European Foreign Affairs Review **8**: 000–000, 2003.

How Far to Endeavour? Recent Developments in the Adaptation of Ukrainian Legislation to EU Laws

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I Introduction

The forthcoming accession of the Central and Eastern European countries into the EU will be one of the most momentous and intricate challenges faced by Europe in the post-cold war period. However, the successes and failures of the enlargement process will bear a profound effect on political, economic and legal reforms in neighbouring non-applicant countries, which have entered either into preferential trade or partnership agreements with the European Communities (EC).

Enlargement will not only shape the future political and economic appearance of an expanded Europe, but will also, more importantly, test the democratic legitimacy of the integration machinery, since it presumes the importation of the vast European legal heritage into the candidate countries' legal systems. The results of this endeavour are very much awaited by non-applicant countries, such as Ukraine, which associate themselves with the future enlarged Europe, and have thereby renounced the legacy of socialistic legal systems. Therefore, transparency, legal certainty and consistency of approximation of legislation all have to be addressed in the process of enlargement.

The 'europeanization' of the Ukrainian legal system started shortly after independence in 1991.[1] As a priority, Ukraine set as a political objective the integration into international political and economic structures and, consequently, membership of the Council of Europe. Once the Council of

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[1] For the comprehensive narrative of the history of the EU and Ukraine relations see A. Lewis (ed.), *The EU & Ukraine Neighbours, Friends, Partners?* (The Federal Trust, 2002).

Europe set the criteria for achieving that goal, the first attempts were made to ensure the conformity of legislation in the spheres of democracy and human rights. As a consequence, Ukrainian criminal, penal and social legislation underwent substantial changes, such as the abolition of the death penalty, the adoption of a new criminal code, and new criminal procedural and civil procedural codes. These reforms marked the first steps towards the reception of European legal standards into the developing Ukrainian legal system.

The Ukrainian decision to embark on a new political course, aimed at rapprochement with the EU, was proclaimed in 1994 with the signing of a Partnership and Cooperation Agreement (PCA) with the EC and the Member States. By signing and subsequently ratifying the PCA, Ukraine has accepted its soft commitment to '*endeavour to ensure* that its legislation be gradually made compatible with that of the Community'. In response to the ambiguous approximation clause in the PCA, Ukraine has designed the notion of 'adaptation' of national law to EU legislation. For the time being, this notion is unique to Ukraine only since, at minimum, it satisfies a soft PCA approximation commitment, and at maximum, it ensures that the EU pays attention to the European aspiration of Ukraine. Furthermore, the adaptation of Ukrainian laws to EU legislation provides some hope that the EU might offer a new model of mutual relations which potentially may bring Ukraine into an enlarged Europe.

II Legal Foundations of the EU–Ukraine Partnership

The apex of the legal framework which governs EU–Ukraine relations is the PCA, which was signed by the EC and its Member States and Ukraine on 16 June 1994, and which entered into force on 1 March 1998.[2] As an international agreement between the EC Member States on the one side, and Ukraine on the other, the PCAs are binding and constitute an integral part of both the EC and Member States legal systems.[3] Subsequently, at least some provisions of the PCAs potentially prevail over conflicting EC legal rules and the national legislation of Member States.[4] In the Ukrainian legal system the

[2] The similar PCAs were signed with Armenia, Azerbaijan, Belarus (did not enter into force), Georgia, Kazakhstan, Kyrgystan, Russia, Uzbekistan, Turkmenistan (has not entered into force yet).

[3] For the acknowledgement by the ECJ of international agreements as a part of the EC legal system see Case 104/81, *Hauptzollamt Mainz v. Kupferberg,* [1982] ECR 3641, para. 13.

[4] The ECJ case law puts forward two conditions that would have to be satisfied before any EC act could be held invalid due to its incompatibility with an international law treaty. First, the EC must be bound by the provision of international law treaty concerned. Secondly, the provision of international law must have direct effect in EC law. For the effect of mixed agreements in EC legal order and legal systems of Member States see Case 12/86*, Demirel v.*

PCA, which is a ratified international agreement, has a binding effect and consequently enjoys priority over any conflicting national legislation, though it does not override the Constitution of Ukraine. Thus in case of conflict the Ukrainian constitutional provision either prevails or has to be amended.[5]

Within the system of EC external agreements, the PCAs constitute a separate group of partnership agreements among 'association', 'cooperation', 'stabilisation' and 'development' agreements entered into by the EC.[6] The EC–Ukraine PCA, as with other PCAs, could be classified as an entry-level agreement that does not envisage membership, but endorses the potential interest in developing further mutual cooperation between the Parties. The PCAs are mixed agreements based on Articles 133 and 308 of the EC Treaty along with Articles 44(2), 47(2), 57(2), 71, 80 EC Treaty. The EC exclusive competence covers PCAs provisions on trade in goods and services including the cross-border supply of services. A number of specific bilateral agreements are concluded on basis of the EC exclusive competence.[7] However, the PCAs do go beyond the EC framework and have a clear EU cross-pillar dimension. It means that the PCAs' institutional framework does interpenetrate with the remaining EU pillars: Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA).[8]

