dualist systems sometimes relies upon international treaties directly, that is *quasi-statute-like*, in order to develop or interpret national law.\(^{128}\) Indeed, domestic courts in monist states occasionally appear hesitant to rely on ratified conventions, while some dualist jurisdictions rely effectively on international law and practice despite the requirement of statutory incorporations.\(^{129}\)

(2) The general principle that national law should be interpreted in the light of obligations arising from international principles and rules seems to be recognised in all legal systems. Hence, in both monist and dualist states, the use of ILS for this purpose is legally possible. The interpretative use of international labour law is exercised with the fundamental principles of labour law often included in constitutions or bills of rights and provisions sometimes containing the same wording. This is called the “constitutionalisation” of labour law. Therefore, when facing disputes on the interpretation of the constitutional provisions that recognize human rights, including labour rights, some domestic courts rely on the international interpretation of these concepts.\(^{130}\)

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(3) The use of ILS as a source for the development of judicial principles also takes place. However, these forms of reliance on international sources are unclearly defined.\textsuperscript{131}

In addition, courts in dualist and monist systems may consider norms contained in formally non-binding instruments or unratified conventions as reflective of customary rules, which are accepted as being part of national law in most legal systems. For instance, a number of monist constitutions refer to general rules or general principles of international law, which usually cover both custom and general principles of law in the sense of Article 38 (b) and (c) of the Statute of International Court of Justice. It seems likely that such rules would exist in the area of fundamental principles and rights at work, and the high rate of ratification of relevant conventions could serve as an indicator. In addition, the fact that an increasing number of national laws refer to these fundamental rights and principles at work seems to support the argument that they have attained the status of “general principles” of law in the sense of Article 38 (c) of the ICJ Statute.\textsuperscript{132}

In post-communist states, the actual status of international law is determined not only by relevant constitutional provisions, but also by the willingness of domestic courts to rely on that body of law.\textsuperscript{133} Judicial practice as such thus is of great importance, especially when it comes to resolving conflicting rules of international and domestic law.\textsuperscript{134} As such, international law can be invoked before the domestic courts in several former Soviet states. Domestic courts usually rely on international law as an additional argument in support of their conclusions based on the applicable constitutional provisions, or they may apply international law directly in cases where there is a gap in national law. Moreover, some national judges may take into account international law even in situations where neither the constitutional provisions nor the general political environment favour the direct application of international standards. In some post-communist states, courts also have the power to dismiss a domestic legislative or executive act on grounds of violation of international law. However, the major problem appears to be in the independence of the judiciary. An independent and professional judiciary is often considered to be a crucial element in the effectiveness of constitutional provisions that declare the supremacy of international law. Therefore, judicial reform remains an important goal for many post-soviet states, including Ukraine.\textsuperscript{135}

Furthermore, according to the 1993 Resolution of the Institut de droit international “On the application of international law by domestic judges,”(Article 4),\textsuperscript{136} national courts, in determining the content of customary international law, should use the same techniques as international tribunals and should enjoy the same freedom to apply rules of customary international law in their current content, taking into account the developments in the practice of states, jurisprudence and doctrine.

\textsuperscript{131} Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 268.
\textsuperscript{132} Ibid., p. 266, footnote 64.
\textsuperscript{133} Danilenko, G.M., 1999, supra note 28, p. 53.
\textsuperscript{134} Vereshchetin, V.S., 1996, supra note 8.
\textsuperscript{135} Danilenko, G.M., 1999, supra note 28, p. 55.
\textsuperscript{136} Ibid., p. 63.
In addition, it should be remembered that non-compliance with international norms can take place not only when a domestic law that is in contradiction to an international treaty is promulgated, but also through acts or omissions of state authorities, including domestic courts and tribunals.\textsuperscript{137} Therefore it is essential for the courts to secure effective applications of international norms.

Finally, case law on the implementation of international law in post-communist states is relatively new, and it is still difficult to obtain information in this regard. In addition, some practical problems, such as the lack of translations of international treaties, court decisions, and the lack of adequate training in international law for domestic lawyers and judges may hinder the application of international law by national courts.

### 2.6. The Supervision of International Labour Standards

#### 2.6.1. Characteristics of the ILO Supervisory System

For a long time, standard-setting in the area of labour law was viewed with scepticism, because it did not seem possible to supervise and enforce these instruments.\textsuperscript{138} However, ratification of ILS would have little value without follow-up, and here the ILO has a number of distinctive mechanisms that no other organisation shares.

The ILO asserts that its supervisory machinery can provide thorough, objective and regular supervision of the effect given to international labour conventions and recommendations.\textsuperscript{139} Scholars have also argued that the ILO supervision procedures have been highly effective, especially compared to other supervisory bodies in the international system.\textsuperscript{140} In addition, the ILO is the only international organisation in which NGOs play a statutory role in the supervision of international obligations and is the only one which reviews and revises its older standards.\textsuperscript{141}

The supervisory system of the ILO relies on the principle that obligations solemnly undertaken by ratification should be respected, and that international supervision is necessary to ensure this.\textsuperscript{142} Ratification thus sets highly elaborate and systematic machinery in motion for supervising the application of conventions.\textsuperscript{143} The purpose of the ILO supervisory system is to discover where states have failed to implement standards fully, and to work together for their implementation, rather than just to detect violations. This is what distinguishes ILO supervision from other international supervisory systems.\textsuperscript{144}

\textsuperscript{137} Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 256.
\textsuperscript{138} Wisskirchen, A., 2005, supra note 35, p. 255.
\textsuperscript{141} Swayne, L., 1997, supra note 118, p. 331; See also Rodgers, G., Swayne L. and J. Van Daele, 2009, supra note 108, p. 20.
\textsuperscript{142} Swayne, L., 1997, supra note 118, p. 327.
\textsuperscript{143} ILO, \textit{The Impact of International Labour Conventions and Recommendations}, 1976, supra note 39, p. 27.
\textsuperscript{144} Swayne, L., 1997, supra note 118, p. 327.
The main characteristics of the ILO supervisory system are:

- Regular reporting on law and practice;
- Supplemental reporting by employers’ and workers’ organisations;
- Detailed examination by a committee of independent experts, covering all ILO instruments in the same way;
- Public examination in a tripartite forum for more serious cases;
- Complaint procedures for ratified conventions;
- Complaints on certain subjects even in the absence of ratification; and
- ILO technical assistance to overcome problems.\(^\text{145}\)

According to Article 22 of the ILO Constitution, the government shall make annual reports to the International Labour Office “on the measures which it has taken to give effect to the provisions of Conventions to which it is a party.” Following a rotation schedule adopted by the Governing Body, reports on other conventions are requested every five years. The CEACR may request also detailed reports outside of the usual periodicity if it has made an observation, made a direct request calling for a reply, or where the Committee considers that a detailed report should be communicated on account of possible changes in legislation or practice in a Member State, which may affect its application of the convention. Detailed reports are requested every two years on priority conventions.\(^\text{146}\)

One issue that has arisen in the context of the ILO supervisory system is the issue of non-self-executing provisions in international labour conventions. For this reason, governments are requested to report on the legal status of ratified conventions in their domestic legal order under Article 22 of the ILO Constitution, as mentioned above. Some governments have argued that automatic incorporation in itself would be sufficient to ensure effective application.\(^\text{147}\) However, the CEACR has rejected this argument.\(^\text{148}\) This is because some provisions contained in ILS are not sufficiently determined in order to be directly enforced by national authorities. Additionally, some ILO conventions explicitly require the adoption of further laws and regulations.\(^\text{149}\) In practice, countries following a monist system may, in many cases, be required to adopt specific legislation, albeit not in order to give domestic legal force to a ratified ILO convention, but in order to ensure its effective application.\(^\text{150}\)

In addition, non-periodic reports should be submitted by governments upon the request of the CEACR, be it of its own initiative or that of the Conference Committee on the Application of Standards; when the CEACR is called on to consider the follow-up to proceedings stated in Articles 24 or 26 of the ILO Constitution or before the Committee on


\(^{146}\) The ILO priority conventions include the following: Freedom of Association: Nos. 87 and 98; Abolition of Forced Labour: Nos. 29 and 105; Equal Treatment and Opportunities Nos. 100 and 111; Employment Policy No. 122; Labour Inspection Nos. 81 and 129; Tripartite Consultation: No. 144.

\(^{147}\) Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 265.


\(^{150}\) Thomas, C., M. Oelz and X. Beaudonnet, supra note 2, p. 266.
Freedom of Association; when comments have been received from national or international employers’ or workers’ organisations and the CEACR deems that the government’s comment is required in response; or when the national government fails to submit a report was supplied or give a reply to comments made by supervisory bodies. No reports are requested for outdated conventions.

Furthermore, conventions and recommendations provide authoritative standards of reference in a number of cases, particularly when carrying out investigations and complaints. The provision contained in Article 19 of the ILO Constitution, which was added to the ILO Constitution in 1956, states that the Governing Body may require reports from all Member States on their practice concerning unratted conventions and recommendations. Article 19 (5) (e) reads as follows:

"[I]f the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, to any provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."

Therefore, Article 19 permits flexibility in the examination of situations even when the conventions concerned have not been ratified. This mechanism has no equivalent in any other international organisation. 151 In addition, comprehensive surveys by the CEACR, which are conducted based on such reports, facilitate the re-examination of the adequacy of national law and practice by governments, employers and workers as well as help to persuade the ILO to consider the need to reinforce its own activities. 152

One of the specific features of ILO supervision is the participation of employers and workers in accordance with Article 23 (2) of the Constitution, which requires governments to send copies of their reports to the “most representative” organisations of employers and workers in the country for such organisations to make comments. The International Labour Office then sends these comments to the government concerned for their response. In addition, Article 5 (1) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) states that governments shall consult employers’ and workers’ organisations on, inter alia, “questions arising out of reports to be made to the International Labour Office under Article 22 of the Constitution.” Experience has shown that observations by employers’ and workers’ organisations calling for greater compliance with ratified conventions are frequently followed up by the government concerned and therefore add substantially to the impact of ILO supervision. 153

The ILO Constitution provides for two types of investigations into allegations of non-observance of ratified conventions, known as representations and complaints. According to Article 24 of the ILO Constitution, an industrial association of employers or workers may

make a representation that a Member State has failed to secure the effective observance of a convention to which it is a party. This form of complaint is unique to the ILO. Under Article 26 of the Constitution, any Member State may file a complaint if it is not satisfied that another Member State is securing the effective observance of a convention that both Member States have ratified.

While the reporting arrangements described above are usually sufficient for obtaining conformity with the requirements of a particular convention in national legislation, this is not the case when it comes to application in practice. Therefore, the ILO supervisory bodies request governments to supply the relevant information on their practical application in the form of reports established by the Governing Body with respect to each convention. In addition, there is a direct contacts procedure, under which a representative of the Director-General may visit a country to meet with the competent authorities to discuss the practical and legal obstacles to the full implementation of given conventions and to find possible solutions.

2.6.2. The Committee of Experts on the Application of Conventions and Recommendations (CEACR)

When the Committee of Experts on the Application of Conventions and Recommendations (CEACR) was established in 1926, it was to advise the Conference and its Committee “as to the facts” after which it was left to the Conference to “decide upon its attitude and upon what is appropriate action it might take or indicate.” Additionally, it was initially stipulated that the CEACR “would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Conventions, nor to decide in favour of one interpretation rather than another.”

In 1990, a question was raised about the binding nature of the findings of the CEACR. In fact, the CEACR does provide interpretation of international standards in its reports. However, pursuant to Article 37 (1) of the ILO Constitution, it is indisputable that only the ICJ has the competence to give a binding interpretation of the ILO Constitution and the ILO conventions. Therefore, the findings and interpretations of the CEACR are not binding. Nevertheless, the Committee suggested in its 1990 report that its own interpretations were binding as long as the ICJ remained silent. Although, after critical debate on this issue, already in the 1991 report, it was stated that the views of the Committee cannot be regarded as a binding decision and that their evaluations have no erga omnes effects. However, the effect of supervision is found in cases in which new legislative enactments specifically indicate that the CEACR has made observations.

156 ILC, 8th Session, 1926, First Record, Appendix V, p. 395.
regarding a given convention, or that the new legislation is intended to achieve greater conformity with one or more conventions.\textsuperscript{160}

Therefore, with an increasing number of standards adopted during the years of the ILO’s work, the CEACR has gained greater influence in performing a quasi-judicial function when evaluating the conformity of national legislation to the ILO instruments.

The conformity evaluations of national legislation performed by CEACR are based on reports submitted by the governments of Member States. The CEACR publishes its comments in the form of “observations” (written comments concerning ratified conventions) or by issuing “direct requests.” \textit{Observations} by the Committee constitute assessments of the Member States’ national legislation and its conformity with ratified ILO conventions.\textsuperscript{161} Thus, the Committee’s observations are delivered in cases of persistent failure of a Member State to comply with its obligations under a particular convention. \textit{Direct requests} of the Committee relate mostly to technical issues or clarifications in order for the Committee to better assess the conformity with ratified ILO instruments. However, only the observations of the Committee are published in its annual report to the Conference.

The comments of the CEACR influence law and practice in the Member States, albeit to varying degrees. Cases where there are positive changes observed in Member States that amended or changed their national legislation to give a fuller effect to a convention are considered “cases of progress” by the Committee, which then notes progress made “with satisfaction” (in cases where a government positively reacted to the previous comments of the Committee) and, since 2000, “with interest” (when the Committee notes positive changes in the existing law and practice of a Member State).

During the last few decades, the implementation of the CEACR’s observations has increased in a number of states, as is proved by the relatively high number of cases of progress as well as the increasing numbers of ratifications of ILO conventions.\textsuperscript{162} This is particularly the case regarding the fundamental conventions. It is undeniable that the increase in the number of cases of progress is connected with the increase in ratifications and submissions of governments’ reports.\textsuperscript{163}

Furthermore, it is observed that Member States have become more receptive to the comments of the Committee. However, despite the work of the CEACR as well as the Committee of Freedom of Association, failure to implement and apply the ILO standards still take place in many Member States.

\textsuperscript{160} ILO, \textit{The Impact of International Labour Conventions and Recommendations}, 1976, supra note 39, p. 54.


2.7. International Labour Standards and Human Rights

In 1950 the author of the Universal Declaration of Human Rights,164 René Cassin, stated that the ILO Constitution represented the first instance of a contractual foundation for “international law regarding fundamental individual freedoms.”165 Indeed, it has often been discussed whether or not and to which extent ILS form part of human rights.

The term “human rights” itself is usually understood to refer to basic rights and freedoms to which all human beings are entitled, such as those covered in the Universal Declaration of Human Rights of 1948 and the ILO Declaration on Fundamental Principles and Rights at Work of 1998.

The question about whether labour rights are human rights is debated by many legal scholars. While some scholars defend the position that labour rights are human rights as such, others instead merely recognize the undeniable influence of labour standards on the development of human rights.166

From 1919 onwards, ILO standards have helped to secure international recognition of the importance of the economic and social rights as an integral part of human rights. It is also crucial to note the fact that labour standards were internationally acknowledged long before the embodiment of human rights in the Universal Declaration. It is therefore fair to say that ILO standards have influenced the more general activities of the international community in the field of human rights as well as in social and development policies. Indeed, the entire standard-setting work of the ILO has aimed to complement aspects of the two main categories of human rights, economic and social rights on the one hand and civil and political rights on the other.167

Moreover, the ILO played an active role in helping to draft both the UN Covenants from 1966. As the Conference resolution of 1967 noted, the Covenants reflected some of the standards previously set in international labour conventions. Indeed, a good argument for considering that most of the ILO standard-setting instruments fall into the human rights

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164 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
category is that Articles 6 to 10 of the International Covenant on Economic, Social and Cultural Rights of 1966 provide a brief restatement of the ILO standards adopted up until that time.\textsuperscript{168}

According to Valticos, the division of human rights into the two categories of civil and political rights on the one hand and economic, social and cultural rights on the other has no logical or legal explanation and in truth "resides on political disparities between States of different persuasions at the time of their negotiation and adoption."\textsuperscript{169} Valticos asserts that international labour rights constitute a special category of human rights as both human rights and ILS share the essence of their inspirations and objectives as well as the similar conditions under which they took shape at the international level.\textsuperscript{170}

Although it may appear that ILS emanate from economic and social rights, their impact on human rights has been equally apparent in the sphere of civil and political rights. Thus, the major spheres of labour standards, such as the abolition of forced labour and child labour, freedom of association and the elimination of discrimination, clearly demonstrate the role of ILO standards in this field.\textsuperscript{171} However, with regard to labour rights specifically, the similarities between ILS and human rights are especially apparent in the International Covenant on Economic, Social and Cultural Rights, and include occupational health and safety,\textsuperscript{172} equal remuneration for men and women,\textsuperscript{173} social security,\textsuperscript{174} weekly rest, holidays with pay, limitation of hours of work,\textsuperscript{175} protection and assistance for children and young persons,\textsuperscript{176} and maternity protection.\textsuperscript{177} Moreover, the broader meaning of the term "human rights" incorporates all of the notions that constitute what the ILO terms "decent work."\textsuperscript{178}

Furthermore, the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and its Follow-up Procedure made a new and important contribution to the promotion and safeguard of four categories of rights, which include: freedom of association and the effective recognition of the right to collective bargaining (ILO Conventions Nos. 87 and 98); the elimination of forced labour (C29 and 105); the abolition of child labour (C138 and 182) and the elimination of discrimination in respect of employment and occupation (C100 and 111). As stated in the Declaration, all ILO Member States are committed to promote and respect these rights regardless of the ratification of respective conventions:

\textsuperscript{168} Rodgers, G., Swepton L., and J. Van Daele, 2009, supra note 108, p. 38.
\textsuperscript{170} Ibid.
\textsuperscript{172} Numerous ILO Conventions and Article 7 of the Covenant.
\textsuperscript{173} ILO Convention No. 100 and Article 7 of the Covenant.
\textsuperscript{174} Several ILO Conventions and Article 9 of the Covenant.
\textsuperscript{175} Several ILO Conventions and Article 7 of the Covenant.
\textsuperscript{176} Several ILO Conventions and Article 10 of the Covenant.
\textsuperscript{177} Several ILO Conventions and Article 10 of the Covenant.
\textsuperscript{178} Rodgers, G., Swepton L., and J. Van Daele, 2009, supra note 108, p. 38.
Even if they have not ratified the Conventions in question, [Member States] have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.\textsuperscript{179}

Notably, these four categories of rights are characterised as being fundamental because of their nature as inherent human rights, which serve as facilitators and allow for the development of other closely connected labour rights.\textsuperscript{180} For this reason, the Declaration makes it clear that these rights are universal and are applicable to all people in all States regardless of the level of economic development. Again, fundamental rights stated in the Declaration constitute the pillars of decent work, as they represent those essential values through which decent work can be actually achieved.

Therefore, human rights and ILSs are obviously related and frequently hold similar values, which are promoted and reinforced by action on both national and international levels.\textsuperscript{181}

3. **The European Union Law as Supranational Law**

3.1. **Characteristics of EU law**

Before the Treaty of Lisbon, the EU law had a differing meaning than the EC law.\textsuperscript{182} Then, with the conclusion of the Treaty of Lisbon, the EU acquired legal personality and the common EU law became equal to the former EC law (including Euratom law). Consequently, in this section and throughout this study it will be referred to the EU law and not the EC law.

Some legal scholars have argued that the EU law represents a unique, somewhat hybrid type of law, and have often referred to it as *sui generis* law or "mixed" law.\textsuperscript{183} Other scholars defend the position that the Union’s legal order is essentially one of international law.\textsuperscript{184} The relationship between European and international legal orders is a topic of great interest among different scholars.\textsuperscript{185}

\textsuperscript{179} ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June, 1998.
\textsuperscript{184} For example, see Moorhead, T., “European Union Law as International Law,” in *EJLS*, Vol. 5, Issue 1, 2012, pp. 126-143.
This thesis adheres to the point that EU law is a supranational type of law because of the legislative, judicial and executive powers the EU possesses. Indeed, EU law represents a legal system that is based on agreements between sovereign states and has specific features that distinguish it from the general public international law. In addition, the way of reasoning in accordance with EU law rules is different from that of national law of states, in particular from constitutional law.\footnote{Ziller, J. “The Nature of European Union Law,” Tratado de Derecho de la Unión Europea, Tomo IV, Chapter “Naturaleza del derecho de la Unión Europea”, J.M. Beneyto, B. Becerril, J. Maíllo, (eds.), Madrid: Aranzadi, 2011, p. 8, available at: \url{http://ssrn.com/abstract=1919481}, (last accessed 23 November 2017).}

The specific features of EU law include the following:

- the EU is not a state, as it does not possess the legal criteria of a state (i.e. territory, population and sovereignty);
- EU law is based on the agreement binding sovereign states; and,
- EU law has a specific mechanism, not present in international law, thereby making the nature of EU law \textit{sui generis}.\footnote{Ibid.}

Pursuant to Article 355 TFEU and Article 52 paras. 1, 2 TEU, the European Union does not have its own territory.\footnote{According to Article 52, para. 1, “The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britannia and Northern Ireland.”} Application of the treaties to specific regions, along with

exceptions to the general rule are defined by Article 355 TFEU, pursuant to which the treaties shall apply to the Member States specified by Article 52 TEU, Article 355, para. 1, 2 (first section) and 4, TFEU. Exemptions as to the application of the treaties are established by paras. 3 and 5, Article 355 TFEU.\(^{189}\) It follows from these provisions that the Member States, and not the EU, define the territory of application of EU laws. The only exemption to this rule is provided in para. 6, Article 355 TFEU, according to which the Union has the power to change the mode of application of the treaties with regards to particular territories.\(^{190}\) It should be noted that the provisions of Article 355 TFEU and Article 52 TEU imply that despite the competence of the Member States to determine the territory, they cannot use their competences in such a way that would create obstacles for the application of EU law.

Since the European Union is not a state, it does not possess general competence similar to that of states.\(^{191}\) In this regard, it is important to note that the competences of the EU are governed by the principle of conferral, which had already been observed in Article 5 TEC, before the entry into force of the Treaty of Lisbon. In fact, the principle of conferral was also rooted in the EEC Treaty of 1957 in Article 7 (now Article 18 TFEU), which provided that “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

The Treaty of Lisbon had given the principle of conferral its written form. Article 5 (1) of the TEU states, “The limits of Union competences are governed by the principle of conferral.” Article 5 (2) TEU further specifies that: “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” Also, in accordance with Article 7 TFEU, “the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”

The Treaty of Lisbon divides the scope of Union competences into three categories: exclusive, shared and supporting competences, whereby the EU has power to adopt measures in order to support or complement policies of Member States. Articles 3, 4 and 6 TFEU list the areas of each category of EU competence.

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\(^{189}\) Article 355, para. 3, TFEU reads: “The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible;” while para. 5, Article 355 specifies territories to which the treaties shall not apply.

\(^{190}\) The territories in question are specified in paras. 1 and 2, Article 355 TFEU; in addition, para. 6, Article 355 TFEU reads: “The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.”

Pursuant to Article 3 (1) TFEU, the Union has exclusive competence in the following areas: (a) the customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. In addition, Article 3 (2) TFEU provides for the exclusive competence of the Union to conclude international agreements “when its 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.”

In accordance with Article 4 (2) TFEU, shared competence between the Union and the Member States is applicable in such areas: (a) the internal market; (b) social policy; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) the environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) the area of freedom, security and justice; (k) common safety concerns in public health matters. Important provisions are also enshrined in Article 2 (2) TFEU, according to which:

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Supporting competences of the Union are defined by Article 6 TFEU and include the following areas: (a) the protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; and (g) administrative cooperation.

It is important to distinguish between the concept of EU competence and the scope of application of EU law. The concept of competence applies to those powers and actions transferred by the Member States to the Union. The scope of application, in contrast, defines the applicability of EU law general principles and rules. The scope of EU law is determined by the subject (ratione materiae), while the scope based on the person (ratione personae) and on the territory (ratione loci) of EU law is limited by the treaties in accordance with special rules. The principle of conferral determines the scope based on the content of the founding treaties and the EU secondary legislation. The founding treaties, nevertheless, do not contain a list that would determine the precise limits of the application scope. In order to determine the limits of the application scope, it is necessary to refer to the legal basis, objectives and competences of the EU that are to be found in the Treaty of Lisbon, yet there is no precise wording of this legal basis.

The EU possesses a system of government that is formed by institutions granted decision and regulatory competences applicable to all Member States. The Union is often referred to as having hybrid features because it is endowed with double democratic legitimacy, the one of the Parliament (direct legitimacy) and that of the European Council and the Council.

193 Ibid., p. 21.
(indirect legitimacy), in accordance with Article 10, paras. 1 and 2, TEU. Nevertheless, the EU has no sovereign power and its competences can be withdrawn by Member States through the amendment of the treaties.

When addressing the nature of EU law, it is necessary to recall the Van Gend en Loos and Costa v. ENEL cases. First, “a new legal order of international law” was affirmed in Van Gend en Loos, where the ECJ ruled:

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals [emphasis added].

In Costa v. ENEL, the European Community was qualified by the Court of Justice as having “its own legal system.” In particular, the Court ruled that:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system, which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plane, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves [emphasis added].

Furthermore, the principle of primacy of EU law was also formulated by the ECJ in Costa v. ENEL:

The precedence of Community law is confirmed by Article 189, whereby a regulation “shall be binding” and “directly applicable” in all Member States. It follows... that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Also, the Declaration (n.17) concerning primacy, which is annexed to the founding treaties, envisages the principle of primacy:

The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law [emphasis added].

194 Article 10, para. 1, TEU, states: “The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”

195 According to Article 48, para. 2, TEU: “The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties.”

196 Van Gend en Loos, Case 26/62, [1963] ECR 1
197 Flaminio Costa v E.N.E.L., Case 6/64, [1964] ECR 585
198 Flaminio Costa v E.N.E.L., Case 6/64, [1964] ECR 585, at 593
199 Flaminio Costa v E.N.E.L., Case 6/64, [1964] ECR 585, at 594
It is also necessary to note the difference between the principles of *primacy* and *supremacy* when assessing the nature of EU law. Given its international treaty nature, the primacy of EU law differs from the supremacy of a constitution in a state’s national legal order, which is based on a hierarchy of norms. In other words, supremacy is based on the hierarchical superiority of norms, while primacy, in contrast, is based on the distinction between the fields of application of different norms.\(^\text{201}\) The primacy of EU law therefore, is not based on a system of hierarchy of norms. This is why an EU regulation would prevail over a Member State’s constitution. Since the primacy of EU law stems from international treaties signed by sovereign states, the Member States may not violate it on the grounds that their internal law contains provisions conflicting with that of the EU. This also follows the Vienna Convention on the Law of Treaties of 1969, Article 27 of which states: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”\(^\text{202}\) In addition, the ECJ’s ruling in *Simmenthal* is important in this regard, where the Court ruled that:

> Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.\(^\text{203}\)

One of the central principles of EU law is the principle of *effectiveness* (efficiency) or the principle of *effet utile*. The concept of *effet utile* was not originally developed by the Court of Justice, unlike other general principles of EU law. In fact, in public international law, this principle is also considered to be one of the fundamental principles in the interpretation of treaties.\(^\text{204}\)

While Article 1 of the Treaty on European Union, calls for the creation of “an ever closer union among the peoples of Europe,” the principle of *effet utile*, along with the mechanisms, principles and rules that must guarantee it, serves the aim of the creation of the Union and ensures the effectiveness of EU law *vis-à-vis* the national law of Member States. These mechanisms, principles and rules derive from the nature of the EU Constitution as an international treaty and are different not only from those of ordinary public international law but also from the constitutional law of many EU Member States.

\(^{203}\) Judgment of the Court of 15 December 1976, Case 35/76, *Simmenthal v. Italian Minister for Finance*, European Court Reports 1976 p. 625, para. 21; See also para. 17 in *Simmenthal* where the Court ruled: “In accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.”
The reason for this is the ECJ’s role in ensuring the compliance of Member States with their obligations under the Treaties.\textsuperscript{205}

Another principle that stems from the international treaty nature of EU law is that of \textit{international state liability}. Thus, under public international law, it is states that are liable for any acts and omissions of their institutions and authorities, including national courts. The ECJ upheld the principle of state liability in \textit{Francovich}.\textsuperscript{206}

The principle of Member State liability for a breach of the Union law also applies to the high judicial authorities of Member States (i.e. Supreme Courts), as the Court of Justice reiterated in the \textit{Köbler} case.\textsuperscript{207} It is also noteworthy that in the \textit{Köbler} case, the Court distinguished between the international legal order and the EU legal order, noting that:

In international law a State which incurs liability for breach of an international commitment is viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals. (para. 32)

However, arguments have arisen concerning the independence of judiciary and the principle of legal certainty.\textsuperscript{208} The Court in this regard observed that:

As to the independence of the judiciary, the principle of liability in question concerns not the personal liability of the judge but that of the State. The possibility that under certain conditions the State may be rendered liable for judicial decisions contrary to Community law does not appear to entail any particular risk that the independence of a court adjudicating at last instance will be called in question. (para. 4)

\textsuperscript{205} Ziller, J., 2011, \textit{supra} note 186, p. 63.

\textsuperscript{206} Judgment of the Court of 19 November 1991, Andrea Francovich and Danila Bonifaci and others v. Italian Republic, Joined cases C-6/90 and C-9/90, \textit{European Court Reports} 1991 p. I-05357. The ECJ ruled: “31. It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions” (see the judgments in Case 26/62 \textit{Van Gend en Loos} [1963] \textit{ECR 1} and Case 6/64 \textit{Costa v ENEL} [1964] \textit{ECR 585}); and, “32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals” (see, in particular, the judgments in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] \textit{ECR} 629, para. 16, and Case C-213/89 Factortame [1990] \textit{ECR} I-2433, para. 19).

\textsuperscript{207} See Judgment of the Court of 30 September 2003, Gerhard Köbler v. Republik Österreich, Case 224/01, ECR, 2003, I-10239, where the ECJ ruled: “30. First, as the Court has repeatedly held, the principle of liability on the part of a Member State for damage caused to individuals as a result of breaches of Community law for which the State is responsible is inherent in the system of the Treaty (the relevant case law is quoted); 31. The Court has also held that that principle applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach (the relevant case law is quoted).”

\textsuperscript{208} Ziller, J., 2011, \textit{supra} note 186, p. 29.
It follows from the founding treaties, that EU law not only includes obligations on the part of states, but also confers rights and duties to individuals, as envisaged by Article 20 (2) TFEU.209 Under EU law, the rights and duties conferred to individuals have a strong connection to the sanctioning regime as a protection against the infringement of Member States’ obligations as well as of the content of the norms of the founding treaties.

Furthermore, pursuant to Article 259 TFEU (ex Article 227 TEC), a Member State may bring the matter before the ECJ if the State considers that another Member State has failed to fulfil its obligations under the Treaties. As a first step, however, the matter must be brought before the Commission, which should then deliver its “reasoned opinion” on the issue within three months. If the Commission does not deliver an opinion within the specified period, “the absence of such opinion shall not prevent the matter from being brought before the Court.” It should be noted that while under public international law only states can take part in the sanctioning regime and access the International Court of Justice, under EU law, institutions and subjects other than states participate in the sanctioning regime and can file a complaint at the European Court of Justice.

### 3.2. Sources of EU Law

The law of the European Union stems from a number of sources, which in a broad sense constitute:

- Primary law sources (EU founding treaties);
- Secondary law sources (regulations, directives, decisions, opinions and recommendations);
- Supplementary sources (general principles of EU law, case law of the ECJ).

All the sources together form the body of EU law, the *acquis communautaire*.

As mentioned previously, the system of EU law sources is built on the hierarchy of norms, and therefore differs from that of public international law. Thus, Article 38 of the Statute of the International Court of Justice is not applicable to the law of the EU. 210

#### 3.2.1. EU Primary Legislation

The primary legislation of the EU (the founding treaties) is located at the top of the hierarchy and is the supreme source of EU law. When referring to EU primary legislation, there are two principal treaties: the Treaty on the European Union (TEU), which was

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209 Article 20, para. 2, TFEU reads: “Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.”

210 Article 38 of the Statute of International Court of Justice (United Nations, *Statute of the International Court of Justice*, 18 April 1946) defines the system of sources of public international law and provides that: 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”
originally the Maastricht Treaty; and the Treaty on the Functioning of the European Union (TFEU), originally the Treaty of Rome. Both treaties have been amended several times.

The founding treaties of the EU contain formal and substantive provisions that determine the legal framework for the implementation of European policies by the EU institutions. The treaties also lay down the rules according to which the division of competences between the EU and the Member States are determined. One of the important features that distinguishes EU law from public international law is that there can be no reservations applied to the EU founding treaties, while there are no indications with regard to reservations envisaged by the treaties. Moreover, EU instruments enter into force with respect to Member States on subject covered by the scope of the treaties, without subsequent ratification, adoption or signature by the Member States.

There are three categories into which the founding treaties may be divided: the original founding treaties, revision treaties and enlargement treaties.

The genuine founding treaties are the Treaty of Paris (the Treaty establishing the European Coal and Steel Community (ECSC Treaty)) of 1951, and the Treaties of Rome (Treaty establishing the European Economic Community and the EURATOM Treaty) of 1957. The Treaty of Maastricht of 1992 (Treaty on European Union (TEU)) represented a new stage in European integration and established the European Union, based on three pillars: the European Communities, the Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (JHA). In the Treaty of Maastricht, the term “European Economic Community” is replaced by “European Community” (EC).

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211 According to Article 2 (d) of the Vienna Convention ‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;” Article 19 provides that: “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”

212 Ziller, J., 2011, supra note 186, p. 44.

213 Treaty Establishing the European Coal and Steel Community (the ECSC Treaty or the Treaty of Paris), 261 U.N.T.S. 140.


The revision treaties include the Single European Act of 1986,\textsuperscript{217} the Treaty of Amsterdam of 1997,\textsuperscript{218} the Treaty of Nice of 2001\textsuperscript{219} and the Treaty of Lisbon of 2007 (which entered into force on 1 December 2009),\textsuperscript{220} which amends the Treaty on European Union and the Treaty Establishing the European Community (TEC). The Treaty of Lisbon changed the title of the Treaty Establishing the European Community to the Treaty on the Functioning of the European Union (TFEU).\textsuperscript{221} Hence, the TFEU represents an amended and renamed version of the TEC.

It is important to note that in 2004 the Treaty for the Establishment of a Constitution for Europe (commonly referred to as “the EU Constitution” or “the Constitutional Treaty”) was drafted. However, the Constitutional Treaty was never ratified, despite being signed by 25 of the EU Member States at the time. The Lisbon Treaty of 2007 reaffirmed major innovations originally drafted in the Constitutional Treaty of 2004, and granted the EU a legal personality, thus making the European Union a subject of international law with the right to negotiate and conclude international agreements on its own behalf.

Furthermore, the Treaty of Lisbon also centralised EU powers; confirmed the competences of the Union to act in human rights, judicial and foreign policy areas; provided the European Parliament with new powers; envisaged powers to harmonise national legal systems and extended the authority of the ECJ into Home Affairs. The Treaty of Lisbon also reduced the number of the EU legal acts, in this way simplifying the legal system of the Union. Following the Lisbon Treaty, the institutions of the Union adopt only those legal instruments laid down by Article 288 TFEU. Furthermore, the Lisbon Treaty reaffirmed the idea that every citizen of a Member State is also a citizen of the EU. Finally, the EU Charter of Fundamental Rights\textsuperscript{222} was also placed within the system of primary legislation of the EU, thus becoming legally binding on the Member States.

Lastly, the enlargement or accession treaties also constitute primary legal sources of the EU. Such treaties are those concluded with new Member States, for example, with Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia in 2003, and with Romania and Bulgaria in 2005.

### 3.2.2. EU Secondary Legislation

There is also a hierarchy established for secondary EU legislation. This hierarchy was introduced by the Treaty of Lisbon and is reflected in Articles 289, 290 and 291 TFEU, which distinguish between legislative, delegated and implementing acts.

\textsuperscript{218} Treaty of Amsterdam Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 O.J. (C340) 1, 37 I.L.M. 253.
\textsuperscript{219} Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001, 2001 O.J. (C80) 1.
Legislative acts, as defined by Article 289 TFEU, are legal acts that are adopted through the ordinary or a special legislative procedure.

Pursuant to Article 290 TFEU, delegated acts are non-legislative acts of general application; they supplement or amend particular elements of legislative acts. The power to adopt such acts is delegated to the Commission by the legislative act, which defines the objectives, content, scope and the duration of the delegation of power. In addition, the provision provides that the legislator shall lay down the conditions to which the delegation is subject, such as the power of the European Parliament or the Council to revoke the delegation or the right to express an objection to a delegated act prior to its entry into force within a period defined by a legislative act.

Implementing acts are adopted by the Commission, which, pursuant to Article 291 TFEU, is granted the power to adopt such acts in cases where uniform conditions for implementing legally binding acts are needed. In duly justified specific cases and those relating to the area of Common Foreign and Security Policy, (cases provided for in Articles 24 and 26 of the Treaty on European Union), the Council has the competence to adopt such acts.

EU secondary legislation consists of unilateral acts and agreements. Article 288 TFEU (ex Article 249 TEC) distinguishes such acts of the Union’s institutions as regulations, directives, decisions, opinions and recommendations. Among these acts, recommendations and opinions do not have binding force.

Thus, Article 288 (2) TFEU provides that “a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.” Regulations are adopted with a view to ensuring the uniform application of EU law in all Member States. In cases of nonconformity of national law with a regulation, the regulation supersedes national law. Member States and private persons as well as the institutions of the Union must fully comply with a regulation if it applies to them. Direct applicability of a regulation implies that it does not require transposition into the national laws of Member States and is applicable from the day of its entry into force.

According to Article 288 (3) TFEU, “a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” EU directives are not directly applicable and require each Member State to incorporate them into their national legal system, thus giving effect to the respective directives. Hence, while regulations of the EU are directly applicable, EU directives must be transposed into the law of the Member States within the deadline set for the given directive. As a legal instrument, a directive does not seem to have any analogous equivalent in other legal systems, imposing very specific obligations on the national legislatures of Member States. Prechal has, however, argued that the detailed drafting of directives often makes the “choice of forms and methods” prescribed by Article 288 TFEU illusory.223

As regards the Union’s institutions decisions, 288 (4) TFEU envisages that “a decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.” Since the entry into force of the Treaty of Lisbon, this type of act has acquired a broader definition, while it does not necessarily specify to whom it is addressed. If a decision is adopted by the Council and the Parliament following the ordinary legislative procedure or a special legislative procedure, it constitutes a legislative act. A decision that is adopted by one of the European institutions is a non-legislative act, which is then referred to as a provision enacted by the European Council, the Council or the Commission in particular cases outside the legislature’s scope of competence. According to the Court of Justice, a decision can produce direct effects while creating rights for the individuals. In order to invoke the rights conferred on individuals by a decision, the respective Member State must first transpose it into its national law. Hence, a decision may be directly applicable on the same basis as directives.

Recommendations and opinions do not have binding force as it is explicitly envisaged in Article 288 TFEU. These instruments do not confer any rights or obligations on those to whom they are addressed. However, recommendations and opinions of the EU do provide guidance when interpreting the Union law and have legal effect in cases where they are subsequently referred to by the ECJ. Thus, when particular recommendations or opinions help to interpret EU law, domestic courts must take these instruments into consideration. Before the Treaty of Lisbon, the Commission had competences to formulate recommendations or deliver opinions on matters dealt with the Treaty whenever it considered necessary to do so, in accordance with Article 211 TEC. These powers of the Commission are not set out in the TEU and TFEU as amended by the Treaty of Lisbon. Nevertheless, the Commission has been empowered to undertake initiatives if they “promote the general interest of the Union.” Pursuant to Article 17 (1) TEU, the Commission “shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.” It can be thus argued that such initiatives of the Commission may also take the form of recommendations or opinions.

3.2.3. Supplementary Sources of EU Law

Supplementary sources of EU law can be divided into the following:

- General principles of EU law and international law;
- International treaties of the EU;
- Case law of the ECJ.

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224 See Case 9/70; Joined cases C-100/89 and C-101/89.
225 See Grimaldi v Fonds des Maladies Professionnelles, Case C-322/88.
The general principles of EU law constitute an unwritten source of the law of the Union and are inferred from its founding treaties. Thus, the Treaty of Rome in Article 340 TFEU (288 TEC) had referred to the principles “common to the Member States.” Such principles are also envisaged by Article 6 (1) TEU (version prior to Treaty of Lisbon), which states: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” After the entrance into force of the Lisbon Treaty, Article 2 TEU states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail [emphasis added].

Article 6 (1) TEU, as amended by the Treaty of Lisbon, provides that the Union “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union,” which shall have the same legal value as the Treaties themselves. Furthermore, pursuant to Article 6 (2) TEU, the Union “shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.” Consequently, Article 6 (3) TEU provides that “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, shall constitute general principles of the Union’s law.”

It is also important to note that Article 7 (3) TEU empowers the Council to suspend certain rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council, in case a respective Member State has breached the values upon which the EU is founded.

In fact, general principles of EU law are also inspired by public international law. In particular, it is important to point out that the rules of the Vienna Convention apply to EU law, insofar as they reflect customary international law. Among the basic principles of the Vienna Convention applicable to the system of EU law are: Article 26 (pacta sunt servanda), Article 27 (internal law and the observance of treaties), and Article 46 (provisions of internal law regarding competence to conclude the treaties). The EU founding treaties, in turn, contain many rules enshrined in the Vienna Convention. However, in cases when the founding treaties contain different rules than those of the Vienna Convention, the provisions of the latter do not apply. Hence, unlike the principles of public international law, where general principles may be contrary to custom or a written agreement and vice versa, the general principles of EU law cannot contradict its founding treaties since the treaties already contain them.

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226 Article 340 TFEU (ex Article 288 TEC) states: “In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”
Furthermore, conventions and agreements of the EU also constitute its law sources, and include international agreements that are signed between the EU and a country or an external organisation. These include association agreements, agreements between Member States, and agreements between the EU institutions (interinstitutions agreements). Pursuant to Article 216 (1) TFEU, the Union may conclude, within the area of its competences, an agreement with one or more third counties or international organisations. These agreements form an integral part of the Union law, and are binding upon the institutions of the Union and on its Member States (Article 216 (2) TFEU). As regards conventions, this instrument was envisaged by Article 34 (2) (d) of the EC Treaty and was subject to the regular regime of international organisations. 227 The adoption of conventions is, however, no longer set down after the entry into force of the Treaty of Lisbon. Nevertheless, any conventions that had already been adopted remain in force pursuant to Article 9 of the Protocol (No. 36) on transitional provisions.228

International agreements of the EU are also among its law sources. Article 216 (1) TFEU provides the option for the Union to conclude, within its sphere of competence, international agreements with third countries or international organisations “where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.” Such agreements form an integral part of the Union law and are binding upon the institutions of the Union and on its Member States.

Finally, the practice of the Court of Justice, considered in the section below, represents one of the most important sources of EU law.

3.3. The European Court of Justice: its Role and Powers

The Court of Justice of the European Union has a different role than the constitutional or supreme court of a sovereign state. It consists of the Court of Justice, the General Court and specialised courts, as defined by Article 19 TEU. The main function of the ECJ as set out in Article 19 (1) TEU is “to ensure that in the interpretation and application of the Treaties the law is observed.” The ECJ’s rules of procedure are defined in Article 253 TFEU (ex Article 223 TEC).

227 Article 34 (2) (d), TEU (prior to Lisbon) provided that “Acting unanimously on the initiative of any Member State or of the Commission, the Council may: establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties.” Treaty on European Union (Consolidated version 2002) OJ C 325, 24 December 2002, pp. 5–32.

228 Protocol (No. 36) on the transitional provisions, Article 9 reads as follows: “The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.”
The practice of the ECJ serves as one of the most important sources of EU law, which includes its case law as well the general principles of EU law, developed by the ECJ, such as that of legal certainty, legitimate expectations, supremacy, direct effect and others.\textsuperscript{229}

The ECJ is granted various competences, which include the power to take actions regarding the failure of Member States to fulfil their obligations under the Treaties (Articles 258, 259 and 260 TFEU); actions for annulment of a legislative act of an EU institution if it violates the Treaties (Articles 263, 264 TFEU); actions for the failure of an EU institution to act in case of infringement of the Treaties (Article 265 TFEU); jurisdiction in disputes relating to compensation for damage in the case of non-contractual liability (Articles 268, 340 (2), (3) TFEU); appeals and reviews against judgments of the General Court in certain cases (Article 256 TFEU); and preliminary ruling (Article 267 TFEU). After the entrance into force of the Treaty of Lisbon, the competences of the Court also include police and judicial cooperation, which was previously the agenda of the former third pillar.

Article 19 (3) TEU provides that the European Court of Justice has the power to:

- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
- (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
- (c) rule in other cases provided for in the Treaties.

The procedure of preliminary ruling by the ECJ under Article 267 TFEU (ex Article 234 TEC) is unique in international law, as it is an instrument of cooperation between the ECJ and national courts, through which the ECJ provides an interpretation of the Union law to national courts in order to enable them to deliver judgment in the cases they are hearing.\textsuperscript{230} The preliminary ruling procedure thus helps to ensure uniform interpretation and application of EU law. The mechanism of the preliminary ruling is enshrined in Article 267 TFEU (ex Article 234 TEC), which states that:

\begin{quote}
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
\begin{itemize}
\item[a)] The interpretation of the Treaties;
\item[b)] The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.
\end{itemize}
\end{quote}

The preliminary ruling procedure can be raised between an individual or a legal entity and a public authority (vertical effect) or between private individuals or legal entities (horizontal effect). National courts or tribunals may start the preliminary ruling procedure by a request to the ECJ to give a binding opinion on the interpretation and validity of EU law, as provided in Article 267, para. 2, TFEU: “Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

\textsuperscript{229} See also Tridimas, T., General Principles of EU Law, Oxford University Press, 2nd ed, 2006.

Hence, a national court is obliged to refer the case to the ECJ for a preliminary ruling in two instances: first, if a national court suggests that a secondary legislation act of an EU institution is invalid; second, in case there are questions arising concerning the interpretation of an legislative act of the Union before the last instance courts, where no judicial remedy exists against their decisions under national law.\(^\text{231}\) Again, pursuant to Article 267, para. 3, TFEU, “Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.”

In case a Member State violates its obligation to bring an issue before the ECJ for a preliminary ruling, such a violation constitutes a failure to fulfil the obligation under the Treaty by that Member State. Consequently, the Commission or another Member State of the Union may bring the issue of this violation before the ECJ.

While, on one hand, the final decision in a case is left to a national court, the preliminary ruling provided by the ECJ is binding for the respective national court, thus affirming the exclusive competence of the ECJ to rule on the validity and interpretation of the Union law.\(^\text{232}\) Consequently, national courts of Member States must interpret national law, as far as possible, in the light of the respective opinion of the ECJ. Furthermore, the violation of Member States to bring the matter before the ECJ may lead to state liability.\(^\text{233}\)

It is necessary to note that issues related to the compatibility of the national law with EU law as well as issues of interpretation of the national law cannot be referred to the ECJ for a preliminary ruling. National courts, nevertheless, often must address the question of whether national legislation is in conformity with EU law. In this regard, the ECJ may reformulate the question addressed by a national court, as the ECJ itself is not bound by the wording of the question submitted to it. This allows the ECJ to guide a national court in its judgment on the compatibility of national law with that of the Union.\(^\text{234}\)

Finally, the preliminary ruling procedure of the ECJ is closely connected with one of the fundamental principles of EU law, namely, the uniform application of the law of the Union.\(^\text{235}\) The principle of uniform application, however, is not directly laid down in the founding treaties. Nevertheless, according to Article 4 (2) TEU, the Union “shall respect the equality of all Member States before the Treaties.” What is more important is that the principle of uniform application is regularly referred by the ECJ in its practice. The most significant ECJ decision in this regard is Rheinmühlen, where the Court ruled that Article

\(^\text{231}\) This obligation is not absolute: see Case 283/81, CILFIT, ECR 1982, 3415.


\(^\text{233}\) In this regard see, for instance, Gerhard Köbler v Republik Österreich. Case C-224/01, ECR, 2003, I-10239.


267 TFEU (ex Article 234 TEC) “is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all States of the Community.”

3.4. The Implementation and Monitoring of EU law by Member States

3.4.1. The Implementation of the Law of the Union

Article 291 (1) TFEU provides for the obligation of Member States to “adopt all measures of national law necessary to implement legally binding Union acts.” In the context of EU law, the notion of “legal implementation” is normally applied to EU directives, while other binding legal acts of the Union, namely regulations and decisions, have direct effect and therefore do not need to be transposed into the national law of Member States in accordance with Article 288 TFEU (ex Article 249 TEC).

The implementation of EU law includes different processes and measures taken by a Member State in order to give effect to the law of the Union. Indeed, the transposition of directives into national legislation implies guaranteeing the effectiveness of EU law by Member States, based on the principle of sincere cooperation as it is provided for in Article 4 (3) TEU. Furthermore, as follows from the practice of the ECJ, EU law can be duly transposed into national law by means of “national provisions of a binding nature which have the same legal force as those which must be amended.”

Hence, national legislators must adopt a transposing act or a “national implementing measure” in order to transpose a directive into domestic legislation within the period laid down in a directive as well as to bring national law in line with the objectives set in a directive. Normally, EU directives are transposed by national law. This implies that a Member State needs to transpose the directive into national law by adopting a legal act that contains the rules laid down in the respective directive. However, in the case of labour law, directives may also be transposed by collective agreements, if they are generally binding and cover all the workers and employers who were covered by the original directive.

When transposing a directive, Member States are given discretion in order to take into account specific national circumstances. In addition, there is a so-called “standstill” principle, which applies to directives that have entered into force, even though they have not yet been transposed into national legislation of a Member State. This principle follows

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236 See, Rheinmühlen-Düsseldorf, Case 166/73, ECR [1974] 33, para. 2.
from the principle of good faith in public international law and is envisaged in Article 18 of the Vienna Convention on the Law of Treaties.  

Individuals are accorded rights and bound by a directive only after its transposition into national legislation. Thus, directives are generally not directly applicable. However, as the ECJ ruled, certain provisions of a directive may have direct effect in a Member State even in the case that a transposing act has not been yet adopted in the following cases: (a) when a directive has not been transposed into national law or has been transposed incorrectly; (b) in the case that the provisions of a directive are imperative and sufficiently clear and precise; and (c) the provisions of the directive confer rights on individuals. The provisions of such directives can be enforced directly in national courts. Member States are also bound to take into account an untransposed directive when it does not confer rights on individuals, yet meets the first and second criteria. Even in cases when a directive has direct effect, it addresses the states, not the individuals. This implies that a directive takes *vertical direct effect*, and not *horizontal direct effect*.  

One of the main reasons why the directive does not take horizontal direct effect stems from the wording of Article 288 TFEU, which grants such effect only to regulations. Therefore, individuals may invoke the respective provisions before the public authorities, in light of the aforementioned criteria, but in dealings with other individuals (horizontal direct effect), it is not possible to rely on the direct effect of an untransposed directive.

Individuals have the right to seek compensation from a Member State when that state does not comply with EU law in the case of an untransposed or inadequately transposed directive in the following instances: (a) a directive is intended to confer rights on individuals; (b) the content of the rights can be identified on the basis of the provisions of a directive; and (c) there is a causal link between the breach of the obligation to transpose a directive and the loss and damage suffered by the injured parties.

Each EU Member State also has an obligation to establish remedies aimed at implementing the Union law on its territory. According to Article 19, para. 1, TEU, “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.” In this regard, it is important to refer to the Court of Justice, which ruled in the Heylens case that:

14 [T]he existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right;

15 Effective judicial review […] presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons.

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239 Article 18 of the Vienna Convention on the Law of Treaties, 1969, states: “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”


242 See *Faccini Dori* Case C-91/92, ECR 1994 I-3325, point 25.

243 See the *Francovich* Case, joined cases C-6/90 and C-9/90.
It is also important to note that the obligation to accept the jurisdiction of the ECJ stems from the accession treaties. This means that a state that becomes an EU member does not have the option of not accepting the jurisdiction of the ECJ. That is why the judicial review is mandatory for the EU Member States, which also makes it different from public international law.

It is certainly the case that many states, especially those CEE states that joined the EU during the largest wave of enlargement in 2004, were faced with the problem of transposition of EU labour law into their national legislation. Important reforms all took place in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia, which were invited to join the EU in 1993.

EU law also influences the domestic law of EU candidate countries. Croatia (before it became a Member State), Turkey and the Former Yugoslav Republic of Macedonia all referred to the *acquis communautaire* when they revised their domestic law, including labour law. The labour laws of Albania, Bosnia and Herzegovina, Serbia and Montenegro have also drawn inspiration from EU law in many respects. Generally, labour law reforms in the former communist countries have led to narrowing down the scope of application of labour law; however, the content of labour law has been enriched and attempts have been made to bring the system of industrial relations system closer prevailing Western European legal framework and practices.

3.4.2. Monitoring the Implementation of the EU Directives in Member States

The European Commission has a supervisory role over the implementation of the obligations of states. This function is entrusted to the Commission by the Treaties. It is also the international treaty nature of the EU that explains the presence of the control and monitoring system of Member States.

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In accordance with Article 17 (1) TEU, the Commission “shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.” The Commission is thus independent in monitoring the implementation of the Union’s law by the Member States.

In a case in which a Member State has not taken measures to transpose a directive into national law, the European Commission can summon a state to enforce a directive. Then, if a Member State does not enforce the respective directive, the European Commission can bring a complaint against the state before the ECJ for failure to fulfil obligations arising out of the founding treaties.

The action for infringement can be taken only against Member States, following the principle of the international responsibility of states. Thus, it is Member States that are subjects with *locus standi*, along with the European Parliament, the Commission and the Council.

The infringement procedure is envisaged in Article 258 TFEU (ex Article 226 TEC), which states:

> If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Furthermore, Article 259 TFEU (ex Article 227 TEC) provides for the right of a Member State that considers that another Member State has failed to fulfil an obligation under the Treaties to bring the matter before the ECJ. If the ECJ establishes that a certain Member State has not fulfilled its obligations under the Treaties, the Member State in question is required to take the necessary measures to comply with the judgment of the Court. If the Member State does not comply with the ECJ’s judgment, the ECJ may impose a financial penalty on the respective State, pursuant to Article 260 TFEU (ex Article 228 TEC).

Therefore, the compulsory jurisdiction of the ECJ is made effective due to the infringement procedure and the Commission’s monitoring powers.246

### 3.5. The Application of EU Law by Courts of the Member States

Before the late 1950s, the application of public international law and the European Community law by national courts did not differ to a great extent. It was later, in *Van Gend en Loos*247 and *Costa v. ENEL*,248 when the European Court of Justice ruled that the EEC Treaty249 differed from ordinary international treaties. In *Van Gend en Loos* the ECJ held that, unlike ordinary international conventions, the EEC Treaty was more than an

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agreement creating mutual obligation between the Contracting States. The ECJ also ruled that it is EU law that determines its effect on national legal order, not national law.250 Hence, Union law confers rights upon individuals independent of the legislation of Member States, while in the case of public international law, the effect of an international norm in domestic legal order is determined by national law.

In fact, EU law was transformed from purely interstate law to include the rights and responsibilities of private parties. National courts then became central actors for enforcing EU law, which, in cooperation with the ECJ, developed and elaborated doctrines with respect to the rights and liabilities of private parties.251 Application of EU law became a model for dealing with public international law. As Charles Leben noted, “Community law is ‘successful international law’, and… is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward.”252

In order to understand how the national courts of Member States apply EU legal norms as well as international treaties it is essential to distinguish between direct effect and indirect effect of such norms.

3.5.1. Direct Effect Principle

The principle of direct effect allows a national court to apply the rule of international law as an independent rule of decision in the national legal order provided that the given rule has not been transposed into domestic law. Hence, the direct effect presupposes the existence of written or unwritten rule of national law, that empowers domestic courts to give effect to international law, such as, for example, constitutional provisions concerning the incorporation of international law into national legislation or specific rules of reference, which incorporate respective treaties of international law.253

The principle of direct applicability of EU law also makes it different from public international law. Thus, in public international law, the self-executing character of a treaty implies that a treaty can be directly applied only when it is recognised by a national court as self-executing and under the condition that the treaty has been incorporated into national law.254

It can be argued that direct effect under EU law has a somewhat narrow meaning as compared to the self-executing character of international agreements. In fact, in its ruling in Van Gend en Loos with regard to the rights of individuals to directly invoke the EU legal norms in national courts, the ECJ noted that the EC Treaty, like the 1972 Convention on the Statute of the European Communities, “presupposes the existence of a constitutional provision which confers on national courts the power to apply such rules.”255

250 See also Costa v. ENEL, Case 6/64, [1964] ECR 585: “The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment to the objectives of the Treaty set out in Article 5 (2) [now Article 10] and giving rise to the discrimination prohibited by Article 7 [now Article 12].”


norms before courts of Member States, the ECJ referred not to direct effect, but to *direct application*. Thus, the narrow meaning of direct effect implies the recognition of the individuals as direct addresses of the EU legal provisions.\(^{255}\) One can refer to the broad meaning of direct effect when it concerns a clear, precise rule of unconditional character that does not require the transposing of legislation.\(^{256}\)

Therefore, in EU law, there are types of legal norms that can be applied directly by virtue of the treaties themselves. For instance, Article 288 TFEU (ex Article 249 TEC) provides that a regulation shall have general application and be directly applicable in all EU Member States.

Direct effect in both EU law and public international law may lead to giving precedence to international rules over national rules.\(^{257}\) In particular, regarding EU law, the *Costa v. ENEL* case serves as an example.\(^{258}\) In public international law, such a result follows from constitutional law. In cases where an international norm does not have direct effect, it will not take precedence over the national norm.

### 3.5.2. Indirect Effect (the Principle of Consistent Interpretation)

The contrasting principle to that of direct effect is the principle of *consistent interpretation*, which can also be referred to as an *indirect effect*. The indirect effect principle has priority over direct effect in the application of both EU law and public international law. The reason for this is that national courts usually use the principle of consistent interpretation when trying to resolve a conflict between international and national law. Direct application of international law may take place only in cases where a national legal norm contradicts respective international provision very clearly and it is not possible to remove the inconsistency via interpretation. Furthermore, an important legal condition for the application of principle of consistent interpretation is that the contents of a national law provision must be open to interpretation in conformity with international law. It is the national provision that allows (or prevents) judges from applying public international law indirectly.\(^{259}\)

Hence, the principle of consistent interpretation is mostly applied when a particular rule of international law has not been transposed into national law. However, with regard to EU law, this principle can be applied in both situations – whether the respective directive has or has not been transposed. This means that judicial interpretation and application becomes an essential tool when dealing with the “correct” transpositions of such rules.\(^{260}\)

The provisions of the EU primary legislation can be applied to the horizontal relationship through the principle of consistent interpretation without difficulties. However, the situation may be different with regard to directives, since they do not impose duties on

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individuals.\(^\text{261}\) For example, the principle of indirect effect was applied in *Dekker case*\(^\text{262}\) and concerned Directive 76/207/EEC on the Equal Treatment of Men and Women,\(^\text{263}\) in particular the violation of the prohibition on gender discrimination. In this case, despite the absence of direct effect, an employer was held liable in a situation where there would not have been liability under the applicable national rules. The ECJ ruled that the simple violation of the prohibition on gender discrimination is sufficient for civil liability “without there being any possibility of invoking the grounds of exemption provided for by national law.”\(^\text{264}\) Therefore, when applying the principle of consistent interpretation in civil law cases, the issue is whether or not the outcome of an interpretation of applicable national law to conform with the directive is acceptable in light of the general principles of law.\(^\text{265}\)

The rules of international law can be and often are applied between private parties. Additionally, international law norms can be applied indirectly. For instance, some treaties have been granted direct effect in horizontal legal relationships, even if those treaties were not initially intended to be applied between private parties. Examples of such treaties include the European Social Charter and the European Convention on Human Rights, where a few provisions have been granted direct effect, but which also can be applied indirectly.

As Betlem and Nollkaemper argue, the distinction between international law and EU law is irrelevant when it comes to the application of principle of consistent interpretation, as the difference between the legal orders of EU law and public international law “is one of degree rather than of principle.”\(^\text{266}\) Hence, the principle of consistent interpretation in EU law is similar to the principle of direct effect, insofar as it is governed not by national law, but by the law of the Union.

Furthermore, application of the principle of consistent interpretation is not subject to any a priori qualities of a rule of international law. Regarding EU law, the *Van Munster* decision stated that all binding norms of EU law may be relevant for applying the principle of indirect effect. The same applies regarding the rules of public international law.\(^\text{267}\) Consequently, this implies that all provisions of domestic law must be interpreted in light of international law. As the ECJ held in *Von Colson and Kamann*:

> All the authorities of the Member States, including the courts… in applying the national law are required to interpret their national law in the light of the wording and the purpose of the directive [emphasis added].\(^\text{268}\)


\(^{267}\) Ibid., p.577.

