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REVIEW

Approximation of environmental legislation: on the way to EU membership

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Abstract

Ukraine’s candidate status for EU membership, granted in June 2022, should be a new turning point in the process of approximation, including environmental and climate change issues. The need to implement relevant environmental and climate change EU legislation can also become so called red lines ensuring that the post-war reconstruction of Ukraine is indeed green and based on the „build back better and greener“ principle. Ukraine has already fulfilled a number of obligations that are key to becoming a full member of the EU, and is not starting from the scratch. The Government of Ukraine declares 64% fulfilment of the obligations in the field of environmental protection and climate change under the EU-Ukraine Association Agreement. There were and remain a number of political, legal, institutional and technical challenges in the implementation process, as well as the need for financial, human and other resources to speed-up the progress. However, Ukraine has gained unique experience, among other things, in the field of approximation, which can be used now, when the process of approximation of legislation should become much more dynamic and effective than at the times before the status of a candidate for EU membership was granted.

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Approximation of environmental legislation: on the way to EU membership

Nataliya Andrusevych

1 Introduction and historical background

Adapting Ukrainian legislation to EU legislation has a long history:¹ Article 51 (1) of the Agreement on Partnership and Cooperation between the European Communities and their Member States and Ukraine (signed in 1994) highlighted the importance of approximation of Ukrainian legislation to the EU legislation. The Agreement established the obligation of Ukraine to “endeavour to ensure that its legislation will be gradually made compatible with that of the Community”.

A number of documents setting the framework for the process of approximation were adopted at the time when the ideas of European integration, and even more so Ukraine's membership in the EU, were rather unpopular. These were the ‘Strategy for the Integration of Ukraine into the European Union’², the ‘National Program for the Adaptation of the Legislation of Ukraine to the Legislation of the European Union’³, the Ukraine-EU Agenda⁴, and other national and bilateral documents.

However, the process of adapting legislation, including in the field of environmental protection, was not very successful at that time, and progress was more than modest. The turning point was the signing of the Association Agreement in 2014 between Ukraine and the European Union, of the one hand, and the European Union, the European Atomic Energy Community and their member states, of the other. It marked the beginning of a new phase of relations between Ukraine and the EU, which involved political association, economic integration, including a free trade zone, and a wide range of industry cooperation.

From that moment on, the issue of implementing European legislation took on a different meaning and dimension: most of the reforms in the country, in particular in the field of the environment, are associated with it. The issue of the Agreements’ implementation acquires not only a political, but also a legal meaning. Ukraine was obliged to start adapting the legislation from November 1, 2014 (for provisions on the free trade zone - from January 1, 2016), so that to ensure that “its existing laws and future legislation

will be gradually made compatible with the EU acquis”⁵.

In the field of environmental protection, Ukraine received a clear task - to implement 29 directives and regulations in eight thematic areas: environmental management and integration of environmental policy into other sectoral policies; atmospheric air quality; waste and resource management; water quality and management of water resources, including the marine environment; nature conservation; industrial pollution and technogenic threats; climate change and protection of the ozone layer; genetically modified organisms.

The Association Agreement gave impetus to systematic and permanent work on environmental reforms in Ukraine and became a signpost for changes in the coming decade.

Several main stages of planning the implementation process of the Agreement can be distinguished:

*Approval of the Plan for the implementation of the Association Agreement for 2014-2017*⁶.

The plan defined the deadlines of implementation and responsible state authorities. The plan defined the measures necessary for the implementation of the provisions of the Agreement. In environmental sphere, they were mainly limited to the development of normative legal acts. The plan also defined those responsible for the implementation of the concrete measure, time frames and partners from the EU side.

Approval of detailed implementation plans for each specific directive and regulation.

