

## **Past and Future Action on Approximation of Ukrainian legislation to that of the EU\***

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The approximation of Ukrainian legislation to EU law has been launched on March 1<sup>st</sup> 1998 when the Partnership and Cooperation Agreement (PCA) between Ukraine and the EU came into force. Article 51 of the PCA circumscribes priorities within which the approximation process must take place and explicitly states that the approximation of Ukrainian legislation is “an important condition for strengthening the economic links between Ukraine and the Community. Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”.<sup>147</sup> Since that the process of approximation of Ukrainian legislation has been gradually evolving and declining in line with tempo of EU-Ukraine relations.<sup>148</sup>

The “Orange revolution” gave fresh impetus to long-cherished Ukrainian aspirations to join the EU. New political elite headed by extremely popular opposition leader Viktor Yuschenko encouraged fresh pro-European sentiments among the Ukrainian nation. Emotional victory of Viktor Yuschenko in dramatic presidential race created impressive worldwide wave of sympathy towards Ukraine. Everyone in Ukraine expected that the EU may reconsider its prudent policy towards Ukraine and recognise the Ukraine’s perspective to join the EU sooner or later. One has to admit that these expectations were mutual. The European Parliament voted on 13 January 2005 in favour of a non-binding resolution calling for Ukraine to be given “a clear European perspective, possibly leading to EU membership”. MEPs said it was now time to consider other forms of association with Ukraine besides the Neighbourhood Policy. Also the Resolution advocated relaxing visa requirements for Ukraine, recognition of Ukraine's market economy and support for the country joining the World Trade Organisation. This positive message from the European Parliament was warmly welcomed by leaders of some EU Member States. Polish President Kwasniewski acted as a strong advocate of immediate enhancement of relations between the EU and Ukraine. President Victor Yuschenko decided to catch the unique political momentum and pushed all efforts towards the objective of Ukraine’s full EU membership. In speech at the European Parliament in February 2005 President Yuschenko promulgated Ukraine’s objective to complete the EU full membership negotiations by 2007. However, Ukraine’s European aspirations have been quickly cooled off at the top EU level. On January 2005 President of the European

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<sup>147</sup> Article 51(2) of the EU-Ukraine PCA states that approximation of Ukrainian legislation to that of the EU must take place within the following areas: 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 health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, and transport.

<sup>148</sup> Petrov R., “Recent developments in the adaptation of Ukrainian legislation to EU law” 8(5) EFARev. 125-141 (2003).

Commission Jose-Manuel Barroso clearly stated that there is no perspective for Ukraine to join the EU in the nearest future. Commissioner Danuta Hubner intentionally dropped any mention about the possibility of Ukraine's membership in the EU by 2015 during her speech at the University of Sussex (UK) in February 2005. Instead, EU officials repeatedly articulated that the fulfilment of the EU-Ukraine Action Plan (AP) must be a priority for EU-Ukraine relations for the immediate future. Consequently, the effective implementation of the AP by Ukraine could lead to the enhancement of the EU-Ukraine relations in political, economic and legal domains.

On February 21<sup>st</sup> 2005 the AP was signed by the European Commission President Jose-Manuel Barroso and by Ukrainian newly appointed Prime-Minister Julia Timoshenko. One has to be aware, that the AP is not a document that was inspired by the "Orange revolution". On the opposite, the AP is a product of negotiation between the Prodi's Commission and former President Kuchma government headed by Viktor Yushenko's opponent Viktor Yanukovich in 2004. For these reasons, the new Ukrainian government pushed the EU towards more advanced document, which could either approve or just mention Ukraine's chances to join the EU. In response to such emphatic strategy of the Ukrainian government, and following active mediation of High Representative in CFSP H. Solana, the EU added some non-binding changes to the document, which envisaged the conclusion a "new enhanced agreement, whose scope will be defined in the light of the fulfillment of the objectives of this Action Plan and of the overall evolution of EU – Ukraine relations" and a possibility of preparing for future negotiations on a visa facilitation agreement.

