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THE ISSUES OF LEGAL REGULATIONS APPROXIMATION IN THE FRAMEWORK OF UKRAINE AND THE EU ASSOCIATION AGREEMENT IN THE POST-CRISIS PERIOD

Key words. Association Agreement, free trade zone, the national program of acquis implementation, global economic crisis, legislation harmonization.

Objective. Insight into the main problems on Ukraine's way to an association with the EU in the post-crisis global economy conditions, as well as the study of recommendations and legislation adaptation measures in the process of association agreement conclusion and, in particular, in the establishment of the profound free trade zone.

Methods. The work employs comparative-analytical methods of scientific research.

Results. The Ukrainian Government set a strategic objective of concluding a new base agreement with the European Union (Association Agreement). The progress achieved in the negotiations process regarding the Agreement is conspicuous. The signed document, however, is to become a starting point of a more ambitious task, i.e., the introduction of European standards in Ukraine through the implementation of undertaken obligations.

The Association Agreement between the EU and Ukraine can further serve as the model of relations between the EU and other partner states within the framework of the Eastern Partnership initiative, in particular, with Moldova, Georgia, and Armenia, with which the EU would also like to commence negotiations, in perspective, concerning the establishment of a profound free trade zone in order for the parties to be able to move on along the political association line. If the free trade zone fails to be established, the parties shall have no association agreements at their disposal, as a free trade zone is the constituent of such documents.

At present, ongoing are negotiations between Ukraine and the European Union (EU), commenced in February 2008, concerning the conclusion of the Agreement on the "profound and comprehensive free trade zone" (FTZ+), which is an integral and one of the major parts of the Association Agreement Between Ukraine and the EU, and which refers not only to goods trade tariffs, but also to bringing Ukrainian legislation in compliance with EU standards and rules in more than 20 spheres, which is very current to date.

Compliance with the liabilities undertaken under the Agreement, especially those that are concerned with legislation adaptation, will require not only political responsibility, but also the development and realization of a well thought-out system of planning and implementation of these liabilities.

The Association Agreement sets forth particular relations of the state with the EU, since it establishes special privileged ties with a non-member state, which must, at least to a certain extent, participate in the Commonwealth system. The intensity of a country and the EU relations is an important fundamental principle in determining regulatory capacity of international agreement norms in the law and order of EU and its member states, namely their capacity of di-

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rect effect [1, p. 10]. In the long run, this will allow Ukrainian natural persons and legal entities to protect more effectively their rights prescribed by the Agreement.

In the initial European Neighborhood Policy (ENP) documents, the European Union proposed to Ukraine and other neighbor states “fully-fledged participation in the Internal EU market”. In return, EPS states would follow the example of the European Economic Zone (EEZ) member states and adapt a great part of *acquis* that regulates the EU Internal market. Starting from 2006, the EU has not put forward such proposal; instead, the EU documents started emphasizing long-term perspective of an economic community that will be formed between the EU and partner states, also providing it that these countries will selectively adopt respective parts of EU legislation [2, p. 11].

On the other hand, “selective harmonization” can be deemed as a pragmatic approach, whereas Ukraine is not a candidate for the entry into EU and has weaker stimuli than those with the candidate status. Thus, presently, Ukraine lacks the possibility, for example, to adopt EU Environmental Directives in full, since this is to bring about extensive expenses. Firstly, this does not serve basis for signing the EZT+ Agreement. And, secondly, Ukraine shall not be granted access to EU structural funds that would reduce harmonization expenses in the sphere. For these stimuli have played an important role in initiating, legitimization, and assertion of changes in the candidate countries of the Central and Eastern Europe of the time.

Legally, harmonization of Ukraine’s national legislation with EU legislation is outlined in Article 51 of the Partnership and Cooperation Agreement between Ukraine and European Communities (European Union) and Their Member States dated June 14, 1994 (PCA) in the following spheres: customs law, companies legislation, banking law, companies accounting, taxes, including indirect ones, intellectual property, labor safety, financial services, competitions rules, public procurements, healthcare and life protection of humans, animals, plants, and environment, consumer rights protection, technical rules and standards, transportation, energy use, including nuclear energy [3, p. 6].