Most of the plans for the environment were approved by a 2015 Decree of the Cabinet of Ministers of Ukraine ‘On Approval of the developed by the Ministry of Environment and Natural Resources plans for the implementation of some acts of EU legislation’⁷ (20 directives and regulations). Such plans defined the purpose and tasks, contained a brief description of the current state of implementation of the act of EU legislation in Ukraine and the expected results of the implementation and determined the main responsible and co-responsible bodies. In addition, the measures for the implementation of the directive were put in a table, listing (a) legislative measures (development of a normative legal act), (b) organizational measures (measures aimed at

¹ This article is based on author's 20+ years' experience, as a chair and chief analyst of an environmental think tank organization, in monitoring, assessing and assisting Ukraine's integration to the EU in environmental area, including approximation of its environmental legislation to the EU acquis.

² Decree of the President of Ukraine, 2015.

³ The Law of Ukraine 1629-IV of 18.03.2004, accessible [here](#).

⁴ EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement, as endorsed by the EU-Ukraine Association Council on 16 March 2015, accessible [here](#).

⁵ Art.114 of the Association Agreement.

⁶ Order of the Cabinet of Ministers of Ukraine, 2014.

⁷ Order of the Cabinet of Ministers of Ukraine, 2015.

organizing the implementation of the upcoming legislation, ensuring the effectiveness of the relevant functions and procedures, maintaining relevant databases, acquiring and installation of the necessary equipment, etc.), (c) institutional measures, (d) coordination measures (interagency monitoring of the implementation of the measure, establishment of the effective work of procedures for the distribution of competences of state bodies, etc. defined by law), (e) joint measures (upon consent and upon proposals by) with representatives of business community and/or the public.

*Approval of the Action Plan for the Implementation of Chapter IV 'Trade and Trade-Related Issues' of the Association Agreement for 2016-2019*⁸.

In addition to specific measures and those responsible for their implementation, the plan defined indicators for every measure and sources of funding. Regarding the environment, the plan referred to the set-up of a Subcommittee on sustainable development and trade, an advisory group on sustainable development, and an assessment of the impact on sustainable development (sustainability impact assessment).

Update of measures to implement the sectoral part of the Association Agreement between Ukraine and the EU.

The government approved the plan of measures for the implementation of Chapter V 'Economic and sectoral cooperation' of the Association Agreement between Ukraine and the EU for 2017-2019 with the introduction of relevant changes to the Decree of the CMU dated September 17, 2014 No. 847⁹. In the area of approximation, the emphasis was on the implementation of relevant plans for the directives and regulations. It also included provisions for updating Annexes XXX and XXXI to Chapter V of the Agreement. In the field of civil protection, it provided for plans to establish cooperation within the framework of an associated partnership within the framework of the cooperation instrument 'EU Civil Protection Mechanism'.

*Approval of the Action Plan for the Implementation of the Association Agreement*¹⁰.

It was adopted in October 2017 and replaced the previously approved plans, including plans for the implementation of specific directives and regulations. This plan became the largest planning document in the field of European integration, containing a total of 1,943 tasks covering all areas of the Association Agreement.

Although the Ukrainian Government declares 64% fulfilment of European integration obligations in the

field of environmental protection and climate change (as of mid-2022)¹¹, Ukraine lags behind the approximation schedule. There are a number of political, legal, institutional and technical challenges in the implementation process, as well as the need for financial, human and other resources to increase the progress.

Ukraine's acquisition of candidate status for EU membership in June 2022 should be a new turning point in the process of approximation, including environmental and climate change issues, because the issue of approximation of Ukrainian legislation to EU legislation is changing from a 'homework' into a requirement without the fulfilment of which full membership in the EU is impossible.

2 Challenges

Despite Ukraine's efforts in the direction of institutional consolidation of the approximation process (separate position of vice-prime minister for Euro-Atlantic and European integration, creation of a government office for European integration, introduction of deputy minister positions for European integration in each ministry) and implementation of strategic approaches to the planning process and convergence. Nevertheless, a number of challenges arose in the process of approximation of its legislation¹².