In addition,

It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, insofar as it is given discretion to do so under national law.\(^\text{269}\)

Furthermore, as explicitly stated in by the ECJ in *Marleasing*:

>In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive [emphasis added]…\(^\text{270}\)

In practice, the legal consequences of indirect effect may be very similar to those of direct effect. As follows from *Marleasing*, in EU law the practice of consistent interpretation means more than just a conformable interpretation and allows for direct effect while “community law precludes application of national law.”\(^\text{271}\)

While interpreting national law in terms of its consistency with international law in both legal systems: EU law and public international law, domestic courts tend to recognize the binding rule of law with a higher hierarchical status, and that the national law shall be construed in order to give effect to the international rules.\(^\text{272}\) In practice, public international law is viewed, in many cases, as supreme even without explicit provisions in a constitution regarding its supremacy.\(^\text{273}\)

Indeed, the courts of many countries apply the principle of consistent interpretation, even if it is not explicitly required by public international law. This is the case of Australia, the United Kingdom, and Israel as well as the Netherlands. In some states, for instance in the UK and the Netherlands, the role of national courts concerning the application of international law resembles their role in EU law, because of respective national practice. However, limitations to the application of international law in both legal systems include the constitutional role of the courts, legal certainty and relevant national provisions.\(^\text{274}\)

In addition, some political-legal factors prevent national courts from achieving the effective application of international law, such as narrow interpretations of constitutional provisions that import international law into a national legal system as well as the tendency to interpret international rules in line with a government’s interest.\(^\text{275}\)


\(^{273}\) General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc. A/CONF. 39/27), para. 15 states that “it is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place that state in breach of the Covenant and one that would enable the state to comply with the Covenant, international law requires the choice of the letter…”


4. The Law of the Council of Europe

4.1. The Council of Europe’s “Regional” International Law

The law of the Council of Europe represents a special type of international law. Founded in 1949 in London by the Statute of the Council of Europe,276 the Council of Europe is an organisation for intergovernmental cooperation, in particular a platform for pan-European cooperation. Nowadays the Council of Europe has forty-seven Member States. In addition to the ten founding Member States – Belgium, the Netherlands, Luxembourg, France, Great Britain, Ireland, Italy, Denmark, Norway and Sweden – the Council was joined by other states in different years.277 Ukraine joined the Council of Europe in 1995 along with other post-Soviet states, including Bulgaria (1992), the Czech Republic (1993), Estonia (1993), Lithuania (1993), Latvia (1995), Moldova (1995), the Russian Federation (1996) and Georgia (1999).

The law of the Council of Europe is simultaneously part of general international law and so-called “regional” international law, due to its adaptation to European requirements. In addition, the legislative function of the Council contributes to international law by giving effect to international principles at the European level, referring to international standards in its instruments, as in the case of the European Convention on Human Rights of 1950, which in turn refers to the Universal Declaration of Human Rights of 1948.278 Also, the body of the Council of Europe law is increasing and nowadays constitutes around two hundred conventions.

The Statute of the Council of Europe, which was approved by the Treaty of London, signed by ten signatory parties on 5 May, 1949, determines the Council’s internal constitutional law and along with its other statutory texts establishes the organisation, composition and aims of the Council.279 Thus, pursuant to Article 1, paragraph a of the Statute of the Council:

[T]he aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.

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278 The Preamble to the European Convention on Human Rights of 1950 states that the signatory parties are “resolved...to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration...”
Article 3 of the Statute of the Council of Europe defines the principles that every Member State of the organisation must accept. These principles include the rule of law, enjoyment by all persons of human rights and fundamental freedoms, and sincere and effective collaboration in carrying out the aims of the Council.

Some scholars argue, however, that the law of the Council is not an independent legal system, as it largely depends on international law. The legislative function of the Council of Europe has been the subject of research in recent years, as the Council has played a major role in harmonising the national laws of European states.

4.2. The Structure of the Council of Europe

Pursuant to Article 10 of the Statute, the Council of Europe consists of two main bodies: the Committee of Ministers and the Consultative Assembly. Since 1994, however, the Committee of Ministers has decided to use the term “Parliamentary Assembly.” Article 10 of the Statute further states that “both these organs shall be served by the Secretariat of the Council of Europe.”

The Committee of Ministers is an intergovernmental body with decision-making powers. According to Article 13 of the Statute, “the Committee of Ministers is the organ which acts on behalf of the Council of Europe.” Under Article 15 of the Statute, the Committee of Ministers, on the recommendation of the Assembly or on its own initiative, “shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.”

Article 15b of the Council’s Statute empowers the Committee of Ministers to issue recommendations to the governments of Member States. After a recommendation has been adopted, the Committee “may request the governments of members to inform it of the action taken by them with regard to such recommendations.”

Therefore, the decisions of the Committee of Ministers are framed as recommendations for the Member States, which have no legal force, or as international agreements, which are binding on those states that ratify the respective agreements.

The opinion of the Assembly of the Council is not binding on the Committee of Ministers, as it does not have legal force. However, the role of the Assembly should not be underestimated, as de facto it plays an important role in taking on decisions by the Committee of Ministers via the resolutions or recommendations that the Assembly adopts. Thus, while Assembly’s main function is to serve as a forum for the discussion of issues of essential importance, for the Council, this function is then extended to the adoption of the recommendations or resolutions, which are addressed to the Committee of Ministers. The

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280 Benoît-Rohmer, F. and H. Klebes, 2005, supra note 279, p. 11
resolutions do not require an explicit reply by the Committee, although the Committee may refer to them when dealing with the Assembly.\textsuperscript{282}

The Parliamentary Assembly \textit{de facto} has the powers regarding the admission and expulsion of members. Currently, it is the largest assembly in Europe and comprises of \textit{“representatives of each member, elected by its parliament from among the members thereof, or appointed from among the members of that parliament...”}\textsuperscript{283} Pursuant to Article 24 of the Council’s Statute, the Assembly is authorised to establish \textit{“committees or commissions to consider any matter which falls within its competence.”}\textsuperscript{284} In addition, the Assembly may set up \textit{ad hoc} committees.

In order to deepen the work of the Council in specific areas, a number of specialised agencies have been established. These specialised agencies are either supported by all the Member States\textsuperscript{285} or concern only some Member States and are based on partial agreements.\textsuperscript{286} Some of these partial agreements are also open to states that do not hold membership in the Council of Europe.

\subsection*{4.3. Membership in the Council of Europe}

Conditions for membership in the Council are specified in Article 4 of its Statute, which reads as follows:

Any European state which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee Ministers. Any state so invited shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.

Thus, in order to become a member of the Council of Europe, states have to fulfil political as well as geographical criteria. First, they have to recognise the democratic values of the Council, and, secondly, they have to be part of Europe.

In its Recommendation 1247, adopted in 1994, the Assembly provided that the enlargement of the Council should be \textit{“in principle open only to states whose national territory lies wholly or partly in Europe.”} This is of particular importance to countries of the

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\textsuperscript{282} Benoît-Rohmer, F. and H. Klebes, 2005, supra note 279, p. 66.
\textsuperscript{283} Article 25 (a) of the Statute of the Council of Europe, 1949.
\textsuperscript{284} There is no obligation for the Assembly to establish such commissions (committees); however, the Assembly has set up ten permanent committees dealing with various issues, such as the Committee on Legal Affairs and Human Rights (82 seats), the Political Affairs Committee (82 seats), the Social, Health and Family Affairs Committee (82 seats), the Committee on Equal Opportunities for Women and Men (50 seats) and the Committee on the Honouring the Obligation and Commitments by Member States of the Council of Europe (Monitoring Committee). Other committees include: the Committee on Rules of Procedure and Immunities (50 seats), the Committee on the Environment, Agriculture and Local Regional Affairs (82 seats), the Committee on Culture, Science and Education (82 seats), the Committee on Economic Affairs and Development (82 seats) and the Committee on Migration, Refugees and Population (82 seats). Only two out of ten committees have 50 seats; the rest have 82 seats each.
\textsuperscript{285} These include agencies such as the Commissioner for Human Rights, the European Commission against Racism and Intolerance (ECRI) and the Congress of Local and Regional Authorities.
\textsuperscript{286} These include bodies such as the European Commission for Democracy through Law (Venice Commission), which was established after the fall of Berlin wall and helped Central-Eastern European states with expert advice, particularly in drafting new constitutions of these states in line with European democratic standards; the Group of States against Corruption (GRECO); the European Centre for Global Interdependence and Solidarity (North-South Centre) and others.
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former Soviet Union, specifically to Ukraine. Indeed, after the collapse of the Soviet Union, prospects of joining the Council of Europe for formal Soviet states, taking in account the geographical criterion, had to be made clear. Therefore, in light of the Council’s enlargement strategy, this criterion was extended by the Assembly by adding a subjective criterion, namely “the will to be part of Europe.” Since then, subjective criterion has been decisive when it comes to the Council’s enlargement.287

In addition to membership, there are various types of “special status” offered by the Council of Europe to states that are willing to cooperate with the Council, but which have not been invited to become full members or do not meet the criteria laid out in Article 4 of the Council’s Statute. The “special status” includes associate member status, observer status and special guest status.

Associate member status, specified by Article 5 of the Statute, is no longer used in practice.288

Observer status is governed by Statutory Resolution (93) 26, Article I of which states that “any State willing to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and wishing to cooperate with the Council of Europe may be granted… observer status with the Organisation.” Pursuant to Article V of the Resolution, states with observer status have no right to be represented on the Committee of Ministers as well as the Parliamentary Assembly “unless a specific decision has been taken by one of these organs on its own behalf.” However, a permanent observer to the Council of Europe may be appointed by states with observer status.289

Lastly, special guest status is defined by the Rules of Procedure of the Parliamentary Assembly. The decision to award special guest status is made by the Bureau.290 States that hold special guest status have no right to vote in the Assembly and the committee meeting, but may attend.291

4.4. **Standard-Setting Activities of the Council**

The legal instruments of the Council of Europe constitute a European *jus communis* and play a considerable role in harmonising the national laws of its Member States. Treaties concluded by the Council take the form of conventions or framework conventions, charters, codes, agreements and arrangements. Conventions constitute the major group of

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288 Associate member status has only been acquired by two states; however, they were not fully sovereign: the Federal Republic of Germany (1950-1951) and the Saarland (1950-1957).
289 Observer status in the Council of Europe has been given, for instance, to the USA, Canada, Mexico and Japan.
291 Rule 60.7., Rules of Procedure of the Assembly.
Council’s instruments, while only four charters have been adopted by the Council so far.\textsuperscript{292} In addition, the Council of Europe also concludes numerous agreements with many international organisations for better cooperation.\textsuperscript{293}

The standard-setting activity of the Council stems directly from its Statute, Article 1 of which states that the Council should pursue its statutory aims through its bodies \textit{inter alia} “by agreements… in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms.” To date, the Council of Europe has adopted about two hundred treaties, which have been designed to set up minimum legal standards, harmonise laws and legal systems of Member States as well as to contribute to the unification of law at the European level. With the common legal area provided by the Council, states are encouraged to cooperate in many areas. Moreover, a multilateral convention of the Council of Europe can substitute for a number of bilateral agreements between individual states.\textsuperscript{294}

Generally, the treaties of the Council of Europe are governed by the Vienna Convention on the Law of Treaties of 1969. Under public international law in general and pursuant to the Vienna Convention, ratifying states are allowed to make \textit{declarations} or \textit{reservations} when signing a treaty. Although reservations make it easier for states to ratify a treaty, excluding certain provisions could create an obstacle for the application of a treaty, and when reservations are used too often by acceding states, the cohesion and integrity of treaties is threatened.\textsuperscript{295}

Twelve of the Council’s conventions are open only to Member States, including the European Convention for Human Rights and Fundamental Freedoms of 1950, the European Social Charter of 1961 and the European Social Charter (revised) of 1996.\textsuperscript{296}

\begin{itemize}
  \item The European Social Charter of 1961 (ETS. No. 35), the European Charter of Local Self-Government (ETS No. 122), the European Charter for Regional or Minority Languages (ETS No. 148) and the European Social Charter (revised) of 1996 (ETS No. 163).
  \item For instance, the Agreement between the Council of Europe and the International Labour Organisation of 23 November 1951; the Agreement between the Council of Europe and the Organisation for European Economic Co-operation (the OEEC, and after 1961, the OECD) of March 1951; the Agreement between the Secretariat General of the Council of Europe and the Secretariat of the United Nations of 15 December 1951; the Agreement between the Secretariat General of the Council of Europe and the Director of the Regional Office for Europe of the World Health Organisation of 9 September 1952; the Arrangement between the Council of Europe and the European Community of 16 June 1987, which was supplemented by the exchange of letters between the Secretary General of the Council of Europe and the President of the Commission of the European Communities in 1996; the Exchange of letters of 13 November 1987 between the Secretary General of the Council of Europe and the Secretary General of the Organisation of American States.
  \item A “declaration” is usually used to clarify the reading of the scope of a treaty or a provision in it (“interpretative” declaration) or to specify the territory to which the treaty shall be applied by a signing state (“territorial” declaration).
  \item Article 2 of the Vienna Convention on the Law of Treaties, 1969, defines a “reservation” as “a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state.”
  \item Twelve of the Council’s conventions are open only to Member States, including the European Convention for Human Rights and Fundamental Freedoms of 1950 (ETS No. 5), the European Social Charter of 18 October 1961 (ETS No. 35) and European Social Charter Revised of 3 May 1996 (ETS No. 163).
\end{itemize}
Non-Member States have also been invited to ratify the Council’s treaties. In fact, more and more of the Council’s conventions have become open to non-Member States. In addition, members of other international organisations are allowed to accede to conventions of the Council of Europe.

However, the effectiveness of the Council’s conventions have been also questioned. First, the supervisory and monitoring mechanisms of the conventions are rather weak. Second, there is a lack of funds and staff in place for the monitoring committees. Consequently, no administrative, technical or legislative measures are taken by states to ensure their commitment. Finally, it is argued that the flexibility of the conventions, which were initially introduced to help states to ratify an instrument and accept the relevant realistic provisions for compliance, now allows states to choose over commitments, thus putting compliance with the treaties under threat.299

4.5. The European Convention on Human Rights and the Role of the European Court of Human Rights

4.5.1. The European Convention on Human Rights, 1950

The European Convention on Human Rights (ECHR) adopted by the newly formed Council of Europe in Rome on 4 November 1950 was the first instrument to implement the Universal Declaration of Human Rights of 1948 in writing and to give effect to certain rights stated in the Declaration, thus making them binding.300

The ECHR, which has been in force since 1953, is in effect a basic law of the Council.301 The Convention is binding upon all Member States, because membership in the Council of Europe subsequently implies the ratification of the Convention. As stated in Article 58, para. 3 of the Convention, “any Contracting Party which ceases to be a member of the Council of Europe, ceases to be Party to the present Convention.” Furthermore, pursuant to the Statute of the Council of Europe and Resolution 1031 of 1994 of the Assembly, “all member states of the Council of Europe are required to respect their obligations under the Statute, the European Convention on Human Rights and all other Conventions to which they are parties.”302 However, the Statute of the Council contains no requirement as to the ratification of the Convention. Nonetheless, since the 1970s, ratification of the Convention by states joining the Council of Europe has become a norm. Furthermore, since 1989,

299 Benoît-Rohmer, F. and H. Klebes, supra note 279, p. 105.
300 The UN Universal Declaration of Human Rights of 1948 is the first instrument to enshrine global expression of rights to which all human beings are inherently entitled. According to Article 2 of the Declaration: “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”
301 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS No. 5.
302 Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe. Text adopted by the Assembly on 14 April 1994 (14th Sitting).
upon the insistence of the Assembly, it is mere a must for the candidate states to ratify the Convention.³⁰³

Rights and freedoms, contained in the Convention are both substantive and procedural rights and include: the right to life (Article 2); the prohibition of torture (Article 3); the prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5); the right to a fair trial (Article 6); no punishment without law (Article 7); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to marry (Article 12); and the right to an effective remedy (Article 13). Furthermore, Article 14 of the Convention states that the enjoyment of the mentioned rights and freedoms “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

As such, the rights contained in the Convention are civil and political rights. In the sphere of economic and social rights, the European Social Charter was adopted by the Council in 1961 and revised in 1966.³⁰⁴ Since 1953, the substantive rights contained in the ECHR have been augmented by a number of Protocols. Also, since the time of its adoption, the number of states adhering to the ECHR has grown to include all 47 Member States of the Council.

4.5.2. The European Court of Human Rights

Article 1 of the European Convention on Human Rights requires that Contracting Parties shall secure enjoyment of these rights and freedoms. To ensure the observance of this obligation, the European Court of Human Rights was established by Article 19 of the Convention, which states, “to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights.”³⁰⁵ The provision further provides that the Court shall function on a permanent basis.

In fact, the resolution of the Hague Congress of 1948 called for establishing a parliamentary assembly in order to examine “the legal and constitutional problems involved in establishing a union or a federation”, and the adoption of a human rights charter, as well as the creation of a supreme court “to defend the rights of the human person and the principles of liberty.” These principles were to be further formalised in the Convention. The human rights charter, as was argued by some of the Congress participants, was to be an integral part of the Council of Europe’s Statute. This would imply the “constitutional” character of the charter. However, many of the states believed that this proposal threatened their sovereignty. Therefore, the European Court of Human Rights is

³⁰³ Benoît-Rohmer, F. and H. Klebes, 2005, supra note 279, p. 32.
³⁰⁴ Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.
³⁰⁵ Council of Europe, European Convention for Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.
not part of the Council of Europe in the strict sense, as it is based on a Convention distinct from the Statute of a Council.\textsuperscript{306}

The Court consists of the number of judges equal to the number of the Council’s Member States\textsuperscript{307} – 47 at present. Judges are elected for a non-renewable term every nine years by the parliamentary assembly of the Council of Europe;\textsuperscript{308} they cannot engage in any activity that would hinder their impartiality and which is incompatible with their independence or with the demands of a full-time office.\textsuperscript{309}

The jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto.\textsuperscript{310} There are two sources of complaints under the European Convention: \textit{inter-state cases} and \textit{individual applications}.

First, under Article 24 of the Convention, a State may refer another State to a Court for “\textit{any alleged breach of the provisions of the Convention and the Protocols thereto}.” Another innovative source of a complaint – \textit{individual applications} – is provided by Article 25 of the Convention.\textsuperscript{311}

Since the establishment of the Court, most cases have been initiated by individuals, thus producing a great number of relevant case law. In 2016 alone, there were a total of 993 judgments produced by the Court, more than half of them relating to only six of the 47 Member States of the Council: the Russian Federation (228), Turkey (88), Romania (86), Ukraine (73), Greece (45) and Hungary (41). Out of these cases, at least one violation of the Convention was found in 222 of the cases concerning the Russian Federation, 77 concerning Turkey, 70 concerning Ukraine, 71 concerning Romania, 41 in case of Greece and 40 in case of Hungary.\textsuperscript{312}

Pursuant to Article 46 of the Convention, as amended by Protocol No. 11, the Committee of Ministers is to supervise executions of judgments given by the Court.\textsuperscript{313} According to para. 3, Article 46, in cases where the Committee considers that “\textit{the supervision or the final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation}.” The decision to refer such matters to the Court requires a majority vote of two-thirds of the representatives entitled to sit in the Committee.\textsuperscript{314}

\textsuperscript{306} Benoît-Rohmer, F. and H. Klebes, 2005, supra note 279, p. 12.
\textsuperscript{307} According to Article 20 ECHR.
\textsuperscript{308} Articles 22, 23 ECHR.
\textsuperscript{309} Article 21 ECHR.
\textsuperscript{310} Article 32 ECHR.
\textsuperscript{311} According to Article 25 ECHR: “The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.”
\textsuperscript{312} For the official statistics, see: \url{http://www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf} (last accessed 15 November 2017).
\textsuperscript{313} In accordance with the Rules adopted by the Committee of Ministers for the application of Article 46, para. 2, of the European Convention on Human Rights (text approved on 10 January 2001, 736\textsuperscript{th} Deputies’ meeting).
\textsuperscript{314} Article 46, para. 3 ECHR.
Also, under Protocol No. 14, which amends Article 46 of the Convention, the Committee may require the Court to interpret a judgment. Furthermore, the Committee of Ministers has the power to bring proceedings before the Grand Chamber of the Court for non-compliance against the state that does not execute a final judgment, after a notice to comply had been issued to the state in question. This decision requires a majority vote of two-thirds of the representatives that are entitled to sit on the Committee. In case the Court finds out that there was a violation of compliance with the final judgment of the Court by the state in question, it refers the case to the Committee of Ministers “for consideration of the measures to be taken.” In case there is no violation found by the Court, it also refers the case to the Committee, “which shall close its examination of the case.” This provision reveals that the authors of the Protocol believed that bringing of proceedings to the Court would be enough to ensure execution and therefore would not have to penalize a non-complying state by other means.315

4.6. The Legal Character of the Member States’ Commitments

Conventions of the Council of Europe do not explicitly require their incorporation into the national law of Member States, thus leaving it to the discretion of states and their national constitutions.

As the European Court of Human Rights ruled in Swedish Engine Drivers’ Union v. Sweden, the European Convention on Human Rights does not oblige states in “any given manner for ensuring within their internal law the effect of implementation of any of the provisions of the Convention.”316

The Assembly procedure for monitoring the obligations and commitments of Member States is governed by Order No. 508 of 1995.317 The Committee of Ministers undertakes thematic monitoring, which implies that there are special themes selected for monitoring and concern issues highly important at the European level.318 In addition, pursuant to the 1994 Declaration,319 the Committee of Ministers may consider “the situation of democracy, human rights and the rule of law in any member state” at the request of Member States or the Secretary General, or on the basis of the Assembly’s recommendation. In cases where “specific action” is required, the Committee of Ministers may request the Secretary General to make contacts, collect information or furnish advice; issue an opinion or a recommendation; forward a communication to the Parliamentary Assembly; or take any other decision within its powers defined in the Statute.320

317 Council of Europe, Parliamentary Assembly, Order No. 508 on the honouring of obligations and commitments by member states of the Council of Europe, (12th sitting), 26 April 1995.
319 Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe (Adopted by the Committee of Ministers on 10 November 1994 at its 95th Session).
320 In accordance with Article 4 of the Declaration on Compliance with Commitments accepted by Member States of the Council of Europe, of 1994.
Non-compliance with commitments leads to sanctions that the Council of Europe may apply to its Member States. Thus, according to para. 12, Resolution 1115 of 1997:

The Assembly may penalize persistent failure to honour obligations and commitments accepted, and lack of co-operation in its monitoring process, by adopting a resolution and/or a recommendation, by the non-ratification of the credentials of a national parliamentary delegation at the beginning of its next ordinary session or by the annulment of ratified credentials in the course of the same ordinary session...

In the case that a Member State continues to fail to respect its commitments, the Assembly may address a recommendation to the Committee of Ministers requesting it to take the appropriate action in accordance with Articles 8 and 9 of the Statute of the Council of Europe.321

5. Cooperation in Standard-Setting Activities: the ILO, the EU and the Council of Europe

5.1. The ILO and other International Organisations: Standard-Setting and Cooperation

Since the creation of the ILO in 1919, its standard-setting activities have performed a quasi-legislative function that has since also been followed by other international organisations.

In 1946, the ILO became the first specialised agency of the United Nations. Since then, especially after World War II, a number of quasi-legislative instruments have been adopted, such as the UN International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966, the UN Convention on the Elimination of All Forms of Discrimination against Women of 1979, and the UN Convention on the Rights of the Child of 1989. Additionally, many instruments have been adopted by other UN agencies, such as UNESCO, as well as by regional organisations.

Hence, the ILO conventions as collective international instruments became major innovations and served as prototypes that were widely imitated.322 Furthermore, the ILO’s implementation methods, which are characterised by tripartite discussions and decisions as well as the independence of the monitoring body, have also influenced the work of other international organisations to some extent. However, as Nicolas Valticos notes, the implementation methods of the ILO cannot be fully replicated, since neither the same institutional basis nor the dynamic influence of tripartism exists elsewhere, even though

321 According to Article 8 of the Statute, any Member State which has seriously violated the principles of the rule of law, human rights and fundamental freedoms (as defined by Article 3 of the Statute) may be “suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.” Under Article 9 of the Statute, the Committee of Ministers “may suspend the right of representation on the Committee and on the Consultative Assembly of a member which has failed to fulfil its financial obligation during such period as the obligation remains unfulfilled.”

certain rules, such as that of the independence of the supervisory bodies, particularly in monitoring compliance with the UN Covenants, have been imitated.\textsuperscript{323} In addition, Virginia Leary emphasises that the ILO played a “pioneering role” regarding methods for monitoring compliance with international human rights.\textsuperscript{324} In fact, nowhere outside of the ILO is there a complete combination of all of the characteristics of the ILO system of supervision.

Another aspect of the system of international labour conventions that has been partly followed by other organisations is the ILO’s practice of adopting separate conventions on individual subjects, rather than very general instruments covering labour problems as a whole. In other words, the ILO deals with each question in a precise and detailed way. This system also enables each Member State to ratify the conventions separately according to its circumstances, if necessary by stages. Other organisations tend to adopt general instruments of a comprehensive character, such as the International Covenant on Civil and Political Rights of 1966. Still, in some cases more detailed instruments covering separate subjects have been adopted, such as, for example, the United Nation Convention on the Elimination of All Forms of Racial Discrimination.\textsuperscript{325}

While the basics of what is now considered to constitute core labour and human rights are contained in ILO standards, UN covenants and conventions, and various regional instruments, the question also arises about whether or not human rights and ILS provide for a comprehensive and consistent body of mutually complementary standards.\textsuperscript{326}

In fact, ILO standards are firmly embedded in the canon of human rights adopted by the international system.\textsuperscript{327} Thus, the role of the ILO is to implement the rights granted to workers at a universal level.\textsuperscript{328} It is also important for the ILO, as a specialised UN agency and therefore a part of the UN system, to ensure that its standards are consistent with those of the UN. However, neither the UN nor the ILO instruments take legal precedence. Therefore, it is essential for the supervisory systems of both organisations to maintain close contact and refer to each other’s conclusions, thus ensuring consistency of judgments.\textsuperscript{329}

Since the growing number of international and regional organisations have begun to engage in legislative activity, they have subsequently established their own machinery for supervising the implementation of the instruments they adopt. In particular, this applies to procedures for the implementation of the International Covenants of 1966, the UN Convention on the Elimination of All Forms of Racial Discrimination, 1965, the UNESCO

\begin{flushleft}
\textsuperscript{323} Valticos, N., 1998, supra note 166, p. 144.
\textsuperscript{326} Valticos, N., 1998, supra note 166, p. 142.
\textsuperscript{327} Rodgers, G., Sweepston L., and J. Van Daele, 2009, supra note 108, p. 40.
\end{flushleft}
Convention against Discrimination in Education, 1960, the European Social Charter, 1960, and the Arab Labour Standards Convention, 1967.\textsuperscript{330}

In addition, there is a need for more close examination of the role of regional conventions \textit{vis-à-vis} the international instruments intended for universal application. In fact, regional conventions sometimes accelerate the application of analogous provisions, particularly when the UN Covenants have been slow to come into force.\textsuperscript{331} In this regard, the European Convention on Human Rights of 1950 can serve as an example. In other cases, regional conventions have been used to accommodate individual characteristics of a given region in order to institute a regional supervisory mechanism, which would then operate without conflicting with mechanisms of the international system. An example of this is the European Social Charter (Revised) of 1996, in relation to the ILO conventions.\textsuperscript{332}

Consequently, there is a clear need for coordinating all universal and regional instruments. Even where standards exist on the same subject by different international organisations, it must be ensured that such standards complement one another, and that parallel standards are not adopted.\textsuperscript{333}

In practice, coordination is necessary not only at the drafting stage in order to make sure that the instruments do not contradict or duplicate one another, but also to avoid confronting the governments for whom they are designed with mutually incompatible or repetitive standards. Coordination is essential at the stage of implementation of the instruments, while it is important to avoid different interpretations and assessments of analogous texts by the various supervisory bodies set up by several international organisations. Also, the problem of coordination may arise within certain organisations in which distinct supervision procedures have been established for different international instruments. Therefore, it is important to facilitate the work of governments, who will have to actually implement the international standards, as well as to ensure that international action is coherent and effective.\textsuperscript{334} However, in all cases in which such parallel standards exist, the supervision of their application should be properly coordinated.

\begin{itemize}
\item \textsuperscript{330} ILO, \textit{The Impact of International Labour Conventions and Recommendations}, 1976, supra note 39, pp. 61, 62.
\item \textsuperscript{331} Valticos, N., 1998, supra note 166, p. 142.
\item \textsuperscript{332} Ibid.
\item \textsuperscript{334} ILO, \textit{The Impact of International Labour Conventions and Recommendations}, 1976, supra note 39, p. 4.
\end{itemize}
5.2. The Law of the ILO and EU law in the Field of Labour

Until the late 1970s, the international labour law was mostly produced by the ILO in the form of conventions and recommendations. Nowadays, EU law significantly influences the shaping of domestic law in 28 EU Member States, including in the field of labour and occupational safety and health.

International labour standards themselves are greatly influenced by existing national legislation. This is particularly the case with respect to EU law. As such, EU labour law also influences international law. Whenever European legislation exists on a particular subject in the form of a regulation or directive, the Commission or sometimes the International Labour Office itself has tended to project this regional “legislation” into ILO standards. In such cases, the conformity of EU members’ legislation with ILO standards is hardly casually linked. Indeed, the formulation of most ILO conventions and recommendations, while reflecting the universal common wisdom, have largely drawn inspiration from Western European law and practice. For example, Directive 75/129/EEC on collective redundancies and Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer respectively influenced the ILO Termination of Employment Convention, 1982 (No. 158) and the Protection of Workers Claims (Employer’s Insolvency) Convention, 1992 (No. 173). In light of this, it is quite paradoxical that many EU Member States do not ratify the respective ILO Conventions.

In general, EU law does not cover as wide range of subjects as the ILO does. For instance, matters addressed in the ILO standards, such as the right to strike, the right of association or the right to impose lockouts, are not included in the scope of EU law. However, EU law covers a variety of issues related to the individual employment relationship, including non-discrimination and equal pay, contracts of employment, collective dismissals, the duration of work, protection of young workers and of pregnant women, and protection of workers’ claims in the event of the insolvency of the employer.

Although the ILO’s and the EU’s respective concepts of health and safety at work are not much different from each other, it is noteworthy that in the field of occupational safety and health, the EU standards are more comprehensive than that of the ILO. This can be explained by the relative homogeneity of the EU in comparison to the ILO, which standards tend to be minimum standards.

The European Union and the Council of Europe: Accession to the ECHR

EU – Council of Europe Relations

Special attention must be paid to the relationship between the Council of Europe and the European Union. Nowadays, the Member States of the EU form the majority at the Council of Europe. Given the growing amount of EU legislation on one hand, and the legal instruments of the Council on the other, closer cooperation between the two organisations as well as the coordination of their standard-setting activities appears to be vital.

The cooperation between the EU and the Council of Europe, which requires mutual respect for the different natures and procedures of both organisations, was emphasised in the resolutions of the Council’s Committee of Ministers in 1985.\(^{341}\) In 2007, the EU-Council of Europe Memorandum of Understanding defined the framework for EU-Council relations and stated that the Council of Europe “will remain the benchmark for human rights, the rule of law and democracy in Europe.” The two parties agreed to develop their relations in all spheres of common interest, including the promotion and protection of democracy, respect for human rights and fundamental freedoms, the rule of law, political and legal cooperation, social cohesion and cultural interchange.

It should be noted that despite the legal instruments that allow the EU to participate in the Council of Europe’s treaties, there is often lack of interest on the part of the Union to do so. The reasons for this are due to the internal nature of the EU, and include internal obligations that the EU has before concluding a treaty. This implies that the EU has to acquire full legislation in the area regulated by a treaty it plans to accede to. If the respective legislation is in place, the EU may have little interest to conclude a treaty, since its objectives have been already attained. Another reason lies in the long process required to accede to a treaty, because all the EU Member States have to ratify it. That is why the EU generally concludes those treaties creating reciprocal rights and obligations rather than simply standardising laws.\(^{342}\)

Since all Member States of the EU are also members of the Council of Europe, the EU’s influence on Council’s decision is even more evident. While it should be remembered that the EU has no voting rights within the Council, it nevertheless influences the content of agreements adopted by the Council by participating in the meetings and preliminary discussions of different committees established by the Committee of Ministers.

In practice, both the EU and the Council of Europe contribute to each other in their activities, albeit having its own distinctive features. Even though the EU is in fact a more sophisticated form of integration, it is argued that the Council will embody greater geographical coverage for quite a long time.\(^ {343}\)

\(^{341}\) Resolution (85) 5 of 25 April 1985; The basis of cooperation of the EU and the Council is to be found in exchanges of correspondence between these organisations, namely two letters, which pursuant to Articles 302 and 303 of the Treaty of Rome are considered international agreements.

\(^{342}\) Benoît-Rohmer, F. and H. Klebes, 2005, supra note 279, p. 130.

\(^{343}\) Ibid., p. 141.
5.3.2. The EU’s accession to the ECHR

The choice to participate in the Council’s treaties is jointly made by the Member States of both the Union and the Council and takes different forms, including that of acceptance, approval, signature or signature followed by acceptance, ratification, or accession at the invitation by the Committee of Ministers. So far, the European Union has acceded to some of the treaties of the Council, though not the European Convention on Human Rights.

In 1996, the European Court of Justice in its Opinion 2/94 held that “as Community law now stands, the Community has no competence to accede the European Convention on Human Rights.” Thus, under the Treaty of Rome there was no provision which allowed the EU institutions to conclude international agreements in the field of human rights.

There seem to be two major concerns regarding the EU accession to the ECHR. First, the accession to ECHR would imply supplementary obligations for EU Member States. Second, after the adoption of the Charter of Fundamental Rights of the EU, accession to the ECHR did not seem necessary.

On the other hand, proponents of the accession have argued that if the EU were to accede to the ECHR, the overall coherence of the legal protection system in Europe would be strengthened and the human rights protection systems would be harmonised. However, such harmonisation would only be possible if all EU Member States were to accept the ECHR as minimum standards. Therefore, ensuring that application of the same set of minimum standards throughout Europe in this way would help to avoid competition between the two systems: the Union system and the Convention system.

In order to allow accession to the ECHR, the EU founding Treaties had to be amended. Following the entry into force of the Treaty of Lisbon, the EU accession to ECHR was made possible. According to Article 6 (2) of the Treaty of Lisbon: “the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution.” Furthermore, Protocol No. 14 amending the European Convention on Human Rights, in particular Article 59 was amended by paragraph 2, which states that “the European Union may accede to this Convention.”

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345 So far, the European Union has joined 17 of the Council’s treaties. For more details, see http://www.coe.int/en/web/portal/european-union (last accessed 14 November 2017).
In addition, according to Protocol No. 8 relating to Article 6 (2) TEU on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, the agreement relating to the accession of the Union to the Convention “shall make provisions for preserving the specific characteristics of the Union law, in particular with regard to: (a) the specific arrangements for the Union’s possible participation in the control bodies of the European Convention; (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.” Also, the agreement relating to the accession to the ECHR must ensure that “accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of member States in relation to the European Convention…”

Up to this point, the EU has not acceded to the Convention, although the negotiations on the EU accession to the ECHR already began in 2010. Therefore, the Union’s acts are not the subject of application to the European Court of Human Rights. Nevertheless, the Court has raised issues relating to the European Union in its rulings.

6. “Soft” Norms and Regulations in International Law

6.1. Definitions and Characteristics of “Soft Law”

Enforcement of international law is a subject that has attracted increasing interest in recent decades, as states do not always sufficiently enforce and comply with binding international legal instruments. As a response to this enforcement crisis, the proliferation of so-called “soft law” is taking place at the international as well as at the EU level. The turn to soft law is also closely connected with the developments in regulation theory, and implies a move from “command-and-control” laws towards “responsive” regulations or “soft” solutions.

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There are various definitions of what “soft law” actually is. For instance, Wellens and Borchardt define soft law as “the rules of conduct that find themselves on the legally non-binding level (in the sense of enforceable and sanctionable through international responsibility) but which according to the intention of its authors indeed do possess legal scope, which has to be further defined in each case.”

For Snyder, soft law implies “rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.” Also, some authors have referred to soft law as “voluntary” rules or legal norms.

What appears to be common for definitions of this concept is that the soft law does not have legal sanctions and is not binding. Among legal scholars, the problem is not so much how to distinguish “soft law” from “hard law” but from law itself, and when it ceases to be “law” as such. Some legal scholars argue that the categories of soft and hard law lie within a continuum that itself is constantly evolving, while legal critics of the use of soft law claim that law cannot be conceptualised along a continuum.

Some theorists reject the notion of law-making through non-binding instruments, and argue that there must be a strict distinction between law and non-law. The idea of different categories of law is seen to weaken the objectives of stability and certainty, creating a “gliding bindingness” and even undermining the international rule of law. These scholars agree with the exclusive criteria of formal legal validity listed in Article 38(1) of the Statute of the ICJ and applied in the Lotus case.

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363 Article 38(1) of the Statute of the International Court of Justice reads as follows: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”
Klabbers, for instance, argues for the redundancy of the concept of soft law and claims that to denote an instrument as “soft law” is to impute legal character to it, albeit of a different nature or degree than that of hard law.\textsuperscript{365}

Furthermore, some authors determine the level of legalisation to be dependent on the level of obligation, precision and delegation, thus taking about single continuum at one end of which the level of obligation, precision and delegation is high (hard law) and at the other end the level of obligation, precision and delegation is low (soft law).\textsuperscript{366} Other scholars note that there are many possibilities across these two ends. Hard law may be sometimes as vague as soft law, and the latter may also be specific and detailed.\textsuperscript{367}

According to Hepple, there is no hard line between “hard” and “soft” law or “hard” and “soft” regulation. He explains that the “hard” end of the spectrum of regulation refers to binding legal instruments with enforcement mechanisms, e.g. ILO conventions, while the “soft” end covers a variety of techniques, which are not directly legally enforceable, such as ILO recommendations, codes of practice and guidelines.\textsuperscript{368} Hepple further notes that the most fruitful way of looking at binding norms is through the lens of what he terms “responsive regulation.” The idea is that regulation needs to be responsive to the different behaviours of the organisations subject to the regulation, as a “soft” approach may work in influencing the behaviour of some organisations, but not others. Moreover, a regulatory strategy will not work if it simply uses one form of regulation and excludes others. Hepple therefore introduces a “pyramidal structure of enforcement,” with assumed voluntary compliance at the base of such a pyramid.\textsuperscript{369}

Baxter explains that the soft law has an “infinite variety” of forms, whether written or unwritten.\textsuperscript{370} In addition, Abbott and Snidal note that “the choice between hard law and soft law is not a binary one,” as the soft law usually comes in many varieties.\textsuperscript{371}

In practice, the conclusions of an agreement in a treaty form, as defined in Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1969, do not ensure that hard obligation has been incurred.\textsuperscript{372} Treaties that employ indeterminate, imprecise language have been

\begin{footnotes}
\footnotetext[368]{Hepple, B., 2006, supra note 88, p. 223.}
\footnotetext[369]{Hepple explains that: “The regulator tries to secure promises of cooperation and encourages voluntary plans to achieve stated goals. If this fails, the regulator goes up the pyramid to investigate or to inspect and sets out what must be done in order to comply. Only then do the coercive sanctions come into play…In order to work, there must be gradual escalation and, at the top, sufficiently strong sanctions to deter even the most persistent offender.” Hepple, B., 2006, supra note 88, p. 224.}
\footnotetext[372]{Article 2(1)(a) of the Vienna Convention on the Law of Treaties states that “a treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.}
\end{footnotes}
termed “legal soft law,” because they combine legal form with soft obligation. However, some scholars reject this term and such classifications, pointing out that the treaty form itself is conclusive of a binding obligation.373 There is also a point of view that a treaty with soft provisions creates an obligation of good faith performance.374

Jean d’Aspremont raises another important point with regard to soft law instruments, who points out that it is necessary to distinguish “legal acts” from “legal facts.”375 A legal act has its effect directly originating from the will of its authors. In contrast, a legal fact implies that the legal effect it might have is not a direct consequence of the will of the legal persons that “produce” the legal fact. From a positivist perspective, the claim of the softness of international law does not relate to legal facts, but only to legal acts, as they are the outcomes of the intention of the subjects. Furthermore, the content of a legal act – the negotium – contains the will of the international legal persons, the authors of an act. The negotium is then enshrined in a particular document or instrument – the instrumentum. Thus, there are two forms of softness of a legal act that can be distinguished from one another, depending on the content and form of the legal instrument. d’Aspremont describes the negotium and the instrumentum as the “content” and the “container” respectively, and explains that there may be “hard” legal instruments with “soft” content, or a “soft” instrumentum with “hard” content (negotium). Legal acts with soft instrumentum may serve as guidance for the interpretation of other legal acts, as in the case of ILO recommendations. On the contrary, a soft law negotium can be enshrined in a hard law instrumentum, as is in the case of some of ILO conventions.

Some scholars evoke consent as a basis for distinction between hard and soft law, in this way associating consent-based norms with hard law, and non-consent sources with soft law.376 Indeed, the intention of states to create a legal obligation, i.e. conclude a binding agreement, may be seen in the language employed in the agreement and the circumstances in which an agreement is concluded, as well as subsequent actions of the parties to the agreement. As the ICJ has affirmed, in determining the binding nature of an agreement, it “must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.”377 Thus, in Qatar v. Bahrain, the ICJ endorsed the binding character of the signed minutes of a meeting and determined that the words of the bilateral agreement superseded any contrary intentions. In this way, the boundaries between soft and hard law were reduced.378

374 Ibid.
377 Aegean Sea Continental Shelf Case (Greece v. Turkey) 1978 ICJ Rep. 3 at para. 96.
378 See Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility) 1994 ICJ Rep. 6, where the ICJ stated: “Whatever may have been the motives of each of the parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given” (para. 41).
Furthermore, soft treaty law may undergo a “hardening” process, and conversely hard obligations may be deliberately softened to ensure some change of behaviour without producing the harsh consequences of a breach. For instance, Abi-Saab identifies three important criteria for determining whether such “hardening” process has taken place: (1) the circumstances of the adoption of the instrument, including voting patterns and expressed reservations; (2) the concreteness of the language; and, (3) the exercise of follow up procedures.

In addition, as the ICJ has ruled, although non-binding instruments do not become binding merely through repetition, “a series of resolutions may show the gradual evolution of opinio juris required for the establishment of a new rule and may influence behaviour, for instance, in promoting treaty negotiations.” An example of such an instrument is the ILO Declaration on Fundamental Principles and Rights at Work, 1998. Hepple, for instance, asserts that although the Declaration is not binding in a traditional sense, it greatly influences the level of ratification of the core ILO conventions by the Member States and the principles, enshrined in the Declaration, will be likely regarded by courts as part of customary international law in the future, thus entering “habitual state practice.”

6.2. The Use of Soft Instruments in International Law

The use of soft law instruments has been closely connected with the growth of international institutions, which, apart from so-called “legal soft law” (e.g., ILO recommendations) adopt various codes of conduct, declarations, resolutions or guidelines; these are termed “non-legal soft law.” The thrust of the argument is that the use of a non-legal form is dictated by the lack of formal legal capacity, while the impact of a non-binding instrument depends upon the political and economic interests of the relevant players.

There are different reasons that make states to choose soft legal instruments over the binding, “hard” law. In practice, states may reach agreements in many different ways, such as through joint communiqués, memorandum of understanding, minutes etc., while deliberately avoiding the form of a legally binding agreement. Another approach is a “declarative” law in norms that have been announced by a majority of states but are not actually enforced by them, or rules that are both practised and accepted as a law, but only by a minority of states. Furthermore, the priority accorded to law and legal sanctions by Western societies is not universal; some states give preference to non-legal forms of social control. Therefore, possible reasons that may explain the choice of soft law over

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379 As in the case, for instance, of the International Covenant of the Economic and Social Rights, 1966.
hard law include: attempts to avoid formal and visible pledges; attempts to avoid ratification; the option to renegotiate or modify positions as circumstances change; or the chance to achieve a tangible result.387

More broadly, Dinah Shelton has articulated various reasons for the choice of soft law over “hard” legal norms, which include: (1) the bureaucratization of international institutions, which have led to the “deformalization” of law and a lack of power on the part of international institutions to adopt binding instruments; (2) the choice of non-binding norms may reflect respect for hard law, while states and other actors may use the soft law form when there are concerns about the possibility of non-compliance; (3) soft law instruments may be intended to induce states to participate or to pressure non-consenting states to conform; (4) soft law may be emerging due to the growing strength and maturity of the international system; (5) legally binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, or where diverse legal systems preclude legally binding norms; (6) soft law allows for more active participation of non-state actors; (7) soft law can be adopted more rapidly because it is non-binding, as it can be quickly amended or replaced when necessary.388

Furthermore, some scholars question whether the form of a normative instrument or the formality with which it is adopted is essential for enforcement and compliance. In fact, there is a general assumption that calling a normative instrument “law” raises different expectations when it comes to compliance, as well as consequences of non-compliance.389 Another point concerns the use of soft law as a possible solution to the enforcement crisis and compliance. Some scholars have argued that despite of the usefulness of soft law regulations in certain aspects, there are some limitations to soft law alternatives.390

With special regard to the labour law field, Guy Davidov notes that the compliance and enforcement of labour laws is hindered by some inherent difficulties, such as benefits that employers might gain in case of non-compliance, various obstacles that prevent self-enforcement of labour laws by employees, the costs and complicity of the effective enforcement by states; the diminution of unionism; the proliferation of migrant workers, for whom the self-enforcement of labour laws is extremely difficult; and the increase use of outsourcing and subcontracting. Furthermore, new employment practices, such as part-time work, irregular hours or working from home along with decreasing government budgets are also hindering compliance with labour laws as well as the ability of labour inspectors to enforce the law.391

389 Ibid.
In fact, the dual enforcement mechanism, which is one of the features of employment laws, implies, on one hand, that employees can sue for their own rights and, on the other hand, it allows the state to use sanctions in case of non-compliance. Because it is the employee who has the most interest in enforcing his or her own rights, there is a significant reliance on self-enforcement of labour standards. However, there are major difficulties that hinder self-enforcement of labour rights, such as a lack of financial recourses to get legal assistance, a lack of knowledge about labour rights and their violation, or fear of reprisal by the employer.392

As a result of the vast range of difficulties with the enforcement of laws by states as well as with self-enforcement, proposals have emerged to shift from the traditional form of "command and control" regulations to a kind of benefit/discount regulation awarded to the complying employer.393 Thus, employers who construct and apply their own standards receive certain benefits, such as an exemption from certain legal requirements. In cases where employment laws are amended so as that an employer who adopts a code of conduct would be exempted from certain conditions in the requirements of such laws, the law itself becomes "soft," the role of law is then limited to facilitating such initiatives or encouraging them, rather than imposing minimum universal standards.394

Indeed, some soft law regulations, such as codes of conduct or social labelling, can be of use when it comes to working conditions. However, when the law is changed to include some voluntary component, there is no guarantee for a worker to enjoy a given level of labour standards.395

Furthermore, forms of soft law regulations such as derogation clauses might also be used by an employer precisely to avoid obligations.396 Thus, it is important to distinguish between minimum standards that are applicable to every worker and every employer, and additional standards, which would be higher than these minimum standards. Ultimately, hard law appears to be necessary for the minimum standards, while for additional standards "soft laws" might be an option.397
Consequently, voluntarist soft regulations are not the proper solutions for the compliance enforcement crisis, though they still could be invoked to encourage labour standards higher than the legislated minimum. However, in no case should minimum labour standards be lowered when soft regulation substitutes hard law.  

6.3. **Non-binding Instruments of the ILO and the EU**

6.3.1. “Soft” Instruments of the ILO

In addition to binding conventions, the ILO also has produced a series of recommendations, resolutions, declarations, conclusions, model codes or codes of practice. These non-binding instruments often lay down principles no less important than those formally enshrined in the ILO conventions. Moreover, non-binding instruments of the ILO can serve as guidance for interpretative purposes and as a source of inspiration in developing judicial principles.

There are the following types of non-binding or “soft” instruments of the ILO:

*Recommendations* serve as non-binding guidelines, do not require ratification by the ILO Member States and mostly supplement respective ILO conventions. There are also autonomous recommendations, which are not linked to any of the conventions. The unique legal nature of ILO recommendations as soft legal instruments that can be as important as ILO conventions is described in Section 2.3.2. (Chapter I) of this thesis.

*Resolutions* of the ILO are officially adopted at the International Labour Conference and other ILO meetings, and are regarded as a formally adopted expression of opinion on a subject.  

*Declarations* adopted by the ILC have the same legal status as its resolutions, although they tend to be used to express matters of greater importance or principle.  

There have been several instances in which declarations, reflecting a certain trend of international opinion, have influenced legislation or practice in Member States even before resulting in the adoption of a convention or a recommendation.

*Codes of practice* are also a long tradition in the ILO, especially regarding occupational safety and health. Being not legally binding, they serve as practical guides for public authorities and agencies, enterprises and trade unions. The influence they exert on national law and practice is variable, but can be considerable, even without any formal follow-up mechanisms.

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400 Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 54.
In addition, reports and findings of the ILO supervisory bodies can prove useful when interpreting national legislation, especially when such legislation addresses issues or concepts similar to those enshrined in ILO instruments.

In fact, the non-binding instruments can be used in the judicial practice of states. Where national legislation incorporates non-binding instruments, courts can rely on them as a matter of national law. In some cases, the courts interpret national legislation in line with international law, without making explicit reference to the relevant instrument. On the other hand, when determining the meaning and scope of a domestic provision in light of international labour law, the courts often go beyond the reliance on ILO conventions and in addition take into account ILO recommendations or the comments of the ILO supervisory bodies. For instance, the reports of the ILO supervisory bodies may inspire courts when developing judicial principles. However, the legal weight given to these comments, may vary from making them binding to their use as secondary sources of information on particular subject, e.g. safety and health.

One of the most far-reaching "soft" instruments of the ILO is undoubtedly the Declaration on Fundamental Principles and Rights at Work, adopted in 1998. Because of the decline in the ratification rates of the ILO conventions in the 1990s, as well as the lack of compliance and enforcement of previously ratified conventions by Member States, the ILO reconsider its approach to international labour standards; the organisation began to turn its attention to promotional and “soft” law approaches. An important role in this regard was played by the 1996 WTO meeting in Singapore, where it was emphasised that the ILO held primary responsibility for labour issues, and that trade sanctions should not be used to deal with disputes over labour standards.

Therefore, the ILO’s new initiative was to prioritise its “core” conventions over other instruments. In 1998, four core labour standards covering eight core conventions served as the basis for the adoption of the Declaration on Fundamental Principles and Rights at Work. The ILO core conventions apply to all Member States irrespective of their ratification.


403 Thomas, C., M. Oelz and X. Beaudonnet, 2004, supra note 2, p. 266.
404 See, for example, the Makwanyane case, where the Constitutional Court of South Africa ruled that when interpreting the Bill of Rights in the light of international law as provided by Article 39 of the Constitution, binding as well as non-binding instruments are relevant; see The State v. Makwanyane and Another, 1995 (3) SA 391 (CC), para. 33, case brought under the 1993 Constitution.
407 The four principles covering the eight core ILO conventions are: freedom of association and the right to bargain collectively (C87, C98); the elimination of all forms of forced labour (C29, C105); the effective abolition of child labour (C138, C182) and the elimination of discrimination in respect of employment and occupation (C100, C111).
The opinions towards the 1998 Declaration vary between legal scholars. The positive argument in favour of the Declaration sees its adoption as a step forward, providing the ILO with a new ratification and enforcement tool regarding the core conventions; this is mainly because of the follow-up reporting mechanism.\textsuperscript{408} Indeed, after the adoption of the 1998 Declaration, the ratification rate of the ILO’s fundamental conventions increased significantly.\textsuperscript{409}

Another argument is that using such an approach towards the “core” conventions reveals the ILO as being under pressure by different employers’ groups, which were in favour of minimalist approaches to labour standards. Philip Alston, for instance, argues that the ILO position and its supervisory mechanisms were even weakened by the adoption of the 1998 Declaration, because the monitoring of core labour standards under the Declaration has been exercised by strictly promotional means with no possibility to apply sanctions.\textsuperscript{410} Furthermore, by selecting and focusing on the “core” conventions, other ILO instruments seem to be neglected or considered less important.

In fact, many of the opponents to the “core” standards approach agree that the four principles and eight conventions that constitute the “core” are not enough, because such an approach is too narrow and it must, in fact, include standards on occupational safety and health, working hours, rest periods, maternity protection, annual paid leave, pensions and a fair living wage.\textsuperscript{411} Moreover, it is also argued that the core labour standards approach put the burden of enforcement on multinational corporations (MNCs) and consumers by means of corporate social responsibility (CSR) and codes of conduct that are of a voluntary nature. In addition, the purpose of the 1998 Declaration can be seen in the promotion of compliance with the objectives or principles of the ILO Constitution – rather than with specific provisions of existing instruments, in particular the relevant conventions.\textsuperscript{412}

Following the criticism of the Declaration, the new Decent Work Agenda (DWA) was introduced at the ILO in 1999 by Juan Somavia. The Decent Work Agenda focused on workers outside of formal employment and was at providing more effective international labour standards by means of MNC’s voluntary codes. However, as noted by Royle, the introduction of the DWA also might be seen as an attempt to cover issues not addressed.


\textsuperscript{409} Maupain, F., 2005, supra note 408, p. 455.


\textsuperscript{412} Maupain, F., 2000, supra note 83, p. 392.
by the core labour standards and to place such issues in a non-legal framework, thus
avoiding reference to the binding conventions and downgrading the “rights” to “goals.”

6.3.2. Soft Law in the Law of the EU

There is a wide variety of legal and non-legal soft law instruments used at the EU level as well.

Among legal soft law of the EU are recommendations and opinions, which pursuant to
Article 288 TFEU do not have binding force. Recommendations and opinions do not confer
any rights or obligations on those to whom they are addressed. However, they provide
guidance when interpreting EU law and are used to provide clarifications on particular
issues in a formal way.

The ECJ may also refer to the EU’s soft law instruments when interpreting and applying
the law of the EU. Indeed, recommendations and opinions may attain legal force when
they are referred to by the Court of Justice. In this case, the recommendations and
opinions serve as a persuasive authority that can have some legal effect. In cases when
the recommendations and opinions can help to clarify the purpose of legislation, national
courts are obliged to consider these instruments when interpreting EU measures.

In addition, diverse “atypical” acts such as communications, white papers and green
papers also constitute sources of the EU law, although they are not listed in Article 288
TFEU. In practice, some instruments of the EU, originally of a soft nature, may also
become hard law, as the case of the EU Charter of Fundamental Rights demonstrates.

The Charter, which was proclaimed at the Nice European Council on 7 December 2000,
did not have any binding legal effect. However, it became legally binding on the EU
institutions and on national governments after the entry into force of the Treaty of Lisbon
on 1 December 2009. The Charter embeds the rights and freedoms enshrined in the
European Convention on Human Rights; the rights following from the case law of the ECJ,
and other rights and principles resulting from the common constitutional traditions of EU
Member States as well as other international instruments. The provisions of the Charter
are addressed to the EU’s institutions and bodies, giving regard to the principle of
subsidiarity, and to national authorities when they are implementing EU law.

Finally, the spread of soft law in the EU provokes arguments that the time of “shaping
European labour law by instruments of ‘hard’ law is over” or, perhaps, will not always be
the case in the future. This can be explained by different interests within the Member

415 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C
326/02.
Comparative Labour Law and Industrial Relations 26, no. 1, 2010, pp. 3-16, p. 15.
States of the Union, thus making it difficult to legislate at the EU level. That is why the focus is shifting to soft law measures.\textsuperscript{417}

7. Conclusions

Various types of international law require different implementation measures by states. Under public international law, states are rather free to divide their national legal order from international rights and obligations. It is the constitutional provisions of states that determine the effect of the international law within the national legal order. Hence, more and more states have introduced provisions into their constitutions to determine the place of international law in their legal orders. Several post-communist states have clarified the hierarchical status of different international rules in their domestic law, while also developing criteria for defining self-executing and non-self-executing treaties. However, the effective implementation of constitutional provisions depends on various political-legal factors, which include the nature of applicable international rules, the rule of law, and the independence of the judiciary as well as the state’s participation in international organisations.

With respect to the ILO instruments, it is possible that they influence the national legislation of both ratifying and non-ratifying states. Significant changes in national legislation may happen before the actual ratification, or as the result of ratification. Subsequent ratification of the ILO conventions still serve a purpose in providing a safeguard against deterioration of standards, even if the standards set out by a convention have already been achieved by the respective state. However, the ratification of the ILO instruments does not automatically guarantee their enforcement. In this regard, domestic courts play an important role in the application of international norms at the national level. Despite the relatively high number of ratifications of the ILO instruments by Member States, practical compliance is still poor. This is largely due to the absence of real sanctions for violations of ILO standards, despite the elaborate supervisory system of the ILO.

The supranational nature of the EU, the content of EU norms and the practice of the European Court of Justice make EU law a unique type of international law, different from that of traditional international organisations. It can be characterised as mixed, hybrid or \textit{sui generis} law.

The content of the EU founding treaties differs from those establishing other international organisations. From a legal perspective, the EU is an international intergovernmental organisation, which has been granted legal personality. Indeed, there is a strong argument that it does not even make sense to distinguish between monist and dualist legal systems when considering the relationship between the EU law and the national law of the EU Member States, because it is the EU law that determines its effect on the national legal order of its Member States.

One of the distinctive features of the EU law, compared to general public international law, is that the system of the EU law sources is based on an internal hierarchy. Public international law and its general principles constitute a supplementary source of the EU law, used to help fill the gaps in the treaties as well as to interpret them. The constitutional law of the EU Member States is also a source of inspiration in defining new principles of EU law. Unlike in public international law, under EU law, national courts are obliged to interpret their national law in conformity with the law of the Union.

The interpretative practice of the European Court of Justice, the main function of which is to ensure compliance with the obligations of Member States, constitutes one of the major sources of EU law. Furthermore, the unique preliminary ruling procedure of the ECJ, which has no equivalent in the practice of international tribunals, helps to ensure the uniform interpretation and application of EU law by Member States.

The law of the Council of Europe is a “regional” type of international law, because of its adaptation to the European region. The law of the Council gives effect to international principles at the European level by referring to international standards in its instruments, e.g. European Convention on Human Rights, 1950. The ECHR is binding for all the Member States of the Council, because membership in the Council of Europe subsequently implies the ratification of the Convention. The ECHR set up the European Court of Human Rights in order to ensure the observance of the Convention by Member States.

In addition, legal instruments of the Council play an important role in harmonising the national laws of its Member States, which must meet the Council’s statutory objectives. Non-member States are also invited to ratify the treaties of the Council or to accede to them. However, because supervisory mechanisms of the Council are rather weak, the effectiveness of its legal instruments is highly questionable.

With the growing number of international and regional instruments, there is a definite need for coordination in standard-setting between various international organisations. In the future, it will be necessary to ensure that parallel standards are not adopted and that the new standards of different international organisations complement each other. Since certain issues cannot be solved only at the level of the EU, cooperation between the Council of Europe and the EU, as well as with the ILO, that would aim to avoid the duplication of standards, appears to be even more essential. Thus, participation of the EU in the Council of Europe treaties is crucial to ensuring legal consistency in European states. With the entry into force of the Treaty of Lisbon, the EU accession to the European Convention on Human Rights was made possible. However, the Union still has not acceded to the ECHR, and EU legislation therefore cannot be subject to the European Court of Human Rights.

The proliferation of soft law regulations at the international level poses questions as to the legal effect of such instruments and whether soft law can present a solution to compliance with hard international law. While there is no single definition of what soft law is, it is normally understood that soft law is not binding and does not have legal sanctions. Often a soft law regulation is adopted as a supplement or an addition to a hard law instrument.
This is the case of a legal soft law, such as ILO recommendations. The unique “soft” nature of ILO recommendations and the legal effect that these instruments have on national law and practice of states reveal that they might have nearly the same effect as binding ILO conventions. There are also cases when soft law instruments undergo a hardening process, as is the case of the EU Charter of Fundamental Rights.

On the other hand, there are many forms of non-legal soft law, such as codes of conduct, resolutions, guidelines etc., which are often seen as a solution to non-compliance with binding international instruments. However, there is a danger that such soft regulations can lower currently existing “hard” standards. Non-legal soft instruments may lack legitimacy to solve the enforcement problem, as they cannot be used to achieve higher compliance especially in the long run. For this reason, soft law regulations might be useful where they supplement hard standards or when they introduce higher standards that are enshrined in binding laws. To secure the adherence to minimum standards, however, only binding “hard” law appears to be of a real use and should not be substituted by “soft” obligations.
Chapter II. Relevance of the International and EU Law for Ukraine

Before analysing the implementation of labour standards into the domestic legislation of Ukraine, it is necessary to understand the role of international law in domestic Ukrainian legislation, as well the right of international treaties in Ukraine. While ratified international treaties form part of national legislation of Ukraine, and are therefore binding and constitute “hard” legal norms and stipulate “hard” obligations for Ukraine, the adaptation of Ukraine’s national legislation to the EU **acquis** under the Partnership and Cooperation Agreement (PCA) constituted commitments of a rather “soft” nature. The question remains whether these soft commitments are being hardened under the EU-Ukraine Association Agreement (AA). Given the Ukraine’s membership in international organisations, this chapter draws on the place of international law in the national legislation of Ukraine.

Furthermore, due to Ukraine’s current European integration process, it is also crucial to assess the legal foundation of EU-Ukraine relations, paying specific attention to the legal nature of the EU-Ukraine PCA of 1994, and, subsequently, to the Association Agreement concluded in 2014.

1. Ukraine’s Participation in International Organisations

After joining the UN as part of the USSR in 1945, and having been a member of the ILO since 1954, Ukraine is party to numerous international agreements. The international obligations of Ukraine did not change after the collapse of the Soviet Union. After the Declaration on State Sovereignty of Ukraine in 1990 and the adoption of the Act of Independence of Ukraine in 1991, the participation of the state in international organisations has become more active and certain achievements in the field of human rights and their implementation in Ukrainian legislation have become more evident.

Nowadays, Ukraine is a member of a number of UN specialised agencies, including UNESCO, the World Health Organization (WHO), the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the International Monetary Fund (IMF) and International Bank for Reconstruction and Development (IBRD). The country is also affiliated with the European Bank for Reconstruction and Development (EBRD). In November 1995, Ukraine became the 37th member of the Council of Europe and is a member of the Organisation for Security and Co-operation in Europe (OSCE) as well.

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Consequently, Ukraine is bound by a variety of international treaties. Ukraine was among the first twenty states to ratify the International Covenant on Civil and Political Rights\(^{420}\) and the International Covenant on Economic, Social and Cultural Rights of 1966\(^{421}\) as well as the Optional Protocol to the International Covenant on Civil and Political Rights.\(^{422}\) In addition, Ukraine has ratified a wide range of international instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination of 1965,\(^{423}\) the Convention on the Elimination of All Forms of Discrimination Against Women of 1979,\(^{424}\) the Convention on the Rights of the Child of 1989,\(^{425}\) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984,\(^{426}\) the Convention relating to the Status of Refugees of 1951,\(^{427}\) the International Convention on the Prevention and Punishment of the Crimes of Genocide of 1948,\(^{428}\) the European Social Charter (Revised) of 1996\(^{429}\) and other international instruments.

