

# What does the Association Agreement mean for Ukraine, the EU and its Member States? A Legal appraisal

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**Abstract:** This paper analyses the EU Association Agreement (AA) with Ukraine. It argues that this new legal framework, the objective of which is to establish a form of close political association and economic integration, is important for several reasons. First, the AA replaces the outdated Partnership and Cooperation Agreement and includes a comprehensive agenda for bilateral cooperation covering all areas of common interest. Second, it contains binding, rules-based provisions aiming at the export of EU rules and values. Third, the AA provides an ambitious agenda for Ukraine's political and economic reform.

## Introduction

Association Agreements between the EU and third countries are one of the most important and traditional tools of the EU's external policy. Already in the Treaty of Rome of 1957, it was foreseen that the at that time European Economic Community "may conclude with a third state, a union of states or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures".<sup>1</sup> Apart from certain procedural amendments, involving *inter alia* a greater role for the European Parliament, this provision has never been substantially amended and is now to be found in Article 217 of the Treaty on the Functioning of the European Union (TFEU).

In the history of the European integration process, association agreements have been concluded with a wide number of third countries. One of the oldest examples is the Ankara Agreement concluded with Turkey in 1963. More recently, the EU concluded a network of

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<sup>1</sup> Article 238 of the EEC-Treaty.

bilateral association agreements with the countries of the Western Balkans region (so-called Stabilisation and Association Agreements) and with the countries of the Southern Mediterranean (so-called Euro-Med Association Agreements). Significantly, the instrument of association is not limited to the European continent or its direct neighbourhood since the EU has also association agreements with countries such as Chili or South Africa.<sup>2</sup> Although all association agreements differ in terms of their exact content and objectives, the common denominator is the ambition to establish a legal and institutional framework for the development of privileged relations involving close political and economic cooperation.

The Association Agreement between the EU and Ukraine builds upon this well-established tradition. It essentially aims to deepen the political and economic relations between Ukraine and the EU through the establishment of an enhanced institutional framework and comprehensive provisions on regulatory and legislative approximation. Of particular significance is the ambition to set up a Deep and Comprehensive Free Trade Area (DCFTA), leading to “Ukraine’s gradual integration in the EU internal market” without formal membership of the EU. In order to fully understand the implications of this arrangement, it is necessary to first analyse the background of the bilateral relations between the EU and Ukraine. Subsequently, this contribution spells out the objectives and specific features of the EU-Ukraine Association Agreement.

### **Background of EU-Ukraine relations: From Partnership and Cooperation to Association**

The AA replaces the Partnership and Cooperation Agreement (PCA), which was signed in 1994 and entered into force in 1998, as the basic legal framework of EU-Ukraine relations.<sup>3</sup> Due to internal developments in both the EU and Ukraine, several provisions of the PCA were out of date and no longer adapted to the current ambition of the bilateral relationship. The preamble and Article 1, for instance, referred to Ukraine as “a country with an economy in transition”, which is no longer appropriate after the country’s accession to the World Trade Organization (WTO) in 2008. Moreover, the agreement included general and broadly defined provisions on economic cooperation but stopped short of any regional trade integration. The minimalistic approach of the PCA was particularly well-illustrated as regards the objective of approximating Ukraine’s existing and future legislation to that of the EU. While recognizing that this process of legislative approximation is an important condition for strengthening the economic links between the parties, Article 51 PCA proclaimed that Ukraine “*shall endeavour to ensure* that its legislation be

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<sup>2</sup> For an analysis of the practice of association agreements, see: M. Maresceau, ‘Bilateral Agreements concluded by the European Community’, *Hague Academy of International Law, Recueil des cours* 309 (2004), 311-422.