The first group of challenges that can be identified in the process of approximation is of a legal nature. They mainly derive from the legal nature of the secondary sources of EU law. For example, given the legal nature of the regulation and the impossibility of its direct application in Ukraine, no special mechanism for the most effective implementation was developed. In some cases, the goals defined by the directives concern only EU member states (see, e.g. Habitats and Birds Directives), and their achievement was impossible by Ukraine itself or could not have a positive impact on the state of the environment in Ukraine. Neither Ukraine nor EU at the bilateral level considered the issue of taking into account the decisions of the Court of Justice of the European Union when implementing the *acquis communautaire*. Taking into account the significant practical experience of the EU member states in the implementation of secondary EU legislation and the importance of the interpretation of the provisions of directives and regulations by the CJEU, Ukraine was not able to take duly into account the problems (as addressed by CJEU in its case law) faced by the EU member states during the implementation process.

⁸ Order of the Cabinet of Ministers of Ukraine, 2016.

⁹ Order of the Cabinet of Ministers of Ukraine, 2014.

¹⁰ Resolution of the Cabinet of Ministers of Ukraine, 2017.

¹¹ Official monitoring web-portal of Agreement's implementation, see <https://pulse.kmu.gov.ua/ua/current-progress>.

¹² Resource & Analysis Center "Society and Environment", 2016.

The control function of the Commission and the review procedure of the Court of Justice of the European Union have an important influence on the effective implementation of the provisions of secondary EU legislation. Accordingly, the state bodies of Ukraine, which are not a member of the EU, cannot be pressured in the event of the absence or improper implementation of European legislation. Of course, Ukraine reports on the fulfilment of its obligations under the Association Agreement, and the European Commission prepares its report¹³, but such reporting is more of a political nature, and does not perform the function of control or supervision of the approximation process. No special mechanism for the implementation of each specific directive or regulation was created in Ukraine. This causes the problem of proper control over the implementation of directives.

A number of directives provides for actions and measures in cooperation with other member states at the EU level or special conditions for member states. This approach leads to asymmetric implementation and puts Ukraine outside the scope of such activities. A number of directives provides for the creation within the framework of the application of the directive of special bodies that facilitate and assist EU member states in their implementation (REACH is a notable example). Not being a member of the EU, Ukraine does not have the opportunity to use the results of the work of such bodies or to be involved in their work. Sometimes, for a more effective implementation of a directive/regulation and to improve the coordination of implementation measures, directives provide for the creation of special bodies and determine their powers.

Among the challenges of a technical nature, first of all, it is necessary to mention the dynamism of the process of legislation development in the EU itself. For Ukraine, there is no mechanism for implementing the latest editions of documents and involving Ukraine in the discussion on the most pressing issues in the relevant field. In addition, there is an acute problem of the quality of the translation of the corresponding act of European law into Ukrainian language.

Although the issue of approximation of legislation is a legal process by nature, political factors and support are important, if not crucial, to the process¹⁴. One of the reasons for little progress in the implementation of the environmental component of the Agreement remains the low priority of environmental issues on the agenda of the Government and Parliament of Ukraine. It is especially important to have a strategic vision for reforming the environmental sphere as a whole and its sectors in particular. Nevertheless,

recently there has been an increase in attention to climate issues, which is mainly caused by the adoption and implementation of the European Green Deal¹⁵ in the EU, which aims to achieve climate neutrality in Europe by 2050. Ukraine has declared its desire to become a part of this ambitious European initiative, therefore the issues of the environment and climate change began to appear more on the agenda not only of the relevant ministry for environment, but also of other bodies of executive and legislative power.

In addition, an important condition for the promotion of European integration reforms is political leadership. With the change of power in 2019, the Association Agreement ceased to be a driver of reforms, in particular in the field of the environment, and its implementation was considered more as a part of the national agenda and a guideline for the development and the adoption of legislation. The 'turbo regime' of the parliament did not become a positive factor in the promotion of environmental reforms, and the merger of the Ministry of Energy and the Ministry of Ecology in 2020 further weakened the role of environmental issues and the priority of approximation of environmental legislation.

