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Recommendations for the prioritisation of the Plan of Measures 2008 on implementation of the National Programme on Approximation of the Ukrainian Legislation to the Legislation of the European Union

These Recommendations of the Ukrainian-European Policy and Legal Advice Centre (UEPLAC) directed at prioritisation of measures suggested to be included in the draft Plan of Measures 2008 on implementation of the National Programme on Approximation of the Ukrainian Legislation to the Legislation (PoMLA 2008). These Recommendations are based on the preliminary recommendations of the UEPLAC to the draft Plan of Measures 2007 on implementation of the EU – Ukraine Action Plan and to the second phase of fulfilment of the National Programme, attached to the letter to the Ministry of Justice of Ukraine of 10 April 2007 No50-1-2007, as well as on the Review of the Level of Approximation of the Ukrainian Legislation to the *acquis communautaire* (in version of the January 2007) produced by the State Department for Legal Approximation (SDLA).

1. GENERAL APPROACH

The prioritisation should consider the implemented measures within the frames of the fulfillment of the National Programme on Approximation of the Ukrainian Legislation to the Legislation (National Programme), measures on implementation of the National Programme in 2007, as well as legal approximation component in the EU – Ukraine Action Plan (EU–Ukraine AP), which, by the UEPLAC's opinion, in presence of political will could significantly contribute to the enhancement of the process of legal approximation in Ukraine.

Undoubtedly, the Review of the Level of Approximation of the Ukrainian Legislation to the *acquis communautaire* is an important reference book of the legal approximation process. The Review produced by the SDLA is based on an analytic approach. It allows keeping tracks of new provisions in the Ukrainian legislation which may mirror similar provisions in the EU legislation. Though it gives no indication if the functioning of the Ukrainian legislation achieves the same results as the EU legislation, which is the criterion for the European Commission in assessment of the efficiency of the legal approximation process and implementation of the approximated legislation. Further revision of the Review could focus on these issues in order to avoid formalised assessment of the progress in legal approximation, reduced to the quantity of the transposed EU directives and regulations.

Along with that much work has still to be done for each individual piece of national legislation supposedly aligned to the corresponding piece of the EU legislation. Very often, definitions have to be made fully compatible, and key provisions which are not hampering the social and economic development of Ukraine have to be introduced, as well as the secondary legislation has to be adopted and discrepancies between the existing texts have to be removed.

Consequently, it is recommended to revise in depth the national legal framework to improve the quality of the national legislation. This exercise could be partly done in the PoMLA 2008.

In the course of the year 2007 several predictable events are liable to determine priorities for the year 2008:

- accession to the WTO;
- finalisation of the negotiations process on conclusion of the new Enhanced Agreement, replacing Partnership and Co-operation Agreement between Ukraine and the European Communities and their Member States of 1994 (PCA);
- conclusion of the Agreement on Free Trade Area between the EU and Ukraine.

It is assumed consequently that a lot of work should be dedicated to the several key sectors, namely customs law (e.g. achieving by Ukraine full compliance with the rules on origin) and personal data protection, which is a cross-cutting issue prioritised in all the recent agreements concluded by the EU and which impacts many other areas of the EU legislation (e.g. financial services, transport, labour law, telecommunications, company registration, statistics and market surveillance).

If we consider only legal measures, those which are mostly relevant for the SDLA, we have to sort out priorities for 2008 in three categories:

- priorities not taken into account so far;
- priorities taken into account to a limited extent;
- priorities taken into account with some uncertainty that national measures will ensure compliance with the EU legislation,

which create a basis for the following analysis:

2. PRIORITIES NOT TAKEN INTO ACCOUNT SO FAR

Internal Market

Under the UEPLAC's assessment, in the sphere of Internal Market the priorities not taken into account are as follows:

The priority in the area of public procurement, is clearly expressed under the point (42) of the EU-Ukraine Action Plan, which has not been addressed so far. At least, there is a need to introduce a EU comparable system of remedies in case of disputes. Another step forward could be the opening up of public procurement for utilities.