The signing of the AP was welcomed by political elite in Ukraine though in somewhat skeptical way. It became clear that Ukrainian pro-European prognoses must be reconsidered in line with more pragmatic objectives of the AP. To support that view the EU side reiterated that the AP is the major framework document that shapes the format and the character of the EU-Ukraine relations in the nearest future. In order to enhance these relations Ukraine is expected to acknowledge and to implement the AP. The approximation of Ukrainian legislation to that of the EU constitutes one of the top AP priorities.

The objective of this article is to discuss contemporary issues of approximation of Ukrainian legislation to that of the EU in the aftermath of the so called "Orange revolution". In the beginning we emphasise major priorities of the approximation of laws process envisaged in the EU-Ukraine Action Plan. In the second part of the article we analyse gains and setbacks of the approximation of laws process in the "after Orange revolution" era. In the final part of the article we examine major difficulties of the EU-Ukraine approximation process, which might occur in the immediate future.

### ***Approximation of laws objectives in the EU-Ukraine Action Plan***

The AP envisages the approximation of laws as a foundation for further economic integration between the Parties including the establishment of an EU-Ukraine Free Trade Area and Ukraine's accession to the WTO. It means that the AP does not limit the scope of the approximation process by EU laws and standards but encompasses the export of wider area of economic and trade-related rules and regulations including

the WTO laws. This also includes the adoption of EU regulatory methods: convergence of economic legislation; the opening of economies to each other; and the continued reduction of trade barriers, which will stimulate investment and growth between the EU and Ukraine. The AP is explicit in stating that the approximation process of Ukrainian legislation to that of the EU includes the reinforcement of Ukrainian administrative and judicial capacity.

Directions of approximation process in the AP comprise several blocks. The first block covers adoption by Ukraine of internationally established standards of democracy, rule of law, human rights and fundamental freedoms. In particular, the AP states that Ukraine must continue its internal reforms based on strengthening democracy, rule of law, respect for human rights, the principle of separation of powers and judicial independence, democratic election in accordance with OSCE and Council of Europe norms and standards (political pluralism, freedom of speech and media, respect for the rights of persons belonging to national minorities, non discrimination on grounds of gender, and on political, religious and ethnic grounds). Special attention is paid to democratic conduct of presidential (2004) and parliamentary (2006) elections.

The second block encourages Ukraine to improve cooperation with the EU in areas including combating terrorism, non-proliferation of weapons of mass destruction and illegal arms exports. Consequently, Ukraine is expected to adhere to fundamental international conventions in these areas (mainly the UN and FATF documents).

The third block focuses on area of economic and social reform and development in Ukraine. Therein the AP explicitly states that Ukraine is expected to advance in gradual approximation of basic legislative and regulatory framework to that of EU, and ensure its effective implementation. These efforts must include ensuring transparency, predictability and simplification of national regulatory frameworks and their effective application. The AP emphasizes that full application of relevant GATT provisions is important precondition of further liberalisation of trade regime between the EU and Ukraine. It relates to issues of movement of goods, customs legislation, implementation of the GATT the most favored nation and national treatment principles. Legislative reforms must also include alignment of Ukrainian legislation with EU laws in consumers safety and sanitary and phytosanitary standards.

The fourth block deals with social situation, employment, poverty reduction in Ukraine. It is stated that Ukraine must ensure a closer approximation of national legislation to EU standards and practices in the area of employment and social policy.

The fifth block covers sectoral cooperation between the EU and Ukraine. The AP envisages implementation by Ukraine of tax systems and their institutions based on international and European standards; adoption of state aid and competition laws that are compatible with EU laws. The Parties agreed to ensure a level of protection of intellectual property rights similar to that in the EU. Also Ukraine must continue approximation to EU legislation on public procurement in order to ensure effective implementation of the key principles of transparency, nondiscrimination, competition and access to legal recourse. These principles should apply to procurement for goods, services and works across all relevant public bodies at all levels. Sectoral cooperation envisages adoption of statistical methods fully compatible with European standards in

relevant areas. Besides the AP calls Ukraine to align own legislation and regulatory frameworks in areas of transport, energy, information society and environment, science and technology, education, training and youth, culture and audio-visual issues, civil society cooperation, public health and cross-border cooperation.