The effectiveness of the practical implementation of the Agreement in the environmental sphere depends on the success of the corresponding sectoral reforms, which essentially means a fundamental restructuring of the regulatory system in such sectors. Often, the implementation of European legislation is completed at the stage of planning or development/adoption of a normative legal act, while successful implementation can be considered only when relevant instrument or mechanism works in practice. Therefore, it is important not only to harmonize Ukrainian legislation with EU legislation, but to reform entire sectors of environmental and climate policy. This should not result in minor changes, but in comprehensive and systemic reform of sectors. Currently, practical implementation in the field of environment is taking place on such issues that did not require changes in the hard sectors, for example, EIA, SEA, access to environmental information. However, those areas that require a fundamental change in the management structure, a complete reboot, financial and investment support are 'sliding'. These include atmospheric air, waste, industrial pollution, water.

Another serious challenge in the implementation process is the low level of involvement of the regions in the development and adoption of reforms for the implementation of the Association Agreement¹⁶. In Ukraine the process of implementation of the Association Agreement in the field of environment is currently focused on the central level - relevant

¹³ See the latest report at https://ec.europa.eu/commission/presscorner/detail/es/ip_20_2259.

¹⁴ Resource & Analysis Center "Society and Environment", 2020.

¹⁵ European Commission, 2019.

¹⁶ Andrushevych et al., 2017.

ministries, government, and parliament. However, most of the reforms carried out in the environmental sphere have a clearly expressed regional component - they assign new functions to local authorities and create new opportunities for regions. The mechanisms of involvement of regions in the implementation of the Association Agreement are far from being perfect. As a result, local authorities, communities and the public remain aloof from the processes important to them, in which they should be full-fledged players, and not only executors, when the implementation process reaches the stage of practical implementation of the adopted strategies, laws, regulations, by-laws.

Among the challenges that are particularly acute in the process of implementing the Agreement at the regional level, one can single out:

- the non-systematic nature of the involvement of regional state administrations by the central government in Ukraine;
- the formality of planning the implementation of the Agreement at the regional level and reporting;
- low level of information about obligations, in particular, about benefits from the introduction of European directives and regulations;
- lack of proper institutional and financial capacity of the regions to carry out at local level the reforms approved at the national level, etc.

3 Conclusion and lessons for the future

The process of approximation of legislation within the framework of the Association Agreement is an important stage on the way to Ukraine's membership in the EU. First, Ukraine has already fulfilled a number of obligations that are key to becoming a full member of the EU, and is not starting from the scratch. Secondly, Ukraine has gained unique experience, among other things, in the field of approximation, which can be used now, when the process of approximation of legislation should become much more dynamic and effective than at the times before the status of a candidate for EU membership was granted.

What is important in the process of fulfilling obligations for EU membership is not only the implementation of specific legal norms, but also the spirit of European integration as such, the values, principles, and foundations on which the new legislative and regulatory system in Ukraine should be based. Therefore, the result of effective implementation in the field of environment and climate change is the implementation not only of individual EU acts, but of EU principles of environmental policy and law as a whole. The functioning of individual European mechanisms and models in practice should take into account national characteristics. The implementation of the Association Agreement in the area of environment and climate was

mainly focused on the implementation of Annex XXX of the Association Agreement, which is aimed at approximating Ukrainian legislation to 29 EU directives and regulations in 8 thematic areas. However, a number of articles in Chapter 6 'Environment', Annex XXXI on climate policy, Chapter 13 'Trade and sustainable development' are left out, although they contain a number of important principles and approaches that should apply to environmental and climate policy and law in Ukraine. This includes, among other things, the integration of environmental policy into other areas, the implementation of multilateral environmental agreements, institutional reform, the implementation of the polluter pays principle and the precautionary principle. The directives provide for a wide range of possible actions for Ukraine while simultaneously complying with the principles and achieving the goals of the directives.