In the area of customs law, some priorities are set under the point (28) of the EU-Ukraine Action Plan for the introduction of legal measures, which do not addressed in the PoMLA 2007. Therefore these priorities should be included to the PoMLA 2008.

They relate the following:

- adoption and updating of the **Harmonised System** and the adoption of the **Combined Nomenclature**;
- preparation and entry into force of a customs-related legislation: provisions on customs **control of precursors**¹, **dual-use goods**², and **cultural goods**³.

¹ Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors.

² Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology.

As regards, **counterfeit and pirated goods**, the draft Law of Ukraine “On Amendments to the Customs Code of Ukraine” No 2414, adopted by the Verkhovna Rada on 16 November 2006, does not fully mirror the provisions of TRIPS Agreement and EC Regulations No 1383/2003 and No 1891/2004. The situation should be improved in the PoMLA 2008.

It is also needed to fix deadlines in the area of technical regulations (point (30) of the EU-Ukraine AP). It is worth noting, however, that the sphere of fertilizers⁴ has not yet been considered in the legal approximation process.

Environment

The climate change issues in the sector of environment, which are still not reflected explicitly among the priorities of approximation, need particular attention. The objective in this area is to reduce emissions of the greenhouse gases to a level that will not cause unnatural variations of the earth's climate. In the short term, the European Union's aim is to achieve the objectives of the Kyoto Protocol – to reduce greenhouse gas emissions by 8% by 2008-2012 compared to 1990 levels. In the long-term perspective by 2020, it will be necessary to reduce these emissions by 20-40%.

National Environmental Protection Strategy is under development and, as the result, the fulfilment of the Kyoto Protocol is not supported by corresponding legislation. To be included in the European emission trading schemes (ETS) framework for emissions allocation, the Ukrainian side should be supported by legal acts and institutional building, considering national emission targets at once.

Energy

There are several unaccounted priorities in the energy sphere. In the context of a potential connection with the market of Central Europe, special attention should be paid to replacing of the existing “single buyer” model (in Ukrainian case – Energorynok), discordant with the EU Internal Market Directive 2003/54/EC, to competitive bilateral model.

Another important task is carrying out gradual adjustments to bring tariffs on electricity for all consumer groups to conformity with the cost levels of energy production, transition and delivering, as well as gas prices to the cost levels of its sale. This process should be based on the continual improvement of regulatory system for electricity, natural gas and heating, strictly distinguishing natural monopoly elements from competitive market, which are directly connected with the sustainability and competitiveness of economy system developing by its own principles.

In the context of discussion by the Verkhovna Rada of the draft Law of Ukraine “On the National Energy Regulatory Commission” there is a need of revision of competence aiming at ensuring its efficiency as the body of market surveillance and appeal in power and natural gas sector. Other important aim in this course is an improvement of the regulatory methodologies and enhancing transparency of the NERC.

As the proposal of pure technical nature could be considered the studying of a possibility of establishing interconnection of Ukraine with UCTE with the view of participation in the Central European electricity market.

³ Council Regulation (EEC) No 3911/92 of 9 December 1992 on the export of cultural goods.

⁴ Regulation (EC) No 2003/2003 of the European Parliament and of the Council of 13 October 2003 relating to fertilizers.