<sup>3</sup> Art. 479 EU-Ukraine AA.

gradually made compatible with that of the Community [now Union]”.<sup>4</sup> This could hardly be regarded as a formal legal commitment. Its vague and open-ended formulation gave the Ukrainian authorities a large freedom to define the time-schedule and methods of implementation. There was only an obligation to act but without a requirement to achieve particular results or a sanction in case the approximation of laws obligation was not fulfilled. Moreover, the approximation clause included a long list of ‘priority areas’ for legislative action but failed to provide clear guidelines on the scope and content of the EU laws to be taken as the basis for approximation nor did it include a link with the objective to establish a Free Trade Area (FTA) in the future.<sup>5</sup>

Proceeding from the identified limits of the PCA and taking into account the implications of the EU’s eastward enlargement, the European Commission proposed a significant revision of the bilateral EU-Ukraine legal relations in the context of the so-called European Neighbourhood Policy (ENP). This policy, which was formally launched in 2004, essentially aims at the export of the EU’s norms and values to its neighbouring countries in order to establish an area of security, stability and prosperity beyond the formal borders of the Union. For this purpose, the participating countries are offered a significant degree of economic integration in return for concrete progress in terms of legal approximation.<sup>6</sup> In the short term, an ENP Action Plan – adopted with Ukraine in 2005 for a period of three years – laid down political and economic priorities for reform whereas the negotiation of a new bilateral framework agreement to replace the PCA was considered to be a long term objective.<sup>7</sup>

Against the political background of the Orange Revolution, Ukraine was the first ENP country to start negotiations on a new Association Agreement in March 2007. Ukraine’s road towards the signature of the agreement in June 2014 was extremely dramatic. Due to mounting economic and political pressure from Russia, the government of Ukraine decided to suspend the process of preparation for signature of the EU-Ukraine AA on 21 November 2013.<sup>8</sup> Following this news, hundreds of thousands of Ukrainians went to the streets. The *Maidan* revolution, which claimed more than a hundred victims, resulted in the dismissal of President Victor Yanukovich on 22 February 2014 and the election of a new pro-European president Petro

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<sup>4</sup> Art. 51 EU-Ukraine PCA, emphasis added.

<sup>5</sup> R. Petrov, ‘Recent Developments in the Adaptation of Ukrainian Legislation to EU law’, 8(1) *European Foreign Affairs Review* (2003), 125-141, at 131.

<sup>6</sup> European Commission, ‘Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’, COM (2003) 104 final, 11 March 2003.

<sup>7</sup> In November 2009, the EU-Ukraine Action Plan was replaced by a bilateral Association Agenda (EU-Ukraine Cooperation Council, ‘Recommendation on the implementation of the EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement’, UE-UA 1057/0923, 23 November 2009).

<sup>8</sup> The Ukrainian government’s decision cannot be disconnected from the Russian proposal to establish a Eurasian Union building upon the already existing Customs Union between Russia, Belarus and Kazakhstan. On the background of this initiative and its implications for the EU-Ukraine relations, see: G. Van der Loo and P. Van Elsuwege, ‘Competing Paths of Regional Economic Integration in the Post-Soviet Space: Legal and Political Dilemmas for Ukraine’, 37 *Review of Central and East European Law* (2012), 421-447.

Poroshenko on 25 May 2014. In the meantime, the territory of Crimea was annexed by the Russian Federation and separatist leaders installed the unrecognised People's Republics of Donetsk and Luhansk in the Eastern part of Ukraine. These dramatic events illustrate how the AA had become much more than just a bilateral agreement between the EU and Ukraine. For the a large part of the Ukrainian population, it is a symbol for change including an agenda for political, economic and legal reforms in line with European norms and values.

### **Objectives and specific features of the EU-Ukraine Association Agreement**

The AA between the EU and Ukraine is one of the most ambitious and voluminous among all EU Association Agreements with third countries.<sup>9</sup> It is a comprehensive framework agreement which embraces the whole spectrum of EU activities, from trade to foreign and security policy and cooperation in justice and home affairs. Of particular significance is the ambition to set up a Deep and Comprehensive Free Trade Area (DCFTA), leading to the gradual and partial integration of Ukraine into the EU Internal Market. This implies a far-reaching liberalisation of trade in goods and services and the abolition of non-tariff barriers through regulatory convergence with regard to issues such as the protection of intellectual property rights, competition law, rules of origin, labour standards and environmental protection. In order to ensure the effective implementation of those commitments, the AA is based upon a strict conditionality approach. Broadly speaking, two different forms of conditionality can be distinguished. On the one hand, the AA includes several provisions related to Ukraine's commitment to the common values of democracy, rule of law and respect for human rights and fundamental freedoms.<sup>10</sup> On the other hand, the part on the DCFTA is based on an explicit 'market access conditionality' implying that additional access to a section of the EU Internal Market will only be granted if the EU decides, after a strict monitoring procedure, that the legislative approximation commitments are adequately implemented.<sup>11</sup> In what follows, the most significant features of the AA and its implications for Ukraine, the EU and its Member States are briefly explained.