Ukraine’s European integration mechanism possesses certain signs that make it different from the structures of former and present candidates for joining the EU. This is primarily manifested in the existence of parallel processes, namely, the Ukraine-EU Action Plan 2005 in the framework of the European Neighborhood Policy (AP ENP) and the National Legislation Adaptation Program (NLAP) regulated by Law of Ukraine No. 1629 “On the National Program of Adaptation of Ukrainian Legislation to European Union Legislation” dated March 14, 2004. The measures set forth by the NLAP are the “voluntary” component, whereas the AP ENP is Ukraine’s obligation before the EU.

Despite the discrepancies in expert evaluations and official claims, Ukraine has mainly honored its obligations in the framework of the Action Plan. On the other hand, NLAP measures demonstrate a low realization level. NLAP compliance indexes throughout 2005-2007 were 50%, 25%, and 10% correspondingly [4, p. 6]. Moreover, if under the term “implementation” one understands not only legislative acts adaptation, but the everyday application of EU norms as well, then Ukraine appears to lag behind in terms of both the Action Plan and the NLAP. Very frequently this is manifested through the shortage of lower-level acts aimed at the compliance of adapted legislation norms and insufficient understanding of the essence of new norms. In view of this, as well as taking into consideration the ever more intense complication of the nature of obligations in the legislation adaptation sphere in the framework of the New Enhanced Agreement, the necessity arises to seriously review the mechanism of Ukraine’s European integration.

As of the pre-crisis period, an agreement was arrived at by Ukraine and the EU that prior to the conclusion of the Association Agreement, the cooperation between the parties shall be

based on the PCA terms and conditions. Thus, with the aim of providing for proper financing and sustainability of the process of Ukrainian legislation adaptation to the EU legislation, the creation of conditions for further advance of Ukraine's integration in the Internal EU market and the taking of necessary steps for the acceleration of the EU Association Agreement conclusion, the Supreme Council of Ukraine (SCU) approved entirely Law of Ukraine No. 852-IV "On Introducing Changes Into the National Program of Ukrainian Legislation Adaptation to EU Legislation" on January 14, 2009, that provides for the prolongation of the first stage of Program for the period until the termination of APC effect" [5].

Overall, within 2005-2009, out of the general volume of *acquis communautaire* that adds up to over 100,000 pages, nearly 60,000 pages have been translated into Ukrainian [6-10]. Constantly ongoing is work on the replenishment of the translation database in the "Electronic system of European Union documentation translated in Ukrainian".

All the states within the last EU expansion wave and Western Balkan States heading towards EU integration developed a rather unified implementation strategy that served as the main instrument for obligations planning, monitoring, and performance. In the case with the Central and Eastern Europe states, the national programs of *acquis* implementation, whereas for Western Balkan States (most of which are not official candidates for EU-membership), the name of National Program of Stabilization and Association Agreement is more common. The outlined approach to the performance of obligations is coordinated by the center and is rather transparent.

In a number of studies, such as, for example IЕД (2006), CEPS (2006), CASE (2007), the profound and comprehensive agreement on free trade zone between the EU and Ukraine is useful in the long-term perspective, as it stimulates the increase of the actual GDP and the growth of economic welfare.

In order to allow the state to capitalize on all free trade zone benefits, attention ought to be shifted away from tariffs towards non-tariff issues, in particular, to technical barriers in the trade, the issues of trade procedures simplification, the intellectual property rights issues, etc. A survey conducted by the International Financial Corporation (2008), demonstrated that technical barriers, in the entrepreneurs' opinion, constitute the major obstacle for business. Moreover, cumbersome technical regulating holds back innovations, commerce and economic growth. Therefore, the maximum full approximation of standards, procedures of compliance valuation, accreditation, and market monitoring effective in the EU by all means belong to the topics of primary importance in the process of negotiations regarding the free trade zone. It should be emphasized, however, that much progress has been achieved in this sphere in the context of the WTO membership, since Ukraine undertook to develop all of its technical regulations on the basis of respective international standards. What is more, since Ukraine joined the WTO, all standards in Ukraine are voluntary, except those set forth in technical regulations designated, in particular, for the protection of national security interests, prevention of fraudulent actions, protection of the health and life of citizens, animals or plants, as well as environmental protection.

