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# IMMINENCE OF UKRAINIAN AND EU LEGAL SYSTEMS IN THE FIELD OF CONVENTIONAL LAW

# APROXIMAÇÃO DAS ORDENS JURÍDICAS DA UCRÂNIA E DA UE NO CAMPO DO DIREITO CONTRATUAL

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**Abstract:** The purpose of this scientific article is to analyze the process of the imminence of Ukrainian and EU legal systems in the field of conventional law in order to develop conceptual suggestions for improving Ukrainian system of conventional law in the context of re-codification of civil law in Ukraine. The authors of the article have substantiated the need for: distinguishing between the concepts of harmonization and unification of EU conventional law; creation of a single codified act within the EU for regulating conventional law; singling out the grounds and prerequisites for the re-codification of civil legislation of Ukraine; coordination of national legislation regarding the requirements on the form of the contract; expansion of freedom of contract through the removal of essential terms of the contract; rethinking the system of contracts within civil legislation of Ukraine and reducing their list in the Civil Code of Ukraine.

**Keywords:** Conventional law. Harmonization and unification. Europeanization of private law. Re-codification of civil law. Form of the contract. Types of contracts.

**Resumo:** O objetivo deste artigo científico é analisar o processo de aproximação das ordens jurídicas da Ucrânia e da UE no campo do direito contratual, a fim de desenvolver propostas conceituais para melhorar o sistema ucraniano de direito contratual no contexto da recodificação do direito civil lei na Ucrânia. Os autores do artigo fundamentam a necessidade de: distinguir entre os conceitos de harmonização e unificação do direito contratual da UE; criação de uma única lei codificada na UE para a regulamentação do direito dos contratos; destacando os fundamentos e pré-requisitos para a recodificação da legislação civil da Ucrânia; harmonização da legislação nacional sobre os requisitos para a forma do contrato; expansão da liberdade contratual através da retirada dos termos essenciais do contrato; repensar o sistema de contratos na legislação civil da Ucrânia e reduzir sua lista no Código Civil da Ucrânia.

**Palavras-chave:** Direito consuetudinário. Harmonização e

unificação. A europeização do direito privado. Recodificação do direito civil. Formulário de contrato. Tipos de contratos.

## 1. Introduction

Global and regional integration processes encourage the expansion of economic relationships between countries and supranational entities. Such relationships are being developed, first of all, in the field of trade, which necessarily involves administrative and, later, legislative changes. Intervention into regulation of public law entails corresponding changes in private law. However, the increase in trade volumes and population migration also require cooperation between countries in other areas.

That is the reason for the processes of harmonization of conventional law have an important place. These processes are caused by the need to simplify the crossing of borders by goods and services, the conclusion of contracts and fulfillment of the obligations assumed under them, and the protection of the interests of the participants in contractual relations.

The European Union is currently in a situation of systematic harmonization of legislation in this area by the unification of contractual legal norms. Rethinking the content of conventional law is also taking place in Ukraine on the background of the re-codification of civil legislation, which has been started in 2020 (The concept of updating the Civil Code of Ukraine, 2020, p. 3).

Such transformational processes in the EU and in Ukraine require a systematic analysis both from the point of view of conventional law sense and in terms of the imminence of the legal systems of Ukraine and the EU and on the background of deepening their cooperation within the submitted application for membership.

## 2. Problem Statement

Despite the long history of development and legal traditions of Ukrainian private law, one must admit that historical experience of legal regulation is a dynamic category that needs constant rethinking and clarification.

It is obvious that amendments in the domestic private law system with the adoption of the Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine) as of 2003 were quite revolutionary and were based on close cooperation with the countries of the post-Soviet space and therefore did not fully take into account the tradition and democratization of conventional

law, which already prevailed in European countries at that time. Even though that the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine was concluded back in 1998, the norms of conventional law recognized in the EU were not mostly regarded in the content of the CC of Ukraine of 2003, despite the fact that the developers took into account the traditions of German and French civil law.