*a) The AA does not pursue the objective of Ukraine's membership in the EU but aims at closer political, economic and legal integration with the EU*

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<sup>9</sup> The agreement counts around 2,140 pages in the Official Journal including 7 titles, 28 chapters, 486 articles, 44 annexes, 3 protocols and a joint declaration.

<sup>10</sup> N. Ghazaryan, 'A New Generation of Human Rights Clauses? The Case of Association Agreements in the Eastern Neighbourhood' *European Law Review* 40 (2015) 391-410.

<sup>11</sup> G. Van der Loo, P. Van Elsuwege and R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', *EUI Working Papers Law* 2014/09, 13; available at: <http://cadmus.eui.eu/handle/1814/32031> accessed 10 January 2016.

The conclusion of association agreements with European countries is often perceived as a stepping-stone towards EU membership.<sup>12</sup> For example, after the signing ceremony on 27 June 2014, the heads of State or Government of the three associated countries linked the conclusion of the AAs with their (long-term) EU membership aspirations.<sup>13</sup> However, there is no automatic link between association and accession prospects. The AA with Ukraine carefully avoids any direct reference to future membership perspectives for Ukraine but somewhat diplomatically observes that “the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice”. It does not entail any legal or political commitment towards further enlargement on behalf of the Union. The AA is thus not a pre-accession agreement such as the Stabilisation and Association Agreements (SAAs) with the Western Balkan countries.<sup>14</sup> However, hypothetically, it neither completely excludes a membership perspective. In this view, the preamble states that “this Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations.”<sup>15</sup> In addition, the parties explicitly recognize that “Ukraine as a European country shares a common history and common values with the Member States of the EU and is committed to promoting those values.” The parallels with the first sentence of Article 49 TEU are obvious. Moreover, it is noteworthy that several provisions reflect the formulation of the Copenhagen pre-accession criteria. Political criteria such as stability of institutions guaranteeing democracy, the rule of law, human rights and fundamental freedoms are not only defined as ‘essential elements’ of the AA,<sup>16</sup> they are also an integral part of the established political dialogue<sup>17</sup> and cooperation in the area of freedom, security and justice.<sup>18</sup> At the economic level, the establishment of a DCFTA is regarded as an instrument “to complete [Ukraine’s] transition into a functioning market economy”.<sup>19</sup> Last but not least, the entire agreement is based on Ukraine’s commitment to achieve “convergence with the EU in political, economic and legal areas”.

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<sup>12</sup> D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press, 1999).

<sup>13</sup> A. Rettman, ‘Georgia, Moldova and Ukraine cement EU ties’, EUobserver, 27 June 2014, available at <<http://euobserver.com/foreign/124792>> accessed 10 January 2016.

<sup>14</sup> The SAAs explicitly refer to the Western Balkan countries’ status as “a potential candidate for EU membership”. Also the Association Agreement with Turkey is conceived to “facilitate the accession of Turkey to the [Union] at a later date”.

<sup>15</sup> As a reaction to the turbulent ‘Maidan protests’ and the following events, the Council emphasised on several occasions that “the Association Agreement does not constitute the final goal in EU-Ukraine cooperation” (e.g. Foreign Affairs Council Meeting, ‘Conclusions on Ukraine’, 10 February 2014). Also at the signing ceremony on 27 June 2014, H. Van Rompuy stated that “these agreements are not the final stage of our cooperation”. These statements can be considered as a careful attempt by the (European) Council to support the pro-EU forces in Ukraine with an EU-perspective while avoiding explicit references to EU accession.

<sup>16</sup> Preamble EU-Ukraine AA.

<sup>17</sup> Art. 6 EU-Ukraine AA.

<sup>18</sup> Art. 14 EU-Ukraine AA.

<sup>19</sup> Art. 1(2)d EU-Ukraine AA.

