



Law Department

The European Neighbourhood Policy: A Framework for Modernisation?

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***Legal Approximation:
Evidence from Ukraine***

Legal approximation: evidence from Ukraine

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The harmonization of Ukrainian legislation with the EU law is one of essential preconditions for deepening Ukraine's cooperation with European Union and its Member States. The European Neighborhood Policy is aimed at opening to Ukraine prospects of many of the benefits previously associated only with membership, such as a stake in the internal market, involvement in EU programmes etc. The harmonization creates prerequisites for moving to the next stages of integration, including in the foreseeable future the obtainment of EU membership by Ukraine.

The 1994 Partnership and Cooperation Agreement between the EC and its Member States, and Ukraine (PCA) as well as other instruments that set the legal framework for the cooperation between the EU and Ukraine have created appropriate preconditions for the harmonization of Ukrainian legislation with Community law.

The harmonization provided for in the PCA, the EU-Ukraine Action Plan and other instruments regulating the cooperation between Ukraine and the EU have both similarities and distinctions if compared with the harmonization at Community level as well as between the EU and third countries. A common feature of these processes is a general goal consisting in the creation of a unified legal environment for market relations. At the same time, the harmonization within the framework of cooperation between Ukraine and the EU is also aimed at the creation of favorable conditions for access of Ukrainian producers and services providers to the EC common market as well as markets of the countries that accept the Community standards.

On the other hand, the harmonization of Ukrainian legislation with Community law sets the foundation for bringing the legal environment of closer to that existing in EU Member States, thus encouraging the business community of EU Member States to work actively in Ukraine. Their presence is supposed to contribute to Ukraine's economic development and bring foreign investments to its economy.

Therefore, the harmonization objectively accelerates the integration of Ukraine with the European Union. That is why the harmonization of Ukraine's legislation with Community law is of special interest to this country.

In the relations between the EU and Ukraine one may speak about two stages of harmonization: voluntary and organized.

As to the voluntary harmonization, it started before the entry into force of the PCA. In particular, certain efforts to bring Ukrainian legislation closer to Community law were made in the spheres of competition, labour and social relations. That stage was characterized by absence of any specific commitments of both parties in this area. Moreover, the steps taken by Ukraine to harmonize its legislation with Community law were not coordinated with the EC and had a unilateral nature.

It should be noted, however, that the process was not absolutely spontaneous. Ukraine had an opportunity to use appropriate acts of Community institutions and analyse the experience of other countries that harmonized their national laws with Community law. In particular, the White paper approved by the European Commission in 1995 described the harmonization priorities for countries of Central and Eastern Europe. Certainly, the list of priority-harmonization spheres could not by itself give an essential impetus to the process. First of all, it was also necessary to take into account that the harmonization could only be started upon the availability of at least some of EU documents translated in the Ukrainian language. However the amount of pages in the acts specified by the White paper as being of top-priority run to about 10.000 and raised a significant technical obstacle to the voluntary harmonization started in Ukraine.

The Temporary Agreement on Trade and Issues Related to Trade Between Ukraine and the EC signed on 1 June 1995 in Brussels was the first instrument to set the legal foundation for the harmonization of Ukrainian legislation with Community law before the entry into force of the PCA. The Temporary Agreement entered into force on 1 February 1996. It was replaced by the PCA in May 1998.

The Temporary Agreement laid the foundation for the organized harmonization. The Agreement provided for harmonization of Ukrainian legislation with Community law in the spheres of competition (Article 17) and the protection of intellectual property rights (Article 18, Annex III).

The entry into force of the PCA provided not only a broad legal bases for the process of harmonization of Ukrainian legislation with Community law but also ensured a diversified character of this process.

It should be noted that the PCA gives special attention to the harmonization of the existing and future Ukrainian legislation with Community law, viewing the harmonization as an important condition for the strengthening of economic links between the two parties (Article 51(1)).

The PCA does not provide a definition for harmonization. The Agreement itself uses terms traditional for Community law, such as “approximation” (Articles 51,60,76), “adaptation”(Articles 53,77), “establishing equivalent standards”(Articles 68) etc. This could mean that, like agreements establishing European Communities, this Agreement uses different words to describe the same process – legal harmonization. The main purpose of this process is to create similar legal conditions for Ukrainian and EU cooperating entities. Provisions of Article 51 (2) of the PCA also seem to imply this as they encourage the “approximation of laws”.

The fact that the PCA uses different terms for the description of the same process could not but heat up the discussion among the Ukrainian academic and practising legal community on what are the differences between their meaning and the preferred use. These disputes seemed to be an objective result prompted by the fact, that as N. Malysheva puts it, “neither the international legal theory nor the contemporary legal practice paid serious attention, up to quite recent time, to the theory of harmonization as well as to basic definitions and approaches, although the applied aspect of the harmonization are among the most topical and widely studied in the foreign legal theory, particularly in the contemporary Community law”.