The result was that the CC of Ukraine, although determined the basic principles of private law regulation, but was unable to depart from the legal tradition that placed the relations between the subjects of contractual relations (especially with regard to such subjects as legal entities of private and public law) on a certain regulated level.

Conventional law in Europe is characterized by diversity. There are at least three different types of conventional law regimes within the EU. First, each Member State has its own national contract law. In addition to these national regimes, there is a set of rules on conventional law that is of European origin. This set consists of a rapidly growing number of Directives and Regulations developed by the EU. Thirdly, there is an international regime created, including, by the United Nations Convention on Contracts for the International Sale of Goods of 1980. Although this regime is not specifically European, it plays an important role in the EU legal field. Besides, active work has been carried out in recent decades to create unified acts in the field of conventional law, which will in a certain way resolve the existing contradictions between all legal systems operating within the EU.

In this regard, it is worth stating that the imminence of Ukrainian and EU legal systems in the field of conventional law, complicated by the systematic internal work in this area by the EU itself, still requires an in-depth analysis in order to develop such national legal mechanisms that will allow all types of counterparties under contracts freely conclude and effectively execute them regardless the place of such conclusion and execution.

## 3. Methodology

The purpose_of this scientific article is to analyze the process of imminence of Ukrainian and EU legal systems in the field of conventional law in order to develop conceptual suggestions for improving the Ukrainian system of conventional law in the context of the re-codification of civil law in Ukraine.

The research of the topic of this scientific article was conducted through the prism of using a variety of methodological tools, where it is worth highlighting analytical, comparative and

legal methods and the method of generalizations. The analytical method was applied by the authors to determine specific features of the processes of harmonization and unification both at the level of the EU and Ukraine. The comparative and legal method was used to compare national and European legislation. The method of generalizations was used to form the main conclusions of the scientific article, including suggestions for improving civil legislation of Ukraine with the aim of bringing it into line with EU legislation.

## 4. Results and Discussion

*Unification and harmonization of EU conventional law*

Private law around the world is currently in the process of constant harmonization and unification, which is due to the convergence of the legal systems of countries with close economic relationships, as well as regional entities, which aim to simplify and improve the mechanisms for the implementation and protection of private rights of all the participants in legal relations. The EU as a special supranational entity is not an exception, given the desire to maximize the freedom of movement of goods and services.

A significant number of researchers point to the tendency of "Europeanization of private law", which seemed a few decades ago impractical and impossible for the private law sphere (Basedow Jurgen, 1998, p. 135). There is an increase in European influence on national private law. In addition to certain directives and regulations, the comprehensive work is underway on joint acts in the field of European conventional law (Christian von Bar. Hans Schulte-Nolke, 2005, p. 165), which indicates the comprehensiveness of rule-making in the EU. Such a tendency can be explained by the expansion of the competence of the EU and the development of such mechanisms of legal regulation of private law norms, which, on the one hand, will contribute to their unification or harmonization at various levels, and on the other hand, will not limit the competence and specifics of the national legal systems of countries. which are part of the EU and third countries having close economic, political and other relationships with the EU.

However, it is also worth pointing out the ambiguity of the perception of the process of Europeanization of private law both by the EU institutions themselves and by scholars. There are fierce debates on this issue among politicians and academicians. Specific features of the structure and functioning of the EU, the distribution of competences between its institutions and Member States established by the deeds of establishment influence the content of this process. Besides, certain authors, pointing to the threats and negative consequences of the

Europeanization of conventional law, appeal to the incompatibility of the welfare levels of European countries, inequality of the internal distribution of income within each society even in those countries characterized by approximately the same level of gross domestic product per unit of population. Therefore, the introduction of uniform mechanisms for the distribution of costs under contracts, compensation for damages is considered dangerous. The authors explain it by the fact that countries with a lower level of income will in this case only have expenses from the adaptation of national contractual legislation with EU legislation (Juan José Ganuza, Fernando Gomez, 2008, p. 579).