To date, in the field of labour law, Ukraine has ratified 71 conventions, of which 63 are in force, including all 8 core conventions and 4 priority conventions. Furthermore, during the last decades, Ukraine has ratified a number of important ILO instruments including the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Administration Convention, 1978 (No. 150). Also, a real breakthrough took place in the ratification of international instruments on safety and health, including the Occupational Cancer Convention, 1974 (No. 139), the Occupational Health Services Convention, 1985 (No. 161), the Safety and Health in Agriculture Convention, 2001 (No. 184), the Safety and Health in Mines Convention, 1995 (No. 176), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174) and the Occupation Health and Safety Convention, 1981 (No. 155).\(^{430}\)

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2. The Role of International Law in Domestic Legislation of Ukraine

2.1. The ‘Bindingness’ of International Treaties on Ukraine

Article 9 of the Constitution of Ukraine states:

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine (para. 1)
The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine (para. 2)

The Constitution thus clearly defines that ratified international instruments become part of national legislation of Ukraine, and are therefore binding for Ukraine. This implies that international treaties that Ukraine is a party to constitute hard law for Ukraine with a binding obligation to comply with its provisions.

However, Article 8, para. 2 of the Constitution of Ukraine states that the Constitution has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and must conform to it. In accordance with Article 8, para. 3, the norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.

The reference to “international treaties that are in force,” enshrined in Article 9, para. 1 of the Constitution implies international public law treaties. Thus, Article 9 of the Constitution connects the notion of an “international treaty” with the procedure of providing consent by the Parliament of Ukraine (Verkhovna Rada) for a treaty to be binding.\(^\text{431}\) The procedure of the conclusion, execution and termination of international treaties is governed by the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004.\(^\text{432}\)

The issue of the effect of international treaties in Ukraine, including those concluded during the period of the USSR, has repeatedly been brought before domestic courts. Article 124, para. 1 of the Constitution of Ukraine states that the jurisdiction of the courts “extends to all legal relations that arise in the State.” Moreover, according to the Law of Ukraine “On Legal Succession of Ukraine” No. 1543-XII of 1991, the state is a successor of the rights and duties under international treaties signed by the USSR, provided that such treaties do not contradict the constitutional provisions of Ukraine and which correspond with Ukrainian national interests.\(^\text{433}\) Hence, in cases where provisions of an international agreement would contradict the norms enshrined in the Constitution, the Constitutional Court of Ukraine may recognise such an agreement as invalid. In cases where the provisions or an international treaty were to contradict Ukrainian national interests, it is for the domestic courts of general jurisdiction to decide upon the validity of the treaty in question. However, the practice of application by international entities of some treaties may influence the

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\(^{431}\) The Commentary to the Constitution of Ukraine // Науково-Практичний Коментар Конституції України, Харків, 2003.


content of obligations under such a treaty, provided that such practice is an official interpretation of the treaty, as is the case with the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Article 32 (1) of the Convention states that the jurisdiction of the European Court of Human Rights (ECtHR) shall extend to all matters concerning the interpretation and application of the Convention. Thus, part of Ukraine’s obligations under this international treaty is to take into account the interpretation of the Convention by the ECtHR.434

The Constitution of Ukraine also stipulates that the Parliament of Ukraine is to grant consent for international agreements if they are to be binding on the territory of Ukraine, in accordance with Article 85, para. 32 of the Constitution. Although the Constitution omits the term “ratification,” this competence of the Parliament is defined as “ratification” in the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004. In particular, Article 8 of Law No. 1906-IV states that the consent of Ukraine to be bound by an international agreement may be expressed by signing, ratification, approval, acceptance of a treaty or by joining a treaty. Such consent may also be expressed in other ways that are agreed upon by the parties to a treaty. Hence, the consent given by the Parliament is possible not only via ratification of an international treaty. Moreover, Article 2 (b) of the Vienna Convention on the Law of Treaties, 1969, apart from the term “ratification” also contains the terms “acceptance”, “approval” and “accession”, which “mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.”

In practice, international treaties that have received the consent of the Parliament in a different form other than ratification also constitute part of the national legislation of Ukraine. Hence, Article 8 of the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004 should be understood or perceived in light of how the Constitution of Ukraine defines the competence of the Parliament, specifically in Article 85, para. 32 of the Constitution.435

It should be noted that there is no legal definition of the term “national legislation” contained in Ukrainian legal acts.436 However, the Constitution of Ukraine in Articles 9, 19, and in Article 118, para. 12 of the Transitional Provisions, also uses this term without defining its content. According to the ruling of the Constitutional Court of Ukraine of 9 July 1998 the term “legislation” includes the following in respective hierarchy:

- The Laws of Ukraine;
- International agreements of Ukraine that are in force and are binding after the respective consent of the Parliament of Ukraine;
- Resolutions of the Parliament of Ukraine (Verkhovna Rada);
- Decrees of the President of Ukraine;

435 Ibid.
436 Ibid.
Decrees and Resolutions of the Cabinet of Ministers of Ukraine;

Normative legal acts of ministries and other executive authorities (bylaws).

Since the Constitution of Ukraine is the fundamental law of the state, it is located at the highest level in the hierarchy of Ukrainian legislation and has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution and should conform to it.437

Article 9, para. 2 of the Constitution of Ukraine states: “The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.” However, the possibility of the conclusion of international agreements that contravene the Constitution is not excluded in practice. The Constitution of Ukraine remains silent in this regard, and does not address the possibility of applying international treaties that contradict the Constitution. However, it does not accept such a collision per se.

According to Article 19, para. 2 of the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004, “if the international agreement of Ukraine, which has come into force under the defined procedure, sets the rules other than those envisaged in the respective act of Ukrainian legislation, the rules of international agreement shall apply.” In addition, Article 15, para. 1 of the Law No. 1906-IV contains one of the basic international law principles – pacta sunt servanda, and states: “International agreements of Ukraine shall be complied with in good faith according to the norms of international law.” Furthermore, Article 15, para. 2 of the Law No. 1906-IV provides that the obligation to comply with international agreements is seen and expected to be mutual between other parties to the agreements.

Therefore, international agreements that are duly ratified or consented to in either way by the Parliament do take priority over the national laws of Ukraine, but not over the Constitution. When an international agreement comes into force, other previously adopted national laws of Ukraine shall not be applied if they contradict the international agreement in question.

In addition, the Constitutional Court of Ukraine, in the case of a collision of norms, used to give preference to the provisions of the Constitution above those of an international treaty. According to Article 87 of the Law of Ukraine “On the Constitutional Court of Ukraine” No. 422/96 of 1996,438 the Constitutional Court could decide on the constitutionality of international agreements of Ukraine. In the case that it rules that an international agreement does not conform to the Constitution, the Court considers the question of the unconstitutionality of the whole agreement or a part of it. Nevertheless, in the case that an agreement that contravenes the Constitution is concluded, the solution of this problem is to be sought in the Vienna Convention on the Law of Treaties, Article 46 (1) of which states:

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437 Article 8, para. 2 of the Constitution of Ukraine, 1996.
[A] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

In addition, “a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”\footnote{Article 46 (2) of the Vienna Convention, 1969.} If this is not the case, then the agreement would be valid and the issue of its execution and application would arise.\footnote{Commentary to the Constitution of Ukraine // Науково-практичний коментар Конституції України, Kharkiv, 2003.}

When analysing Ukraine’s binding obligations, it is also necessary to take into account Ukraine’s membership in the Council of Europe. Legal instruments of the Council of Europe, in cases in which they are ratified by Ukraine, have a binding character for Ukraine and must be complied with, just as it happens with ILO Conventions. The ratified legal instruments of the Council of Europe, pursuant to the Constitution of Ukraine, become part of the national legislation and therefore constitute “hard law” for Ukraine. Thus, since Ukraine ratified the European Social Charter (revised) of 1996, it is bound by the obligations arising from this international treaty. Generally, Ukraine’s membership in the Council of Europe and participation in the conventions of the Council, especially the European Convention on Human Rights, as well as adherence to the decisions of the European Court of Human Rights, have positively influenced the conformity of national legislation in the field of human rights and democracy.\footnote{Also, some decisions of the ECIHR have been published in Ukrainian in Praktyka Evropeiskogo Sudu z prav lyudu (Practice of the European Court of Human Rights) since 1997.} In particular, penal, criminal and social legislation underwent significant changes.\footnote{Petrov, R. and P. Kalinichenko, “The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: the Cases of Russia and Ukraine,” International & Comparative Law Quarterly, Vol. 60, 2011, pp. 325-353, at p. 344.}

\subsection*{2.2. Ukraine’s “Soft” Commitment, or the “Voluntary Harmonisation” of National Legislation to the EU Law}

Since Ukraine is not an EU Member State, it does not have a legal obligation to transpose and implement EU directives. Nonetheless, in recent years the issue of approximation of the national legislation of Ukraine to EU legislation has gained increasing attention, due to the country’s course toward closer integration with the European Union.

Indeed, the law of the European Union may have a positive “side effect” for Ukrainian legislation, provided that there is a determination on Ukraine’s side to conform to it, even though there are no binding obligations to do so. In this case, the term “soft commitment” or “voluntary harmonisation” may be of use.

Hence, the Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the European Union” No. 1629-IV of 2004 stipulates the transposition of the \textit{acquis communautaire} into Ukraine’s legal system.\footnote{Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU” No. 1629-IV of 18.03.2004 (Vidomosti Verkhovnoyi Rady (VVR), 2004, No. 29, p. 367).} Part II of the
Law No. 1629-IV also mentions that the sources of the *acquis* include, *inter alia*, the decisions of the European Court of Justice. Thus, pursuant to Law No. 1629-IV, Ukraine has undertaken to implement the *acquis*, albeit without having a clear membership perspective in the EU. Scholars and lawmakers have argued, however, that such voluntary harmonisation of Ukraine’s national legislation to that of the EU will positively influence and accelerate the country’s integration into the European Union and is an essential precondition for the democratic transformation of Ukrainian society.\(^{444}\)

The Partnership and Cooperation agreement signed with the EU in 1994 listed the priority spheres in which the approximation of legislation should be undertaken and included the area of occupational health and safety (Article 51 PCA). However, the PCA only contained “soft” obligations for Ukraine to bring its national legislation in line with that of the Union. As such, this is about bringing legislation in line with EU standards, rather than transposing and implementing EU directives. The EU-Ukraine Association Agreement of 2014 stipulates more precise and “harder” obligations for Ukraine to approximate its legislation with that of the EU, as will be analysed below.

3. **The European Integration of Ukraine and Adaptation of National Legislation**

3.1. **Adaptation, Approximation or Harmonisation: Defining the Terms**

When assessing the process of bringing a state’s national legislation into conformity with the laws of the European Union, different terms are in use. Therefore, it is necessary to distinguish between terms such as “adaptation”, “approximation” and “harmonisation.” While there are no unified definitions for these terms, the formulations below are derived from the content of legal acts of Ukraine, thus reflecting on the terms as they are used in the national context.

*Adaptation* of Ukrainian national legislation to EU legislation implies a process of harmonising the laws of Ukraine and other normative legal acts in line with the *acquis communautaire*. In the Ukrainian context, adaptation means not only improving the existing legislation, but also developing drafts of normative legal acts in compliance with the *acquis communautaire*.

*Approximation* has a narrower meaning than “adaptation” and implies bringing national legislation closer to EU legal norms. Thus, approximation of the national legislation of Ukraine implies reforming its legal system and gradually bringing it in line with European standards. It covers, among others, laws on labour protection and health and safety standards. Given that Ukraine is not an EU Member State, its legislation has only to be “approximated” to the standards of the EU, which is stipulated by various national normative acts, but nevertheless was an important prerequisite for concluding an Association Agreement with the EU in 2014.

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**Harmonisation** is the process of convergence of the legal systems by removing the contradictions between them, and bringing about the formation of minimum legal standards through the establishment of common legal principles. This involves bringing the laws of Member States and non-members in line with the requirements of international law on the basis of international agreements and includes various means, such as adaptation, implementation, approximation, etc.\(^{445}\)

The term “adaptation” is referred to in several national legal instruments. First, it was defined as the following in the Resolution of the Cabinet of Ministers of Ukraine “On the Concept of Adaptation of the Ukrainian Legislation to the Legislation of the EU”, No. 1496 of 1999:\(^{446}\)

[T]he adaptation of the legislation of Ukraine to the EU legislation is a process of approximation and gradual bringing of Ukrainian legislation into conformity with the EU legislation [emphasis added].\(^{447}\)

In addition, two additional laws constitute the basic legal framework for the process of adaptation, the Law of Ukraine “On the Concept of State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU,” No. 228-IV of 2002\(^{448}\) and the Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU,” No. 1629-IV of 2004.\(^{449}\)

Law No. 228-IV on the Concept of State Programme defines “adaptation” as the following:

[T]he adaptation of Ukraine’s legislation to the legislation of the European Union is a gradual adoption and implementation of normative-legal acts of Ukraine, which are drafted in line with the EU legislation [emphasis added].\(^{450}\)

According to the Law No. 1629-IV on the State Programme of Adaptation:

[T]he adaptation of legislation is a process of bringing the laws and other normative-legal acts of Ukraine in line with the acquis communautaire [emphasis added].\(^{451}\)

\(^{445}\) For more on this topic and definitions, see Zadorozhniy, O. V. and M. M. Gnatovsky, “Адаптація Законодавства України до Законодавства Європейського Союзу: Парламентський Вимір” (The Adaptation of National Legislation of Ukraine to EU law) // Законодавство України: проблеми вдосконалення, К., 2001; See also Chanusheva, G., “Вплив міжнародних трудових норм на розвиток трудового права України (окремі питання)” (The Impact of International Labour Norms on the Development of Labour Law in Ukraine (some issues)), Підприємництво, господарство і право, No. 5, 2001.


In the context of bringing the legislation of Ukraine in line with EU law, the term “adaptation” is most commonly used. In part, this has to do with the rather ambiguous approximation clause in the EU-Ukraine Partnership and Cooperation Agreement (PCA), according to which Ukraine has committed to “endeavour to ensure that its legislation be gradually made compatible with that of the Community.” 452 As follows from this formulation, the commitment of Ukraine to “endeavour to ensure” is of a rather “soft” nature. While the PCA agreement is binding for Ukraine as well as for the EU, 453 the provisions on ensuring the compatibility of Ukraine’s legislation with that of the EU can nevertheless be called a “soft commitment.” Petrov has therefore argued that Ukraine adheres to the notion of “adaptation” of legislation as if in response to the ambiguity of the respective PCA provisions. 454

However, the term “adaptation”, as it is used in Ukrainian context, does not seem to reflect all of the processes of bringing national legislation into conformity with that of the EU. Taking into account that the notion of the EU acquis is wider than that of the EU legislation, the usage of the term “approximation” also appears to be relevant.

3.2. The Adaptation of National Legislation to the EU acquis: The Legal Framework

Since gaining independence in 1991, Ukraine has gradually begun to move away from its Soviet past with aspirations for European integration. After signing the Partnership and Cooperation Agreement with the EU in 1994, 455 the real course for the European integration or the “European vector” in Ukraine’s national policy, reflected in national legislation, begins only in 1998, with the issuance of the Decree of the President of Ukraine “On the Strategy of Integration of Ukraine into the European Union” No. 615/98 (the Strategy of Integration). 456

The main purpose of Decree No. 615/98 has been to implement the strategic course of Ukraine’s integration into the European Union. The President of Ukraine guides (controls) the integration strategy of Ukraine to the EU. Internal support for the integration process rests upon the Cabinet of Ministers of Ukraine and central and local executive authorities in cooperation with the legislative authority and relevant local authorities. The Decree notes that after the expansion of the EU to include Poland and Hungary as members, the geopolitical situation would change fundamentally. Therefore, it would be necessary to

453 The PCA is a ratified international agreement, and thus pursuant to the Constitution of Ukraine has a binding effect. In case of conflict with the provisions of national legislation, the PCA provisions will apply. However, the PCA does not override the provisions of the Constitution of Ukraine.
455 The EU-Ukraine PCA was signed on 14 June 1994 and entered into force on 1 March 1998.
define a clear and comprehensive foreign policy and strategy for Ukraine’s integration into the European political, informational, economic and legal space.

The preamble to the Strategy of Integration declares that “joining the European political, economic and legal area and, subsequently, acquiring associate membership of the EU constitute the major priority of Ukrainian foreign policy in the medium term.” Furthermore, the Strategy emphasises that the national interests of Ukraine require an identification of Ukraine as an influential European state and a full member of the EU. In light of this, the Strategy of Integration defines the main directions and the general framework of the integration process, which are:

1. The adaptation of Ukrainian legislation to that of the EU and the ensuring of human rights;
2. Economic integration and the development of the trade relations between Ukraine and the EU;
3. Ukraine’s integration in the EU in the context of European security;
4. Political consolidation and strengthening of democracy;
5. Adaptation of the social policy of Ukraine to EU standards;
6. Cultural, educational, scientific and technical integration;
7. Regional integration of Ukraine;
8. Sectoral cooperation;
9. Cooperation in the field of environmental protection.

The first point is explicit in that one of the priority directions of the integration process is the adaptation of Ukrainian legislation to that of the EU. According to the Strategy of Integration, adaptation of the Ukrainian legislation to the EU norms will ensure the development of the political, social and cultural activities of Ukrainian citizens, facilitate the economic development of Ukraine and contribute to the gradual growth of welfare, thus bringing it to the level that prevails in EU Member States. Here, the term “approximation” is narrower than the “adaptation.” According to Article 1 of the Strategy of Integration, “the adaptation of Ukrainian legislation to the EU legal norms implies approximation to the modern European legal system.”

National legislation that is to be brought in line with that of the EU covers the following sectors: private law, customs law, labour law, financial law, tax law, intellectual property law, labour protection law, occupational health and safety law, environmental law, consumer protection law, technical regulations and standards, and transport law as well as other sectors defined by the PCA between Ukraine and the EU. Furthermore, adaptation of Ukraine’s legislation to that of the EU necessitates profound reforms of the country’s legal system.

According to the Strategy of Integration, the adaptation of the legislation must be pursued through different stages, such as the implementation of the PCA, the conclusion of sectoral agreements, making the current legislation of Ukraine consistent with EU
standards and establishing mechanisms for draft regulations adaptation in line with EU norms. With regards to the adaptation of Ukraine’s social policy to European standards, the document puts specific emphasis on the ratification and subsequent implementation of the European Social Charter (revised) of 1996.

Adaptation of labour legislation of Ukraine to EU legislation involves examination carried out by competent state authorities of the EU regulatory framework in the field of labour and OSH, a comparative assessment of national labour law and its conformity to the EU standards, the drawing up of recommendations and proposals to applicable laws, relevant amendments and changes in national legislation and subsequent and ongoing supervision of the implementation of respective normative regulations, as well as continuous monitoring of the EU policy in the area of occupational health and safety.

Formally, the adaptation process of Ukrainian legislation to that of the EU started with the adoption of another important instrument, the “Concept of Adaptation of the Legislation of Ukraine to the Legislation of the EU”, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1496 in 1999, that defines the concept of “adaptation” of Ukrainian legislation to the legislation of the European Union as “a process of approximation and gradually bringing the legislation of Ukraine into conformity with EU legislation.” The aim of adaptation is to ensure compliance of Ukrainian legislation with the requirements envisaged by the PCA of 1994; development of national legislation in line with EU legislation and ensuring an elaborated level of the preparation of draft legal acts; and the establishment of a legal framework for Ukraine’s integration into the EU. The Concept also defines the necessary measures for the implementation of adapted legislation, which is the most important element of the adaptation process. Such measures include the establishment of respective mechanisms, professional level of officials in executive authorities and the creation of effective judicial mechanisms for the protection of rights and interests of those whose legal affairs fall into the sphere of these norms.

In 2000, the “Programme of Integration of Ukraine to the European Union”, approved by the Decree of the President No. 1072/2000 was adopted (the Programme of Integration). The Programme of Integration envisaged the short, medium, and long-term objectives of executive authorities for Ukraine’s proper integration process into the EU. It provides detailed guidelines for the executive authorities dealing with the implementation of the PCA and other measures concerning European integration of Ukraine. The Programme of Integration analyses the possibilities for the country’s potential membership in the EU. As a basic framework for Ukraine’s European integration, the Copenhagen Criteria were formally accepted. The Programme sets economic, political and legal


459 The Council of the European Union decided in Copenhagen in 1993 on the following accession criteria (Copenhagen Criteria) to be met by the applicant countries: a political criterion, which implies the stability of institutions guaranteeing democracy, the rule of law and human rights; an economic criterion, meaning
reforms as the main objectives, to be carried out with profound analysis of the current state of economic development and the rule of law and democracy, as well as the protection of human rights in Ukraine. In order to implement the objectives of the Programme, the Cabinet of Ministers of Ukraine is required to issue an Adaptation Action Plan annually. The Action Plan lays out the list of organisational and legislative measures to be undertaken by state authorities during that respective year.

Indeed, gradual transformation of the EU-Ukraine relations from Partnership and Cooperation Agreement to a new level of integration required the adoption and implementation of the EU-Ukraine Action Plan. Irrespective of the EU likelihood of membership, the internal need for legal reform, including reform in the field of labour, further stimulated Ukraine’s integration into the EU. However, the implementation of the Ukraine-EU Action Plan has not proven to be successful.460

In 2002, the Law of Ukraine “On the Concept of State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU” No. 228-IV authorised the Cabinet of Ministers of Ukraine to draft and adopt the State Programme of Ukraine’s legislation to EU law.

Consequently, in 2004, the Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the European Union” No. 1629-IV (the State Programme of Adaptation) was adopted. The State Programme of Adaptation defines the mechanism for achieving compliance with the third of the Copenhagen Criteria as well as the Madrid criteria by Ukraine.462 This mechanism involves the adaptation of legislation, the establishment of corresponding institutions and other complementary measures necessary for effective law-making and enforcement. According to the State Programme of Adaptation, the aim of the adaptation of Ukrainian legislation to the EU law is to achieve compliance of the legal system of Ukraine with the acquis communautaire, taking into account the criteria established by the EU for states that are aspiring to membership in the Union. Furthermore, the adaptation of national legislation of Ukraine to that of the EU is a priority component in the process of Ukraine’s integration into the EU, which in turn is a priority direction of Ukraine’s foreign policy.

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462 The third Copenhagen criterion is the legal accession criterion, which implies the adoption of the EU acquis by a candidate state; the Madrid criterion, also known as the fourth accession criteria, which was adopted in 1995 at the Madrid European Council, requires the establishment of administrative as well as judicial capacities for the implementation and application of the acquis communautaire in candidate countries.
Furthermore, for the first time in Ukrainian legislation, the concept of the *acquis communautaire* was defined. The State Programme of Adaptation listed the sources of the EU *acquis* as well as defined the term “adaptation” of national legislation as “a process of bringing laws of Ukraine and other normative legal acts in conformity with the *acquis communautaire*.” As envisaged by the Programme, draft laws and other normative legal acts of Ukraine, which, according to the subject of legal regulation relate to areas, legal relationships in which are governed by the law of the EU, must undergo a compulsory assessment on their compliance with the *acquis communautaire*. An assessment (or expertise) of the laws and other normative legal acts that relate to spheres where legal relations are governed by the EU law are designated to the oversight by a central executive authority. The assessment of such normative legal acts, drafts by ministries and other central local authorities is performed by the respective departments of those authorities that issued the act in question. Furthermore, as is specified in the Programme, normative-legal acts that contradict the *acquis communautaire* may only be adopted with sufficient justification and only for a clearly defined time.

The “adaptation of legislation” is defined by the Programme as a systematic process that involves several stages, each of which must achieve a certain degree of conformity of Ukrainian legislation to the EU *acquis*. According to the first stage of implementation of the Programme, priority legal spheres in which adaptation shall be undertaken are defined. Labour protection is listed as one of these areas. In addition, measures also must be undertaken during the first stage of the adaptation process, which include the development of an *acquis communautaire* glossary to ensure the adequacy of understanding and uniform application of the adaptation process; the creation of a centralised translation system of *acquis communautaire* acts; comparative legal research on the compliance of the legislation of Ukraine to the EU *acquis* in priority areas; the establishment of an effective state mechanism for the adaptation of legislation, including a mechanism for draft laws and other normative legal acts revision and their conformity with the *acquis*; the creation of a state information network on the issues of the EU law; and, the establishment of a system of education and training for officials working on EU law issues.

The next stages of legislation adaptation, as stated in the Programme, are determined depending on the results achieved in the first adaptation stage, as well as the economic, political and social situation that prevails in Ukraine and the development of Ukraine-EU relations. In addition, the State Programme of Adaptation also defines state policy on the adaptation of national legislation. This policy is a part of legal reform in Ukraine and is aimed at ensuring the compulsory consideration of EU legislation requirements when drafting legal acts, training qualified specialists, and creating appropriate conditions for institutional, scientific, educational, law-making, technical and financial support for the process of the adaptation of Ukrainian legislation.

### 4. The Legal Foundations of EU-Ukraine Relations

It must be remembered that the relations of the EU with non-member states are of a different legal nature. There is no clear definition of a partnership or association agreement concluded by the EU and another state. It is through analysing the founding treaties of the
EU, the case law of the European Court of Justice, partnership and cooperation agreements, or association agreements with different states that one can assess the legal scope of these respective instruments.

In the case of Ukraine, the Partnership-Cooperation Agreement of 1994 was in force until the EU-Ukraine Association Agreement was signed in 2014. It is therefore important to draw on the distinction between these two agreements. The question is whether the legal nature of these agreements profoundly differs from each other, and if the Association Agreement implies a new, “higher” level of the relations with more “hard” commitments between the EU and Ukraine.

4.1. A Partnership and Cooperation Agreement: General Characteristics

A Partnership and Cooperation Agreement (PCA) belongs to the system of the external agreements of the European Union. Among the EU’s various cooperation, stabilisation, development and association agreements, PCAs constitute a separate group. In general terms, the procedure of the conclusion of such agreements is less complicated compared to association agreements. Also, PCAs do not actually envisage membership in the EU, intentionally avoiding references to further integration into the Union and a membership perspective.

The legal foundation of the PCA is found in Article 212 (3) TFEU, which states that the Union and the Member States, within their respective spheres of competence “shall cooperate with third countries and the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.” Within the meaning of this provision, such agreements pursue the objectives of economic, financial and technical cooperative measures, including financial assistance, with third countries other than developing countries. Furthermore, such measures are to be consistent with the development policy of the Union and are to be carried out within the framework of the principles and objectives of its external action strategies.

The aims of PCAs vary depending on the state with which the agreement is concluded. It is important to distinguish between a PCA with a European PCA state, and with a non-European PCA state. Thus, the PCAs with Ukraine, Russia, Moldova and Belarus, which are considered European PCA states, contain “evolutionary clauses” which differentiate these agreements. Again, the very concept of evolutionary clauses implies what is known as “conditional differentiation” in the external policy of the European Union.

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The objective of the approximation of a state's legislation to that of the EU is not enshrined in every concluded PCA, and if so, the approximation clauses must be read differently depending on the country with which this agreement is signed. Furthermore, the approximation clause can even vary within the same group of agreements, as is the case of Ukraine, Russia, Moldova and Belarus PCAs, which are all the European PCAs. For instance, when comparing the PCAs between the EU and Russia and the EU and Ukraine, the common feature would be the promulgation of strategic partnership with the EU. However, in case of Russia, the ultimate objective is “to create necessary conditions for the future establishment of a free trade area between the Community and Russia,” whereas in case of Ukraine the further development of relations with the EU is conditional on Ukraine’s approximation process.

In fact, the approximation of laws in European PCAs is acknowledged to constitute an important means of strengthening the economic links between the parties to the agreement, albeit the states in question only “endeavour to ensure” that their national laws comply with those of the EU. Hence, it could be argued that there is a “voluntarily harmonisation” taking place in the countries of European PCAs. It should be mentioned that in the case of a number of CEE states, before they joined the Union, the approximation of laws was also defined as “voluntary adaptation,” because the obligation of harmonisation of legislation in EU Member States differs from that of the then-candidate CEE countries. It is also interesting to note that for those candidate countries that set membership as a priority, the harmonisation of their national legislation to that of the EU has consequently formed an obligation.

In some cases, a PCA may lead to the achievement of objectives that are normally expected from an association agreement. In this regard, it is useful to recall the Kziber case, in which the ECJ emphasised that the fact that the agreement is confined to instituting cooperation between the Parties without making reference to any intention of association or accession to the EU does not per se prevent its provisions from being directly applicable.

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467 See Evans, A., “Voluntary Harmonisation in Integration between the European Community and Eastern Europe,” in: European Law Review, Vol. 22. 1997, pp. 201-220; Evans defines “voluntary harmonisation” as a concept under which a third state adapts its national law to EU law which has no binding force for that state and in the framing of which the state does not participate.
470 See Case 18/90 Kziber, 1991 ECR I-199; Similarly, in the Simutenkov case, the ECJ ruled that: “According to well-established case law, a provision in an agreement concluded by the Communities with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to its purpose and nature of the agreement, the provision contains a clear and precise
4.2. The EU-Ukraine Partnership and Cooperation Agreement of 1994

Before the Association Agreement was signed between the EU and Ukraine in 2014, the legal basis of the relationship between Ukraine and the European Union was the EU-Ukraine Partnership and Cooperation Agreement of 1994. For the purpose of assessing the development of EU-Ukraine relations, it is thus useful to reflect first on the provisions of the PCA before analysing the subsequent Association Agreement.

The main objectives of the 1994 PCA were the following: to provide an appropriate framework for the political dialogue between the parties to the agreement, allowing in this way for the development of close political relations; to promote trade, investment and harmonious economic relations between the parties to the agreement and thus accelerate their sustainable development; to create the basis for mutually beneficial economic, social, financial, civil, scientific and cultural cooperation; and, to support the efforts of Ukraine in the consolidation of its democracy and developing its economy as well as in completing the transition to a market economy.471

As the PCA further states, one important condition for strengthening economic relations between Ukraine and the Union is the approximation of existing and subsequent legislation of Ukraine with that of the Union. Article 51 of the EU-Ukraine PCA states that Ukraine “shall endeavour to ensure that its legislation be gradually made compatible with that of the Community.” For this, Ukraine would have to undertake steps to ensure that its domestic legislation would gradually be brought in line with the legislation of the EU in the following areas: customs law, banking law, tax law, intellectual property law, labour law, financial services, competition law, public procurement, protection of life and health of people, protection of animals and plants, environmental protection law, consumer protection, indirect taxation, technical rules and standards, laws and regulations on nuclear energy, and transport. The parties to the Agreement were also called on to cooperate in the social sphere, in particular regarding occupational safety and health, with the goal of improving the state of workers’ health and safety. Such cooperation was intended to include education and training on health and safety issues, particularly in high-risk sectors; the development and application of preventive measures against occupational diseases and other work-related illnesses; the prevention and reduction of major accident risks; regulation of the usage of toxic chemicals; and research in the sphere of knowledge development regarding working conditions as well as health and safety of workers.

It is worth mentioning that among the countries covered by European PCAs, Ukraine is basically the only country that explicitly promulgated its European aspirations. The EU Common Strategy on Ukraine, adopted in 1999,472 which complements the PCA, also

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471 Pursuant to Article 1 of the EU-Ukraine PCA of 1994.
made support for the democratic and economic transition in Ukraine a priority, as well as the gradual approximation of Ukraine’s legislation to that of the EU. In accordance with Article 20 of the EU-Ukraine Common Strategy, approximation of domestic legislation was to take place in the following areas: competition policy, standards and certification, intellectual property rights, data protection, customs procedures and the environment. This means that legislation on occupational safety and health is not defined by the Common Strategy as a priority area for the approximation process. However, Article 51 of the EU-Ukraine PCA included protection of workers at the workplace as one of the areas where Ukraine was to “endeavour to ensure” the compatibility of its domestic laws with the laws of the EU. Thus, the Union and its Member States should also “endeavour to ensure” that the status of Ukrainian citizens, who were lawfully employed on the territory of a Member State, did not allow for any discrimination on the grounds of citizenship in relation to working conditions, remuneration or termination of employment in comparison with the citizens of a respective Member State. The same obligations rested upon Ukraine in the relation to the citizens of the EU Member States that were working on the territory of Ukraine.

Generally, one can classify the PCA between the EU and Ukraine as an entry-level agreement that endorsed the development of further mutual cooperation between the parties to the agreement, albeit not envisaging membership. The vague formulation “endeavour to ensure” in Article 51 of the PCA did not entail any sanctions for the failure to make national legislation compatible with that of the Union. Moreover, there were no clear guidelines as to the scope of the EU laws to which the Ukrainian legislation was to be approximated.

4.3. An Association Agreement: General Characteristics

An association agreement is one of the essential pillars of the external policy of the European Union. The legal basis for association agreements of the EU is enshrined in the Treaty of Lisbon, specifically Article 217 TFEU, with a special procedure defined by Article 218 TFEU. According to Article 217 TFEU “the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.” Indeed, reciprocal rights and obligations are at the core of an association between the EU and a third country.

When referring to the legal foundation of an association agreement, it is also important to mention Article 21 (1) TEU, in accordance with which the external policy of the EU shall be “guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” As a result, when entering into external agreements with

474 Petrov, R., 2003, supra note 454, p. 3.
the EU, third countries should share the democratic values of the Union. In addition, the obligation of a third country to share common EU values stipulates monitoring by respective EU institutions.\footnote{See Petrov, R., 2011, \textit{Association Agreement Versus Partnership and Cooperation Agreement. What is the Difference?}, 27 January 2011, available online at \url{http://www.easternpartnership.org/community/debate/association-agreements-and-deep-and-comprehensive-free-trade-areas-who-will-benefit}, (last accessed 12 December 2017).}

Pursuant to Article 218 TFEU, the Council must act unanimously when concluding an association agreement with a third country. This unanimous vote by the Council and the consent of the European Parliament are the main features that distinguish the procedure of concluding the association agreement from procedures of concluding other EU external agreements. In contrast, PCAs do not need the European Parliament’s consent and can be concluded as a result of the Council’s decision to do so, based on a qualified-majority vote. In fact, often a PCA does not envisage the establishment of common institutions that would issue binding decisions in pursuance of the agreement.

Under EU law, an association agreement may thus be characterised as having the following features: reciprocal rights and obligations of the parties to the agreement; common action and special procedure; a third country’s participation; and privileged links between the third country and the EU.\footnote{Ibid.} In this regard it is important to recall the ECJ’s ruling in the \textit{Demirel} case.\footnote{Case C-12/86 Demirel v. Stadt Schwäbisch Gmünd [1987] I-ECR 3719.} As stated in \textit{Demirel}, an association agreement implies “creating special privileged links with a non-member country in the EU system, which must, at least to a certain extent, take part in the Community system.”\footnote{See Case C-12/86 Demirel v. Stadt Schwäbisch Gmünd [1987] I-ECR 3719, para. 9.}

As for membership in the Union, it should be kept in mind that signing an association agreement also does not imply (future) membership in the EU. Indeed, association and applying for a membership are two different processes under EU law. However, it is true that before acquiring membership in the Union, most of the EU Member States signed an association agreement first.\footnote{Petrov, R., 2011, \textit{supra} note 475.}

Furthermore, differentiation is used by the EU when entering into association with a third country. Thus, the objectives stated in a given association agreement may differ depending on the signatory party and are different, as the examples of Turkey, Croatia, or Ukraine all demonstrate. For instance, an association agreement may include comprehensive integration objectives that lead to eventual membership in the EU, as was in the case of the CEE states or the Western Balkans. There also are association agreements signed with third countries that do not envisage EU membership and are focused solely on sectoral cooperation, or closer political and economic cooperation aimed at the establishment of free trade areas between the parties, as in cases of association with Israel, Morocco and Tunisia.
4.4. The EU-Ukraine Association Agreement of 2014

Negotiations on the EU-Ukraine Association Agreement, which implied another level of the EU-Ukraine relations containing more “hard” provisions, (including a requirement to bring the national legislation in conformity with that of the EU) have taken place since 2007. After the President of Ukraine at the time, Victor Yanukovych, failed signing the Association Agreement at the Vilnius Summit in 2013, which resulted in massive protests and later violent ongoing conflict between Russia and Ukraine, the political part of the Association Agreement was signed by the new government of Ukraine on 21 March 2014. The complete text of the AA between the EU and Ukraine was signed on 27 June 2014 by the newly elected President, Petro Poroshenko.

Pursuant to Article 479 of the EU-Ukraine AA, the Association Agreement replaces the PCA of 1994 as the basic legal framework of EU-Ukraine relations. The preamble to the Agreement states the EU’s acknowledgment of Ukraine’s European aspirations and welcomes its European choice, including the commitment to building a deep and sustainable democracy and market economy. It states that the parties are committed to a close relationship based on common values, such as respect for democratic principles, the rule of law, good governance and fundamental freedoms. The aim of the Agreement is to deepen political and economic relations between the Union and Ukraine as well as to establish an enhanced institutional framework and innovative provisions on the approximation of national legislation to that of the EU. As also stated in the preamble, Ukraine is committed to achieving “convergence with the EU in political, economic and legal areas.”

An Association Agreement is sometimes regarded as paving the way for membership in the Union. However, as noted above, it should be remembered that the conclusion of an AA does not automatically imply prospects for EU membership. This is why, in the wording of the EU-Ukraine AA, any direct references to future prospects for Ukraine to become a member of the Union were carefully avoided. Nonetheless, the opportunity for membership is also not entirely excluded, taking into account the formulation in the preamble of the 2014 AA, which points out that “the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice” and that “this Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations.”

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480 The political part of the agreement signed on 21 March 2014 includes the Preamble, Article 1 (Objectives), Title I (General Principles), II (Political Dialogue and Reform, Political Association Cooperation and Convergence in the Field of CFSP) and VII (Institutional, General and Final Provisions).

481 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, pp. 3–2137.


It is argued that in many aspects the EU-Ukraine AA is relatively unique and provides a new type of “integration without membership.” 484 By establishing “close and privileged links” between Ukraine and the EU, the main objective of the EU-Ukraine AA is to ensure partial integration of Ukraine into the EU without offering membership in the Union. 485 Thus, the preamble to the AA states:

Political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement as well as Ukraine’s track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas.

It must be noted that emphasising the connection between the progress achieved by a third country and further engagement with the EU is a feature of the European Neighbourhood Policy (ENP) and the Eastern Partnership (EaP). Previously, this principle has been applied through Action Plans or Association Agenda, which are soft instruments. Now, however, it has been enshrined in a legally binding agreement. 486

Moreover, the preamble to the EU-Ukraine AA specifies the need for Ukraine to implement the political, socio-economic, legal and institutional reforms that are necessary for the effective implementation of the Agreement. The EU for its part states that it is committed to supporting these reforms in Ukraine. Also, as it is emphasized in the preamble, the parties to the Agreement are committed “to gradually approximating Ukraine’s legislation with that of the Union along the lines set out in this Agreement and to effectively implementing it.”

Furthermore, the EU-Ukraine AA envisages two forms of conditionality. One type is conditionality regarding Ukraine’s commitment to common values, such as democracy, the rule of law, and respect for human rights and fundamental freedoms. 487 Another type is market access conditionality, which implies that Ukraine will have to implement its commitments on legislative approximation before it can be granted access to the EU internal market. 488

The new AA envisages specific provisions on legislative and regulatory approximation. It is important to note, that the EU-Ukraine AA contains detailed annexes that specify the approximation procedure and offer detailed lists of respective EU legislation as a basis for approximation in some areas. Pursuant to Article 474 of the EU-Ukraine AA, “Ukraine will carry out gradual approximation of its legislation to EU law.” The commitment of Ukraine to undertake the gradual approximation of its national legislation is referred to in about 44 annexes to the AA, stipulating specific commitments and mechanisms for approximation. It is this sophisticated mechanism for approximation of legislation that makes it different from other models of “integration without membership.” 489 Different mechanisms of legislative approximation stipulated by the AA vary in their scope depending on the envisaged level of market opening and on integration.

485 Ibid., p. 10.
486 Ibid.
487 See specific reference in Articles 6 and 14 of the EU-Ukraine AA of 2014.
489 Ibid., p. 17.
Specific approximation clauses are enshrined in Title IV on the Deep and Comprehensive Free Trade Agreement (DCFTA), in Title V on Economic and Sector Cooperation and in Title VI on Financial Cooperation. As for the other Titles of the EU-Ukraine AA, they encompass more general provisions with reference to international conventions or “European and international standards.”490 The general provisions are therefore not regarded as approximation clauses, as they do not contain precise obligations concerning the incorporation of the EU acquis.

In the field of labour and social policy, Article 419 of the EU-Ukraine AA stipulates that “Parties shall strengthen their dialogue and cooperation on promoting the decent work agenda, employment policy, health and safety at work, social dialogue, social protection, social inclusion, gender equality and non-discrimination.”491 The approximation of legislation is foreseen in the areas of labour law, anti-discrimination and gender equality and health and safety at work. In addition, Annex XL to the Agreement contains the scope of the EU legislation that should be implemented by Ukraine, specifying precise timeframes for each instrument.

There are various terms and concepts used in the EU-Ukraine AA to state that Ukraine is committed to “align to”, “approximate to” or “to achieve conformity with” the law of the EU, or to make the national legislation “compatible” with the EU acquis. Such a variety of terms causes confusion; however, they all refer to the same process – specifically, the process of bringing national legislation that is currently in force as well as future laws in line with the law of the Union. However, it is noteworthy that the term “approximation” is used more often in the 2014 AA, though in national legislation the definition of this term is very similar to that of “adaptation.” Therefore, no single terminology is used when referring to bringing national legislation in line with the EU acquis, thus creating confusion that may subsequently hinder the effective implementation of this commitment.

The EU-Ukraine AA also is intended to promote the rule of law and requires judicial reform. Both the EU and Ukraine are to “attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular.” In addition, with a view toward the gradual approximation of Ukraine’s legislation to that of the EU, the Association Agreement establishes a multi-level institutional framework and sets up the Association Council as a forum for the exchange of information on EU and Ukrainian legislative acts; this body meets at the ministerial level and has decision-making capacities as laid down in Article 463 of the AA. The legislative acts concerned include those already in force as well as draft legislation. Furthermore, the Association Council is called on to assist with implementation, enforcement and compliance measures.492

490 Article 15, EU-Ukraine Association Agreement, 2014.
491 Article 419, Chapter 21, Title V of the EU-Ukraine Association Agreement, 2014.
492 Article 463, Title VII of the EU-Ukraine Association Agreement, 2014.
The 2014 Association Agreement requires a continuous monitoring system for the appraisal of progress in implementing and enforcing measures covered by the Agreement. It states that monitoring will include assessments of approximation of Ukrainian law to EU law, including aspects of implementation and enforcement. Such assessments may be conducted either individually or jointly by parties to the agreement. In order to facilitate the assessment process, the Agreement stipulates the obligation of Ukraine to report to the EU on the progress of approximation process.\textsuperscript{493}

It should also be noted that there is a lack of direct enforceability of international treaties in the national legal order of Ukraine. In fact, the necessity to apply binding decisions of institutions established under the framework of an international agreement, as in the case of the Association Council envisaged by the AA, had not previously been known in Ukraine. Therefore, it is crucial that a special implementation law with regards to the application of the EU-Ukraine AA be adopted soon. Furthermore, interpretation of national legislation in light of EU law, or “Euro-friendly interpretation,” is also essential for the effective implementation of the EU-Ukraine AA.\textsuperscript{494}

There are also some difficulties with implementing the AA taking into consideration provisions of the national constitution. Under Article 9 of the Constitution of Ukraine, the AA becomes part of the national legislation of Ukraine, as any other international treaty ratified by the Parliament of Ukraine. In accordance with Article 19 (2) of the Law “On International Agreements of Ukraine” No. 1906-IV of 2004, provisions of ratified international treaties take priority over conflicting national legislation. However, in accordance with Article 9, para. 2 of the Constitution, international treaties cannot enjoy priority over constitutional provisions, if such treaties contradict the Constitution of Ukraine.

In this regard, it is important to note that some of the provisions of the EU-Ukraine AA do contradict national constitutional provisions. For instance, Article 5 of the Constitution of Ukraine states that “The right to determine and change the constitutional order in Ukraine shall belong exclusively to the people and shall not be usurped by the State, its authorities or officials.” Hence, the constitutional principles of legality and sovereignty are in conflict when it comes to approximation of national legislation to the dynamic EU acquis, because Ukrainian institutions do not take part in the decision-making process of the legislation of the Union.

In addition, there are constitutional challenges to the ratification of the Rome Statute on the International Criminal Court.\textsuperscript{495} The obligation of Ukraine to ratify and implement the Rome Statute is stipulated by Article 8 of the EU-Ukraine AA. However pursuant to the ruling of the Constitutional Court of Ukraine, some provisions of the Rome Statute

\textsuperscript{493} Article 475, Title VII of the EU-Ukraine Association Agreement, 2014.


contradict the Constitution of Ukraine and therefore can only be ratified when, and if, the respective changes are introduced into the Constitution.\textsuperscript{496}

In fact, some candidate states did amend their constitutions before joining the EU in order to provide for direct effect of the international treaties.\textsuperscript{497} Ukraine could also follow this example, though introducing changes to the Constitution of Ukraine is a complex procedure. Nevertheless, it is very likely that with the conclusion of the AA, further constitutional reform will follow, making it possible to effectively implement the objectives of the agreement, including the approximation of national legislation to that of the EU.

5. Institutional Mechanisms for the Implementation and Adaptation of Ukrainian Legislation to the EU \textit{acquis}

In order to implement the EU-Ukraine PCA and to enhance the integration process, a number of enactments was adopted, which establishes the institutional framework for European integration with the respective institutional mechanism in place, as well as defines the scope of the competences of respective executive authorities.

Since Ukraine launched the Programme of Adaptation, quite extensive institutional reform has taken place. Thus, in accordance with the Strategy of Integration, the President is charged with carrying out the European integration policy of the state, defining the external policy priorities, guiding the integration strategy and authorising agencies, organisations and institutions to implement measures concerning the integration process.\textsuperscript{498}

In 2000, the National Council on the adaptation of Ukrainian legislation to the legislation of the EU (National Council)\textsuperscript{499} was set up, followed two years later by the establishment of the State Council on European and Euroatlantic integration issues.\textsuperscript{500} These authorities monitored the course of the integration process and could only issue non-binding proposals.

Until 2002, the process of the adaptation of domestic legislation to the EU laws was \textit{de facto} exercised by the executive branch of power. This could be the reason why there was no coherent institutional mechanism that would coordinate the adaptation process within all branches of power in Ukraine.\textsuperscript{501} As a result, there were inconsistencies in regulations adopted by the executive authorities and the laws adopted by the Parliament. For this


\textsuperscript{498} Decree of the President of Ukraine “On Approval of the Strategy of Integration of Ukraine into the European Union” No. 615/98 of 11.06.1998 (\textit{Ofizijniy Visnyk Ukrainy} (official publication), 1998, No. 24, p. 3, para.870).

\textsuperscript{499} Decree of the President of Ukraine “On the National Council on the Adaptation of Ukrainian legislation to the legislation of the EU” No. 1033/2000 of 30.08.2000 (\textit{Ofizijniy Visnyk Ukrainy} (official publication), 2000, No. 35, p. 12, para. 1481).


reason, the Parliamentary Committee on European Integration Issues was established in 2002 and the Concept of the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU was adopted.502

However, until 2004 there was no single authority that was solely responsible for pursuing the integration policy of Ukraine and implementing its objectives. Competences regarding the integration process were divided among what was called the Ministry of Economy and European Integration,503 the Ministry of Foreign Affairs and the Ministry of Justice.

In 2004 the institutional mechanism underwent another substantial change: specifically, the establishment of the Coordination Council on Adaptation of Ukrainian Legislation to the EU Legislation (Coordination Council) within the Ministry of Justice.504 Resolution No. 1365 stated that the main purpose of the Coordination Council was to ensure the interaction of state authorities and non-state institutions during the execution of the State Programme for Adaptation of Ukrainian Legislation to the Legislation of the EU. The Council is headed by the Prime-Minister of Ukraine. The main tasks of the Coordination Council include the development of proposals for cooperation with the European Union in the adaptation of Ukraine’s legislation to that of the EU; the determination of the authorities responsible for the organisation of adaptation work; and the creation of annual action plans and annual reporting to the Parliament of Ukraine on the implementation of the Programme of Adaptation. To perform its duties of approximating Ukrainian legislation to that of the EU, the Coordination Council has the right to engage employees of ministries and other officials in its work; to require all necessary documentation and materials from ministries and other executive authorities, institutions and organisations; to get information on the current state of execution of the Coordination Council’s decisions regarding the adaptation process in the form of reports from ministries and other authorities; to establish advisory and expert committees, working groups, engaging employees of central and local executive authorities, organisations, institutions, scholars and experts, also including experts from abroad.

Branch ministries and other executive authorities also perform tasks relating to the adaptation of legislation within their competence. Some agencies perform specific tasks on education and retraining, and improving the qualifications of specialists dealing with European integration issues (e.g. the National Agency for Civil Service and the National Academy of Public Administration).

503 Since 2011, this has been the Ministry of Economic Development and Trade of Ukraine, established in pursuance of the Presidential Decree No. 634/2011 of 31.05.2011 (Ofiliznyi Visnyk Ukrainy (official publication), 2011, No. 41, p. 20, para. 1666).
The assessments regarding conformity of draft national legislation with the *acquis communautaire* is carried out at the parliamentary as well as at the governmental level. The functions concerning adaptation of the legislation are divided between the Parliament of Ukraine, the Cabinet of Ministers and the Ministry of Justice.

The Parliament of Ukraine, as the central legislative authority, is responsible for the adoption of laws, introducing changes to the State Programme of Adaptation of Legislation as well as carrying out judicial expertise of draft laws on their conformity to *acquis communautaire*. There is a special Committee within the Parliament – the Committee on European Integration – which coordinates the work of Parliament in the area of legislation adaptation.

The Cabinet of Ministers of Ukraine implements the State Programme of Adaptation of Legislation and annually includes costs for the implementation of the Programme into the annual draft of the State Budget of Ukraine. The Department of European Integration, established within the Cabinet of Ministers, provides for organisational, analytical, legal, informational and other support in the activities of the Cabinet of Ministers aimed at the realisation of the state policy in the sphere of Ukraine’s integration into the EU and the adaptation of its legislation to that of the EU.

The Ministry of Justice of Ukraine is the authorised central executive authority in the adaptation of national legislation to EU law. The following functions are entrusted to the Ministry of Justice as regards the adaptation of the national legislation: ensuring implementation of policy on adaptation of Ukrainian legislation to the EU law; submitting annual proposals to the Ministry of Finance regarding the formation of a state budget, taking into account the funding for the implementation of the State Programme of Adaptation; monitoring the implementation of the State Adaptation Programme together with the Committee on European Integration of the Parliament of Ukraine; and providing expert, scientific, analytical, methodological and informational support for the State Adaptation Programme, the translation of the *acquis communautaire* and managing a glossary of *acquis communautaire* terms.

In recent years, the institutional mechanism had undergone quite quick and occasionally unpredictable changes. For instance, the Centre of European and Comparative Law was established within the Ministry of Justice of Ukraine in 2003.\(^505\) The Centre, however, functioned for only one year before being replaced in 2004 by a new executive authority, the State Department on Adaptation of Legislation, which was also subordinated to the Ministry of Justice.\(^506\) The new department was soon dissolved in 2011 by Resolution No.

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\(^505\) According to the Resolution of Cabinet of Ministers of Ukraine “On the Establishment of Centre for European and Comparative Law” No. 716 of 15.05.2003 (*Ofizijnji Visnyk Ukrainy* (official publication), 2003, No. 21, p. 378, para. 936).

of the Cabinet of Ministers of Ukraine with a view to “optimising the central system of executive authorities agencies.”

Such institutional changes, however, are not always helpful for a consistent integration policy and the adaptation of national legislation to that of the EU.

6. Conclusions

Ukraine’s participation in international organisations on one hand, and its course towards European integration on the other, means that the state is bound by various agreements and commitments of both a “hard” and “soft” legal nature. Pursuant to national constitutional provisions, ratified international treaties are binding and constitute part of the national legislation of Ukraine. This implies that the 2014 EU-Ukraine Association Agreement as the legal basis for the EU-Ukraine relations is binding, and therefore constitutes hard law for Ukraine.

Previously, the adaptation of Ukraine’s national legislation to the EU law, was seen as a “soft commitment” or “voluntary harmonisation.” The soft nature of Ukraine’s commitments concerning bringing national legislation in line with the law of the Union was especially evident in the vague wording of the EU-Ukraine PCA of 1994, despite the PCA being binding for Ukraine. However, even the soft commitment of Ukraine to comply with the EU acquis might have a similar effect as the compliance with binding instruments, provided that voluntary compliance takes place.

Furthermore, it is possible to suggest, that Ukraine’s “soft” obligations to approximate its legislation with that of the EU can be hardened when the respective binding agreement with more stringent obligations of Ukraine to approximate its national legislation to the EU acquis is in place.

Hence, with the conclusion of the EU-Ukraine AA in 2014, and given the current political and legal developments in Ukraine, the relationship between the Union and Ukraine is stepping into a new phase with more “hard” obligations of Ukraine to adapt its laws to that of the EU as well as the obligations of the Union to support legal and institutional reforms in Ukraine.

Despite the usage of different terms in different provisions of the 2014 EU-Ukraine AA, such as “harmonisation”, “approximation” and “adaptation”, it is nevertheless clear that Ukraine is expected to bring its legislation in line with that of the EU and set up effective institutional mechanisms to perform this task.

Moreover, the conclusion of the Association Agreement can be seen as an important step forward in ensuring and securing common values, respect for democratic principles and the rule of law, and continuing the course for further European integration of Ukraine. The
EU-Ukraine AA ultimately sets up a single legal framework and a complex mechanism for the approximation of legislation and dispute settlement, along with a monitoring mechanism for the effective implementation of the Agreement that is distinct from other types of integration without membership, thus making the EU-Ukraine AA a rather innovative legal instrument in the external relations of the Union.

While stipulating more “hard” obligations for the approximation of the national legislation, and provided that the respective institutional mechanism is in place, it could be argued that the EU-Ukraine AA will have a positive effect on bringing the Ukrainian legislation in line with that of the EU, even without clear membership prospects in the Union.
Chapter III. Labour Law and Labour Protection in Ukraine: Conformity with International Standards in the field of OSH

This chapter focuses on the conformity of Ukrainian national legislation with international instruments in the area of occupational safety and health. For this, the labour law of Ukraine and its sources as well as general conformity of the constitutional provisions to international treaties is analysed. The chapter also draws on the country’s policy on occupational safety and health as well as the current legal framework in this field. This it followed by an examination of safety and health issues in international instruments, specifically of the ILO, the EU and the Council of Europe. The chapter closes with an assessment of the degree to which Ukrainian legislation conforms to international instruments, paying particular attention to the approximation of national legislation to EU standards on OSH.

1. The Labour Law of Ukraine, its Sources and Correspondence with International Norms

1.1. Sources of Labour Law of Ukraine

The system of labour law sources of Ukraine is built on the principle of hierarchy of norms and consists of:

- The Constitution of Ukraine;
- Ratified international agreements;
- The laws of Ukraine;
- Subordinate normative-legal acts and regulations;
- Regulations of social partnership;
- Regulations of local executive authorities;
- Local regulations.

The main source of labour law in Ukraine constitutes its basic law, namely the Constitution of Ukraine adopted on 28 June 1996.509 The Constitution of 1996 contained new principles of labour relations regulation previously unknown in Soviet times. Articles 3, 8, 19, 21-24, 36, 43-46, 49, 50, 55-61, 64 and 68 enshrined the main labour rights of a person, as well as social and labour protection, and health care.

Besides the Constitution and ratified international treaties, the main source of labour law is the Labour Code of Ukraine of 1971,510 inherited from the Soviet Union times. In addition to Chapter XI on Labour Protection (Occupational Safety and Health) of the 1971 Labour Code, the regulation methods concerning labour protection are also enshrined into other

chapters of the Code, namely in Chapter IV on Working Time, Chapter V on Periods of Rest, Chapter III on Labour Contract, Chapter XII on Women’s Labour, Chapter XIII on Youth Labour, Chapter XVI on Trade Unions, Chapter XVIII on Supervision and Control over Observance Labour Legislation. Over the past decades, there were numerous changes introduced to the Labour Code of 1971. Nevertheless, a number of provisions of the 1971 Code are still largely outdated and it is evident that the Labour Code of 1971 as a whole has not been able to adequately react to modern labour relations.

An early draft of the new Labour Code, which has been intensively debated in Ukraine since 2000, had serious disadvantages – it was not oriented to a market economy and did not correspond with new socioeconomic conditions. Ultimately, a new draft of the Labour Code of Ukraine No. 1658 was proposed in the parliament in December 2014 and passed the first reading on 5 November 2015. This draft had been sent to the ILO for an analysis on its conformity to international standards and has been prepared for the second reading in the parliament of Ukraine. Hence, it is expected that the new Labour Code will be adopted in the near future.

Other sources of national labour legislation include separate labour laws, the majority of which have been incorporated into the Labour Code of 1971.


In addition, subordinate normative legal acts, such as decrees of the Parliament of Ukraine, enactments of the Cabinet of Ministers of Ukraine, decrees of the President of Ukraine, regulations of the Ministry of Labour and Social Policy, acts of local government bodies as well as collective bargaining agreements also constitute the sources of the country’s labour law. Such acts, however, should not contradict the Constitution and laws of Ukraine.

512 As of March 2018.
Furthermore, the Resolutions of the Supreme Court of Ukraine have also been used to serve as a source of labour law and have had an impact on the application of international legal norms by national courts. However, with the diminished role of the Supreme Court in the course of the legal reform in 2010, this source of law does not have considerable weight nowadays.\textsuperscript{518}

1.2. The Conformity of Ukrainian Constitutional Provisions to International Norms

The 1996 Constitution of Ukraine provides for a wide range of labour rights, due to the inclusion of rights and freedoms laid down in international treaties on human rights. Thus, some of the provisions of the 1948 Universal Declaration of Human Rights, as well as of both International Covenants (1966), are explicitly reflected in the Constitution. For the first time after the collapse of the Soviet Union, the following rights and freedoms were enshrined in the Constitution of Ukraine of 1996: the right to entrepreneurial activity that is not prohibited by law (Article 42); the right to labour (Article 43); the right to strike (Article 44).

Pursuant to Article 3 of the Constitution, the human being, and his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and course of the state’s activities. Affirming and ensuring human rights and freedoms is the main duty of the state.

According to Article 43 of the Constitution, everyone has the right to labour, including the possibility to earn one’s living by labour that he or she freely chooses or to which he or she freely agrees. This provision is formulated in line with Article 23 of the Universal Declaration of Human Rights, 1948. Pursuant to para. 2, Article 43 of the Constitution, the obligation of the state is to create conditions for citizens to fully realise their right to labour. The state should also guarantee equal opportunities in the choice of profession and of types of labour activity, and should implement programmes of vocational education, training and retraining of personnel according to the needs of society. According to para. 3, Article 43, the use of forced labour is prohibited. This corresponds to Article 8 of the International Covenant on Civil and Political Rights, 1966, the ILO Forced Labour Convention, 1930 (No. 29) and the ILO Abolition of Forced Labour Convention, 1957 (No. 105). Para. 4 Article 43 states that everyone has the right to proper, safe and healthy working conditions, and to remuneration no less than the minimum wage as determined by law. The employment of women and minors for work that is hazardous to their health is prohibited (para. 5, Article 43). Citizens are guaranteed protection from unlawful dismissal (para. 6, Article 43) and the right to timely payment for labour is protected by law (para. 7, Article 43).

Under Article 46 of the Constitution, citizens have the right to social protection, including the right to financial security in cases of complete, partial or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control, in old

\textsuperscript{518} For more on the role and functions of the Supreme Court of Ukraine see Chapter V (Section 2.4.) of this thesis.
age, and other cases determined by law (para.1) This right is guaranteed by general mandatory state social insurance based on insurance payments made by citizens, enterprises, institutions and organizations as well as by budgetary and other sources of social security; and by establishing a network of state, communal and private institutions caring for people incapable of work.

The right to strike, which is stipulated by the Constitution of Ukraine, corresponds to Article 8 of the International Covenant on Economic, Social and Cultural Rights, 1966. According to para. 2, Article 44 of the Constitution, the procedure for exercising the right to strike is established by law, taking into account the necessity to ensure national security, health protection, and the rights and freedoms of other persons. Also, no one may be forced to participate or not to participate in a strike (para. 3) and the prohibition of a strike is possible only on the basis of the law (para. 4).

Article 45 of the Constitution provides everyone who is employed the right to rest. This right is to be ensured by providing weekly rest days, paid annual vocation, and the establishment of a shorter working day for certain professions and industries, as well as reduced working hours at night. Such provisions are in line with Article 7 of the International Covenant on Economic, Social and Cultural Rights as well as with Article 24 of the Universal Declaration of Human Rights. Para. 3, Article 45 of the Constitution states that the maximum duration of working hours, the minimum duration of rest and of paid annual vacation, days off and holidays, as well as other conditions for exercising this right will be determined by law.

According to Article 49 of the Constitution, everyone has the right to health protection, medical care and medical insurance. Health protection is to be ensured through state funding of the relevant socioeconomic, medical/hygiene, health improvement and preventive health programmes. Furthermore, the state is to create conditions for effective medical services that are accessible to all citizens (para. 3).

Article 50 of the Constitution states that everyone has the right to an environment that is safe for life and health, and to compensation for damages caused by violation of this right. Also, everyone must be guaranteed the right of free access to information about the environmental situation and the quality of food and consumer goods, as well as the right to disseminate such information. No one shall make such information secret.

Freedom of association is enshrined in Article 36 of the Constitution. Citizens of Ukraine have the right to take part in trade unions with the purpose of protecting their labour and socioeconomic rights and interests, in accordance with para. 3, Article 36 of the Constitution. Trade unions can be formed without prior permission on the basis of the free decisions of their members. Moreover, according to para. 5, Article 36, all associations of citizens are equal before the law.