The AP pays special attention to the Ukraine's adherence to the vague concept of European common values. The AP does not specify the scope of these values. However they could be deduced from the draft of the Constitution for Europe.<sup>149</sup> The Ukrainian commitment to common values shall be closely monitored by the EU and will directly influence "the pace of progress of the relationship" between the EU and Ukraine. Therefore, the AP induces significant approximation commitments on Ukraine. In general, the EU wants Ukraine to commit to the process of voluntary harmonisation of national legislation to the EU *acquis*.

### ***Approximation of laws efforts by the Ukrainian government in the aftermath of the "Orange Revolution"***

The signing of the AP marked the new stage of the approximation of laws process in Ukraine. Below we shall consider major gains and mishaps of this intrinsic process for Ukraine.

In area of protection of human rights and fundamental freedoms the Ukrainian government took efforts to join multilateral conventions, which have not been signed by Ukraine yet. Ukraine became a Party to the European convention of remedies to victims of crimes. The Verkhovna Rada ratified the Council of Europe Civil Law Convention on corruption. Trough ratifying this convention Ukraine obtained membership in the GRECO group (Council of Europe group of countries against corruption). Legislative measures have been taken to involve public into decision making. Public Boards and expert groups (on price making and salaries) were established within the Cabinet of Ministers and local governments. Regulation on public monitoring of the Cabinet of Ministers and local governments was approved by the government of Ukraine. However, the long-awaited reform of judiciary did not succeed. The concept of judicial reform was debated in the Verkhovna Rada but without any effective measures adopted.

Year 2005 has been marked by the acceleration of the EU-Ukraine cooperation in foreign affairs and security issues. The EU and Ukraine signed the Agreement on the security procedures for exchange of classified information and the Agreement establishing a framework for Ukraine's participation in EU crisis management operations. Also Ukraine joined so called "Australian group" that is responsible for control over trade in dual goods. National lists of dual goods have been adopted by the Ukrainian government in accordance with recommendations of the "Australian group". Access of EU nationals to the Ukrainian territory was considerably liberalised. Ukraine voluntarily abolished the visa regime for EU and Swiss national from 1 May 2005 in remote hopes of adequate measures on behalf of the EU.

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<sup>149</sup> Article 1-2 of the EU Constitution provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

Following reiterating requests from the EU the Ukrainian government started negotiations on the EU-Ukraine readmission agreement.

In economic and social areas the Ukrainian executive and legislature made serious efforts to liberalise national services market and to accelerate structural reforms. The Verkhovna Rada of Ukraine adopted for consideration and plenary debates draft laws on mortgage securities, stock market as well as laws on opening domestic markets to foreign banks and auditors and the draft law on liberalisations and permissions and approvals in commercial activities. Furthermore, the Verkhovna Rada adopted a package of laws aimed at dismantling discrimination of foreign investors in Ukraine. In particular, 5 years moratorium on setting new tax privileges was introduced. Tax privileges in free economic zones were abolished. In area of fiscal control the government of Ukraine eliminated the mandatory selling of 50% of foreign currency income by enterprises.

