

кордонного характеру, а також визнання та виконання рішень у цивільних та торгових справах (у тому числі рішень у позасудових справах), які базуються на одному із засадничих принципів заснування та розвитку простору свободи, безпеки та юстиції — принципі взаємного визнання.

Реальні досягнення в уніфікації окремих процесуальних інститутів, серед яких, окрім підсудності та виконання судових рішень, є вручення судових документів, дослідження доказів, обмін правовою інформацією, дають підстави говорити про якісно новий комплекс правил судочинства — європейське цивільне процесуальне право.

1. *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters // Official Journal. — No. L 12. — 16.01.2001.*
2. *Official Journal. — No. C 189. — 28.07.1990.*
3. *Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility // Official Journal. — No. L 338. — 23.12.2003.*
4. *Council Decision 2003/93/EC of 19 December 2002 authorising the Member States, in the interest of the Community, to sign the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children // Official Journal. — No. L 48. — 21.2.2003.*
5. *Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law // Official Journal. — No. L 151. — 11.6.2008.*
6. *Commission Green Paper of 15 April 2004 on maintenance obligations // COM(2004) 254 final.*
7. *Council Regulation № 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations // Official Journal. — No. L 7. — 10.01.2009.*

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## Ukrainers struggle for harmonization of consumer contract law with provisions of eu law

**Прантл Д. Зусилля України щодо гармонізації споживчого договірною права з положеннями європейського права**

На основі Угоди про партнерство та співробітництво між Україною та Європейськими Співтовариства відбувається процес гармонізації українського законодавства, зокрема у сфері споживчого договірною права. Законодавство України щодо захисту прав споживачів відповідає європейським стандартам і навіть йде далі за мінімальні вимоги директив ЄС. Але, на жаль, рівень реалізації адаптованих норм залишається низьким.

**Ключові слова:** споживче договірне право, права споживачів, адаптація законодавства, європейські стандарти

The development in European Law, particularly the implementation of secondary law, has involved the introduction of common rules on particular aspects in the Member States' jurisdictions<sup>1</sup>. Since the resolutions of the European Parliament in 1989<sup>2</sup> and 1994<sup>3</sup> the "Europeanisation"<sup>4</sup> of contract law, which has been considered as a decisive contribution to the realization of the Common Market, has become a long term target. Yet, the multitude of legal documents issued by the European Commission<sup>5</sup> has not lead to a successful approximation of national contract laws.

The Europeanisation, particularly of consumer contract law, does not only take place within the European Community. As the eastern enlargement has shown legal harmonisation has become a prerequisite for European integration. Consequently, Ukraine's wish to become a member of the EU by 2020 justifies its efforts to achieve European standards<sup>6</sup>. The legal fundament for the harmonisation of Ukrainian legislation to that of the community presents Art 51 clause 1 of the Partnership and Co-operation Agreement signed in 1994 by Ukraine and the EU<sup>7</sup>. Art 51 clause 2 and Art 75 of the PCA literally refer to consumer protection as a particular field of cooperation.

Beyond, the Strategy of Integration of Ukraine into the EU (1998), the Concept of Adaptation of Ukrainian Laws to the Legislation of the EU (1999), the European Neighbourhood Policy (2003), the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union (2004), the EU-Ukraine Action Plan (2005), the Agenda 2020 (2006), the New Enhanced Agreement (2007) as the successor of the PCA as well as the fact that Ukraine joined the WTO in 2008 reflect Ukraine's "European choice"<sup>8</sup> and spurred legal harmonisation. As a pre-

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<sup>1</sup> Cf *Twigg-Flesner*, *The Europeanisation of Contract Law* (2008) 9.

<sup>2</sup> *Resolution* on action to bring into line the private law of the Member States, Official Journal C 1989/158, 400.

<sup>3</sup> *Resolution* on the harmonization of certain sectors of the private law of the Member States, Official Journal C 1994/205, 518.

<sup>4</sup> According to *Twigg-Flesner* this term is in the first place used to cover various activities of the EU which affect contract law; secondly, in a much wider sense the term also refers to scholarly activities.

<sup>5</sup> For instance: Communication from the Commission to the Council and the European Parliament on European contract law 13.9.2001, Official Journal C 2001/255, 1; Communication from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan 15.3.2003, COM(2003) 68 final, Official Journal C 2003/63, 1; Communication from the Commission to the European Parliament and the Council – European Contract Law and the revision of the acquis: the way forward 11.10.2004, COM(2004) 651 final.