Nevertheless, the AA does not aim at the preparation of Ukraine's accession to the EU but at the establishment of "close and privileged links".<sup>20</sup> In other words, the key objective of the AA is to ensure Ukraine's partial integration in the EU without offering any concrete membership perspective. For this purpose, the AA contains so-called 'evolutionary' and 'conditionality' clauses. These are provisions with specific objectives (for instance, granting a visa-free regime, access to certain freedoms of the EU Internal Market), the attainment of which is conditional either on certain actions on behalf of Ukraine (such as the elimination of trade barriers and uncompetitive practices) or the effective functioning of democratic and market-economy standards (such as free and fair elections and fighting corruption). It is well known that such a process raises significant challenges in terms of the EU *acquis* export and, in particular, for the uniform interpretation and application of the shared legal framework within legal systems of third countries. For this purpose, the AA with Ukraine introduces a reinforced institutional framework, enhanced forms of conditionality and sophisticated mechanisms for legal approximation and dispute settlement which are distinct from other existing models of integration without membership.<sup>21</sup>

*a) The EU may closely influence the progress of reforms in Ukraine through the mechanisms of conditionality and monitoring*

The AA is based upon a strict conditionality approach, which links Ukraine's performance and the deepening of its integration with the EU. The preamble to the agreement explicitly states that "political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement as well as *Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas.*"<sup>22</sup> This link between the third country's performance and the deepening of the EU's engagement is a key characteristic of the European Neighbourhood Policy (ENP). Whereas this principle has so-far been applied on the basis of soft-law instruments such as Action Plans and the Association Agenda, it is now encapsulated in a legally binding bilateral agreement.<sup>23</sup>

In addition to the standard reference to democratic principles, human rights and fundamental freedoms as defined by international legal instruments (Helsinki Final Act, the Charter of Paris for a New Europe, the UN Universal Declaration on Human Rights and the

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<sup>20</sup> Art. 1(2)(a) EU-Ukraine AA.

<sup>21</sup> For a comprehensive analysis, see: G. Van der Loo, *The EU Ukraine Association Agreement and Deep and Comprehensive Free Trade Area* (Leiden-Boston: Brill) 2016, forthcoming.

<sup>22</sup> Emphasis added.

<sup>23</sup> See e.g. the EU-Ukraine Association Agenda (EU-Ukraine Cooperation Council, 'Recommendation on the implementation of the EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement', UE-UA 1057/0923, 23 November 2009, updated in 2011).

European Convention on Human Rights and Fundamental Freedoms),<sup>24</sup> the AA contains common values that go beyond classic human rights and also include very strong security elements, such as the “promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery”.<sup>25</sup>

Apart from the more general ‘common values’ conditionality, the AA contains a specific form of ‘market access’ conditionality, which is explicitly linked to the process of legislative approximation. Hence, it is one of the specific mechanisms introduced to tackle the challenges of integration without membership. Of particular significance is the far-reaching monitoring of Ukraine’s efforts to approximate national legislation to EU law, including aspects of implementation and enforcement.<sup>26</sup> To facilitate the assessment process, the government of Ukraine is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreement. In addition to the drafting of progress reports, which is a common practice within the EU’s pre-accession strategy and the ENP, the monitoring procedure may include “on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed”.<sup>27</sup> Arguably, the latter option is a new and far-reaching instrument introduced precisely to guarantee that legislative approximation goes beyond a formal adaptation of national legislation.

The results of the monitoring activities are to be discussed within the joint bodies established under the AA. Such bodies may adopt recommendations on the basis of unanimity but it is only the Association Council (or the Trade Committee) which shall decide on further market opening if the parties agree that the necessary measures covered within the DCFTA part of the agreement have been implemented and are being enforced.<sup>28</sup> Significantly, recommendations or decisions of the joint institutional bodies as well as a failure to reach such recommendations or decisions cannot be challenged under the specific DCFTA dispute settlement procedure.<sup>29</sup> In other words, the ‘market opening’ conditionality is very strict. From a legal point of view, it requires the agreement of both parties to proceed. Of course, in practice, Ukraine will be the requesting party which places the EU in a powerful position to decide on the pace and scope of market opening.

*b) Ukraine will be required to pursue comprehensive domestic legal reforms in order to ensure the effective implementation of the AA*

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<sup>24</sup> Arts. 2 EU-Ukraine.

<sup>25</sup> Art. 2 EU-Ukraine AA.

<sup>26</sup> Art. 475 (2) EU-Ukraine AA.