In accordance with Article 55 of the Constitution of Ukraine, human and citizens’ rights and freedoms are protected by the court. Para. 2 of Article 55 states that everyone is guaranteed the right to challenge in court the decisions, actions or lack thereof by state authorities, local self-government bodies, officials and officers. Also, everyone has the right of appeal for the protection of his or her rights to the Authorized Human Rights...
Representative (Ombudsman) of the Verkhovna Rada of Ukraine (para. 3). Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law (para. 5). After exhausting all domestic legal remedies, everyone has the right to appeal to the relevant international judicial institutions or the relevant bodies of international organizations which Ukraine is a member of for the protection of his or her rights and freedoms (para. 4. Article 55). It should be noted that the inclusion of this provision in the Constitution of 1996 changed the mechanism of the protection of rights, thus making it possible to directly appeal to the courts for labour rights protection in cases of their violation. Before 1996, almost all individual labour claims in Ukraine were first addressed to special commissions that specifically dealt with such cases.519

Pursuant to Article 57 of the Constitution, everyone is guaranteed the right to know his or her rights and duties (para. 1). Laws and other normative legal acts that determine the rights and duties of citizens must be brought to their notice in compliance with procedures established by law (para. 2). Laws and other normative legal acts that determine the rights and duties of citizens, but which have not been brought to their notice in compliance with procedure established by law, shall be considered invalid.

Once ratified by Verkhovna Rada of Ukraine, international treaties that are in force are part of the national legislation of Ukraine, as stated in the Article 9 of the Constitution. Para. 2, Article 9 of the Constitution specifies that the conclusion of international treaties that contravene the Constitution is possible only after introducing relevant amendments to the Constitution. Therefore, the International Covenants of 1966 as well as ILO conventions constitute sources of Ukrainian labour law. Also, sources of labour law of Ukraine include regional legal acts such as the European Convention on Human Rights, 1950, and the European Social Charter (revised) of 1996.

There is a principle of priority of international legal norms over national legal norms in accordance with Article 8-1 of the Labour Code of Ukraine. Therefore, in case an international treaty that Ukraine is a party to sets out different norms than those contained in labour legislation of Ukraine, the norms of the international treaty will thereafter be applied. This norm is obligatory for the courts as well when deciding on labour law cases. In practice, however, the principle of the priority of international norms is not always complied with by the courts in Ukraine, as this study will later illustrate.

2. Safety and Health Legislation of Ukraine

2.1. National Policy on Occupational Safety and Health

Pursuant to Article 43 of the Constitution of Ukraine, the national policy on occupational safety is formulated by the Parliament of Ukraine (the Verkhovna Rada) and focus on providing proper, safe and healthy working conditions, thus preventing occupational diseases and accidents at work. The government of Ukraine (the Cabinet of Ministers) is

charged with executing the state labour protection policy. The government also submits a national programme on the improvement of occupational safety, hygiene and the work environment for approval by the Parliament. Moreover, the government directs and coordinates activities of ministries and other central executive authorities in terms of the creation of healthy and safe working conditions as well as the supervision of labour protection; it also establishes a unified system of state statistical reporting on issues related to labour protection.

In accordance with Article 4 of the Law “On Labour Protection” No. 2694-XII of 1992, the national policy on occupational safety and health in Ukraine is based on the following principles:

- Priority for life and health of a worker;
- Full employer responsibility for the provision of proper, safe and healthy working conditions;
- Increasing industrial safety levels by the securing of comprehensive technical control over products, technologies and production conditions, and assistance to enterprises in ensuring safe and healthy working conditions;
- Complex solution of tasks of labour protection based on nation-wide, industry, regional programs on this issue and taking into account other directions of economic and social policy, achievements in science and technology and environmental protections;
- Social protection of workers, full compensation of damage for workers which have suffered from occupational diseases or accidents at work;
- The establishment of uniform OSH requirements for all enterprises and entrepreneurial entities regardless of the ownership form and the area of economic activity;
- The adaptation of working processes, taking into account workers’ abilities and their health and psychological condition;
- The use of economic methods of labour protection management, state’s participation in financing the measures aimed at labour protection, attraction of voluntary contributions and other revenues for these purposes that does not contradict the national legislation;
- Informing the population on OSH issues, carrying out training, professional training and advanced training of workers concerning labour protection;
- Cooperation and coordination of public authorities and NGOs dealing with OSH issues, cooperation and consultation among employers and workers or their representatives, and consultation among all social groups on matters of OSH at the local as well as at the national level;
International cooperation on OSH issues, including the use of international experience for the improvement of working conditions with regard to health and safety.\textsuperscript{520}

In 2013, the State National Programme on Improving Safety, Occupational Health and the Working Environment for the years 2014-2018 was adopted.\textsuperscript{521} The aim of the Programme has been to provide comprehensive solutions in the field of labour protection, to ensure a safe and healthy working environment, and to minimize the risks of occupational injuries, diseases and accidents at work; this in turn is to contribute to sustainable economic development and social progress as well as the preservation and development of labour potential in Ukraine. The Programme envisages methods and means for solutions in the field of labour protection. Among the first two issues addressed by the Programme are the necessity to increase the effectiveness of public health and safety management, in particular by: (1) adapting the normative-legal framework on labour protection in line with requirements and legislation of the EU; and (2) improving the system of state oversight (inspection) and public oversight over compliance with national health and safety legislation, the optimisation of structural health and safety units of central and local executive authorities and local self-governments.

Other ways to deal with problems regarding OSH in Ukraine that have been suggested include improving public health and safety management through reforming state administrative labour protection authorities (the labour administration); the monitoring, design, implementation and operation of the OSH management system at the national, sectoral and regional levels; deregulation of business activities by simplifying the licensing system in the field of labour protection and the introduction of the declarative principle of self-surveillance of labour protection and occupational safety at enterprises; the development and implementation of economic incentives for employers corresponding to the level of safety, injury rates, occupational diseases and current state of health and safety at a given enterprise; increasing the level of employers’ responsibility for providing healthy and safe working conditions as well as timeliness and reliability of submitted information as regards the states of labour protection at enterprises; improving the system of record-keeping and data analysis on accidents at work and occupational diseases; improving the mechanism of detection of cases when industrial accidents and occupational diseases are being concealed; the development and implementation of innovative technologies in current production processes, along with introducing new types of individual and collective protection while using modern materials and scientific achievements in the field of labour; rehabilitation and modernization of health services in workplaces, especially those workplaces with severe, harmful and dangerous working conditions; the development of a state system of requirements regarding training, including advanced training on OSH issues; the expansion of the OSH information system for the


public; increasing the level of scientific and technical research on OSH, focusing on prevention of occupational accidents and diseases (this includes the formation of responsible personal attitudes by employees regarding their own health and safety at work as well as the healthy and safe working conditions of others); and the use of national and international experience in improving conditions of OSH through international cooperation.

In order for the OSH system to function properly at a workplace, employers and the workers involved are obligated to cooperate according to their responsibilities defined by law. Hence, an employer is obliged to create working conditions in accordance with laws and regulations on OSH at the enterprise level as well as at the level of each structural unit, and ensure compliance with statutory requirements regarding workers’ rights to safe and healthy working conditions.\(^{522}\) The employer also must establish a Labour Protection Service.\(^{523}\)

Furthermore, there is an obligation to conclude a collective agreement between an employer or an authorized body on the one side, and one or more trade union organizations or other bodies authorized by the working collective, or a workers’ representative, on the other side. The obligation to conclude a collective agreement is based on a stipulation of the parties’ obligation to promote the regulation of labour relations between employees and employers as well as to defend the interests of both parties. Collective agreements are concluded within the scope of the Law of Ukraine “On Collective Agreements and Accords” No. 3356-XI of 1993.\(^{524}\)

Also, in accordance with Article 20 of the Law of Ukraine “On Labour Protection” No. 2694-XII of 1992, the collective agreement obliges the parties to provide for the social guarantees in the field of occupational safety and labour protection at the level not lower than stipulated by law. Furthermore, pursuant to the Law, the responsibilities of the parties to the collective agreement and comprehensive measures to be introduced in order to achieve standards set in the area of occupational safety, hygiene and the working environment, and improvement of the existing level of labour protection; and the prevention of occupational injuries, diseases and accidents at work. In addition, it determines the amounts and sources of financial support necessary to implement the measures on OSH. Provisions of a collective agreement apply to all workers irrespective of their membership in a union and are binding on employees as well as on employers or the relevant authorized body.


\(^{523}\) In accordance with the Model Regulation “On Labour Protection Service,” approved by the Order of the State Committee of Ukraine on Labour Protection Supervision, No. 255 of 15.11.2004 (Ofizinyi Visnyk Ukrainy (official publication), 2004, No.48, p. 162, para. 3191).

2.2. National Legal Framework on Occupational Safety and Health

Provisions on occupational health and safety issues are contained in the Labour Code of Ukraine of 1971, the Law of Ukraine “On Labour Protection” No. 2694-XII of 1992, the Law of Ukraine “On Mandatory State Social Insurance” No. 1105-XIV of 1999, and other laws and regulatory legal acts adopted pursuant thereof, international conventions and agreements ratified by Ukraine, decrees and orders of the President of Ukraine, resolutions of the Government of Ukraine, as well as in numerous regulations including regulatory normative acts of ministries and other central state executive authorities. Today, there are more than a hundred national laws of Ukraine and more than two thousand subordinate legal acts (bylaws) in force, which are focused on the regulation of specific issues pursuant to the Law “On Labour Protection” and which deal with OSH as well as with working conditions more generally.

For the convenience of the analysis of the legal framework on OSH issues and labour protection in Ukraine, normative legal acts are divided into two groups according to their legal force/effect:

Group I constitutes the laws of Ukraine with the highest legal force;

Group II of normative-legal acts is comprised of resolutions of the Parliament, orders of the President of Ukraine, decrees of the Cabinet of Ministers of Ukraine, normative regulations of ministries and other central executive authorities.

2.2.1. Group 1: Laws of Ukraine on Occupational Safety and Health and Labour Protection

The first group of analysed national legislation dealing with OSH and labour protection includes the laws of Ukraine, which have the highest legal force in the hierarchy of norms, after the Constitution of Ukraine and ratified international agreements.

2.2.1.1. The Labour Code of Ukraine of 1971

Article 153 (Chapter XI on Labour Protection) of the Labour Code of Ukraine\(^{529}\) provides for healthy and safe working conditions in all enterprises, organizations and institutions, as well as stipulates the obligation of employers to ensure such working conditions. Employers are required to introduce modern safety techniques and ensure sanitary and hygienic conditions in order to prevent occupational accidents and diseases. Also, an employer is not be entitled to demand performance of work by an employee, when this work, due to its hazardous nature, poses a direct threat to the life of an employee or under such working conditions which do not comply with legislation on labour protection. An employee has the right to refuse to perform any work harmful to his or her life and health, the life and health of other people, or work that has a harmful influence on the environment. In addition, employers are obliged to carry out systematic training and instructing workers on OSH matters.\(^{530}\)

Article 159 of the 1971 Labour Code lays out the obligations of an employee in fulfilling the requirements of regulatory acts on labour protection. This above all means that employees must have knowledge about and must comply with the requirements of normative regulations on labour protection, on the use of vehicles, machinery and equipment at work, and on the use of collective and individual means of protection. Also, employees must comply with OSH requirements outlined in collective agreements, labour contracts and the internal labour regulations of enterprises; they must undergo preliminary and periodic medical examinations; and they must cooperate with employers in organizing safe and healthy working conditions to prevent situations that might harm life and health of people, or that would have a harmful effect on the environment.

Article 160 of the Labour Code of 1971, stipulates the obligation of employers to exercise constant supervision and oversight over compliance with requirements of normative legal acts on labour protection by employees. Labour collectives and trade unions through their representatives also must exercise control over compliance with labour legislation at the workplace.

Furthermore, the provisions of the 1971 Labour Code contain requirements regarding special protective clothing and equipment for workers that perform harmful or hazardous work (Article 163); if an employer does not provide workers with such protective clothes or equipment on time, compensation must be paid to the workers who have to purchase such equipment at their own expense (Article 164); employers are also obliged to provide workers who are performing hazardous work with soap and disinfectants (Article 165); and to provide workers with preventive nutrition (Articles 166 and 167). Furthermore, Article 168 states that employees are entitled to extra work breaks if they are working outside in the cold season or in unheated buildings or loaders, as well as some other special category of workers. Such working breaks are counted as working time. Compulsory periodical medical examination of employees involved in work which is harmful or dangerous for health, as well as all employees under the age of 21, is also an obligation of


employers (Article 169). According to their state of health and with their consent, workers may be transferred to less harmful jobs (Article 170). Pursuant to Article 171, employers are obliged to investigate and record incidents, occupational diseases and accidents at work. In case a worker’s health is affected by the performance of his or her duties, the worker is entitled to compensation for damages in accordance with the law (Article 173).

Since 2001, when the Law “On Mandatory State Social Insurance” No. 1105-XIV 531 came into force, the obligation to compensate for damages to a worker’s health has been located with the Social Insurance Fund against Accidents at Work and Occupational Diseases. 532

Separate chapters of the Labour Code of 1971 are dedicated to the employment of women and youth. 533 According to Article 174, it is forbidden to employ women to perform strenuous work or work with harmful or dangerous working conditions as well as underground work, except for underground work that requires no physical strength or is in the field of sanitation and social services. The employment of women in lifting and carrying things whose weight exceeds the established limits is forbidden. The list of strenuous work and work with harmful and dangerous working conditions in which the labour of women is forbidden, as well as the limits for lifting and carrying heavy things by women is approved by the Ministry of Health of Ukraine in consultation with the State Committee for Labour Protection of Ukraine. Furthermore, it is forbidden to employ women for night work, except in those industries of the national economy in which this is of particular necessity and is allowed as a temporary measure. However, the law makes exceptions for women working in enterprises in which only family members are engaged (Article 175). 534 Similarly, the law prevents the employment of pregnant women and women with children under three years old in night work, overtime work, and work on days off, as well as business trips (Article 176). 535 Moreover, women with children aged three to fourteen years old, or disabled children, are not to be employed in overtime work or sent on business trips without their consent (Article 177). 536 In accordance with a medical examination, pregnant women and women with children under three years old have reduced output quotas or established service norms, or must be transferred to another job which is easier and excludes the influence of unfavourable industrial factors, with preservation of average salary of the previous job (Article 178). 537

In accordance with Article 187 persons under eighteen years old (minors) are considered equal to adults in labour relations. In the field of labour protection, working hours, paid leave and some other working conditions, minors can also take advantage of additional

533 Chapter XII and XII respectively, the Labour Code of Ukraine of 1971.
535 Article 176 as amended under the Decree of the Presidium of the Verkhovna Rada No. 4841-11 of 30.10. 1987; Law No. 871-12 of 20.03.1991.
536 Article 177 as amended under the Decree of the Presidium of the Verkhovna Rada No. 4841-11 of 30.10.1987; Law No. 871-12 of 20.03.1991.
537 Article 177 as amended under the Decree of the Presidium of the Verkhovna Rada No. 4841-11 of 30.10.1987; Law No. 871-12 of 20.03.1991, No. 263/95-BP of 05.07.1995.
benefits established for this category of workers by legislation of Ukraine. Employment of youth under sixteen years old is not allowed; in exceptional cases, minors who have reached fifteen years of age may be employed with the consent of one of their parents. In accordance with Article 190, it is forbidden to use the labour of youth under eighteen years old in strenuous (severe) work and in work with harmful or dangerous working conditions as well as in underground work. Employment of persons under eighteen years old for lifting and carrying things which weight exceeds the established limits is also not allowed. Finally, the Labour Code prohibits the use of workers under eighteen years old in night work, overtime and days off (Article 192).

2.2.1.2. The Law of Ukraine “On Labour Protection” No. 2694-XII of 14 October 1992

The Law of Ukraine “On Labour Protection” of 1992 is a fundamental normative instrument in the field of OSH. It contains basic provisions regarding workers’ exercise of their constitutional right to protection of their life and health at the workplace, and proper, safe and healthy working conditions. The Law No. 2694-XII also regulates the relationship between employers and employees regarding safety, hygiene and the working environment. Moreover, this Law establishes a uniform procedure for organizing labour protection in Ukraine. The scope of application of the Law No. 2694-XII covers all enterprises, institutions and organizations irrespective of their form of ownership and area of activity, and is valid for all citizens who work in these enterprises. Foreigners and stateless persons working in enterprises located on the territory of Ukraine enjoy the same rights to workers’ protections as citizens of Ukraine.

Pursuant to Article 3 of the Law “On Labour Protection”, legislation on workers’ protection comprises of the Law No. 2694-XII itself, the Labour Code of Ukraine of 1971, the Law “On Mandatory State Social Insurance” No. 1105-XIV of 1999 as well as other regulatory instruments adopted in compliance with the above-mentioned normative legal acts. Furthermore, Article 3 of the Law No. 2694-XII stipulates that in cases where international treaties or agreements to which Ukraine is a party establish regulations on workers’ protection other than those established by Ukrainian legislation, the rules of those treaties or agreements apply.

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538 Article 187 as amended under Law No. 263/95-BP of 05.07.1995.
539 Article 188 as amended under the Decree of the Presidium of the Verkhovna Rada No. 4617-10 of 24.01.1983; Laws No. 871-12 of 20.03.1991, No. 2418-12 of 05.06.1992.
Provisions of the Law “On Labour Protection” No. 2694-XII stipulate the following guarantees for employees regarding their right to health and safety at work:

- *The right to labour protection when concluding a contract with an employer* implies that the terms of an employment contract do not contain provisions that contradict laws and other normative-legal acts in the area of occupational safety and health. When concluding a contract, the employer is obliged to inform the employee on the working conditions (with the written confirmation of the employee) and on any harmful or hazardous industrial factors involved when performing the work; possible consequences of the influence of such factors on the employee’s health, as well as information on the rights employees have for benefits and compensation for the work under such conditions pursuant to legislation in force as well as the collective agreement. Furthermore, the employee cannot be offered a job which, according to the medical report (examination), is forbidden to him or her due to his or her state of health (Article 5).

- *The rights of workers to health and safety at work* stipulates that working conditions; the safety of technological processes, machines, equipment and other means of production; and collective and individual protection equipment which is used by workers must comply with the requirements of legislation in force. Any employee has the right to refuse to perform work assigned to him or her in a working situation, if it is dangerous for his or her life and health, for the life and health of other people or if it is harmful to the working environment. Considering this, the employee must immediately inform the employer about such a situation. Any employee can also terminate his or her employment contract unilaterally if the employer fails to comply with OSH legislation and with the terms of a collective agreement (Article 6).

- *The right of workers to benefits and compensation for severe and hazardous working conditions* provides that workers employed in jobs with severe and hazardous conditions enjoy such benefits as additional paid leave, increased pay rates, shorter working hours, retirement benefits, and other policies in accordance with the legislation in force. The employer has the right to provide employees with more benefits and higher compensation than those stipulated by legislation (Article 7).

- *Provision of protective clothing, other means of individual protection, detergent and disinfectants.* The employer is obliged to ensure the provision of relevant equipment in accordance with legislation on OSH or to compensate the employee for expenses incurred in case the employee obtained such equipment at his or her own expense (Article 8).

- *Compensation for damage caused to an employee that resulted in harm to his or her health or in death* is carried out by the Social Insurance Fund against Accidents at Work and Occupational Diseases.545 The employer may at the enterprise’s expense provide additional compensation to employees or members of their

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families in accordance with the terms of a collective agreement or an employment contract. Those employees that are not able to perform their work due to a condition of health that resulted from the damage are entitled to their average monthly salary as well as the preservation of their job position (occupation) during the entire period of rehabilitation. In case they are no longer capable of performing their previous job, confirmed by a medical examination, employees are entitled to training or retraining, and assignment to another position (Article 9).

- **Occupational safety of women.** The provisions regarding safety and health of women at work stipulate that it is forbidden to employ women in severe work, those with harmful and dangerous working conditions and underground work. However, some underground work which is non-physical work, or work related to health and consumer services is not prohibited. Women also are not allowed to be involved in lifting and moving heavy loads in excess of allowed standards (Article 10). Labour by pregnant women and women with minors is regulated in accordance with respective legislation in force.

- **Labour protection for minors.** The provisions on occupational safety and labour protection for minors state that minors are not allowed at works with severe, harmful and dangerous working conditions, night work, overtime and day off work, as well as lifting and moving heavy loads which exceeds the limits set by law (Article 11).

- **Occupational safety for disabled people.** This provision implies that enterprises that use the labour of disabled people are obliged to create working conditions for them that take into account the recommendations of the Medical-Social Expert Commission and individual rehabilitation programmes, and also must take additional measures that address the specific needs of this category of workers. Employers have an obligation to organize training and retraining programmes for disabled workers in accordance with medical recommendations. Involving disabled workers in overtime work is possible only with their consent, provided that it does not contradict the recommendations of the Medical-Social Expert Commission (Article 12).

Article 13 of the Law “On Labour Protection” contains provisions on **employers’ obligations.** Employers are to create healthy and safe working conditions at their enterprises and all their structural units, and must ensure observance over the legislation on workers’ rights in the field of health and safety. For this purpose, employers must maintain a **safety management system,** particularly by:

- Establishing appropriate services and appointing officials to provide solutions on health and safety issues, approving instructions on the duties, rights and responsibilities of such officials and monitoring officials’ compliance with their duties;

- In cooperation with the parties to a collective agreement, developing and implementing comprehensive measures to achieve the requirements of OSH standards;

- Introducing advanced technologies and developments in the area of OSH;
- Ensuring implementation of preventive measures deemed necessary according to changing circumstances;
- Ensuring the proper maintenance of buildings, structures and production equipment as well as monitoring the technical conditions of such property;
- Ensuring elimination of elements that might cause accidents and occupational diseases and the provide preventive measures;
- Organizing occupational health and safety audits and research on working conditions, assessment of technical conditions of working equipment and facilities, and certification of workplaces regarding compliance with OSH legislation;
- developing and approving local OSH regulations and instructions for use at an enterprise and informing workers about such rules and regulations;
- Monitoring workers’ compliance with technological processes, handling of vehicles, machinery, equipment and other means of production according to OSH requirements;
- Promoting safe working methods and collaboration with occupational safety officials;
- Taking immediate action to provide help to injured people and/or victims in the event of accidents and emergencies at an enterprise.

The Law “On Labour Protection” No. 2694-XII stipulates the direct liability of the employer for any violations of the above-mentioned requirements.

Also, the Law No. 2694-XII enshrines provisions stipulating workers’ obligations to comply with OSH legislation. Thus, pursuant to Article 14 of the Law, a worker is obliged: to care for personal safety and health as well as the safety and health of other people present during the performance of any work or while remaining on the premises of an enterprise; to have knowledge of and comply with the requirements of OSH legislation as well as to comply with rules on the use of machines and machinery, equipment and other means of production, and the use of collective and individual protective clothing and equipment; and to undergo preventive and periodical medical examinations as stipulated by respective legislation. The employee is directly liable for any violation of these requirements.

It is necessary to mention that the Law “On Labour Protection” No. 2694-XII of 1992 was the first regulatory legal act in Ukraine that directed legislation to the protection of rights and interests of citizens, thus ensuring the prevalence of legal regulation methods, as opposed to the USSR Labour Code with its administrative regulation rules.\footnote{546 ILO, \textit{National Profile: Occupational Safety and Health in Ukraine}, executed by Borodin, Kyiv, 2010, p. 6.} In order to bring the instrument in line with requirements of international as well as EU standards, the Law “On Labour Protection” is periodically amended and revised.
2.2.1.3. The Law of Ukraine “On the Legislative Basis of Ukraine on Health Protection” No. 2801-XII of 19 November 1992

Law of Ukraine “On the Legislative Basis of Ukraine on Health Protection” of 1992\(^\text{547}\) also contains provisions directly related to health and safety at the workplace. Article 6 of the Law grants the right of every person to health protection and, \textit{inter alia}, to safe and healthy working conditions as well as the right to legal protection against any forms of discrimination on the basis of one’s state of health. In order to prevent harmful effects on human health and the environment, the Law sets out obligations for owners of enterprises, institutions and organizations to ensure compliance with safety regulations at the workplace and industrial hygiene as well as with other health and safety requirements stipulated by labour legislation (Article 28). Furthermore, the Law requires compulsory health examinations for workers in certain categories, in particular those with hazardous working conditions. Employers are responsible for regular compulsory medical examinations of their employees as well as for the consequences of non-examination of employees which result in adverse harmful effects to their state of health (Article 31). Article 65 of the Law No. 2801-XII enshrines provisions concerning supervision and oversight over working conditions of youth, as well as regular evaluation of their health (Article 66).


The Law No. 1105-XIV\(^\text{548}\) defines the legal basis, the economic mechanisms and the organizational structure of a compulsory state social insurance of citizens in cases of industrial accidents or occupational diseases which cause disability or death at work. It provides, \textit{inter alia}, for the creation of a social insurance fund for occupational accidents; deals with compensation for personal injury; and establishes rights and obligations of the insured and of the employer as an insurer. This Law applies to persons who work under labour contracts at enterprises, institutions and organizations, regardless of the form of ownership and type of the business activity; to self-employed persons and physical persons engaged in entrepreneurial activity.

2.2.1.5. The Law of Ukraine “On Ensuring the Sanitary and Epidemic Wellbeing of the Population” No. 4004-XII of 24 February 1994

The Law No. 4004-XII\(^\text{549}\) includes provisions that require enterprises to develop and implement sanitary and anti-epidemic measures (Article 7); enterprises must ensure that air in industrial and other facilities meets hygienic and sanitary standards (Article 19); employers are required to establish safe and healthy working conditions at the enterprise


and implement measures focused on preventing occupational diseases, poisoning, accidents, injuries as well as environment pollution (Article 22); and enterprises must ensure radiation safety (Article 23) as well as ensure protection from harmful effect of noise (Article 24).


The Law No. 2245-III defines the legal, economic, social and institutional framework of activities related to high-risk facilities. The goal of the Law is to protect the lives and health of people and the environment against the harmful effects of accidents at these sites by means of prevention, the isolation (localisation) of development of such accidents, and their elimination. State supervision and oversight of activities associated with high risks are carried out by state bodies authorized by law, including specially authorized central executive authorities and their respective territorial branches.

Apart from a wide range of laws and regulations specifically regulating labour protection and OSH issues, there are a number of other legal instruments which to a greater or lesser extent contain provisions related to the OSH field. For example, norms related to labour protection are also laid down in the Law of Ukraine “On Standards, Technical Regulations and Conformity Assessment Procedures,” No. 3164-IV of 2005; the Civil Code of Ukraine of 2003, Chapter 82 of which establishes the reimbursement of damages and liability for the detriment of health or the death of an employee resulting from the performance of his or her duties at work. In addition, criminal liability is stipulated by the Criminal Code of Ukraine of 2001, particularly Chapter X is devoted to crimes against industrial safety for violations of legislation on occupational safety (Article 271), violations of safety rules when performing high-risk work (Article 272); infringement of safety rules at enterprises or workshops where there is a risk of fire or explosion (Article 273); violations of safety rules at nuclear or radiation plants (Article 274); and violations of regulations concerning the safe use of industrial products or the safe utilization of buildings and structures (Article 275).

2.2.2. Group 2: Subordinate Legislation on OSH

The second group of legal instruments dealing with occupational health and safety at work consists of a number of bylaws or regulatory and subordinate normative legal acts. These include resolutions of the Parliament of Ukraine, decrees of the President of Ukraine, resolutions and decrees of the Cabinet of Ministers of Ukraine, normative acts and regulations of ministries and other central executive authorities in the field of OSH and

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labour protection. There are more than two thousand such regulations in force in Ukraine. Here is a selected overview of the most important regulations.

2.2.2.1. The Resolution of the Cabinet of Ministers of Ukraine “Some Issues on the Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work” No. 1232 of 30 November 2011

The Procedure of Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work, approved by Resolution of the Cabinet of Ministers of Ukraine No. 1232 of 2011, defines the process of investigation and registration of accidents and occupational diseases that occur with employees at enterprises, institutions and/or organizations, regardless of the form of ownership, as well as in subsidiaries of such enterprises, their separate units or representative offices. The scope of the Procedure also covers physical persons (private entrepreneurs). In the event of an accident at work, a special commission must be created and within three working days it has to investigate the site of the accident; obtain a written explanation from the victim, if possible; interview witnesses of the accident; determine whether the working conditions in question were in conformity with the requirements of labour protection and OSH legislation; clarify the circumstances and causes of the accident; examine preliminary medical reports; determine whether the accident was work-related or not; identify persons who had infringed labour legislation requirements; develop an action plan in order to prevent similar accidents (para. 14).

The Procedure of 2011 replaced the previous instrument on respective issues and brought in some novelties. First of all, the trade unions now hold a more important role in the investigation process of an occupational accident. In addition, if the accident happened to a self-employed person or an entrepreneur who was not a member of a union, the local trade union organization nevertheless must be informed about such an accident. Another aspect of the present Procedure is that the timeframe for investigating an occupational accident changed. Before the adoption of this instrument, the investigation was completed only after an official report of the respective authorities; now there is a one-month period in which the Commission of Inquiry can define an authority, directly investigating the case and sending its report to this authority.

Furthermore, under the current Procedure the employer is obliged to inform the victim of an accident in written form about the establishment of the Commission of Inquiry; the employer also must ensure proper conditions for the work of the Commission when investigating an accident. The terms for the investigation of an accident have also been prolonged by the Procedure from 72 hours to three working days. The 2011 Procedure also includes para. 15 (7), according to which an accident is considered work-related if it


occurred during the execution of actions by a victim in the interest of an enterprise where a 
victim is employed. This implies that an accident is now regarded as work-related even if 
an employee performs actions unrelated to his or her official working duties. These actions 
include the prevention of accidents and the rescue of people or property of an enterprise 
or other activities at the request of the employer. The same applies to participation in 
sports and other mass activities or events that are held by the enterprise. This specific 
paragraph was suggested for inclusion to the Procedure by trade unions. The Procedure 
also specifies that trade union representatives may participate in the investigation of all 
accidents that occur, regardless of whether employees or self-employed persons are 
involved. Therefore, trade unions are empowered to participate in the investigation and, in 
case it is necessary, to prevent the wrongful accusation of a victim and to ensure that an 
accident is work-related.

2.2.2.2. The Resolution of the Cabinet of Ministers of Ukraine “On the Identification 
and Declaration of Safety of High Risk Facilities No. 956 of 11 July 2002

The Resolution No. 956 of 2002\textsuperscript{556} provides for threshold quantities of harmful and 
hazardous substances according categories; standardized threshold quantities of harmful 
substances for identification in high-risk facilities; and threshold quantities of harmful 
substances for individuals. It also establishes a procedure for the identification and 
registration of high-risk facilities, and envisages the maintenance of the State Register of 
High-Risk Facilities as well as determines the procedure for the declaration of safety of 
high-risk facilities.

2.2.2.3. The Resolution of the Cabinet of Ministers of Ukraine “On the Procedure of 
Certification of Workplaces according to Working Conditions” No. 442 of 01 
August 1992

The Procedure of Certification of Workplaces according to Working Conditions of 1992\textsuperscript{557} 
provides for the certification of workplaces, which is conducted at enterprises and 
organizations regardless of the form of ownership, where the manufacturing process, 
equipment or raw materials are potential sources of harmful and dangerous industrial 
factors that may negatively influence workers’ health. The main purpose of certification is 
to regulate relations between the employer and employees regarding fulfilment of the right 
to healthy and safe working conditions, special pensions, and benefits and compensation 
for work in unfavourable conditions. The results of certification are used in determining 
pensions on special terms, benefits and compensation at the expense of enterprises and 
organizations. In addition, as a result of certification, the list of professions and 
occupations that are entitled to preferential pensions is created or renewed, and measures

\textsuperscript{556} Resolution of the Cabinet of Ministers of Ukraine “On the Identification and Declaration of Safety of High 
23, para. 1357).

\textsuperscript{557} Resolution of the Cabinet of Ministers of Ukraine “On the Procedure of Certification of Workplaces 
According to Working Conditions” No. 442 of 01.08.1992.
for the improvement of working conditions and recreation measures for workers are developed.

2.2.2.4. **The Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees, approved by the Order of State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, No. 53 of 24 March 2008**

The Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees of 2008\(^{558}\) applies to enterprises, institutions and organizations regardless their form of ownership. This stipulates that employees must be provided with special protective clothing, footwear and other individual protection equipment for work with hazardous and dangerous working conditions, work related to pollution, or jobs conducted in unfavourable meteorological conditions.\(^{559}\) These provisions are drafted in accordance with Article 163 of the Labour Code of Ukraine of 1971 and Article 8 of the Law “On Labour Protection” of 1992. The employer must ensure purchase, provision, distribution and maintenance of protective equipment in accordance with laws and regulations on labour protection and collective agreements. In addition, those employees who are involved in individual tasks related to elimination of the consequences of accidents, natural disasters etc., when such work is not envisaged by the collective agreement, must nevertheless be provided with protective equipment. Para. 1.3 of this regulation states that the essential requirements of Directive 89/656/EEC on the Use of Personal Protective Equipment\(^{560}\) must be taken into consideration. This is one of the examples, few as they are, where an EU directive has been referred to or mentioned in a national normative regulatory act.

2.2.2.5. **The Resolution of Cabinet of Ministers of Ukraine “On the Procedure for Conducting State Expertise (Inspection) of Technological, Construction and Technical Documentation for Production of Goods and Their Conformity with Normative Acts on Labour Protection” No. 431 of 23 June 1994**

The Procedure for Conducting State Expertise (Inspection) of Technological, Construction and Technical Documentation for Production of Goods and Their Conformity with Normative Acts on Labour Protection of 1994,\(^{561}\) establishes the order in which state examinations of design documentation, the introduction of new technologies and

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\(^{558}\) Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees” No. 53 of 24.03.2008 (Ofizijnyi Visnyk Ukrainy (official publication), 2008, No. 38, p. 98, para. 1275).

\(^{559}\) Para. 1.2 of the Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees, Order No. 53 of 24.03.2008.


manufacturing for the means of production, and collective or individual protection facilities must be conducted, as well as their conformity to labour protection regulations. The main objective of this inspection is to determine the adequacy and quality of project decisions with respect to ensuring safe working conditions as well as to detect deviations from the requirements stipulated by labour protection normative regulations.

2.2.2.6. **The Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Procedure for Issuing Permits for the Performance of Highly Hazardous Work and for the Utilization of Machinery, Mechanisms and Equipment with a High Level of Risk” No. 1107 of 26 October 2011**

The Procedure for Issuing Permits for the Performance of Highly Hazardous Work and for the Utilization of Machinery, Mechanisms and Equipment with a High Level of Risk of 2011 requires the employer to submit the results of an inspection as to compliance with labour protection and occupational safety legislation to the relevant authority in order to perform work with high risk, including works that involve utilization of machines and special equipment with a potentially high rate of risk.

2.2.2.7. **The Resolution of the Cabinet of Ministries of Ukraine “On the Approval of the Procedure for conducting inspection, testing and expert examination (technical diagnostics) of vehicles, machinery and high-risk equipment” No. 687 of 26 May 2004**

The Procedure for Conducting Inspection, Testing and Expert Examination (technical diagnostics) of Vehicles, Machinery and High-risk Equipment of 2004 applies to all commercial entities that carry out inspection, testing and/or expert examination (technical diagnostics) of vehicles, machinery and high-risk equipment; the list of such entities is approved by the Cabinet of Ministers of Ukraine. The Procedure also applies to all enterprises, institutions and organizations regardless of the form of ownership and type of economic activity, as well as to private persons that use hired labour and intend to use or already utilize the applicable equipment.

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2.2.2.8. The Order of the Ministry of Health of Ukraine “On the Approval of the Regulation on the Requirements for sanitary-hygienic characteristics of working conditions” No. 614 of 13 December 2004

The Regulation on the Requirements for Sanitary-hygienic Characteristics of Working Conditions of 2004\(^{564}\) stipulates that sanitary-hygienic characteristics of working conditions must be drafted if an employee is suspected to suffer from occupational disease (or poisoning). Sanitary-hygienic Characteristics of Working Conditions is a document that serves as a basis in any case when the question of the relationship between chronic diseases and the influence of production factors and the labour process is considered, in order to rightly diagnose a chronic occupational disease (para. 1.3 of the Regulation). The hygienic classification of working conditions (based on indicators of hazardousness and the danger of production environment factors, and the severity and intensity of the work process) lists the following factors: harmful substances, as well as physical factors such as noise, infrasound, ultrasound, non-ionizing and ionizing radiation, microclimate, the severity and intensity of labour, etc. (para. 1.3) Sanitary-hygienic Characteristics enumerate which harmful production factors exist at the workplace of an employee that could influence the occurrence and development of occupational disease; this document must be signed by an occupational health physician (or a doctor from another division of the state sanitary-epidemiologic service in case of their involvement), and is approved by the chief sanitary doctor (para. 1.21). During the preparation for the conclusions on sanitary and hygienic working conditions, the employer must submit the necessary documents to the chief sanitary doctor, at the request of the latter. The employer then bears responsibility under the applicable legislation for the completeness and accuracy of the documents submitted (para. 1.14). Persons who have signed the act of examination of working conditions as well as those completing sanitary-hygienic characteristics are responsible for the accuracy of information on working conditions and labour processes outlined in sanitary and hygienic characteristics, in accordance with applicable legislation (para. 1.6).

2.2.2.9. The Order of the State Committee on Labour Protection Supervision “On the Approval of the Model Regulations on the Procedure for Conducting Training and Knowledge Examination of Labour Protection Issues and the List of High-Risk Jobs” No. 15 of 26 January 2005

The Model Regulations on the Procedure for Conducting Training and Knowledge Examination of Labour Protection Issues and the List of High-Risk Jobs of 2005\(^{565}\) sets out the procedure for training and testing of knowledge in labour protection and OSH issues of health and safety officers and employees at the workplace, as well as students, interns


\(^{565}\) Order of the State Committee on Labour Protection Supervision “On the Approval of the Model Regulations on the Procedure for Conducting Training and Knowledge Examination of Labour Protection Issues and the List of High-Risk Jobs” No. 15 of 26.01.2005 (Ofizijnyi Visnyk Ukrainy (official publication), 2005, No. 8, p. 188, para. 455).
during employment and vocational training (para. 1.1). This regulation is aimed at the implementation of a continuous training system on labour protection and first aid assistance in case of accidents at work (para. 1.2). Requirements of the Model Regulations are binding on all central and local executive authorities, local self-government authorities, public institutions and business entities regardless of ownership forms and types of activities (para. 1.3).

2.2.2.10. The Order of the State Committee of Ukraine on Labour Protection Supervision “On the Approval of the Model Regulation on Labour Protection Service” No. 255 of 15 November 2004

The Model Regulation on Labour Protection Service, approved by the Order of the State Committee of Ukraine on Labour Protection Supervision No. 255 of 2004 provides for the establishment of the Labour Protection Service by the employer with the aim of organizing the implementation of legal and organizational as well as technical, sanitary, socio-economic and preventive measures in order to prevent occupational diseases and accidents at work. The main objects of the Labour Protection Service are: the implementation of effective OSH management system; the implementation of preventive measures with the goal of eliminating harmful and hazardous industrial factors, and preventing occupational accidents and diseases and other situations that may pose a danger to the life or health of workers; the examination and promotion of the implementation into the production process scientific achievements, advanced and safe technologies and modern means of collective and individual workers’ protection; supervision of compliance with laws and other regulatory normative acts regarding OSH by workers; informing and guidance to workers on OSH issues. The Labour Protection Service is subordinated directly to the employer and is established at all enterprises with 50 or more employees. At enterprises with fewer than 50 employees, the function of the Labour Protection Service may be performed by a qualified representative. At enterprises with fewer than 20 employees, external specialists must be invited to perform the functions of the Labour Protection Service.

2.2.2.11. The Order of the Ministry of Health of Ukraine “On the Approval of the Weight Limits of Lifting and Moving Heavy Loads by Women” No. 241 of 10 December 1993

The Weight Limits of Lifting and Moving Heavy Loads by Women of 1993 establishes weight limits for women according to different kinds of work. For lifting and moving heavy loads (maximum 2 times per hour), while performing other work in turn, there is a weight

566 Para. 1.3. as amended by the Decree of the State Committee of Ukraine for Industrial Safety, Labour Protection and Mining Supervision No. 273 of 16.11.2007.


limit of 10 kg. For continuous lifting and moving heavy loads during the entire work shift, the weight limit is 7 kg. The total load moved during each hour of the work shift shall not exceed 350 kg (when moved from the working surface level) or 175 kg (when moved from the floor level).

2.2.2.12. The Order of the Ministry of Health of Ukraine “On the Approval of the Weight Limits of Lifting and Moving Heavy Loads by Minors” No. 59 of 22 March 1996

The Weight Limits of Lifting and Moving Heavy Loads by Minors, approved by the Order of the Ministry of Health of Ukraine No. 59 of 1996 like the previous regulation concerning lifting weights by women, establishes limits for minors in the age from 14 to 18 years old who are employed by enterprises, institutions, organizations, educational establishments, legal entities and private individuals. Weight limits are different for male and female minors, and vary according to their age, shortened working time or ordinary shift. Thus, for instance, male minors of 14 years of age are not allowed to lift more than 5 kg during short-time work. For female minors of the same age the limit is 2.5 kg. According to para. 2 of this regulation, it is prohibited to assign minors such types of work which exclusively concern lifting, holding or moving heavy objects. Furthermore, only those minors who have no medical contraindications according to certification by a medical examination may be permitted to perform work that requires lifting and moving heavy loads. Minors under 15 years of age are not allowed to perform work which involves continuous lifting and moving of heavy objects. In addition, the regulation contains working time requirements for minors, which may not exceed 24 hours per week for minors of 14-15 years old and 36 hours per week for minors of 16-17 years old (para. 5). Work including lifting heavy loads must not exceed one-third of the total working time.

2.2.2.13. The Order of the Ministry of Health of Ukraine “On the Approval of the Specification of Heavy works and Works with Hazardous and Dangerous Conditions, under which an Employment of Minors is Prohibited” No. 256 of 29 December 1993

The Specification of Strenuous Work and Work under Hazardous and Dangerous Conditions, under Which the Employment of Women is Prohibited, approved by the Order of the Ministry of Health of Ukraine No. 256 of 1993, sets out a list of very specific professions where the employment of women is not allowed, due to exposure to conditions that are dangerous and/or harmful to physical health. These specific professions are present in the following sectors: (1) metal processing (including casting, welding, forging extension, etc.)

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571 Generally, in the sectors listed in the Specification, work by women is allowed, with the exception of some specific professions present in these sectors.
and thermal work, metal plating and painting, metal assembly work, work with lead); (2) construction, assembly and repair work; (3) mining; (4) geological exploration, topographic and geodesic activities; (5) drilling of wells; (6) extraction of oil and gas; (7) ferrous metallurgy; (8) non-ferrous metallurgy; (9) repair of power plant equipment and electrical grids; (10) abrasives production; (11) electrical production; (12) radio engineering and electronics production; (13) the production and repair of aircraft; (14) shipbuilding and repair; (15) chemical production; (16) rubber processing; (17) the processing of oil, gas, shale and coal, and the production of synthetic oil products and petroleum oils; (18) harvesting work, rafting and tapping wood; (19) the production of cellulose, paper, cardboard and other products thereof; (20) the production of building materials; (21) the manufacture of glass and glass products; (22) textiles and light industry; (23) the food industry; (24) railway and underground transport; (25) automobile transport; (26) maritime transport; (27) river transport; (28) operations, flight training enterprises and organizations and civil aviation flight-testing stations; (29) communications; (30) the printing industry; (31) the manufacture of musical instruments; (32) agriculture; (33) professions common to all sectors of social services (e.g. including divers, firemen).

2.2.2.14. The Order of Ministry of Health of Ukraine “On the Approval of the Specification of Heavy Works and Works with Hazardous and Dangerous Conditions, under which an Employment of Minors is Prohibited” No.46 of 31 March 1994

The Specification of Strenuous Work and Work under Hazardous and Dangerous Conditions, under Which the Employment of Minors is Prohibited, approved by the Order of Ministry of Health of Ukraine No. 46 of 1994, stipulates that employment of minors in the production, occupation and work under difficult and hazardous working conditions (according to the list attached in the regulation) is prohibited at all enterprises, institutions and organizations regardless of the ownership forms and types of economic activity. Admission for training in occupations provided by the list in the regulation is allowed for persons who have reached 18 years of age by the moment of completing their studies (graduation). During practical training (production training) persons under 18 years of age, while being enrolled in professional-educational schools, may be present at the production sites and work specified in the list no more than four hours and under a condition of strict compliance with applicable OSH requirements and labour protection norms.

Other related normative regulations in the field of OSH and those in specific industries include, among others: the Model Regulation on Health and Safety Commission at an Enterprise of 2007; Technical Regulations on Personal Protective Equipment of 2008;
Technical Regulations on Machinery Safety of 2013;\textsuperscript{575} Regulations on Compulsory Preventive Medical Examinations of Certain Categories of Workers, Productions and Organizations, Activities of Which are Related to Public Service and Can Lead to the Spread of Infectious Diseases of 2002;\textsuperscript{576} the Procedure on Medical Examination of Certain Categories of Workers of 2007;\textsuperscript{577} the Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry of 2009;\textsuperscript{578} Safety Rules during Work on Board Fishing Vessels of 2006;\textsuperscript{579} and Safety Rules in Oil and Gas Industry in Ukraine of 2008.\textsuperscript{580}

3. **ILO Instruments on OSH and Ukrainian Legislation’s Conformity with International Standards**

3.1. **ILO Policy in the area of Occupational Safety and Health**

According to the ILO, every year millions of workers die from occupational injuries and diseases or suffer from poor working conditions that do not conform to the ILO standards. More than 5,000 deaths occur every day because of work-related accidents. Estimated annual losses in the result of interruption of production, workdays lost, medical expenses etc., amount to 4% of the gross national product of all countries throughout the world.\textsuperscript{581} In order to respond to these challenges, the ILO promotes occupational health and safety through international labour standards and codes of practices, as well as technical advice.\textsuperscript{582} The fundamentals of the OSH policy are contained in three ILO Conventions and respective Recommendations: the Promotional Framework for Occupational Safety

\textsuperscript{574} Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Technical Regulations on Personal Protective Equipment” No. 761 of 27.08.2008 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2008, No. 66, p. 50, para. 2216).

\textsuperscript{575} Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Technical Regulations on Machinery Safety” No. 62 of 30.01.2013 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2013, No. 9, p. 54, para. 344).


\textsuperscript{577} Order of the Ministry of Health of Ukraine “On Procedure on Medical Examination of Certain Categories of Workers” No. 246 of 21.05.2007 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2007, No. 55, p. 138, para. 2241).

\textsuperscript{578} Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry” No. 62 of 16.04.2009 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2009, No. 37, p. 111, para. 1267).

\textsuperscript{579} Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Safety Rules during Work on Board Fishing Vessels” No. 26 of 27.12.2006, registered by the Ministry of Justice of Ukraine under No. 74/13341 of 29.01.2007.

\textsuperscript{580} Order of the State Committee of Ukraine on Labour Protection Supervision “On Safety Rules in Oil and Gas Industry in Ukraine” No. 95 of 06.05.2008 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2008, No. 41, p. 95, para. 1383).


The objective of the ILO Convention on Promotional Framework for Occupational Safety and Health No. 187 and its accompanying Recommendation No. 197 of 2006 is to create an obligation for the Member States that ratify the Convention to promote continuous improvement of occupational safety and health in order to prevent injuries, diseases and deaths at work. Thus, states must develop a national policy, national system and national programme on OSH in consultation with representative organizations of workers and employers. Article 4 (3) of the Convention provides that each Member State formulates its national policy in accordance with national conditions and practices and in consultation with organizations of workers and employers, and promote basic principles; these include assessing occupational risks or hazards and combatting them at the workplace; and developing a national preventive safety and health culture that includes information, consultation and training. In addition, Article 3 (2) of the Convention stipulates the obligation of each Member State to promote and advance the right of workers to a safe and healthy working environment. Such rights are to be advanced at all relevant levels.

The ILO Occupational Safety and Health Convention No. 155 and Recommendation No. 164 of 1981 provide for the adoption of a national policy on OSH. The instruments set out the actions to be taken by governments and enterprises in order to promote OSH as well as the working environment. Pursuant to Article 7 of Convention No. 155 “The situation regarding occupational safety and health and the working environment shall be reviewed at appropriate intervals, either overall or in respect of particular areas, with a view to identifying major problems, evolving effective methods for dealing with them and priorities of action, the evaluating results.”

In addition, the 2002 Protocol, which supplements Convention No. 155, calls for the establishment and periodic review of requirements and procedures for recording occupational accidents and diseases as well as for the publication of these respective statistics annually. The ILO Occupational Health Services Convention (No. 161) and Recommendation (No. 171) of 1985 provide for the establishment of occupational health services at enterprises. Occupational health services are called on to ensure the implementation of health surveillance systems and OSH policy.

As of the beginning of 2017, the ILO Convention on Promotional Framework for Occupational Safety and Health No. 187 had received 43 ratifications from the ILO Member States, Occupational Health Services Convention No. 161 had 33 ratifications and Occupational Safety and Health Convention No. 155 had 66 ratifications.\footnote{See ratifications table at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO: (last accessed 29 November 2017)} However, the ILO has argued that the practical impact of these instruments, especially Conventions Nos. 155 and 161, had been far more extensive.\footnote{Alli, B.O., Fundamental Principles of Occupational Health and Safety, ILO, Geneva, 2008, p. 12.} Even when countries had not ratified
the respective instruments, they did implement the principles envisaged by them, albeit only to a certain extent.

In addition, there are various other initiatives of the ILO in the field of OSH. These include the Global Strategy on Occupational Safety and Health, which has been promoted by the ILO since 2003.\textsuperscript{585} In addition, the LAB/ADMIN Programme was launched and the Global Jobs Pact was introduced in June 2009.\textsuperscript{586} In order to ensure compliance with labour legislation the Global Jobs Pact is designed to entrust labour administration and labour inspection with new roles and responsibilities. The Pact also aims at better coordination in different areas of inspection, including advice, consultation, enforcement, implementation and control.

For effective implementation and application, however, the ILO standards on safety and health require national policies and measures to be periodically reviewed in light of scientific and technical progress as well as more flexible wording of the standards. This flexibility is also needed to make sure that such standards adjust to rapid technological change.\textsuperscript{587}

3.2. ILO Standards on Occupational Safety and Health

The scope of the instruments adopted by the ILO in the area of OSH can be divided into two categories: (1) instruments that were adopted shortly after foundation of the ILO until World War II, and, (2) instruments adopted after the World War II.

One of the first international labour conventions in the field of OSH dealt with prohibiting work with phosphorus and was adopted in Bern in 1906.\textsuperscript{588} Later, the Preamble to the Constitution of the ILO, 1919, referred to “the protection of the worker against sickness, disease and injury arising out of his employment.” After that, the ILO began to adopt numerous instruments in the field of OSH. While the first instruments adopted concerned risks inherent in especially harmful products (such as phosphorus), other instruments referred to the tasks that were prohibited for some categories of workers, either because of their vulnerability (women, youth) or specific working conditions (e.g. work in ports). This was followed in the late 1920s by the adoption of Recommendation No. 31 on the prevention of industrial accidents, 1929; the Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27); the Protection against Accidents (Dockers)


\textsuperscript{588} International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, 26 September 1906; See also the Recommendation concerning the Application of the Berne Convention of 1906, on the Prohibition of the Use of White Phosphorus in the Manufacture of Matches, 28 November 1919.
Convention, 1929 (No. 28) and the Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32).

After World War II, new instruments provided for the protection against specific risks. These included the adoption of the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78), the Medical Examination of Young Persons Recommendation, 1946 (No. 79) and the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124) as well as other standards on hygiene and safety for different categories of workers (seafarers, dockworkers, farm workers and workers in construction and mines). Thereafter, this period was characterized by the adoption of general standards, from the point of view of both the workers covered and the risks dealt with. The relevant ILO instruments include the Protection of Workers’ Health Recommendation, 1993 (No. 97), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174), the Prevention of Major Industrial Accidents Recommendation, 1993, (No. 181), the Occupational Safety and Health Convention, 1981 (No. 155) and Recommendation No. 164 of 1981, and the Occupational Health Services Convention (No. 161) and Recommendation No.171of 1985.

In principle, ILO conventions and recommendations in the field of OSH can be classified according to the following types:

- Instruments with general scope;
- Instruments that consider specific factors (such as toxic substances and agents, machines, loads, air pollution, noise and vibrations); and,
- Instruments addressing a special category of workers or related to specific branch of activity.

The ILO instruments with general scope are:

The Occupational Health and Safety Convention, 1981 (No. 155), the accompanying Recommendation, 1981 (No. 164) and the Protocol to Convention No. 155 of 2002; the Occupational Health Services Convention, 1985 (No. 161) and the Recommendation, 1985 (No. 171); the Prevention of Major Industrial Accidents Convention, 1993 (No. 174) and Recommendation, 1993 (No. 181); and the Protection of Workers’ Health Recommendation, 1953 (No. 97).

The ILO instruments related to specific factors include:

The Radiation Protection Convention, 1960 (No. 115) and the Recommendation, 1960 (No. 114); the Benzene Convention, 1971 (No. 136) and the Recommendation, 1971 (No. 144); the Occupational Cancer Convention, 1974 (No. 139) and the Recommendation. 1974 (No. 147); the Asbestos Convention, 1986 (No. 162) and the Recommendation, 1986 (No. 172); the Chemicals Convention 1990, (No. 170) and the Recommendation, 1990 (No. 177); the Guarding of Machinery Convention, 1963 (No. 119) and the Recommendation, 1963 (No. 118);

the Maximum Weight Convention, 1967 (No. 127) and the Recommendation, 1967 (No. 128); the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148) and the Recommendation, 1977 (No. 156).

The ILO instruments in the field that deal with specific branch of activity or addressed to particular category of workers include:

- The Hygiene (Commerce and Offices) Convention, 1964 (No. 120) and the Recommendation, 1964 (No. 120);
- the Safety and Health in Construction Convention, 1988 (No. 167) and the Recommendation, 1988 (No. 175);
- the Safety and Health in Mines Convention, 1995 (No. 176) and the Recommendation, 1995 (No. 183);
- the Safety and Health in Agriculture Convention, 2001 (No. 184) and the Recommendation, 2001 (No. 192);
- and the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152) and the Recommendation, 1979 (No. 160).

It is noteworthy that few recommendations concerning OSH preceded the adoptions of conventions in the field. This is the case, for instance, of Protection of Workers’ Health Recommendation, 1953 (No. 97), which generally applies to hygiene and the workplace environment, and contains general principles applicable to the prevention of all risks of diseases recognized as being occupational or which could be recognized as such. Principles laid down in Recommendation No. 97 cover measures for the protection and medical examination of workers exposed to special risks, the notification of occupational diseases and first aid. Later, on the basis of Recommendation No. 97, the ILO adopted the Occupational Health Services Recommendation 1959 (No. 112), which enshrined detailed provisions on the status of occupational health and services.

3.3. **Ukraine’s National Legislation Conformity with ILO Standards on OSH**

Up to this time, Ukraine has ratified a total of 71 ILO conventions that directly or indirectly deal with OSH issues, including the following:

- The Radiation Protection Convention, 1960 (No. 115);
- The Hygiene (Commerce and Offices) Convention, 1964 (No. 120);
- The Occupational Cancer Convention, 1974 (No. 139);
- The Occupational Safety and Health Convention, 1981 (No. 155);
- The Occupational Health Services Convention, 1985 (No. 161);
- The Prevention of Major Industrial Accidents Convention, 1993 (No. 174);
- The Safety and Health in Mines Convention, 1995 (No. 176);
- The Safety and Health in Agriculture Convention, 2001 (No. 184);
- as well as other ILO conventions related to OSH issues.\(^{590}\)

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\(^{590}\) Ukraine has also ratified: the Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16); the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124); the Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27); the Underground
Among other important ILO conventions in the field of OSH, Ukraine has not ratified the following instruments:

The Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148);

The Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152);

The Asbestos Convention, 1986 (No. 162);

The Safety and Health in Construction Convention, 1988 (No. 167);

The Chemicals Convention, 1990 (No. 170), and


Provisions of the following ILO conventions on OSH ratified by Ukraine are reflected in national legislation to a varying extent, ranging from relatively full or partial conformity to poor conformity or conflicting norms in national legislation.

3.3.1. The Hygiene (Commerce and Offices) Convention, 1964 (No. 120)

The requirements of the Hygiene (Commerce and Offices) Convention, 1964 (No. 120) are reflected in:

- The Labour Code of Ukraine of 1971, Article 153 concerns the obligation of an employer to ensure safe and healthy working conditions at the enterprise, including proper hygienic conditions in order to prevent occupational diseases;
- The Law “On Labour Protection” No. 2694-XII of 14 October 1992, Article 13 on the management of labour protection and employers’ obligations concerning proper working conditions;
- The Law “On Ensuring Sanitary and Epidemic Wellbeing of the Population,” Article 7 on the duties of enterprises, institutions and organizations to implement sanitary and anti-epidemic measures and sanitary regulations;
3.3.2. *The Occupational Cancer Convention, 1974 (No. 139)*

Provisions of the Occupational Cancer Convention, 1974 (No. 139) are reflected in:

- The Labour Code of Ukraine, 1971, Article 153 on the obligation of an employer to ensure safe and healthy working conditions at the enterprise; Article 158 on the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.;

- The Law “On Labour Protection” No. 2694-XII of 14 October 1992, Article 13 on labour protection management and employers’ obligations to ensure safe and healthy working conditions;

- Decree of the Cabinet of Ministers of Ukraine “On the Adoption of the List of Occupational Diseases” No. 1662 of 8 November 2000. This list includes “occupational cancer” among other occupational diseases, and specifies the reasons and conditions under which occupational cancer may develop;\(^591\)

- The List of Substances, Products, Industrial Processes, Domestic and Natural Factors, Carcinogenic to Humans, approved by the Order No. 7 of the Ministry of Health of Ukraine in 2006.\(^592\)

3.3.3. *The Occupational Safety and Health Convention, 1981 (No. 155)*

Provisions of the Occupational Safety and Health Convention, 1981 (No. 155) are reflected in the following acts of national legislation:

- The Labour Code of Ukraine of 1971, Article 157 on national normative regulations in the sphere of occupational safety and health;

- The Law “On Labour Protection” No. 2694-XII of 1992, Article 4 stipulates the main principles of national policies on occupational safety and health;

- The Law “On the Legislative Basis of Ukraine on Health Protection” No. 2801-XII of 1992, Article 28 sets out obligations for owners of enterprises, institutions and organizations to ensure compliance with safety regulations at the workplace, as well as with other industrial hygiene and OSH requirements as stipulated by labour legislation;

- The Law “On the Approval of the State National Programme on Improving Safety, Occupational Health and Working Environment for the years 2014-2018” No. 178-VII of 4 April 2013. The Programme aims to provide comprehensive solutions in the

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field of labour protection, ensuring a safe and healthy working environment and minimizing the risks of occupational injuries, diseases, and accidents at work.

3.3.4. *The Occupational Health Services Convention, 1985 (No. 161)*

The Occupational Health Services Convention, 1985 (No. 161) finds its reflection in the following acts of national legislation:

- The Labour Code of Ukraine of 1971, Article 153 on obligations of employers to ensure healthy and safe working conditions at enterprises, organizations, and institutions;

- The Law “On Labour Protection,” Article 13 contains provisions on employers’ obligations, including the maintenance of a safety management system, by establishing appropriate services and appointing officials to provide solutions on health and safety issues, approving instructions on the duties, rights, and responsibilities of such officials and monitoring these officials’ compliance with their duties, etc.; Article 15 establishes employers’ obligations to create a labour protection service at enterprises with more than 50 employees; or to entrust the function of a labour protection service to external specialists at enterprises with less than 50 employees;

- The Model Regulation on Labour Protection Service, approved by the State Committee of Ukraine on Labour Protection Supervision, Order No. 255 of 15 November 2004;

- The Model Regulation on Health and Safety Commission at an Enterprise, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 55 of 21 March 2007.

