Miskolc Journal of International Law
MISKOLCI NEMZETKÖZI JOGI KÖZLEMÉNYEK

VOLUME 4. (2007) NO. 2. PP. 38-45.

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The Acquis Communautaire as a Basis for the Community Legal Order

It was not until quite recently that the term *"acquis communautaire"* has been introduced in legislative acts of Ukraine[2] and in the Ukrainian doctrine of European law.[3] This notion is primarily used in the context of determining the parameters for the harmonisation of Ukrainian legislation with legislation of the European Union (EU). Among foreign legal publications on European integration problems are works by C. Gialdino,[4] A. Ott,[5] A. Toth,[6] which are devoted to general issues of the role of the *acquis communautaire* in the process of integration. However, these authors have not given sufficient attention to how the content of the *acquis communautaire* is determined and what is its scope for the countries non-candidates for EU membership. 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 influence on the legal orders of third countries that have contractual relations with European integration organisations — 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 harmonisation for Ukrainian legislation with the European Union's legislation in the process of implementing 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,[7] and other documents relating to the co-operation of the parties in the process of developing the European integration and extending it to new States. It should be noted that an important feature of the EU legal order is that its basis constitutes the so-called *acquis communautaire.* A special importance of the *acquis communautaire* 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

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[2] The Programme of Integration of Ukraine into the European Union, approved by Ukrainian President's Decree No. 1072 of 14 September 2000.
[3] *Муравйов В. І.* Правові засади регулювання економічних відносин Європейського Союзу з третіми країнами (теорія і практика). — К.: Академ-Прес, 2002.—426с.
[4] Gialdino C. Some Reflection on the Acquis Communautaires // Common Market Law Review. — 1995. - V. 32, No. 3. - p. 1089—1121.
[5] Handbook on European Enlargement. Commentary on the Enlargement Process / Edited by A. Ott and K. Inglis. The Hague, 2002 — 1116 p.
[6] Toth A. Oxford Encyclopedia of European Community Law. — Oxford 1990. — 985 p.
[7] O.J. 1998, L49.

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.[8]

Homogeneity of law of European integration organisations is maintained, in particular, in the light of the interpretation given by the Court of Justice of European Communities (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.[9]

The term *„acquis communautaire"* 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.[10] References to the *acquis communautaire* may be found in the EC Treaty, the Treaty establishing the EC, draft Constitution of the European Union, documents adopted by EU institutions, international agreements of the Community, and the ECJ's rulings. In particular, Article 2 of the Treaty on European Union states that the Union sets itself the objective to maintain "in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community". Article 43(e) of the Treaty on EU provides that the mechanisms used by the Member States with the aim of establishing "closer co-operation between themselves should not affect the *'acquis communautaire'* and the measures adopted under the other provisions of the said Treaties". According to Article 11(5) of the EC Treaty, the said Article "is without prejudice to the provisions of the Protocol integrating the Schengen acquis into the framework of the European Union".[11] The Preamble to the draft Constitution of the European Union expresses the Union's determination to continue the work carried out within the framework of the EC Treaty and the Treaty on EU by ensuring the compliance with the *acquis communautaire.* Article 1—43(4) of the EU Constitution provides that "acts adopted in the framework of enhanced co-operation shall bind only participating States. They shall not be regarded as an *acquis* which has to be accepted by candidates for accession to the Union".[12] This suggests that the founding Treaties on European integration institutions do not determine the content of the *acquis communautaire.*

References to the *acquis communautaire* are also contained in the EU legal acts on matters of foreign relations of the organisation. An explicit interpretation for the notion of the *acquis communautaire* can be found in the Opinion of the EC Commission of 29 May 1979 concerning the accession of Greece to the European Communities. The EC Commission considered that, from the moment of acquiring its membership in the Communities, the applicant country should unconditionally recognise the agreements and the political objectives therein, any kinds of decisions adopted after the entry into force of the agreements, as well as the selected possible ways for building up and strengthening the Communities. From the moment of approving the founding Treaties of the European Communities, the legal regime initiated thereby involves direct effect of certain rules of Community law and certain legal acts of the

[8] Case 104/81, Kupferberg [1982] ECR 3641.
[9] Case 26/62, Van Gend en Loos [1963] ECR 1.
[10] Gialdino C. Ibid, p. 1090.
[11] Європейський Союз: консолідовані договори. — К.: Port — Royal, 1999. — 206 с.
[12] Provisional constitutional version of the draft Treaty establishing a Constitution of Europe, CIG 86/04.

