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THE IMPACT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE LEGAL SYSTEM OF UKRAINE*

Abstract. This article looks at the impact of the Court of Justice of the EU (CJEU) on the implementation and application of the EU-Ukraine Association Agreement, which triggered unprecedented political, economic and legal reforms in Ukraine. In particular, the article focuses on the constitutional challenges that have arisen for Ukraine in the course of implementing the Association Agreement into its legal system.

Two issues form the focus of consideration in the article. The first issue is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second issue is compatibility between the Association Agreement and the Ukrainian Constitution. The latest political and legal developments in Ukraine are analyzed through the prism of effective implementation of the Association Agreement and the rise of pro-European judicial activism in Ukraine. In conclusion it is argued that the EU-Ukraine Association Agreement enhanced the adaptability of the national constitutional order to the European integration project and European common values.

The EU-Ukraine Association Agreement established a sustainable institutional and legal framework for application of the EU *acquis* including CJEU case law and comprehensive legislative approximation between Ukrainian and EU law. However, the institutional reforms that have already taken place cannot be regarded as fully sufficient. The Ukrainian Parliament has failed to establish substantive and procedural foundations for applying and implementing the EU-Ukraine AA in the Ukrainian legal order. However, this gap is being partially filled by a surprising judicial activism in Ukraine. The Ukrainian judiciary has already started referring to the EU-Ukraine Association Agreement and relevant parts of the EU *acquis*, thereby laying a foundation for regular application of general principles of EU law in applying the provisions of the EU-Ukraine Association Agreement.

Keywords: Association Agreement; Ukrainian Constitution; international law; European common values; case law; constitutional amendments.

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Ukraine's road towards the signature and entry into force of the EU-Ukraine Association Agreement (the Association Agreement) was highly dramatic[1]. Following unprecedented economic and political pressure from Russia, on 21 November 2013 the Government of Ukraine decided to suspend the process of preparation for signature of the Association Agreement[2]. Further events led to the "Maidan" revolution, which claimed more than 100 victims and led to the dismissal of President Victor Yanukovich on 22 February 2014, the annexation of Crimea by Russia in March 2014, and bloody military conflict in the Donbass area. However, the Association Agreement instigated far-reaching economic, political and profound constitutional reforms in Ukraine which will determine its future geopolitical orientation and economic stability of our country. One of the most significant challenges from both theoretical and practical sides is impact of the Court of Justice of the European Union (CJEU) on the legal system of Ukraine.

Taking the above as a starting point, the aim of this article is to highlight most visible facets of the current and future impact of the CJEU on the legal system of Ukraine while implementing the Association Agreement into its legal system. The paper focuses on three major features of this intricate process. The first feature is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second feature is compatibility between the Association Agreement and the Ukrainian Constitution. The third feature is reference to the CJEU case law by the Ukrainian judiciary.

Transition of the Ukrainian Legal System and Judiciary

The Europeanization of the Ukrainian legal system started shortly after independence in 1991. As a priority, Ukraine set as its political objective integration into international political and economic structures and, consequently, membership of the Council of Europe and the European Union. Once the Council of Europe set the criteria for membership, the first attempts were made to ensure the conformity of legislation in the spheres of democracy and human rights. Consequently, Ukrainian criminal, penal and social legislation underwent substantial changes, such as the abolition of the death penalty and the adoption of new criminal, criminal procedural and civil procedural codes. These reforms marked the first steps in the reception of European legal standards into the developing Ukrainian legal system. The workload of Ukrainian courts is excessive. Independent studies indicate

[1] Peter Van Elsuwege, Guillaume Van der Loo, Roman Petrov, 'The EU-Ukraine Association Agreement: a New Legal Instrument of Integration without Membership?' (2015) 1 Kyiv-Mohyla Law and Politics Journal 1-19.

[2] Decision of the Ukrainian Cabinet of Ministers No 905-p of 21 November 2013 <http://zakon0.rada.gov.ua/laws/show/905-2013-%D1%80> (accessed: 05.05.2019).

the span of workload from 7 100 cases per year to 3 500 cases per year in Ukrainian courts of first instance[3].