Justice, Freedom and Security (JFS)

Though JFS sphere still is not among the key sectors of approximation, UEPLAC suggests that efficient implementation of the EU – Ukraine Action Plan on JFS of 2006 (JFS AP) needs consideration of this sphere in the PoMLA. Regarding the flow of negotiations on JFS AP Scoreboard the priorities in PoMLA 2008 seems as follows:

Migration:

- to transfer institutional responsibilities (such as identification of illegal migrants, running of accommodation facilities for illegal migrants and return to the country of origin or former residence) from the State Border Guards Service and the police to the State Migration Service of Ukraine;
- to introduce a normative legal act on social integration of recognised refugees and other categories of legal immigrants;
- to continue revision of the legislative provisions relating to border guard and migration issues, ensuring that the legal framework is sufficient to facilitate legitimate migration while allowing for the deterrence, prevention and detection of illegal migration;
- to entry into force and implementation of EU – Ukraine readmission agreement;
- to establish a network to exchange information on (illegal) migration flows between Ukraine and source and destination countries.

Border Management:

- to develop practices of integrated border management, including by reviewing and simplifying the existing legal framework of basic laws;
- to take part in founding of the International Border Management.

Fight against Organised Crime and Terrorism:

- to consider the adoption of the European Criminal Intelligence Model adopted by Europol in 2005;
- to identify national Ukrainian authorities at operational level (contact points) in order to exchange information with EU Member States' law enforcement authorities.

Human Trafficking:

- to establish a national network of lawyers who might provide legal services to trafficked persons by representing their interests in court.

Judiciary:

- to ensure an adequate level of legal education through certificating, on a competitive basis, law schools which can demonstrate the requisite standards;
- to ensure that the judgments of the Supreme Court are coherently followed by lower courts in accordance with Art.124 of the Constitution;
- to clarify the role of the respective appellate levels;
- to define with precision the jurisdiction of each court;
- to bring the powers of the Prokuratura in line with the requirements of the Council of Europe, including the recommendation of the Venice Commission;
- to establish of predefined criteria and grounds for dismissal of the Prosecutor General of Ukraine;
- to develop an open and fair appointment order of prosecutors;
- to clarify the respective responsibilities of the Prosecutor General and of regional/local prosecutors in relation to a particular case

3. PRIORITIES TAKEN INTO ACCOUNT TO A LIMITED EXTENT

Legislation on Industrial Products

The priority industrial sectors for which Ukraine is aiming at participating in the EU internal market have been selected. These priorities relate to the future conclusion of the ACAAs⁵ for the categories of products subject to New Approach Directives: Electro-Magnetic Compatibility (EMC), Low Voltage (LVD), Machinery and Simple Pressure Vessels (SPV).

Those EC Directives are already reflected in the Ukrainian legislation, and the law approximation process targeting all New Approach Directives will be almost completed through the completion of the PoMLA 2007.

Nevertheless, the entry into force of the related Ukrainian legislation is postponed until the introduction in Ukraine of the full set of CEN/CENELEC Standards. Furthermore, the Order of the DSSU⁶ No 28 of 1 February 2005 provides for a list of products subject to mandatory certification.

The priority set under the point (31) of the EU-Ukraine AP has not been met. As a result, the drastic reduction of mandatory certification for specific products that are not regulated by the EU legislation, or are regulated by the EU through requirements limited to the labelling of products, should be included in the PoMLA 2008.

At once the PoMLA 2008 could provide for various legal and institutional measures to ensure appropriate inspections and market surveillance operations in line with individual New Approach Directives and Regulation (EEC) No 339/93 on checks for conformity with the rules on product safety in the case of products imported from third countries.

For the time being, the Ukrainian legislation on the labelling of non-food products is reflecting the EU legislation only in the indication of prices. The PoMLA 2007 identifies measures on the labelling of textile products but the EC Directive on classification, packaging and labelling of dangerous substances has not been addressed so far.

Food law

Under the *Review 2005* the Regulation 178/2002/EC laying down the general principles and requirements of food law has been fully implemented (except 2 articles).

However, it has to be noted that none of the basic EU implementing Regulations (food hygiene package) has been addressed so far:

- Regulation (EC) No 853/2004 of 29 April 2004, laying down specific hygiene rules for food of animal origin;
- Regulation (EC) No 852/2004 on the hygiene of foodstuffs;
- Regulation (EC) No 882/2004 of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules;
- Regulation (EC) No 854/2004 of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption.