<sup>27</sup> Art. 475 (3) EU-Ukraine AA.

<sup>28</sup> Art. 475 (5) EU-Ukraine AA Sometimes, the decision about market accession is specifically endowed to the Trade Committee. This is, for instance, the case with regard to services and establishment (Art. 4 Annex XVII) and public procurement (Art. 154).

<sup>29</sup> Art. 475(6) EU-Ukraine AA.

The AA is not just an ordinary international agreement, but a complex legal framework containing not only specific norms governing the functioning of the relations between the EU and Ukraine but also envisaging the export of a significant part of EU rules within the legal system of Ukraine.<sup>30</sup> The scope of the so-called EU *acquis* to be applied by Ukraine covers not only primary and secondary EU legislation but also EU legal principles, common values, and even case law of the ECJ, as well as specific methods of interpretation of the relevant EU *acquis* within their legal systems. Hitherto, the Ukrainian legal system has not faced the necessity to implement and effectively apply the dynamic legal heritage of an international supranational organisation.<sup>31</sup> Subsequently, adherence of Ukraine to the dynamic EU *acquis* via the AA will encapsulate a plethora of challenges to its national legal order.

One of the serious challenges to be faced by Ukraine is the reluctance of the judiciary to apply and effectively implement international law sources in their own judgments.<sup>32</sup> In practice, the Ukrainian courts refer mainly to the international agreements which are duly signed and ratified by their national parliaments and which are self-executing within the Ukrainian legal system. Even in these cases, the correct application of international agreements is not guaranteed. It happens because one of the most important impediments for the application of international law by the Ukrainian judiciary is the correct understanding of these international conventions by national judges. The application of the AA by the Ukrainian judiciary will increase through increasing familiarity with the AA and the EU legal order as well, due to claims on behalf of the Ukrainian nationals, based on provisions of the AA and the EU *acquis*.<sup>33</sup>

The objective of effective implementation and application of the AA may be achieved by issuing a special implementation law that will clarify all potential conflicts of provisions of this agreement with Ukrainian legislative acts. For example, Ukraine has already gained some experience in ensuring the implementation and application of the European Convention of Human Rights (ECHR), which was ratified in 1997. This took place by means of two laws. The first law was the law on ratification of the ECHR, wherein Ukraine recognised the jurisdiction of

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<sup>30</sup> For more on application of ‘pre-signature’ and ‘post-signature’ EU *acquis* in the EU external agreements, see R. Petrov, *Exporting the acquis communautaire through EU External Agreements* (NOMOS, Baden-Baden, 2011).

<sup>31</sup> May be with exemption of the application of the EU sectoral “energy” *acquis* under the framework of the Energy Community which Ukraine joined in 2010. See R. Petrov “Energy Community as a Promoter of the European Union’s ‘Energy Acquis’ to Its Neighbourhood”, 38(3) *Legal Issues of Economic Integration* (2012), 331-35.

<sup>32</sup> R. Petrov and P. Kalinichenko, “The Europeanization of Third Country Judiciaries through the Application of the EU *Acquis*: The Cases of Russia and Ukraine”, 60 *International & Comparative Law Quarterly*, (2011) 325-353. This happens mainly due to: 1) the belief that international case law is not relevant to civil law systems; 2) the translation of case law and jurisprudence; 3) the lack of translation of case law into Ukrainian to help judges adjust their decisions to best European standards. Furthermore, the *Verkhovna Rada* of Ukraine is not always expedient in solving conflicts between ratified international agreements and national legislation.

<sup>33</sup> More on judicial activism and voluntary application of the EU *acquis* in the eastern neighbouring countries see P. Van Elsuwege and R. Petrov (eds.), *Legal Approximation of EU Law in the Eastern Neighbourhood of the EU: Towards a Common Regulatory Space?*, (Routledge Press, 2014).

the European Court on Human Rights (ECtHR).<sup>34</sup> The second law was a special law on application of case law of the ECtHR in Ukraine. It imposed on Ukraine a duty of mandatory and timely execution of all judgments of the ECtHR related to this country.<sup>35</sup> In accordance with these laws, judgments of the ECtHR are being formally accepted by the national judiciary as sources of law and Ukrainian judges frequently refer to the ECtHR judgments in their decisions. However, the rate of effective application of the ECtHR case law in Ukraine is considered as unsatisfactory and lags far behind other European countries<sup>36</sup>.