However, it should be noted that the EU is one of the best examples of successful harmonization in various areas. The EU decisions adopted through directives and regulations are examples of harmonization, since they must be transposed into the national legal systems of the Member States. They can be transposed into law and have the flexibility to be applied by national authorities in Member States with different legal systems, allowing the establishment of legal norms that take into account the laws and traditions of those Member States. At the same time, it is necessary to state that various legal relations within the framework of conventional law (protection of consumer rights, conclusion of certain types of contracts, etc.) are currently scattered in a large number of EU acts that does not always contribute to their correct and full application. However, there is a number of legal relationships that are regulated at the level of national legal systems, but do not have the corresponding legal mechanism at the EU level, despite the increasing pace of harmonization during the last decades, including the issue of the feasibility of creating a single codified act at the EU level. This, in particular, concerns general contractual provisions, which are currently almost non-existent in the EU legal system and are contained only in "soft law" (DCFR, PECL). But taking into account the different legal systems that exist in the EU, the uneven interpretation of such provisions may sometimes contribute to the impossibility of concluding a contract.

In this context, it should be also noted that harmonization is different from unification. On the one hand, while maintaining an order based on the respect for legal traditions of Member States, harmonization is aimed at eliminating differences between various laws, ensuring coordination and setting standards, as well as emphasizing the voluntary participation of interested parties. Unification, on the other hand, replaces the existing legal system with a new legal system and is aimed at the convergence of different legal systems rather than the implementation of legal decisions. General principles regulating the creation of different legal systems can be combined through integration, harmonization and unification (Catriona Paisey.

Nicholas J. Paisey, 2004, p. 1038).

If talking about the unification of EU conventional law, it should be noted that the expediency or impracticality of its implementation has been the subject of lively discussions for the last decade both at the level of EU institutions and at the level of the scientific community depending on the political situation within the EU.

Nowadays, the main task of the research group for the development of the European Civil Code is the introduction of such an effective legal mechanism that would ensure the search for a combination of alternative methods of determining the general principles and foundations of conventional law in national legal systems and traditional methods of unification as the final stage, which should lead to the adoption of mandatory regulatory act. The form of such a tool is still being discussed. Some authors are convinced that the method of complete unification of material private law is currently burdensome and impractical, and therefore the Code should be tested over time by means of general principles. Other authors look further and claim that the EU does not have sufficient legal power to adopt any complex Civil Code (Dyminska, 2017, p. 135). However, this process is currently suspended. The reason for this was a certain crisis of the EU existence in the whole, as well as the withdrawal of Great Britain from the EU.

In our opinion, unification and harmonization are the right tools to combat legal uncertainty that will benefit all potential participants regardless of the form of imminence of conventional law. For example, the PECL and the DCFR (Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference) tried to establish the balanced rule between different legal systems based on the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles. It does not mean that the contract rules set out in the PECL and the DCFR are formed on the basis of combination or predominance by choosing the most favorable rules or those common to different legal systems. On the contrary, those laws are their own specialized systems built on the basis of ensuring commercial relations between EU Member States under the influence of modern trade practices and providing their own autonomous interpretation of the rules of international trade in accordance with the principles of uniformity and good faith.

It should be also noted that the process of unification of EU conventional law is not easy and is associated with significant economic, political and time costs. In order to successfully develop and implement common European law in the field of conventional law, EU institutions need to collect a sufficient number of reliable data about the reality of regulated relations, to evaluate alternatives for each institution of conventional law, and to identify the likely impact of

the implemented norms on all participants in the relations. And it is very important both to develop a single act and to invest some political capital in it from the point of view of informing the entire professional and non-professional society about the expediency of the existence of such an act. Although it is worth noting that Ukraine, while developing new acts or even today in the process of re-codification, also faces an explanatory company on the feasibility of these changes, and this path is obviously complicated. Therefore, one can only imagine the complexity of such communication within the boundaries of an interstate entity with a large number of subjects. However, this should not be the reason to abandon the idea of a single EU conventional law.