The experience of new EU member states and Western Balkan States having performed or performing under minor agreements with the EU testifies to the fact that their governments were preparing for the management of the changes implementation process with the aim of successful compliance with respective agreements. Such preparation possessed multiple common features in different states. In particular, the governments of these countries resolved the following issues [11]:

Establishment and operation of a centralized mechanism (that most often possessed the format of a special executive authority) securing political and administrative coordination of governmental activities aimed at Agreement implementation.

Implementation as a governing instrument of a national program of Association Agreement implementation. The governments of all states performing under similar EU agreements organized their work precisely around the all-national strategic documents – detailed action plans aimed at performance of all obligations undertaken in the context of the association agreement, composed in accord with a uniform structure featuring the division into short-, mid- and long-term priorities.

Building-up of institutional capacity of the executive power vertical in all sectors embraced by a state's obligations under the agreement with the EU, which includes respective central, territorial (regional), and local executive bodies, to develop sector-based parts of the national program and secure their implementation.

At the same time, it is noteworthy that the process of adaptation of domestic legislation to *acquis communautaire* is connected with the following issues [3, p. 60]:

1. The present-day *acquis communautaire* implementation state testifies to the fact that this matter is not given sufficient attention on the all-national level. Therefore, it failed to find stable social legitimization and to become the subject of extensive discussion among scientists, non-government organizations, political associations, mass media, and the public on all levels.

2. Implementation presupposes establishing priority adaptation sectors in the framework of a concrete type of politics. However, in the process of national legislation adaptation planning, despite the clear establishment of its procedure, central bodies of power demonstrate insufficient initiative.

3. A serious challenge to the adaptation process is the provision of due quality of translations. According to the experience of the states that have recently joined the EU, it is very difficult to secure uniform approaches to terminology in the conditions of excessive translation volume and lack of respective experience. Moreover, the *acquis communautaire* acts are the result of multilateral negotiations and contain specific terminology. And the lack of knowledge of foreign languages, English in particular, hinders the negotiations on important sector-specific issues and familiarization with EU legislative acts [12, p. 26].

4. The process of EU regulatory acts translation and interpretation is rather slow, in comparison with Poland, Turkey, and Croatia. The main reason for such delay lies in the necessity to overcome difficulties of legal systems incompatibility of the EU states and Ukraine. Thus, the recommended source of translation into Ukrainian is the German variant of *acquis communautaire*, since its terminology is approximated to the continental system of law. However, these arguments are too weak. For in the process of adaptation, one should take advantage of the possibility of using the official translations of EU regulatory acts into the languages of some member states (Poland, Bulgaria), the legal system and language structure of which is much related to the Ukrainian one [13].

5. The translation and processing (interpretation, terminology concordance) of *acquis communautaire* is accompanied by low priority level of the implementation of its norms on the part of the SCU to the national legislation (certain bills implementing EU norms in the national legislation have been under review of SCU committees since 2006, and the State Department for Legislation Adaptation conclusions regarding the compliance of bills with the *acquis communautaire* norms have no impact upon the process of their adoption).

6. There exists incompliance of regulation spheres of normative-technical and regulatory acts of Ukraine and the EU. Thus, a rather wide range of relations regulated in the EU on the level of directives, are regulated in Ukraine by voluntarily used interstate standards.

For the acceleration of the process of adaptation to *acquis communautaire*, we deem the following necessary [3, p. 60]:

- To grant the programs of measures connected with the *acquis communautaire* norms implementation with the National status in order to increase the significance of the issues of national legislation adaptation to the EU legislation and the involvement of a wider range of public, institutions, and organizations in the process.