The special law on implementation of the AA may solve much more complicated issues than the Ukrainian law on ratification of the ECHR in 1997. For instance, this law will face the necessity to clarify how binding decisions of the Association Councils should be applied in Ukraine. Direct applicability of the Association Councils' decisions will depend on their undisputed acceptance by national judiciaries. The special law on implementation of the AA must clarify whether the ECJ case law constitutes a part of the EU sectoral *acquis* contained in the AA's annexes. This issue is of prime importance for the Ukrainian governmental agencies and the judiciary which will deal with the interpretation of various elements of the EU sectoral *acquis* within their national legal orders. Another challenge is to clarify how the EU directives listed in the annexes to the AA should be implemented into the legal system of Ukraine.

*c) The (lack of) direct effect in the legal orders of the EU Member States*

The issue of direct applicability of the EU-Ukraine AA not only concerns the constitutional system of Ukraine but is also of particular importance within the legal order of the EU. Over the years, the European Court of Justice has developed a consistent practice of accepting the direct effect of bilateral agreements on the condition that the provisions invoked are clear and unconditional.<sup>37</sup> Only if the agreement contains a formulation excluding the direct applicability of the agreement or the direct effect of some its provisions, the situation is different. The latter is the case for the EU-Ukraine AA. For instance, chapter 14 on the specific dispute settlement mechanism in relation to the DCFTA part of the agreement explicitly provides that “[f]or the avoidance of doubt, this Title shall not be construed as conferring rights or imposing obligations which can be directly invoked before the domestic courts of the Parties.” Arguably, the

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<sup>34</sup> Law of Ukraine “On Ratification of the European Convention on Human Rights 1950, First Protocol and protocols № 2, 4, 7 and 11” of 17<sup>th</sup> July 1997, № 475/97-BP.

<sup>35</sup> Law of Ukraine “On Execution of Judgments and Application of Case Law of the European Court of Human Rights” of 23<sup>rd</sup> February 2006, № 3477-IV.

<sup>36</sup> See the Annual Report of the Committee of Ministers ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights’ in 2014. Available at <[https://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2014\\_en.pdf](https://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2014_en.pdf)> accessed 10 January 2016.

<sup>37</sup> M. Maresceau, “The Court of Justice and Bilateral Agreements”, in: A. Romas, E. Levits and Y. Bot (eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty years of Case-law*, (Asser Press, 2013), 693-717.

introduction of such a statement was deemed necessary to ensure consistency with the multilateral dispute settlement mechanism of the World Trade Organisation (WTO), which does not have direct effect in the EU's legal order.<sup>38</sup> The same logic applies with regard to the inclusion of references that certain specific commitments laid down in annexes to the agreement “shall have no self-executing effect and thus confer no rights directly on natural or legal persons.”<sup>39</sup> This practice, which can also be observed in other recently concluded EU free trade agreements, avoids the possibility to circumvent the non-direct effect of WTO commitments.<sup>40</sup>

Significantly, in addition to the specific clauses precluding direct effect of the AA's trade dispute settlement mechanism and the WTO-like commitments in the field of establishment and services, the Council Decisions on the signing and provisional application of the AA unequivocally provide that “[t]he Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals.”<sup>41</sup> The question arises to what extent such a unilateral declaration, which is not part of the agreement itself, precludes the direct effect of the AA's clear and unconditional provisions. This issue is particularly relevant with regard to the non-discrimination clause of Article 17(1) EU-Ukraine AA, which provides that “[s]ubject to the laws, conditions and procedures applicable in each Member State and the EU, treatment accorded to workers who are Ukrainian nationals and who are legally employed in the territory of a Member State shall be free of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to the nationals of that Member State”. In the *Simutenkov* judgment, the Court of Justice concluded that an identically worded provision of the PCA with Russia “has direct effect, with the result that individuals to whom that provision applies are entitled to rely on it before the courts of the Member States.”<sup>42</sup> Precluding a similar right for Ukrainian nationals would, therefore, lead to a very paradoxical situation. It would imply that an old PCA with Russia having relatively limited ambitions of partnership would have more far-reaching direct legal implications than a far more ambitious association agreement with Ukraine.<sup>43</sup>

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<sup>38</sup> Case C-377/02, *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465.