In general, the PCAs are treaties aimed mainly at the establishment of a political dialogue; facilitation of economic relations between the Newly Independent States (NIS) and the EC/Member States; promotion of democratic reforms in Ukraine; human rights protection and establishment of legal order that guarantees the rule of law. Preambles of the PCAs intentionally omit any reference to 'the process of European integration' or 'the objective of membership in the EU' as it is provided in the EU association agreements.[9] The PCAs are aimed solely at: the development of close political relations; the promotion of trade, investment and harmonious economic relations between

Stadt Schwäbisch Gmund, [1987] ECR 3719. For the potential direct effect of the PCAs see R. Petrov, 'Rights of Third Country Nationals/Newly Independent States' Nationals to Pursue Economic Activity in the EU' (1999) 2 EFA Rev, pp. 235–251.

[5] Article 9 of the Ukrainian Constitution provides that 'international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.'

[6] For a concise classification of the EC external agreements see D. McGoldrick, *International Relations Law of the European Union* (Longman, London, 1997), pp. 116–137.

[7] For example, an agreement with the Russian Federation on trade in textile products; OJ 1998, L 222.

[8] C. Hillion, 'Institutional Aspects of the Partnership Between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine' (2000) 37 CML Rev, pp. 1211–1235.

[9] For example, the Preamble of the EU–Hungary EA.

the Parties; sustaining mutually advantageous cooperation and support of a PCA country's efforts to complete its transition into a market economy.[10] Thus, the PCAs could be seen as a quite successful formula in EU external policy. For the time being, it certainly serves its purpose as a reliable legal instrument in sustaining long-term relations with the NIS countries, while holding them at a controllable distance from closer access to the EC Single Market.[11]

The EU Common Strategy on Ukraine (CS), adopted by the Council on 11 December 1999 in Helsinki, complements the PCA, thereby marking the emerged skeleton of laws governing relations between Ukraine and the EU, wherein the PCA occupies the upper level.[12] The CS displays clear political and economic guidelines to Ukraine for the purpose of enhancing the nature of its relations with the EU. In response to Ukraine's reiterated diplomatic calls for a new framework agreement, the CS merely acknowledges and welcomes Ukraine's European aspirations, and establishes its major objective of working with Ukraine to facilitate its further rapprochement with the EU.[13] The CS towards Ukraine prioritises the support for the democratic and economic transition in Ukraine, including the progressive approximation of national legislation,[14] and foresees the possibility of studying the circumstances of the establishment of a free trade area between Ukraine and the EC.[15]

III The PCAs' 'Approximation Clauses' and Differentiation in EU External Policy

The notion of approximation in the PCAs is not uniform or linked to the objectives of every partnership agreement. The PCAs are differentiated by 'evolutionary clauses'[16] inserted into the agreements with Russia, Ukraine,

[10] Article 1 of the EU–Ukraine PCA.

[11] For the comparative overview and scrutiny of the PCAs see R. Petrov, 'The Partnership and Cooperation Agreements with the Newly Independent States' in A. Ott and K. Inglis (eds), *European Enlargement Handbook* (Asser Press, the Hague 2002) pp. 175–194.

[12] Presidency Conclusions, Helsinki European Council, point 56, OJ 1999, L 331/1. The same is envisaged in the CS towards Russia. The European Council meeting in Cologne in June 1999 adopted the first CS towards Russia. Presidency Conclusions, Cologne European Council, point 78, OJ 1999, L 157/1.

[13] Article 6 of the CS towards Ukraine.

[14] It is stressed in Article 20 of the CS towards Ukraine that approximation should take place in such areas as: competition policy, standards and certification, intellectual property rights, data protection, customs procedures and environment.

[15] Article 61 of the CS towards Ukraine.

[16] *Supra* note 11, pp. 179–180. See also C. Hillion, 'Approximation of laws in the context of EU–NIS partnership' in A. Nikodem (ed.), *Perspectives of the Legal Approximation Process in Central and Eastern Europe – Mutual Experiences* (Academy of European Law and Istvan Bibo College of Law, Budapest, 2001).