⁵ Agreement on Conformity Assessment and Acceptance of Industrial Products.

⁶ State Committee for standardisation, technical regulations and consumer protection.

The PoMLA 2007 contains measures on feedstuffs, epizooties and zoo-technical requirements. That is not sufficient to meet the priorities set under the point (32) of the EU-Ukraine AP (towards the requirements of WTO/SPS Agreement).

There is still a lot of work to do to allow Ukraine to export foodstuffs to the EU. Apart from the hygiene package mentioned above, Ukraine has to fill stock of the gaps in the national legislation to be aligned with the EC rules on the following:

- Animal health rules governing the production, processing, distribution and introduction of products of animal origin for human consumption;
- Procedures and maximum level of contaminants in foodstuffs;
- Contamination due to contact with foodstuffs, food packaging and containers (plastics, ceramics, cellulose);
- Products added to improve the organoleptic properties of foods (colorants, sweeteners flavourings) and verification of purity criteria for certain additives;
- General requirements on product labelling and packaging (labelling, presentation and advertising of foodstuffs, identification of foodstuffs by lot, foodstuffs treated with ionising radiation, frozen food);
- Identification and labelling of specific products (for example, beef products, organic production, milk derivatives);
- Animal welfare.

To take benefit from the future free trade agreement between the EU and Ukraine, it is recommended to focus on the food law in the PoMLA 2008 and to conduct at once an institutional and administrative reform for its correct implementation (with clear allocation of responsibilities between various institutions).

Establishment and operations of companies

Under the analysis of the Ukrainian legislation (e.g. Draft law No 2402 adopted on 16 November 2006 authorising foreign banks to open branches), as well as under results of the meetings with the stakeholders (the SDLA, the National Bank of Ukraine), it has become clear that the distinction between ‘subsidiary’ and ‘branch of a company’ is not well perceived in Ukraine. The concept of “permanent establishment” (for taxation purpose, in line with the OECD requirements) is wrongly assimilated to the concept of subsidiary.

Therefore it is recommended to scrutinise and, where appropriate, to revise the pieces of the Ukrainian legislation concerning the establishment branches of foreign companies.

Environment

The principles of the Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage are taken in account partly. Under the terms of the Directive, environmental damage is defined as:

- a) direct or indirect damage to the aquatic environment covered by Community water management legislation ;
- b) direct or indirect damage to species and natural habitats protected at Community level by the 1979 “Birds” Directive or by the 1992 “Habitats” Directive;

- c) direct or indirect contamination of the land which creates a significant risk to human health.

The "polluter pays" principle, which is in the heart of Directive, must be taken into account in all legal acts related to the environment of Ukraine. Trans-border pollutions will relate to specific conventions and bilateral international agreements.

Energy

With the view of continuation of fulfilment of the EU – Ukraine AP target (51) on the possibility for Ukraine to take part in the Intelligent Energy-Europe Programme, it is proposed to ensure necessary prerequisites, which include the existence of the National or Regional Energy Efficiency Agencies (the EU might finance 50% of Agencies internal costs for 3 years), sustainable legal base and implementation measures (monitored by the EU Intelligent Energy Agency). That is why it is also proposed to enhance the competence of the National Agency for Efficient Use of Energy Resources and to establish its regional branches.

In the PoMLA 2008 particular attention should be paid to the elaboration of the Concept of operation and development of the Wholesale electricity market of Ukraine considering the EU Energy legislation and trends of the EU electricity market developments. In this field the project for rehabilitation of hydropower plant governors is already launched within the frames of the World Bank's loan project for reformation of the power sector in Ukraine. Amendments to exiting sector legislation are non-avoidable. Those amendments will be related to approximation and broad regulatory impact assessment activities. Mentioned approximation will be related not only to primary legislation, but in great extend to secondary norms as well. Adoption of the general principles of the UCTE Hand Book for cross-boarder trade of electricity is the simplest way how to recognize legal approximation areas in power sector.