- On the legislative level, to oblige central executive bodies of power authorized to effect trade policies to submit proposals with the aim of forming “Tentative plan of *acquis communautaire* acts translation into Ukrainian in the respective year” (in conformity with the *acquis communautaire* acts translation into Ukrainian procedure approved by Order No. 56/5 of the Ministry of Justice of Ukraine dated June 08, 2005).

- To commission to the State Department for Legislation Adaptation main, guiding, and coordinating functions by way of introducing changes into respective regulatory acts.

- At the same time, to involve in the process of adaptation, taking into account the transparency principle, non-state structures, public organizations and higher education institutions financed within the projects administered mutually with the EU.

- It is expedient to train respective professional staff for the performance of translations of proper quality in view of the difficulty of providing uniform approaches to terminology and in the conditions of excessive translation volumes (translation of *acquis communautaire* and informational and analytical materials, legislative acts and their drafts into English).

- To change the process of bills consideration by the SCU so that each bill package submitted for consideration to the SCU contains a conclusion regarding its conformity with *acquis communautaire*; and prior to its direct consideration, the conclusion should be read to the deputies by the SCU chairperson.

- To establish the order of cooperation with national manufacturers regarding standards, norms, and rules harmonization that will allow to preserve funds during the adaptation of the most important standards, in particular, the standards on the basis of export goods groups (as opposed to general harmonization). It is considered expedient to replace the normative-technical documents with regulatory acts, in the cases of spheres the regulation of which is performed on the EU directives level.

Upon the analysis of harmonization costs and benefits for a number of *acquis* sections, it has been established that:

- coordination of the law on companies and state assistance rules regulation presupposes rather considerable expenses for certain companies, yet, as it appears to be, shall be of benefit for the entire society as such;

- liberalization of capital flows is useful for the state, though there exist liberalization risks pertinent to imperfection of the market;

- there are high expenses connected with the introduction of Basel II rules in Ukraine, which makes the approximation of these norms questionable. It is all the more doubtful at present, when the global economic crisis revealed considerable gaps in the system;

- enactment of stricter ecological standards shall pose biggest challenges to companies that have previously positioned themselves in cheap sectors or produced low-quality products.

At the same time, in view of Ukraine’s aim of gaining EU membership, the approximation with European standards and practice must be thoroughly planned. At this, the following consideration should be taken into account.

Firstly, global economic crisis changes the regulatory field of activity worldwide and in the EU states in particular. These changes must be taken heed of in the adaptation of EU norms.

Secondly, since Ukraine shall effect essential reforms in the process of securing the performance of obligations under the Free Trade Zone Agreement with the EU, it is within the

scope of Ukraine's interests to secure interest on the part of the EU in lending financial and technical support to these reforms in the country.

In the given post-crisis conditions of the bodies of power functioning, the government can experience the following issues with organizing its performance [11]:

- absence of an effective centralized coordination mechanism. This is manifested in the fact that not a single body for the coordination of European integration politics has been established in Ukraine. To date, there exists a set of detached processes in separate bodies of power that are often performed simultaneously. The majority of European integration politics aspects are coordinated by the Ministry of Economics, the Ministry of Justice, and the Cabinet of Ministers of Ukraine Secretariat (the European and Euroatlantic Integration Coordination Bureau in particular, or presently the European Integration Bureau, the latter being a subunit of the former). Thus, due to such doubling, the entire coordination system appears to be ineffective, and the responsibility for concrete problems and failures is absent.

- Unpreparedness for the development of the national program for Association Agreement performance. Due to the absence of standards and quality control procedures in the existing governmental planning system, particularly strategic and budget planning, it is impossible to use in Ukraine such management tool as the performance of the Association Agreement in accord with procedures and patterns implemented by all countries that are performing or have performed upon the similar agreements with the European Union.

- Institutional incapability of central executive authorities. As of now, no clear-cut tasks have been assigned to central executive authorities to be fulfilled for the successful implementation of programs and plans regarding integration with the EU. At the same time, their internal structure hinders the performance of such tasks, whereas no precise conditions have been established as to who is responsible for separate results needed for the preparation and execution of the national program for the performance of the Association Agreement. Frequently, different structural units undertake the same functions and none bear responsibility for the final outcome.