The Ukrainian government and the Verkhovna Rada achieved positive results in preparation of the Ukrainian membership in the WTO. By the end of 2006 the Ukrainian government signed all bilateral protocols on mutual access of goods and services (apart from Kyrgyz Republic and Taiwan) with members of the WTO working group on accession of Ukraine. It means that the Ukrainian government agreed 98% of national consolidated tariff nomenclature with other countries – WTO members. The EU and the USA have granted to Ukraine the status of the market economy country. Furthermore, the USA recognised democratic and market economy reforms in Ukraine by lifting notorious Jackson-Vanik amendment, which imposes discrimination on goods from the former USSR republics. The government of Ukraine adopted new regulations to liberalise the access of foreign investors to domestic markets and to protect their intellectual property rights. Privileges of national producers in car making industry were abolished. Ukrainian sanitary, phytosanitary and technical standards have been further aligned with EU relevant standards. The Verkhovna Rada of Ukraine decreased export and import tariffs on agricultural products and iron scrap. Besides, the Verkhovna Rada adopted a package of laws, which allowed the liberalisation of national insurance, audit and banking services in 5 years time after accession into the WTO. As a result of these legislative reforms the Ukrainian government claimed that the WTO ministers may consider the issue of the Ukraine membership in February 2007. However, the eventual WTO membership could only be considered possible after the Verkhovna Rada adopts the package of the liberalisation of trade laws. Frequent changes of government in Ukraine hinder this possibility thereby leaving Ukraine's chances to join the WTO before the Russian Federation under question. In area of environment protection the Ukrainian government confirmed its adherence to objectives of the Kyoto Protocol and took first steps to implement Kyoto Protocol requirements. In area of education Ukraine joined the Bologna Process in May 2005.

The Ministry of Justice continues to play an important role in the approximation of laws process. More than 3000 pages of the EU acquis have been translated by the Ministry of Justice in 2005 and 2006. Only in the first half of 2005 experts of the Ministry of Justice approved 121 drafts of legal acts as confirming EU law standards. About 100 legal drafts were sent back to responsible ministries for further improvement in accordance with EU acquis. Besides, the Ministry of Justice assisted to the Verkhovna Rada in reviewing compliance of legislative drafts with EU laws.

However, the process of the AP implementation encountered significant problems and setbacks in the “after Orange revolution” period. The first, and in our opinion the major problem is that the implementation of the AP did not tackle the reform of judiciary. Hitherto, judiciary remains the most non-transparent branch of power in Ukraine. In opinion of Ukrainian public the judiciary is associated with sophisticated corruption. Access to judicial profession is extremely limited and, therefore, suspected in nepotism. In 2005 and 2006 some Ukrainian judges issued conflicting and perplexing judgments that suited interests of specific political groups. As a result, the Ukrainian judiciary gained negative image and disrespect with Ukrainian public opinion. This disappointing situation could be explained by several reasons. The first reason is lack of professionals who could personally initiate the reform of judiciary. Unfortunately, neither any of “after Orange revolution” Ministers of Justice nor any of prominent judges took courage to launch urgently needed reforms. The second reason is political pressure on the Ukrainian judiciary on behalf of the Ukrainian government. Some members of the “Orange revolution” team were accused in pressing judges to issue decisions, which suited political interests of the government. Important change in sphere of judiciary which must be highlighted is opening for Ukrainian public case practice of Ukrainian courts. It is hoped very much that this reform will encourage further reform of the Ukrainian judiciary towards transparency and democracy.

The second problem of the approximation of laws process in Ukraine is that the Verkhovna Rada kept many legislative drafts required by the AP in pipeline without approval. For example, the Verkhovna Rada approved the first draft of law on equal opportunities for men and women. Issue of public television and radio channel as well as amendments related to protection of rights of imprisoned who are in custody for a long time were debated but not approved by the Verkhovna Rada of Ukraine.

The third problem is overall stagnation of the Ukrainian economy in the “after Orange revolution” era. In our opinion this factor negatively influenced the tempo of the approximation of laws process in Ukraine. The impressive growth of 2004 economy has stalled due to the disappointment of foreign investors from inconsistent and unpredictable policy of the Ukrainian government. Foreign investors called the Ukrainian government to ensure two major guarantees: 1) certain degree of predictability of the governmental policy towards investors, and 2) high standards of equality between all players on the market.<sup>150</sup> However, the Ukrainian government headed by Julia Timoshenko ignored these calls. One of its first actions was the dismantlement of numerous free economic zones in Ukraine thereby infringing upon interests of foreign investors already operating in Ukraine. Also, the Ukrainian government embarked upon the policy of active interference into national economy. Facing the eminent rise of Russian export tariffs on gas and oil the government of Ukraine revalued the Ukrainian hryvna. The objective of this interference was to compensate losses of petroleum importers in return of keeping petroleum prices at the fixed level. However, these efforts led to almost total deficit of petroleum and 50% rise in petroleum prices in Ukraine. In area of privatisation the government of Ukraine launched the notorious campaign of re-privatisation. It means that the government questioned the legality of privatisation of earlier privatised companies. However the