Another one potential priority of the PoMLA 2008 is the target (57) of the EU – Ukraine AP in the context of ensuring of the nuclear safety and adoption of a nuclear waste strategy. Provisions of the Council Directive 96/49/EC are partially incorporated in Ukrainian legislation, but issues of transportation dangerous goods trough the domain of Ukraine must be reflected in full extents by national legislation. Nuclear waste strategy will be intensively discussed during the negotiations on PCA. No doubt, amending legislation will be urgently required. Therefore this part of approximation will be paramount important, and nuclear waste strategy will facilitate assessment of performance standards and quality of legislation.

The PoMLA 2008 should also consider the target (53) of the EU – Ukraine AP regarding energy networks, particularly in the issues of increasing performance of networks and reduction of network losses (oil, gas, electricity). And thus, it is proposed measures to make transmission and distribution tariffs transparent and cost reflective. It is worth stressing that not only good regulatory practices will give the contribution, but balanced legal requirements for reasonable framework on information collection, performance standards of network companies and customer information systems.

The EU does have great experience and cooperation practice in this specific field. The same time problem of market access might be solved, which allows make approximation process more practical and bringing benefits to customers and other market participants of Ukraine. Specific issues of network security, quality of services and good functioning of market would be covered by this chapter.

The target (54) of the EU – Ukraine AP on the transit of natural gas, namely increasing of performance, safety and security of the gas transit networks is one of mutual interests for all parties

involved – Ukraine, EU and Russia, especially in the context of the new PCA negotiations. The European Charter Treaty is important argument for transparency, but EU Directives and regulations are binding for EU parties, therefore they are approximation indicators and benchmarks, and thus they are the guiding lines for the approximation in the PoMLA 2008. Approximation of transparency clauses will be in the core of substantial improvement of cooperation.

Continuing the fulfilment of the target (56) of the EU – Ukraine AP on progress in improving energy efficiency and enhancing the use of renewable energy, it is proposed to focus on the approval of the Energy Efficiency Strategy and relative state programme, directed on the substantial efficiency gains, savings and security of supply improvements. Involvement in early stage of legal activities in the demand side sector is needed and will facilitate regulatory impact assessment.

In this light the approval of the Law “On Efficient Use of Energy Resources” with appropriate impact assessment of its draft, as well as the Law “On Energy Audit” are also important to improve efficiency gaining for public and private sector in buildings, specifically in time of booming construction activities and active real estate market.

4. PRIORITIES TAKEN INTO ACCOUNT WITH SOME UNCERTAINTY REGARDING COMPLIANCE WITH THE EU LEGISLATION

The PoMLA of 7 March 2007 is addressing a number of pieces of the EU legislation. Notwithstanding it is dubious that such work on law approximation could be completed by the end of 2007. Secondly, it is not expressed in the Plan whether Ukraine is seeking full or partial compliance with the EU legislation. Thirdly, there is always a risk of a flawed transposition. Depending on the assessment to be made at the end of 2007, some priorities of the PoMLA 2007 should be postponed or revised in the PoMLA 2008.

They may include the following:

Company law

The priorities set under the point (17) of the EU-Ukraine AP (eliminate inconsistencies in the existing Economic and Civil codes) and under the point (20) on the adoption of a new joint stock company law are liable to be met in 2007. Furthermore, the PoMLA 2007 foresees the adoption of the law on limited liability companies.

It is expected that the national legal framework will achieve conformity with the corresponding EU legislation. The assessment should be made when the final version of the draft laws will be submitted to the Verkhovna Rada indicating if the continuation of work is necessary in 2008.

Bankruptcy Law

Bankruptcy law is a priority in the PoMLA 2007. It seems that the main purpose of this initiative is the introduction of provisions to deal with the cross-border aspects of insolvency procedures. The priority set under the point (33) of the EU-Ukraine AP does not go so far. The main issue is the proper functioning of the current law.