Yet the Ukrainian judiciary is criticized for the reluctant application and implementation of international agreements into its own legal system. Ukrainian courts refer mainly to international agreements which are duly signed and ratified by the Ukrainian Parliament (Verkhovna Rada) and which are self-executing within the Ukrainian legal system. Even in these cases, the correct application of international agreements is not guaranteed, since 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. International and European organizations realize this problem and target their assistance towards eliminating the incorrect application of international and European law by Ukrainian judges.

The Constitutional Court of Ukraine has proved to be an undisputed champion among other Ukrainian courts in referring to international law and universally-recognized principles in its own decisions. In most cases, these references relate to the protection of constitutional rights and freedoms: the freedom of association, the right to participate in public management, the right to vote and to be elected, the right to a fair trial, and others. The Constitutional Court of Ukraine justifies references to international legal documents by the fact that Ukraine's ratification of fundamental international and regional conventions (ECHR) permitted Ukrainian citizens, foreigners and stateless persons to refer to international bodies to protect their rights in cases where they are not adequately protected by the judiciary in Ukraine. In most judgments, the Constitutional Court of Ukraine endeavoured to interpret the provisions of the Ukrainian Constitution in line with best international and European legal standards[4].

In most decisions taken by the Constitutional Court of Ukraine, the EU *acquis* is applied as a persuasive source of law. For instance, in the course of comparative analysis, the Constitutional Court referred to EC Regulation 2004/2003 'on the regulations governing political parties at European level and the rules regarding their funding'[5], along with the ECHR and ECtHR case law in its ruling on the constitutionality of the Ukrainian law "On political parties in Ukraine"[6]. Furthermore, the Constitution Court of Ukraine referred to EC

[3] 'Як працює судова система в Україні' (*Опендатабот*, 05.03.2018) <https://opendatabot.ua/blog/170-fast-court> (дата звернення: 09.01.2019).

[4] М Селівон, 'Гармонізація положень національного законодавства з нормами міжнародного права та їх застосування в практиці Конституційного Суду України' (2003) 3 Вісник Конституційного Суду України 36-51.

[5] Regulation 2004/2003 of the European Parliament and the Council of November 4 2003 'On the regulations governing political parties at European level and the rules regarding their funding' [2003] OJ L297.

[6] Decision of the Constitutional Court of Ukraine on 12 June 2007, No. 2/2007.

Council Directive 2000/78[7] in its ruling on the constitutionality of Ukrainian laws "On public service", "Diplomatic service", and "Local self-governmental service"[8]. It is remarkable that in both cases, the Constitutional Court did not offer any reasoning as to why it decided to refer to these particular sources of the EU *acquis*.

Legal Framework of Relations between the EU and Ukraine

The EU-Ukraine Association Agreement (AA) replaced the outdated Partnership and Cooperation Agreement (PCA) as the basic legal framework of EU-Ukraine relations on 27 June 2014[9].

Implementation and application of the AA within the legal system of Ukraine is governed by its Constitution. Provisions of the Constitution of Ukraine on application of international agreements follow the same approach and provide that in case of conflict of the AA's provisions with national legislation (excluding national Constitutions), the former prevails. Once duly ratified by the Parliament of Ukraine, the AA has become an inherent part of the Ukrainian legal system just like any other duly ratified international agreement[10].

Relevant provisions of the Constitution of Ukraine imply that, on the one hand, properly ratified AA will not only be equated to the same status as national laws but will also enjoy a priority over conflicting national legislation[11]. On the other hand, the AA cannot overrule conflicting provisions of the national Constitution and, therefore, does not envisage direct enforceability of international agreements in the national legal order.

The Ukrainian legislature, executive and judiciary consider that the AA is not just an ordinary international agreement, but a complex framework legal structure that contains not only specific norms that govern the functioning of the association relations between the EU and Ukraine. Furthermore, the AA also envisages a possibility of application of the vast scope of the "pre-signature" and "post-signature" EU acquis[12] within the legal system of Ukraine.

[7] EC Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[8] Decision of the Constitutional Court of Ukraine on 16 October 2007, No. 8/2007 (case on the maximum retirement age for civil servants).

[9] Art. 479 EU-Ukraine AA.