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<sup>150</sup> Speech by Paul Ostling, head of the “Ernst & Young Global” (USA), at the meeting with the President of Ukraine on 20.10.05.

new government was accused in political lustration and redistribution of private property to new owners who are loyal to the ruling political elite. As a result of these events the economic growth in Ukraine has lost its dynamic and even fall down. Forecasted 7% GDP growth turned to less than 4% GDP growth in 2005.<sup>151</sup>

Furthermore, Ukraine went through serious institutional crisis in area of European integration. The Ukrainian government did not manage to solve the issue of separation of competences within the executive in area of European integration. Former Vice Prime-Minister in European Integration Oleg Rybachuk's efforts to establish the Ministry of European Integration, which could be responsible for intergovernmental coordination and control in issues including the approximation of laws, failed. It appeared that Vice Prime-Minister Rybachuk encroached into competences of other ministries, in particular, the Ministry of Foreign Affairs. In the end, not only plans to set up the Ministry of European Integration were dropped but the position of Vice Prime-Minister in European Integration was eliminated.

### ***Future action on Approximation of Ukrainian legislation to that of the EU***

The above mentioned setbacks of the approximation of laws process in Ukraine were engendered by several problems. The prime problem was caused by the lack of experienced professionals in the early "after Orange revolution" governments. Very few professionals have been promoted to top positions in the government in the aftermath of the "Orange revolution". In general, top executive positions were distributed to politicians who either directly or indirectly supported the "Orange revolution". As a result, these governments lacked bold initiative professionals who were able to accelerate the approximation of law process and to initiate far reaching political, economic and legal reforms in Ukraine. Another problem was caused by lack of effective cooperation between the Ukrainian government and the Verkhovna Rada in issues of aligning Ukrainian legislation in line with EU standards. Many of the government bills have been blocked by the Verkhovna Rada not only because political clashes but also because of insufficient and ineffective exchange of information between the government and the Verkhovna Rada. For instance, this problem appeared during the adoption of the package of laws needed for the Ukraine's accession to the WTO. Furthermore, the Ukrainian government failed to be transparent to the Ukrainian nation. Many of seminal decisions have been taken "behind closed doors" without involvement of general public into the decision making. Ukrainian journalists protested against the absence of fairness in the Ukrainian media and presence of nepotism in top appointments.

The approximation of laws programme in Ukraine came through several serious internal and external challenges. The first challenge is associated with results of Ukrainian parliamentary elections on March 26<sup>th</sup> 2006 which displayed growing dissatisfaction of the Ukrainian population with the progress of European integration. More than a third of votes was casted in favour of pro-Eastern oriented parties (Party of Regions, Communist Party). In other words, significant part of the Ukrainian nation expressed their wiliness for deeper economic integration with former Soviet republics through closer involvement into the Single Economic Space (SES)

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<sup>151</sup> Information of the Ukrainian Institute of Evolution Economy,  
<<http://iee.org.ua/ru/detailed/prognoz/319>>, last visited 20<sup>th</sup> October 2005.

initiatives. Nevertheless, results of the 2006 parliamentary elections could hardly change priorities of the Ukrainian foreign policy in the immediate future. Both possible coalitions in the Verkhovna Rada (“democratic coalition” headed by charismatic Julia Timoshenko and “anti-crisis coalition” chaired by pro-Russian Viktor Yanukovich) confirmed continuation of pro-European course of the Ukrainian foreign policy. It means that, at least in the foreseeable future, new Ukrainian government will continue further rapprochement with the EU through participation in the “Wider Europe” initiative with hope to set up a free trade area between the EU and Ukraine and to open sectors of the EU internal market to Ukrainian undertakings.