A separate aspect of central executive authorities' activities is effective functionality of structural units concerned with European integration. To date, no single vision exists regarding the role and objectives of the structural units for European integration in the bodies of state power: European integration is undertaken chiefly by departments that combine this type of activities with international cooperation. In this respect, the following problematic spheres can be singled out:

- The number of employees undertaking European integration issues within the body is inconsiderable (2-3 persons).

- Heterogeneous list of types of activities of the European integration units.

- European integration units perform varied functions (coordination, planning, policies development etc.), often doubling the work of other departments. Being in imbalance, such units have multiple tasks and scarce resources, human resources, for instance.

The negative experience of Ukraine being compliant with prior agreements with the EU in the post-crisis period testifies to a great risk of the failure to comply with new obligations under the Association Agreement. The European party definitely aims at comprehensively harsh control of the Agreement performance. That is why even the best imitation of intense activities cannot conceal real achievements or lack thereof.

Post-crisis phenomena have made the question of negotiation process acute; and the process is still ongoing. Therefore, the political management must realistically evaluate the government's capacity to secure the performance of the Agreement. And for this, the scope of issues causing the risk of failure must be determined, as well as immediate action ought to be taken with the

aim of providing a complex resolution of these. Thus, we have come to believe that there is a necessity to take the following steps on the way to government preparation for the EU Agreement performance:

- Developing a centralized model of European integration coordination by way of the Cabinet of Ministers issuing an order on the establishment of a centralized coordination body. Its chief objective will be coordination of the central executive bodies' activities in the sphere of preparation and execution of the National Program of EU Association Agreement Implementation, and the powers of the majority of bodies should be redistributed in order to concentrate them in the hands of the central coordination body.

- Performing transfer to centralized planning of Association Agreement performance through the preparation and adoption of a legislative act that will define the status and place of the National Program of EU Association Agreement Implementation in the state programs and plans system that must receive the priority status in respect of other programs. The said legislative act must contain a reliable definition of objectives, manpower and material needs for achieving the objectives with forecasted results, the functioning of the regular program review mechanism, control of performance of the program development and implementation tasks by respective bodies, as well as proper liabilities for failures to comply.

- Creating institutional capacity of the bodies by virtue of not only regulatory list of obligatory objects and products, reforming of the internal structure of central executive authorities, but also on the basis of changing the role of European integration units in the bodies of power and establishing professional requirements to personnel. This means the necessity of determining the knowledge and skills that officials commissioned with the tasks regarding Agreement performance should possess; also, relevant requirements in typical state servicepersons professional and qualification role profiles should be established.

Conclusions. On the basis of the undertaken research, one can ascertain that, at the present post-crisis stage, in view of the peculiarities of the institutional provision of bilateral relations between Ukraine and the EU, as well as taking into consideration the quality and level of *acquis communautaire* implementation, it should be pointed out that the quantitative approach to determining the adaptation scope provides no idea of the directions and volumes of implementation works on the national legislation; and all spheres mentioned in the present work require taking into account the provisions of *acquis communautaire* acts.

The key and top-priority direction of work in the legislation harmonization sphere is preparation for Association Agreement implementation as a legally binding international agreement that will establish all aspects of cooperation with the EU, in the trade and economic sphere primarily, and will provide for economic integration in the internal EU market by way of constant adaptation of Ukrainian legislation to that of the EU.

In view of the above, the process of preparation for the implementation of the Agreement between Ukraine and the EU must necessarily include the development of a centralized coordination model of European integration, the shift to centralized planning of the Association Agreement performance, as well as the creation of institutional capability of central executive authorities.

The delineated solutions are but a part of state administration reforms that call for implementation both at the preparation stage and at the stage of performance under the Association Agreement with the EU. They can mark the commencement point, as they require neither radical institutional changes nor hefty financial expenses, nor much time. However, it is obvious that such commencement can be secured solely by complete implementation of an integral system of European standards of democratic governance into the Ukrainian system of state administration.