

# Towards an effective model for approximation of Ukrainian legislation to EU legislation in preparation for EU accession



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# Contents

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1. Legislation approximation under Partnership and Cooperation Agreements (PCA) between the European Communities and Ukraine and other NIS
2. Approximation practice under Association Agreement between the EU and Ukraine, European Treaties with candidate countries and EEA and EFTA agreements
3. Challenges in approximation for the candidate status of Ukraine

# Partnership and Cooperation Agreements (PCAs)

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**Identical provisions** of PCA with 10 NIS (1994-1996) and European Agreements with 10 Central and East European Countries (1991):

- “The Contracting Parties recognize that the major precondition for (*specific country*) economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. (*Specific country*) shall use its best endeavours to ensure that future legislation is compatible with Community legislation”.
- areas of approximation defined;
- obligation of the Community to provide the country with technical assistance.

## **IP obligations:**

- “(*Specific country*) shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by the end of the fifth year after the entry into force of the Agreement for a level of protection similar to that existing in the Community, including effective means of enforcing such rights”.

# PCA Agreements

## Results in 10 years

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**Candidate countries:** approximations programs implemented; comprehensive European Commission guidelines “White Paper in Preparation of the Associated Countries of Central and Eastern Europe to Integration into the Internal Market of the Union”, 1995; European Council approval of the result of accession negotiations in 2002;

**NIS** – absence of substantial progress. Non fulfilling the provisions on Intellectual Property approximation:

### **Reasons:**

- significant volume of EU acts;
- the absence of translations and working institutional mechanisms for adapting legislation;
- the difference in political priorities of the countries;
- but most importantly – the absence of EU policy documents regarding the scope and the stages of legislative approximation for the PCA countries;
- absence of adequate technical assistance targeted on reviewing the legislation system and working out of new draft laws.

# Ukraine initiative on National Program of Approximation, 2004

**Adoption of the Law on the National Program of Approximation** of Ukrainian legislation to that of the European Union, 2004. The law stipulated requirements to approximation:

- determining a list of relevant EU legal acts;
- translating them into Ukrainian by using single standards
- conducting complex comparative research on the conformity of Ukrainian legislation to that of the EU;
- drafting recommendations on approximation of Ukrainian legislation to that of the EU; determining the list of law-making measures; and drafting laws and other legal acts.

## **Institutional legal approximation mechanism:**

- annual plans of the Cabinet of Ministers of Ukraine for the preparation of laws;
- creation of the State Department for Approximation of Legislation of the Ministry of Justice of Ukraine which:
  - coordinated the implementation of the Program;
  - carried out an examination of draft acts for compliance with EU legislation;
  - worked on created a nationwide information network on issues of EU law.

# Case example: Intellectual Property legislation approximation

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Development by the Working Group, created under National Program of Approximation, of the concept of approximation, which included the analysis of:

- the clarity of the provisions of the EU acts;
- ECJ rulings on interpretation of the provisions;
- the practice of implementing EU directives and regulations in the EU Member States. Determining the best implementation practices, especially in relation to matters refer by EU acts within the competence of Member States;
- unharmonized national EU Member States' laws in the respective area which reveal the best national practice;
- development of the EU legislation, reports on evaluation of effectiveness of legislation, including reasons for making amendments. Paying attention to inefficient and vague law norms;
- prospects for the development of EU law.

By doing so, it is possible to understand the merits and ambiguities of the provisions of the EU acts, risks in implementation and it targets us to take into account both the practice of the Court of Justice and the best Member States experience in implementation of the EU acts.

# Association Agreement, 2014

## Institutional mechanism of approximation

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### **Cabinet of Ministers of Ukraine**

- adoption of plans for the preparation of draft laws;
- preparation by the ministries - developers of the draft act - conclusions on the compliance of the draft with the obligations of Ukraine in the field of European integration and the Law of the EU (EU acquis);
- examination of draft acts by the Office for the Coordination of European and Euro-Atlantic Integration of the Cabinet of Ministers Secretariat.

### **Verkhovna Rada of Ukraine**

Resolution "On some measures to fulfil Ukraine's obligations in the field of European integration" dated 07.29. 2022 envisages:

- creation of sub-committees in the committees of the Verkhovna Rada on adaptation of legislation to the provisions of EU law (acquis EU), fulfilment of Ukraine's international legal obligations on European integration;
- conducting an additional examination on the compliance of European integration draft laws with Ukraine's international legal obligations on European integration and EU law by the Committee on Ukraine's Integration into the European Union and/or by the Government;
- consideration of draft laws aimed at adapting legislation in the presence of tables of compliance with them, as well as official translations of relevant EU acts etc.