Moldova and Belarus (known as European PCAs). The concept of the evolutionary clause illustrates the example of 'conditional differentiation' in EU external policy.[17] Despite similarity in the wording, the PCAs' approximation clauses must be read differently depending on whether they concern a European PCA country or a non-European PCA country. The evolutionary clause in the Russian, Ukrainian, Belarus and Moldavian PCAs explicitly envisages 'the beginning of negotiations on the establishment of a free-trade area' upon 'advances in market-oriented economic reforms and the economic conditions'.[18] However, even within the same group of European PCA countries, the role of the approximation varies. For instance, the European Council promulgated a strategic partnership solely towards two PCA countries, namely Russia and Ukraine.[19] Nevertheless, only Ukraine has repeatedly been urged to accelerate its approximation process as a condition of further rapprochement with the EU. The CS towards Ukraine prioritized the support for the democratic and economic transition in Ukraine, including the progressive approximation of Ukrainian legislation to EU laws.[20] Regular EU–Ukraine summits consistently emphasize the need for approximation of Ukrainian legislation to EU legal standards. It was stressed at the latest EU–Ukraine Summit in Copenhagen on 4 July 2002[21] that the approximation of Ukrainian laws to EU legal standards must be regarded as one of the key elements of the intensified relationship between Ukraine and the EU. Furthermore, the approximation of Ukrainian legislation to EU norms and standards as well as WTO rules was considered as a best recipe to benefit the undergoing enlargement process in Central and Eastern Europe.[22]

On the contrary, EU–Russia legislative cooperation lacks the intensity and momentum inherent in EU–Ukraine relations. It is focused more on developing cooperation in the field of the JHA and the CFSP pillars. In particular, the EU encourages Russian legal reforms to fight organized crime, corruption, money laundering, trafficking in drugs and human beings, and illegal immigration. Only recently, the approximation of Russian legislation to EU laws on competition, public procurement, customs, services and

[17] For more about the types of differentiation in the EU external policy including the 'conditional differentiation' see M. Cremona 'Flexible Models: External Policy and the European Economic Constitution' in G. De Burca and J. Scott (eds), *Constitutional Change in the EU From Uniformity to Flexibility?* (Hart Publishing, Oxford, 2000) at 60–61.

[18] Distinctively from all the PCAs, the preamble of the EU–Russia PCA explicitly promulgates the objective 'to create the necessary conditions for the future establishment of a free trade area between the Community and Russia'.

[19] CSs towards Russia and Ukraine.

[20] Paras. 20 and 52 of the EU–Ukraine CS.

[21] The *fifth* EU–Ukraine Summit Joint Statement, 10607/02 Presse (195).

[22] Ibid. It was stated in the Joint Statement that relevant PCA subcommittees must identify the annual priorities in the process of approximation of laws.

standardisation was considered a key issue in establishing the EU–Russia common European economic space.[23]

Therefore, visibly similar PCA approximation clauses must be read differently depending on the progress in bilateral relations of a particular PCA country with the EU. In case of differentiating and deepening relations with a PCA country, the EU tends to exceed the non-binding scope of the approximation clause and regard it as an intrinsic condition of further activation of the evolutionary clause.

IV The Ambiguity of the Approximation Pattern for Ukraine

The scope of EU legislation put forward as pattern of approximation for Ukraine is rather fragmented. Firstly, it comprises 'priority areas' defined in Article 51 PCA and in the CS towards Ukraine. The approximation clause in Article 51 of the PCA imposes a soft law obligation on Ukraine merely to 'endeavor to ensure' the compatibility of its legislation to EC laws. The second paragraph of Article 51 of the PCA articulates priority areas of the approximation process in Ukraine.[24] The CS on Ukraine has further endorsed the importance of the approximation of Ukrainian legislation to the EU, and complemented the list of the priority areas.[25]

Secondly, the PCA emphasizes the necessity of the application of specific international rules such as GATT, and of the implementation of international law instruments. For example, the PCA title on the trade in goods is governed by the GATT provisions (Articles I, II, III, V, XIII), which cover most-favoured-nation treatment, legal issues governing the free transit of goods, and the non-discrimination principle. This means that Ukraine has to apply selected GATT rules prior to obtaining WTO membership, while trading with the EC Member States. Furthermore, Ukraine has committed itself to

[23] Report to the EU–Russia Summit of 29 May 2002 of the High-Level Group on the common European economic space <www.europa.eu.int/comm/external_relations/russia/summit_05_02/rep.htm>, 30 September 2002.

[24] They are: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of life and health of humans, animal and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations and transport.

[25] They are issues of fiscal policy, personal data protection and money laundering. Decisions of the Helsinki Summit with regard to the approximation have been implemented into Ukrainian legislation by the decision of the 4th Interministerial Coordination Council on adaptation of the Ukrainian legislation to the EU legislation by Decree (Postanova) of the Cabinet of Ministers of Ukraine 'Regulation on Interministerial Coordination Council on adaptation of the Ukrainian legislation to the EU legislation', 12 June 1998, 852.

accession to the comprehensive list of multilateral conventions on intellectual, industrial and commercial property rights by the year 2002 (within five years after entry into force of the PCA).[26] In accordance with the PCA, Ukraine is required to fulfil the 'essential elements', which are concerned with respect to democratic principles, human rights, and the principles of a market economy. Unsurprisingly, the scope of the essential elements is not precisely defined in the PCA, but refers to international treaties and documents of general application, thereby leaving to the EC a wide range for political manoeuvring.[27] A violation of the 'essential elements' implies a material breach of the agreement, and allows the other Party to suspend unilaterally the implementation of the agreement.[28]

Thirdly, the preamble of the PCA provides that Ukraine has undertaken the commitment to implement *all principles and provisions* contained in the Final Document of the Conference on Security and Cooperation in Europe (CSCE), the documents of the Madrid and Vienna CSCE meetings, the CSCE, the Bonn Document on economic cooperation, the 'Charter of Paris for a New Europe' and the 1992 CSCE Helsinki document 'The Challenges of Change'.