3.3.5. *The Prevention of Major Industrial Accidents Convention, 1993 (No. 174)*

Provisions of the Prevention of Major Industrial Accidents Convention, 1993 (No. 174) are implemented into the following acts of national legislation:

- The Labour Code of Ukraine of 1971, Article 153 on obligations of employers to ensure healthy and safe working conditions at enterprises, organizations, and institutions;

- The Law “On Labour Protection” No. 2694-XII 1992, Article 13 on the employer’s obligation to ensure safe working conditions at an enterprise;

- The Law “On High Risk Facilities” No. 2245-XII of 2001, Article 3 on state supervision in the sphere of activities dealing with high-risk facilities; Article 8 on the obligations of business entities to take measures for the prevention or elimination of industrial accidents, and the protection of people from their harmful consequences as well as for the minimization of risks resulting from the utilization of high-risk facilities;

- Procedure of Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1232 of 30.11.2011;

- The Procedure for Issuing Permits for the Performance of Highly Hazardous Work and for the Utilization of Machinery, Mechanisms and Equipment with a High Level of Risk, No. 1107 of 2011;\(^{593}\)

3.3.6. *The Safety and Health in Mines Convention, 1995 (No. 176)*

The Safety and Health in Mines Convention, 1995 (No. 176) is reflected in the following acts of national legislation:

- The Labour Code of Ukraine of 1971, Article 153 on obligations of employers to ensure healthy and safe working conditions at enterprises, organizations, and institutions;

- The Law “On Labour Protection” No. 2694-XII 1992, Article 13 on the employer’s obligation to ensure safe working conditions at an enterprise;

- The “Mining Law of Ukraine” No. 1127-XIV of 6 October 1999, Article 18 on requirements for carrying out work in mines, including the use of advanced, safe, and non-hazardous methods of preparation and development of mineral deposits; continuous observation of safety and technical operation rules when carrying out mining, extraction and transportation activities; the development of a system of measures for safe operation during work in mines; compliance with the maximum allowable emission standards and discharges of pollutants into the environment; the ensuring of radiation and ecological safety during mining as well as compliance with other requirements stipulated by national legislation; Article 25 on the system of emergency protection and the safety of mining operations; Article 26 on technical and organizational measures for the prevention of accidents during work in mines; Article 30 on employers’ obligations during the mitigation of accidents and the rescue of people; Article 32 on ensuring safety during work in mines and labour protection; Article 35 on the protection of the mining enterprise from the harmful effects of hazardous industries and natural phenomena; Article 38 on the obligations of owners of mining enterprises, including the obligation to ensure safety during mining operations, and adhere to established norms in the area of mining operations, safety rules and rules governing the utilization of technical equipment; Article 43 on the workers’ rights at mining enterprises;

- The General Requirements on Labour Protection at Mining Enterprises of 2006;\(^{594}\)

3.3.7. The Safety and Health in Agriculture Convention, 2001 (No. 184)

The provisions of the Safety and Health in Agriculture Convention, 2001 (No. 184) are reflected in:

- The Labour Code of Ukraine of 1971, Article 153 on obligations of employers to ensure healthy and safe working conditions at enterprises, organizations, and institutions; Article 158 on the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.);

- The Law “On Farming Enterprises” No. 973-IV of 19 June 2003, Article 27, para. 5 stipulates the employer’s obligation to ensure safe working conditions, the compliance with safety requirements, and industrial hygiene and sanitation, as well as fire safety at an agricultural enterprise;

- The Law “On Labour Protection” No. 2694-XII of 1992, Article 13 on the employer’s obligation to ensure safe working conditions at an enterprise also concerns the agricultural sector;

- The Labour Protection Rules in Agriculture, approved by the Ministry of Emergencies of Ukraine, Order No. 1353 of 26 November 2012. The Labour Protection Rules contain requirements on safety and health during works on production of crop and livestock products, growing of agricultural crops and also workers who carry out cultivation, harvesting, processing of crop and livestock products;

- The Model Regulations on the OSH Training Procedure and the List of Works of High Danger, approved by the State Department for Supervision of Compliance with Labour Legislation (Derzhnahlyadpra2), Order No. 15 of 26 January 2005;

- The General Requirements on Securing Workers’ Labour Protection by Employers, approved by the Ministry of Emergencies of Ukraine, Order No. 67 of 25.01.2012.


While there are some instruments that Ukraine has ratified but has still failed to fully comply with, there are other international standards in the field of OSH that Ukraine has not ratified, but has taken into consideration in national legislation. The two examples below, one on the use of asbestos in industry, and the other one on the ionizing radiation, show that conformity, albeit not full, can be relatively similar in case of non-ratified as well as ratified standards.

3.3.8. Asbestos Convention, 1986 (No. 162)

First, the ILO Asbestos Convention of 1986 (No. 162) has not been ratified by Ukraine. Up to this time, there has been no single and comprehensive legal act in the national legislation of Ukraine dealing with OSH and the use of asbestos in industry. 598 Nevertheless, Ukraine maintains state sanitary and epidemiological supervision over the enterprises that use asbestos, in compliance with Article 9 of the Convention.

Article 10 of Convention No. 162 requires national laws and regulations to ensure that exposure to asbestos is prevented or controlled by measures that make it so that work in which exposure to asbestos may occur is subject to regulations prescribing adequate controls and workplace practices as well as workplace hygiene; this is achieved by prescribing special rules and procedures, including authorization, for the use of asbestos or its certain type or products containing asbestos as well as for certain work processes. In Ukraine, enterprise owners had to replace prohibited asbestos cement pipes with plastic ones, and asbestos-board roofing has been replaced by metal ties or other roofing materials, in conformity with Article 10 of Convention No. 162. Furthermore, according to the Procedure for Medical Examination of Certain Categories of Workers, approved by the Ministry of Health of Ukraine in 2007, 599 employees engaged in work with asbestos or asbestos-containing materials must undergo annual medical examination. In addition, assessments of working conditions and laboratory instrumental monitoring of air at the workplaces where asbestos or asbestos-containing materials are used must be conducted.

Furthermore, in accordance with the Global Action Plan on Workers’ Health 2008-2017, 600 Article 10, as well as Article 10 of the Parma Declaration on Environment and Health of 2010, 601 the Ministry of Health of Ukraine developed in 2012 the State Sanitary Rules and Regulations on Safety and Protection of Workers from the Harmful Effects of Asbestos and

598 Only chrysotile asbestos is in use in national industry, in asbestos cement and in technical industries. No amphibole asbestos is used in Ukraine.
Asbestos Containing Materials, subsequently amended in 2017, with the aim of harmonizing national legislation with international standards. The Sanitary Regulations contain requirements concerning the protection of life and health of employees at enterprises using chrysotile asbestos, or chrysotile-containing materials or items. Taking into consideration the requirements laid out in ILO Convention No. 162 and the ILO Asbestos Recommendation, 1986 (No. 172), the Sanitary Regulations provide for the protection of health of the population living in the area of industrial emissions of the above-mentioned enterprises, and requirements for the hygienic assessment system of these enterprises and their products.

3.3.9. Radiation Protection Convention, 1960 (No. 115)


These instruments contain requirements for health protection against possible harm that ionizing radiation might cause and for the safe operation of sources of ionizing radiation. In addition, the Basic Sanitary Rules of Radiation Safety establish a system of radiation hygiene regulations in order to ensure the limits of acceptable radiation exposure for individuals and society in general. The state supervision in the sphere of radiation safety is exercised by the State Nuclear Regulation Inspectorate, according to the Presidential Decree No. 403/2011 of 6 April 2011.

Furthermore, in accordance with the Procedure for the Medical Examination of Certain Categories of Workers of 2007, preliminary and periodic medical examinations must be carried out as one of the measures of protection of workers' health against ionizing


radiation. Such examinations are to be conducted with the following goals: determining the state of health of a given employee and the possibility of performing work duties with no detriment to the state of health as a result of the influence of harmful and hazardous factors of the working environment and working process; determining occupational diseases that had occurred earlier due to employment in previous jobs and preventing work-related occupational diseases; detecting early symptoms of acute and/or chronic occupational diseases of employees; determining the employee’s capacity to continue to perform work under specific harmful and hazardous production factors and working processes; developing and conducting activities designed to improve workers’ health, including the development of individual and group treatment, as well as preventive and rehabilitation measures for workers; and monitoring and re-examining the state of health of an employee working under harmful and hazardous production factors in individual cases. As such, the present legal framework with respect to ionizing radiation shows a high level of conformity with the ILO Convention No. 115.

The table of conformity of Ukrainian national legislation to ILO instruments on OSH is provided in Annex I of this thesis.

4. EU Standards on OSH and Conformity with Ukrainian Legislation

4.1. Occupational Safety and Health Issues in the Law of the EU

Until the 1980s, the TEC did not contain any explicit provisions concerning occupational safety and health. However, it was about that time that occupational safety and health was deemed to be relevant for market harmonization as well as EEC economic policies more generally. Hence, the first European directives in the field of OSH, such as Directive 77/576 EEC on the harmonization of national laws on safety signs in the workplace and Directive 78/610 EEC on the harmonization of occupational exposure limits to vinyl chloride monomers, were adopted in accordance with ex Article 100 and 100a TEC, thus having general market harmonization provisions as their legislative basis.

A few provisions on safety and health were envisaged by the Euratom Treaty (Chapter III, Title II). Pursuant to Article 30 of the Euratom Treaty, the Community was required to lay down basic standards for the protection of health of workers and the public against the dangers arising from ionizing radiation. The basic standards, according to Article 30, imply: (a) maximum permissible doses compatible with adequate safety; (b) maximum permissible levels of exposure and contamination; and (c) fundamental principles governing the health surveillance of workers. However, because of the rather limited area of applicability, these provisions did not contribute much to further developments in the field.

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A new normative provision on social policy came with the adoption of the Single European Act of 1986, which introduced Article 118A into the EEC Treaty (now part of Article 153(1)(a) TFEU). The respective provision states: “Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonisation of conditions in this area, while maintaining the improvements made.” Later, under the Treaty of Amsterdam in 1997, Article 136 strengthened the legislative competence in the European social policies area. Finally, the Lisbon Treaty renumbered the Article on social policy, while preserving the content of ex Article 136 TEC (now Article 151 TFEU), according to which the Union and the Member States, “shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.”

Hence, since the Treaty of Lisbon came into force in 2009, there has been a legal foundation for EU directives in the field of occupational health and safety as laid down in Article 153 TFEU. In accordance with Article 153 TFEU (ex Article 137 TEC), Member States have the right to legislate in the area of protection of workers’ health and safety as well as on working conditions. In addition, Article 153 TFEU envisages that Member States may maintain or introduce more stringent protective provisions than those enshrined in the respective directives, while the legislative requirements on labour protection vary from one Member State to another.

In addition, Article 156 TFEU (ex Article 140 TEC), in order to achieve the objectives of Article 151 TFEU, provides that the Commission should encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields in matters relating to, inter alia, labour law and working conditions, occupational hygiene and the prevention of occupational accidents and diseases.

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4.2. **The OSH Framework Directive: Scope and Principles**

Directive 89/391 EEC – OSH Framework Directive – of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work is designed to guarantee health and safety requirements in EU Member States. The directive contains general principles on the prevention of occupational risks; the protection of safety and health; the elimination of risk and accident factors; the informing, consultation, and balanced participation in accordance with national laws and/or practices and training of workers and their representatives; and general guidelines for the implementation of these aforementioned principles.  

Directive 89/391 is referred to as a Framework Directive, because it provides the enabling framework and serves as a basis for a number of individual directives covering the following areas: work equipment; personal protective equipment; work with visual display units; handling of heavy loads involving the risk of back injury; temporary or mobile work sites; and fisheries and agriculture. The OSH Framework Directive applies to all sectors of activity, both public and private, with the exception of certain specific activities in the public and civil protection services, and contains a number of basic provisions concerning the organization of health and safety measures at work and the responsibilities of employers and workers.

Directive 89/391 provides for the following definitions of the terms, such as (a) **worker**: any person employed by an employer, including trainees and apprentices but excluding domestic servants; (b) **employer**: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment; (c) **workers’ representative** with specific responsibility for the safety and health of workers: any person elected, chosen or designated in accordance with national laws and/or practices to represent workers where problems arise relating to the safety and health protection of workers at work; and (d) **prevention**: all the steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks.

Article 4 of Directive 89/391 stipulates the obligation of Member States to take necessary steps to ensure that employers, workers and workers’ representatives are subject to the legal provisions necessary for the implementation of the Directive. Particularly, adequate controls and supervision shall be ensured by Member States. Hence, the Directive requires Member States to implement the Directive and to monitor its compliance.

Directive 89/391 contains provisions on employers’ obligations. Here, the employer is obliged to ensure the safety and health of workers in every aspect related to the work. Workers’ obligations in the field of safety and health at work are not to affect the principle

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615 Article 3, Directive 89/391/EEC.
616 Article 4, para. 1, Directive 89/391/EEC.
617 Article 4, para. 2, Directive 89/391/EEC.
618 Article 5, para. 1, Directive 89/391/EEC.
of the responsibility of the employer. Member States do, however, have the option to exclude or limit employer responsibility in case of unforeseeable circumstances beyond an employer control.

Pursuant to Article 6, para. 1 of Directive 89/391, an employer must take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means. Such measures must take into account changing circumstances and aim to improve existing situations.

Article 6, para. 2 stipulates the *general principles of prevention*, on the basis of which the employer shall implement the abovementioned measures. These principles include:

(a) avoiding risks;
(b) evaluating the risks which cannot be avoided;
(c) combating the risks at source;
(d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
(e) adapting to technical progress;
(f) replacing the dangerous by the non-dangerous or the less dangerous;
(g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment;
(h) giving collective protective measures priority over individual protective measures;
(i) giving appropriate instructions to the workers.

Furthermore, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment: (a) evaluate the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of work places; (b) where he entrusts tasks to a worker, take into consideration the worker's capabilities as regards health and safety; (c) ensure that the planning and introduction of new technologies are the subject of consultation with the workers and/or their representatives, as regards the consequences of the choice of equipment, the working conditions and the working environment for the safety and health of workers; and (d) take appropriate steps to ensure that only workers who have received adequate instructions may have access to areas where there is serious and specific danger.

In a case where several undertakings share a workplace, employers shall cooperate in implementing the safety, health and occupational hygiene provisions and,
taking into account the nature of the activities, shall coordinate their actions in matters of the protection and prevention of occupational risks, and shall inform one another and their respective workers and/or workers’ representatives of these risks. The Framework Directive also provides that measures related to safety, hygiene and health at work may in no circumstances involve the workers in financial cost.

Article 7 of Directive 89/391 requires the employer to designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and/or establishment. If such protective and preventive measures cannot be organized due to a lack of competent personnel in the establishment, the employer must enlist competent external services or persons. Furthermore, Article 8 of the Directive requires the employer to take the necessary measures for first aid, firefighting and evacuation of workers when necessary. Additional obligations of employers include: (a) being in possession of an assessment of the risks to safety and health at work, including those facing groups of workers exposed to particular risks; (b) deciding on the protective measures to be taken and, if necessary, the protective equipment to be used; (c) keeping a list of occupational accidents resulting in a worker being unfit for work for more than three working days; and (d) drawing up, for the responsible authorities and in accordance with national laws and/or practices, reports on occupational accidents suffered by his workers.

The provisions of the OSH Framework Directive also contain requirements on workers’ consultation and information. Pursuant to Article 10, the employer must take appropriate measures so that workers receive all the necessary information concerning safety and health risks as well as protective and preventive measures and activities with respect to both the undertaking and/or establishment in general and to each type of workstation and/or job. Workers or their representatives with specific functions in protecting the safety and health of workers must have access, to carry out their functions, to risk assessments and protective measures, the list and respective reports, as well as to the information yielded by protective and preventive measures, inspection agencies and bodies responsible for safety and health. Article 11 of the Directive provides for the obligation of employers to consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work. Furthermore, Directive 89/391 contains provisions on training of workers on OSH issues, workers’ obligations to take care as far as possible of their own safety and health and that of other persons, as well as health surveillance of workers.

It should be mentioned, that the OSH Framework Directive brought the following innovations. Thus, the term “working environment” was defined in accordance with ILO Convention No. 155. Furthermore, the modern approach to technical safety and general

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622 Article 6, para. 4, Directive 89/391/EEC.
623 Article 6, para. 5, Directive 89/391/EEC.
624 Article 9, Directive 89/391/EEC.
625 Article 12, Directive 89/391 EEC.
626 Article 13, Directive 89/391/EEC.
627 Article14, Directive 89/391 EEC.
prevention measures was determined. The aim of the Directive was to establish an equal level of safety and health for the benefit of all workers. However, domestic workers as well as certain public servants were excluded from the scope of its application. In addition, the principle of risk assessment and its main elements, such as worker participation, hazard identification, periodical reassessment and the documentation of workplace hazards, and the introduction of appropriate measures with the risk elimination priority etc. were introduced.

The implementation of the Directive, however, has been different from one Member State to another. Since 1990, the European Commission has instituted 78 infringement proceedings for failure to transpose the Framework Directive correctly into national legislation in. In particular, difficulties to transpose the Directive were observed in Spain (26 out of 78 infringements). Also, Germany has been subject to 8 cases of infringement, followed by Italy (7 cases) and Portugal (6 cases). 628

According to the European Commission, one of the typical non-conformities lies in failure to make the Framework Directive provisions applicable to the public sector. Other non-conformities were found in imprecise implementation of Art. 5.1 of the Directive (the employers’ duty to ensure the safety and health of workers in every aspect related to the work), incomplete transposition of the general principles of prevention (Art. 6.2), uncertainties regarding the obligation to evaluate the risks to the safety and health of workers (Art. 6.3 (a)), incorrect transposition of the provisions for preventive and protective services (Art. 7).

However, according to the Commission’s report, most of the problems related to the transposition of the Directive in respective countries have been overcome. Moreover, a large number of Member States have implemented more detailed or stringent requirements than those specified by the Framework Directive. For instance, Cyprus, Estonia, Finland, Ireland, Luxembourg, Latvia, Malta, the Netherlands, Poland, Portugal and Sweden have included domestic servants in the definition of “worker” when transposing the Framework Directive, thus broadening the scope of its application. 629

4.3. The Conformity of Ukrainian Legislation with EU OSH Directives

The obligation of Ukraine to gradually approximate its national legislation on occupational health and safety issues to that of the EU is explicitly stipulated by the EU -Ukraine Association Agreement of 2014. 630 Articles 419-425, Chapter 21 (Cooperation on Employment, Social Policy and Equal Opportunities), Title V (Economic and Sector


629 Ibid.

630 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ 2014 L 161/3; Article 424 of the AA states: “Ukraine shall ensure gradual approximation to EU law, standards and practices in the area of employment, social policy and equal opportunities, as set out in Annex XL to this Agreement.”
Cooperation) of the Association Agreement include the provisions regarding OSH issues as well as hygiene at work.

Annex XL to Chapter 21 of the EU – Ukraine AA lists the EU Directives to which the national legislation of Ukraine has to be gradually approximated to. With regard to safety and health at work, Ukraine has to approximate its national legislation to certain EU Directives within the stipulated timeframes ranging from 2 to 10 years.


The sections below illustrate the actual status of national legislation conformity to EU directives in the field of OSH in accordance with the EU-Ukraine Association Agreement, taking into account the legislative developments resulting from the approximation process.

In addition, a comparative table of national legislation conformity to the EU OSH directives is provided in Annex II of this thesis.

### 4.3.1. National Legislation Conformity with the OSH Framework Directive

As is stipulated by the EU – Ukraine AA, the provisions of Council Directive 89/391/EEC of 12 June 1989 – OSH Framework Directive – shall be implemented within 3 years of the entry into force of the Agreement. To date, the requirements of the OSH Framework Directive have been considered in a number of national legal acts of Ukraine, albeit only to a certain extent.

Thus, the provisions generally conforming to the requirements of the OSH Framework Directive include:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through the introduction of the introduction of appropriate technical means and organizational measures) of the Labour Code of Ukraine.

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636 Annex XL to Chapter 21 of the EU – Ukraine AA of 2014.
637 See Annex II of this thesis for a table on the conformity of national legislation to EU OSH directives.
of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.);


- Articles 5, 6 and 7 of Directive 89/391/EEC on the general obligation of employers are taken into consideration in Article 8 of the Law “On Labour Protection” No. 2694-XII, 1992, concerning the obligation of employers to provide workers with individual protective equipment, as well as taking measures necessary for the safety and health protection of workers; Article 13 of the Law provides for the obligations of employers on safety management; para 2.1. of the General Requirements on Securing Workers’ Labour Protection by Employers of 2012 stipulates the obligation of employers to secure healthy and safe working conditions for workers at an enterprise; 638

- Article 8, para. 4 of Directive 89/391/EEC, which allows workers to leave their workstation in the event of serious danger, is reflected in Article 6, part 2 and 3 of the Law “On Labour Protection” No. 2694-XII of 1992; Article 20, para. 4 of the Code of the Civil Protection of Ukraine of 2012 contains the requirements for employers to organize the evacuation of workers in case of emergencies; 639

- Article 10, para. 3 of Directive 89/391/EEC concerning the access of workers with specific functions to risk assessment and protective measures is considered in Law “On Labour Protection” No. 2694-XII, 1992, namely in Article 41 (on public control over the observance of labour protection legislation by professional unions and associations through their elected officials and representatives) and Article 42 (concerning the right of workers’ representatives on labour protection to oversee the fulfilment of labour protection legislation requirements at enterprises and to submit proposals to the employers for the rectification of violations of labour protection legislation);

- Article 11 of Directive 89/391/EEC, concerning the obligation of employers to consult workers and allow them to take part in discussions on issues relating to safety and health at work is reflected in Articles 12 and 13 of the Law “On Labour Protection” No. 2694-XII of 1992;


- Article 14 of Directive 89/391/EEC concerning workers’ health surveillance is reflected in Article 17 (on mandatory medical examinations of certain categories of

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638 Order of the Ministry of Emergencies of Ukraine “On the Approval of the General Requirements on Securing Workers’ Labour Protection by Employers” No. 67 of 25.01.2012 (Ofizijnyi Visnyk Ukrainy (official publication), 2012, No. 19, p. 37, para. 716)


Partially considered provisions of Directive 89/391/EEC in the national legislation are:

- Article 13 of Directive 89/391/EEC on workers’ obligations is considered in Article 14 of the Law “On Labour Protection” No. 2694-XII of 1992; however, it is not consistent with the respective provisions of the Directive;

- Article 8, para. 2 of the Directive 89/391/EEC concerning the obligation of employers to designate workers for first aid, firefighting and the evacuation of workers. In national legislation, this obligation is only imposed on the management of a special category of enterprises that are exposed to the risks of fire or explosion.

Other normative legal acts that reflect some of the provisions of the OSH Framework Directive include:

- The Procedure of Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1232 of 30 November 2011;\(^640\)

- The General Requirements on Securing Workers' Labour Protection by Employers, approved by the Ministry of Emergencies of Ukraine, Order No. 67 of 25 January 2012;\(^641\)

- The Model Regulation on Labour Protection Service, approved by the Order of the State Committee of Ukraine on Labour Protection Supervision, No. 255 of 15 November 2004;\(^642\)

- The Model Regulations on the Procedure for Conducting Training and Knowledge Examination of Labour Protection Issues and the List of High-Risk Jobs, approved by the Order of the State Committee of Ukraine on Labour Protection Supervision No. 15 of 26 January 2005;\(^643\)

- The Procedure on Medical Examination of Certain Categories of Workers, approved by the Order Ministry of Health of Ukraine No. 246 of 21 May 2007.\(^644\)


Certain requirements of Directive 89/391/EEC are not considered in national legislation, namely:

- Article 6, para. 4 on the cooperation and action coordination of employers, where several undertakings share a workplace, in implementing safety, health and occupational hygiene provisions, and the protection and prevention of occupational risks;

- Article 8, para. 3 (c) of the Directive, according to which the employer shall “save in exceptional cases, for reasons duly substantiated, refrain from asking workers to resume work in a working situation where there is still a serious and imminent danger;”

- Article 10, para. 2 of the Directive, stipulating the obligation of employers to take appropriate measures to provide adequate information concerning certain safety and health risks to workers from any outside undertakings and/or establishments engaged in work at his undertaking.

- The Labour Code of Ukraine of 1971 as well as the Law “On Labour Protection” of 1992 does not lay down the provision on general principles of prevention, which are stipulated by Article 6, para. 2 of Directive 89/391/ EEC.

Furthermore, national legislation of Ukraine does not contain a comprehensive legal act that would set minimum requirements for health and safety in the work areas; this, again, does not correspond to Directive 89/391/ EEC. In addition, there is no comprehensive legal act on working equipment and its use in national legislation, though there are several regulations covering the issue. This would require further amendments to current national legislation in order to bring it in line with the requirements of the OSH Framework Directive.

4.3.2. National Legislation Conformity with EU Individual Directives in field of OSH

Individual directives supplement the OSH Framework Directive and contain provisions on specific tasks, workplaces and sectors, work-related aspects (e.g. the organization of working time), hazards at work (e.g. the exposure to dangerous substances or physical agents), and specific groups of workers (e.g. pregnant women, young workers etc.). Individual directives set out minimum standards for workers’ protection, though Member States may introduce higher protection measures. Thus, the individual directives may contain more stringent provisions than those envisaged by the Framework Directive. In the case that an individual directive provides for more stringent provisions than the Framework Directive, the provisions of this individual directive prevail.

EU individual directives on OSH issues are normally grouped according to the subjects they deal with that fall into the following categories:

- Workplace and equipment safety;
- Chemical agents and chemical safety;
- Physical hazards and biological agents;
- Special risks; and,
- Sector-specific and worker-related directives.

The sections below list the directives of each group and specify the corresponding provisions of national legislation of Ukraine in the field of OSH.

4.3.2.1. Workplace and Equipment Safety

The first group of the OSH directives concerns workplaces, equipment, signs and personal protective equipment. As stipulated by the EU-Ukraine AA, the following directives of this group are to be implemented by Ukraine:

- **Directive 89/654/EEC on the workplace requirements of 30 November 1989**645 (implementation timeframe for Ukraine – 3 years)

The requirements of Directive 89/654/EEC are considered in the following acts of national legislation:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.);

- The Law of Ukraine “On Labour Protection” No. 2694-XII of 1992, Article 6, para. 1 provides that conditions of work at the workplace, safety of technological processes, machines, mechanisms, equipment and other means of production, the state of collective and personal protection equipment used by the employees, as well as sanitary conditions, must meet the requirements of national legislation;

- Article 2 of Directive 89/654/EEC provides for a definition of the “workplace” as “the place intended to house workstations on the premises of the undertaking and/or establishment and any other place within the area of the undertaking and/or establishment to which the worker has access in the course of his employment.” In Ukraine, there was no definition of the “workplace” in the national legislation of Ukraine until 2012. The requirements of Directive 89/654/EEC were considered in the General Requirements on Securing Workers’ Labour Protection by Employers of 2012,646 where the terms “working area” and “workplace” are defined, taking into consideration the provisions of Directive 89/654/EEC. Thus, a “working area” implies “a defined space where the workplace of permanent or temporary location

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of a worker during his or her working activity is located,” while a “workplace” is “a permanent or temporary location of a worker during his or her working activity.”

- Articles 6 and 7 of Directive 89/654/EEC are considered in para. 2.1. of the General Requirements on Securing Workers’ Labour Protection by Employers of 2012, on the obligation of employers to secure healthy and safe working conditions for workers at their respective enterprises.

- **Directive 89/656/EEC on the use of personal protective equipment of 30 November 1989** (implementation timeframe – 7 years)

Most of the provisions of the Directive 89/656/EEC are reflected in national legislation, including:

- Article 163 of the Labour Code of Ukraine of 1971 requires providing workers with special clothing and other individual protective equipment at works with harmful and dangerous conditions;

- Article 2 of Directive 89/656/EEC (the definition of personal protective equipment), Article 4 (on the requirements for the design and production of personal protective equipment), Article 5 (requirements on the assessment of personal protective equipment), Article 6 (on the rules of use of personal protective equipment) are considered in the Law of Ukraine “On Labour Protection” of 1992, Article 8 of which contains requirements regarding the obligation of employers to provide workers with individual protective equipment;

- The Technical Regulations on Personal Protective Equipment of 2008 provide additional provisions on protective equipment;

- The Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees of 2008, para. 1.2. states that at works with hazardous and dangerous working conditions, works related to pollution or those conducted in unfavourable meteorological conditions, employees must be provided with special protective clothing, footwear and other individual protection equipment.

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650 Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees” No. 53 of 24.03.2008 (Ofizijnyi Visnyk Ukrainy (official publication), 2008, No. 38, p. 98, para. 1275).
- The Procedure on Free Distribution of Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 62 of 16.04.2009.651

- **Directive 92/58/EEC on the minimum requirements for the provision of safety and/or health signs at work of 24 June 1992**652 (implementation timeframe – 7 years)

  The requirements of Directive 92/58/EEC are partially considered in:

  - The Technical Regulation on Workers’ Safety and Health Signs of 2009653 for the definitions of signs and general requirements (Article 2 of the Directive 92/58/EC), employers’ obligations and the use of safety signs (Section II of the Directive 92/58/EC), and instruction and consultation for workers (Articles 7 and 8 of the Directive 92/58/EC).

- **Directive 99/92/EC on risks from explosive atmospheres of 16 December 1999**654 (implementation timeframe – 10 years)

  The requirements of Directive 99/92/EC are considered in:

  - The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.);

  - The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);

  - The Technical Regulation on Equipment and Protective Systems for Use in Potentially Explosive Atmospheres of 2016.655

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651 Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Procedure on Free Distribution of Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry” No. 62 of 16.04.2009 (Official Publication) 29.05.2009, No. 37, p. 111, para. 1267.


Not considered in the national legislation:

- Article 6 of Directive 99/92/EC concerning the duty of coordination of employers where workers from several undertakings are present at the same workplace.

**Directive 2009/104/EC on the use of work equipment of 16 September 2009**

(implementation timeframe – 3 years)

The requirements of Directive 2009/104/EC are partially considered in the following acts of national legislation of Ukraine:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 156 (the prohibition of the production and use of new machines, mechanisms, equipment as well as the introduction of new technologies without the permission of the central executive authority, which implements state policy in the field of labor protection);

- The General Requirements on Securing Workers’ Labour Protection by Employers of 2012 contain provisions on work equipment requirements (part V), and requirements for the safe conduct of work when using work equipment (part VI);

- Article 13, para. 7 of the Law “On Labour Protection” on the employer’s obligations to ensure the proper maintenance of work equipment conforms to the provisions of Article 4 (2) of 2009/104/EC on the rules concerning work equipment and the obligation of the employer to take the measures necessary to ensure that work equipment is adequately maintained;


It should be noted that no single normative act on the use of work equipment exists in national legislation of Ukraine, though this issue is regulated in different acts of subordinate legislation.

Some other EU OSH directives also find its reflection in national legislation, albeit not listed in the EU-Ukraine AA as obligatory for the implementation. For instance:

- The provisions of Directive 2014/68/EU on pressure equipment of 15 May 2014 are considered in the Technical Regulations on Safety of Equipment Operating under Pressure of 2011 in part concerning classification of equipment that operates under pressure; technical requirements of such equipment and conformity assessment.


4.3.2.2. Chemical Agents and Chemical Safety

The second group of EU directives comprises those on chemical safety and on exposure to chemical agents. The following directives of this group shall be implemented by Ukraine:

- **Directive 2009/148/EC on exposure to asbestos at work of 30 November 2009** (implementation timeframe – 7 years)

  The provisions of Directive 2009/148/EC are generally considered in:

  - The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises);

  - The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);


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662 Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Technical Regulations on Simple Pressure Vessels Safety” No. 268 of 25.03.2009 (Офіційний Вісник України (оfficial publication), 2009, No. 23, p. 38, para. 748).

Directive 98/24/EC on risks related to chemical agents at work of 7 April 1998\textsuperscript{665} (implementation timeframe – 10 years)

The provisions of Directive 98/24/EC are generally considered in:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises);

- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);


- The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order 627 of 2012.\textsuperscript{666}

Directive 91/322/EEC on indicative limits values of 29 May 1991\textsuperscript{667} (implementation timeframe – 10 years)

The provisions of Directive 91/322/EEC are partially considered in:

- Article 153 of the Labour Code of Ukraine, 1971, as regards the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.;

- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);


\textsuperscript{666} Order of the Ministry of Emergencies of Ukraine “On the Approval of the Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents” No. 627 of 22.03.2012, registered by the Ministry of Justice of Ukraine under No. 521/20834, 10.04.2012 (Ofizijnyi Visnyk Ukrainy (official publication), 2012, No. 30, p. 290, para. 1126).

- The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order 627 of 2012.

- Directive 2000/39/EC on indicative occupational exposure limit values of 8 June 2000\(^{668}\) (implementation timeframe – 10 years)

- Directive 2006/15/EC establishing a second list of indicative occupational exposure limit values of 7 February 2006\(^{669}\) (implementation timeframe – 10 years)

The provisions of both Directives are partially considered in:

- The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order 627 of 2012.

- Directive 2004/37/EC on carcinogens or mutagens at work of 29 April 2004\(^{670}\) (implementation timeframe – 7 years)

The provisions of Directive 2004/37/EC are generally considered in:

- Article 153 of the Labour Code of Ukraine, 1971, on the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.;

- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);

- The List of Substances, Products, Industrial Processes, Domestic and Natural Factors, Carcinogenic to Humans, approved by Order No. 7 of the Ministry of Health of Ukraine in 2006\(^{671}\);

- The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order 627 of 2012.

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4.3.2.3. *Physical Hazards and Biological Agents*

The third group of OSH directives relates to exposure to *physical hazards* and *biological agents*. Ukraine has to implement the following directives in this group:

- **Directive 2000/54/EC on biological agents at work of 18 September 2000**¹

  (implementation timeframe – 7 years)

The requirements of Directive 2000/54/EC are partially considered in:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.);
- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);
- The Law of Ukraine “On Ensuring the Sanitary and Epidemic Wellbeing of the Population” No. 4004-XII of 24.02.1994, Article 25 of which states: “Executive power authorities and local self-government authorities, enterprises, institutions organizations, and citizens shall observe sanitary regulations in the event of application of chemical substances and materials, as well as biotechnological products;”
- General Requirements on Biological Safety of 1976;²
- The State Sanitary Rules on Safety Work with Microorganisms of I-II Groups of Pathogenicity of 1999.³

Hence, national legislation considers the following requirements of Directive 2000/54/EC:

- Article 2 of Directive 2000/54/EC on the classification of biological agents into four groups depending on the risk level. However, this classification does not precisely coincide with that of the Directive;
- Article 5 concerning the requirement for the employer to replace a harmful biological agent with less dangerous one;
- Article 6 on the reduction of risks.

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³ The State Sanitary Rules on Safety Work with Microorganisms of I-II Groups of Pathogenicity (ДСП 9.9.5.03599), Ministry of Health of Ukraine, 1999.
Not considered in the national legislation are the following provisions of Directive 2000/54/EC:

- Article 3 concerning the obligation of employers to determine and assess risks;
- Article 7 on informing the competent authority on any risks revealed;
- Article 10 on workers’ information in cases of a serious accident or incident involving the handling of a biological agent;
- Article 11 concerning the obligation of employers to keep a list of workers exposed to group 3 and/or group 4 biological agents;
- Article 13 regarding notification to the competent authority on the biological agents used for the first time;

- **Directive 2002/44/EC on vibration of 25 June 2002**675 (implementation timeframe – 10 years)

The requirements of Directive 2002/44/EC are partially considered in:

- Article 153 of the Labour Code of Ukraine, 1971, concerning the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions through reduction and elimination of noise, vibration, ionizing radiation, etc.;
- Article 13 of the Law of Ukraine “On Labour Protection,” 1992, on the employer's obligation to create working conditions in accordance with laws and regulations on OSH;
- The Technical Regulations on Personal Protective Equipment of 2008, para. 33 of which contains provisions on the protective equipment against the influence of mechanical vibration; 676 Article 3 of Directive 2002/44/EC on the exposure limit values and action values is also considered in the Technical Regulations.

Not considered are the following provisions of Directive 2002/44/EC:

- Article 4 of Directive 2002/44/EC on the determination and assessment of risks;
- Article 5 (3), (4) of Directive 2002/44/EC on the requirement that workers not be exposed above the exposure limit value and the obligation of employers to adapt the measures defined by the Directive to the requirements of workers at particular risk;

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- Article 10 (2) of Directive 2002/44/EC on the requirement that the exposure value averaged over 40 hours must be less than the exposure limit value.

- **Directive 2003/10/EC on noise of 6 February 2003**[^677] (implementation timeframe – 10 years)

The requirements of Directive 2003/10/EC are generally considered in:

- The Labour Code of Ukraine, 1971, Article 153 (the obligation of employers to ensure safe and healthy working conditions at enterprises); Article 158 (the obligation of employers to improve the working conditions through reduction and elimination of noise, vibration, ionizing radiation, etc.);

- The Law of Ukraine “On Labour Protection,” 1992, Article 13 (the employer’s obligation to create working conditions in accordance with laws and regulations on OSH and ensure compliance with statutory requirements regarding workers’ rights to safe and healthy working conditions);

- The Law of Ukraine “On Ensuring the Sanitary and Epidemic Wellbeing of the Population” No. 4004-XII of 24.02.1994, Article 24 provides for protecting the population from harmful effects of noise, non-ionizing radiation and other physical factors, including the obligation of employers to prevent and reduce the harmful effect of noise at enterprises;

- The General Requirements on Securing Workers’ Labour Protection by Employers of 2012.

- **Directive 2006/25/EC on artificial optical radiation of 5 April 2006**[^678] (implementation timeframe – 10 years)

The provisions of Directive 2006/25/EC are generally considered in:

- Article 153 of the Labour Code of Ukraine, 1971, on the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions through reduction and elimination of noise, vibration, ionizing radiation, etc.;

- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (the employer’s obligation to create working conditions in accordance with laws and regulations on OSH).


There are no specific regulations adopted to fully meet the requirements of the Directive yet.

- **Directive 2013/35/EU on electromagnetic fields of 26 June 2013**\(^{679}\)
  (implementation timeframe – 10 years)

Most of the requirements of Directive 2013/35/EU are considered in:

- Article 153 of the Labour Code of Ukraine, 1971, on the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions the introduction of advanced technologies, reduction and elimination of dust and air pollution in production premises, reduction of noise, vibration, ionizing radiation, etc.;

- The Law of Ukraine “On Labour Protection” of 1992, Article 13 (the employer’s obligation to create working conditions in accordance with laws and regulations on OSH);

- The Law of Ukraine “On Ensuring the Sanitary and Epidemic Wellbeing of the Population” No. 4004-XII of 24.02.1994, Article 24 (on the protection of the population from harmful effects of noise, non-ionizing radiation and other physical factors, including the obligation of employers to prevent and reduce these harmful effects at enterprises;

- The State Sanitary Norms and Regulations during the Work with the Electromagnetic Fields Sources, approved by the Ministry of Health of Ukraine, Order No. 476 of 18.12.2002;

- The Safety Rules during the Operation of Computers, approved by the State Committee on Industrial Safety, Labour Protection and Mining Supervision, Order No. 65 of 26.03.2010;

- The Requirements for Employers on Workers’ Protection from the Harmful Effects of Electromagnetic Fields, approved by the Ministry of Energy and Coal Industry, Order No. 99 of 2014.\(^{680}\)

4.3.2.4. **Special Risks**

The fourth group constitute the OSH directives on *workload, ergonomical* and *psychological risks*. The following directives of this group shall be implemented in Ukraine:

- **Directive 90/269/EEC on manual handling of loads of 29 May 1990**\(^ {681} \)
  (implementation timeframe – 10 years)


The requirements of Directive 90/269/EEC are considered in:

- The Labour Code of Ukraine, 1971, Article 174 (on manual handling of loads by women), Article 190 (on manual handling of loads by young workers);

- The Law “On Labour Protection” No. 2694-XII of 1992, Articles 10 (on the prohibition of manual handling of loads by women that exceed the limits established for them), and Article 11 (on the prohibition of manual handling of loads by young workers above the established limits for this category of employees);

- The Weight Limits of Lifting and Moving Heavy Loads by Minors of 1996;\(^{682}\)

- The Weight Limits of Lifting and Moving Heavy Loads by Women of 1993;\(^{683}\) and other technical regulations concerning the manual handling of loads.

- Directive 90/270/ EEC on display screen equipment of 29 May 1990\(^{684}\)

(implementation timeframe – 7 years)

The requirements of Directive 90/270/ EEC are partially considered in:

- Article 153 of the Labour Code of Ukraine, 1971, on the obligation of employers to ensure safe and healthy working conditions at enterprises; Article 158 on the obligation of employers to improve the working conditions the introduction of advanced technologies etc.;

- Article 13 of the Law of Ukraine “On Labour Protection,” No. 2694-XII, 1992, on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH;

- The Safety Rules during the Operation of Computers of 2010;\(^{685}\) The Safety Rules do not fully consider the requirements of the Directive as for the safety of computers regardless of their display methods.

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\(^{682}\) Order of the Ministry of Health of Ukraine “On the Approval of the Weight Limits of Lifting and Moving Heavy Loads by Minors” No. 59 of 22.03.1996, registered by the Ministry of Justice of Ukraine under No. 183/1208 of 16.04.1996.


\(^{685}\) Order of the State Committee on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of Safety Rules during the Operation of Computers” No. 65 of 26.03.2010 (Ofizijnyi Visnyk Ukrainy (official publication), 2010, No. 30, p. 12, para. 1119).
4.3.2.5. Sector-specific and Worker-related Directives

The fifth group of EU OSH Directives consists of sector-specific and worker-related directives. The directives of this group include provisions specifically targeting different categories of workers (e.g. young people, women) as well as workers in various sectors. Ukraine has to implement the following directives of this group:

- **Directive 92/29/EEC on medical treatment on board vessels of 31 March 1992**\(^{686}\) (implementation timeframe – 10 years)

To date, there are no relevant regulations conforming to Directive 92/29/EEC in place. However, the Strategy for the Implementation of the Provisions of the European Union Directives and Regulations in the Field of International Maritime and Inland Water Transport (the Roadmap), adopted by the Cabinet of Ministers of Ukraine in 2017,\(^ {687}\) stipulates the implementation of the Directive through development of specific rules and regulations by the Ministry of Infrastructure of Ukraine.

- **Directive 92/57/EEC on temporary or mobile construction sites of 24 June 1992**\(^ {688}\) (implementation timeframe – 7 years)

The requirements of Directive 92/57/EEC are considered in:

- Article 153 of the Labour Code of Ukraine, 1971, provides for the obligation of employers to ensure safe and healthy working conditions at enterprises;


- The Minimum Safety and Health Requirements at Temporary or Mobile Construction Sites, approved by the Order of the Ministry of Social Policy of Ukraine No. 1050 of 23.06.2017.\(^ {689}\) These Requirements were developed on the basis of Directive 95/57/EEC and are in full conformity to the latter;


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\(^{689}\) Order of the Ministry of Social Policy of Ukraine “On the Approval of Minimum Safety and Health Requirements at Temporary or Mobile Construction Sites” No. 1050 of 23.06.2017 (Ofizijnyi Visnyk Ukrainy (official publication), 2017, No. 82, p. 171, para. 2519).
- **Directive 92/91/EEC on mineral-extracting industries/drilling of 3 November 1992** (implementation timeframe – 2 years)

The requirements of Directive 92/91/EEC are generally reflected in national legislation, in particular:

- Article 153 of the Labour Code of Ukraine, 1971, on the obligation of employers to ensure safe and healthy working conditions at enterprises;
- The General Requirements on Labour Protection at Mining Enterprises of 2006.

Partially considered in national legislation are the following provisions of Directive 92/91/EEC:

- Requirements laid down in the Annex to Directive 92/91/EEC (minimum safety and health requirements as referred to in Article 10 of the Directive), Part A, para. 2.1. regarding organization of a workplace are generally considered in national legislation, except for the requirement to keep workplaces that are cleaned with any hazardous substances or deposits to be removed or controlled in order not to endanger the health and safety of workers (para. 2.1.1, Part A, Annex to Directive 92/91/EEC);
- Para. 2.8, Part A of the Annex to Directive 92/91/EEC on the introduction of a system of work permits for the carrying out of hazardous activities;
- Paras. 6, Part A of the Annex to Directive 92/91/EEC concerning protection from harmful atmospheres and explosion risks;
- Paras 8, 9, 11 and 12 Part A of the Annex to Directive 92/91/EEC concerning ventilation, temperature and natural and artificial lightening are considered in national technical regulations; however they do not fully conform to all the requirements laid down in the Directive;
- Para. 10, Part A of the Annex to Directive 92/91/EEC on requirements for floors, walls, ceilings and roofs of rooms;

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- Para. 6, Part B of the Annex to Directive 92/91/EEC on safety drills concerning the training of workers in part of providing workers with special protective equipment;
- Para. 2, Part C of the Annex to Directive 92/91/EEC on fire detection and firefighting are considered in technical regulations of Ukraine in more general terms than those of the detailed provisions of Directive 92/91/EEC;

Not considered in national legislation are the following provisions of Directive 92/91/EEC:
- Article 3 (3) of the Directive, which provides that where workers from several undertakings are present at the same workplace, each employer shall be responsible for all matters under his control;
- Article 4 of the Directive on protection from fire, explosions and health-endangering atmospheres and the obligations of the employer in this regard;
- Article 5 of the Directive on the obligation of the employer to provide and maintain appropriate means of escape and rescue;
- Article 6 of the Directive on the obligation of employers to take measures to provide necessary warning and other communication systems;
- Para. 2.2., Part A of the Annex to Directive 92/91/EEC concerning the appointment by an employer of a person in charge for the safety of workplaces;
- Para. 7, Part A of the Annex to Directive 92/91/EEC on emergency routes and exits;
- Para. 13, Part A of the Annex to Directive 92/91/EEC on requirements for doors and gates;
- Paras. 17 and 19, Part A of the Annex to Directive 92/91/EEC on the requirements for rest rooms, including those for pregnant women and breastfeeding mothers;

**Directive 92/104/EEC on mineral-extracting industries of 3 December 1992**\(^{692}\) (implementation timeframe – 2 years)

The requirements of Directive 92/104/EEC are partially reflected in national legislation:
- Article 153 of the Labour Code of Ukraine, 1971, provides for the obligation of employers to ensure safe and healthy working conditions at enterprises;
- The Law “On Labour Protection” of 1992, Article 13 (on the employer’s obligation to create working conditions in accordance with laws and regulations on OSH).

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- Annex to Directive 92/104/EEC (on Minimum Safety and Health Requirements as referred to in Article 10 of the Directive), Part B on Special Minimum Requirements applicable to Surface Mineral-Extracting Industries and Part C on Special Minimum Requirements applicable to Underground Mineral-Extracting Industries are considered in the General Requirements on Labour Protection at Mining Enterprises of 2006. In particular, provisions of the General Requirements comply with the provisions of the Directive 92/104/EEC in part of the requirements regarding measures to prevent fire and explosions; emergency and rescue equipment; minimum requirements concerning safety at work, including organization and supervision, requirements concerning workplace and working environment.

- **Directive 93/103/EC on work on board fishing vessels of 23 November 1993**

  (implementation timeframe – 10 years)

  The requirements of Directive 93/103/EC are generally considered in:

  - Article 153 of the Labour Code of Ukraine, 1971, provides for the obligation of employers to ensure safe and healthy working conditions at enterprises;
  - Article 13, the Law “On Labour Protection” of 1992, concerning the employer’s obligation to create working conditions in accordance with laws and regulations on OSH.
  - The Rules on Safety during Works on Board Fishing Vessels, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 26 of 2006.

  The following provisions of Directive 93/103/EC are partially reflected in national legislation:

  - Article 3 of Directive 93/103/EC on requirements for owners to ensure that their vessels are used without endangering the safety and health of workers;
  - Article 7 of Directive 93/103/EC on the equipment and maintenance of vessels. National legislation in this regard contains more general provisions than those envisaged by the Directive;
  - Article 8 of Directive 93/103/EC on information for workers, in part concerning the obligation of employers to inform workers on the conditions of safety and labour protection, the causes of accidents and occupational diseases, to provide access for workers to all necessary information, and to inform workers on measures taken;

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and the participation of workers’ representatives in resolving issues on labour protection at an enterprise;

- Article 9 of Directive 93/103/EC on the training of workers;


Not considered in national legislation are the following provisions of Directive 93/103/EC:


- Annex I, para. 17 on appropriate technical measures to reduce the noise level on vessels.

In addition, there are some EU directives in this group, not specified by the EU-Ukraine Association Agreement, which nevertheless find its reflection in national legislation of Ukraine to a certain extent.

For instance, the requirements of Directive 91/383/EEC on fixed duration or temporary employment relationship of 25 June 1999 are considered in the following provisions of the Ukrainian national legislation:

- Article 29, para. 4 of the Labour Code of Ukraine, 1971, concerning the obligation of employers to instruct young workers on the occupational health and safety, industrial hygiene and fire safety partially conform to the requirements of the Directive, excluding those on the medical surveillance of workers after the termination of employment (Article 5 of the Directive 91/383/EEC);

- Article 5, para. 2 of the Law “On Labour Protection” of 1992 stipulates the obligation of an employer to inform the worker, before entering in the employment relationship, on labour conditions and any dangerous or harmful factors present as well as possible consequences of such factors for workers’ health, and the rights workers have to benefits and compensation for work in harmful conditions. A worker must certify in written form that he or she has been properly informed about these labour conditions. This provision is in conformity with Article 3 of Directive 91/383/EEC on the provision of information to workers.

The following requirements of Directive 92/85/EEC on pregnant workers of 19 October 1992 are considered in the national legislation:

- The requirements of Directive 92/85/EEC concerning the implementation of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding are reflected in the Labour Code of Ukraine of 1971, Part XII on Women’s Labour,


Article 174-186. In particular, pursuant to Article 176 of the Labour Code, work by pregnant women at night, during overtime and on weekends is not allowed. Article 178 stipulates the transfer of pregnant women to less strenuous work; Article 179 reflects the provision of Article 8 of the Directive, according to which women are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement; Article 184 prohibits employers from refusing for employment, reducing wages or dismissing workers on the grounds of pregnancy. Pursuant to Article 186 of the Labour Code, at enterprises with large number of female workers, places for breastfeeding as well as personal hygiene for women must be established;

- Article 10 of the Law “On Labour Protection” of 1992 regulates the protection of labour of women and stipulates the adoption of national legislation on labour protection of pregnant workers.

Not considered in Ukrainian legislation are the following requirements of Directive 92/85/EEC:

- Article 2 (5) of Directive 92/85/EEC concerning the right of workers at the end of parental leave to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship is not considered in Article 179 on parental leave in the Labour Code of Ukraine of 1971;

- Article 5 of Directive 92/85/EEC concerning the obligation of an employer, in case of a revealed risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker, to take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided;

- Article 9 of Directive 92/85/EEC concerning time off for prenatal examinations, which requires employers to ensure that pregnant workers are entitled to time off without loss of pay, in order to attend prenatal examinations, if such examinations have to take place during working hours.

The requirements of Directive 94/33/EC on young workers of 22 June 1994 are considered in:

- The Labour Code of Ukraine of 1971, Part XIII on the Labour of Youth, Articles 187-200. In particular, Article 190 of the Labour Code prohibits young people under the age of 18 to work where dangerous and harmful working conditions are involved, including work underground. Article 191 provides for compulsory medical examinations of workers under 18 before employment and annually during the employment until the age of 21. Pursuant to Article 192 of the Labour Code, it is prohibited to engage young persons in work on weekends, during overtime and at night;

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- Article 11 of the Law “On Labour Protection” of 1992 states that the labour of young person in employment with harmful and dangerous conditions as well as work at night, during overtime or on weekends, or work involving the lifting of heavy weights beyond the established limits for this category of workers is prohibited;

- The Regulation on Training of Minors on Works with Harmful or Dangerous Conditions, of 1994\(^{698}\) conforms to the requirements of Directive 94/33/EC concerning the training and instructions given to young people (Article 6 (2) (e) of the Directive).

Not considered in national legislation are the following requirements of Directive 94/33/EC:

- Article 10 of Directive 94/33/EC concerning the regulation of the minimum rest period;

- Article 11 of Directive 94/33/EC concerning the recommendation that a period free of any work must be included, as far as possible, in the school holidays of children subject to compulsory full-time schooling under national law;

- Article 12 of Directive 94/33/EC on the regulation of length of daily break time during the working day of young employees.

5. Regional Instruments on OSH: the European Social Charter of the Council of Europe

One of the most important European instruments in the sphere of social rights is the European Social Charter, adopted by the Council of Europe in 1961\(^{699}\) and revised in 1996.\(^{700}\) The Charter provides for extensive protection of fundamental social and economic risks and guarantees such human rights as the right to employment, health, social protection, welfare etc. The European Social Charter, also called the “Social Constitution of Europe,” serves as a point of reference for EU law, while most of the social rights guaranteed by the EU Charter of Fundamental Rights are based on the relevant provisions of the European Social Charter.

The European Social Charter enjoys a legal position vis-à-vis national law similar to that of ILO standards, as it supersedes any contradictory national legislation in monist states. In dualist states, the Charter must be implemented through national laws or regulations. The follow-up procedures of the Charter are reminiscent of the ILO supervisory machinery. Monitoring is based on annual national reports, subject to examination by the European Committee of Social Rights (ECSR). The Committee publishes conclusions every year, which contain decisions on the level of conformity with the Charter. In case the Committee finds that a state has not complied with the Charter and has taken no action to enforce compliance, the Committee of Ministers addresses a recommendation to that state, asking


\(^{699}\) Council of Europe, European Social Charter, 18 October 1961 (CETS No. 35).

\(^{700}\) Council of Europe, European Social Charter (revised), 3 May 1996 (CETS No. 163).
it to change the situation in law and in practice. In addition, the protocol of 1995 (in force since 1998) provides for complaints regarding violations of the Charter to be addressed to the ECSR. The conclusions of the ECSR are not enforceable before a court. However, it has been argued that the follow-up procedures do have significant influence on changes in labour legislation of many Member States in the Council of Europe.\textsuperscript{701}

It is argued that the European Social Charter was the first international instrument to enshrine a human right to health and safety at work. Part I (3) of the revised Charter states that “all workers have the right to safe and healthy working conditions.” Article 3 of the Charter enshrines the right to safe and healthy working conditions. Both versions of the Charter proclaimed this right under Article 3. While the 1961 Charter contained 3 paragraphs under Article 3, the 1996 revised Charter has one additional paragraph 4 on the promotion of occupational health services. Pursuant to Article 3 of the Charter (revised), a state, in consultation with employers’ and workers’ organizations, is required to:

Formulate, implement and review periodically a coherent national policy on occupational health, occupational safety and the working environment. The primary aim of the policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimizing the causes of hazards inherent in the working environment (para. 1).

A state has to adopt safety and health regulations (para. 2) and to provide the enforcement of such regulations by measures of supervision (para. 3). In addition, a state has an obligation “to promote the development of occupational services for all workers with essentially preventive and advisory functions” (para 4). Furthermore, Article 3 the 1996 Charter (revised) contains the request (in the introductory sentence) for a state to “consult with workers’ and employers’ organizations” on issues related to health and safety at work. Consequently, this condition applies to all four paragraphs under Article 3 of the revised Charter, while in the 1961 Charter, consultation with workers’ and employers’ organisations were required only with regards to the “measures intended to improve industrial safety and health.”\textsuperscript{702} Hence, the introduced tripartite mechanism is intended to serve the efficient implementation of national laws and regulations.\textsuperscript{703}

Article 3 (2) of the Charter stipulates that public authorities must issue safety and health regulations. Hence, the Charter reflects the statutory model, which allows for more effective protection of workers against work related hazards due to the number of domestic laws on occupational safety and health.\textsuperscript{704} The regulations adopted by the states’ competent authorities must be brought in line with EU directives as well as with the respective ILO conventions. The instruments concerned are mainly Framework Directive 89/391/EEC of 12 June 1989 on the introductions of measures to encourage improvements in the safety and health of workers at work, and the ILO Convention on Occupational Safety and Health of 1981 (No. 155).\textsuperscript{705}

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According to the Conclusions of the ECSR, regulations for ensuring safety and health at work must refer to all measures for the protection of life and health at work, including regulations on the safety of technical equipment and technical standards; fire safety regulations; hygiene and anti-epidemic regulations; transportation regulations; and regulations on handing flammable and explosive materials, weapons, radioactive materials, and poisons, as well as other materials harmful to health, provided they are intended to address issues concerning the protection of life and health.706 Furthermore, the ECSR specifies that along with general legislation on health and safety, states must ensure the adoption of other regulations specifically addressing particular risks, by establishing prohibition measures and maximum exposure levels for hazardous agents such as chemical, physical and biological agents, including benzene,707 white lead (painting),708 ionizing radiation709 and asbestos.710 In this regard, the ECSR refers to the ILO instruments as well as to EU directives in the field. For instance, the ILO Benzene Convention of 1971 (No. 136) envisages that the use of benzene and of products containing benzene must be prohibited in certain work processes, as specified by national laws and regulations. Hence, the ECSR refers to this ILO instrument as well as to Directive 2000/69/EC on limit values for benzene and carbon monoxide in ambient air.711 The ECSR also refers to the ILO White Lead (Painting) Convention, 1921 (No. 13), the ILO Asbestos Convention, 1986 (No. 162) and Directive 83/477/EC on the protection of workers against risks connected with exposure to asbestos during work,712 which was later repealed by Directive 2009/148/EC.713 With regard to exposure to asbestos, in order to comply with Article 3 (1) of the Charter, exposure limits must be equal to or lower than those laid down in Directive 2009/148/EC. In the opinion of ECSR, total prohibition of asbestos would ensure more effective protection of the right to safe and healthy conditions, which is enshrined in Article 3 (1) of the Charter.

In addition, regulations ensuring health and safety at work must include prevention measures. In order to comply with Article 3 (2), measures sufficiently precise to permit their effective application must be adopted, taking into account the occupations concerned, the number of people involved, and the current state of knowledge on the respective subject.714 Both employed and self-employed workers are meant to be covered by the regulations in question, as the Charter so implies. The scope of the OSH legislation covers

714 ECSR, Conclusions XII-2, p. 62.
all sectors of the economy. In addition, in order to comply with Article 3 (2) of the Charter, certain vulnerable categories of workers (such as non-permanent workers) must be protected. It is the obligation of the states to introduce measures to ensure that these categories of workers receive adequate information, training and medical surveillance and that there is no discrimination against such workers with regard to their employment status when it comes to health and safety at work.  

Furthermore, the right of children and young persons to protection of their health and safety at work is envisaged by Article 7 of the Charter. In this regard, there is a number of case law on the European Social Charter that refers to the ILO Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182) and Directive 94/33/EC on the protection of young people at work. Article 8 regulates the employment of women, including night work of pregnant women, women who have recently given birth and women nursing their infants. Pursuant to Article 8 (5), the employment of these categories of women in underground mining is prohibited, as well as all other work that is dangerous, unhealthy or has an arduous nature. Applicable instruments in this regard, according to the ECSR, are the ILO Underground Work Convention of 1935 (No. 45) and Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

Finally, under the Charter, the workers enjoy the right to address violations of provisions on healthy and safe working conditions before the international forum. Thus, the Charter fills in the gap that both the ILO and the EU norms had failed to address. For Ukraine, the ratification of the revised Charter in 2006 implies that it has become part of Ukrainian national legislation and must be applied by domestic courts. The provisions of national legislation generally conform to those envisaged in the Charter, albeit only after introducing respective amendments to national laws.  

6. Conclusions

Current national labour legislation of Ukraine, including that on labour protection and OSH, is comprised of a mixture of different legal norms adopted during different historical periods and economic situations. While some of these norms are up to date, many are outdated and cannot adequately react to modern labour relations. Thus, the Labour Code of Ukraine of 1971, inherited from the Soviet Union times, contains provisions on occupational health and safety with regard to different categories of workers. Despite the fact that the Labour Code has undergone numerous amendments and changes during
recent years, its provisions still remain outdated to a large extent. Moreover, technical regulations on occupational health and safety in Ukraine, many of which were also adopted during the Soviet time, amount to more than two thousand normative acts that regulate different issues on OSH and often duplicate each other.

The analysis of international instruments in the field of labour protection and OSH and the conformity of Ukrainian national legislation with respective international provisions shows that, in general terms, the national legislation complies with the respective ILO conventions ratified by Ukraine. Such conformity is found, to a different extent, with regard to the ILO Radiation Protection Convention, 1960 (No. 115), the Hygiene (Commerce and Offices) Convention, 1964 (No. 120), the Occupational Cancer Convention, 1974 (No. 139), the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174), and the Safety and Health in Mines Convention, 1995 (No. 176) as well as the Safety and Health in Agriculture Convention, 2001 (No. 184). On the other hand, unratified instruments, such as the ILO Asbestos Convention, 1986 (No. 162), nevertheless find reflections in provisions of national legislation of Ukraine with relatively high conformity to international standards.

The provisions of Council of Europe's European Social Charter (revised) of 1996, which has been ratified by Ukraine and is therefore a part of national legislation of the state, also finds reflections in national legal acts, including those with OSH relevance.

The EU has implemented more complex health and safety standards than those adopted by the ILO. Therefore, to assess the conformity of national provisions to that of the EU requires further and more thorough analysis. However, there are various cases of high or partial conformity of national legislation to EU standards on OSH.

The provisions of the OSH Framework Directive (Directive 91/383/EEC) are reflected in national legislation to a varying extent. In particular, there is national legislation conformity regarding the employers’ general obligations to take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as necessary organization and means (Article 6, para. 1 of Directive 91/383/EEC); protective and preventive services (Article 7); employers obligations as regards protective measures and protective equipment, keeping record of occupational accidents and reporting to the responsible authorities (Article 9, para. 1 (b), (c), (d)); the right of workers to leave their workstation in the event of serious danger (Article 8, para. 4). Furthermore, the following provisions of the OSH Framework Directive are reflected in national legislation: Article 10 (worker information), Article 11 (consultation and participation of workers), Article 12 (training of workers) and Article 14 (health surveillance of workers).

Some of the provisions of Directive 91/383/EEC are only partially considered in national legislation. This includes Article 13 on workers’ obligations; Article 8, para. 2 on the obligation of employers to designate workers for first aid, firefighting and the evacuation of workers.
Certain requirements of the OSH Framework Directive are not reflected in Ukrainian domestic legislation, such as those on general principles of prevention (Article 6, para.2), on cooperation and action coordination of employers in implementing OSH provisions, where several establishments share a workplace (Article 6, para. 4); on employers’ obligation to refrain from asking workers to resume work under serious and imminent danger (Article 8, para. 3); and employers’ obligations to provide information on safety and health risks to workers from any outside establishments (Article 10, para. 2).


Also, there is a low conformity or inconsistence of national legislation to the EU OSH directives observed regarding the requirements of Directive 2002/44/EC on vibration, Directive 2003/10/EC on noise, Directive 2000/54/EC on biological agents at work, Directive 2006/25/EC on artificial optical radiation as well as Directive 92/29/EEC on medical treatment on board vessels.

However, there is an ongoing tendency to bring the national legislation of Ukraine in the field of OSH into line with international and European standards. The EU-Ukraine Association Agreement in this regard is likely to foster greater approximation of national legislation to the respective EU directives.
Chapter IV. Labour Inspection: International and European Standards. Labour Inspection in Ukraine

The institution of labour inspection was established in industrialized societies in order to guarantee and enforce rights at work as well as to enhance compliance with labour laws. This chapter outlines the role and functions of labour inspection in ensuring compliance with international labour standards. In addition, the legal scope of labour inspection duties and powers under the law of the ILO as well as in the EU is assessed. Further, the chapter examines the contemporary challenges faced by labour inspection internationally. Finally, there is an analysis of the legal scope and role of labour inspection in Ukraine in enhancing compliance with international labour standards (ILS) at workplace, particularly with regards to the functions envisaged by international norms on the powers of labour inspectors and the conformity of national legislation of Ukraine to respective international instruments.