<sup>6</sup> Cf *Denisov/Muraviov*, Legal grounds for the implementation of the law of the European Union into the internal legal order of Ukraine, in *Kubko/Tsvetkov* (Ed), *Problems of harmonisation of the legislation of Ukraine and the legislation of the European countries* (2003) 151 (163 f); *Swieboda*, *Agenda 2020: Implementation and Progress report 2008* [http://www.yes-ukraine.org/en/agenda2020report\\_july2008.html](http://www.yes-ukraine.org/en/agenda2020report_july2008.html) (10.11.2008).

<sup>7</sup> Cf *Zadorozhnyi*, On state policy in the field of harmonization of Ukrainian legislation and legislation of the countries of Europe, in *Kubko/Tsvetkov* (Ed), *Problems of harmonisation of the legislation of Ukraine and the legislation of the European countries* (2003) 115 (121); *Schneider*, *The Partnership and Co-operation Agreement (PCA) between Ukraine and the EU – Idea and Reality*, in *Hoffmann/Möllers* (Ed), *Ukraine on the Road to Europe* (2001) 66-78.

<sup>8</sup> Vgl *Wolczuk*, *Integration without Europeanisation: Ukraine and its policy towards the European Union*, *EUI Working Papers Nr 15* (2004) 2 [http://cadmus.iue.it/dspace/bitstream/1814/2757/1/04\\_15.pdf](http://cadmus.iue.it/dspace/bitstream/1814/2757/1/04_15.pdf) (18.1.2010).

condition to WTO membership Ukraine had to adopt consumer and market policy according to international and European standards. Therefore, the State Consumer Standard<sup>1</sup> elaborated an Action Plan for achievement of the full-fledged conformity of the Ukrainian national standardization and technical regulation system with the requirements of the WTO Agreement on Technical Barriers to Trade for the years 2005–2011 which on the one hand gave rise to new regulatory documents and on the other hand lead to a harmonisation of Ukrainian legislation to the *acquis*<sup>2</sup>.

As a result of the efforts mentioned above Ukraine's legislation is not (so) different from EU legislation. In 2002 a comparison between Ukrainian energy law and the respective legislation of the EU proved that there were no significant differences in this field of law. Furthermore, it turned out that Ukrainian legislation was more detailed<sup>3</sup>.

The same is true for the Law of Ukraine on consumer rights protection<sup>4</sup>. Among the former Soviet countries, Ukraine was one of the first countries that adopted a Consumer Protection Act,<sup>5</sup> which serves as primary legal source for contractual relationships of consumers. As consumer rights have not (re-)emerged until the end of the Soviet regime, eastern countries' jurisdictions are not only younger but also more extensive and less obsolete than many central European Acts. This assumption is verified by a comparison of the uaCPA with the Austrian Konsumentenschutzgesetz<sup>6</sup>, which came into force on March 8th, 1979. Contrary to the KSchG, the uaCPA also contains provisions dealing with environment (Art 6 part 3 clause 1, Art 7 part 3 clause 1, Art 14 part 1 clause 1) and foodstuff (Art 8 part 8, Art 15 part 1 clause 2 cipher 3–5, 7, 11), which result from the consideration of the UN-Guidelines for Consumer Protection<sup>7</sup> in the law making process and later on amendments. Therefore, the Ukrainian Act seems to address more consumer relevant needs than the Austrian law. When it comes to goods of improper quality the Ukrainian consumers have a right to address either the seller or the manufacturer (Art 8 part 5 clause 1),<sup>8</sup> while according to § 8 KSchG (referring to § 932 ABGB) warranty claims can only be asserted against the professional seller. Thus, the Ukrainian solution, that is by the way modelled after the French action directe,

<sup>1</sup> Держспоживстандарт України [www.dssu.gov.ua](http://www.dssu.gov.ua) (19.1.2010); abbr: SCS.

<sup>2</sup> Cf Larsson/Lysenko/Samchishshin/Frolov, Consumer Protection in EU and Ukraine (2007) 1 (36) <http://www.consumerinfo.org.ua/upload/files/ConsumerProtection-in-EU-and-Ukraine.pdf> (19.1.2010).