In general, the PCAs tend to prioritize the application of international law provisions like the GATT, and implementation of international multilateral conventions in the area of intellectual property and of the CSCE non-binding documents over the vaguely-worded, limited in scope and non-binding approximation clause in Article 51 PCA. At the same time, the PCAs do not lay out precisely what has to be achieved by NIS countries in order to evoke the evolutionary clause and subsequently establish a free trade area with the EC. The PCAs' approximation clause is neither directly linked to the evolutionary clause, nor is it considered as the agreement's objective. Thereby the priority of approximation in bilateral EU–PCA relations is subject to question, which plainly demonstrates the soft nature of commitment. The list of priority areas in the approximation clauses does not display a coherent EU

[26] For the list of the conventions see Annex III of the EU–Ukraine PCA.

[27] The PCAs essential elements comprise of 'democratic principles and human rights as defined *in particular* in the Helsinki Final Act, and Charter of Paris for a New Europe and principles of market economy *including those* enunciated in the Documents of the CSCE Bonn Conference'. Article 2 of the EU–Ukraine PCA.

[28] See the joint declarations annexed to the Russian and Ukrainian PCAs (articles 107 and 102 respectively). The EU 'watches over' the fulfilment of the 'essential elements', though on a case-by-case approach. For example, the EU did not ratify the PCA with Belarus due to violations of democracy, rule of law and human rights' 'essential elements' by this country, although the same reasons did not entail similar consequences towards Russia on the matter of human rights violations in Chechnya, proving the political nature of the decision-making process of the EU.

guideline on the scope and content of the EU laws to be taken as a pattern for approximation. Therefore, the approximation clauses inherent in the PCAs are better revisited in new framework agreements between the EU and neighbour PCA countries so as to satisfy the needs of the NIS countries willing to enhance their partnership with the EU.

Approximation clauses in the latest Stabilisation and Association Agreements (SAAs) with South-European countries represent an appropriate model for potential reception into future agreements with the European PCA countries.[29] The SAA countries, similarly to the PCAs, only 'endeavour to ensure the gradual compatibility of their laws to the EC'. However, the SAAs' approximation formula is made more explicit than the PCAs', by marking a new experience in EU external policy. Firstly, the approximation of national legislation constitutes one of the aims of the agreement. Therein, the approximation of national legislation is mentioned as a core element of developing the economic and international cooperation of the SAA countries. However, there is no reference to eventual membership as in the Europe Agreements (EAs),[30] but only a reference to the possibility of establishing a free trade area with the EC.[31] The liberalization of the service sector and customs regime are closely linked to the approximation of laws achievements by the SAA countries.[32] Furthermore, the whole Title VI of the EU–Macedonia SAA is devoted to the approximation of laws and law enforcement. Herein, approximation takes place in two stages. The first stage is aimed at bringing national laws into conformity with 'certain fundamental elements of the Internal Market *acquis* as well as other trade-related areas'.[33] It is provided that certain deadlines will be set for approximation in fields such as competition law, intellectual property law, standards and certification law, public procurement law, and data protection law. The second stage of approximation will cover other elements of the *acquis communautaire*.[34] Clearly, such emphasis on the necessity to undertake the consistent approximation of the SAAs' legislation to EU laws endorses the approximation requirement as the essential condition of liberalized market access for associated countries' goods and services to the EC.[35]

[29] The Stabilisation and Association Agreements were signed with Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, and Albania.

[30] European Agreements were signed with Poland, Hungary, Romania, Bulgaria, Slovak and Czech Republics, Estonia, Latvia, Lithuania.

[31] For example see Article 1(2) of the EU–Macedonia SAA.

[32] For example see Article 55(3) of the EU–Macedonia SAA.

[33] According to Article 5 of the EU–Macedonia SAA the overall duration of the Agreement should not exceed ten years. The first stage lasts for four years after entry into force of the Agreement.

[34] Article 68 of the EU–Macedonia SAA.

[35] M. Cremona, 'The European Union as an International Actor: Issues of Flexibility and Linkage' (1998) 3 EFA Rev, at p. 86.

The SAA approximation formula may be successfully imported into future agreements with the European PCA countries, which will share a common border with the enlarged EU. Issues of safer economic, political and security safety of the expanded EU require a new framework agreement with the neighbour NIS countries. Nevertheless, the temporary risks of illegal migration flow, organized crime and other possible dangers may necessitate 'iron curtain' clauses in these agreements. Therefore, precise evolutionary clauses along with elaborate approximation clauses should balance the endeavours of both parties. For this purpose approximation must be considered as one of several neighbour-agreement objectives, and clear stages of the approximation process should be established. In certain cases further liberalization of specific sectors of mutual trade could be linked to the success of adoption and implementation of the *acquis communautaire*.