1. Labour Inspection and its Role in Enhancing Labour Standards

Labour inspection emerged as an institution in industrialized societies in the 19th century and still plays a central role in national prevention systems. As early as 1833, in England the Factory Act (Lord Althorp’s Act) was the first regulation that created a system of public labour inspection with powers to enter the workplace and impose sanctions, thus intervening in the private labour relationship between an employer and an employee. Hence, labour inspectorates were specifically created to guarantee that labour law provisions were obeyed, with their main duty being to enforce rights at work.

Since the creation of the ILO, ensuring that Member States apply international standards correctly has been among the main concerns of the organization. Thus, Article 427, Part XIII of the Treaty of Versailles listed methods and principles for regulating labour conditions. Among these principles was the provision that reads: “Each State should make provision for a system of inspection in which women should take part, in order to ensure the enforcement of the laws and regulations for the protection of the employed.”

The first international instruments on labour inspection were the ILO Labour Inspection (Health Services) Recommendation, 1919 (No. 5), and the Labour Inspection Recommendation, 1923 (No. 20). These non-binding standards of the ILO contained basic principles on modern labour inspection. After the Second World War, a set of new instruments was adopted, namely the Labour Inspection Convention, 1947 (No. 81) and the respective Recommendations (Nos. 81, 82, 85). Later on, two more relevant

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instruments were adopted by the ILO: the Labour Inspection (Agriculture) Convention, 1969 (No. 129) and the Labour Administration Convention, 1978 (No. 150).

The following principles on the functioning of labour inspection were set up in the ILO instruments:

1) **Labour inspection is a public function.** This implies that the establishment of a labour inspection is a responsibility of governments. Labour inspectors should enjoy their independence and their status as public officials; impartiality and freedom from external state pressure or constraints must be guaranteed. In addition, labour inspectors do not only enjoy a set of rights, but also have duties, which must be duly exercised;

2) **Cooperation between the labour inspectorate and workers’ and employers’ organisations.** Such cooperation is vital when it comes to the formulation of labour protection legislation and its application at the workplace;

3) **Cooperation with other institutions and organisations** (i.e. social security authorities, research institutes, NGOs, universities, experts in the field, etc.);

4) **Prevention** (or the preventive function of a labour inspection). A key aspect of the development of a preventive culture in social and labour policy is the orientation of labour inspection activities not only to detect violations and impose sanctions, but also on prevention. Thus, by ensuring that the labour legislation is complied with, labour inspectors prevent a large number of occupational accidents, injuries and diseases;

5) **Universal coverage of labour inspection’s protective and preventive functions.** Effective labour inspection should cover all workers in all sectors of economic activity.\(^{725}\)

The role of labour inspectors in the content and implementation of improving labour law has been widely recognized and is reflected in the legislation of most of the countries that have ratified the respective ILO Conventions.\(^{726}\)

The labour inspection as a main tool for good governance has been reintroduced occasionally, especially with regard to the occurrence of new forms of work and the protection of the standard employment relationship in the context of globalization.\(^{727}\)

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During the 95th ILC Session in 2006, it was emphasized that enforcement is essential in providing protection at workplaces.\textsuperscript{728} As the result, the ILO Employment Relationship Recommendation (No. 198) was adopted, representing the first internationally based approach devoted to the employment relationship to be addressed to the constituents.\textsuperscript{729} Although being a “soft law” instrument, the Recommendation directs Member States towards ensuring the enforcement of labour protection. The main objectives of the Recommendation are to solve uncertainties about employment relationship regulation; to ensure compliance and effective implementation of employment relationship regulation; to combat disguised employment relationships; and, to provide guidance on the most effective ways to determine the existence of an employment relationship.

Also, Recommendation No. 198 recognizes labour inspectorates and labour administrations as key instruments for achieving decent working conditions through the broader protection of all workers, and not only those in the formal sector. Indeed, the decent work concept and the scope of fundamental rights cover all workers with the labour inspection acting as the main governance institution in this regard.\textsuperscript{730} Hence, labour inspection serves as a vital link in the promotion of decent work for all.\textsuperscript{731}

Furthermore, in 2009, in order to strengthen national labour administration and inspection systems, the ILO created its Labour Administration and Inspection Programme (LAB/ADMIN). Later on, labour administration and labour inspection came on the agenda at the 100th ILC Session in 2011. The resolution concerning these institutions recognized them as essential for achieving decent work objectives through good governance at the service of ILO constituents.\textsuperscript{732} The resolution also established a series of conclusions for the International Labour Office that aimed at strengthening labour administration and inspectorates and dealt with the challenges for effective labour inspection posed by increasing outsourcing, subcontracting, disguised and triangular employment relationships; the means or methods to extend and enforce legislation to all workers in an employment relationship; and the training of labour inspectors.


\textsuperscript{731} Ibid., p. 4.

1.1. **Labour Inspection under the Law of the ILO**

The central ILO instruments related specifically to the labour inspectorate are the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129) as well as the Protocol of 1995 to the Labour Inspection Convention of 1947, which covers the non-commercial services sector.

1.1.1. *The Labour Inspection Convention, 1947 (No. 81)*

The aim of the ILO Labor Inspection Convention No. 81 of 1947,\(^{733}\) which applies to the commercial sector, is the effective monitoring of labour standards and the availability of information regarding the content of such standards. In the majority of the ILO Conventions on working conditions and the protection of workers adopted after the Convention No. 81, there are provisions for the establishment of labour inspection or the appointment of authorities who would be responsible for ensuring the supervision of the application of relevant legislation.

Thus, Convention No. 81 contains provisions on the organization and functioning of labour inspection services;\(^{734}\) the supervision and control of a central authority over the labour inspectorate and the responsibilities of a central authority;\(^{735}\) the recruitment of qualified staff, including women;\(^{736}\) measures each Member must take to ensure that qualified technical experts and specialists are involved in the work of inspection;\(^{737}\) the number of inspectors sufficient for performing their duties;\(^{738}\) facilities to be provided to inspectors;\(^{739}\) the powers of labour inspectors;\(^{740}\) remedies to be taken by labour inspection authorities in the event of threats to the health and safety of workers;\(^{741}\) the periodicity of inspection of workplaces;\(^{742}\) penalties for violations of the legal provisions enforceable by labour inspectors;\(^{743}\) and the submission and publication of annual reports concerning the work of inspection services.\(^{744}\)

Specifically, Article 12 of Convention No. 81 defines the powers of labour inspectors. It states that the labour inspectors should be empowered to:

(a) Enter freely and without previous notice, at any hour of the day or night, any workplace liable for inspection;

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\(^{734}\) Article 3, Labour Inspection Convention, 1947 (No. 81).

\(^{735}\) Articles 4, 5, Labour Inspection Convention, 1947 (No. 81).

\(^{736}\) Articles 6-8, Labour Inspection Convention, 1947 (No. 81).

\(^{737}\) Article 9, Labour Inspection Convention, 1947 (No. 81).

\(^{738}\) Article 10, Labour Inspection Convention, 1947 (No. 81).

\(^{739}\) Article 11, Labour Inspection Convention, 1947 (No. 81).

\(^{740}\) Article 12, Labour Inspection Convention, 1947 (No. 81).

\(^{741}\) Article 13, Labour Inspection Convention, 1947 (No. 81).

\(^{742}\) Article 16, Labour Inspection Convention, 1947 (No. 81).

\(^{743}\) Articles 17, 18, Labour Inspection Convention, 1947 (No. 81).

\(^{744}\) Articles 19-21, Labour Inspection Convention, 1947 (No. 81).
(b) Enter by day any premises which they may have reasonable cause to believe to be liable for inspection;

(c) Carry out any examination, test or enquiry which they may consider to be necessary in order to ensure that legal provisions are being strictly observed (including rights to interrogate the employer or staff on any matters concerning the application of legal provisions; to require the production of any books, registers or other documents in order to ensure that they are in conformity with the legal provisions, and to make copies of such documents and make extracts from them; to enforce the posting of notices required by legal provisions; and to take or remove samples of materials and substances used or handled for purposes of analysis). 745

Furthermore, pursuant to para. 2, Article 12 of the Convention No. 81, inspectors must notify the employer or his representative about an inspection visit, “unless they consider that such a notification may be prejudicial to the performance of their duties.”

Another important provision, contained in Article 16 of the Convention, stipulates that “workplaces shall be inspected as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions.”

Also, under Convention No. 81, Article 13, with a view to remedying defects observed in the plant, layout or working methods which labour inspectors believe constitute a threat to the health or safety of the workers, labour inspectors must be empowered to take the necessary steps, including making orders requiring: “(a) such alterations to the installation or plant, to be carried out within a specified time limit, as may be necessary to secure compliance with the legal provisions relating to the health or safety of the workers; or (b) measures with immediate executory force in the event of imminent danger to the health or safety of the workers.” In case such procedures are not compatible with the administrative or judicial practice of a Member State, “inspectors shall have the right to apply to the competent authority for the issue of orders or for the initiation of measures with immediate executory force.” 746

The 1995 Protocol to Convention No. 81 states that each Member State that ratifies the Protocol “shall extend the application of the provisions of the Labour Inspection Convention, 1947, to activities in the non-commercial services sector.” 747 The Protocol “applies to all workplaces that do not already fall within the scope of the Convention.” 748 Simultaneously, the Protocol provides for flexibility in order to ensure that certain legitimate concerns do not hinder the application of the Convention to the respective sector.

745 Article 12, para. 1, Labour Inspection Convention, 1947 (No. 81).
746 Article 13, para. 3, Labour Inspection Convention, 1947 (No. 81).
1.1.2. The Labour Inspection (Agriculture) Convention, 1969 (No. 129)

The ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129)\textsuperscript{749} is based largely on the provisions of Convention No. 81, in particular concerning those on the functions, organisation and staff of the labour inspection system as well as duties and powers of labour inspectors, albeit within the agricultural sector. Article 5 of Convention No. 129 provides that a Member State “may, in declaration accompanying its ratification, undertake to cover by labour inspection in agriculture one or more of the following categories of persons working in agricultural undertakings: (a) tenants who do not engage outside help, sharecroppers and similar categories of agricultural workers; (b) persons participating in a collective economic enterprise, such as members of a co-operative; (c) members of the family of the operator of the undertaking, as defined by national law or regulations.” Thus, covering the above-mentioned categories of agricultural workers is subject to a declaration by a Member State that ratifies the Convention.

In addition, Convention No. 129 enshrines provisions not envisaged by Convention No. 81, thus bringing in innovations. These provisions include those on the advisory and enforcement functions of labour inspectors concerning legal provisions relating to the living conditions of workers and their families;\textsuperscript{750} the organizational flexibility and structure of the labour inspection services;\textsuperscript{751} the option to include representatives of occupational organizations in the system of labour inspection officials;\textsuperscript{752} and the possibility of entrusting certain functions of labour inspection to other government services or public institutions at the regional or local level.\textsuperscript{753}

1.1.3. The Labour Administration Convention, 1978 (No.150)

The Labour Administration Convention, 1978 (No.150)\textsuperscript{754} was adopted by the ILO with a view to ensure the organization and effective operation of a system of labour administration by ratifying states. Article 4 of the Convention provides that each Member State which ratifies the Convention is obliged to “ensure the organisation and effective operation in its territory of a system of labour administration, the functions and responsibilities of which are properly coordinated.”

The system of labour administration is responsible for the formulation, implementation and supervision of national labour standards; and studies, research and statistics on labour as well as employment and human resources development. Moreover, the labour administration system must provide support for labour relations and ensure the participation of workers, employers and their organizations in relation to national labour policy.


\textsuperscript{750} Article 6, Labour Inspection (Agriculture) Convention, 1969 (No. 129).

\textsuperscript{751} Article 7, Labour Inspection (Agriculture) Convention, 1969 (No. 129).

\textsuperscript{752} Article 8, Labour Inspection (Agriculture) Convention, 1969 (No. 129).

\textsuperscript{753} Article 12, para. 2, Labour Inspection (Agriculture) Convention, 1969 (No. 129).

\textsuperscript{754} ILO Convention concerning Labour Administration: Role, Functions and Organisation, 1978 (No.150), ILC, 64th Session, Geneva, 26 June 1978.
Thus, the Labour Administration Convention, 1978 (No.150) determines the following functions of labour administration: preparation, administration, co-ordination, checking and reviewing the national labour policy; the preparation and implementation of laws and regulations; participation in the preparation and administration of national employment policy; studying and reviewing the situation of employed, unemployed and underemployed persons, the conditions of working life and terms of employment; the provision of services, advice and consultation to employers and workers and their organizations; and the provision of technical advice to employers, workers and their organizations on their request. The system of labour administration should also cover workers “who are not, in law, employed persons.” Furthermore, labour administration should represent the State in international labour affairs.

In addition, the ILO Labour Administration Recommendation, 1978 (No. 158) provides that “the system of labour administration should include a system of labour inspection” (para. 6, Part II). Hence, labour inspection forms a part of labour administration system.

It is worth noting that ILO Convention No. 81 was ratified by 145 countries and therefore became one of the ILO instruments with highest ratification rate. ILO Convention No. 129 on Labour Inspection in Agriculture, however, was ratified by only 53 Member States, while the Labour Administration Convention No. 150 received 76 ratifications.

In most ILO Member States, the scope of labour inspection is defined in general legislation as labour codes, general labour acts, legislation on conditions of work and industrial relations law. The determining factor for inclusion in the scope of labour inspection, at least in law, is often the existence of an employment or apprenticeship relationship. However, in practice the functions of the labour inspectorate vary from one country to another and are often limited depending on the national, political or economic situation.

1.2. Labour Inspection in the European Union

Different types of labour inspectorates exist in contemporary Europe, though there is also quite a large gap in the comparative study on labour inspections in EU Member States, with only a few exemptions.

In many EU states, the general inspection system monitors compliance with all the rules that govern employment relations, while a specialized inspection system deals with health and safety issues at work. The monitoring of labour standards may be performed by one single administrative body, or such functions might be shared across different sections of the labour ministry, or distributed across several specialized ministries and public

755 Article 6 of the Labour Administration Convention, 1978 (No. 150).
756 Article 7 of the Labour Administration Convention, 1978 (No. 150).
757 Article 8 of the Labour Administration Convention, 1978 (No. 150).
agencies. Thus, while in some EU states labour inspection is carried out by a single body of public service, in other states, such as France, Germany and Switzerland, different bodies complement the activities of the main inspectorate. For example, in France and Luxemburg, there is a specific inspectorate in charge of monitoring the activity of occupational health services. Belgium has a state-run labour inspectorate, which is split into different specialized branches such as employment laws, social security, welfare at work, etc. In Sweden, a specialized agency monitors the regulations for chemicals used in workplaces and sold to consumers. France and the Netherlands have specialized transport inspection services. Also, the majority of EU Member States have specific environmental inspectorates.

The legal basis for the scope of the labour inspection in the European Union is found in the Framework Directive 89/391 EEC. The Framework Directive defines the general application of EU health and safety law, and it applies to all sectors, with exemptions for self-employed persons and risks to the public, arising from work activities. In fact, the sectoral scope of the Framework Directive is wider than that of the ILO Labour Inspection Convention, 1947 (No. 81). Moreover, the labour inspectorate may also perform functions that are not covered by the legislative scope of the Framework Directive. For instance, such functions may concern the environment or industrial relations.

In addition, the legal basis for labour inspection in EU Member States is part of the ILO Conventions in the field. In fact, all EU Member States are also members of the ILO. This is why “the ILO Conventions have attained a constitutional standing within the EU.” When the EU adopts legislation in the field of labour as well as on OSH in particular, it is very much influenced by the relevant ILO standards.

Nonetheless, the setting of labour inspection basically remains within the individual sphere of a Member State’s responsibility. In addition, EU harmonization is lacking on this point. Indeed, as Richthofen notes “by their very nature, labour inspection services, as part of a public administration system, require an institutional framework based on laws and regulations.” Such laws and regulations are enacted by Member States. Thus, in some EU Member States, the basic legal foundation of labour protection is enshrined in their constitutions. However, normally the constitutional provisions related to labour protection must be supplemented by respective legislation, including those on labour inspection. In some states, labour legislation is codified (for instance, in France), while other states adopt a specific body of legislation on occupational safety and health (Netherlands, Germany, Norway and Sweden).

765 Von Richthofen, W., 2002, supra note 720, p. 23.
The number of inspectors relative to the number of workers remains low in most of the EU countries. The highest ratio (of the “inspectors-per-million-workers”) is in Denmark, Finland, Italy and Greece. The lowest ratio is in Germany, Belgium, Spain, Hungary, Luxemburg, Netherlands, and France, while the medium ratio is seen in countries such as the United Kingdom, Sweden, Austria, Estonia, Latvia and Poland.\textsuperscript{766} It should also be noted that the working conditions of some categories of workers (e.g. agricultural, domestic workers or inmates working in prisons) are not always monitored by inspection services in the EU.

The role of labour inspection in EU states has gradually changed over recent years, particularly as a result of the increased responsibility taken by enterprises with respect to OSH.\textsuperscript{767} In addition, due to privatization and the expansion of private sectors, the role of the labour inspection became increasingly important.\textsuperscript{767} However, health and safety inspection, as well as the promotion of safe and healthy working conditions, evolved and developed in each country according to its own priorities, national traditions and culture.\textsuperscript{768} This trend toward greater efficiency in OSH inspection has encouraged policymakers to take various initiatives to bring about positive changes in OSH matters and to ensure that inspectorates are more flexible and are able to quickly adjust and respond to new challenges, with health and safety performance as a priority.\textsuperscript{769} Furthermore, inspection in many EU states has gradually extended to the psychological and psychosomatic aspects of the employment relationship, such as stress and sexual harassment at the workplace.

Also, in order to improve cooperation between EU Member States and the European Commission and to encourage consistent application of the EU legislation, the Senior Labour Inspectors Committee (SLIC) was formally created in 1995.\textsuperscript{770} Together with the European Agency for Safety and Health at Work in Bilbao, SLIC is designed to contribute to the effectiveness of the labour inspectorates in different countries and consists of senior labour inspectors or health and safety representatives from all the EU Member States, with Iceland, Lichtenstein and Norway having observer status. One of the main activities of SLIC is to define common principles for labour inspection in the field of OSH, as well as to take full account of the ILO Labour Inspection Convention (No. 81). Common principles defined by SLIC address the issues of the effective enforcement of Community law as a precondition for improving quality of the working environment; a realization of the need for effective planning and monitoring of annual plans; powers, competences and independence of labour inspectors; internal communications as well as guidance regarding labour inspection and its activities in Member States.\textsuperscript{771}


\textsuperscript{769} Ibid., p. 15.


1.3. Challenges for Labour Inspection

Generally, labour inspectorates meet increasing difficulties in coping with its tasks in many countries around the world as well as in the EU.\footnote{See Hoferlin, I., “Hard Times for Labour Inspection,” in: Labour Education, No. 140-141, 2005, pp. 22-27.}

One of the most serious challenges for labour inspection is posed by globalization, which, while resulting in “race to the bottom” in labour standards, creates many other obstacles for the effective functioning of labour inspection.\footnote{See Singh, A. and A. Zammit, “Labour Standards and the Race to the Bottom: Rethinking Globalization and Workers’ Rights from Developmental and Solidaristic Perspectives,” ESRC Centre for Business Research, University of Cambridge, Working Paper No. 279, 2004.} For instance, with regard to OSH, globalization seriously contributed to high rates of work-related causalities, while during recent decades there has been a shift of industry to developing countries with comparatively lower standards in OSH.\footnote{ILO, A Guide to Selected Labour Inspection Systems, 2011, supra note 731, p. 3.}

Another related problem for labour inspection is posed by the informal economy.\footnote{ILC General Discussion, Decent Work and the Informal Economy, Committee on the Informal Economy, Governing Body, 90th Session, June 2002, para.3. The ILC noted that, while there is no universally accepted definition of the “informal economy,” it can be referred to “all economic activities by workers and economic units that are — in law or in practice — not covered, or insufficiently covered by formal arrangements. Their activities are not included in the law, which means they are operating outside the formal reach of the law; or they are not covered in practice, which refers to the fact that — although they are operating within the formal reach of the law, the law is not applied or not enforced....” See also Daza, J.L., “Labour Inspection and the Informal Economy,” in: Labour Education, No. 140-141, pp. 15-21, 2005.} It includes difficulties in obtaining information about microenterprises and small-scale enterprises, and even accessing them; difficulties in addressing migrant workers; difficulties in applying general or special standards to rural labour; and the poor or non-existing labour administration of some states, especially when it comes to the agricultural sector. To deal with the problems posed here, labour inspectors have to possess knowledge of labour standards as well as their application to various types of enterprises and workers.\footnote{ILO, A Guide to Selected Labour Inspection Systems, 2011, supra note 731, p. 3.}

Furthermore, since the number of working activities is growing, a problem with classification is emerging. In fact, the new forms of working activities are “challenging legal categories.”\footnote{ILO, Labour Inspection and the Employment Relationship, 2013, supra note 729, p. 13.} In order to guarantee good governance and compliance with respective laws, labour inspection should also deal with unprotected work in its different forms, be it undeclared work, quasi-employees, triangular or disguised relationships, etc.\footnote{Ibid., p. 60.}

Hence, sometimes the working relationships that deserve legal protection afforded to employees by the legislator are excluded from the scope of employment. In many states, there is a lack of mechanisms and statutory powers for labour inspectorates to identify disguised employment relationships.\footnote{Although definitions of the employment relationship vary among states, the legal notion of the “employment relationship” in many countries refers to the relationship between an employee and an employer for whom the employee performs work under certain conditions, in return for remuneration (Labour Inspection and the Employment relationship, op. cit., p. 13, 14; See also ILO: The Scope of the Employment Relationship, Fifth item of the agenda, Report V, International Labour Conference, 91st}
assess and determine the employment relationship. However, in most developed countries, one of labour inspectorates’ tasks is to establish the existence of a true employment relationship. In this case, labour inspectors assess and gather evidence about the reality of facts in the workplace, rather than establishing the existence of the pact. It is noteworthy that some developing countries are also adopting strategies to address this issue.\textsuperscript{780}

Due to continuous changes in the global labour market, it is the legal framework governing employment relations through which these changes must be addressed. Yet, in many states, the margins between employment and self-employment are poorly defined, thus leaving many of workers in a “grey area” between these two notions, while under current laws, the working relationships of such workers only partially conform to the requirements of employment. In addition, the area between employment and self-employment is not covered by any “median” legal category. Therefore, it is necessary to adapt relevant labour laws that would meet the new realities of the global market.\textsuperscript{781}

Furthermore, during the last two decades, inspectors in Europe and in other countries around the world are faced with new challenges or so-called “new hazards”, which include stress, violence at work, sexual harassment, aggression at work, etc.\textsuperscript{782} Some European countries have been quite effective in dealing with these “new hazards.” For instance, in the Netherlands, inspectors have been quite successful in developing specific questionnaires, which are modified in accordance with the situation and allow inspectors to detect whether a “stress factor” is present in particular jobs. If the “stress” at work is revealed, inspectors are then empowered to issue a notice, pursuant to the national legislation, with further investigation undertaken by a private OSH service. With regard to sexual harassment, labour inspectors in Netherland may take further measures, such as legal proceedings and sanctions, depending on the degree of the violation.\textsuperscript{783} However, the most successful countries in addressing the issue of work-related stress have been those of Scandinavia, sharing their experience with labour inspectorates in other states.\textsuperscript{784}

Another challenge for labour inspectors is to find the ways of regulating cases of non-compliance, and protecting those whose interests have been compromised, without putting workers’ jobs and the functioning of an enterprise at risk.\textsuperscript{785} Hence, another problem faced

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{780} See selected case studies on Argentina, Brazil, Chile, France, Ireland, Italy, Spain, United States in: ILO, \textit{Labour Inspection and the Employment Relationship}, 2013, supra note 733.
  \item \textsuperscript{781} ILO, \textit{Labor Inspection and the Employment Relationship}, 2013, supra note 729, p. 13.
  \item \textsuperscript{782} At the beginning of the millennium, two million workers out of 159 million workers in the EU were the victims of violence annually, while three million were victims of sexual harassment, and a growing proportion of workers – 14 million – were victims of stress as well as psychological harassment (See the Survey of the European Foundation, Dublin, 2000); See also Von Richthofen, W., 2002, supra note 720.
  \item \textsuperscript{783} Von Richthofen, W., 2002, supra note 720.
  \item \textsuperscript{785} Ibid., p. 12.
\end{itemize}
\end{footnotesize}
by inspectors occurs with regard to decisions to intervene in cases where labour standards are violated.

What is more important, the legal scope of a labour inspector’s rights, which is not the same everywhere, creates obstacles for the effective functioning of this institution. In addition, judicial decisions in some countries have placed labour inspectors’ administrative activities at risk. In many occasions, court decisions have reflected a lack of understanding of both the role of the labour inspectorate and the nature of the ILO itself. Also, non-compliance reports by labor inspectorates are rarely followed by a court case in many EU Member States and most violations detected and reported by inspectors nevertheless go unpunished.

Furthermore, in addition to a lack of adequate financial resources of state labour administration even in developed states, governments sometimes contribute to the weakening of labour inspection by assigning tasks beyond the mandate envisaged by the ILO instruments. For instance, in some countries, instead of protecting the workers, inspectors mostly monitor unions or seek out illegal migrant workers. The Committee of Experts in this regard emphasized that “the primary duty of labour inspectors is to protect workers and not to enforce immigration law.”

To tackle the abovementioned challenges, public authorities in many countries have started to facilitate labour inspectorates’ work and to strengthen their cooperation with judiciary, social security institutions, tax authorities, public insurance agencies, municipalities and other state authorities.

2. Labour Inspection in Ukraine

2.1. The Institutional Framework of Labour Inspectorate in Ukraine

The collapse of the Soviet Union resulted in a breakdown of the general OSH administration at the national as well as at the enterprise level. It also led to the transfer of labour inspection from trade unions to government as well as to termination of the social protection functions of enterprises. Cutbacks on “non-productive” safety departments and safety engineers at enterprises in many CIS states during the early 1990s has created major concerns regarding working conditions, along with a large number of fatal accidents, especially in the informal sector, and the decreasing life expectancy of the working population. Hence, in newly independent states, legislation on labour inspection that would define its scope, powers and duties had to be put in place.

In Ukraine, after 1993, with the entry into force of the Law “On Labour Protection” No. 2694-XII, the functions of labour inspectorate were transferred to the State Committee of Technical Control (Derzhtekhnaglyad), on the basis of which the Committee of Labour Protection was established. Execution of public control over the observance of labour law standards remained within the competence of legal inspectors of the unions. In 1995, the State Department for the Supervision of Compliance with Labour Legislation was created within the Ministry of Labour and Social Policy, whose main task was to enforce labour legislation. However, by 2011, the Department had already been dissolved and the State Labour Inspectorate was established instead.

Hence, until 2014, the state supervision over compliance with laws and other normative-legal acts in the area of labour protection in Ukraine, including health and safety, was exercised by different executive authorities, in accordance with the branch of industry and pursuant to Article 38 of the Law of Ukraine “On Labour Protection” No. 2694-XII of 1992, including:

1) The State Service of Mining Supervision and Industrial Safety (Derzhhirpromnahliad) – the central executive authority for implementation of national policy in the field of occupational safety;

2) The State Nuclear Regulation Inspectorate – the central executive authority for implementation of national policy in the field of nuclear and radiation safety;

3) The State Inspectorate of Technogenic Safety – the central executive authority on supervision and control over observance of legislation in the field of fire and

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792 Established according to the Decree of the Cabinet of Ministers of Ukraine “On the Approval of the Regulation on the State Department for Supervision of Compliance with Labour Legislation” No. 1771 of 29.11.2000, not in force; regulated by the Decree of Cabinet of Ministers of Ukraine “On Some Issues of State Department for Supervision of Compliance with Labour Legislation” No. 50 of 18.01.2003, not in force.


794 In accordance with the Decree of the President of Ukraine “On the Regulation of the State Labour Inspectorate of Ukraine” No. 386/2011 of 06.04.2011 (Ofizijnyi Visnyk Ukrainy (official publication), 2011, No. 9, p. 34, para. 539).


797 Decree of the President of Ukraine “On the Regulation of the State Nuclear Regulation Inspectorate of Ukraine” No. 403/2011 of 06.04.2011 (Ofizijnyi Visnyk Ukrainy (official publication), 2011, No. 29, p. 169, para. 1241).
technogenic safety.\textsuperscript{798} In 2014 this authority was transformed to the State Emergency Service of Ukraine,\textsuperscript{799}

4) The State Sanitary and Epidemiological Service (\textit{Derzhsanepidemslyzhba}) – a specially empowered public authority for occupational health.\textsuperscript{800}

In 2014, a new central executive authority – the State Labour Service of Ukraine – was established as a result of a merger between the State Service of Mining Supervision and Industrial Safety and the State Labour Inspectorate.\textsuperscript{801} In addition, The State Labour Service also took on the functions of the State Sanitary and Epidemiological Service regarding the implementation of state occupational health policy as well as monitoring of workplace radiation exposure. In addition, labour inspection in agriculture is carried out by a specially established authority – the State Agricultural Inspectorate, which functions pursuant to the Decree of the President of Ukraine No. 459/2011 of 13 April 2011.\textsuperscript{802}

\section*{2.2. \textbf{The State Labour Service of Ukraine: Rights and Duties}}

The State Labour Service of Ukraine (\textit{Derzhprazi}) is a central executive authority, that exercises general supervision over compliance with labour laws. The activities of the State Labour Service are coordinated by the Cabinet of Ministers of Ukraine through the Minister of Social Policy of Ukraine. The \textit{Derzhprazi} exercises its functions through regional offices. The functions and scope of the \textit{Derzhprazi} are defined in the Regulation on the State Labour Service of Ukraine of 2015.\textsuperscript{803}

The main tasks of the State Labour Service are:

1) the implementation of state policy in the areas of industrial safety; occupational safety and health; occupational hygiene; the use of explosive materials in industry; state mining supervision; and supervision and monitoring of compliance with labour legislation and employment legislation. The State Labour Service also oversees compliance with legislation dealing with the compulsory state social insurance system with respect to the assignment and payment of compensation, the provision

\textsuperscript{798} Decree of the President of Ukraine “On the Regulation on the State Inspectorate of Ukraine on Technogenic Safety” No. 392/2011 of 06.04.2011 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2011, No. 29, p. 80, para. 1229).

\textsuperscript{799} In 2013, the State Inspectorate of Technogenic Safety had been transformed to the State Emergency Service, in accordance with the Decree of the President of Ukraine “On the State Emergency Service of Ukraine” No. 20/2013 of 16.01.2013 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2013, No. 5, p. 46, para. 154).


\textsuperscript{803} Decree of the Cabinet of Ministers of Ukraine “On Approval of the Regulation on the State Labour Service of Ukraine” No. 96 of 11.02.2015 (\textit{Ofizijnyi Visnyk Ukrainy} (official publication), 2015, No, 21, p. 201, para. 584).
of social services and other types of material support in order to secure the rights and entitlements of insured persons;

2) comprehensive labour protection management and industrial safety at the state level;

3) state regulation and oversight in the area of activities related to high-risk objects;

4) the organization and implementation of state supervision (oversight) in the field of the functioning of the natural gas market with respect to maintenance of the proper technical conditions of systems, units, and measurement devices for natural gas at the point of extraction and ensuring the safe and reliable operation of the facilities of the Unified Gas Transportation System.\(^{804}\)

In accordance with the tasks entrusted to it, the State Labour Service:

- generalizes the practice of application of legislation on matters lying within its competence, and develops proposals for the improvement of legislative and regulatory acts;

- prepares and submits proposals for the formulation of state policy in the areas of industrial safety, occupational safety and health, the management of explosive materials of industrial use, and the implementation of state mining supervision, as well as on supervision and monitoring of compliance with labour legislation, employment legislation, and legislation related to the compulsory state social insurance system;

- coordinates the work of ministries, other central executive authorities, local state administrations, local authorities, enterprises, institutions and organizations, or other commercial entities in the areas of industrial safety, occupational safety and health, the handling of explosive materials for industrial use, and the implementation of state mining supervision; it also coordinates the supervision and monitoring of compliance with labour legislation, employment legislation, and legislation dealing with the system of compulsory state social insurance;

- exercises control over the performance of state labour protection management functions by ministries and other central executive bodies, as well as local state administrations and local self-government bodies;

- develops, (with participation of ministries, other central executive authorities, the Social Insurance Fund of Ukraine, and all-Ukrainian organizations of employers and trade unions), the national programme for improving the safety, health, and working environment, and controls the implementation of this programme. It also takes part in the development and implementation of other state and sectoral programmes;

- exercises state control over compliance with labour legislation by legal persons, including their structural and separate units, which are not legal persons, and individuals who use hired labour; it carries out state supervision over compliance

\(^{804}\) Para. 3 of the Regulation on the State Labour Service of Ukraine of 2015.
with labour and employment legislation by executive authorities of city and local
councils and central executive authorities;
- carries out control over the quality of workplaces certification in accordance with
labour conditions;
- exercises state supervision over the observance of labour and employment
legislation requirements in terms of the observance of the rights of citizens during
recruitment and dismissal; the employment of foreigners and stateless persons;
compliance with rights and guarantees concerning the employment of citizens with
additional employment entitlements, the conducting of mediation and employment
services;
- monitors compliance with the requirements of legislation on job vacancy
advertisements (recruitment);
- carries out state oversight over compliance with legislation on the employment of
persons with disabilities by enterprises, institutions, and organizations, as well as
individuals who use hired labour;
- monitors the timeliness and objectivity of investigations of occupational accidents,
their record keeping, and the implementation of measures for the elimination of the
causes of accidents;
- carries out state supervision (oversight) over the activities of the Social Insurance
Fund of Ukraine;
- carries out state supervision (oversight) in the field of occupational hygiene,
including compliance with factors in the production environment known to be
harmful to the health of workers; the implementation of measures to prevent the
occurrence of occupational diseases; compliance with the requirements of sanitary
regulations; monitoring of the execution of mandatory medical examinations of
workers;
- organizes examinations of draft documentation for compliance with the
requirements of normative legal acts regarding safety during the handling of
explosive materials for industrial purposes; technical inspections regarding the
safety of mining operations, the construction and operation of mining enterprises,
and the examination of projects for the emergency protection of mining enterprises;
the testing of equipment and materials, including the technical inspection of
machines, instruments, and hazardous equipment;
- carries out independent examinations of draft documentation for compliance with
the requirements of normative legal acts on OSH; carries out investigations and
recordkeeping of accidents at work, analyses their causes, and prepares proposals
for the prevention of such accidents;
- carries out investigations of the circumstances and causes of acute and chronic
occupational diseases and poisonings;
- monitors the state of working conditions and health of workers, which is an integral part of the state’s social and hygienic monitoring;
- organizes training and retraining of officials of central and local executive authorities, whose tasks involve carrying out supervision over compliance with labour legislation;
- takes part in carrying out state examination (verification) of technological, design, technical documentation for the introduction of new technologies, collective and individual protection measures as to their compliance with the labour protection legislation; the state examination of investment programmes and construction projects in accordance with legislative requirements;
- takes part in the work of commissions on the investigation of accidents at work;
- cooperates internationally on matters within its competence; studies and generalizes the experience of foreign states on OSH, participates in the preparation and conclusion of international treaties, raising funds for international technical assistance, represents the interests of Ukraine in the international organizations;
- provides information to the population concerning compliance with labour legislation, employment legislation, and state mandatory social insurance legislation; participates in conducting the social dialogue and interaction with all-Ukraine trade union organizations and employers’ organizations on issues that fall within its competence;
- carries out explanatory and informational work on the prevention of discrimination of workers living with HIV/AIDS;
- stops or restricts the operation of enterprises and performing certain types of work that might cause harm to the health and life of workers;
- provides for audio, photographic, and video recording of labour inspection visits to enterprises;
- imposes fines for violating legislation and non-compliance with the instructions of State Labour Service officials, in cases stipulated by law;
- issues labour inspectors’ passes and maintains their register;
- monitors the situation in the area of labour remuneration, which must be provided in a timely manner and in an amount not lower than the minimum wage established by the state;
- performs other functions within the sphere of its competence.\(^{805}\)

In order to perform its duties, the State Labour Service of Ukraine has the following rights:
- to engage experts and specialists in the field to assist with issues falling under the competence of the State Labour Service;

\(^{805}\) Para. 4 of the Regulation on the State Labour Service of Ukraine of 2015.
- to freely obtain, under legally established procedure, all necessary information, documents, materials and/or statistics from ministries, or other central and local executive authorities;

- to use relevant information, data, or systems of communication of state authorities, including government authorities, as well as other technical means;

- to hold meetings, establish commissions and working groups, organize conferences and workshops on issues within the State Labour Service’s competence;

- to freely conduct and without any prior notice at any working hour of the day inspections at enterprises, including administrative buildings or workplaces located off enterprises’ premises as well as production facilities of individuals who use hired labour, and to record the fact of violation of legislation, supervision of which is in the competence of the State Labour Service;

- to obtain any necessary information, documents or materials from employers upon the inspector’s request, as well as to make copies of such materials;

- to freely conduct inspections at the executive premises of the Social Insurance Fund of Ukraine and the Mandatory State Social Insurance Fund in the Event of Unemployment regarding the assignment and payment of benefits or other types of material support provided by these authorities in order to guarantee the rights of insured persons and to demand all necessary materials and copies or extracts of documents from these organizations; receive from employers and officials written or oral explanations and reports on the level and status of the implementation of preventive measures, the causes of violations of legislation and measures taken to eliminate them;

- to provide the employer with recommendations obligatory for consideration regarding the introduction of technological or organizational processes or structures, and in due course the changes necessary to bring such processes in line with the provisions of legislation on OSH and occupational hygiene, and to increase the level of protection of employees;

- to require from central executive authorities officials as well as from officials of local authorities to eliminate the causes and conditions of improper fulfilment of their tasks, supervision over which lies within the competence of the State Labour Service;

- to involve law enforcement officers in carrying out state supervision (oversight) measures in the areas falling within the competence of the State Labour Service;

- to file complaints in court in cases determined by legislation;

- to carry out legal procedures aimed at ensuring the implementation of the rights of inspectors stipulated by law.\(^\text{806}\)

\(^{806}\) Para. 6 of the Regulation on the State Labour Service of Ukraine of 2015.
The national legal framework according to which state supervision and control over the compliance with labour legislation is exercised, including that in the field of OSH, is comprised of the Labour Code of Ukraine of 1971, Chapter XVIII, Articles 259 (on the supervision and control over the observance of labour legislation), 260 (on state authorities that exercise the supervision over the observance of labour legislation), 265 (on the liability for violation of labour legislation); the Law “On Labour Protection” No. 2694-XII of 1992, Articles 38 (on the state supervision authorities over the observance of labour legislation), 39 (on the rights and responsibilities of the officials of the state authority, implementing the state policy in the field of labor protection), 40 (on the social protection of the officials of the supervision authority), 43 (on the penalties for the labour legislation violation by legal entities and individuals), 44 (on the liability for the violation of labour legislation); the Law “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007, the Regulation on the State Labour Service of Ukraine of 2015 as well as the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017, which is analyzed below.

Hence, Ukraine ratified ILO Conventions Nos. 81, 129 and 150 in 2004. As mentioned before, Article 9 of the Constitution of Ukraine states that international treaties in force, consented to by the Verkhovna Rada (the Parliament of Ukraine) as binding, are an integral part of the national legislation. The expectation was that the respective conventions would be implemented fully into national legislation. However, an analysis of national legislation shows that there are serious inconsistencies and contradictions in the national norms and the ILO instruments.

When analyzing the conformity of national legislation to the ILO Labour Inspection Convention, 1947 (No. 81), the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 5 April 2007 deserves special attention. The Law No. 877-V regulates the supervision over compliance with labour laws in the area of commercial activity and identifies the main principles for state supervision in this area.

Specifically, Article 3 of Law No. 877-V lists the main principles according to which the state supervision (oversight) is carried out. Among them are such basic principles as the equality of rights and legitimate interests of all subjects of economic activity; objectivity and impartiality in the process of state supervision; legitimate reasons for carrying out state supervision; openness, transparency and consistency of state supervision; the independence of state supervision authorities from political parties or any other associations; the unacceptability of duplicating the competence of state supervision authorities; non-interference by the state supervision authority into the statutory activities...
of an enterprise if its activities are exercised within the scope of the law; and, most importantly, “compliance with the international treaties of Ukraine.” In addition, the Law stipulates that there can be only one state supervision (oversight) authority operating within the respective central executive authority. This principle is closely related to the aforementioned basic principle of the unacceptability of duplicating the state supervision authority’s competence.

Articles 4, 5 and 7 of Law No. 877-V contain general requirements for the state supervision and oversight, including those concerning compliance with labour laws. Thus, according to Article 5, para. 4 of Law No. 877-V, bodies of state supervision (labour inspection) must implement planned and scheduled measures of state supervision, provided that the written notification is sent to an enterprise or a private entrepreneur about an upcoming supervision no less than ten days prior to the date of an inspection. However, this provision in Law No. 877-V clearly contradicts the norms of the ILO Labour Inspection Convention, 1947 (No. 81). Thus, in accordance with Article 12, para.1 (a) of the Convention No. 81, “labour inspectors provided with proper credentials shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection.” Moreover, Article 12, para. 2 of the Convention states that “on the occasion of an inspection visit, inspector shall notify the employer or his representative of their presence, unless they consider that such a notification may be prejudicial to the performance of their duties.”

Furthermore, Article 7, para. 5 of Law No. 877-V requires the inspectors to present an order (a “referral”) from a competent authority issued for the inspection of a particular enterprise or workplace as well as the document certifying the credentials of a labour inspector (an inspector’s pass). Without having a “referral” and an inspector’s pass, the inspector “has no right to exercise an inspection.” The representative of the enterprise that which is to be inspected has the right to prevent the officials of state supervision to conduct the inspection if the official (an inspector) does not present the documents provided for in Article 7, Law No. 877-V. Again, requesting any other documents from inspectors to perform their duties, as those envisaged in Article 7 of Law No. 877-V, clearly contradicts the requirements of Article 12 of Convention No. 81.

It is noteworthy, that the Regulation on the State Labour Inspectorate as well as the Regulation on the State Service of Mining Supervision and Industrial Safety of Ukraine of 2011, envisaged the right of inspectors “to freely conduct investigations” at enterprises and other entities. However, this did not imply that the inspectors could enter an enterprise “at any hour of the day or night and without previous notice” as stipulated in ILO Convention No. 81. Furthermore, these Regulations were silent concerning the authorization documents required for the inspector to possess before the inspection takes place as defined by Law No. 877-V. Even if the formulation “to freely conduct investigations” enshrined in both Regulations could be interpreted in the light of Convention No. 81, the

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809 Article 3 as amended by paragraph 14 in accordance with Law No. 2399-VI of 01.07.2010.
810 Article 7, para. 5 of Law No. 877-V of 2007.
rule is that, in case of a conflict of norms, the provisions of Law No. 877-V would apply, given its higher judicial force than that of the Regulations.

Importantly, recent legislative developments concerning the procedure of conducting inspections as well as the rights of inspectors reflect a positive trend in national provisions toward closer conformity with international standards. In 2015, with the establishment of the State Labour Service of Ukraine and the adoption of the corresponding Regulation No. 62, labour inspectors gained the right to “to conduct freely and without prior notice at any working hour of the day inspections at enterprises” and other business entities, including those of individuals who use hired labour. Moreover, in 2017, a new Procedure of Carrying out State Oversight over Compliance with Labour Legislation was approved by the Cabinet of Ministers of Ukraine.

According to the Procedure of 2017, labour inspectors “with a certificate of credentials have the right, freely and without prior notice.”

- to enter any production or administrative premises where hired labour is used in order to conduct an inspection at any time of the day, in particular to identify unregistered labour relationships, upon the grounds specified in the Procedure;

- to have access to any books, registers and documents, which contain information on issues subject to an inspection visit, in order to verify their compliance with labour legislation requirements and to obtain copies or extracts from such documents;

- to question, either personally or in the presence of witnesses, the employer and/or the staff of the inspected enterprise on issues concerning labour legislation compliance, and to receive oral and/or written explanations on the matter;

- to alert law enforcement officers in cases of signs of criminal offences and/or the creation of a threat to the safety of the labour inspector;

- to have the possibility of conducting a confidential interview with employees regarding the subject of an inspection visit in a specially provided place;

- to record an inspection visit by means of audio, photographic, and video equipment;

- to obtain any information necessary for the inspection visit from the state authorities.

The Procedure of Carrying Out State Oversight over Compliance with Labour Legislation of 2017 lists the grounds, based on which an inspection can be conducted. More specifically, Paragraph 5 of the Procedure allows inspection visits to be carried out:

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811 Para. 6 (5) (5-1), Regulation on the State Labour Service of Ukraine No. 96 of 11.02.2015.
813 In accordance with para. 5 of the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017.
814 Para. 11 of the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017.
- at the request of an employee concerning a violation of labour legislation and his or her rights;
- upon the claim by an individual subject to a violation of employment legislation requirements regarding the registration of the existence of an employment relationship;
- upon a decision by the head of the inspection authority to conduct an inspection visit in order to reveal unregistered employment relationships on the basis of information received from the media or other sources, access to which is not restricted by law, and from sources referred to in subparagraphs 1, 2, 4-7, para. 5 of the Procedure;
- in accordance with a court ruling or a report by law enforcement authorities on violation of labour legislation;
- upon receiving information from the officials of state supervisory (oversight) authorities regarding violations of labour legislation revealed during the performance of their duties;
- upon receiving information from the State Statistics Service of Ukraine on the payment of wages in arrears at a particular enterprise;
- upon receiving information from the State Fiscal Service of Ukraine on a disproportionate number of employees to the quantity of work they are to perform; facts regarding the violation of labour legislation detected during the performance of oversight powers of the State Fiscal Service’s officials; facts regarding the conduct of economic activity without state registration as stipulated by law; information on employers who have payments in arrears of a single contribution to the compulsory state social insurance system of an amount exceeding the minimum insurance contribution for each employee;
- upon receiving information from the State Pension Fund of Ukraine on an employer paying less than the minimum wage; and/or an employer who employs 30% or more of its employees under civil law contracts;
- according to information received from trade unions on violations of workers’ rights, revealed during the exercise of public control over the observance of labor legislation.\textsuperscript{815}

Furthermore, the Procedure of 2017 contains a provision that allows the labour inspector to refrain from notifying the employer of his/her visit, if the inspector believes that such notification may jeopardize the performance of his or her duties.\textsuperscript{816}

\textsuperscript{815} Para. 5 of the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017.
\textsuperscript{816} Para. 8 of the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017.
Hence, the above mentioned provisions of the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017 are generally in conformity with the provisions of the ILO Labour Inspection Convention of 1947 (No. 81), particularly concerning the inspectors’ powers as stipulated by Article 12 of the Convention.

However, since Law No. 877-V, which has a higher judicial force than the regulations mentioned above, has not been amended to make its provisions conform to international standards, the legal scope of labour inspectors’ powers under this Law is in conflict with Articles 12(1)(a) and (2), and 15(c) of ILO Convention No. 81, thus violating the inspectors’ right to independent inspection, and the enforcement of the rights of workers. Given that the Law of Ukraine No. 877-V enshrines the principle of compliance with international agreements ratified by Ukraine, it is then even more paradoxical why particular provisions of the Law do not conform to international agreements in force, namely the ILO Convention No. 81.

Notably, the non-conformity of national legislation on labour inspection to ILO instruments was repeatedly raised by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) in different years.817 In 2010, with regard to the application of ILO Conventions Nos. 81 and 129, the Committee asked the government “to take the necessary measures in the near future to ensure that law and practice are brought into line with the provisions of the Convention with regard in particular to the rights and powers of labour inspectors.”818

In 2011, the CEACR again referred to the comments by the Federation of Trade Unions of Ukraine (FTUU) concerning Law No. 877-V. The FTUU noted that Law 877-V significantly restricted the rights of state inspectors and their ability to carry out their supervisory functions, namely:

- The requirement to establish the periodicity of inspection visits to workplaces;
- The requirement to obtain specific authorization documents, without which inspection officials may be refused entrance by the employer;
- The fact that inspection visits may be carried out only during working hours;
- The fact that notice of a planned visit must be given at least ten days in advance;
- The requirement of an order or warrant from the relevant superior authority in case of unscheduled inspections.819

These requirements were thus still in violation of Articles 12 (1) (a) and (2), and 15 (c) of the Convention No. 81 and this fact was acknowledged by the Government when addressing the FTUU comments. The Government was asked again “to indicate the

measures taken in order to ensure that Law No. 877-V is amended with a view to bringing it into conformity with the Convention." However, in 2012, the Government’s report contained no information on the issues raised in the Committee’s previous comments as regards to the observations made by the FTUU concerning discrepancies between Convention No. 81 and Law No. 877-V. The same was noted with regard to ILO Convention No. 129. The Government was thus asked once again to indicate the measures that ensured that Law No. 877-V was in conformity with ILO instruments. The issue was raised yet again in 2014, when the Committee noted that with respect to the restrictions of labour inspectors’ powers in national law (that were recognized by the Government to be in violation of Articles 12(1)(a), (2) and 15(c) of the Convention), the Government referred to a bill that provided for the amendment of those provisions of Law No. 877-V, which are not in conformity with the Convention. In addition, the State Labour Inspectorate (SLI) has made proposals on this bill.

In 2017, the Committee raised the issue again, while no amendments to Law No. 877-V of 2007 has been made until then. Specifically, the Committee reiterated request to amend Law No. 877-V, so as to bring it into conformity with the Articles 12(1)(a) and (b), 15(c) and 16 of Convention No. 81 and Articles 16(1)(a) and (b), 20(c) and 21 of Convention No. 129. In response to this request, the Government indicated that pursuant to amendments in 2014, Law No. 877-V of 2007 no longer applies to the activities in the area of labour and employment legislation by the State Labour Inspectorate.

In fact, prior to the amendments to Law No. 877-V in 2014, there were diverse opinions among experts regarding its scope. It was deemed that the Law cannot be applicable to the activities of Labour Inspection Service because of the specificity of labour inspection functions, taking into account respective ILO standards. This is because the functions of a labour inspector substantially differ from the functions performed by other state controlling authorities (i.e. fiscal authorities or inspections controlling technologies and quality of production). Therefore, the attempts to apply the provisions of Law No. 877-V to labour inspection creates a problematic legal field.

So, legal experts in Ukraine proposed to either exempt the functioning of labour inspectorate from the scope of Law No. 877-V through respective amendments, or to adopt a new law that would regulate oversight activities in the field of labour.

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Hence, in 2014 and then again in 2017, amendments were introduced to Law 877-V of 2007.\textsuperscript{825} Now Article 2, para. 4 of Law 877-V reads: "Oversight activities are exercised by the state supervision authorities in the field of labour in accordance with the procedure established by this Law, taking into account the peculiarities defined by the laws in the relevant areas and international agreements."\textsuperscript{826} Thus, this somewhat ambiguous formulation may lead to misinterpretation when it comes to the application by the Law 877-V to labour inspection.

Moreover, \textit{de facto}, the provisions of Law 877-V are still applied to labour inspection services in some cases, mostly to safeguard the interest of employers. It is therefore even more important that the functions and rights of labour inspection in Ukraine will be regulated by a specific law that will conform to the relevant ILO standards.

At the same time, in 2017 the Committee also noted with \textit{deep concern} the information on the moratorium on labour inspections.\textsuperscript{827} As a result of this moratorium, introduced between January and June 2015, the number of complaints made to the SLS concerning labour law violations significantly increased. Also, the Committee noted \textit{with concern} that the number of labour inspections between 2011 and 2014 decreased from 42,323 to 21,015. For instance, in 2015, only 2,704 labour inspection visits were undertaken.\textsuperscript{828} Recalling that a moratorium placed on labour inspection is contrary to the principles of the Convention, the Committee urged the Government to ensure that "the proposed amendments to the national legislation are undertaken with the purpose of bringing the national legislation into conformity with the Conventions and do not introduce restrictions and limitations on labour inspection."\textsuperscript{829}

In fact, Law No. 1728-VIII of 2016 foresees a new moratorium on inspection visits until 31 December 2018, however this does not apply to labour inspection.\textsuperscript{830}

Ultimately, it is expected that the new Labour Code of Ukraine, the draft of which is currently being negotiated in the parliament, will provide a legal foundation for a labour inspection system in Ukraine, where the powers and duties of inspectors are drawn in line with international standards. In the current draft of the Code,\textsuperscript{831} there is a section devoted to the system of labour inspection, including provisions on the main tasks and functions of labour inspectorate, the rights of inspectors (including the right to freely enter an enterprise


\textsuperscript{826} Article 2, para. 4, Law of Ukraine No. 877-V of 2007.

\textsuperscript{827} Pursuant to the Concluding Provisions of Act No. 76 VIII of 28 December 2014 on the repeal of several legislative acts.


\textsuperscript{829} Ibid.


liable for inspection at any time); the duties of labour inspectors; and the procedure for carrying out inspections. Mostly, the provisions of the new draft conform to the ILO standards on labour inspection. However, only the final adoption of the new Labour Code of Ukraine would make it possible to further access its provisions on the conformity with ILS.

4. Conclusions

The main task of labour inspection institutions in different states is to monitor compliance with labour legislation in the workplace. The application and monitoring of international labour standards require adequate administrative capacity and competence. Under the law of the ILO, the ratifying Member States are obliged to secure application of the international labour standards by establishing the effective system of labour administration and labour inspection.

Labour inspectorates differ in their scope and structure from one country to another. In recent years, there have been some changes observed in the functioning of labour inspections in many EU Member States, where inspections not only deal with occupational safety and health issues, but also pay attention to the “new hazards”, such as stress at work, sexual harassment, mobbing etc. However, in many countries around the world, labour inspections still face numerous challenges, including limited recourses, understaffing and insurmountable workloads.

In Ukraine, the State Labour Service supervises the compliance with labour legislation, including that of OSH. However, the new hazards mentioned above have not yet seemed to find a place within the scope of the national labour inspectorate. In addition, labour inspection in Ukraine faces serious difficulties, including a lack of professional staff and low remuneration of inspectors, a lack of workers’ awareness of their rights, and difficulties in supervising the informal sector as well as the concentration of unions on bigger enterprises.

Despite the fact that Ukraine has ratified ILO Conventions Nos. 81, 129 and 150, the state labour inspection in Ukraine still faces serious obstacles that prevent its effective functioning. Often such obstacles are found in conflicting national legislation. When analysing the conformity of Ukrainian national legislation on labour inspection to international standards, it appears that some legal acts violate provisions of the ILO instruments regarding inspectors’ powers as well the procedures of carrying out inspections.

Notably, the Regulation on the State Labour Service of 2015 as well as the Procedure of Carrying out State Oversight over Compliance with Labour Legislation of 2017 were drafted in line with ILO Labour Inspection Convention No. 81, particularly with respect to inspectors’ powers when conducting inspections. However, another national law with higher judicial force than these aforementioned regulations, specifically the Law “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007 is still in conflict with the respective international standards. Despite numerous observations and requests of the CEACR to bring the current legislation in line
with the ILO instruments, there have been no respective amendments made to the Law No. 877-V until recently. The amendments to Law No. 877-V introduced in 2017 are still ambiguous when it comes to application by the Law to labour inspection by Ukrainian judiciary.

Finally, it is expected that the new Labour Code of Ukraine, which has already passed the first reading in the Parliament and shall be adopted in the nearest future, will contain the legal foundation of the entire system of labour inspection, with inspector’s powers and duties drafted in line with international and European standards. Hence, the mechanisms essential for effective enforcement of the labour inspectorate have yet to be established, and contradictory laws still have to be amended.
The efficient application of the rule of law is impossible to achieve without the effective functioning of a country’s judiciary. For this reason, it is important to examine the development of the country’s judicial system and the application of international treaties by domestic courts.

This chapter thus provides an insight into the judicial system of Ukraine following its recent series of legal reforms. Next, the courts’ practice in the application of international and European standards is examined, giving particular attention to the legal nature of EU-Ukraine relations. Also, considering the key role of labour inspection in enhancing labour standards at work, this chapter contains a selected case law analysis on the application of ILS in Ukraine, particularly in regards to the ILO instruments on labour inspection and occupational health and safety.


After the independence of Ukraine in 1991, the outdated system of the Ukrainian judiciary, inherited from the Soviet Union, was in need of reform. Since that time, there have been a series of judicial reforms undertaken in Ukraine, the last of which came in 2016-2017.

The first steps towards reforming the judiciary were stipulated in the Concept of Judicial Reform that was approved by the Parliament of Ukraine in 1992. According to the Concept, it was necessary “to guarantee the autonomy and independence of the judiciary from the influence of the legislative and executive branches of power” as well as to “implement the democratic ideas of justice, developed by international practice and science” and “to establish the system of legislation on the judiciary that would ensure the independence of judicial power.” Thus, in the process of judicial reform, a wide range of previously adopted laws were amended, including, among others, the Law of Ukraine “On Arbitration Courts” No. 1142-12 of 1991, the Law “On the Status of Judges” No. 2862-12 of 1992 and the Law “On the Prosecutor's Office” No. 1789-12 of 1991.

In 2006, the President of Ukraine issued a Decree “On the Concept of Improvement of the Judiciary to Ensure Fair Trial in Ukraine in Line with European Standards” No. 361/2006, the aim of which was to ensure the formation of the judiciary in Ukraine into a single system of judicial organization and proceedings that would function in accordance with the

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833 Article 2 of the Concept of Judicial Reform, No. 2296-XII of 28 April 1998.
rule of law and European standards, and would guarantee the right of a person to a fair trial.\textsuperscript{837}

The most crucial period of judicial reform took place during 2010. This is when the Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI was adopted.\textsuperscript{838} It introduced a new structure to the judicial system of Ukraine and legalized the relations between the executive and judicial branches of power. Furthermore, a novelty in the hierarchy of courts of general jurisdiction was the establishment of specialized courts, which would consider matters in particular fields such as civil, commercial and administrative law. Ultimately, the creation of these administrative courts was one of the most important developments of judicial reform in Ukraine. Additionally, during the past decade, other improvements in the country’s judiciary have taken place, including the creation of an electronic database of national courts’ decisions and better transparency throughout the court system.

Judicial and labour legislation reform in Ukraine was supported by international organizations. Part of this included ILO support for labour legislation reform through technical and financial assistance and other various projects, such as, for instance, the ILO Decent Work Country Programme (DWCP), which included the harmonization of national legislation with ILS as one of the priority areas of cooperation. In addition, changes in the institutional structure of the judiciary became subject to monitoring by the Venice Commission of the Council of Europe.

The EU has also played an important role in the reform of the judiciary in Ukraine. In fact, the changes introduced by Article 21 of the Lisbon Treaty to TEU specifically aim to enhance the coherence of the EU’s external action.\textsuperscript{839} This implies that the EU, in pursuing its objectives stipulated in Article 21 of the Lisbon Treaty, is supposed to export the EU acquis into third countries’ legal systems and ensure effective implementation and application of the acquis by national judiciaries.\textsuperscript{840}

Moreover, Ukraine’s gradual integration into the EU required further reforms in Ukraine’s legal system. One of the components of this process has been referred to as the “Europeanisation” of the judiciary.\textsuperscript{841}

\begin{flushright}
\textsuperscript{837} Decree of the President of Ukraine “On the Concept of Improvement of the Judiciary to Ensure Fair Trial in Ukraine in Line with European Standards” No. 361/2006 of 10.05.2006 (Ofizijnyi Visnyk Ukrainy (official publication), 2006, No. 19, p. 23, para. 1376).
\textsuperscript{839} Article 21 TEU as amended by the Lisbon Treaty provides that “the Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organizations which share the principles which have inspired the creation of the EU, namely democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN Charter and international law. The EU also shall promote multilateral solutions to common problems” (Article 21 (1) of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01).
\textsuperscript{841} Petrov, R., 2012, supra note 444.
\end{flushright}
judiciary means consistent application of the EU *acquis*, and that the judges of national courts conform to fundamental principles of EU law in their decisions.\textsuperscript{842}

As such, the EU’s influence on the Ukrainian judiciary can be seen from two different perspectives. On the one hand, there is regular monitoring of Ukraine’s judicial reform by the EU, using various action plans and country reports (soft law instruments), while on the other hand, the EU provides financial and technical assistance to facilitate reform in Ukraine in line with EU standards.\textsuperscript{843}

In addition, Ukraine’s participation in the Conventions of the European Council, especially in the European Convention on Human Rights (ECHR) is considered to be an important factor in the reform of the legal system in Ukraine, specifically because Ukraine must then adhere to the decisions of the European Court of Human Rights (ECtHR).

However, it can be argued that despite rather profound reform of the Ukrainian judiciary in 2010, the efficient application of international instruments has still lagged behind. The reasons for this have included a high level of corruption in the Ukrainian judiciary; pressure and intervention from state authorities, ministries and officials trying to influence the courts’ decisions; high politicization of the Ukrainian judiciary; a lack of authority on the part of the judicial system and judges; poor communication and cooperation within the court system and among judges; inadequate mechanisms for appointing national judges; a lack of professional training of judges and lawyers; a lack of state funding for national courts; insufficient salaries for judges; and, often imperfect, conflicting and inconsistent national legislation, which leads to the adoption of contradictory decisions by Ukrainian judges.\textsuperscript{844}

In 2015-2017 another wave of judiciary reform took place in Ukraine. It started with the “Strategy to Reform the Judicial System and Related Institutes,” adopted by the President of Ukraine in 2015.\textsuperscript{845} The Strategy outlined a number of reforms aimed at strengthening judicial independence and the rule of law. This process involved profound legislative changes, including changes to the Constitution of Ukraine. Previously, the appointment of judges depended on the executive and legislative branches of power. The constitutional changes of 2016 included the introduction of the new High Council of Justice\textsuperscript{846} with judges elected by their peers constituting the majority (Article 131 of the Constitution).

\textsuperscript{842} Petrov, R. and P. Kalinichenko, 2011, supra note 442, p. 327.

\textsuperscript{843} Such assistance is provided through the European Neighbourhood Partnership Instrument (ENPI); Moreover, the EU has supported various initiatives within the framework of judicial reform, such as the EU-funded “Support to Justice Sector Reforms in Ukraine” project, which had run until the end of 2016.