<sup>3</sup> Cf Shemshuchenko, Theoretical issues of harmonization of Ukrainian legislation with European law, in Kubko/Tsvetkov (Ed), Problems of harmonisation of the legislation of Ukraine and the legislation of the European countries (2003) 35 (41).

<sup>4</sup> ЗАКОН УКРАЇНИ «Про захист прав споживачів» Nr 1023-XII latest version 13.1.2006 (abbr: uaCPA); all articles stated in the text without reference to a particular law refer to the uaCPA.

<sup>5</sup> Cf Larsson/Lysenko/Samchishshin/Frolov, Consumer Protection in EU and Ukraine (2007) 33.

<sup>6</sup> Austrian Consumer Protection Act BGBI 140/1979 latest version 2008 (abbr: KSchG); for more information see Lehofer, Minimum Implementation of Minimum Directives? Consumer Protection in Austria in the Context of European Integration, Journal of Consumer Policy 1994, 3-22.

<sup>7</sup> 39/248 UN Guidelines for Consumer Protection April 16th, 1985 <http://www.un.org/documents/ga/res/39/a39r248.htm> (18.1.2010); in addition Consumer Society and Citizen Networks, United Nations guidelines for consumer protection (2007) [http://www.consumerinfo.org.ua/en/must\\_know/articles\\_rights/UNGuidelines-for-ConsumerProtection.php](http://www.consumerinfo.org.ua/en/must_know/articles_rights/UNGuidelines-for-ConsumerProtection.php) (18.1.2010)

<sup>8</sup> Cf Knaul/Dozorets/Samokhvalov, Produkthaftung Baumax. Memorandum CMS (2008) 1 (3).

enhances chances that consumer claims are satisfied because a direct liability of the manufacturer provides redress for the consumer in case the seller is not able (or willing) to resolve consumer complaints. For that reason, the introduction of a direct producers' liability has been debated on the European level, though so far the Commission lacks sufficient evidence to justify an extension of mandatory liability that goes beyond the seller<sup>1</sup>.

Moreover, a comparative analysis of the uaCPA and the European *acquis* in the field of consumer contract law, which consists primarily of 22 consumer protection directives, yields that the level of consumer protection granted by the Ukrainian Act satisfies European requirements and goes even beyond in some cases.

Parallels between the Law of Ukraine on consumer rights protection and certain consumer protection standards can be identified. Firstly, Art 12 uaCPA about "Consumer's rights if an agreement is made outside commercial or office premises" reminds of the Doorstep Selling Directive<sup>2</sup>. The conclusion of a consumer sales contract outside commercial or office premises entitles the consumer to cancel the agreement within fourteen days (Art 12 part 3), thus the deadline granted by this provision is consistent with Art 5 of the respective Directive ("... right to renounce ... within a period of not less than seven days") as well as with Art 8, which determines the Directive's minimum harmonisation character. Secondly, Art 13 uaCPA about "Consumer's right in case of making an agreement remotely" seems to implement the Distance Selling Directive<sup>3</sup>. Under the circumstances of a remotely made consumer sales agreement Ukrainian consumers – again – have the right to revoke by notifying the seller about the cancellation within fourteen days (Art 13 part 4 clause 1). Art 5 clause 1 of the Directive claims at least a period of "seven working days in which to withdraw from the contract without penalty and without giving any reason". In the field of services parallels can be found between Art 17 and Art 20 uaCPA and the Services Directive<sup>4</sup>. Moreover, Art 19 uaCPA about "Prohibition of unfair business practices" is the equivalent to the Unfair Commercial Practices Directive<sup>5</sup>.

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<sup>1</sup> Cf *Communication* from the Commission to the Council and the European Parliament on the implementation of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees including analysis of the case for introducing direct producers' liability 24.4.2007, COM(2007) 210 final 10 ff; see also Bradgate/Twigg-Flesner, Expanding Boundaries of Liability for Quality Defects, *Journal of Consumer Policy* 2002, 345-377; European Consumer Law Group, Opinion on the Proposal for a Directive on the Sale of Consumer Goods and Associated Guarantees, *Journal of Consumer Policy* 1998, 91 (92 f).

<sup>2</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *Official Journal L* 1985/372, 31.

<sup>3</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *Official Journal L* 1997/144, 19.

