# *Acquis* of European Union and Legal Order of Ukraine

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**Summary:** The article is devoted to the analysis of the concept and content of EU acquis as well as on its role in the legal regulation of the European integration and of the EU external relations. The content of acquis is characterized by stability and flexibility depending on whether it forms the basis for the legal order of the European Union or fixed in international agreements with the third countries thus transposing the EU law in their internal legal orders. The signing of the Association Agreement by Ukraine with the European Union and its Member States provides for the country a perspective of its integration in the Union with possible membership in it upon the creation of the free trade area between both partners. The effective using of implementation legal tools requires from Ukraine establishing the proper and relevant legal background. Certain prerequisites for the application of the EU acquis into the Ukrainian legal order have been created. The legal basis for the realization of the EU law in Ukraine is formed by the Constitution and national legislation of Ukraine. However, Ukraine is required to make some radical amendments in its legislation to insure the efficient realization of the Association Agreement in the internal legal order. The most important instrument of the realization EU acquis in the internal legal order of Ukraine is harmonization of legislation. In relations between the EU and Ukraine the compatibility of the Ukrainian legislation with EU law can be achieved at the level of international obligations and the level of EU obligations. Harmonization of Ukrainian legislation with that of the EU remains the most powerful legal instrument for the expansion of the acquis into the internal legal order of Ukraine.

**Keywords**: European Union, EU law, acquis, harmonization of legislation, legal effect, association agreement, implementation, legal mechanism.

It was not until quite recently that the term *"acquis"* has been introduced in legislative acts of Ukraine[1] and in the Ukrainian doctrine of European law.[2] In

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[1] The Programme of Integration of Ukraine into the European Union, approved by Ukrainian President's Decree No. 1072 of 14 September 2000.

[2] Muraviov V. Legal foundations of the regulation of economic relations of European Union with third countries (theory and practice). – K.: Academ – Press, 2002, 426 p.

Ukraine this notion is primarily used in the context of determining the parameters for the harmonization of Ukrainian legislation with legislation of the European Union (EU). Among foreign and Ukrainian legal publications which are devoted to general issues of the role of the *acquis* in the process of European integration are the works by C. Gialdino,[3] A. Ott,[4] A. Toth,[5] G. Van der Loo,[6] N. Mushak[7], R. Petrov.[8] However, these authors have not given special attention to how the content of the acquis is determined and what is its scope for the third countries that have international agreements with the EU. These issues need to be researched so as to discern special features of the legal character of the EU law, its sources, and means of its impact on the legal orders of third countries that have contractual relations with the Union – all this is on the agenda of the Ukrainian science of European law. This task is of great practical significance to Ukraine, since it is directly connected with the issue of establishing legal frameworks and the limits for the harmonization for Ukrainian legislation with the European Union's legislation in the process of implementing the Association Agreement (AA) between Ukraine, on the one hand, and the European Union (EU) and the Member States, on the other,[9] and other documents relating to the co-operation of the parties in the process of developing the European integration and extending its legal effect into the internal legal order of Ukraine.

It should be noted that an important feature of the EU legal order is that its basis constitutes the so-called *acquis.* A special importance of the *acquis* concept consists in guaranteeing homogeneity of the legal system of the European Union, since it is based on the idea that its elements may not be changed in the process of cooperation with other subjects of international law. As a whole, it ensures the integrity of this system and necessarily a uniform application of EU law in all the Member States.[10]

Homogeneity of law of European Union is maintained, in particular, in the light of the interpretation given by the Court of Justice of European Communities

[3] Gialdino C. Some Reflection on the Acquis Communautaires // Common Market Law Review. – 1995. – V. 32, No. 3. – p. 1089–1121.

[4] Handbook on European Enlargement. Commentary on the Enlargement Process / Edited by A. Ott and K. Inglis. The Hague, 2002. 1116 p.

[5] Toth A. Oxford Encyclopedia of European Community Law. Oxford, 1990. 985 p.

[6] The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: a New Legal Instrument for a EU Integration without Membership. – Leiden/Boston, 2016. – 398 p.

[7] Mushak N. Role of Acquis in the EU Legal Order, Evropský politický a právní diskurz, Volume 4, Issue 3, 2016. P. 21-26.