\textsuperscript{845} Decree of the President of Ukraine “On the Strategy to Reform the Judicial System and Related Institutes in 2015-2020” No. 276/2015 of 20.05.2015 (Ofizijnyi Visnyk Ukrainy (official publication), 2015, No. 41, p. 38, para. 1267).

Furthermore, the powers of the President of Ukraine and the Parliament concerning the appointment of judges, including judges’ lifetime appointment, were abandoned.\footnote{Law of Ukraine “On Amendments to the Constitution of Ukraine (regarding Justice)” No. 1401-VIII of 02.06.2016 (Vidomosti Verkhovnoyi Rady (VVR), 2016, No. 28, p. 7, para. 532).} Now, according to the Constitution of Ukraine, a judge is appointed to office by the President, following the submission from the High Council of Justice (Article 128 of the Constitution).

Most importantly, the reform of 2016 resulted in the adoption of the new Law “On the Judiciary and the Status of Judges” No. 1402-VIII.\footnote{Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 02.06.2016 (Vidomosti Verkhovnoyi Rady (VVR), 2016, No. 31, p. 7, para. 545).} This law further specified constitutional changes and introduced a new system of courts, and also granted new powers to the Supreme Court, thus establishing its position as the highest court in the system of courts in Ukraine. Additionally, another new law, the Law “On Constitutional Court of Ukraine” No. 2136-VIII was adopted in 2017, introducing changes to constitutional proceedings and the organizational structure of the Court.\footnote{Law of Ukraine “On the Constitutional Court of Ukraine” No. 2136-VIII of 13.07.2017 (Vidomosti Verkhovnoyi Rady (VVR), 2017, No. 35, p. 376).}

These profound changes to the Ukrainian judiciary are expected to enhance the efficiency and transparency of court proceedings in Ukraine. Provided that such changes are properly implemented, the goal is also to improve justice by reducing the level of corruption in Ukraine’s judiciary as well as to make judges more accountable for their rulings.

2. **The Judicial System of Ukraine (Before and After the 2016 Judicial Reform)**

In order to better understand the operation of international law in a national context, it is necessary to examine the judicial system of the country under discussion.

Before 2016, the legal principles of the organization of judicial power and the execution of justice in Ukraine, the system of courts of general jurisdiction, and the status of professional judges were determined by the Law “On the Judicial System and the Status of Judges” No. 2453-VI of 2010.\footnote{Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI of 07.07.2010 (Vidomosti Verkhovnoyi Rady (VVR), 2010, No. 41-42, No. 43, No. 44-45 p. 529).} This law established that the Ukrainian judiciary consisted of courts of general jurisdiction and a court of constitutional jurisdiction. The courts of general jurisdiction comprised a single court system, and dealt with civil, commercial and administrative cases, and with cases of administrative offences. The only court of constitutional jurisdiction in Ukraine is the Constitutional Court of Ukraine.\footnote{Article 3 of the Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI of 07.07.2010.}

Hence, pursuant to Law No. 2453 of 2010, the system of courts of general jurisdiction included:

- Local courts;
- Courts of appeal (appellate instance);
High specialized courts (cassation instance); and,
The Supreme Court of Ukraine.\textsuperscript{852}

Before the judicial reform of 2016, the courts of cassation instance in civil, criminal, commercial and administrative cases were referred to as high specialized courts.\textsuperscript{853} The highest judicial authorities of specialized courts included the High Commercial Court of Ukraine, the High Specialized Court of Ukraine on Civil and Criminal Cases and the High Administrative Court of Ukraine. The last instance in the system of administrative courts was the Supreme Court of Ukraine.

The reformed system of the Ukrainian judiciary is determined by the Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 2016, that establishes the “renewed” system of courts in Ukraine and introduces a new role and powers to the Supreme Court, as well as engaging jurors in court trials in cases defined by the law.

In its Preamble, Law No. 1402-VIII of 2016 defines the organization of the judiciary and the administration of justice in Ukraine “\textit{which operates on the principles of the rule of law in accordance with European standards, and ensures the right of everyone to a fair trial.}”

Pursuant to Article 1 of Law No. 1402-VIII of 2016, judicial power in Ukraine is exercised by independent and impartial courts, according to the constitutional principles of the separation of powers. Article 2 of the Law states that the task of the judiciary is to ensure everyone’s right to a fair trial and respect other rights and freedoms guaranteed by the Constitution and laws of Ukraine, as well as by ratified international agreements. In addition, Article 7 of Law No. 1402-VIII establishes that everyone is guaranteed protection of their rights, freedoms and interests within a reasonable time frame by an independent and impartial court.\textsuperscript{854} In addition, foreigners, stateless persons and foreign legal entities are entitled to judicial protection in Ukraine on an equal basis with the citizens and legal entities of Ukraine.\textsuperscript{855}

In accordance with Article 17 of Law No. 1402-VIII of 2016, the system of courts in Ukraine is based on the principles of territoriality, specialization and instance. The Supreme Court is the highest court in the system of justice in Ukraine.\textsuperscript{856} The Law of 2016 introduces a three-level court system, thus returning to a court system that operated before the 2010 reform of the Ukrainian judiciary.

Hence, as a single judiciary system, it now comprises:

- Local courts;
- Appellate courts;

\textsuperscript{852} In accordance with the Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI of 07.07.2010.


\textsuperscript{854} Article 7, para. 1, Law No. 1402-VIII of 02.06.2016.

\textsuperscript{855} Article 7, para. 2, Law No. 1402-VIII of 02.06.2016.

\textsuperscript{856} Article 17, para. 2, Law No. 1402-VIII of 02.06.2016.
• The Supreme Court.\textsuperscript{857}

Such courts specialize in civil, commercial, criminal and administrative cases, and cases of administrative offences.\textsuperscript{858}

Therefore, compared to the judicial system under Law No. 2453-VI of 2010, the new system of courts doesn’t include the high specialized courts as independent courts of a cassation instance, while four courts of cassation are now directly subordinate to the Supreme Court.\textsuperscript{859} Henceforth, the renewed system of courts is expected to decrease the level of corruption in judiciary and to eliminate the inconsistencies in the application of national legislation as well as international standards.

2.1. Local Courts

Before the 2016 judicial reform, local general courts in Ukraine were the courts of first instance, and included regional, district courts in cities, city courts and inter-regional courts.\textsuperscript{860} Such courts specialized in civil, criminal and administrative cases, and in cases of administrative offences. Local courts were divided into local general courts, local commercial courts and local administrative courts. Local commercial courts included commercial courts in the Autonomous Republic of Crimea, regional commercial courts and the city commercial courts of Kyiv and Sevastopol; they heard cases arising from commercial legal relations. Respectively, local administrative courts heard cases that concern administrative jurisdiction (administrative cases).

With the adoption of the Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 2016, local general courts now comprise:

• District courts of criminal and civil jurisdiction;
• District administrative courts; and,  
• District commercial courts.\textsuperscript{861}

In accordance with Article 22 of Law No. 1402-VIII of 2016, local courts act as courts of first instance and administer justice in the manner stipulated by the procedural law. Local courts hear civil, criminal and administrative cases and cases of administrative offenses in the instances and following the procedures stipulated by procedural law.

2.2. Courts of Appeal

Before 2016, courts of appeal in Ukraine used to function as courts of general jurisdiction and of the appellate instance in civil, criminal, commercial and administrative cases, and cases of administrative offences. These included regional courts of appeal, the Kyiv and Sevastopol city courts of appeal and the Court of Appeal of the Autonomous Republic of

\textsuperscript{857} Article 17, para. 3, Law No. 1402-VIII of 02.06.2016.
\textsuperscript{858} Article 18, para. 1, Law No. 1402-VIII of 02.06.2016.
\textsuperscript{859} More on the structure and powers of the Supreme Court see Chapter V, part 2.1.4. of this thesis.
\textsuperscript{861} Article 21, Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 02.06.2016.
Crimea. Courts of appeal in commercial and administrative cases were commercial courts of appeal and administrative courts of appeal respectively.

Under Law No. 1402-VIII of 2016, courts of appeal now comprise:

- Appellate courts (criminal and civil jurisdiction);
- Appellate administrative courts; and,
- Commercial appellate commercial courts.\(^{862}\)

Furthermore, in accordance with Law No. 1402-VIII of 2016, appellate courts act as courts of appellate instance and in cases determined by procedural law – as courts of first instance for consideration of civil, criminal, commercial, administrative cases and cases of administrative offenses.\(^{863}\)

The powers of appellate courts include:

1. To administer justice in the manner stipulated by procedural law;
2. To analyze judicial statistics, to study and generalize court practice, and to notify respective local courts and the Supreme Court on the results of the court practice generalization;
3. To provide methodological assistance to local courts in applying legislation; and,
4. To exercise other powers determined by the law.\(^{864}\)

The judges of appellate courts must have minimum of five years’ work experience along with possessing an academic degree in the field of law and at least seven years of scientific work experience in the field of law.\(^{865}\)

2.3. **High Specialized Courts**

High specialized courts of Ukraine acted as courts of cassation instance in civil, criminal, commercial and administrative cases are referred to as high specialized courts.\(^{866}\) Thus, before the 2016 judicial reform, the highest judicial authorities of specialized courts, namely, the High Commercial Court of Ukraine, the High Specialized Court of Ukraine on Civil and Criminal Cases and the High Administrative Court of Ukraine, comprised an independent pillar within the system of courts of general jurisdiction.

According to Law No. 2453-VI of 2010, the powers of high specialized courts included:

1. To review cases of the respective court jurisdiction according to the cassation procedure as defined by the procedural law;
2. To review cases of respective court jurisdiction as a first instance court or a court of appeal;

\(^{862}\) Article 26, Law No. 1402-VIII of 02.06.2016.

\(^{863}\) Article 26, para. 1, Law No. 1402-VIII of 02.06.2016.

\(^{864}\) Article 27, Law No. 1402-VIII of 02.06.2016.

\(^{865}\) Article 28, Law No. 1402-VIII of 02.06.2016.

(3) To analyse judicial statistics, and study and summarize court practice;

(4) To provide methodical assistance to courts of lower levels in order to ensure uniform application of the norms of the Constitution and the laws of Ukraine in judicial practice; to provide courts of lower instances with explanatory recommendations on the issues of applying legislation in order to resolve cases of the respective court jurisdiction.\textsuperscript{867}

One of the major novelties of the 2016 reform was that the high specialized courts mentioned above were dissolved. The new Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 2016 foresees the establishment of high specialized courts for different categories of cases, in particular these are:

- The High Specialized Court on Intellectual Property; and,
- The High Specialized Anticorruption Court.\textsuperscript{868}

The high specialized courts shall function as courts of first instance for consideration of cases assigned to their jurisdiction. However, the jurisdiction of these courts has not been defined in the Law yet and is subject to amendments to the procedural laws of Ukraine.

The powers of the high specialized courts under Law No. 1402-VIII of 2016 include:

1. The administration of justice as courts of first or appellate instance in cases determined by procedural law;

2. The analysis of judicial statistics, the examination and summarization of case law and the role of informing the Supreme Court on the results of the court’s generalization of practice;

3. The exercise of other powers as stipulated by law.\textsuperscript{869}

Consequently, the establishment of new high specialized courts in Ukraine is designed to enhance consistency in the application of national legislation and international standards.

\textbf{2.4. \textit{The Supreme Court}}

\textbf{2.4.1. The Role and Powers of the Supreme Court of Ukraine during 2010-2016}

The Supreme Court of Ukraine used to be the highest judicial authority within the system of courts of general jurisdiction, including the high specialized courts. However, the judicial reform of 2010 and the adoption of the Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI significantly diminished the role of the Supreme Court.

Before 2010, the Supreme Court of Ukraine had more powers compared to its functions during 2010-2016. Previously, the Supreme Court performed the functions of a court of cassation instance in civil and criminal cases. For example, in 2009 the Supreme Court


\textsuperscript{869} Article 32, Law No. 1402-VIII of 02.06.2016.
heard more than 55,000 cases, while in 2012 the number of cases decreased to only 769. In addition, instead of eighty members of the court, the Supreme Court of Ukraine consisted of only twenty members in 2010-2016.

The powers of the Supreme Court of Ukraine under Law No. 2453-VI of 2010 included the review of cases on the grounds of inconsistent application by courts of cassation instance; the review of cases where an international judicial institution, the jurisdiction of which is recognized by Ukraine, has established a violation of international obligations by Ukraine when trying a case in a national court; the issuing of an opinion on whether actions for which the President of Ukraine has been accused demonstrate signs of treason or other crimes; the right to appeal to the Constitutional Court of Ukraine on issues regarding the constitutionality of laws and other legal acts, as well as the official interpretation of the Constitution and the laws of Ukraine; and, the exercise of other powers under the Law.

Another legal act that amended the laws defining the powers of the Supreme Court is the Law “On Amendments to Certain Legislative Acts of Ukraine Regarding Proceeding of Cases by the Supreme Court of Ukraine” No. 3932-IV, adopted in 2011. This law established the right of the Supreme Court to adopt a new judgement in a case. However, the Supreme Court did not de facto have the opportunity to adopt new judgements, as it did not have the right to overturn decisions of both the courts of first instance and appellate instances. Even when a ruling by a court of first instance or an appellate court was incorrect, the Supreme Court was only empowered to annul the inconsistent decision of the court of cassation and direct the case for a new cassation review. That is why the Supreme Court could not adopt a final judgement in a case, as it did not have the authority to assess the correctness of the findings of the courts of first instance and the courts of appeal. Consequently, the legal opinion of the Supreme Court was contained in the interim judgement, and not the final one. Therefore, the referral of a case for a new cassation review has basically turned the Supreme Court of Ukraine into an “intermediate” chain of the judicial system.

It is also important to note that before the 2010 judicial reform, one of the competences of the Supreme Court of Ukraine was to issue resolutions on the application of legislation by courts of lower instances. In this way, the Supreme Court, as the highest judicial authority within the system of courts of general jurisdiction, could influence the application of legislation by national courts, including labour legislation.

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873 Romaniuk, Y., 2013, supra note 870, p. 10.

874 For instance, in the field of labour, the following resolutions of the Supreme Court of Ukraine were adopted: Resolution of the Plenary Supreme Court of Ukraine “On Practice of Application by Courts of Ukraine of Legislation in Cases of Crimes against Occupational Safety” No. 7 of 12.08.2009 (Visnyk Verhovnogo Sydy (official publication of the Supreme Court of Ukraine) 10.09.2009, No. 8, p. 15); Resolution of the Plenary Supreme Court “On the Practice of Courts in Trials on Labour Disputes” No. 9
In general, such resolutions contained the official legal position of the Supreme Court for the application of legislation in particular cases, and were used to solve problematic issues in the administration of justice. In addition, such resolutions contributed to the formation of unified judicial practice and its consistent application. However, the Law No. 2453-VI of 2010 deprived the Supreme Court of this competence.

Furthermore, under Law No. 2453-VI of 2010 the legal conclusions of the Supreme Court of Ukraine became precedents that could be used as a source of law. However, it has been argued that such legal conclusions, despite their obligatory character, are rather declarative, as discrepancy of a court decision with the legal conclusion of the Supreme Court does not constitute grounds for appeal. As such, the obligatory character of the legal conclusions of the Supreme Court was not enough to ensure the unity of judicial practice.\textsuperscript{875}

One more aspect of the diminished powers of the Supreme Court of Ukraine after the reform of 2010 was its decreased role in forming unified judicial practice, which is an important component of the principle of legal certainty. Thus, in many European states the necessity to form a system of unified judicial practice has led to a trend towards an increasing role played by high judicial authorities.\textsuperscript{876} Moreover, the competences of the high judicial authority of a state, such as forming unified judicial practice as well as providing guidance and clarification for the application of legislation by lower courts were emphasized in Opinion No. 11 of the Consultative Council of European Judges (CCJE) concerning the quality of judicial decisions.\textsuperscript{877}

Moreover, the Venice Commission adopted a Joint Opinion on the Law of Ukraine “On the Judicial System and the Status of Judges” No. 2453-VI of 2010, which emphasized the limited powers of the Supreme Court of Ukraine. Most importantly, para. 31 of the Joint Opinion reads:

\begin{quote}
[T]he competence of the Supreme Courts is limited to cases where there is an alleged contradiction between various decisions of the same high specialised court, or between decisions of various high specialised courts. The fact that, in order for the Supreme Court to have jurisdiction there must be an alleged conflict between decisions, means that the Supreme Court can only act in a reactive way, i.e. to intervene when contradictions have actually manifested themselves. This is far from the idea of a supreme court generally
\end{quote}

\begin{flushright}
\textsuperscript{875} Romaniuk, Y., 2013, supra note 870, p. 9.  \\
\textsuperscript{876} As it is, for instance, in France and Italy; See Romaniuk, Y., 2013, supra note 870, p. 8.  \\
\textsuperscript{877} Council of Europe, Consultative Council of European Judges (CCJE), Opinion No. 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, Strasbourg, 18 December 2008, CCJE (2008), para. 71 reads: “By their case-law, their examination of judicial practices and their annual reports, superior courts may contribute to the quality of judicial decisions and their evaluation; in this respect, it is of utmost importance that their case-law is clear, consistent and constant. The superior courts may also contribute to the quality of judicial decisions by developing guidelines for the lower courts, in which attention is drawn to the applicable principles, in accordance with the relevant case-law.”
\end{flushright}
interpreting the law in an authoritative way and thus paving the way for a uniform interpretation of the law by all courts, even before contradictions have arisen.\textsuperscript{878}

Furthermore, the Venice Commission pointed out that, while parties do not have direct access to the Supreme Court under Law No. 2453-VI and the application for review has to be filed through the high specialized court that has handed down the decision about which there was a complaint, the same high specialized court is the one deciding upon the admissibility of application. This implied that “the high specialized court is asked to check itself whether there is reason to think that it has misinterpreted the law.”\textsuperscript{879} Therefore, under Law No. 2453-VI of 2010, the Supreme Court of Ukraine \textit{de facto} lost its authority as the highest court of general jurisdiction in Ukraine.

In order to ensure unified judicial practice and the consistent application of national and international norms by domestic courts, it was necessary that the Supreme Court, was conferred with the powers to issue guidelines and clarifications on the application of legislation by national courts and the right to adopt a final judgment in a case, as well as the right to annul the decisions of the courts of first and appellate instances. In addition, it has been argued that in cases where there was uncertainty in the application of particular norms, the Supreme Court of Ukraine could be useful by issuing preliminary rulings for national courts on their request, as the only judicial authority that may do so.\textsuperscript{880} Therefore, for the effective functioning of Ukraine’s highest judicial authority as well as for country’s judicial system as a whole, it appeared necessary to review the scope of powers assigned to the Supreme Court of Ukraine; this was subsequently undertaken during the judicial reform of 2016.

2.4.2. The Supreme Court After the 2016 Judicial Reform: Powers and Composition

Over the course of 2016 reform of the judiciary, the newly adopted Law of Ukraine “On Amendments to the Constitution of Ukraine (regarding Justice)” No. 1401-VIII and the Law of Ukraine “On the Judiciary and the Status of Judges” No. 1402-VIII of 2016 defined the Supreme Court as the highest court in the court system of Ukraine.\textsuperscript{881} The Supreme Court


\textsuperscript{879} \textit{Ibid.}, para. 32. In this regard, the Venice Commission further notes: “The conditions for the admissibility of an application are formulated in such a way that one can only wonder how often the Supreme Court will be able to effectively exercise its review competence. The Supreme Court should be allowed to decide itself on the admissibility of cases concerning the conflicts of interpretation between the high specialised courts. The solution chosen unduly restricts the functions of the Supreme Court and will prevent it from fulfilling its constitutional position as the highest judicial body. In practice, the new arrangement will set the high specialised courts above it in that they alone will be able to decide what cases can be referred to it” (para. 33).

\textsuperscript{880} Romaniuk, Y., 2013, \textit{supra} note 870, p. 11.

was called on to ensure the sustainability and uniformity of court practice in a manner specified by procedural law.  

The powers of the new Supreme Court as defined by Law No. 1402-VIII of 2016 include:

1. The administration of justice as a court of cassation instance and in cases stipulated by procedural law – as a court of first or appellate instance;

2. The analysis of judicial statistics and the generalization of case law;

3. The issuing of conclusions on draft laws concerning the judiciary, legal proceedings, the status of judges, the enforcement of judgments and other issues related to the functioning of the court system;

4. The issuing of an opinion on the presence or absence of signs of treason or other crimes in actions of which the President of Ukraine is accused of; upon request of the Parliament of Ukraine, the presentation of a written motion on the incapability of the President of Ukraine to exercise his/her powers for health reasons;

5. The addressing of the Constitutional Court of Ukraine regarding the constitutionality of laws and other legal acts, as well as those regarding the official interpretation of the Constitution of Ukraine;

6. The ensuring of the uniform application of legal provisions by courts of different specializations in a manner stipulated by procedural law; and

7. The exercise of other powers stipulated by law.

Hence, the Supreme Court is now the only cassation instance in Ukraine. This implies that, after the abolition of the high specialized courts in administrative, commercial and civil/criminal matters, cases are now taken directly to the Supreme Court following the appellate instance.

Law No. 1402-VIII of 2016 also introduces a new structure to the Supreme Court, which consists of five internal bodies, which deal with cases that fall under the scope of their specialization. These are:

- The Grand Chamber of the Supreme Court;
- The Administrative Court of Cassation;
- The Commercial Court of Cassation;
- The Criminal Court of Cassation;
- The Civil Court of Cassation.

For adjudicating certain categories of cases, Law No. 1402-VIII foresees the establishment of chambers in each court of cassation, taking into account the specialization of judges.

So, the Administrative Court of Cassation must include chambers adjudicating cases on:

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882 Article 36, para. 1, Law No. 1402-VIII of 02.06.2016.
883 Article 36, para. 2, Law No. 1402-VIII of 02.06.2016.
884 Article 37, Law No. 1402-VIII of 02.06.2016.
885 Article 37, para. 4, Law No. 1402-VIII of 02.06.2016.
1) taxes, fees and other mandatory payments; 2) the protection of social rights; and, 3) election processes and referendum and protection of political rights of citizens. The Commercial Court of Cassation includes chambers that consider cases on: 1) bankruptcy; 2) the protection of intellectual property rights and rights related to antimonopoly and competition law; and, 3) corporate disputes, corporate rights and securities. All other chambers in the courts of cassation are established upon a decision of the meeting of judges of a cassation court.

Furthermore, Article 37, para. 1 of Law No. 1402-VIII of 2016 establishes that the Supreme Court consists of not more than two hundred judges, thus significantly increasing the number of judges in the Court compared to the period of 2010-2016. The Head of the Supreme Court is elected from among the Supreme Court judges for a four-year term with a right to hold the position for no more than two consecutive terms.

It is important to note the observations concerning the new changes in the national legislation on justice, including that on the structure and scope of the Supreme Court, provided by the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR). Here, the “Opinion on the Law of Ukraine on the Judiciary and the Status of Judges,” issued in 2017 stated that the new Law No. 1402-VIII of 2016 was generally in line with international standards and the document welcomed the efforts to increase transparency in the judiciary as well as ensure the unity of jurisprudence in Ukraine.

The OSCE/ODIHR Opinion of 2017 also noted the importance of the independence of the judiciary as a prerequisite for the right to a fair trial, in accordance with Article 6 of the European Convention of Human Rights. In addition, a range of soft law instruments have been adopted on this issue, such as the European Charter on the Statute for Judges, opinions of the Consultative Council of European Judges along with various legal instruments. These instruments include:


- **Opinion No. 3 on the Principles and Rules governing Judges’ Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality**, 2002, [hereinafter, “CCJE Opinion No. 3”](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2002)OP3&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FF2E00&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3) and Opinion No. 17 on the Evaluation of Judges’ Work, the Quality of Justice and
UN instruments\textsuperscript{895} and the recommendations of the Council of Europe.\textsuperscript{896} Furthermore, the OSCE/ODIHR’s “Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia”, adopted in 2010, are of particular relevance when it comes to implementing the right to a fair trial in Ukraine.\textsuperscript{897}

At the same time, with regard to the new structure of the Supreme Court, it noted that detailed procedural legislation on the functioning of this new system had not yet been adopted.\textsuperscript{898} Therefore, a successful transition towards the unification of jurisprudence in Ukraine will largely depend on the future procedural laws, in particular concerning the procedures within the Supreme Court.\textsuperscript{899}

2.5. **The Constitutional Court of Ukraine**

2.5.1. The Constitutional Court of Ukraine Before and After the 2016 Judicial Reform

The 1996 Constitution of Ukraine provided for the creation of the Constitutional Court, an integral, independent part of the judiciary of Ukraine, which is “the sole body of constitutional jurisdiction in Ukraine.”\textsuperscript{900} In addition to the Constitution of Ukraine, the legal


\textsuperscript{896} OSCE/ODIHR, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (2010), hereinafter “Kyiv Recommendations” were developed by a group of independent experts under the leadership of ODIHR and the Max Planck Institute for Comparative Public Law and International Law – Minerva Research Group on Judicial Independence. The Kyiv Recommendations are available at [http://www.osce.org/odihr/KyivRec](http://www.osce.org/odihr/KyivRec) (last accessed 14 December 2017).

\textsuperscript{897} Para. 35, the OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges of 30 June 2017.

\textsuperscript{898} Para. 36, the OSCE/ODIHR Opinion on the Law of Ukraine on the Judiciary and Status of Judges of 30 June 2017.

\textsuperscript{899} Article 147, para. 1 of the Constitution of Ukraine of 1996.
basis of the Constitutional Court was founded on the Law of Ukraine “On the Constitutional Court of Ukraine” No. 422/96, adopted in 1996.\textsuperscript{901}

Before the introduction of changes to the Constitution regarding the judiciary over the course of the 2016 reform, the role of the Constitutional Court of Ukraine was to decide on issues concerning the conformity of laws and other legal acts, including ratified international agreements or international agreements that are awaiting ratification by the Parliament to the provisions of the Constitution of Ukraine, and to provide an official interpretation of the Constitution and the laws of Ukraine.\textsuperscript{902}

According to the Constitution of 1996, it was only at the request of the President of Ukraine or the Cabinet of Ministers of Ukraine, and not individuals, that the Constitutional Court provided opinions regarding the constitutionality of international treaties.\textsuperscript{903} However, Law No. 422/96 contained a provision which stated that \textit{constitutional petitions} to the Constitutional Court may be submitted by Ukrainian citizens, foreigners, stateless persons and legal entities.\textsuperscript{904}

The judicial reform of 2016 paved the way for the adoption of a new law, the Law “On the Constitutional Court of Ukraine” No. 2136-VIII of 13 July 2017, which entered into force on 3 August 2017.\textsuperscript{905} The new law introduces substantial changes to the system of the constitutional jurisdiction in Ukraine. More specifically, the most important changes concern the organizational structure of the Constitutional Court of Ukraine as well as constitutional proceedings.

Article 1 of Law No. 2136-VIII of 2017 has defined the Constitutional Court of Ukraine as “\textit{the body of constitutional jurisdiction, which ensures the supremacy of the Constitution of Ukraine, decides on the conformity of the laws of Ukraine with the Constitution of Ukraine and other acts in cases provided for by the Constitution of Ukraine, and provides official interpretation of the Constitution of Ukraine, as well as exercising other powers under the Constitution of Ukraine.”

In light of this, the jurisdiction of the Constitutional Court is limited to the area of constitutional review, which implies a guarantee of the supremacy of the Constitution of Ukraine.

\textbf{2.5.2. The Structure and Powers of the Constitutional Court of Ukraine}

The new structure of the Constitutional Court of Ukraine in accordance with Article 32 of Law No. 2136-VIII of 2017 includes:

- The Grand Chamber;
- Two Senates; and, 

\textsuperscript{902} Article 147, para. 2 of the Constitution of Ukraine of 1996; Article 13, Law No. 422/96 of 16.10.1996.
\textsuperscript{903} Article 151, para. 1 of the Constitution of Ukraine of 1996.
\textsuperscript{904} Article 42 of the Law of Ukraine “On the Constitutional Court of Ukraine” No. 422/96 of 16.10.1996.
Six Boards.

The Grand Chamber consists of all judges of the Constitutional Court and considers issues regarding: 1) the constitutionality of the laws of Ukraine or other legal acts of the Parliament of Ukraine, decrees of the President and the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea; 2) the official interpretation of the Constitution of Ukraine; 3) the conformity of ratified international treaties or those awaiting ratification with the Constitution of Ukraine; 4) the conformity of questions to be submitted for an all-Ukrainian referendum on a popular initiative with the Constitution of Ukraine; 5) oversight of constitutional procedures for the investigation and consideration of the removal of the President of Ukraine from office through impeachment; 6) the conformity of a draft law on amendments to the Constitution of Ukraine with Articles 157 and 158 of the Constitution of Ukraine; 7) violations of the Constitution and laws of Ukraine by the Verkhovna Rada of the Autonomous Republic of Crimea; 8) the conformity of normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea with the Constitution and laws of Ukraine; 9) the constitutionality of laws of Ukraine (specific provisions thereof), upon constitutional complaints in the event of the relinquishment of jurisdiction by the Senate in favour of the Grand Chamber in instances determined by this Law. The powers of the Grand Chamber also include resolving any procedural issues that may arise during constitutional proceedings.

The Senates of the Constitutional Court consist of nine judges each, and have the authority to consider issues regarding the constitutionality of laws of Ukraine and their specific provisions with respect to a submitted constitutional complaint.

The Boards consist of three judges each, and have the power to decide on initiating constitutional proceedings in cases upon constitutional petitions, constitutional appeals or constitutional complaints.

Under Article 7 of Law No. 2136-VIII of 2017, the powers of the Constitutional Court include:

1. the power to decide on the conformity to the Constitution of Ukraine (constitutionality) of the laws of Ukraine and other legal acts of the Parliament of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, and legal acts of the Parliament of the Autonomous Republic of Crimea;

2. the power to officially interpret the Constitution of Ukraine;

3. the power to provide, upon application by the President of Ukraine, or at least forty-five People’s Deputies of the Verkhovna Rada, or the Cabinet of Ministers of Ukraine, opinions on the conformity of applicable international treaties ratified by

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Ukraine or those international treaties that are submitted to the Parliament for ratification with the Constitution of Ukraine;

(4) the power to provide, upon application by the President of Ukraine or at least forty-five People’s Deputies of the Verkhovna Rada, opinions on the conformity (constitutionality) of questions to be submitted to an Ukraine-wide referendum with the Constitution of Ukraine;

(5) the power to provide, upon application by the Parliament of Ukraine, opinions on oversight of the constitutional procedures for investigating and considering a case removing the President of Ukraine from his/her post through the procedure of impeachment;

(6) the power to provide, upon application by the Parliament of Ukraine, opinions of draft laws on amendments to the Constitution regarding their conformity with Articles 157 and 158 of the Constitution of Ukraine;

(7) the power to provide, upon application by the Parliament of Ukraine, opinions on violations by the Parliament of the Autonomous Republic of Crimea of the Constitution or laws of Ukraine;

(8) the power to decide on the conformity of normative legal acts adopted by the Parliament of the Autonomous Republic of Crimea with the Constitution and laws of Ukraine, upon application by the President of Ukraine;

(9) the power to decide on the constitutionality of laws of Ukraine (specific provisions thereof), upon a constitutional complaint by an individual who considers the law of Ukraine to have been applied in the final court judgment in his or her case in a way that contravenes the Constitution of Ukraine.

Compared to the previous Law “On the Constitutional Court of Ukraine” No. 422/96 of 1996, the Constitutional Court is no longer empowered to provide official interpretation of the laws of Ukraine, but only the Constitution of Ukraine. However, under the new law, Law No. 2136-VIII of 2017, the competences of the Constitutional Court now include the power to review the constitutionality of questions to be submitted for referenda organized by popular initiative, as well as the power to review the conformity of acts of the Parliament of Autonomous Republic of Crimea with the Constitution and the laws of Ukraine.

2.5.3. The Procedural Aspects (Constitutional Proceedings)

In accordance with Article 50, para. 1 of Law No. 2136-VIII of 2017, applications to the Constitutional Court of Ukraine are made in the form of a constitutional petition, a constitutional appeal or a constitutional complaint.

The proceedings before the Constitutional Court should mainly be in writing; the general duration of such proceedings is six months. For particular types of cases, such as, for example, the review of constitutionality of draft laws introducing amendments to the Constitution of Ukraine, the duration of the proceedings is limited to one month.
A constitutional petition is a written application submitted to the Court regarding: 1) findings rendering an act (and/or specific provisions thereof) unconstitutional; and, 2) the official interpretation of the Constitution of Ukraine. Subjects of the right to constitutional petitions include the President of Ukraine, at least forty-five People’s Deputies, the Supreme Court, the Commissioner of the Verkhovna Rada of Ukraine for Human Rights, and the Verkhovna Rada of the Autonomous Republic of Crimea.

A constitutional appeal is a written application submitted to the Constitutional Court regarding: 1) the conformity of an applicable international treaty of Ukraine or of an international treaty to be submitted to the Parliament of Ukraine for its ratification with the Constitution of Ukraine; 2) the constitutionality of questions to be put to an all-Ukrainwide referendum organized by popular initiative; 3) oversight of the constitutional procedure for investigating and considering a case that would result in the removal of the President of Ukraine from office through impeachment; 4) the conformity of a draft law on amendments to the Constitution of Ukraine with Articles 157 and 158 of the Constitution of Ukraine; 5) violations by the Verkhovna Rada of the Autonomous Republic of Crimea of the Constitution or laws of Ukraine; 6) the conformity of normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea with the Constitution and laws of Ukraine. Subjects of the right to constitutional appeal include the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, or at least forty-five People’s Deputies of the Verkhovna Rada of Ukraine.

A constitutional complaint is a written application submitted to the Court regarding the conformity (constitutionality) of legislation (and/or specific provisions thereof) with the Constitution of Ukraine that was applied in a final court judgment, in the case of a subject with the right to constitutional complaint.

Therefore, another important aspect of the Law “On the Constitutional Court of Ukraine” No. 2136-VIII of 2017 is that now a constitutional complaint can be filed by individuals or legal entities. Public legal entities cannot be subjects of the right to constitutional complaint. Therefore, if an individual or a legal entity believes that the law applied in a final judgement in a dispute contravenes the Constitution of Ukraine and no other remedies are available, they have the right to file a constitutional complaint to the Constitutional Court during a period of three months following the issuance of the final court decision in the applicant’s case. If the Constitutional Court upholds the unconstitutionality of the law in question, the applicant has the right to seek reconsideration of her or his case in the court that had previously adopted the adverse decision.

One additional novelty of Law No. 2136-VIII is that it allows amicus curiae in particular matters to be submitted to the Constitutional Court and reviewed by the Grand Chamber or the Senate. The Court then decides whether or not to accept such a submission.

915 Provided that the decision of a court was adopted not earlier than 30 September 2016.
Finally, the institute of a special advisor has been temporarily established by Law No. 2136-VIII (until January 1, 2020) with a view to providing expert assistance in constitutional proceedings in cases regarding constitutional complaints in the Constitutional Court. For the execution of the functions of a special advisor, the Court may invite a former judge from a constitutional court of a foreign state or a representative of an international governmental organization whose statutory mission concerns constitutional law.916

3. The Application of International Law by the Ukrainian Judiciary

The Ukrainian judiciary has often been criticized for the non-application or ineffective application of international and European legal standards. Indeed, before the collapse of the USSR and during the early 1990s, national courts of Ukraine did not rely on international body of law in their practice. In fact, until 1993 no court in Ukraine had ever taken into account any international instrument on human rights.917

After the independence of Ukraine in 1991, numerous laws that corresponded with international instruments, particularly those on human rights were adopted. Still, the body of Ukrainian human rights law had remained rather weak, as many elements of the old system managed to survive in Ukrainian legislation.918 Butkevych, for instance, has mentioned the rhetorical character of former Soviet legislation, with both an excess of reassurances of values of a moral, political and ideological nature, and at the same time shortcomings in the Ukrainian legal system such as legal fictions, vague legal presumptions and definitions. Furthermore, fundamental problems sprang from the absence of a strong and independent judiciary in Ukraine, where national courts were incapable of acting independently of the legislative and executive branches and were more concerned with punishment rather than protection of human rights.919

After the adoption of the Constitution of Ukraine in 1996, it became increasingly necessary for national courts to apply international legal norms. Gradually, over the last twenty years the situation started to change positively, with a growing number of ratified ILO Conventions and other international instruments. In addition, Ukraine’s membership in the Council of Europe since 1995 also prompted the application of European legal standards by domestic courts.

Moreover, Ukraine’s integration into the EU stipulated further reforms in Ukraine’s legal system. The 2014 EU-Ukraine Association Agreement has been expected to foster the approximation of national laws, including those in the field of labour, to EU law and, as a result, the national courts may apply the EU acquis more often in their practice.

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919 Butkevych, V., 1993, supra note 917.
Furthermore, the 2016 reform of the Ukrainian judiciary, including new powers attributed to the Supreme Court as well as constitutional changes regarding justice, is likely to improve the application and implementation of international and European standards in Ukraine.

3.1. The Application of Ratified International Treaties by Domestic Courts of Ukraine

In their practice, the courts of general jurisdiction as well as the Constitutional Court of Ukraine, are supposed to rely on ratified international agreements, which, pursuant to the Constitution of Ukraine, constitute part of national legislation.

It should also be recalled that the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004 provides that “if the international agreement of Ukraine, which has come into force under the defined procedure, sets the rules other than those envisaged in the respective act of Ukrainian legislation, the rules of international agreement shall apply.” However, such international agreements do not take priority over the provisions of the Constitution of Ukraine and must conform to the latter.

As such, most of the references to international law by the Constitutional Court of Ukraine concern protection of constitutional rights and freedoms and include the freedom of association, the right to vote and be elected, the right to participate in public management, the right to a fair trial, and the prohibition of discrimination on various grounds. For instance, the Constitutional Court of Ukraine referred, inter alia, to the provisions of the International Covenant on Civil and Political Rights, 1966, in particular to Article 2 (the general prohibition of discrimination), Article 14 (equality before the court, the right to a fair and public hearing by a competent, independent and impartial court established by law) as well as Article 26 (the equality of everyone before the law and prohibition of discrimination).

Additionally, there have been cases in the Constitutional Court’s practice when its decisions have contained references to the following provisions of the International Covenant on Economic, Social and Cultural Rights, 1966: Article 2 (the general obligation of the state to gradual full realization of the rights recognized in the Covenant by all appropriate means), Article 4 (the criteria of admissibility of the right limitation) and


921 This study refers to the rulings of the Constitutional Court of Ukraine issued before the 2016 judicial reform.


924 Decision of the Constitutional Court of Ukraine No. 9-pn/2012 of 12 April 2012.

925 Decision of the Constitutional Court of Ukraine No. 3-pn/2012 of 25 January 2012.

Article 8 (the right to form trade unions).\(^{927}\) In some of its decisions, the Constitutional Court has also referred to Articles 10, 11 and 13 of the Covenant.\(^{928}\)

Furthermore, the Constitutional Court has also made references to non-binding international instruments, such as the Universal Declaration of Human Rights of 1948.\(^{929}\) In fact, in some of its decisions the Court referred to the Declaration in general, without specifying particular provisions of the latter.\(^{930}\) In other cases, the provisions of the Declaration applied by the Constitutional Court of Ukraine have concerned equal rights and equality before the law (Articles 1, 2 and 7 of the Declaration),\(^{931}\) the right to an effective remedy by a court (Article 8),\(^{932}\) the right to a fair and impartial trial (Article 10),\(^{933}\) the right to social security (Article 22)\(^{934}\) and the establishment of a limitation on human rights and freedoms (Article 29).\(^{935}\)

In the field of labour, the Constitutional Court has applied the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),\(^{936}\) the Social Security (Minimum Standards) Convention, 1952 (No. 102),\(^{937}\) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)\(^{938}\) as well as the Termination of Employment Convention, 1982 (No. 158).\(^{939}\)

The courts of general jurisdiction also refer to international legal instruments in their practice. Often, in their decisions, the national courts refer to the UN Covenants of 1966 and the Universal Declaration of Human Rights of 1948. In the field of labour law, most references by national courts to international legal norms include the following ILO Conventions: the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Occupational Cancer Convention, 1974 (No. 139), the Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153), the Safety and Health in Mines Convention, 1995 (176), the Underground Work (Women) Convention, 1935 (No.45), the Discrimination (Employment and Occupation) Convention, 1979 (No. 212), the Right to Education Convention, 1960 (No. 62), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Social Security Convention, 1952 (No. 102), and the Equal Remuneration Convention, 1970 (No. 111).\(^{940}\)

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\(^{927}\) Decision of the Constitutional Court of Ukraine No. 11-pn/2000 of 18 October 2000.

\(^{928}\) Articles 10, 11 and 13 of the Covenant respectively concern the obligation of the state to provide children with protection and care necessary for their well-being, the right to an adequate standard of living and the right to education. These provisions were applied in the following respective Decisions of the Constitutional Court of Ukraine: No. 3-pn/2009 of 3 February 2009, No. 15-pn/2010 of 10 June 2010 and No. 5-pn/2004 of 4 March 2004.


\(^{930}\) For instance, in Decision of the Constitutional Court of Ukraine No. 2-pn/2008 of 29 January 2008.

\(^{931}\) Decision of the Constitutional Court of Ukraine No. 9-pn/2012 of 12 April 2012.


\(^{935}\) Decisions of the Constitutional Court of Ukraine No. 4-pn/2011 of 31 May 2011, No. 2-pn/2012 of 20 January 2012.

\(^{936}\) Decision of the Constitutional Court of Ukraine No. 11-pn/2000 of 18 October 2000.


1958 (No. 111) and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).  

3.2. The Application of EU Law by Domestic Courts of Ukraine

Due to the fact that Ukraine is not an EU Member State, there is no binding obligation on national courts to consider and refer to the legal instruments of the EU. Correspondingly, as the jurisdiction of the European Court of Justice (ECJ) extends only to EU Member States, and the decisions of the Court are binding for the parties of the dispute as well as the national court that applied for a preliminary ruling, Ukraine is not bound by the decisions of the ECJ. In addition, national legislation of Ukraine does not contain provisions regarding any obligation to consider the ECJ rulings in practice of national courts.

However, references of national courts to the law of the European Union do exist in practice, albeit rarely, compared to the application of the ratified international agreements, which are binding for Ukraine. There are different reasons and motivations as well as various external and internal factors that influence the application of EU legal norms by national courts. In Ukraine, where there are references to the EU acquis in courts’ practice, it is mostly applied as a persuasive source of law.

So far, the administrative courts of Ukraine applied the EU acquis more than other national courts. Considering the positive experience of Central and Eastern European countries, where administrative courts had to be established during the EU accession process, the Ukrainian administrative courts started to refer to general principles of the EU law and to consider the practice of the ECJ. Indeed, without effective application of the EU acquis by national judiciaries, including those of third countries that are not EU members, (as in the case of Ukraine), the European common values would be difficult to promote.

For instance, in one ruling, the Kyiv District Administrative Court referred to the Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the European Union” No. 1629-IV, and emphasized that the aim of adapting national legislation of Ukraine necessitates bringing it in line with the acquis communautaire, which consists of EU primary and secondary law, and taking account of ECJ practice. In addition, the administrative courts have introduced the concept of legal certainty, borrowed from ECJ case law, which was a new concept for the Ukrainian legal system. Thus, in the cases where a state is liable before the individual, the failure to guarantee constitutional rights by the absence of the respective national law cannot be justified. In this regard, references were made to the ECJ’s van Duyn v. the Home Office case and the court reaffirmed the


See also Petrov, R. and P. Kalinichenko, 2011, supra note 442.

right of nationals to rely on the obligation of states even when the law containing these obligations does not have direct effect.\textsuperscript{943}

To date, however, most references to EU legal instruments by the national courts of Ukraine are observed in cases dealing with commercial issues concerning the area of finance law.\textsuperscript{944} Nevertheless, referring to the EU directives in the field of labour also takes place in the practice of national courts. For instance, in one of its decisions,\textsuperscript{945} the Constitutional Court of Ukraine referred to Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.\textsuperscript{946}

It is important to recall that the EU-Ukraine PCA, which had been in force before the Association Agreement was signed in 2014, contained a “soft” approximation clause, envisaged in Article 51 of the PCA. However, this provision has been used as justification when national judges refer to the EU law. Thus, even a “soft” commitment may have an important impact on the decisions of national courts provided that voluntary application of the EU law takes place.

In addition, it is argued that due to the European integration of Ukraine, the official interpretation of national legislation of Ukraine by the Constitutional Court in the light of EU legal instruments as well as the application of the EU acquis by national courts is likely to increase in the future. This implies that the courts of general jurisdiction may start to apply the EU acquis gradually, even if only as a source of reference. Furthermore, EU-Ukraine political and economic cooperation relate to those external factors that significantly influence the country’s Europeanization, and therefore there has been a more flexible approach of national courts towards the application of the EU legal standards.\textsuperscript{947}

Moreover, in its preamble, the 2014 EU-Ukraine Association Agreement stated that the parties to the Agreement would be committed “to gradually approximating Ukraine’s legislation with that of the Union along the lines set out in this Agreement and to effectively implementing it.” While there is no direct obligation for the courts of Ukraine or the Constitutional Court to consider the law of the EU in their practice, referring to EU legal instruments may, however, influence de facto implementation of European standards, particularly in the area of human rights, which are seen as inclusive of labour rights.

\textsuperscript{943} Case 41/74, van Duyn v Home Office, ECR [1974] 1337.
\textsuperscript{945} Decision of the Constitutional Court of Ukraine No. 8-pn/2007 of 16 October 2007.
Hence, in their practice, the courts of Ukraine can and occasionally do consider EU legal instruments, the use of which follows from the provisions of the Constitution of Ukraine, the Law of Ukraine “On International Agreements of Ukraine” of 2004 and the EU-Ukraine Association Agreement of 2014. However, it is still early to speak of complete Europeanization of the Ukrainian judiciary, or of homogeneity of the Ukrainian legal system with the EU. Nevertheless, this gradual process may advance following developments in EU-Ukraine relations.

3.3. The Application of the Legal Instruments of the Council of Europe


Article 2, para. 1 of Law No. 3477-IV provides for the obligation of Ukraine to execute final judgments of the ECtHR against Ukraine, while Article 17, para. 1 of the Law obliges national courts to apply the European Convention on Human Rights and the practice of European Court of Human Rights as a source of law. Thus, the judgments of the ECtHR constitute a source of law for the national judiciary.

Furthermore, pursuant to Article 13 of Law No. 3477-IV, Ukraine must also take general measures to ensure the application of the provisions of the ECHR if a judgment of the ECtHR establishes any violations in this regard, as well as to eliminate underlying systemic shortcomings that caused such violations. These measures include amendments to existing legislation and the practice of its application; the introduction of changes to administrative practices; the ensuring of legal expertise of draft laws; and the provision of professional training on the Convention and ECtHR practice for prosecutors, lawyers, law-enforcement officers and other categories of public servants, whose work involves the enforcement of laws.

Hence, when referring to the rulings of ECtHR, national courts act on the basis of the Constitution of Ukraine and the laws of Ukraine, according to which the jurisdiction of ECtHR applies to Ukraine, and in their practice, the national courts must use the decisions

950 According to Article 55, para. 4 of the Constitution of Ukraine “After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant;” Article 92, para 1 (1) of the Constitution states that “human and citizens’ rights and freedoms, the guarantees of these rights and freedoms; the main duties of the citizen are determined exclusively by the laws of Ukraine.”
of ECHR as a source of law. In most cases, it is the Constitutional Court of Ukraine that applies ECHR practice in its rulings and opinions.952

It is important to keep in mind that juridically, the Constitutional Court is not subordinate to the European Court of Human Rights and not bound, therefore, by the case law of the latter.953 However, analyses of the practice of the Constitutional Court of Ukraine reveal examples of application of legal instruments adopted by the Council of Europe, mostly of the European Convention on Human Rights. Hence, the Constitutional Court may, in the consideration of a case concerning human rights and freedoms, refer to provisions of the ECHR, provided that it is in conformity with the Constitution of Ukraine. In some cases, the Constitutional Court only generally refers to the ECHR and its effect in the national legal system of Ukraine,954 while in other cases there have examples of direct reference to particular provisions of the Convention, including, inter alia, Article 6 (the right to a fair trial),955 Article 7 (no punishment without legal basis),956 Article 10 (freedom of expression),957 Article 13 (the right to an effective remedy),958 Article 14 (the prohibition of discrimination),959 Article 18 (the limitation on the use of restrictions on rights)960 and Article 1 of Protocol No. 12 to the Convention961 (the general prohibition of discrimination).962 In the field of labour, the Constitutional Court of Ukraine has used in particular Article 11 (freedom of assembly and association) of the Convention as a reference when adopting a decision.963

Another important instrument of the Council of Europe that the Constitutional Court and the courts of general jurisdiction have referred to in their practice is the European Social Charter (revised) of 1996.964 In particular, there are references to Articles 1 (the right to

952 See the National Report on Ukraine by the Constitutional Court of Ukraine, XVIth Congress of the Conference of European Constitutional Courts: “Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives” (12-14 May, Vienna, Austria), where it is stated that out of 22 cases of the Constitutional Court of Ukraine, in which the decisions had been influenced by the ECHR, 20 were decided during 2007-2012; this shows that the number of cases with references to the practice of the ECHR is increasing.


954 For instance, this is demonstrated in the Decision of Constitutional Court of Ukraine No. 9-pn/97 of 25 December 1997; No. 6-pn/2007 of 9 July 2007; No. 20-pn/2008 of 8 October 2008; and No. 5-pn/2012 of 13 March 2012.


959 Decision of the Constitutional Court of Ukraine No. 9-pn/2012 of 12 April 2012.

960 Decision of the Constitutional Court of Ukraine No. 4-pn/2011 of 31 May 2011.


962 Decision of the Constitutional Court of Ukraine No. 9-pn/2012 of 12 April 2012.


964 Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.
labour), Article 2 (the right to fair labour conditions), Article 3 (the right to safe and healthy working conditions), Article 11 (the right to the protection of health), Article 12 (the right to social security) and Article 13 (the right to social and medical assistance) of the Charter.

Courts of general jurisdiction have also referred to the ECHR in many cases, using it either as a general source of reference or basing their decision on particular ECHR provisions. Among the most applied provisions by national courts have been Articles 3, 6, 7, 10-14 of the ECHR.

The application of ECtHR case law by courts of general jurisdiction in Ukraine has occurred not only in the form of direct references to a particular decision of the ECtHR, but also, more commonly, by referring to the decisions of the Constitutional Court of Ukraine that contain references to ECtHR case law. Thus, the application of the ECtHR rulings by national courts takes the form of a reproduction of the content of ECtHR legal positions in terms of wording and context that is enshrined in the respective decision of the Constitutional Court of Ukraine. However, there are rulings by ordinary courts where the legal position of the ECtHR is introduced and analysed in a wider context than as it had appeared in a decision of the Constitutional Court. As such, it can be argued that the courts of general jurisdiction of Ukraine directly analyse the context in which the ECtHR legal position is expressed and do not only refer to those decisions of the Constitutional Court of Ukraine applying the practice of ECtHR.

Current provisions of national laws and those enshrined in the Constitution of Ukraine oblige national courts to consider and apply the decisions of the European Court of Human Rights, not only as a source of law, but also in order to introduce changes to the application of current national legislation in case of amendments to the legislation, aimed at eliminating systemic challenges and the reasons from them as determined by rulings of the ECtHR in cases against Ukraine. De facto influence of the ECtHR, however, also emerges when an analogous approach is used in national courts decisions compared to previous rulings of the ECtHR on similar issues, without a direct reference to the particular ruling of the ECtHR in the decision of a national court.


In order to assess the application of international labour standards by national courts of Ukraine, it is necessary to undertake an analysis of court practice. The case law analysis introduced in this study covers the period starting from Ukraine’s independence in 1991 until the most recent reform of the country’s judiciary in 2015-2017.

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The aims of such case law analysis are manifold. First, it is necessary to assess the actual practice of the Ukrainian judiciary concerning the general application of the international labour law. Second, it is necessary to analyse the practice of domestic judges in giving preference to an international norm over conflicting national legislation. In addition, there have also been cases where there was no contradiction between a national and an international norm. In these instances, it is important to examine whether an international norm was used as a mere reference in support of the main argument based on a national norm, or instead if an international norm was applied as a priority norm in a court ruling.

In Ukraine, disputes relating to labour law fall under the competence of courts of general jurisdiction. Therefore, when examining a case, and whether a decision in it was issued in line with, or was based on international or national norms, it was crucial to give attention to courts of first instance and courts of appeal, as well as to the high specialized courts of Ukraine (in this case, the High Administrative Court of Ukraine). Due to the specific role of the Supreme Court of Ukraine before the judicial reform of 2016, its practice has not been included in the case law analysis presented here.

Specifically, the case law analysis below concerns the application of the ILO instruments, taking into consideration that ratified ILO conventions are binding for Ukraine. Because of the key role that labour inspection plays in enhancing international labour standards at workplace, specific attention is paid to the application of the ILO Labour Inspection Convention, 1947 (No. 81), and the Labour Inspection (Agriculture) Convention, 1949 (No. 129) as well as to occupational safety and health standards, in particular the ILO Occupational Cancer Convention, 1974 (No. 139).

As Chapter IV (on Labour Inspection) of this thesis demonstrates, national legislation on labour inspection does not fully comply with ILO Conventions Nos. 81 and 129. For instance, under ILO Convention No. 81, inspectors have the right to freely enter an enterprise without prior notice in order to perform their duties. However, the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007 stipulates that inspectors must give notice to an employer ten days prior to visiting an enterprise to conduct an inspection. Other contradictions between national and international legal norms on labour inspection concern the functions of the inspectorate, and its powers and duties (e.g. obtaining a specific order from the state authority in order to carry out the inspection, and so on). Therefore, it is important that courts’ decisions involving the labour inspectorate are not based on conflicting national legislation.

With regard to labour inspection, 78 court cases were randomly selected for the analysis, all involving a labour inspectorate either as a plaintiff or as a defendant in different court instances. Out of these 78 cases, 46 referred to ILO Convention No. 81 or No. 129. However, only 19 cases out of the 46 cases correctly applied the respective ILO

References to the rulings of the High Administrative Court of Ukraine are made before the 2016 reform of the judiciary.

Convention and therefore gave preference to the international rule over the contradictory national legislation. Courts in the remaining 27 cases (out of 46), while referring to the ILO instrument and citing its provisions, issued a decision based on the conflicting national legislation.

The application of international norms is more efficient regarding the ILO Occupational Cancer Convention No. 139. Thus, out of 24 analysed cases dealing with occupational cancer, in 17 cases the courts referred to the ILO Convention and applied it correctly. The reason for this lies in the fact that the national legislation on occupational safety and health (at least with regard to occupational cancer) is more consistent with international norms than in the case of the labour inspection institution and its powers.

Hence, the court cases examined below include some best practices of the application of international norms by the Ukrainian judiciary before the 2016 reform, as well as some examples of incorrect application of the international standards.

4.1. Decisions by the Courts of First Instance

4.1.1. Case 1 (Reference to ILO Convention No. 81)

The Dnepropetrovsk District Administrative Court, in its decision on the lawsuit of Joint Stock Company “Pivdennyi Radiozavod” v. the Territorial State Labour Inspectorate in the Dnipropetrovsk region, referred ILO Labour Inspection Convention No. 81. In this case, the plaintiff claimed that the inspection was carried out in violation of national legislation and requested the court to acknowledge the inspection report as null and void, and to abolish the resolution that would impose penalties on the plaintiff for violating the labour legislation.

The court based its decision on the provisions of national legislation as well as ILO Convention No. 81. In particular, the court referred to Article 12, para. 1 (a) of the Convention. The court not only cited the provision, but also analyzed its content, emphasizing that the right of inspectors to visit an enterprise for examination at any hour of the day or night is connected with the necessity to monitor compliance with labour laws at the workplace, including taking into consideration employees who work overtime, and persons who are not officially employed and may have to work at night.

In addition, the court referred to Article 12, para. 2 of Convention No. 81 and noted that this provision does not require labour inspectors to notify the employer or his representative of their presence if they consider that such notification may create obstacles to the performance of their duties. Furthermore, the court referred to Article 16 of the Convention, which states that inspections of workplaces can be carried out “as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions.”

971 Dnepropetrovsk District Administrative Court, Case No. 2a/0470/1633 of 23 February 2012.
972 Article 12 (1) (a), ILO Convention No. 81, reads: “Labour inspectors provided with proper credentials shall be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection.”
Hence, based on the national labour legislation as well as on the norms of ILO Convention No. 81, the court did not satisfy the plaintiff’s claim.

4.1.2. Case 2 (Reference to ILO Convention No. 81)

In a similar case, the Kostopilsky Regional Court of the Rivne Region also adopted a decision in favour of a labour inspector. In this case, the plaintiff turned to the court with an administrative claim asking the court to abolish the imposition of an administrative penalty by the labour inspector. The administrative penalty in question was imposed on the plaintiff by the labour inspector for creating obstacles during the inspection visit and for refusing to provide information and necessary materials for the inspection. As a defendant in the court, the labour inspector did not acknowledge the claims of the plaintiff and reiterated that during the inspection, she, the inspector of the State Labour Inspectorate in the Rivne Region, acted in accordance within the scope of duties of the labour inspection competences stipulated by the national legislation of Ukraine, and the imposition of a penalty on the plaintiff was therefore lawful.

In its decision the court referred not only to provisions of national legislation, namely, the Constitution of Ukraine of 1996, the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004 and the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007, but also relied on the norms contained in the ILO Labour Inspection Convention No. 81.

In particular, the court based its decision on Articles 1-3 and 12 of Convention No. 81 by not only citing the provisions of the Convention, but also by analysing its content and acknowledging the inconsistency of national legislation with the ratified Convention No. 81. The court referred to Article 12 of the Convention No. 81 and cited, in detail, its provisions regarding the powers of labour inspectors. Thus, the court reiterated that according to Article 12 of the Convention, labour inspectors with proper credentials must be empowered to enter freely and without previous notice at any hour of the day or night any workplace liable to inspection; to carry out any examination, test or enquiry which they may consider necessary in order to make sure that the legal provisions are being observed, in particular, to require the production of any books, registers or other documents, the keeping of which is prescribed by national laws or regulations relating to conditions of work, in order to see that they are conforming with the legal provisions. Hence, in its decision the court ruled:

While carrying out inspections by a labour inspector the legal provisions of the ILO Labour Inspection Convention No. 81 shall be applied, and not the provisions of the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007. This implies the right of labour inspectors to carry out examinations of a workplace is defined by the Convention and such examinations as well as the requirement to provide an inspector with all the necessary documents related to the conditions of work can be carried out without any previous notice and only upon the presentation of a labour inspector’s credentials [emphasis added].

973 Kostopilsky Regional Court of Rivne Region, Case No. 2-a-38/2009 of 23 April 2009.
Consequently, the court ruled out that the decision of the labour inspector to impose an administrative penalty on the plaintiff was lawful and there are no grounds to satisfy the plaintiffs’ claim for nullification of the penalty. This case is one of the best, albeit rare, examples of an application of international legal provisions (in particular, when an international instrument is given precedence over contrary national legislation) by a national court of a first instance.

4.1.3. Case 3 (Reference to ILO Convention No. 81)

In the case of Joint Stock Company “Krymenergo” v. the Territorial State Labour Inspectorate in the Autonomous Republic of Crimea,976 the plaintiff (“Krymenergo”) filed a lawsuit asking the District Administrative Court of the Autonomous Republic of Crimea to acknowledge the actions of the labour inspector as unlawful. In particular, the plaintiff asserted that the labour inspector did not present the order and the referral from the competent authority that empowered him or her to carry out the inspection. In addition, the plaintiff claimed that the labour inspector refused to register in the special journal that kept the record of inspections conducted at the enterprise. The plaintiff based its arguments on the provisions of the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V and claimed that the labour inspector violated the requirements concerning inspections at workplace and the procedure specified by this Law. As a result, the plaintiff prevented the labour inspector from carrying out the inspection.

The representative of the defendant (the Territorial State Labour Inspectorate) denied the claim, stating that the labour inspector acted in accordance with the scope of labour inspection competences, which had been defined by national legislation as well as by the international agreements of Ukraine, namely the ILO Labour Inspection Convention, 1947 (No. 81). The defendant also emphasized that those provisions of Law No. 877-V that did not conform to the norms of the Convention would not apply. In particular, the requirements of Law 877-V for registration in the inspection record journal at the enterprise as well as having an order or a referral from the competent authority to carry out an inspection contradicted Article 12 (1) (a) and (2) of ILO Convention No. 81, which stipulates that a properly credentialed labour inspector is empowered to freely enter any workplace liable for inspection at any hour of the day or night and without previous notice; also, inspectors need not notify the employer of their presence if they consider that such a notification may create obstacles to the performance of their duties. Therefore, the defendant claimed that preventing the inspector to carry out an examination at “Krymenergo” was unlawful.

In its decision, the District Administrative Court of the Autonomous Republic of Crimea noted that the following provisions of national labour legislation defined the legal scope of the labour inspection competences: Article 259 of the Labour Code of Ukraine of 1971 (which states that supervision and control over the observance of labour legislation is carried out by authorized competent authorities and inspections, which do not depend on

976 District Administrative Court of the Autonomous Republic of Crimea, Case No. 2a-5448/09/1/0170.
the owner of an enterprise or the owner’s representative for their activities); Article 27 of the Law of Ukraine “On Vacations”, which duplicates the Article 259 of the Labour Code of Ukraine and Article 35 of the Law of Ukraine “On Remuneration of Labour” concerning the competences of the Ministry of Labour and its authorities to exercise control over the observance of labour legislation compliance, was also relevant. The court stressed that the aforementioned legal norms are norms of general character, which define the state authorities of supervision and oversight over the compliance with labour legislation. A special law in the field, however, is the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007, which provides the legal and institutional framework, and the basic principles and procedures for carrying out state supervision in the area of commercial activities as well as the rights, duties and responsibilities of state supervisory officers. The court also mentioned that labour inspectors are guided by ILO Convention No. 81 in carrying out their activities.