# Association Agreement, 2014

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Substantial feature: identification of the list of EU acts to which the Ukraine (Moldova, Georgia) legislation should be approximated

- no uniform requirements for the approximation of legislation, as it was in European Agreements with candidate countries and in PCA with NIS states.

*Examples:*

- detailed requirements in AA for financial, telecommunication, postal, maritime transport services;
- limited requirements for sanitary measures sanitary measures;
- no special requirements on approximation for Intellectual Property (for example – no obligations to approximate legislation to existing and future EU acts)
- no requirements to follow ECJ rulings on interpretation of the EU acts implemented in national legislation in judicial practice except some exclusion.



# Present challenges in approximation

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- 1) The Association Agreement remains the main document that contains the list of EU acts subject to approximation.
  - 2) The need in simultaneous fixing of the important new EU acts adopted in the time of preparation and after signing of the AA or another acts important for approximation (Association Council).
- The need in identification the requirements for the approximation for the areas where they were not defined, like Intellectual Property (Association Council).
- 3) developing an approach to take into account the provisions of the decisions of the Court of Justice on the interpretation of EU acts during the application in Ukraine of the implemented provisions of such acts.

## Present challenges in approximation

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Following options are possible:

- **First option:** not to introduce the requirement that in application of EU acts provisions, implemented in national legislation, the ECJ decisions should be taken into account. That will follow approximation models of implementation of the European Agreements with candidate countries and the White Paper approach.

From our point of view such approach has its negative side in complexity of the application of legislation by the Ukrainian courts as well by the users in case the EU acts contain provisions which are not formulated clearly enough and require interpretation.

- **Second option:** to introduce a mechanism for applying the decisions of the Court of Justice similar to the European Economic Area countries, as well as the practice of the EFTA court.

Thus, to envisage in legislation that the acts specified in the Association Agreement in their implementation and application, be interpreted in conformity with the relevant rulings of the ECJ handed down **prior to the date and after the date** of signature of the Association Agreement.

# Interpretation of EU acts transposed into the Ukrainian legislation according to ECJ rulings

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4) For Ukrainian courts when considering disputes relating to the application of EU acts implemented in the national legislation, it may be necessary to obtain an interpretation of one or another provision of an EU act. In this case, similar to the competence and practice of the EFTA Court it would be expedient, from our point of view:

- to make amendments to the Ukrainian Law on the Judiciary and the Status of Judges establishing the powers of the Supreme Court (similar to the competence of EFTA Court) to interpret EU acts based on the ECJ rulings when applying provisions of EU acts transposed into the Ukrainian legislation;
- to provide other courts with a procedure for applying to the Supreme Court for interpretation;
- to issue a decision within the framework of the Association Agreement or, if necessary, conclude another agreement with provisions similar to the EEA Agreement and EFTA Surveillance and Court Agreement, which:
  - introduces exchange of information between the ECJ and the Supreme Court on court rulings (similar to those implementing the EEA Agreement);
  - provides the Supreme Court with a procedure for receiving written observations submitted on behalf of the authorized bodies of the Association Agreements and, if necessary, the European Commission.

This is new in comparison with other candidate countries. At the same time, the preparation for accession may take a substantial period of time. On the one hand, this time should be used to prepare the judiciary for the application of the *acquis*. On the other hand, as noted earlier, taking into account only the provisions of the Association Agreement or only EU acts could be not enough for effective use of implemented legislation.

## Selected sources

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Resolution of the Verkhovna Rada of Ukraine "[On some measures to fulfil Ukraine's obligations in the field of European integration](#)" of July 29, 2022 No 2483-IX (in Ukrainian)

[Activity Regulation of the Cabinet of Ministers of Ukraine](#) of July 18, 2007 No. 950 (with subsequent amendments) (sections related to approximation of Ukrainian legislation to EU legislation - § 12, 28, 33, 35, 47-1 - 47-5, 54, 71) (in Ukrainian)

Law of Ukraine "[On the National Program of Approximation of Ukrainian Legislation to that of the European Union](#)" of March 18, 2004 No 1629-IV.

[Guidelines for the Ukrainian public administration on the approximation of Ukrainian legislation to EU Law](#). EU project "Support to the implementation of the EU-Ukraine Association Agreement". European Integration Portal. 2018.

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Thank you.