The majority of Ukrainian lawyers, who studied this issue, prefer to use the term “harmonization”.

In the “Dictionary of terms and notions of International and European law”, published by the Institute of Legislation at the Verkhovna Rada in 2005, harmonization is considered as a general notion meaning the process of making legislation of the member states and non member countries compatible with the requirements of the EU on the bases of legal acts of EU institutions. Harmonization is carried out in various forms, such as adaptation of legislation , implementation, standardization etc.

However, the official documents often use the term “adaptation” of Ukrainian legislation with EU legislation. In accordance with the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union, adopted in 2004, the adaptation consists in the approximation of Ukrainian legislation to the *acquis communautaire*.

On the other hand, the EU-Ukraine Action Plan speaks directly about “harmonization” of legislation.

The practical experience of the EU shows that the different terms used in Community law and agreements between the EC and third countries essentially

describe the same process of making national laws compatible with the law of the EC. I believe that the term “harmonization” describes most adequately the ultimate goal of this process: consistency of national norms so that they would offer similar legal conditions for main actors on the market.

It is necessary to note that the harmonization of Ukrainian legislation with the Community law has a narrower objective than the reform of the Ukrainian legal system although it may be used for its progressive development.

The harmonization provisions of the PCA and the EU-Ukraine Action Plan have a framework character and their implementation depends on the adoption of legislation and the creation of necessary institutional mechanisms.

In relations between the EU and Ukraine the compatibility of Ukrainian legislation with EU law can be achieved at various levels (level of international obligations, level of EU obligations). At each of these levels the harmonization is implemented by various means (accession to international treaties, making national laws consistent with legal acts of EU institutions, recognition by Ukraine of national standards of EU Member States).

The PCA specifies the main spheres in which the harmonization is supposed to be achieved by means of undertaking relevant international obligations regarding particular international relations. These include intellectual property, energy, environmental protection, prevention of money laundering etc. The harmonization by acceding to international instruments that set international standards in particular spheres is generally not all-sufficient. As a rule it requires additional legal measures to be undertaken in the form of national laws adopted with the aim of implementing provisions of international agreements to which Ukraine has become a party.

The adoption of national laws and regulations compatible with Community law has become a more common harmonization method on which Ukraine and the EU rely upon in their relations. The legal bases for such harmonization is established in the PCA (Articles 50, 51, 60, 63, 68, 71, 75, 76, 77), the Action Plan, Ukrainian legislation. The spheres of such harmonization include the protection of intellectual property rights, customs, company law, banking, company accounting, taxes, labour protection, financial services, competition rules, public procurement, protection of health and life of humans, animals and plants, the environment, technical rules and standards, nuclear energy, transport, industry, agriculture etc.

It should be noted that the EU-Ukraine Action Plan set out the number of priorities in harmonization and adds some new areas.

The Action Plan requires from Ukraine to implement international standards on juvenile justice, prevention of the financing of terrorism; international and European standards in the sphere of labour relations, technical rules and standards, company law, financial control; European standards on the assessment of conformity of industrial products, licensing of imports, sanitary and phito-sanitary rules, protection of intellectual property rights, public procurement, statistics.

Almost all provisions of the PCA and the Action Plan constitute the so-cold “soft law”, in other words, they express intentions rather than explicit obligations. This in fact makes all the harmonization process dependent on whether the parties could get interest in its success and adds a political coloring to their actions.

It is important to note in this regard that the PCA specifies no time frame for harmonization. The only exception is the protection of intellectual property rights, which must have been implemented by Ukraine within five years following the entry into force of the Agreement. On the other hand the Action plan gives Ukraine three years for implementing its provisions on harmonization.

The PCA provides that the EU should give technical assistance to harmonization measures. Such assistance is to include the exchange of experts, advance information on relevant EU legislation, organization of seminars, training activities, aid of translation of Community legislation in the respective sectors, development of necessary documents. The provisions on the assistance to the harmonization do not specify any time frame for their implementation. This affects to some extent the implementing measures taken by the Community.

The major problems dealt by Ukraine in the process of harmonization of its legislation with the EU law may be of objective and subjective character.

In the course of the harmonization of legislation, Ukraine should take into account that this is not reciprocal process as it does not involve any reciprocal steps of both parties to make their legal compatible with each other while requiring only Ukraine to change its legislation so as to harmonize it with Community law. Ukraine in fact has no influence on the law-making process within the EU and plays only the role of a point of destination for the EU legal precepts.