Despite all the obstacles, we believe that the process of Europeanization of conventional law has globally entered a new dimension due to specific legislative methods, such as harmonization and unification. Differences in legal systems, which certainly increase the costs of international trade, should be limited by unified solutions introduced in national legislation. Legal norms and fundamental principles of conventional law play an important role not only from an economic point of view, but are also important foundations of a single European legal identity. Despite numerous obstacles, we believe that the process of development of the unification of European law has more advantages than disadvantages. It is explained by the fact that only under such conditions it is possible to talk about the formulation of typical European law that would simplify and improve the system of EU conventional law, but not hinder its development.

In order to replace important areas of law with new content and methods, it is necessary to take into account both political, economic and social factors. It is due to the fact that the unification of EU conventional law, but not the adaptation of specific legal norms, will change the structure of the European legal system and may affect the beliefs, perceptions and general values of the key subjects of this system.

It is quite obvious that the creation of a single integration structure corresponds or should correspond to the formation of a single legal system of the EU. It is confirmed in the introduction of a single legal field of the EU (Dyminska, 2016, p.219). However, we are convinced that not only the EU law plays an important role in the structure of the European legal system, but also national legal systems, which have a profound influence on the formation of the EU law.

It is important to note the following in this regard. Of course, the transition to a single integration association, the modernization of the legal system and the formation of a single EU

law are closely related in legal terms and they are a certain step forward in the integration process. However, it should be noted that, despite the external unity of the EU, there are significant differences in the procedure for exercising EU powers depending on the scope of their application, since decision-making procedures and the procedure for their implementation are heterogeneous, which is related to different types of competences that are distributed between the EU and the Member States. Therefore, emphasizing the importance of unification or harmonization processes within the framework of conventional law, one should state the complexity of this process from the point of view of harmonizing all legal systems.

*Updating the concept of conventional law in Ukraine through the prism of imminence of Ukrainian and EU legal systems*

Regardless of the form of the EU conventional law in the future, Ukraine has taken on a number of obligations to bring national legislation into line with EU legislation. It is also related to private law. It was one of the factors that led to the need for re-codification of civil legislation of Ukraine.

In the process of the last codification of civil legislation in Ukraine, like in other republics of the former Soviet Union, the general provisions on the contract were allocated into a separate Chapter II of the Book V. According to the authors, such a decision was fully justified at that time in view of the need to radically revise the role of the contract in regulating private relations and the place of this legal construction within the system of civil and legal tools. Totalitarian methods of influencing economic relations were to be replaced by market mechanisms of legal regulation, where the contract has a priority place.

Such a solution to the problem definitely played its positive role – contractual structures organically entered the civil circulation and became a powerful foundation for the introduction and construction of a market economy. The type taxonomy of civil contracts has been dynamically developed in recent decades: new kinds and types of contractual structures have appeared (Kuznetsova N.S., Zahvataev V.M., 2021, p. 333).

As it was noted in the Concept of Re-codification, the normative array of the Book V of the CC of Ukraine at the stage of updating should be primarily oriented on the ideas laid down in the fundamental acts of harmonization of European private law, in particular on the DCFR, as well as on the PECL (The concept of updating the Civil Code of Ukraine, p. 119).

The Book II of the DCFR covers the definition of a contract, provisions on the autonomy of the will during the conclusion of a contract, forms of a contract, stages of its

conclusion, issues of invalidity, including grounds for invalidity, regulates pre-contractual obligations, interpretation of contracts. It is fundamental for the re-codification of the CC to resolve the issue about the place of the provisions that are focused on the regulation of the contract itself, first of all, which provisions should be transferred to the Book I (to the Chapter 16) by expanding its content by the presence of provisions on the contract as a legal fact, taking into account that it is contracts that make up the largest segment in the total volume of transactions. Apparently, it is not by chance that the Book II of the DCFR is focused on contracts and other legal acts (i.e., legal facts), and the Book III on obligations and corresponding rights (The concept of updating the Civil Code of Ukraine, 2020, p. 119).