Realising the need to provide more backing to pro-European parliamentary coalition in Ukraine the European Parliament issued non-binding resolution on the parliamentary elections in Ukraine.<sup>152</sup> In this resolution the European Parliament praised “democratic and transparent manner” of Ukrainian elections and asked “the new government formed after these elections to consolidate Ukraine’s exposal of common European values and objectives”. The most importantly, this resolution “calls on the Commission to begin to negotiate an Association Agreement” with Ukraine. It means that the European Parliament urged the Commission to start negotiations on a new agreement, which should substitute the outdated Partnership and Cooperation Agreement (PCA) between the EU and Ukraine (came into force on 1<sup>st</sup> March 1998 and it is due to expire in 2008). Mere reference to the need to conclude an association agreement with Ukraine does not imply that objective of this agreement will be either the full membership of Ukraine in the EU or even remote perspective of that. However, a new association agreement between the EU and Ukraine might lead to closer political and economic rapprochement between the Parties through establishment of a customs union/a free trade area and liberalisation of mutual trade. In case if “anti-crisis coalition” will form majority in the Verkhovna Rada and form a new government the Ukrainian foreign policy will return to the multi-vector foreign policy that was actively employed by former President L. Kuchma. It means that while maintaining participation of Ukraine in the ENP the “anti-crisis coalition” will reinvigorate Ukraine’s participation in the Russia led integration project, which might lead to eventual establishment of customs union in the former USSR area. In return, Ukraine could get access to cheaper energy supplies from Russia and its satellites. The newly appointed Prime-Minister Victor Yanukovich advocates an idea of coordination and synchronisation of Ukrainian and Russian policies in relation to joining the WTO and closer rapprochement with the EU. This strategy could have significant implications for Ukraine. Taking into account that the Russian government is not keen on accepting “democratic and human rights clauses” in future agreement with the EU<sup>153</sup> one may predict a possibility application of similar pragmatic policy by the Ukrainian government during negotiations on new EU-Ukraine Neighbourhood Agreement. Hitherto, the new government in Ukraine confirms its support for pro-European foreign policy of Ukraine and need to enter into new level neighbourhood relations with the EU and acceptance of common democratic values with the EU. The second challenge is related to the recent political and economic crisis in the EU, which handicaps all EU intentions to reward Ukraine for possible successes of its approximation programme. Facing continuing constitutional crisis and further wave of enlargement the EU is

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<sup>152</sup> 6 April 2006, P6\_TA-PROV(2006)0138.

<sup>153</sup> <http://euobserver.com/?aid=22654>



keen to safeguard its public opinion by adding so called “absorption” or “integration capacity” in addition to well known Copenhagen criteria for any countries which wish to join the EU.<sup>154</sup> This dubious situation might bring the EU-Ukraine approximation process to the standstill.

Future action on approximation of laws in Ukraine must undergo serious revisions in order to achieve objectives of the AP. There is an urging need to shift from mere legislative approximation of laws towards more close involvement of judiciary into the approximation of laws process. The Ukrainian judiciary must pay more attention to applying EU general principles in the process of taking decisions. References to EU general principles and EU common values could drastically accelerate the process of approximation of laws on all levels of power in Ukraine. The Ukrainian judiciary may serve the role of catalyst of the whole approximation of laws process in Ukraine by actively applying European legal heritage in own decisions. Work of law enforcement bodies in Ukraine need drastic reform too. Many of court decisions can not be enforced due to lack of efficiency and sufficient competence of law enforcement officials. Experience of reform of law enforcement bodies in EU Member States and former candidate countries must be taken into account. Therefore, the priority of the approximation of laws process must be given to the reform of judiciary and law enforcement bodies.

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<sup>154</sup> The European Commission Communication “Enlargement Strategy and Main Challenges 2006-2007”, COM(2006)649.