With regards to the nonconformity of the provisions of Law 877-V with the Convention, the court noted that pursuant to Article 9 of the Constitution of Ukraine, ratified international agreements constitute part of the national legislation. Also, international norms have priority over contradictory national legislation, though not the Constitution of Ukraine. Nevertheless, the court emphasized that:

ILO Convention No. 81 establishes the right of labour inspectors to carry out an examination of a workplace, while Law of Ukraine No. 877-V defines the procedure for such examinations [emphasis added].

Furthermore, the Court asserted that the right of labour inspectors to freely enter a workplace as well as the right of non-notification of the employer of their presence in accordance with Article 12(1) (a) of the Convention “does not preclude the necessity to comply with the conditions upon which the inspection shall be carried out as well as to present proper inspectors’ credentials as it is defined by Law No. 877-V.” Hence, the Court noted that:

The Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007 does not contradict ILO Convention No. 81. The defendant’s arguments regarding nonconformity of the respective law to the Convention are thus baseless [emphasis added].

In addition, the court pointed the necessity of labour inspectors’ compliance with Law 877-V as a guarantee of the rights of an employer against illegitimate inspections conducted by incompetent authorities. Therefore, as the court noted, the labour inspector “had the right to act in accordance with Convention No. 81 provided that he or she had the relevant

980 Ibid.
981 Ibid.
982 Ibid.

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documents certifying his or her competence.” In this formulation, the Court implied the documents defined by Law No. 877-V of 2007.

Furthermore, the reason for the inspection visit was a complaint from the employees. According to Article 6 of Law No. 877-V, an unplanned visit of a labour inspector to a workplace upon such a complaint is possible only after receiving consent of the competent authority, which clearly contradicts Article 15 (c) of the ILO Convention, according to which labour inspectors “shall treat as absolutely confidential the source of any complaint bringing to their notice a defect or breach of legal provisions and shall give no intimation to the employer or his representative that a visit of inspection was made in consequence of the receipt of such a complaint.”

Hence, based on the arguments mentioned above, the court ruled out that the labour inspection violated the provisions of Law No. 877-V concerning the procedure of carrying out an examination of a workplace. As a result, the actions of the labour inspector were acknowledged by the court as unlawful. Thus, ignoring the norms of international law and their precedence over national legislation of Ukraine, as it is provided by the Constitutional of Ukraine, the Law of Ukraine on “International Agreements of Ukraine” No. 1906-IV, and violating one of the basic principles of international law – pacta sunt servanda – the court deliberately took the side of an employer and his interests, while neglecting the provisions of Convention No. 81 and asserting that Law of Ukraine No. 877-V of 2007 did not contradict the Convention, even though an analysis of the two normative instruments clearly illustrate the opposite.

This case is an example of an incorrect application of ILO Convention No. 81, a disregard for international labour standards and the inconsistency of national legislation, which was given priority over international norms even though the applied national law did not conform to international legal norms.

4.1.4. Case 4 (Reference to ILO Convention No. 139)

In the court case of Social Insurance Fund against Accidents at Work and Occupational Diseases v. The Institute of Occupational Medicine of the National Academy of Medical Sciences of Ukraine the Holosiivsky Regional Court of Kyiv applied the norms of the ILO Occupational Cancer Convention of 1974 (No. 139), which was ratified by Ukraine in 2010, as well as national legislation in the field of occupational health and safety. In this case, the Social Insurance Fund (the plaintiff) sued the Institute of Occupational Medicine (the defendant) in court in order to invalidate the decision of the Institute, which concerned the establishment of the connection between an acquired disease by a third person (an employee at a mining enterprise) and his exposure to harmful production factors at work.

The court found that the employee, who had worked at the mining enterprise and had sixteen years of underground work experience, suffered from an occupational disease that was caused by constant exposure to coal dust containing harmful chemical substances.

983 District Administrative Court of the Autonomous Republic of Crimea, Case No. 2a-5448/09/1/0170.
984 Holosiivsky Regional Court of Kyiv, Case No. 752/20297/13-ц.
The connection between the exposure to harmful production factors and the disease acquired by the employee was established by the Institute of Occupational Medicine, which, based on the medical examination, determined the respective disease to be an “occupational cancer.”

In its lawsuit, the Social Insurance Fund claimed that the conclusions of the Institute of Occupational Medicine did not respond to the real circumstances, arguing that the employee had not been exposed to the harmful production factors that could cause occupational cancer, and therefore the casual link between the disease and the labour conditions could not be confirmed. Thus, the Social Insurance Fund asked the court to invalidate the resolution of the Institute.

In its decision, the court referred to and explicitly cited Article 3 of ILO Convention No. 139, according to which each Member State that ratified the Convention “shall prescribe the measures to be taken to protect workers against the risk of exposure to carcinogenic substances or agents and shall ensure the establishment of an appropriate system or records.”

In addition, the court took into consideration Ukraine’s signature of the Constitution of the WHO and the country’s consequent obligation to apply the data of the WHO’s specialized agencies – in this case the International Agency for Research on Cancer (IARC) – when making a final decision in the context of expert evaluations connecting the exposure of harmful substances to a given occupational disease. Thus, the court established that the Institute of Occupational Medicine, which is the only state authority that has competence to adopt resolutions in the field of occupational diseases and their connection to exposure to harmful substances at work, acted in accordance with national legislation, such as the Procedure of Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work of 2011 as well as with international norms, in particular ILO Convention No. 139. Consequently, the court rejected the plaintiff’s claim.

4.2. Decisions by the Courts of Appeal

4.2.1. Case 1 (Reference to ILO Convention No. 81)

In case of Labour Inspectorate v. a State Company, the Kyiv Administrative Court of Appeal annulled the ruling of a local court, where the plaintiff (a state enterprise) asked the court to acknowledge the actions of a labour inspector as unlawful.

In this case, the labour inspector detected a violation of labour law norms with regard to employment contracts, paid leave and other violations of workers’ rights. The labour inspector then issued an order for the enterprise to take measures in order to bring the

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985 The data that was considered was published in IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, 1972-2010, Vol. 1-100.
respective issues into conformity with national labour legislation. However, the state enterprise, as a plaintiff, claimed that the labour inspector unlawfully entered the workplace and thus refused to take the specific measures stipulated by the inspector’s order.

The ruling of the local court of general jurisdiction (the court of first instance) was in favour of the state enterprise. Afterwards, the labour inspectorate filed a claim of appeal to the Kyiv Administrative Court of Appeal. The court of appeal ruled that in its decision, the court of first instance did not take into account norms of national legislation regarding the issues mentioned above, and hence its decision was based on the incorrect application of material law norms. Furthermore, the court of appeal, in support of its decision, referred to ILO Convention No. 81 and explicitly cited the content of its provisions concerning the powers of labour inspectors (Article 12 of the Convention). Consequently, the Kyiv Administrative Court of Appeal set aside the decision of the court of first instance.

4.2.2. Case 2 (Reference to ILO Conventions Nos. 81 and 129)

The Lviv Court of Appeal went further in the application of international labour standards. In this court case, the Labour Inspectorate – as a plaintiff – appealed to the Court against the decision of the Ostrozkyi Regional Court.988 The court of first instance (the Ostrozkyi Regional Court) issued a decision in a lawsuit by a plaintiff (an employer) overturning the imposition of penalties by a labour inspector as a result of an examination of a workplace and the detection of labour legislation violations. Ultimately, the court of first instance ruled that the actions of the labour inspector were unlawful.

The court of first instance had based its decision on what were current provisions of national legislation, specifically the Law of Ukraine “On the Main Principles of State Supervision (Oversight) in the Area of Commercial Activity” No. 877-V of 2007. According to the Article 7, para. 5 of Law No. 877-V, officials of state supervision (labour inspectors) must present an order (a referral) from a competent authority issued for the inspection of a particular enterprise or workplace, as well as a document certifying the credentials of the labour inspector (an inspector’s pass). Representatives of the enterprise that is to be examined have the right to prevent officials of the state supervision from conducting the inspection if these officials (inspectors) do not present the documents provided for in Article 7, Law No. 877-V. The plaintiff in this case stated that the inspector did not present the respective referral from a competent authority, which would empower him to carry out an examination of the workplace and therefore the inspectorate had violated the provisions of national legislation. Based on this, the plaintiff asked the court of first instance to strike down the imposition of penalties by the inspector as null and void. The court subsequently satisfied this claim, based on the provisions of Law No. 877-V.

The Lviv Court of Appeal, while hearing arguments on the labour inspectorate’s demand to overturn the decision of the court of first instance, referred to provisions of ILO Convention No. 81 as well as the ILO Labour Inspection (Agriculture) Convention, No. 129. Here, the Court of Appeal explicitly stated that apart from national legislation, the scope of labour

988 Lviv Court of Appeal, Case No. 71579/10 of 24 November 2011.
inspection competences was defined by the ILO Conventions Nos. 81 and 129, which had been ratified by Ukraine and therefore were part of national legislation, pursuant to Article 9 of the Constitution of Ukraine. In addition, the Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 2004 states that if a ratified international agreement of Ukraine sets down rules other than those specified in the respective Ukrainian legislation, the rules of the international agreement apply. Moreover, even Law No. 877-V, Article 3 provides that the state supervision (oversight) agency is to be carried out based on the principle of adherence to the norms of Ukraine’s international agreements.

In its decision, the Lviv Court of Appeal noted that Article 7, paras. 1-5 (concerning the requirements for an inspector to present a referral from a competent state authority before carrying out an inspection), and Article 10, para. 4 of Law No. 877-V (concerning the right of the employer to prevent officials of state supervision to conduct an inspection without having presented the abovementioned referral) were not in conformity with the norms set out in Article 12 (1) of ILO Convention No. 81, which provides that in order to conduct an examination, a labour inspector need only be required to present “proper credentials” certifying his or her position as such. Furthermore, the court of appeal emphasized that:

The documents certifying the positions of an inspector are the official ID and copies of legal acts, which establish powers, rights and duties of the state labour inspectorate. The request of any other documents from the inspectors creates obstacles for inspectors to visit a facility immediately in order to verify and ensure the compliance with the labour laws by the employer and contradicts the provisions of ILO Convention No. 81 [emphasis added].

The Lviv Court of Appeal also explicitly noted the nonconformity of national legislation with international legal norms, stating that only those provisions of Law No. 877-V that did not contradict ILO Conventions Nos. 81 and 129 could be applied. For instance, Law No. 877-V regulates the procedure of conducting planned examinations, which do not contradict the norms enshrined in respective ILO Conventions. However, regulating unplanned inspection visits (upon the order of a competent authority or individual complaints by workers, or their representatives or associations) was once again beyond the scope of Law No. 877-V, as in accordance with Article 15 (c) of ILO Convention No. 81, labour inspectors “shall treat as absolutely confidential the source of any complaint bringing to their notice a defect or breach of legal provisions and shall give no intimation to the employer or his representative that a visit of inspection was made in consequence of the receipt of such a complaint.”

Furthermore, the Lviv Court of Appeal also cited Article 16 of ILO Convention No. 81, which provides that in order to ensure that labour laws are complied with, labour inspectors may carry out examination of workplaces as often and as thoroughly as is necessary. Therefore, as the court emphasized, any prevention of an examination of a workplace by a labour inspector can only be considered lawful and possible in cases where an inspector refused to present documentation certifying his or her position and authority (i.e. official ID); no other documents are necessary.
Consequently, the Lviv Court of Appeal, heavily relying on the respective provisions of the ILO instruments, set aside the previous decision of the court of first instance on the grounds of violating norms of material and procedural law, and upheld the appeal of the State Labour Inspectorate.

4.2.3. Case 3 (Reference to ILO Convention No. 139)

In an appeal by a state enterprise, the “Donetsk Coal and Energy Company” of a decision by the Holosiivsky Regional Court of Kyiv at the Kyiv Court of Appeal, the court also referred to international norms, in particular to the ILO Occupational Cancer Convention, 1974 (No. 139). The state enterprise (appellant) claimed that the decision of the Holosiivsky Regional Court of Kyiv (court of first instance) was adopted in violation of the norms of material and procedural law. In its claim to the court of first instance, the state enterprise asked the court to invalidate a resolution of the Institute of Occupational Medicine that determined that the occupational disease (in this case lung cancer) of an employee who had worked at the enterprise for more than fifteen years was due to his exposure to harmful substances at work, namely to coal dust.

In its claim to the court of first instance, the Donetsk Coal and Energy Company referred to national legislation of Ukraine, in particular to the List of Substances, Products, Industrial Processes, Domestic and Natural Factors, Carcinogenic to Humans of 2006 approved by the Ministry of Health of Ukraine, and stated that the production factors that the employee was exposed to at work are not included in the List as being harmful or carcinogenic.

Like in the case of the Social Insurance Fund against Accidents at Work and Occupational Diseases v. The Institute of Occupational Medicine of the National Academy of Medical Sciences of Ukraine, the court of first instance applied the provisions of ILO Convention No. 139, in particular with reference to Article 3, which states that each state that ratifies the Convention “shall prescribe the measures to be taken to protect workers against the risks of exposure to carcinogenic substances or agents and shall ensure the establishment of an appropriate system of records.” Furthermore, the court noted that in accordance with the Convention, the Institute of Occupational Medicine, is to refer to the Monographs of the International Agency for the Research on Cancer (IARC), the specialized agency of the WHO, when adopting resolutions on occupational diseases. The court then found that, when establishing a diagnosis of “occupational cancer” and the connection between the disease and the exposure of the respective employee to harmful substances (coal dust), the Institute of Occupational Medicine based its decision on IARC Monograph Vol. 68 of 1997, according to which the harmful substance contained in the coal dust, specifically “free crystalline silica,” was listed as a carcinogenic agent.

989 Case No. 22-u/796/4588/2014.
As a result, the court of first instance did not uphold the claim of the Donetsk Coal and Energy Company, and ruled that the resolution of the Institute of Occupational Medicine concerning the establishment of the diagnosis of occupational cancer was adopted in accordance with international norms. In its decision, the Kyiv Court of Appeal reiterated the provisions of ILO Convention No. 139 and left the decision of the court of first instance in force.

4.3. **Decisions by the High Administrative Court of Ukraine**

4.3.1. **Case 1 (Reference to ILO Convention No. 81)**

In a case where a joint stock company filed a complaint against a labour inspector, whose actions were considered as unlawful by the plaintiff (the Company), the court of first instance ruled in favour of the Company. Later, the Kharkiv Administrative Court of Appeal, upon the claim of the labour inspectorate, struck down the ruling of the local court and pointed out that the court of first instance based its decision on national legal norms, according to which the fact that the labour inspector, when visiting the enterprise, did not have a special order empowering him or her to enter the workplace, served as a reason to prevent the inspection by the enterprise. To require such an order from the relevant state authority to inspect the workplace is clearly stipulated by Law No. 877-V. In this regard, the Court of Appeal made a reference to Convention No. 81, which does not require a labour inspector to have a specific order for entering a workplace to carry out an inspection.

In its decision, the Court of Appeal explicitly noted the failure of the local court to take into account international norms. The Company then turned to the High Administrative Court of Ukraine with a request to annul the decision of the Kharkiv Administrative Court of Appeal and brought the same claims regarding the unlawful actions of the labour inspector as it did in its complaint to the local court. The High Administrative Court as well did not uphold this claim. It supported the decision of the Court of Appeal and made further references to Convention No. 81, specifically with regards to the requirements for labour inspectors to be provided with proper credentials, as stated in Article 12, para. 1 of the Convention. Furthermore, the High Administrative Court emphasized the priority of the Convention over conflicting national legislation. Hence, the High Administrative Court concluded that the national norms stipulating that a labour inspector must have an order from the competent state authority when entering an enterprise is in contradiction with international norms, and therefore, the respective international norm had to be applied in this case.

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992 Kharkiv Administrative Court of Appeal, Case No. 2a-11990/11/2070 of 17 April 2012.
4.3.2. Case 2 (Reference to ILO Convention No. 81)

In the cassation review of an administrative case, Credit Union “Svyatogor” v. the Chief Labour Inspector of the Territorial State Labour Inspectorate of the Donetsk Region, the High Administrative Court of Ukraine also referred to ILO Convention No. 81 in support of its decision.\textsuperscript{993}

In a lawsuit filed in the court of first instance, the chairman of the Svyatogor Credit Union asked the court to acknowledge the actions of the labour inspector as unlawful and to overturn the resolution on the administrative offense issued by the labour inspector. The court based its decision on the norms of national legislation, which contradict the provisions of ILO Convention No. 81 with regards to the powers of labour inspectors, in particular to the right of a labour inspector to demand any documents or registers from an employer in order to see that they conform to legal provisions (pursuant to Article 12, (1) (c) (ii) of the Convention). However, during the inspection visit to the Credit Union, the employer refused to provide the labour inspector with the relevant documentation. As a result, the labour inspector issued the resolution regarding the administrative offence committed by credit union. The court of first instance, nevertheless, ignored the provisions of ILO Convention No. 81 and upheld the claim of the plaintiff, finding the actions of the labour inspector as unlawful and invalidating the inspector’s resolution of the administrative offence.

In turn, the Territorial State Labour Inspectorate appealed to the Donetsk Administrative Court of Appeal. The court of appeal then upheld the claim of the labour inspectorate, basing its decision on the provisions of ILO Convention No. 81. As a result, the Court of Appeal overturned the decision of the court of first instance.

Disagreeing with the decision of the Donetsk Administrative Court of Appeal, the credit union then filed a cassation claim with the High Administrative Court of Ukraine, asking to annul the decision of the appellate court and to uphold the decision of the court of first instance.

The High Administrative Court acknowledged the correct application of international legal norms and national legislation by the court of appeal. In its judgment, the High Administrative Court referred to ILO Convention No. 81 and reiterated its provisions concerning the powers of labour inspectors. Consequently, the High Administrative Court left the decision of the Donetsk Administrative Court of Appeal in force, and rejected the claim of the Credit Union.

5. Conclusions

In Ukraine, dealing with international labour law within national courts is a relatively new issue, which only started to develop in the course of reforms, after Ukraine became an independent state in 1991. After all, during the Soviet period, attention was never paid to international norms. Thus, the application of international law by national courts as well as

\textsuperscript{993} High Administrative Court of Ukraine, Case K-32938/09 of 26 February 2013.
flexibility in such application started to take place only after the collapse of the Soviet Union and with the adoption of the Constitution of Ukraine in 1996.

Major reforms of the Ukrainian judicial system, the last of which was undertaken in 2016-2017, have led to substantial changes in Ukrainian legislation in order to bring it in line with international standards. In addition, Ukraine’s participation in international organizations, such as the ILO and the Council of Europe, as well as the country’s integration into the EU, clearly prompted the application of international and European legal instruments. Thus, current provisions of national laws and the Constitution of Ukraine oblige national courts to apply the European Convention on Human Rights in their practice, and to acknowledge the decisions of European Court of Human Rights as a source of law.

Decisions by Ukrainian courts tend to primarily refer to international agreements the country has ratified, such as ILO Conventions or the instruments of the Council of Europe, that are self-executing in the national legal system, though judges’ understandings of the norms contained in international agreements is not always accurate, and this often leads to the incorrect application of international norms.

The application of EU standards, including those in the field of labour, takes place much less often than the application of ratified international treaties. One reason for this is the legal nature of EU-Ukraine relations. Hence, under the EU-Ukraine Partnership and Cooperation Agreement of 1994, there was a “soft” commitment for Ukraine to bring its legislation in line with the EU acquis (a so-called “voluntary harmonization”); therefore fully efficient application of the acquis was not expected. Nevertheless, where there are references to the EU acquis in courts’ practice, it has generally applied as a persuasive source of law. However, even a “soft” commitment may have an important value for national courts’ decisions, given that voluntary application of EU law takes place.

The 2014 Association Agreement between the EU and Ukraine contained more specific approximation clauses as well as more “hard” obligations to approximate national legislation to the EU acquis. The implementation of the Association Agreement has been expected to increase the application of EU law in national courts, albeit still mostly as a persuasive source of law, considering the fact that Ukraine is not bound to transpose EU directives in its legislation.

Analysis of court practices for the period of 1991-2016 has shown that there were some positive examples in the application of international standards by domestic courts, especially by appellate courts and high specialized courts. Here, there has been a tendency to give priority to international norms over conflicting domestic legislation, particularly in cases concerning labour inspection and the application of respective ILO instruments, such as ILO Conventions Nos. 81 and 129. Also, the ILO Occupational Cancer Convention No. 139 has been efficiently applied in some cases.

Furthermore, the case law analysis makes it evident that the courts of appeal apply international norms to a greater extent than local courts (courts of first instance). Very often, the appellate courts overturn the decisions of local courts that did not apply, when necessary, an international norm instead of a conflicting national norm.
In addition, there have also been cases where neither a local court nor a court of appeal has used international norms in preference to conflicting national norms. In this regard, the High Administrative Court of Ukraine normally overturns the decisions of both, or that of a lower court. Indeed, the High Administrative Court has applied international norms far more often than courts of lower instances. Despite the best examples of court practice, where international standards were applied as a basis for a court decision and priority was given to an international norm over conflicting national legislation, the application of international legal instruments and, moreover, of EU standards, still lags behind. There are various reasons for inefficient application, the most important of which lies in inconsistent and often contradictory national legislation with regard to international standards. Last but not least, another important factor for the efficient application of international as well as EU norms is the willingness of domestic judges to apply these norms, along with their possessing the relevant knowledge and training.
Final Conclusions

The present study has focused on the implementation of different types of international law and on the conformity of national legislation with international and EU instruments in the field of occupational safety and health, as well as on the scope of labour inspection in Ukraine, with subsequent analysis of the application of international law by national courts. From analysis detailing the differences in the implementation and application measures of law of the ILO and the Council of Europe on the one hand, and EU law on the other, it is possible to draw the following conclusions.

1. Types of International Law and its Implementation

Just as there are variations in the different types of international law, implementation of international law in the national legal orders of states also varies. It is therefore necessary to distinguish the diverse effects that different types of international law produce on a state’s domestic legal order.

Nowadays, most constitutions of states around the world contain provisions determining the place of international law in a national legal order. However, various political-legal factors also influence the effective implementation of constitutional provisions, such as a state’s membership in international organizations, the rule of law, and the nature of applicable international rules, as well as the independence and efficiency of the domestic judiciary when applying international legal norms.

It appears that the international labour standards of the ILO may influence the national legislation of both ratifying and non-ratifying states, though changes introduced to national legislation may take place either before the actual ratification, or as the result of ratification. Yet, despite the relatively high number of ratifications of ILO instruments by Member States, in many of them there is a lack of normative and practical compliance with ILS. In this regard, domestic courts play an important role in the application of international norms at the national level, because court decisions are among the most important means to ensure the compliance with international legal norms.

Another type of international law – the law of the EU – can be characterized as mixed, hybrid or *sui generis* law due to the unique legal nature of the EU and the content of its founding Treaties, as well as the practice of the European Court of Justice. EU law itself determines its effect on the national legal order of EU Member States. Another distinctive feature of EU law is the internal hierarchy of its sources. Moreover, the courts of EU Member States are obliged to interpret their national law in conformity with the law of the Union. Hence, one of the major sources of EU law – the interpretative practice of the ECJ and its preliminary ruling procedure – is employed to ensure the uniform application of EU law by Member States. Public international law serves as a supplementary source of the law of the Union, helping to fill in the gaps or to interpret the treaties.

One more type of international law assessed in this study is the law of the Council of Europe, that is often referred to as a “regional” international law, because of its adaptation to the European region. The most fundamental instrument of the Council – the European
Convention on Human Rights of 1950 – gives effect to international principles in the field of human rights at the European level by referring to international standards.

Membership in the Council implies – and indeed requires – ratification of the ECHR. Therefore, the Convention is binding for all the Member States of the Council. Furthermore, the European Court of Human Rights, set up by the Convention, is designed to ensure the observance of the Convention by Member States of the Council. In addition, the Council’s legal instruments help to harmonize the national laws of its Member States. Non-Member States may also ratify the Council’s treaties or accede to them. However, the effectiveness of the legal instruments of the Council of Europe have frequently been called into question because of rather weak supervisory mechanisms.

In addition, various “soft law” instruments, either legal or non-legal, may also influence the application of international law in the national legal orders of states. While there is no single definition of what soft law is, it is normally understood that soft law is not binding and does not have legal sanctions.

Legal soft law is characterized by the “hard” content of norms, albeit enshrined in a non-binding instrument that is often used to supplement a “hard” legal instrument and the legitimacy of the authority that adopts these “soft” legal instruments (as in the case of ILO recommendations). In fact, non-binding ILO recommendations might have nearly the same effect on states’ domestic law and practice as binding ILO conventions. Non-legal soft law, on the other hand, consists of various non-binding codes of conduct, guidance, resolutions etc. that might also be used in order to enhance compliance with “hard” legal instruments, especially when they supplement binding instruments or introduce higher standards than those set out in “hard” laws. In any case, such soft instruments should not lower existing “hard” standards.

Finally, because the number of international and regional instruments is growing, there is a need for coordination in standard-setting to ensure that parallel standards are not adopted and that the new standards of different international organizations complement, rather than contradict, each other.

2. Relevance of the International and EU Law for Ukraine

Ukraine’s membership in international organizations as well as its course towards European integration imply the state’s participation in various binding agreements as well as commitments of a “soft” legal nature.

Because of Ukraine's participation in international organizations, such as the UN, the ILO, and the Council of Europe, the state has ratified numerous treaties that carry “hard” obligations to comply with them. This also includes ratified ILO conventions, which constitute part of national legislation pursuant to the provisions of the Constitution of Ukraine of 1996.

Up to now, Ukraine has ratified 71 ILO conventions, including most of those directly dealing with OSH. However, Ukraine has not ratified such important ILO instruments in OSH field as the Asbestos Convention, 1986 (No. 162), the Occupational Safety and

At the European level, Ukraine’s membership in the Council of Europe obligates the state to adhere to the European Convention on Human Rights of 1950. In addition, Ukraine has ratified other important instruments of the Council, including the European Social Charter (Revised) of 1996.

On the other hand, EU law is currently becoming ever more relevant for Ukraine. First, the relevance of EU law is crucial because of Ukraine’s European aspirations and integration into the European Union. Second, the legal foundation of the EU-Ukraine relationship has recently developed expanding from a Partnership and Cooperation Agreement in 1994 to an Association Agreement, which was signed in 2014.

Because Ukraine does not hold membership of the EU, it is not bound by the law of the EU and does not have any obligation to transpose EU directives or to adhere to the decisions of the ECJ. However, Ukraine has to approximate its legislation to that of the EU. The nature of this commitment comes from the legal basis of EU-Ukraine relations.

Thus, under the PCA of 1994, the commitment to “endeavour to ensure” that national legislation would be in compliance with the EU acquis could be characterized as a “soft” commitment, with approximation being voluntary. However, even in this case it can be argued that the EU law might have had an impact on the national legislation of Ukraine provided that voluntary approximation took place. Following the PCA, in 2004, the country launched its Programme of Adaptation of Ukrainian Legislation to the Legislation of the European Union. The aim of adapting Ukrainian legislation to EU law was to help the legal system of Ukraine achieve a level of compliance with the acquis communautaire. As a result, some national laws and regulations were brought into conformity with the EU acquis, albeit not to a large extent. This was partially due to the ambiguity of the PCA provisions and partially because of a lack of sufficient action on part of the Ukrainian government to undertake its commitments to bring national legislation in line with the EU acquis.

Therefore, when analyzing the effect of soft norms on the enforcement of international law, the results of this study suggest that the law of the EU might have influenced the approximation of national legislation to the EU acquis, thus amounting to a quasi-soft law for Ukraine, given the “soft” nature of the country’s commitments under the PCA of 1994.

The developments of the EU-Ukraine relationship with the conclusion of Association Agreement in 2014 marked an important step forward for further European integration of Ukraine. The AA of 2014 committed Ukraine to approximating its national legislation to that of the EU, thus “hardening” this obligation. Hence, the EU-Ukraine AA sets up a single legal framework and a complex mechanism for the approximation of legislation and the settlement of disputes, as well as a monitoring mechanism for the effective implementation of the Agreement. This makes the EU-Ukraine AA an innovative legal instrument in the
EU’s external relationship that is quite distinct from other types of “integration without membership” agreements.

Given Ukraine’s obligations under the Association Agreement of 2014 to approximate its legislation in line with the EU *acquis*, specifically in light of the detailed approximation clause and including the precise timeframe for the implementation of particular EU directives, stipulated in the Agreement, it appears that EU law is likely to have a greater effect on Ukrainian national legislation and eventually on the practice of national courts in the near future.

3. **Labour Law and Labour Protection in Ukraine: Conformity with International Standards in the Field of OSH**

Current labour legislation of Ukraine consists of a mixture of different legal norms, which are not always up to date, with a large number of them stemming from the Soviet times or the early 90s, though many of the legal acts have been amended during an ongoing process of legal reform. The Labour Code of 1971, currently in force in Ukraine, contains provisions on occupational safety and health as regards different categories of workers. However, many of its provisions, despite numerous amendments in recent years, are outdated. In addition, there are more than two thousand technical regulations on occupational health and safety in Ukraine; many of these were also adopted during the Soviet era and often duplicate each other.

The analysis of the national legislation on occupational safety and health and its conformity with ILO standards shows that the provisions of ratified ILO conventions on OSH are generally reflected in national law and regulations. Hence, national legislation conforms to a different extent to the ILO Radiation Protection Convention, 1960 (No. 115), the Hygiene (Commerce and Offices) Convention, 1964 (No. 120), the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174) the Safety and Health in Mines Convention, 1995 (No. 176) the Safety and Health in Agriculture Convention, 2001 (No. 184) as well as the Occupational Cancer Convention, 1974 (No. 139). Also, there is relatively high conformity of national legislation with respect to some unratiﬁed instruments, such as in the case of the ILO Asbestos Convention, 1986 (No. 162).

To cover the large spectrum of health and safety issues in national legislation that still need to be drafted in line with international standards, it would be essential for Ukraine to ratify other important ILO instruments in the field, such as the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), the Safety and Health in Construction Convention, 1988 (No. 167), the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), the Chemicals Convention, 1990 (No. 170) and the Asbestos Convention, 1986 (No. 162).
The EU – Ukraine Association Agreement of 2014 stipulates the implementation of the provisions and requirements of the EU directives on occupational safety and health into national legislation of Ukraine. From the analysis of the conformity of Ukrainian legislation to Directive 91/383/EEC (OSH Framework Directive) and individual directives covering OSH issues, it is evident that Ukraine has undertaken some steps to amend its national legislation in line with EU standards in recent years.

As such, the provisions of the EU OSH Framework Directive are reflected in national legislation to a varying extent. In particular, national legislation of Ukraine conforms to the provisions of the OSH Framework Directive with respect to the employers’ general obligations to take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as necessary organization and means (Article 6, para. 1 of Directive 91/383/EEC); protective and preventive services (Article 7); employers obligations as regards protective measures and protective equipment, keeping record of occupational accidents and reporting to the responsible authorities (Article 9, para. 1 (b), (c), (d)); the right of workers to leave their workstation in the event of serious danger (Article 8, para. 4); information of workers (Article 10), consultation and participation of workers (Article 11), training of workers (Article 12) and health surveillance of workers (Article 14).

There are provisions of Directive 91/383/EEC, which are only partially considered in national legislation, namely: Article 13 on workers’ obligations; Article 8, para. 2 on the obligation of employers to designate workers for first aid, firefighting and the evacuation of workers.

Also, some requirements of the OSH Framework Directive are not reflected in Ukrainian domestic legislation, such as those on general principles of prevention (Article 6, para.2), on cooperation and action coordination of employers in implementing OSH provisions, where several establishments share a workplace (Article 6, para. 4); on employers’ obligation to refrain from asking workers to resume work under serious and imminent danger (Article 8, para. 3); and employers’ obligations to provide information on safety and health risks to workers from any outside establishments (Article 10, para. 2).


Still, there are cases of incoherence in domestic OSH legislation or only partial conformity with EU standards. In particular, partially reflected in national legislation are the requirements of Directive 2009/104/EC on the use of work equipment, Directive 90/270/EEC on display screen equipment, Directive 91/322/EEC on indicative limits values, Directive 92/58/EEC on safety and health signs, Directive 99/92/EC on risks from

At the same time, there is a low conformity or inconsistence of national legislation to the EU OSH directives observed with regard to the requirements of Directive 2002/44/EC on vibration, Directive 2003/10/EC on noise, Directive 2000/54/EC on biological agents at work, Directive 2006/25/EC on artificial optical radiation as well as Directive 92/29/EEC on medical treatment on board vessels.

Furthermore, it should be mentioned that where there is a conformity with EU OSH standards, such conformity appears to be mostly formal, when national laws contain overly general formulations compared to the detailed requirements of EU directives. Therefore, it would be necessary to adopt uniform national laws and regulations, fully covering all the issues envisaged in the OSH Framework Directive and drafted in line with other individual EU directives in the field.

Finally, with the 2014 EU-Ukraine Association Agreement coming into force, further approximation of national legislation to EU directives, including those in the field of OSH, is ever more expected in the nearest future.


Labour inspection worldwide is called to monitor compliance with labour legislation at the workplace, including compliance with international labour standards. In accordance with the ILO Labour Inspection Convention No. 81 of 1947, the ratifying Member States are obliged to ensure application of international labour standards by establishing an effective system of labour administration and labour inspection.

In most ILO Member States, the scope of labour inspection is defined in general labour legislation such as labour codes, general labour acts, etc. The existence of an employment relationship serves as a defining factor for the inclusion in the scope of labour inspection, at least in law. In practice, however, the functions and structure of labour inspectorate vary greatly from one country to another and are often limited depending on the national political or economic situation. Labour inspection authorities still face numerous challenges in many states, including understaffing, limited financial resources and overwhelming workloads.

The legal basis for the scope of labour inspection in the European Union is found in Framework Directive 89/391 EEC, which defines the general application of EU health and safety law. In fact, the sectoral scope of the Framework Directive is wider than that of the ILO Labour Inspection Convention, 1947 (No. 81). Although EU legislation in the field of labour as well as on OSH is highly influenced by the ILO standards, the setting of labour inspection basically remains within the individual sphere of EU Member States’ responsibility.
In Ukraine, general supervision over compliance with labour laws is exercised by the State Labour Service (Derzhprazi), established 2015 as a successor of the State Labour Inspectorate of Ukraine. The main objectives of the State Labour Service is to implement government policy on supervision, monitor compliance with labour legislation, and exercise state supervision (oversight) over compliance with general labour laws and labour protection legislation, including that on occupational safety and health, by enterprises, institutions, and organizations of all types of ownership and activities as well as by individuals using hired labour, by state executive authorities, and by local governments.

However, labour inspection in Ukraine does not yet properly deal with the “new hazards”, such as stress, bullying, or sexual harassment at work – the subjects which are now gaining increased attention of labour inspection in many EU Member States.

Furthermore, labour inspection in Ukraine faces other numerous challenges, such as difficulties in supervising the informal sector, a lack of professional staff and training, the low remuneration of inspectors, a lack of workers’ awareness of their legal rights, etc. The major challenge for the effective functioning of labour inspection in Ukraine, however, lies in the non-conformity of national legislation on labour inspection with the respective international standards; this creates a serious obstacle for labour inspectors to perform their main duty – enhancing labour legislation and international labour standards at the workplace and to exercising their rights that have been established at the international level.

Hence, the analysis of the conformity of Ukrainian national legislation regarding labour inspection to international standards reveals that the Law of Ukraine “On the Basic Principles of State Supervision (Oversight) in Economic Activities” No. 877-V of 2007 (which regulates compliance and enforcement of labour laws in the area of commercial activity and identifies the main principles for state supervision in this area), contradicts provisions of ILO instruments regarding the powers of inspectors as well as the procedures followed when carrying out inspections. In particular, the main inconsistency of national legislation with international standards is found in the right of inspectors to enter “freely and without previous notice any workplace liable to inspection at any time of the day or night” (Article 12, para. 1(a) and para.2 of the ILO Convention No. 87 of 1947). Contrary to the provisions of the Convention, Law No. 877-V requires an inspector to notify an employer in written form on the planned inspection visit at least ten days prior to the inspection. Furthermore, Law No. 877-V requires inspectors to present an order from a competent authority for the inspection of a particular enterprise or workplace, apart of presenting a document certifying the credentials of a labour inspector (an inspector’s pass), which also contradicts Article 12 (2) of Convention No. 81.

Despite the fact that Ukraine has ratified ILO Conventions Nos. 81, 129 and 150, and despite the numerous observations and requests of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to bring current legislation in line with respective ILO instruments, no amendments have been made to bring the respective national legislation until recently.
Pursuant to the amendments introduced to Law No. 877-V in 2017, labour inspection activities were deemed to be exempted from the scope of the Law. However, ambiguous formulations as regards the oversight of labour legislation by inspection authorities envisaged by Law No. 877-V still lead to misinterpretation of its provisions and therefore to incorrect application of the Law by Ukrainian judiciary. It is therefore even more important that the functions and rights of labour inspection in Ukraine will be regulated by a specific law that will conform to the relevant ILO standards.

Finally, the long-awaited and continually negotiated draft of the new Labour Code of Ukraine is expected to contain a new legal foundation of the entire system of labour inspections (including inspectors’ powers and duties) that conforms to respective international standards. Nonetheless, it would still be necessary to establish an effective enforcement mechanism for the functioning of labour inspection, as well as to amend contradictory national legislation in this regard.

5. Judicial Practice in the Application of International Legal Instruments in Ukraine

The use of international law by national courts is relatively new for Ukraine. Although Ukraine had been a member of international organizations such as the UN and the ILO while still being a Soviet state, domestic courts as a rule had not referred to international legal instruments in their practice before the country’s independence in 1991 or even throughout the 1990s.

Since 1991, Ukraine has gradually ratified a number of international agreements in different spheres, including many of the ILO conventions. This was accompanied by the adoption of numerous laws that corresponded with international instruments, particularly those on human rights and labour issues. For this reason, it became increasingly necessary for national courts to apply international legal norms in their practice. In addition, Ukraine’s membership in the Council of Europe since 1995 and consequently its participation in the European Convention on Human Rights of 1950 has obligated Ukraine to adhere to the decisions of the European Court of Human Rights as well as to recognize the decisions of the ECtHR as a source of law.

Although juridically the Constitutional Court of Ukraine is not subordinate to the European Court of Human Rights and is not bound, therefore, by the case law of the latter, analysis of the practice of the Constitutional Court illustrates various examples of the application of legal instruments adopted by the Council of Europe, specifically the European Convention on Human Rights. In other words, the Constitutional Court refers to provisions of the ECHR, provided that such provisions are in conformity with the Constitution of Ukraine. Such references to the ECHR have rather a general character (emphasizing the general effect of the ECHR on the national legal system of Ukraine), though in some cases, there are references to particular provisions of the Convention. Courts of general jurisdiction also refer to the ECHR in their practice, using it either as a general source of reference or basing their decision on specific ECHR provisions.
The analysis of the application of international law by domestic courts undertaken before the 2016 judicial reform shows that the courts of general jurisdiction and the Constitutional Court of Ukraine referred to a different extent to ratified international agreements in their decisions. There are some positive examples of the application of international standards, especially by appellate courts and high specialized courts, illustrated in this study.

Thus, in the decisions of the High Administrative Court of Ukraine as well as in the case law of appellate courts, there was a tendency to give priority to international norms over conflicting domestic legislation, at least in cases concerning the powers of labour inspectors and the application of corresponding ILO instruments (Conventions Nos. 81 and 129). In the area of OSH, the ILO Occupational Cancer Convention No. 139 of 1974 has also been effectively applied in some cases. Often, the courts of appeal have overturned the decisions of local courts that have failed to apply respective international norms instead of conflicting national provisions. In fact, it appears that the appellate courts applied international norms to a greater extent than courts of first instance.

The application of EU standards, including those in the field of OSH, is much less common than the application of ratified international treaties, such as the ILO conventions. This is due to the legal nature of EU-Ukraine relations. Indeed, the effective application of EU law under a rather “soft” commitment for Ukraine to approximate its legislation to the EU *acquis* under the Partnership and Cooperation Agreement of 1994 had not been widely expected. However, there were still cases of application of the EU *acquis* by national courts, albeit mostly as a persuasive source of law. Therefore, even a “soft” commitment might have an important effect on national courts’ decisions, if the voluntary application of EU law takes place. In fact, the willingness of Ukrainian judiciary to approximate its legislation to that of the Union and to effectively apply EU standards might ultimately have the same effect as the application of ratified international agreements.

Furthermore, in cases where national legislation is brought into full conformity with that of the EU, particularly in the area of OSH, the courts would be able to adopt decisions in line with EU standards. This would prove the effect that EU law might have on the law and practice of a state that itself does not hold membership in the Union. Therefore, further important steps must still be taken to bring national legislation into closer conformity with international and European standards and adopting new laws on labour protection that can adequately respond to modern challenges and meet international requirements.

Importantly, the application of international norms by Ukrainian judges is not always correct or effective for various reasons, the most important of which lies perhaps in the non-conformity of national legislation with international standards as well as the absence of unified practice on the part of courts. Other reasons include a lack of sufficient knowledge and experience in the application of international as well as EU instruments by judges, their willingness to apply such instruments, and a lack of professional training.

At the same time, it should be remembered that developments in the judicial and legal systems of Ukraine are still taking place. Due to Ukraine’s gradual integration into the EU, further reforms in the country’s legal system have been undertaken. As such, the EU-Ukraine Association Agreement adopted in 2014 stipulates the approximation of national
legislation of Ukraine, including that in the field of labour, to the EU *acquis*. As a result, it is expected that national courts will apply the EU *acquis* in their practice more frequently.

Furthermore, for the courts to have clear guidelines on the application of international norms and for the uniformity of court practice, it was crucial to review the scope of powers assigned to the Supreme Court of Ukraine, which were substantially reduced over the course of the legal reform of 2010. Therefore, during 2016-2017 a major judicial reform took place in Ukraine, which brought about changes to the Constitution of Ukraine regarding justice, including the status of judges and the exercise of judicial powers.

The constitutional amendments of 2016 resulted into the adoption of new legislation that introduced changes to the structure and powers of national courts – and most importantly, the Supreme Court. This legislation concerned changes from a four-tier court system (composed of the courts of first and second instance, high (specialized) appellate courts, and the Supreme Court) to a three-tier court system (the courts of first and second instance; and the Supreme Court, which now has the specialized courts of cassation integrated into its structure). According to the current legislation, the Supreme Court is defined as the highest court in the court system and is now the only cassation instance in Ukraine. However, detailed procedural legislation on the functioning of the judiciary in Ukraine has yet to be adopted.

Consequently, it is expected that the 2016-2017 reform of the country’s judiciary, will have a positive impact on the application of international and European standards in Ukraine. This is an area that will require further examination of the future judicial practice of Ukraine’s domestic courts.
Annex I. Conformity of National Legislation of Ukraine with ratified ILO Conventions on Health and Safety Issues and Labour Inspection

<table>
<thead>
<tr>
<th>ILO Conventions (ratified by Ukraine)</th>
<th>Corresponding National Legislation</th>
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<tr>
<td></td>
<td>Laws of Ukraine</td>
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<td></td>
<td>The Basic Sanitary Regulations for Ensuring Radiation Safety in Ukraine, approved by the Order No. 54 of the Ministry of Health of Ukraine of 02.02.2005</td>
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<td></td>
<td>The State Nuclear Regulation Inspectorate of Ukraine, approved by the Order of the President of Ukraine No. 403/2011 of 06.04.2011</td>
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<tr>
<td></td>
<td>The Radiation Safety Standards of Ukraine, approved by the Resolution No. 62 of the Chief State Health Officer of Ukraine of 01.12.1997</td>
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<td></td>
<td>The Procedure for the Medical Examination of Certain Categories of Workers, approved by the Ministry of Health of Ukraine, Order No. 246 of 21.05.2007</td>
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<tr>
<td>Convention</td>
<td>Source 1</td>
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<td></td>
<td>The Law of Ukraine “On the Approval of the State National Programme on Improving</td>
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<tr>
<td>Regulation / Convention</td>
<td>Relevant Laws and Regulations</td>
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The Model Regulation on Labour Protection Service, approved by the Order of the State Committee of Ukraine on Labour Protection Supervision, No. 255 of 15.11.2004  
The Model Regulation on Health and Safety Commission at an Enterprise, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 55 of 21.03.2007 |
The Law of Ukraine “On High Risk Facilities” No. 2245-XII of 18.01.2001 (Articles 3, 8)  
The Procedure of Investigation and Registration of Accidents, Occupational Diseases and Emergency at Work, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1232 of 30.11.2011 |
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<tr>
<th>Convention</th>
<th>Relevant Laws and Instruments</th>
<th>Reference</th>
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<tr>
<td></td>
<td>The “Mining Law of Ukraine” No. 1127-XIV of 06.10.1999 (Articles 18, 25, 26, 30, 32, 35, 38, 43)</td>
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</tbody>
</table>
Decree of the President of Ukraine “On the State Agricultural Inspectorate of Ukraine” No. 459/2011 of 13.04.2011 |
Annex II. Approximation of National Legislation of Ukraine with EU Directives in the field of OSH and Labour Protection

(In accordance with Annex XL to Chapter 21 of the EU-Ukraine Association Agreement)

<table>
<thead>
<tr>
<th>EU Directives</th>
<th>Laws Of Ukraine</th>
<th>Other normative legal acts and regulations</th>
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</table>
The Procedure on Providing Special Clothes, Footwear and other Individual Protection Equipment to Employees, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 53 of 24.03.2008  
The Procedure on Free Distribution of Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 62 of 16.04.2009 |
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<td><strong>industries through drilling (Eleventh individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)</strong></td>
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<td></td>
<td><strong>The General Requirements on Labour Protection at Mining Enterprises, approved by the Ministry of Emergencies, Order No. 459 of 19.07.2006</strong></td>
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<tr>
<td><strong>Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels</strong></td>
<td><strong>No relevant legislation in place</strong></td>
<td><strong>No relevant regulations in place</strong></td>
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<td>The Safety Rules During Work on Board Fishing Vessels, approved by the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision, Order No. 26 of 27.12.2006</td>
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<td></td>
<td>The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order No. 627 of 22.03.2012</td>
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<td>Directive</td>
<td>Relevant Acts and Regulations</td>
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</table>
| Directive 2004/37/EC - carcinogens or mutagens – of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work | The Labour Code of Ukraine, 1971 (Articles 153, 158)  

The General Requirements to Securing Workers' Labour Protection by Employers, approved by the Ministry of Emergencies of Ukraine, Order No. 67 of 25.01.2012

The List of Substances, Products, Industrial Processes, Domestic and Natural Factors, Carcinogenic to Humans, approved by the Ministry of Health of Ukraine, Order No. 7 of 13.01.2006

The Requirements to Employers for the Protection of Workers from Harmful Exposure to Chemical Agents, approved by the Ministry of Emergencies of Ukraine, Order 627 of 22.03.2012

The State Sanitary Rules and Regulations on the Safety and Protection of Workers from the Harmful Effects of Asbestos and Asbestos Containing Materials, approved by the Ministry of Health of Ukraine, Order No. 339 of 29.03.2017
<table>
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<tr>
<th>Directive</th>
<th>Relevant Regulations</th>
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<tr>
<td></td>
<td>No relevant regulations in place</td>
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<td></td>
<td>The Safety Rules during the Operation of Computers, approved by the State Committee on Industrial Safety, Labour Protection and Mining Supervision, Order No. 65 of 26.03.2010</td>
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<tr>
<td></td>
<td>The Requirements for Employers on Workers’ Protection from the Harmful Effects of Electromagnetic Fields, approved by the Ministry of Energy and Coal Industry, Order No. 99 of 05.02.2014</td>
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- The Labour Code of Ukraine, 1971 (Articles 153, 158)
- The Labour Code of Ukraine, 1971 (Articles 153, 158)
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<tr>
<th>Directive 2009/104/EC – <strong>use of work equipment</strong> - of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)</th>
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<tr>
<td><strong>The Labour Code of Ukraine, 1971</strong> (Articles 153, 156)</td>
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<tr>
<td><strong>The Technical Regulations on Machinery and Equipment Safety, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 933 of 12.10.2010</strong></td>
</tr>
<tr>
<td><strong>The General Requirements on Securing Workers’ Labour Protection by Employers, approved by the Ministry of Emergencies of Ukraine, Order No. 67 of 25.01.2012</strong></td>
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<tr>
<th>Directive 90/269/EEC – <strong>manual handling of loads</strong> - of 29 May 1990 on the minimum health and safety requirements for the manual handling of loads where there is a risk particularly of back injury to workers (Fourth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)</th>
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<tr>
<td><strong>The Labour Code of Ukraine, 1971</strong> (Articles 174, 190)</td>
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<tr>
<td><strong>The Weight Limits of Lifting and Moving Heavy Loads by Minors, approved by the Ministry of Health of Ukraine, Order No. 59 of 22.03.1996</strong></td>
</tr>
<tr>
<td><strong>The Weight Limits of Lifting and Moving Heavy Loads by Women, approved by the Ministry of Health of Ukraine, Order No. 241 of 10.12.1993</strong></td>
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<tr>
<th>Directive 90/270/EEC – <strong>display screen equipment</strong> - of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (Fifth individual Directive)</th>
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<tr>
<td><strong>The Labour Code of Ukraine, 1971</strong> (Articles 153, 158)</td>
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<tr>
<td><strong>The Safety Rules during the Operation of Computers, approved by the State Committee on Industrial Safety, Labour Protection and Mining Supervision, Order No. 65 of 26.03.2010</strong></td>
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<td>Directive</td>
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<td>2000/39/EC of 8 June 2000 establishing a first list of indicative occupational exposure limit values in implementation of Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work</td>
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<tr>
<td>Commission Directive 2006/15/EC on indicative occupational exposure limit values of 7 February 2006</td>
</tr>
</tbody>
</table>
List of Relevant National Legislation of Ukraine

Laws of Ukraine:


Law of Ukraine “On International Agreements of Ukraine” No. 1906-IV of 29.06.2004 (Vidomosti Verkhovnoyi Rady (VVR), 2004, No. 50, p.540)

Law of Ukraine “On the State Programme of Adaptation of Ukrainian Legislation to the Legislation of the EU” No. 1629-IV of 18.03.2004 (Vidomosti Verkhovnoyi Rady (VVR), 2004, No. 29, p. 367)


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Decree of the President of Ukraine “On the State Emergency Service of Ukraine” No. 20/2013 of 16.01.2013 (Ofizijnyi Visnyk Ukrainy (official publication), 2013, No. 5, p. 46, para. 154)

Decree of the President of Ukraine “On the Approval of Regulation on the State Service of Mining Supervision and Industrial Safety of Ukraine”, No. 408/2011 of 06.04.2011 (Ofizijnyi Visnyk Ukrainy (official publication) 26.04.2011, No. 29, p. 169, para. 1241)


Decree of the President of Ukraine “On the Regulation on the State Inspectorate of Ukraine on Technogenic Safety” No. 392/2011 of 06.04.2011 (Ofizijnyi Visnyk Ukrainy (official publication), 2011, No. 29, p. 80, para. 1229)

Decree of the President of Ukraine “On the Regulation of the State Nuclear Regulation Inspectorate of Ukraine” No. 403/2011 of 06.04.2011 (Ofizijnyi Visnyk Ukrainy (official publication), 2011, No. 29, p. 169, para. 1241)


Decree President of Ukraine “On the Concept of Improvement of the Judiciary to Ensure Fair Trial in Ukraine in Line with European Standards” No. 361/2006 of 10.05.2006 (Ofizijnyi Visnyk Ukrainy (official publication) 24.05.2006, No. 19, p. 23, para.1376)

Decree of President of Ukraine “On the Court of Appeal of Ukraine, the Court of Cassation of Ukraine and the High Administrative Court of Ukraine” No. 889/2002 of 01.10.2002 (Ofizijnyi Visnyk Ukrainy (official publication) 18.10.2002, No. 40, p. 29, para. 1856)


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Regulations on Machinery Safety” No. 62 of 30.01.2013 (Ofizijnyi Visnyk Ukrainy (official publication) 12.02.2013, No. 9, p. 54, para 344)

Resolution of the Cabinet of Ministers of Ukraine “Some Issues on the Investigation
and Registration of Accidents, Occupational Diseases and Emergency at Work” No.1232 of 30.11.2011 (Ofizijnyi Visnyk Ukrainy (official publication) 12.12.2011, No. 94, p. 64, para 3426)

Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Procedure
for Issuing Permits for the Performance of Highly Hazardous Works and for
the Exploitation of the Machinery, Mechanisms and Equipment of High Risk”
No. 1107 of 26.10.2011 (Ofizijnyi Visnyk Ukrainy (official publication) 07.11.2011, No. 84, p. 75, para 3077)

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Authorities” No. 346 of 28.03.2011 (Ofizijnyi Visnyk Ukrainy (official publication), 2011, No. 26, p. 22, para. 1054)

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Regulations on Safety of Equipment Operating under Pressure” No. 35 of
19.01.2011 (Ofizijnyi Visnyk Ukrainy (official publication) 31.01.2011, No. 5, p. 12, para 246)

Resolution of Cabinet of Ministers of Ukraine “On the Approval of the Technical
Regulation on Workers’ Safety and Health Signs” No. 1262 of 25.11.2009
(Ofizijnyi Visnyk Ukrainy (official publication) 07.12.2009, № 92, p. 76, para 3118)

Resolution of the Cabinet of Ministers of Ukraine “On the Approval of the Technical
Regulations on Simple Pressure Vessels Safety” No. 268 of 25.03.2009
(Ofizijnyi Visnyk Ukrainy (official publication) 06.04.2009, No. 23, p. 38, para 748)

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(Ofizijnyi Visnyk Ukrainy (official publication) 12.09.2008, № 66, p. 50, para 2216)

Resolution of the Cabinet of Ministers of Ukraine “On the Establishment of the State
Department for Adaptation of Legislation” No. 1742 of 24.12.2004 (Ofizijnyi Visnyk Ukrainy (official publication), 2004, No. 52, p. 297, para. 3447)

Resolution of the Cabinet of Ministers of Ukraine “On Some Issues of the Adaptation
of Ukrainian Legislation to the Legislation of the EU” No. 1365 of 15.10.2004
(Ofizijnyi Visnyk Ukrainy (official publication), 05.11.2004, № 42, p. 35, para. 2763)

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for Conducting Inspection, Testing and Expert Examination (Technical
Diagnostics) of Vehicles, Machinery and High-Risk Equipment” No. 687 of
26.05.2004 (Ofizijnyi Visnyk Ukrainy (official publication) 11.06.2004, No, 21,
p. 68, para. 1434)
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Order of the Ministry of Health of Ukraine “On the Procedure on Medical Examination of Certain Categories of Workers”, No. 246 of 21.05.2007 (Ofizijnyi Visnyk Ukrainy (official publication) 06.08.2007, No. 55, p. 138, para. 2241)

Order of the Ministry of Health of Ukraine “On the Approval of the List of Substances, Products, Industrial Processes, Domestic and Natural Factors, Carcinogenic to Humans”, No. 7 of 13.01.2006 (Ofizijnyi Visnyk Ukrainy (official publication) 22.02.2006, No. 6, p.148, para. 334)

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Productions and Organizations, Activities of Which are Related to Public Service and Can Lead to the Spread of Infectious Diseases”, No. 280 of 23.07.2002 (Ofizijnii Visnyk Ukrainy (official publication) 30.08.2002, No.33, p. 27, para. 1538)


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Order of the State Committee on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of Safety Rules during the Operation of Computers”, No. 65 of 26.03.2010 (Ofizijnii Visnyk Ukrainy (official publication) 05.05.2010, No. 30, p. 12, para. 1119)

Order of the State Committee of Ukraine on Industrial Safety, Labour Protection and Mining Supervision “On the Approval of the Procedure on Free Distribution of Special Clothes, Footwear and other Individual Protection Equipment to Employees of General Professions in Different Branches of Industry”, No. 62 of 16.04.2009 (Ofizijnii Visnyk Ukrainy (official publication) 29.05.2009, No. 37, p. 111, para. 1267)

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Summary

The current PhD thesis focuses on the implementation of different types of international law into national legislation of Ukraine and its application. In particular, the law of the International Labour Organization, the law of the EU and the law of the Council of Europe are considered. Starting from general insights into the role and place of international law in Ukraine’s national legal order, the implementation of different types of international law in national legal systems of states and the application of international treaties by domestic judiciaries, the study then moves to a focus on the international occupational health and safety instruments.

Providing Ukraine as an example, the study aims to illustrate how the state implements and applies different types of international law, considering both the hard and soft nature of the state’s obligations to comply with international legal norms. In this regard, specific attention is paid to the relevance of international law for the Ukrainian legal order, by providing a comparative legal analysis of Ukraine’s obligations under binding versus non-binding international norms. As a member of many international organizations, including the ILO and the Council of Europe, Ukraine must apply ratified international treaties as part of its national legislation. However, with regard to the law of the European Union, Ukraine has to approximate its laws to that of the EU. In this respect, the Ukraine’s process of European integration, ongoing legal reforms in Ukraine as well as the legal nature of the EU-Ukraine relationship and its development is assessed. In this regard, the recently signed EU-Ukraine Association Agreement is analysed, with a particular focus on the obligation of Ukraine to bring its national legislation in line with the EU *acquis communautaire*, including EU instruments in the area of occupational health and safety, and the nature of such obligations. Focusing further on the labour law of Ukraine, its sources, and the conformity of its constitutional provisions with international standards, the study then turns to an analysis of the conformity of national legislation provisions with ratified international treaties as well as to EU directives in the field of occupational health and safety.

Considering the essential role of labour inspection institutions in enhancing compliance with labour legislation, especially those on labour protection and occupational health and safety at a workplace, the role and scope of labour inspection under the law of the ILO, at the EU level as well as in Ukrainian national legislation is assessed and compared.

Since the implementation of treaties is not sufficient without effective application by national judiciaries, the role of the Ukrainian judiciary in ensuring the application of international standards also comes under scrutiny. In particular, the study analyses how and whether the Ukrainian courts of different instances apply international legal norms, particularly those concerning the powers of labour inspectors, and whether priority is given to the international legal provisions over contrary national legislation.

The study thus contributes to the ongoing discussions on the implementation of international law into national legislation, particularly in regard to health and safety, the effective application of international norms by domestic judiciaries, and the extension of the influence of the EU law on the legislation of non-Member States as well as the nature of obligations to bring the legislation in line with the EU *acquis* under EU external agreements that do not envisage membership in the Union.
Zusammenfassung


Am Beispiel der Ukraine zeigt diese Arbeit, wie der Staat verschiedene Arten des internationalen Rechts implementiert und anwendet; dies unter Berücksichtigung der Natur der Verbindlichkeit staatlicher Verpflichtungen um internationalen Rechtsnormen zu genügen. Hierbei wird insbesondere die Relevanz von internationalem Recht auf die ukrainische Rechtsordnung betrachtet; dies durch die komparative rechtliche Analyse der ukrainischen Verpflichtungen in Bezug auf die bindenden versus nicht-bindenden internationalen Normen.

Als Mitglied in vielen internationalen Organisationen muss die Ukraine ratifizierte, internationale Abkommen als Teil ihrer nationalen Gesetzgebung anwenden. Da die Ukraine kein Mitglied der EU ist, soll sie ihre Gesetze denen der EU anlehnen. In dieser Hinsicht wird der Kurs der Ukraine mit Richtung auf die europäische Integration, die laufenden rechtlichen Reformen in der Ukraine, die rechtliche Natur der Beziehung zwischen EU und der Ukraine, einschließlich dem 2014 EU-Ukraine Assoziierungsabkommen bewertet; dies mit besonderem Augenmerk auf der Verpflichtung der Ukraine, ihre nationale Gesetzgebung mit dem EU acquis communautaire in Einklang zu bringen. Im weiteren wird das Arbeitsrecht der Ukraine und seine Quellen, die Übereinstimmung von Vorschriften des nationalen Rechts mit ratifizierten internationalen Abkommen, sowie mit EU Richtlinien im Bereich Arbeitssicherheit und Arbeitsschutz, analysiert.

Des Weiteren wird die Rolle und der Geltungsbereich von Arbeitsinspektionen gemäß ILO und EU Recht, sowie gemäß der nationalen ukrainischen Gesetzgebung verglichen und bewertet.

Anschließend wird in dieser Arbeit die Rolle der ukrainischen Justiz bezüglich der Sicherstellung der Anwendung von internationalen Standards eingehend untersucht. Insbesondere wird analysiert, ob und wie die ukrainischen Gerichte internationale Rechtsnormen anwenden, vor allem diejenigen welche die Rechte von Arbeitsinspektoren anbelangen, und ob internationalen gesetzlichen Vorschriften Priorität gegenüber konträrer nationaler Gesetzgebung gewährt wird.

The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine

Labor and Globalization | Volume 13
Kateryna Yarmolyuk-Kröck

In this book, Kateryna Yarmolyuk-Kröck examines the implementation and application of international law in Ukraine. In particular, the analysis is centered on the occupational safety and health (OSH) instruments of the International Labour Organisation (ILO) as well as the European Union (EU) OSH directives and their conformity with national legal provisions. The book offers a thorough assessment of the ongoing legal reforms in Ukraine in the process of European integration and the legal nature of the EU-Ukraine relationship, including Ukraine's obligation to bring its national legislation in line with the EU acquis communautaire under the EU-Ukraine Association Agreement of 2014. Further, the author assesses the role and scope of labour inspection under the national legislation and the ILO instruments and the practice of the Ukrainian judiciary in the application of international standards. This study thus contributes to ongoing discussion on the implementation of international law into national legislation, the effective application of international standards by domestic courts, and the extension of the influence of the EU law on the legislation of non-Member States.

Key words: international labour standards, implementation, occupational safety and health, labour inspection, EU-Ukraine Association Agreement

Kateryna Yarmolyuk-Kröck studied law at the “Kyiv-Mohyla Academy” in Ukraine and worked as a legal advisor to Ukrainian trade unions. She received her MA in Labor Policies and Globalization from the Berlin School of Economics and Law and the University of Kassel as part of the Global Labour University. She was awarded a PhD scholarship by the International Center for Development and Decent Work (ICDD). She holds a PhD in law from the University of Kassel. Her academic interests include the issues of implementation and application of international law in the national legislation of states, occupational safety and health standards and the role of labour inspection in enhancing labour legislation at work.