<sup>4</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *Official Journal L* 2006/376, 36.

<sup>5</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *Official Journal L* 2005/149, 22.

An interim conclusion shows that the Ukrainian legislator kept track of the development in European consumer contract law and has fulfilled the minimum standards of Directives 85/577/EEC and 97/7/EC, yet the fourteen-days-withdrawal-period is more favourable from the consumers' point of view.

There are more passages in the Law of Ukraine on consumer rights protection that make the Act more consumer friendly than European legislation itself proves to be. For instance, several articles of the uaCPA refer to an obligation to make information available to the consumer and hence account for a current trend in European Law. A general information duty of the State towards consumers is laid down in Art 5 part 1 and part 2 uaCPA. Beyond that, Art 15 uaCPA constitutes "Consumer's right to product information". The accessibility of the information before the consumer buys or orders a product or service is crucial. Inaccessible, unreliable, incomplete or untimely information about the consumer good or the seller (contractor, manufacturer) that has lead to "the impossibility of using the purchased product according to its purpose" entitles the consumer to demand "proper information within in a reasonably short term but not later than one month. If no information has been provided within the said term the consumer shall have the right to cancel the agreement and claim damages" (Art 15 part 7 clause 1 cipher 2). Additionally, Art 4 part 3 clause 1 cipher 1 uaCPA (obligation of the consumer to carefully read instructions) can be understood as a counterpart of the seller's information duty. Moreover, the Ukrainian Act outmatches national rules on information duties, which generally lack sanctions, as Art 23 part 1 clause 7 uaCPA imposes a fine on the economic party that fails to provide "necessary, accessible, reliable and timely product information".

On the European level Art 153 EC Treaty assigns consumers a right to information. Besides, Art 5 clause 1 lit a-i of the Proposal for a Directive on consumer rights<sup>1</sup> contains a similar catalogue of "general information requirements" comprising product characteristics (lit a), details regarding the identity of the trader such as his address (lit b), the existence of a right of withdrawal (lit e). Art 6 of the proposal deals with "failures to provide information". The Document Common Frame of Reference<sup>2</sup> also refers to a general (II.-3:101: Duty to disclose information about goods, other assets and services) and a more specific (II.-3:103: Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) pre-contractual information duty. "Remedies for breach of information duties" are considered in II.-3:109 DCFR.

Furthermore, Ukraine's approach to development defence serves as evidence that the Law of Ukraine on consumer rights protection even establishes a higher level of consumer protection than the standards foreseen by the European legislator. While European producers are exempted from indemnification if the defect of a product resulted from compliance with regulations, that is "the state of scientific

<sup>1</sup> *Proposal for a Directive of the European Parliament and of the Council on consumer rights* 8.10.2008, COM(2008) 614 final.

<sup>2</sup> V. Bar/Clive/Schulte-Nölke (Ed), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Outline Edition* (2009); abbr:DCFR.

and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered”<sup>1</sup>, strict liability, that is no development defence for manufacturers of consumer goods (Art 16 part 4), service providers and manufacturers of works (Art 10 part 10), is laid down in the Law of Ukraine on consumer rights protection.

According to Medvedchuk the reformation of key legal spheres in Ukraine is at a closing stage<sup>2</sup>. The examples mentioned serve as evidence that Ukrainian consumer contract legislation has been approximated to European standards. However, the harmonisation of black letter rules is not where the struggle ends – it is actually the beginning. The effectiveness of consumer rights will not automatically increase due to harmonised statutes. Without the implementation of the approximated rules, consumers benefit from their rights only on the paper but not in everyday life. This is unfortunately true for Ukraine. Existing weaknesses in the law enforcement process can only be overcome by the establishment of legal monitoring, which requires government support, empowerment of the SCS, participation of consumer organisation as well as a change in the predominant Ukrainian consumer attitude towards a higher level of response. Actually, not legislation but the aforesaid key success factors (players), which seem to be still influenced by political and sociological doctrines that differ from West European countries, to a certain extent hinder the process of Europeanisation outside the EC<sup>3</sup>.