<sup>39</sup> This reference is included in annex XVI-A to chapter 6 ‘EU party reservations on establishment’, annex XVI-B to chapter 6 ‘list of commitments on cross-border services’ and annex XVI-C to chapter 6 ‘reservations on contractual services suppliers and independent professionals’.

<sup>40</sup> See, for instance, the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJ*, 2001, L 127/6. For comments on this practice, see: A. Semertzi, “The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements”, *Common Market Law Review* 51 (2014), 1125-1158.

<sup>41</sup> See: Art. 5 of Council Decision 2014/295/EU (OJ 2014 L161/1) and Art. 7 of Council Decision 2014/668 (OJ 2014 L278/1).

<sup>42</sup> Case C-265/03, *Simutenkov v. Real Federacion Española de Fútbol* [2005] ECR I-02579, para. 29.

<sup>43</sup> In this respect, it is also noteworthy that the AAs with Georgia and Moldova do not even include a comparable provision on the non-discrimination of legally employed workers.

*d) The AA supports the Ukrainian security and territorial integrity and encourages peaceful settlement of regional conflicts*

The principles of good neighbourliness, peaceful settlement of regional conflicts and territorial integrity were given a prominent place among the essential elements of the AA.<sup>44</sup> Furthermore, these principles are encapsulated in the provisions on regional stability, where it provides that ‘the Parties shall intensify their joint efforts to promote stability, security and democratic development in their common neighbourhood, and in particular to work together for the peaceful settlement of regional conflicts’.<sup>45</sup>

Taking into account that the text of the EU-Ukraine AA was already initiated before the Russian annexation of Crimea and the outbreak of violence in the eastern part of Ukraine, this issue is not explicitly addressed in the agreement. Nevertheless, the EU-Ukraine Association Council confirmed the parties’ ‘commitment to a political and peaceful solution to the conflict in eastern Ukraine based on the respect for Ukraine’s independence, sovereignty and territorial integrity.’<sup>46</sup> It is also noteworthy that the question of territorial integrity is more explicitly dealt with in the AAs with Moldova and Georgia, which also face the phenomenon of ‘breakaway regions’. For example, the article on regional stability in the EU-Moldova AA contains the commitment of the Parties ‘to a sustainable solution to the Transnistrian issue, in full respect of the sovereignty and territorial integrity of the Republic of Moldova’.<sup>47</sup> A similar provision in the EU-Georgia AA underlines that the Parties ‘shall work towards peaceful settlement of the unresolved conflicts in the region’<sup>48</sup> implying thereby the frozen conflict between Georgia and Russia over Abkhazia and South Ossetia. However, the AAs are nowhere near to providing any firm commitments from the EU to provide any sort of military, financial or technical assistance in case of escalating security threats to the parties to the agreements.

Even though the dispute between Russia and Ukraine is formally not dealt with in the framework of the AA, several initiatives had been developed in the margins of this agreement.<sup>49</sup>

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<sup>44</sup> Article 2 EU-Ukraine Association Agreement (n 33), the EU-Georgia AA and the EU-Moldova AA provide that ‘Promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery also constitute essential elements of this Agreement’.

<sup>45</sup> Article 9 EU-Ukraine Association Agreement, Article 8 of the EU-Georgia Association Agreement, Article 8 of the EU-Moldova Association Agreement.

<sup>46</sup> Joint Press Release following the Association Council Meeting between the European Union and Ukraine, 7 December 2015, available at: <http://www.consilium.europa.eu/en/press/press-releases/2015/12/07-joint-press-release-eu-ukraine-association-council/> accessed 10 January 2016.

<sup>47</sup> Article 8 EU-Moldova Association Agreement (n 37).

<sup>48</sup> Article 8 EU-Moldova Association Agreement (n 37). The text of the AA is available on the website of the EU External Action Service <[http://eeas.europa.eu/georgia/assoagreement/assoagreement-2013\\_en.htm](http://eeas.europa.eu/georgia/assoagreement/assoagreement-2013_en.htm)> last accessed 20 September 2014.

<sup>49</sup> P. Van Elsuwege, ‘EU-Russia Relations and the Crisis in Ukraine: How to Proceed?’, *JTIBlog*, 15 June 2015, available at: <http://iog.tk.mta.hu/blog/2015/06/eu-russia-relations-and-the-crisis-in-ukraine> (accessed 20 January 2016).