It is worth noting in this context that the coordination group for the development of the DCFR decided that Books II and III should cover the matters regulated in the PECL - general provisions on contracts and other legal acts, as well as general provisions on contractual and (in many cases) other bindings. It was quite difficult for the coordination group to decide how those matters should be divided between the Books and what are the titles of the Books, until the definition and content of the terms "contract" and "binding" had been resolved in the DCFR. As a result, the Book II deals with contracts and other legal acts (how they are executed, interpreted, consequences of invalidity, definition of the content), while the Book III is focused on the regulation of duties related to the scope of the DCFR, both contractual and non-contractual, and corresponding rights (Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference).

Specific feature of the DCFR is a clear distinction between a contract considered as a type of transaction (a type of legal act), and legal relations, which usually include groups of mutual rights and obligations arising from it. Contracts in the Book II are treated as legal acts; the Book III deals with rights and obligations arising from contracts as legal acts, as well as non-contractual rights and obligations. The structural division in this context, which was only implied in the PECL, is directly expressed in the DCFR. In fact, the DCFR follows a natural "chronological" order regarding contracts and contractual obligations: First, the pre-contract stage, then the conclusion of the contract, the right to withdraw from the contract, representation (in case if the contract can be concluded by a representative), grounds for invalidity, interpretation, content and consequences of the contract, performance, methods of protection in case of non-performance, plurality of persons supporting the debtor and creditor, change of persons in the contract, crediting of claims (mutual performance) and coincidence of debtor and creditor in one person and period of limitations. This is the same order as we can see

in the PECL. The only difference is that the DCFR delineates the boundaries between norms dealing with contracts as transactions (conclusion, interpretation, invalidity, content and effects of a contract) and norms on rights and obligations arising from contracts. The new Book begins on this border, and the Chapter on duties and corresponding rights in general is included in it. Such a change is justified not only because there are differences between the contract and the rights and obligations arising from it; this approach helps to have a clear consent, but also because it makes it possible to define the chapter at the beginning of the Book III including those norms, which are difficult to find another place, such as, for example, norms about conditional and temporary rights and obligations (Cherniak, 2022, p. 56).

"Typical regulations" constitute most of the text of the DCFR. The adjective 'typical" indicates that they are offered not as universally binding examples, but as "soft law" rules, like the PECL and similar publications. Of course, it can be assumed that this position is explained by the fact that it is possible to use certain rules as a model for law-making, for example to equalize contradictions of the Acquis Communautaire. However, we believe that such practice also has another goal – to maximize the freedom of the participants in conventional relations in building specific contractual structures.

In this regard the construction of the Book IV of the DCFR, which contains a complex of typical norms on certain types of contracts and the rights and obligations under them, seems to be interesting. These rules, in the field of their application, expand and specify the general provisions (Books I–III) and, if necessary depart from them or regulate relations that have not mentioned them. The structure of this Book differs from the traditional structure of the national CC of Ukraine, where the general provisions of the purchase / sale contract, performance of works and services are determined. The Book IV of the DCFR contains provisions on purchase / sales (Part A: Sales); lease of goods (Part B: Lease of goods); services (Part C: Services) (construction contract, processing, storage, design works contract, information and consulting services, medical services); mandate (Part D: Mandate contracts); contracts of agency, franchising and distribution (Part E: Commercial agency, franchise and distributorship); loan contract (Part F: Loan contracts); personal security obligations (Part G: Personal security); donation (Part H: Donation).

This position of the developers of all "soft law" acts in the field of contractual law is due to the high level of freedom of the contract, which is emphasized there and the definition of only certain contractual constructions is explained by their complexity and the importance of

protecting the participants of contractual relations from them.

It is also currently important to refuse from the regulation of issues related to the form of the contract without dividing into separate requirements to the form of contracts for different types of participants in civil relations. Exceptions are currently made by European legislation and "soft law" acts only for a limited range of contracts (written form is mandatory for the safety conditions of using products for consumers, for gift contracts, etc.), which is due to the need to protect the interests of the participants of such contracts.