V The Scope of the Adaptation Process in Ukraine and its Institutional Framework

With the entering into force of the PCA on 1 March 1998, the Ukrainian government faced serious dilemmas related to the methods and means of the implementation and enforcement of the PCA provisions within the national legal system. It was apparent in 1994 that the Ukrainian legal system, based on the inherited socialistic legal system, required substantive efforts to achieve the presupposed legal, institutional, economic and political changes envisaged in the PCA.

Since 1998 the President and the Government of Ukraine have adopted a package of legislative acts with the purpose of the PCA implementation.[36] The general framework of the integration process was set up in the Strategy of Integration of Ukraine into the EU (Strategy of Integration).[37] This document determines the major priorities of the executive power which are aimed at the ultimate objective of acquiring EU membership as soon as possible.[38] Intrinsically, the President of Ukraine promulgated that 'joining the European political, economic and legal area and, subsequently, acquiring associate membership of the EU constitute the major priority of the Ukrainian foreign

[36] In the meantime, about 50 legal acts in field of integration of Ukraine into the EU were adopted by the Verkhovna Rada and the Government of Ukraine.

[37] Edict (Ukaz) of the President of Ukraine 'On approval of the *Strategy of Integration of Ukraine to the European Union*', 11 June 1998, 615/98.

[38] The initial deadline to qualify for the full membership in 2007 was recently extended to 2011. The deadline to acquire the WTO membership was set up at 2003. Address of the President of Ukraine to the Verkhovna Rada of Ukraine 'European Choice. Conceptual foundations of the strategy of economic and social development of Ukraine in 2002–2011', 20 June 2002, 20-IV.

policy in the medium term'.[39] Soon thereafter, the scope of competence of the executive agencies was defined and the corresponding institutional framework was established with the purpose of accelerating the process of integration and of implementing the PCA.[40]

From the very beginning, the government of Ukraine has embarked upon the process of adaptation of national legislation to EU legal standards, thereby distinguishing the latter from notion of 'approximation' which is generally applied in the process of accession. The adaptation of Ukrainian legislation to EU law was formally launched in 1999 when the Cabinet of Ministers of Ukraine issued the Concept of Adaptation of Ukrainian Laws to the Legislation of the EU (Concept of Adaptation), where the official understanding of the adaptation process was set up. The general aims and scope of the adaptation process in Ukraine were already broadly defined in the Strategy of Integration,[41] as the approximation of national legislation with contemporary European legal systems in order to safeguard the development of political, business, social, and cultural activism of Ukrainian nationals, to provide the economic growth of Ukraine in the EU, and to facilitate the gradual increase of well-being of Ukrainian nationals to the EU level. According to the Strategy of Integration, the adaptation process in Ukraine was aimed at implementing the PCA, entering into sectoral agreements with the EU, and bringing and drafting Ukrainian legislation closer to EU laws. The Concept of Adaptation formulates the notion of 'adaptation' as a gradual and coherent process, which encompasses three basic stages, each of them guaranteeing certain level of conformity of laws, in the specified spheres of priority.[42]

The first stage of adaptation is targeted at developing the Ukrainian legal system in accordance with the Copenhagen criteria, approximating Ukrainian laws in the priority areas envisaged in the PCA and other international treaties that relate to the EU–Ukraine cooperation, and within the priority fields in the Concept of Adaptation.[43]

[39] *Supra* note 31, para. 7 of the preamble.

[40] Ruling (Rasporiadzhenia) of the President of Ukraine 'About the list of the governmental authorities responsible for fulfilment of the tasks defined by the *Strategy on Integration of Ukraine to the European Union*', 27 June 1999, 151/99-rp (as amended by Edict of the President of Ukraine, 6 July 2000, 240/2000).

[41] Article 1 of the Edict of the President of Ukraine 'On approval of the *Strategy of Integration of Ukraine to the European Union*', 11 June 1998, 615/98.

[42] Decree of the Cabinet of Ministers of Ukraine, *Concept of Adaptation of the Legislation of Ukraine to the Legislation of the EU*, 16 August 1999, 1496. Recently, legal acts issued by the Government of Ukraine seem to apply simultaneously and, sometimes interchangeably, definitions 'adaptation', 'approximation', 'harmonisation' without clarifying the difference of their content.

[43] Ibid, Article 2, para. 4.

The second stage of adaptation will comprise the reconsideration of Ukrainian legislation in force in the spheres, specified in Article 51 of the PCA with a purpose of 'approximate adequacy' with EU legislation. Furthermore, this stage anticipates the provision of legal assistance on establishment of a free trade area between Ukraine and the EU, and the consequent preparation of Ukraine for associate membership in the EU. It is envisaged that this stage of adaptation is likely to commence in time for the transition membership period of the first wave accession of the Central and Eastern European countries into the EU.