Of particular importance is the so-called trilateral dialogue between the EU, Ukraine and Russia which was installed in the context of the Minsk peace arrangement and the de-escalation process for the Eastern Ukraine crisis. The first trilateral negotiations of June 2014 resulted in an important compromise solution. On the one hand, the EU and Ukraine agreed to postpone the provisional application of the DCFTA until 1 January 2016. Simultaneously, the EU promised to continue the application of its unilateral trade preferences to Ukraine until the same deadline. On the other hand, the Russian Federation did not suspend its existing free trade arrangement with Ukraine. This compromise essentially aimed to buy time for technical negotiations in response to a list of Russian concerns about the impact of the EU-Ukraine DCFTA. Three issues are significant in this respect. First, Russia claims that its domestic market will be flooded by EU products re-exported via Ukraine and thus circumventing the customs tariffs applicable in EU-Russia trade relations. Second, Russia's exports to the Ukrainian market are expected to suffer from increased competition with EU products. Third, Ukraine's commitments under the DCFTA to adopt EU technical product standards and sanitary and phytosanitary standards (SPS) may collide with the standards applicable in the Eurasian Economic Union and as such further complicate the export of Russian products to the Ukrainian market.

None of the identified economic concerns are inherently problematic in the sense that they can be addressed on the basis of effective customs cooperation, controls on rules of origin and arrangements on regulatory convergence and/or the principle of mutual recognition. This is precisely where the trilateral negotiations can make a difference. More problematic, of course, are the underlying (geo)political considerations and attempts to more fundamentally revise the EU-Ukraine AA. In this respect, the European Commission has drawn some clear red lines: it is absolutely impossible to change the text of the agreement and the entry into force of the DCFTA cannot be further postponed after 1 January 2016 irrespective an earlier Russian request to do so. In a counter-reaction, the Russian Federation decided to unilaterally suspend its free trade agreement with Ukraine and introduced heavy trade restrictions on Ukrainian exports to Russia. These measures are currently contested at the level of the World Trade Organisation.<sup>50</sup>

## **Conclusion**

Taking into account the comprehensive nature of the agreement, the underlying conditionality approach and the complex mechanisms for legislative approximation and dispute settlement, the EU-Ukraine AA occupies, together with the Moldova and Georgia AAs, a unique position within the network of bilateral agreements concluded between the EU and third countries. As such, it offers an ambitious agenda for reform in a region where endemic corruption is hampering economic development and political stability. The obligation to share the EU's common

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<sup>50</sup> "WTO shares Ukraine's complaints about Russia's trade discrimination with WTO members", 16 January 2016, available at: <http://en.interfax.com.ua/news/economic/317920.html> (accessed 20 January 2016).

democratic values based upon regular monitoring by the EU institutions should prevent the Ukrainian government from undemocratic practices. In addition, the establishment of a DCFTA is expected to boost the bilateral economic relations. Despite the rather unstable situation in the region, exports from Georgia and Moldova to the EU significantly increased in the first 12 months of the implementation of the DCFTA provisions and a similar positive evolution is expected for Ukraine.<sup>51</sup> Of course, the context for the full and successful implementation of the EU-Ukraine AA is particularly challenging. Apart from the unstable military situation in the east of Ukraine, the country faces a considerable constitutional reform. Moreover, the scope of the EU *acquis* to be adopted by Ukraine is massive and covers not only EU laws but also fundamental EU principles, doctrines and the ECJ case law. Ukrainian civil servants and judges will require in-depth training in EU law in order to be able to apply those norms in their everyday activities. For the EU and its Member States, on the other hand, the EU-Ukraine AA provides an opportunity to export its norms and values abroad.

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<sup>51</sup> European Parliament Resolution of 21 January 2016 on Association Agreements/Deep and Comprehensive Free Trade Areas with Georgia, Moldova and Ukraine, P8\_TA(2016)0018. It is noteworthy that the DCFTAs with Moldova and Georgia provisionally entered into force on 1 September 2014 whereas the provisional application of the DCFTA with Ukraine only started at 1 January 2016 (as a result of a compromise deal reached in the context of the trilateral EU-Russia-Ukraine dialogue).