[10] Article 9 of the Ukrainian Constitution of 1996 provides that: 'International treaties in force, consented by the Verkhovna Rada of Ukraine [Ukrainian Parliament] as binding, shall be an integral part of the national legislation of Ukraine. Conclusion of international treaties, contravening the Constitution of Ukraine, shall be possible only after introducing relevant amendments to the Constitution of Ukraine'. Full text in English is available at <http://www.president.gov.ua/en/content/constitution.html> (assessed: 10.01.2019).

[11] Article 19(2) of Law of Ukraine "On International Treaties of Ukraine" provides that 'If duly ratified international treaty of Ukraine contains other rules then relevant national legal act of Ukraine rules of the respective international treaty should be applied'.

[12] 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 2011).

The scope of the EU *acquis* to be applied by Ukraine covers not only primary and secondary EU laws, but also EU legal principles, common values, and even case law of the CJEU as well as specific methods of interpretation of the relevant EU *acquis* within the Ukrainian legal system. Hitherto, the Ukrainian legal system has not faced the necessity to implement and to effectively apply a dynamic legal heritage of an international supranational organisation[13]. 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 the Ukrainian legal system is the reluctance of the domestic judiciary to apply and effectively implement international law sources in their own judgments[14]. In practice, the Ukrainian courts refer mainly to international agreements which are duly signed and ratified by their national parliament 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, as noted above, 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. Application of the AA by the Ukrainian judiciary will increase through increasing familiarity with the AA and the EU legal order as well as due to claims on behalf of Ukrainian nationals based on provisions of the AA and the EU *acquis*[15].

In the writer's opinion, 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 Ukraine ratified in 1997. The ratification of the ECHR by Ukraine took place by means of two laws. The first law was the law on ratification of the ECHR wherein Ukraine recognised the jurisdiction of the European Court on Human Rights (ECtHR)[16]. 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

[13] May be with exemption of 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' [2012] 38(3) Legal Issues of Economic Integration 331-5.

[14] R Petrov and P Kalinichenko, 'The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine' (2011) 60 International & Comparative Law Quarterly 325-53.

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

[16] On Ratification of the European Convention on Human Rights 1950, First Protocol and protocols№ 2, 4, 7 and 11: Law of Ukraine of 17 July 1997, № 475/97-ВР.

all judgments of the ECtHR related to this country[17]. 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[18].

Article 474 of the EU-Ukraine AA provides that "Ukraine will carry out gradual approximation of its legislation to EU law" as referred to in no less than 44 annexes to the agreement and based on specific commitments and mechanisms identified in both the annexes and specific titles to the agreement. Separate approximation clauses can be found in Title IV on the Deep and Comprehensive Free Trade Agreement (DCFTA), Title V on Economic and Sector Cooperation and Title VI on Financial Cooperation. Other EU-Ukraine AA Titles contain rather general provisions referring to international conventions or "European and international standards"[19] and cannot be considered as approximation clauses *sensu stricto* because there is no clear obligation to incorporate EU legislation. They all contain the same approximation clause according to which "Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*"[20]. These are the only provisions in the AA explicitly obliging Ukraine also to approximate its "future" legislation to the EU *acquis*.

It is obvious that the EU-Ukraine AA includes a very complex and sophisticated patchwork of legislative approximation mechanisms which differ from other existing models of integration without membership. First, in comparison to the Swiss model of sectoral bilateral arrangements or the multilateral sectoralism of the Energy Community (EnC) Treaty and the ECAA, the EU-Ukraine AA incorporates several different sectoral approximation mechanisms in a single legal instrument. Second, the various legislative approximation mechanisms included in the EU-Ukraine AA differ in scope and nature depending on the envisaged level of integration and market opening. Only in those areas where full internal market treatment is foreseen, such as in services and establishment, the arrangement is comparable to the mechanism for legislative approximation under the European Economic Area (EEA) Agreement[21]. Third, in comparison to the EEA model, the EU-Ukraine

[17] On Execution of Judgments and Application of Case Law of the European Court of Human Rights: Law of Ukraine of 23 February 2006, № 3477-IV.

[18] See Annual Reports of the Committee of Ministers 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights' <https://www.coe.int/en/web/execution/annual-reports> (accessed: 10.01.2019).