[8] Petrov R. Transposition of the European Union acquis into the legal systems of the third countries. – K.: Istina, 2012. – 364 p.

[9] OJ L 161/3

[10] Case 104/81, Kupferberg [ 1982] ECR 3641.

(ECJ) to EU law in several of its rulings. The Court sees EU law as a new legal order for the sake of which the States have restricted their sovereign powers and which is distinct both from international law and domestic law.[11]

The term *"acquis"* is of French origin. Although it has its equivalents in other languages of the Member States and third countries, lots of documents and papers on EU law use this French version.[12] References to the *acquis* may be found in the Lisbon Treaties on the European Union and on functioning of the European Union, documents adopted by EU institutions, international agreements of the Union and the ECJ's rulings. In particular, references to the *acquis* may be found in the Article 20 of the Treaty on European Union stating that "Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union". According to Article 87 of the Treaty on functioning of the European Union "The specific procedure provided for in the second and third subparagraphs (of this Article – V.M.) shall not apply to acts which constitute a development of the Schengen *acquis*". Article 7 of the Protocol 19 attached to Lisbon Treaties provides that "For the purpose of the negotiations for the admission of new Member States into the European Union, the Schengen *acquis* and further measures taken by the institutions within its scope shall be regarded as an acquis which must be accepted in full by all States candidates for admission".

References to the *acquis* are also contained in the EU legal acts on matters of foreign relations of the Union. An explicit interpretation for the notion of the *acquis* can be found in the Opinion of the EC Commission of 23 May 1979 concerning the accession of Greece to the European Communities. The EC Commission considered that, in joining the Communities the applicant state accepts without reserve the Treaties and their political objectives, all decisions taken since their entry into force, and the actions that has been agreed in respect of the development and reinforcement of the Communities; it is essential feature of the legal system set up by the Treaties establishing the Communities that certain provisions and certain acts of the Community institutions are directly applicable, that Community law takes precedence over any national provisions conflicting with it, and the that procedures exist for ensuring the uniform interpretation of this law; accession to the Communities entails recognition of the binding force of these rules, observance of which is indispensable to guarantee the effectiveness and unity of Community law; the principles of pluralist democracy and

[11] Case 26/62, Van Gend en Loos [1963] ECR 1.
[12] Gialdino C. Ibid, p. 1090.

respect for human rights form part of the common heritage of the peoples of the States brought together in the European Communities and are therefore essential elements of membership of the Communities.[13]

It should be noted that this Opinion of the EC Commission only relates to the *acquis* of the European Communities. It was specified further in the European Council's conclusions made at its session on 26 and 27 June 1992 in Lisbon already in regard to the *acquis* of the European Union as a structure encompassing the EC, the common foreign and security policy, co-operation in matters of law enforcement and internal affairs. In determining the conditions and criteria for acquiring the membership in the European Union, the European Council has noted that the membership implies the acceptance of the rights and the obligations actual and potential, of the Community system and its institutional framework – the Community *acquis,* as it is known. That means:

- the contents, principles and political objectives of the Treaties, including the Maastricht Treaty;
- the legislation adopted in implementation of the Treaties, and the jurisprudence of the Court;
- the declarations and resolutions adopted in the Community framework;
- the international agreements, and the agreements between Member States connected with the Community's activities.

The assumption of these rights and obligations by a new Member may be subject to such technical adaptations, temporary (not permanent) derogations, and transitional arrangements as are agreed in accession negotiations. The Community will show comprehension for the problems of adjustment which may be posed for new members, and will seek adequate solutions. But the principle must be retained of acceptance of the *acquis* so as to safeguard the achievements of the Community.

Future accessions will take place in conditions different from the past:

The completion of the single market means that the maintenance of frontiers between old and new members, even for a temporary period, could create problems. Such transitional arrangements should be kept to a strict minimum.

The realization of economic and monetary union will imply a real effort of cohesion and solidarity on the part of all members. The passage to the final stage will depend on the number of States including new Members – who fulfil the criteria of economic convergence.