Communities' institutions, the primacy of Community law in respect of competing rules of the Member States' domestic law, and the availability of procedures capable of ensuring the unity in interpreting Community law. The accession to the Communities involves recognising the binding character of these rules, their strict observance, which is intended to guarantee the effectiveness and unity of EU law.[13]

It should be noted that this Opinion of the EC Commission only relates to the *acquis communautaire* 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 communautaire* 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 realisation 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.
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 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

[13] Європейський Союз: основи політики, інституційного устрою та права: Навчальний посібник /Науковий редактор В. П'ятницькій. – К., 1999. – С. 39-40.
[14] Europe and the challenge of enlargement. Bulletin of the European Communities. Supplement 3/92.
[15] COM (2004) 373 final, p. 12.

agreements on partnership and co-operation and association agreements. The document emphasises 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 harmonisation with EU legislation".[16]

Also, the term *"acquis communautaire"* has been used in the sphere of international agreements of the Community. In particular, references to the *acquis communautaire* are contained in some stabilisation agreements concluded between the EC and Balkan countries. Article 69 of the agreement on stabilisation and association between the EC and Croatia, concluded in 2001, provides that Croatia will endeavour to gradually bring its legislation into line with the Community *acquis,* first of all, with fundamental *acquis* elements of the internal market.[17]
The ECJ has also made its contribution to developing the notion of *acquis communautaire.* 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 communautaire* doctrine.

According to the European law doctrine, the *acquis communautaire* is commonly understood as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by European integration organisations in their practice and which should be unconditionally accepted 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 communautaire"* has various meanings in EU law. Consideration should also be given to the fact that, according to all these documents, court decisions and doctrines, the *acquis communautaire* 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 integration organisations and in Article 1—32 of the draft Constitution of the European Union. This suggests that the content of the *acquis communautaire* 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 communautaire,* the EU institutions did not reasonably undertake to clearly outline its scope. The matter is in the following. Although it is believed that *acquis communautaire* is essentially an established body of rules to be unconditionally recognised 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

[16] Ibidem, p.14.
[17] O.J.2001.C332.
[18] Cases 80 and 81/77 Commissionnaires Reunis et Ramel[1978] ECR 927.
[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.

the *acquis communautaire* has continuously been updated. In particular, it has continuously been augmented by new rules — as, for instance, in the case with the inclusion into the EU's *acquis communautaire* the provisions of Schengen agreements or the exclusion therefrom the acts which have lost their effect. On the other hand, not all the rules making up the body of the *acquis communautaire* 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 between the internal and external *acquis communautaire.* The first part forms the basis for the legal order of the European Union, whereas the meaning of the second one depends on the level of relations between the European Union and third countries.
Thus, with the concept of the *acquis communautaire* being quite flexible and uncertain, the content of the *acquis communautaire* is not something fixed and steady — rather, it is continuously updated. This flexibility is especially noticeable when it comes to the recognition of the *acquis communautaire* 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 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 communautaire* for the countries intending to conclude 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 communautaire* 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 communautaire,* whereas the association frameworks for preparing Central and Eastern European countries for EU membership required that only 1,100 acts — most of which govern issues of the internal market — should be approved by the associated countries so as for them to be eligible for accession to European integration organisations.[22] The partnership and cooperation frameworks for Ukraine do not at all refer to the *acquis communautaire* of the Community, though various provisions of the PCA require the harmonisation of Ukrainian legislation with Community legislation making up the base of the *acquis communautaire.* But, in all instances, the specific content of the *acquis communautaire* of the Community to be recognised by third countries within the scope of the international agreements of the Community should be determined by EU institution.