There is much ambiguity as to the clarification of exact meaning of the EU law, with which Ukrainian legislation needs to be harmonized. In fact, only the ECJ may interpret these acts. Owing to its interpretation, the acts may acquire somewhat different meaning. However, a country that harmonizes its legislation with Community law is not able to constantly follow all the changes and timely take them

into account by amending its legislation. At the same time, Community institutions are not obliged to inform Ukraine of amendments in Community law. So, all this may result in a situation where national norms may appear inconsistent with EU rules, which would lower the efficiency of the implementation of Community law in Ukraine's national legal order. Therefore, the ultimate goal of the harmonization, which consists in the creation of similar legal conditions for the entities regulated by the basic and harmonized norms, might not be achieved.

On the other hand, it should be taken into account in the course of the harmonization of Ukrainian legislation with that of the EU that the acts of Community institutions operate in a certain legal environment and are a part of the EU legal system. Ukraine may not always be able to comprehend all the legal subtleties of EU legal acts.

The other problems of harmonization are of Ukrainian origin.

In Ukraine particular attention is paid to the creation of the legal mechanism for governing the process of harmonization on the national level. Such mechanism includes screening, measures of control, assessment of the effect, identification of priorities etc. The legal bases for these activities constitute the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union of 2004, the Resolution of the Cabinet of Ministers "Some issues of Adaptation of Ukrainian legislation to that of the European Union of 2004, the EU-Ukraine Action Plan of 2005.

The institutions which are involved in the process of harmonization include the Verkhovna Rada, the Cabinet of Ministers, the Ministry of Justice, the Ministries and other central bodies of the executive power, the Coordination Council for the Adaptation of legislation of Ukraine to that of the EU, the European Integration Committee of the Verkhovna Rada.

The National Programme establishes a procedure of cooperation between the legislative and the executive power in the area of harmonization of legislation. Each draft law registered in the Parliament should within seven days be submitted to the European Integration Committee for determining if it belongs to the area governed by the EC law. If the Committee decides positively, the draft is sent to the Ministry of Justice where it should be subjected to a legal expertise on its compliance with *acquis communautaire*. After such an expertise the draft with the comments from the Ministry of Justice comes back to the Parliament.

However, this mechanism does not work efficiently.

The existing legal framework does not regulate and specify the competence of the European Integration Committee in the Parliament. Compliance of draft laws with *acquis communautaire* is insured to the extent reasonable and possible up to the moment of consideration of the draft in the first reading only. There is no mechanism for analysis of compliance of draft laws with *acquis communautaire* at the second and the third reading in the Parliament. And there is no mechanism, which would prevent adoption of a law by the Parliament, which would contradict EU legislation.

The Council of experts at the European Integration Committee, which is supposed to render assistance to the Committee's Secretariat, given the limited personnel capacities of the Secretariat – 10 members, does not work. This diminishes the quality of expertise.

Evaluation of the achieved progress, as well as identification of institutional and administrative problems impeding the successful implementation are crucial factors for enhancement of future harmonization. However, there is no unified mechanism for monitoring of implementation of harmonized legislation.

The Ministry of Justice as the only institution responsible for the legal expertise of draft legislation as regards its compliance with *acquis communautaire* is overburdened and requires considerable resources.

The Ministry of Justice is in charge of translation of the *acquis communautaire* acts for the harmonization of legislation. According to this procedure, based on the Order of June 2005 “On Approval of the Procedure of Translation of *acquis communautaire* Acts into Ukrainian”, the Department of Legislation Approximation prepares a tentative plan of translations to be done during a year on the basis of proposals from the line ministries and other central bodies of the executive power. The procedure for planning translation is cumbersome and limits possibilities for any ad hoc practice, which might be needed given the dynamics of the Acquis development or the urgent need for the preparation and drafting of a law not listed.

The quality of translation of *acquis communautaire* in Ukrainian is another big problem.

And the last but not the least observation. As to the approaches to the harmonization process, now Ukraine uses mainly the evolutionary one, focusing on the meaning and intent of the EU norms with which Ukrainian legislation is to be aligned. Such approach may be justified by the fact that the national legal system in general has extensive legislation that is codified in the majority of areas relevant to *acquis communautaire*. However, in the areas where there is no extensive national

legislation the revolutionary approach is appropriate. It may be justified by an urgent need to precipitate the speed of the process of harmonization by providing for direct transposition of the EU norms and removing preexisting Ukrainian legal acts. In such a case more competence is supposed to be given to the executive bodies in adopting normative acts, as it was done in Poland, Hungary, the Baltic states, Bulgaria and some other countries.

Notes

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