[13] OJ L 291, 19.11.1979, p. 3–3

The *acquis* in the field of foreign policy and security will include the Maastricht Treaty and its political objectives.[14]

In the EC Commission's Communication of 10 May 2004 "The European Neighbourhood Policy, Strategy Paper", the term *acquis* is used in connection with the following two aspects. The first aspect concerns conditions for Libya's entry into the Barcelona process of co-operation between the EU and Mediterranean countries – one of them is Libya's full acceptance of the Barcelona *acquis*.[15] Secondly, the use of this term is associated with the implementation of agreements on partnership and co-operation as well as of association agreements. The document emphasizes that the neighbouring countries' "legislative and regulatory approximation will be pursued on the basis of commonly agreed priorities, focusing on the most relevant elements of the *acquis* for stimulation of trade and economic integration, taking into account the economic structure of the partner country, and the current level of harmonization with EU legislation".[16]

Also, the term *"acquis"* has been used in the sphere of international agreements of the Community. In particular, references to the *acquis* are contained in some stabilization agreements concluded between the EC and Balkan countries. Article 72 of the agreement on stabilization and association between the EC and Serbia, concluded in 2001, provides that the Parties recognize the importance of the approximation of the existing legislation in Serbia to that of the Community and of its effective implementation. Serbia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis.* Serbia shall ensure that existing and future legislation will be properly implemented and enforced.[17]

The ECJ has also made its contribution to developing the notion of *acquis.* In its judgments in cases 80 and 81/77 *(Commissionnaires Reunis et Ramel),* the ECJ referred to the *acquis communautaire* as an update of the Community concerning the unification of the market.[18] However, as the practice has shown, the ECJ has failed to play any noticeable role in the development of the EU's *acquis* doctrine.

According to the European law doctrine, the *acquis* is commonly understood as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by the European Communities in their practice and which should be unconditionally accepted

[14] Europe and the challenge of enlargement. Bulletin of the European Communities. Supplement 3/92.

[15] COM (2004) 373 final, p. 12.

[16] Ibidem, p.14.

[17] O.J.2010, L108/3

[18] Cases 80 and 81/77 Commissionnaires Reunis et Ramel [1978] ECR 927.

by the States candidates for EU membership – that is, as something which may not be negotiated.[19] An attempt has also been made to define the types of *acquis* (accession *acquis,* institutional *acquis, acquis* concerning associations with third countries, *acquis* of the European economic space).[20]

The mentioned examples suggest that the term *"acquis"* has various meanings and contents in EU law. Consideration should also be given to the fact that, according to all these documents, court decisions and doctrines, the *acquis* includes, in addition to provisions of agreements and acts by EU institutions, also declarations and resolutions adopted within the framework of the Community – that is, even the acts which are not binding. It also includes the ECJ's case law, though rulings by this authority do not belong to the sources of EU law as laid down in the founding Treaties of the European Union. This suggests that the content of the *acquis* is wider than the term "EU law" and may be equated with the EU legal order. On the other hand, it should be noted that it is possible that, when defining the content of the *acquis,* the EU institutions did not reasonably undertake to clearly outline its scope. The matter is in the following. Although it is believed that *acquis* is essentially an established body of rules to be unconditionally recognized both by the Member States and the States expressing their wish to accede to the European Union – for this reason, this body may not be changed during negotiations on accession, – in reality, the content of the *acquis* has continuously been updated. In particular, it is regularly augmented by new rules as, for instance, in the case with the inclusion into the EU's *acquis* the provisions of Schengen agreements. On the other hand, parts of the *acquis* are regularly excluded from the legal instruments at the expense of those acts which have lost their effect. One should bear in mind that not all the rules making up the body of the *acquis* are relevant for the candidate country. There are also those that do not concern a particular country, although the latter has in some instances to accept that the rules are binding upon it.[21]

In this context, we can distinguish to some extent between the content of the internal and external *acquis.* The first part forms the basis for the legal order of the European Union, whereas the content of the second one depends on the level of relations between the European Union and third countries.

Thus, with the concept of the *acquis* being quite flexible and uncertain, the content of the *acquis* is not something fixed and steady as well – rather, it is permanently being updated. This flexibility is especially noticeable when it

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[19] Gialdino C. Ibid, p. 1090; Handbook on European Enlargement. Commentary on the Enlargement Process, p. 14; Toth A. Ibid, p. 9–10.