In the process of approximation to the EU legislation, it is important to take into account the latest trends and progress in certain areas in the EU itself. If we talk about environmental and climate issues, this is, first of all, the European Green Deal. It envisages significant changes not only in the environmental and climate legislation itself, but also the close integration of climate and environmental issues into other spheres of politics and public life. When implementing directives or regulations, it is necessary to take into account the availability of newer versions of the document. This will help to implement the most progressive approaches in Ukraine in relevant fields and will provide an opportunity to participate in discussions on such issues at the level of the European Union.

Special attention should be paid to the role of the EU in the approximation processes, especially in cases when there is a need for special solutions related to the difficulties of implementing the Association Agreement, as well as regarding the implementation of obligations related to cooperation and dialogue. In this context, it is also important to verify the compliance of normative legal acts adopted for the purpose of implementing EU law, their compliance with a specific EU directive or regulation, as well as the effectiveness of the proposed national mechanisms. Such verification should not only be a formality, such as the submission of a letter stating compliance with the legal act of the *acquis communautaire*. But a detailed analysis by lawyers and relevant specialists of a narrow profile should be carried out. Now the issue of compliance will be extremely acute, as it is key in the case of assessing compliance with the criteria for Ukraine's membership in the EU.

Ukraine must arrange for official translation of all documents that Ukraine must implement. In the process of translation, one should carefully approach

the translation of terms, especially in case of the absence of such a term in Ukrainian legislation.

The involvement of regions in the process of approximation and practical implementation of the *acquis communautaire* should be more effective. For this, it is necessary, first of all, to improve the implementation process itself by introducing a clearly defined regional component (by replacing general planning with the design of specific reforms and monitoring, by systematizing the process of regional planning of measures, by strengthening the awareness of local communities and local authorities about reforms and benefits that they carry for communities, taking into account the financial capacity of regions to implement environmental reforms locally). The processes of implementation of European legislation, decentralization and regional development should be coordinated as much as possible. In particular, this can be achieved by supplementing regional development strategies with clear goals for European integration and the implementation of the Agreement, by developing a vision of the functions and role of local authorities in environmental protection, delineating their functions with other (including, central) authorities¹⁷.

Implementation of European legislation requires significant direct costs at all stages of the process. The expected result of the effective implementation of sectoral environmental acts (waste, water, air, etc.) is a deep reform of the relevant markets, which in turn requires significant investments (in technologies, business processes, education). The first stages of implementation (evaluation, transposition) require significant funds, too. This is due to the lack of qualified experts in Ukraine, which in turn requires the involvement of European experts. Therefore, current implementation takes place only in those areas where the EU or other states provide direct support. In turn, this approach prevents the Government from prioritizing the process and makes its effectiveness dependent on the success of international technical assistance projects implemented by private (usually European) companies. Therefore, it is necessary to carry out a pragmatic and objective assessment of direct costs.

Implementation of directives and regulations should not end or be limited to the stage of transposition of relevant European norms into Ukrainian legislation. For the practical implementation of future legislation to happen, especially for the implementation of sectoral directives, the process should be accompanied by a detailed economic and social forecast, as well as be supported by the implementation of specific financial instruments. In this context, it is also important to make the most of the legal nature of the

directives – namely, the possibility of applying different implementation options, rather than one proposed model. This will make it possible to take into account national features, special conditions for the functioning of one or another sector in Ukraine, and choose the best policy option for Ukraine.

It is important to ensure support by various stakeholders to Ukraine's integration into the EU: communities, scientists, businesses, public organizations, citizens. Therefore, great attention should be paid to awareness raising and explaining the benefits of EU membership for different target groups.

Ukraine's preparations for full membership in the EU will take place in difficult times. The approximation of the legislation and the implementation of other mandatory tasks will take place simultaneously with the implementation of the Ukraine's post-war reconstruction plans. Environmental and climate requirements and the need to implement relevant legislation in these areas that can become so called red lines ensuring that the post-war reconstruction of Ukraine is indeed green and based on the 'build back better and greener' principle.

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¹⁷ Resource & Analysis Center "Society and Environment", 2018.



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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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