The third stage of adaptation is the least well-defined. It could be launched upon the EU recognition of Ukraine's sufficient progress in pursuing tasks set for the first and second stages of adaptation. The final stage of adaptation is aimed at preparing Ukraine for the negotiation of an accession agreement with the EU and the subsequent harmonization of the entire Ukrainian legislation with the whole *acquis communautaire*.

Shortly after the Concept of Adaptation came into force, the President of Ukraine issued the comprehensive Programme of Integration to the EU (Programme of Integration),[44] which displays a framework of short-, medium-, and long-term objectives for the executive branch to integrate Ukraine into the EU. Therein, the Copenhagen criteria for membership in the EU were formally endorsed and accepted as a basic framework for integration efforts in Ukraine. The Programme of Integration scrutinizes possibilities and choices of Ukraine's potential membership in the EU. Furthermore, it fixes the precise objectives of political, economic and legal reforms through the careful analysis of the current state of democracy and rule of law, administrative and judicial reform, protection of human rights, and economic development in Ukraine. The Programme of Integration accesses the level of openness of the domestic market, economic and fiscal policies, social protection, regional cooperation, life and environmental standards, innovations, and a broad range of other issues, which arise along with implementation of the policy on integration to the EU. To conclude, the Programme of Integration has both declarative and normative effects, and offers the detailed guidelines as well as political course for the executive authorities for the implementation of the PCA and other measures directed at the integration of Ukraine into the EU.

To fulfil the objectives of the Programme of Integration, the Cabinet of Ministers of Ukraine issues yearly Adaptation Action Plans[45] that set up a precise list of organizational and legislative measures to be enforced and adopted in the course of a calendar year. The 2002 Yearly Action Plan pays

[44] Programme of Integration to the European Union , approved by the Edict of the President of Ukraine, 14 September 2000, 1072/2000

[45] Action Plan for fulfilment of priority provisions of the Programme of integration in 2002 adopted by the Ruling the Cabinet of Ministers of Ukraine on 28 January 2002, 34-p.

particular attention to the cooperation with international institutions and enforcing international conventions (accession into the WTO is regarded as one of major priorities for the time being). In response to the Cabinet of Ministers Action Plan, all ministries and government agencies involved in the process of integration of Ukraine into the EU issue their own yearly Adaptation Action Plans.[46]

VI The Institutional Mechanism of the Adaptation Process in Ukraine

The adaptation of Ukrainian legislation to EU laws is exercized by the institutions established under the PCA and by various national governmental offices and agencies. Institutions established under the framework of the PCA apparently reiterate the EU institutional structure, namely: the Cooperation Council, the Cooperation Committee, and the Parliamentary Cooperation Committees. However, none of these institutions was granted the power to issue binding decisions, and thereby were lifted of significant influence over the process of adaptation in Ukraine.[47] The most important political issues and trade disputes are decided by summits between the President of the EU Council, the President of the Commission on the one side and the President of the PCA country on the other side.[48] Summits also take place in relation to Ukraine, in spite of the fact that the EU–Ukraine PCA does not mention them.[49] Summits play a very important role in furthering economic and political cooperation between the Parties, including accelerating the adaptation process.

Ukraine passed through considerable institutional reform since the launching of the adaptation programme. Hitherto, the President of Ukraine remains the main political figure who enforces the European integration policy in the country. He guides and defines the strategy of integration, sets up the

[46] For example see the Action Plan 2002 of the Ministry of European Integration and Economy on 1 April 2002, 90.

[47] With regard to structure and competence of the PCA institutions see *supra* note 11, pp. 180–181.

[48] Russian PCA provides two meetings of such kind a year (see Article 7 of the EU–Russia PCA). Summits are frequently joined by other EU top officials like the Secretary-General of the Council/High Representative for CFSP, assisting the President of the European Council. See Joint Statement EU–Russia Summit, 29 May 2000, Press Release No. 8976/00.

[49] The fifth EU–Ukraine Summit took place in Copenhagen on 4 July 2002. Joint Statement by the A. Fogh Rasmussen, President of the European Council assisted by the Secretary General of the Council/High Representative for Common Foreign and Security Policy of the EU, J. Solana, the President of the Commission of the European Communities, R. Prodi, as well as the President of Ukraine, L.D. Kuchma. 10607/02 Presse (195). The Parties agreed to focus on approximation of Ukraine's legislation, cooperation in areas of energy, trade, justice and home affairs, environmental protection, transport, science and technology.

external policy priorities, and as part of his jurisdiction authorizes agencies, organizations, institutions and civil servants to carry out the integration tasks.[50] Two advisory bodies were established to assist the President of Ukraine in framing the integration strategy of Ukraine into the EU and other international institutions. The National Council for the adaptation of Ukrainian legislation to EU laws[51] and the State Council in issues of European and Euroatlantic integration[52] issue non-binding proposals and monitor the speed of the integration process.