[20] Gialdino C. Ibid.

[21] European Union: Foundations of politics, institutions and law: Textbook / Scientific editor V. Pjatnitsky. – K.: 1999. – P. 40.

comes to the recognition of the *acquis* by third countries. First of all, this concerns the countries whose relations with the European Union are based on the association and partnership agreements, since only some of such agreements envisage the approximation of laws of such countries to EU law. However, the most important point is that the specific content of the *acquis* for the countries intending to conclude association or partnership agreements with the EC may be determined only when the conclusion of such agreements is being negotiated. Moreover, the specific content of the *acquis* changes depending on the Communities' approaches to determining the level of co-operation between the parties. For instance, the EEA Agreement, which does not aim to prepare the Contracting States for EU membership, was to be concluded upon the condition that the associated countries recognise 1,400 acts of the whole body of EC acts making up the *acquis,* whereas the association frameworks for preparing Central and Eastern European countries for EU membership required that only 1,100 acts – most of which governed issues of the internal market – were be approved by the associated countries so as for them to be eligible for accession to European Union.[22]

The Association agreement (AA) with Ukraine rightly pertains to the new generation of the association agreements of the European Union. In the Agreement the term *"acquis"* is used more often than in any other agreement of this kind. Actually in line with the objectives as set out in Article 1 of the Agreement, Ukraine is obliged to carry out gradual approximation of its legislation to EU *acquis* referred to in Annexes I to XLIV to the Agreement according to the provisions of those Annexes. What is more, apart of the harmonization of its legislation with that of the EU Ukraine is committed itself to transpose the parts of the *acquis* in such areas as standardization (Article 56.8), supply of services (Annex XVII) etc.

But, in all instances, the specific content of the *acquis* of the Community to be recognized by third countries within the scope of the international agreements of the Union should be determined by EU institution.

Among Ukrainian legal documents, the first one to use the term *"acquis"* was the Programme of Integration of Ukraine into the European Union, adopted by Presidential Decree No. 1072/2000 of 14 September 2000. The Programme laid down objectives and priorities for Ukraine on its way towards the integration into the European Union for the period of up to 2007. In this regard, the Programme obliged the Cabinet of Ministers of Ukraine to develop and annually approve a plan of action on implementing the priority tasks set forth in this document. The plan was supposed to include, in particular, the measures

[22] Tatam A. Law of European Union: Manual for high school students / Translation from English. – K.: 1998. – 370 p.

to ensure the harmonization of Ukrainian legislation with Community law. The programmes and plans developed by executive authorities were to be agreed with this Programme.

According to the Programme, the *acquis* also included legal and normative standards of the EU. Almost each of the Programme's economic sections presented a list of the European Union's basic acts making up the *acquis.* The acts were selected on the basis of the candidate countries' experience of accession to the European Union as well as the necessity of meeting the criteria implied by the objectives of monetary, economic, and political union of the Member States and formulated by the European Council in Copenhagen. The Programme's provisions suggested that, for the most part, the *acquis* only included the EU's economic legislation, which was generally based on Articles 50 and 51 of the Partnership and Co-operation Agreement (PCA) between Ukraine, on the one hand, and the European Communities (EC) and the Member States, on the other[23]. In our view, such an approach to defining the content of the *acquis* was wholly in the interests of Ukraine and it was capable of fully satisfying its Eurointegration aspirations. The main focus on measures to harmonize economic legislation laid down the foundation for bringing the relations with the European Union to a new phase which might involves the signature of an agreement on a free trade area.

However, the absence in Ukraine of an effective mechanism for harmonising its legislation with EU law appeared to be a factor which has not facilitated the implementation of the Programme. For this reason, there have been attempts to supplement it with another document – namely, the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union, which was approved by Law of Ukraine No. 1629 – IV of 18 March 2004.[24]

Section II of the National Programme defines the *acquis* as the legal system of the European Union, including the EU law acts (but, not only such acts) adopted within the framework of the European Community, Common Foreign and Security Policy and Common Policy on Justice and Home Affairs. The National Programme considerably widens the content of the *acquis.* Ukrainian laws and other legislative acts should be brought into line with it. This can also be seen from the Programme's list of *acquis* sources. According to the Programme, among these sources are: the Treaties establishing the European Communities (the EC and the European Atomic Energy Community) and the Treaty on European Union as amended by further Treaties; Merger Treaty of 1965; Acts of Accession; acts adopted by EU institutions; the EC's international agreements;

[23] O.J. 1998, L49.