Finally, in order to put Ukraine’s shortcomings in perspective it should be pointed out that European consumer contract law lacks coherence as well. On the one hand consumer confidence suffers from different standards in contract law across the EU<sup>4</sup> and on the other hand businesses bear higher transaction costs due to accounting for different national<sup>4</sup> regulations. Therefore, a variety of approaches has been pursued in order to arrange the patchwork of national pieces of consumer contract legislation. The latest event has been the publication of the Document Common Frame of Reference<sup>5</sup>. In the Commission’s Action Plan of

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1 Cf Edwards, *Consumer Protection and Practice in the EU* (2007) 1 (6)

[http://www.consumerinfo.org.ua/en/must\\_know/articles\\_rights/eu-practice.php](http://www.consumerinfo.org.ua/en/must_know/articles_rights/eu-practice.php) (19.1.2010).

2 Cf Medvedchuk, *Political and legal problems of approximation of the Ukrainian legislation to the legislation of the European Countries*, in Kubko/Tsvetkov (Ed), *Problems of Harmonisation of the Legislation of Ukraine and the Legislation of the European Countries* (2003) 101 (112).

3 Cf Kubko, *Improvement of Ukrainian legislation and problems of its harmonization with foreign legislation*, in Kubko/Tsvetkov (Ed), *Problems of harmonisation of the legislation of Ukraine and the legislation of the European countries* (2003) 61 (79 f).

4 Cf Consumer Society and Citizen Networks, *The Review of EU Consumer Protection Rules “The Review of the Consumer Acquis”* (2007) 1 (2) [http://www.consumerinfo.org.ua/en/must\\_know/articles\\_rights/eu-consumer-rules-review.php](http://www.consumerinfo.org.ua/en/must_know/articles_rights/eu-consumer-rules-review.php) (20.1.2010).

5 V. Bar/Clive/Schulte-Nölke (Ed), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Interim Outline Edition* (2008); revised and extended version: v. Bar/Clive/Schulte-Nölke (Ed), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Outline Edition* (2009); followed by a 6 volume opus including not only draft model rules but full comments and notes, which explain why a rule is formulated as it is, how it relates to other rules and where its roots lie in the European legal systems: v. Bar/Clive (Hrsg.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Full Edition* (2009).

2003<sup>1</sup> the DCFR is presented as a possible optional instrument, which would according to the “opt-in” model exist in addition to national jurisdictions and could be chosen by the parties as the law applicable to their legal relationship<sup>7</sup>. The importance of such an instrument for Ukraine depends on its scope. Nevertheless, regarding Europeanisation the Ukrainian legislator could benefit from the framework if becomes a so-called toolbox of harmonised principles, terms and definitions.

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## Роль суду Європейського Союзу в становленні та розвитку європейського права

**Шпакович О. М. Роль суду Європейського Союзу в становленні та розвитку європейського права**

Статтю присвячено історії Європейського Союзу та європейського права. Автор досліджує роль Суду ЄС у виникненні права Євросоюзу. Особливу увагу в статті приділено юридичній природі норм права ЄС.

**Ключові слова:** судова система ЄС, європейське право, «новий правопорядок», міжнародне право, національне право, внутрішній правопорядок держав.

Судова система Європейського Союзу (Євросоюзу) була створена з метою вирішення суперечок між суб'єктами європейської інтеграції, а також забезпечення цілісності та узгодженості права європейських інтеграційних організацій шляхом відповідного тлумачення його норм. Важливим завданням судової системи Євросоюзу стало також забезпечення безконфліктної взаємодії норм права Євросоюзу та внутрішнього права держав-членів як передумови для нормального функціонування організаційно-правового механізму європейської інтеграції. Окремим питанням функціонування судових установ Євросоюзу присвячені дослідження В. Муравйова, В. Опришко, Р. Петрова, Ж.-Л. Сорона, Ж. Рідо, Н. Феннелі та ін.

Виникнення Європейського Союзу (Євросоюзу) та європейського права — це єдиний та тісний взаємопов'язаний процес. Створення та розбудову-

<sup>1</sup> *Communication* from the Commission to the European Parliament and the Council – A more coherent European contract law – An action plan 12.2.2003, COM(2003) 68 final, Official Journal C 2003/63, 1; the Action Plan proposes to overcome the fragmentation of national contract laws with a new strategy, that is based on soft law.

<sup>2</sup> *Cf Dragneva/Ferrari*, Contract Law Harmonisation and Regional Integration: Can the CIS learn From the EU? Review of Central and East European Law 2006, 1 (28 ff).