The Cabinet of Ministries of Ukraine ensures the implementation of the Programme of Integration in practice, whereas the coherence and effectiveness of the adaptation process between the executive agencies are bridged and guided by the Interminsterial Coordination Council on the adaptation of Ukrainian legislation to EU laws. This body coordinates the fulfilment of the adaptation objectives by issuing decisions binding on governmental entities, and by preparing proposals to the Cabinet of Ministers.[53] The Commissioner for Issues of European Integration plays a watchdog role in coordinating and monitoring adaptation efforts within the executive, and ensures the collaboration of the Ukrainian government with the Parliament – the Verkhovna Rada.[54] However, the major adaptation workload is divided between the Ministries, each of them responsible for a certain sphere, designated by the Cabinet of Ministers.[55] Unfortunately, the objective of instituting a specialized governmental agency with appropriate binding competence in pursuing the integration reforms has not yet been fulfilled. The Ministry of Economy of Ukraine was transformed into the Ministry of Economy and European Integration, in response to lobbying attempts to establish a Ministry of European Integration as exist in Central and Eastern European associated countries. Nonetheless, the discretion of competence of this office is circumvented by merely economic aspects of the EU–Ukraine partnership, and therefore omits other significant fields of cooperation.

All legal acts to be issued by the Cabinet of Ministers have to be taken

[50] *Supra* note 31.

[51] Article 1 of the Edict of the President of Ukraine 'On the National Council on adaptation of the Ukrainian legislation to that of EU', 30 August 2000, 1033/2000.

[52] Edict of the President of Ukraine 'On the State Council in issues of European and Euroatlantic integration', 30 August 2002, 791/2002.

[53] Decree of the Cabinet of Ministers 'On the Interminsterial Coordination Council on adaptation of the Ukrainian legislation to EU laws', 12 November 1998, 1773.

[54] Edict of the President of Ukraine 'Issues of the Commissioner for European Integration', 26 November 2001, 146/2001.

[55] Decree of the Cabinet of Ministers 'On the approval of the Temporary Rules of Procedure of the Cabinet of Ministers', 5 June 2000, 915 amended by Decree of the Cabinet of Ministers, 10 January 2002, 39.

through the monitoring and compliance procedure. Any draft that falls within priority areas of adaptation must be screened in the related Ministry for the conformity with EU legislation. After consideration of the draft, a conclusion must be issued as to the potential conflict with norms of EU law. Furthermore, the draft, together with the respective Ministry's conclusion, is delivered to the Ministry of Justice for the final legal expertise as to compatibility with EU norms. In cases of inconsistency of a submitted draft with EU legislation, the Ministry of Justice issues a negative conclusion. Nevertheless, it is up to the Cabinet of Ministers to have the final word in deciding whether it is necessary to pass the particular law, taking into account the conclusion of the Ministry of Justice. Such a juncture displays the wide scope of the discretion of the Cabinet of Ministers in shaping the speed and depth of the adaptation process in Ukraine.

Until 2002 the adaptation process was exercized solely within the executive branch of power under the guidelines of the President of Ukraine. Therefore, there was no either comprehensive legal or coherent institutional mechanism for coordinating the adaptation process by all branches of power, including the legislature and the judiciary.[56] As a result, many of the Ukrainian laws adapted by the executive were inconsistent with primary laws issued by the Verkhovna Rada. Recently, some attempts have been made to engage all branches of power in the coherent institutional framework of adaptation process in Ukraine. The major breakthrough came after parliamentary elections in 2002, when Ukraine's European aspirations found a majority endorsement among the victorious political parties. The Verkhovna Rada of Ukraine has explicitly acknowledged the necessity of adapting laws aimed at the implementation of the PCA, the accession of Ukraine to the WTO, and the establishment of a free trade area with the EC. As a result, the Parliamentiary Committee for Issues of European Integration was established, chaired by the pro-Western ex-minister in foreign affairs, Boris Tarasuk. The Verkhovna Rada Rules of Procedure will be amended to avoid the adoption of laws which contradict EU legal standards.[57] The long awaited Concept of State Programme of Ukrainian legislation to EU law has been adopted by the Verkhovna Rada.[58] This law authorizes the Cabinet of Ministers to draft the State Programme of the Adaptation of Ukrainian legislation to EU law (State Programme of

[56] The *Strategy on Integration* empowed highest, central and local executive authorities of Ukraine to establish close cooperation with legislative Verhovna Rada and relevant local council authorities to pursue integration into the EU on all levels of Ukrainian society.

[57] Decree of the Verkhovna Rada of Ukraine 'Recommendations after parliamentary hearings in issues of realisation of the governmental policy on integration of Ukraine to the EU', 17 January 2002, 2999-III.

[58] Law 'About the Concept of State Programme of Adaptation of Ukrainian laws to EU laws', 21 November 2002, no. 228-IV.