Among Ukrainian legal documents, the first one to use the term *"acquis communautaire"* was the Programme of Integration of Ukraine into the European Union, adopted by Presidential Decree No. 1072/2000 of 14 September 2000. The Programme lays 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 obliges 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 should include, in particular, the measures to ensure the

[21] Європейський Союз: основи політики, інституційного устрою та права, с. 40.
[22] *Татам А.* Право Європейського Союзу: Підручник для студентів вищих навчальних закладів / Переклад з англійської. — К., 1998, с. 370.

harmonisation of Ukrainian legislation with Community law. The programmes and plans developed by executive authorities are to be agreed with this Programme.

According to the Programme, the *acquis communautaire* also includes legal and normative standards of the EU. Almost each of the Programme's economic sections presents a list of the European Union's basic acts making up the *acquis communautaire.* The acts are 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 Council of Europe in June 1993 in Copenhagen. The Programme's provisions suggest that, for the most part, the *acquis communautaire* only includes the EU's economic legislation, which is generally based on Articles 50 and 51 of the PC A. In our view, such an approach to defining the content of the *acquis communautaire* is wholly in the interests of Ukraine and is capable of fully satisfying its Eurointegration aspirations. The main focus on measures to harmonise economic legislation lays down the foundation for bringing the relations with the European Union to a new phase which involves the signature of an agreement on a free trade area. Such an approach is also reflected by the fact that the European Union gives Ukraine a necessary assistance in the harmonisation sphere, which is provided for by Article 51(4) of the PCA.

However, the absence in Ukraine of an effective mechanism for harmonising its legislation with EU law appears 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.[23]
Section II of the National Programme defines the *acquis communautaire* 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 communautaire.* 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 communautaire* 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; general principles of EC law; general provisions or principles relating to matters of foreign and security policies; the ECJ's rulings.

This list, which is rather incomplete, may not be regarded as absolutely correct. In particular, it does not include such sources of the *acquis communautaire* 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.

[23] 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.

However, this does not change essentially the harmonisation approach which is mirrored in the National Programme. The Programme reflects an effort to encompass the *acquis communautaire* as a whole — that is, not only rules of economic law of European integration organisations. In practice, this suggests that the National Programme aims to ensure that Ukrainian legislation is harmonised 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 harmonisation does not match the practice of the countries candidates for EU membership. It seems that the harmonisation 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 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 harmonisation raises some questions. The first is whether Ukraine is capable of implementing such wide-scale measures of harmonisation. The second is whether there is generally a need, at the current stage of Ukraine-EU relationship, for the harmonisation oriented to the entire *acquis communautaire.* 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, which has 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 communautaire"* 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 communautaire* should be interpreted — namely, whether it is necessary to incorporate the entire *acquis communautaire* or only its economic part.

This suggests that the content of the *acquis communautaire* 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 the economic *acquis communautaire* whose content is specified in the White Paper on preparing the Central and Eastern European Countries for integration into the internal market of the European Union.[24] Such an approach is optimal in terms of achieving a necessary balance between costs associated with harmonisation measures and the anticipated result.

Thus, the *acquis communautaire* may be defined as a body of legal rules, court decisions, doctrinal notions, recommendations, arrangements, etc., which have been established or adopted by European integration organisations in their practice and which constitute the foundation for the legal order of the European Union which should be unconditionally accepted by its Members and candidates for EU membership. Since the *acquis communautaire* 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 communautaire"* in its broad sense. It should also be taken into account that the content of the *acquis communautaire* is not something fixed — rather, it is continuously 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 harmonised with law of European integration organisations. An important factor in this

[24] COM (95) 163 final.

context may become the EU's assistance as provided for by Article 51(4) of the PC A — especially, when it comes to determining the content of EU law provisions with which Ukrainian legislation should be harmonised. It should also be remembered that all attempts to include into Ukrainian legislation a broad interpretation of the *acquis communautaire* would require considerable funds for the harmonisation process. It is agreed that, for the time being, it is optimal for Ukrainian legislative acts to use the term "legislation of the European Union" (EU legislation) — namely, the part of the *acquis communautaire* that comprises virtually all acts of European integration organisations with which Ukrainian laws are to be harmonised in the process of implementing the PCA and other agreements or co-operation arrangements.