[24] The National Programme for Approximation of the Legislation of Ukraine to that of the European Union, approved by Ukrainian Law No. 1629 – IV of 18 March 2004.

general principles of EC law; general provisions or principles relating to matters of foreign and security policies; the ECJ's rulings, EU Official publications.

This list, which is rather incomplete, cannot be regarded as absolutely correct. In particular, it does not mirrors the fundamental changes in the sources of the EU law after entering into effect of the Lisbon Treaties on the European Union and on functioning of the European Union, it does not include such sources of the *acquis* as acts adopted by the Member States' representatives in the Council of the European Union; international agreements between the Member States of the European Union, concluded in the process of implementing the provisions of the founding Treaties; the 1970 and 1975 agreements on budget, international traditions established by the European Union over the period of its existence; declarations and resolutions of EU institutions.

However, this does not change essentially the harmonization approach which is mirrored in the National Programme. The Programme reflects an effort to encompass the *acquis* as a whole – that is, not only rules of economic law of European Union. In practice, this suggests that the National Programme aims to ensure that Ukrainian legislation is harmonized with EU law, in the same way as it was done by the countries which having already passed a preparatory association phase, are preparing for their accession to the European Union It should be noted that such an approach to harmonization does not match the practice of the countries candidates for EU membership. It seems from the document that the harmonization is being carried out for its own sake and not for the sake of the objective declared – namely, a step-by-step approximation of Ukrainian legislation to the legislation of the European Union, which is a necessary stage on the way towards creating an area of free trade with the EU. Therefore, such an approach to harmonization raises some questions. The first is whether Ukraine is capable of implementing such wide-scale measures of harmonization by her own. The second is whether there is generally a need, at the current stage of Ukraine-EU relationship, for the harmonization oriented to the entire *acquis* of the Union. The answers to these questions can hardly be positive. In our view, there exists a risk that the National Programme may lead to the same result as the preceding Programme of 2000, which had remained to be nothing but a declaration of good intentions of Ukraine.

In this context, it should be noted that the problem is not in the term *"acquis"* as such – namely, not in whether it can be used in legislative and other normative-legal acts of Ukraine – but rather in how the content of the *acquis* should be interpreted – namely, whether it is necessary to incorporate the entire *acquis* of the Union or only its part fixed in the Association agreement.

This suggests that the content of the *acquis* can be easily identified if there is a real willingness to take into consideration the experience of the

States candidates for EU membership. We believe that the current stage of the Ukraine-European Union relationship should be oriented towards mainly the economic *acquis* whose content is specified in the Association agreement between the EU and Ukraine. Such an approach is optimal in terms of achieving a necessary balance between costs associated with harmonization measures and the anticipated result.

Thus, the *acquis* may be defined as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by European Union in its practice and which constitute the foundation for the legal order of the EU which should be unconditionally accepted by its Members and candidates for EU membership. Since the *acquis* applies, first of all, to the Member States and States candidates for EU membership, it is not very necessary for the Ukrainian legislation to use the term *"acquis"* in its broad sense. It should also be taken into account that the content of the *acquis* is not something fixed – rather, it is permanently updated. This, in its turn, can cause difficulties in the process of applying EU law provisions in Ukraine during the period when its legislation is being harmonized with law of European Union. An important factor in this context may become the EU's assistance as provided for by Article 475 of the AA – especially, when it comes to determining the content of EU law provisions with which Ukrainian legislation is to be harmonized. It should also be remembered that all attempts to include into Ukrainian legislation a broad interpretation of the *acquis* would require considerable funds for the realization process. It is agreed that, for the time being, it is optimal for Ukrainian legislative acts to use the term in a narrow interpretation, based on the AA – namely, the part of the *acquis* that comprises virtually all acts of European Union with which Ukrainian laws are to be harmonized in the process of implementing the AA and other agreements or co-operation arrangements between both sides.