The Ukrainian legal tradition has a practice of special regulation of the terms of the contract, where there are legal consequences for the contract in the whole in case there are no essential terms of the contract.

The DCFR (Draft Common Frame of Reference, II.-9: 101) defines that the terms of the contract can be directly or indirectly established by the agreement of the parties, legal norms or practice that has been established within mutual relations of the parties, or customs of business turnover. It can be stated that European conventional law does not operate with the concept of essential terms of the contract (in the sense of civil legislation of Ukraine), leaving the scope and content of the terms of the contract to the discretion of the parties, but does not exclude the possibility of regulating certain terms of the contract by regulatory acts. Such norms can be both special for certain types of contracts and general.

European contract law also defines such special terms of the contract as pre-contractual statements of the parties, which are recognized by the terms of the contract; the terms of the contract determined by the tacit agreement of the parties; contract terms defined by a third party.

In particular, the DCFR (Draft Common Frame of Reference, IV. C.-2:102) provides that pre-contractual statements of the parties made before the conclusion of the contract are considered to contain a term of the contract, if the other party has every reason to believe that such a statement is made in order to include such a provision in the contract, in case of its conclusion. The content and form of such statements differ depending on the type of contract, especially for pre-contract clauses in contracts with consumers, since consumers have, among other things, the right to information about products, which is the pre-contractual right in most cases.

The given examples are only a part of the issues that must be resolved in the process of re-codification of civil legislation of Ukraine, taking into account imminence of Ukrainian and

EU legal systems. Such changes, in our opinion, should improve the possibility of concluding contracts with counterparties from European countries, should increase the level of their implementation and guarantee the property rights of the participants of such contractual relations.

## 5. Conclusions

The difference between the legal regimes of several countries can be reduced only in the process of creating an effective single supranational legal system, if the harmonization process is successful. The parties involved in contractual obligations, regardless of the jurisdiction, will be able to use such legal rules as they are ready for and will rely on such legal certainty. The results of harmonization in any of their manifestations will gradually gain maximum spread and effect promoting commercial relationships both within the EU Member States and at the level of the EU internal market. Such positive results can be achieved with the help of the correct harmonization tools aimed at meeting the needs of the parties interested in the effective conclusion and execution of the contract, reducing contractual costs.

There is currently a number of concerns regarding the harmonization of EU conventional law, including the choice of the form of such harmonization. Despite the fact that certain institutions of conventional law, such as the protection of consumer rights, have a larger volume of harmonized norms, there is progress in other areas during the last decades, in particular related to the development of the DCFR, which demonstrated the possibility of creating a single EU act regarding the general provisions of conventional law, which will maximally take into account specific features of various legal regimes presented in the EU. However, this process takes place and must take place gradually and, perhaps, in some cases has features of coercion. Nevertheless, it is worth noting that the culture of applying supranational (international) legal norms does not have the highest level required for the effective functioning of the EU internal market and, in fact, the global commercial turnover. The need for harmonization must be accompanied by the correct knowledge and information in this area, the application of such rules must be supported by motivation for the Member States.

It also seems obvious that the renewed CC of Ukraine should not fully correspond to the structure of the DCFR. However, the traditional classification of contracts for Ukrainian science should be reconsidered in this context, especially in the context of distinguishing between contracts for the performance of works and the provision of services. Besides, the

updated CC of Ukraine should only contain general norms regarding certain types of contracts, and their detailing should be provided by special regulatory legal acts in case when it is justified by the complexity of the contractual structure or in case of the need to protect individual participants of such contracts. The rest of the norming should be specifically aimed at the freedom of the contract, both in terms of its content, including the elimination of the norms on the essential terms of contracts, and in terms of the form. Such minimization will both "simplify" the content and scope of the CC of Ukraine and will contribute to the expansion of the scope of freedom of contract, which is the aim of European conventional law.

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