Adaptation) by 30 April 2003 and is aimed at paving the way for Ukraine to acquire the association with the EU. The future State Programme of Adaptation will envisage some novelties, like the issuing of Annual Adaptation Plans, drafted jointly by executive and legislature, engaging the judiciary in the adaptation process, and studying the approximation experience of Central and Eastern European states.

To conclude, a sustainable institutional framework for the adaptation of Ukrainian laws to EU laws is emerging. However the institutional reforms that have already taken place can not be regarded as fully sufficient. The Verkhovna Rada remains behind the President of Ukraine in exercizing the adaptation process. So far, a balanced dialogue in adaptation matters has to be ensured between the executive and the legislature. Yet there is no designated governmental agency that bears the primary responsibility of fulfilling Ukraine's integration objectives, but the competence to pursue integration efforts is dispersed between the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry of Economy and European Integration. As a result, the effectiveness of three years' history of adaptation reforms in Ukraine is not impressive. Hitherto, hardly any of the original objectives in the Concept of Adaptation have been achieved. Appropriate educational efforts must be taken to enhance the level of expertise of public servants in EU law. Otherwise, the enforcement of Ukrainian laws brought into alignment with EU laws might endure inevitable risks of failure.

VII Conclusion

The EU–Ukraine PCA (as well as other PCAs) mirrors the conventional 'conditionality approach' in EU external policy. Any prospective of furthering relations and deepening cooperation between the EU and Ukraine is conditional on safeguarding the essential elements in the PCA, fulfilling hard obligations and successfully approximating national laws to EU laws. Ukraine appeared to be the only PCA country that explicitly promulgated its European aspirations to enhance mutual partnership and cooperation with the eventual establishment of a free trade area with the EC. The initiation of the comprehensive programme of adaptation of national legislation to EU laws indicates the seriousness of Ukraine's European aspirations. Indeed, Ukraine is willing to adapt its national laws to EU legal rules, which have no binding force in relation to itself, and in the framing of which Ukraine has no real participation.[59] This voluntary harmonization of Ukrainian laws to

[59] This process was defined by Andrew Evans as 'voluntary harmonisation' in A. Evans, 'Voluntary Harmonization in Integration between the European Community and Eastern

EU laws has engendered all major legal reforms undertaken by Ukrainian government since the entering into force of the PCA. However, the scope of EU legislation to be approximated by Ukraine remains diverse. It comprises general principles of international law, selected provisions of the WTO legislation, and priority areas of law, specified in the PCA and the CS. None of the EU institutions have been explicit in defining the scope of EU legislation that could be considered a pattern for approximation. Neither the PCA nor the CS refer to the *acquis communautaire*, and in particular, to EC general principles that constitute the core of EU legislation. Similarly, neither the PCA nor other EU legal sources clearly specify what has be done by Ukraine to activate the evolutionary clause and, consequently, to establish a free trade area with the EC. As a result, the national legislature found itself in quite a peculiar situation when it had to choose either between the blind reception of the whole *acquis communautaire*, or the consecutive approximation of Ukrainian laws to EU primary and secondary legislation as defined by the PCA and the CS priority areas.

Facing a problem of reconciling various models of approximation, the Government of Ukraine has superseded the 'approximation' of legislation by the vague notion of 'adaptation'. Article 1 of the Strategy on Integration explicitly states that 'adaptation of Ukrainian legislation to EU laws comprises of approximation with the contemporary European system of law'. The Verkhovna Rada of Ukraine defined the adaptation as a 'stage by stage adoption and implementation of legal acts drafted *with consideration* of EU laws ... *as far as financial, political and social consequences of such adaptation are appropriate for Ukraine*'.[60] Thus, on the one hand, the 'adaptation' of Ukrainian legislation to EU laws equips the Ukrainian government with a discretionary power to steer the process of adaptation in accordance with national interests. On the other hand, it slows down the speed of the approximation reforms in Ukraine.

This complexity of the adaptation process is stipulated by the ambiguity of the EU policy towards Ukraine. It is argued that approximation clauses in any future EU framework agreement with Ukraine must be more precise and clarify in detail the scope of EU legislation – the pattern for approximation. For instance, the SAAs' approximation clause could be taken as an example. Another solution could be the drafting of a Guide for Ukraine, similar to what is known as the White Paper for the accession into the Internal Market for the countries of the Central and Eastern Europe. Alternatively, the above-

Europe' (1997) 22 ELRev, pp. 201–220. Other authors define it as 'autonomous adaptation'. For example see P.-C. Müller-Graff, 'The Legal Framework for the Enlargement of the Internal Market to Central and Eastern Europe' (1996) 6 MJICL 2, at p. 196.

[60] *Supra* note 58.

mentioned White Paper must be recognized as having effect for any third country willing to align its own legislation with EU laws for the purpose of potential association in the EU. The success of legal reforms in Ukraine requires a coherent and consistent guideline from the EU on the precise priorities and methodology of the approximation process.