Competition and State Aids

Some of the measures contained in the PoMLA 2007 intends to deal with the objectives (39) and (40) of the EU-Ukraine AP. It is realistic to expect the adoption of the procedural rules to implement the national anti-trust legislation. By contrast, the issue of state aids is more sensitive, especially while continuation of a discussion on the definition of state aids. On the WTO and EU levels, only full compliance with the definitions will be acceptable.

Intellectual and Industrial Property Rights (IPR)

To a large extent the basic EU legislation on IPR prioritised in the White Paper for CEECs (trade marks and copyright) is already reflected in the Ukrainian legislation and the PoMLA 2007. Furthermore, the PoMLA 2007 adds others measures to address the EU legislation on plant variety rights. Maybe, in the PoMLA 2008 Ukraine could move again forward to deal with other issues, considered as “priority stage I” in the White Paper for CEECs: topographies of semiconductors, computer programs. The partial harmonisation could be also advanced in the following areas: copyright applicable to satellite broadcasting, geographical designation of origin and certificate of specific character for agricultural products, design, databases. More importantly, the focus should be put on the effective enforcement of IPR to ensure “a level of protection similar to that in the EU” (point (41) of the EU-Ukraine AP).

Labour law, Health and Safety at Work, Social security

The priorities set in the EU-Ukraine Action Plan under the points (11) and (21) relate to the application of the best endeavour clause of the article 51 of the PCA. There are no tangible targets to be reached within a limited period of time.

Some work has been made in those fields and there are also a number of measures in the PoMLA 2007 (health and safety at work, working time, etc). Nevertheless, in most cases the relevant pieces of EU legislation are not fully implemented. Sometimes, the definitions are not compatible, sometimes, key provisions are missing.

It is recommended to review the national legal framework accordingly.

Indirect Taxation

The PoMLA 2007 provides for a very advanced stage of transposition of the EU legislation on the VAT and excise-duty (rates, exemptions, etc). The objective (38) of the EU-Ukraine AP, seeks for more modest results: efficiency of the legislation (VAT refund backlog) and removal of discrimination on imports (adoption and implementation of VAT and excise-duty legislation compatible with the PCA and WTO norms). It would be advisable to address the longstanding issues of the functioning of the existing legislation before envisaging further alignment.

Other areas

It is noted that the PoMLA 2007 identifies a number of legal measures in the area of free movement of goods (Old Approach). This ambitious programme includes the following sectors:

- Cosmetics

- Vehicle Type-approval (motors vehicles/trailers, two or three wheeled motorised vehicles, agricultural and forestry tractors)⁷
- Detergents
- Pharmaceuticals

As regards, the law approximation process to progressively allow the supply of financial services between the EU and Ukraine, the PoMLA 2007 intends to improve the regulatory and supervisory framework towards the *acquis communautaire*.

Depending on the results achieved in 2007, the PoMLA 2008 probably will have to fill the gaps between the national legislation and the EU legislation in the same fields.

Guiding by the further conceptualisation of legal approximation measures in 2008, the UEPLAC suggests it impossible without assessment of the implementation of the PoMLA 2007 and measures on fulfilment in 2007 of the EU – Ukraine AP. Thus, the Project expresses its readiness to co-operate closely with State Department for Legal Approximation and other partners on working out of the joint adjusted approach to the formulating of the targets and concrete measures of the process of approximation to the *acquis communautaire* in Ukraine.

⁷ It is assumed that the approximation process does not aim at transposing the EC Directives but, more significantly in the case of Ukraine, takes into consideration the 1958 Agreement of the United Nations Economic Commission for Europe (UN/ECE) on international technical harmonisation in the motor vehicle sector and the Global Agreement of 1998 (ECE/TRANS/132), where the European Community is actively participating.