[19] Art. 15 EU-Ukraine AA.

[20] Respectively Arts. 114, 124, 133 and 138 EU-Ukraine AA.

[21] Agreement on the European Economic Area. 2 May 1992 <https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> (accessed: 05.05.2019).

arrangement for legislative approximation does not provide for the creation of a homogenous and dynamic legal space. Rather, it offers an alternative model based on strict market access conditionality[22].

Significantly, the DCFTA part of the AA also includes a unique inter-governmental dispute settlement mechanism (DSM) relating to legislative approximation (Article 322 EU-Ukraine AA). This procedure only applies to disputes concerning the interpretation and application of provisions relating to legislative approximation in a limited number of DCFTA Chapters, "or which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law"[23]. If a dispute between the EU and the Ukraine in relation to one of those chapters concerns a question of interpretation of a provision of EU law, the arbitration panel established to resolve the dispute shall not decide the question, "but request the Court of Justice of the European Union to give a ruling on the question", which will be binding on the arbitration panel[24]. This provision is unique in the sense that in no other agreement, concluded by the EU, the EU-Ukraine arbitration panel is given the competence to ask for a preliminary ruling to the Court of Justice of the EU (CJEU). In a limited number of other EU integration agreements, the CJEU can respond to preliminary questions from a national court or tribunal[25].

The procedure of Article 322 EU-Ukraine AA is crucial to preserve the CJEU's exclusive jurisdiction to interpret the EU *acquis*[26]. It is settled case law that the EU and its Member States are not bound by a particular interpretation of rules of EU law, referred to in an agreement which "extends" the EU *acquis* to third countries such as the EEA and the ECAA[27]. In Opinion 1/91 on the draft EEA Agreement, the Court of Justice also clarified that the interpretation of EU rules cannot be entrusted to bodies created on the basis of international agreements[28]. In order to avoid a repetition of the EEA saga, Article 322 EU-Ukraine AA precludes the arbitration panel to give a binding ruling on the

[22] When comparing the EU-Ukraine AA with the EEA, it should be noted that the latter is "an international treaty sui generis which contains a distinct legal order of its own [and which] goes beyond what is usual for an agreement under public international law" (*EFTA Court, Erla Maria Sveinbjörnsdóttir v. Government of Iceland*, Case E-9/97, 1998, para 95).

[23] The Chapters of the EU-Ukraine AA are Technical Barriers to Trade (Chapter 3), Sanitary and Phytosanitary Measures (Chapter 4), Customs and Trade Facilitation (Chapter 5), Establishment, Trade in Services and Electronic Commerce (Chapter 6), Public Procurement (Chapter 8) and Competition (Chapter 10).

[24] Art. 322(2) EU-Ukraine AA.

[25] For instance, Art. 107 and Protocol 34 EEA Agreement. Also the ECAA Agreement, inspired by the EEA model, foresees, under certain conditions, the possibility for national courts or tribunals of the ECAA Partners to ask the Court of Justice for a preliminary ruling (see Art. 16(2) and Annex IV ECAA).

[26] Art. 19 TEU. For analysis, see: I Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the autonomy of the EU Legal Order' in Hillion C and Koutrakos P (eds), *Mixed Agreements Revisited* (Hart Publishing 2010) 192-9.

[27] Opinion 1/00, Proposed agreement between the European Community and non-Member states on the establishment of a European Common Aviation Area, [2002], ECR 3493, para. 3 and 11.

[28] Opinion 1/91, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991], ECR 06079, para. 42.

interpretation of the agreement's provisions which are essentially rules of EU law by delegating disputes on "a question of interpretation of a provision of EU law" to the CJEU by means of a preliminary ruling.

In addition to this preliminary ruling procedure, the EU-Ukraine AA includes specific provisions guaranteeing the uniform interpretation of legal norms. It is well known that similar provisions in international agreements and in EU law do not automatically have the same meaning but that the objective, purpose and context of the agreement needs to be taken into account. It is noteworthy that several DCFTA Chapters contain such explicit provisions. The most straightforward obligation can be found, somewhat hidden, in the annex to the Services and Establishment Chapter. Article 6 of Annex XVII states that:

> <...> insofar as the provisions of this Annex and the applicable provisions specified in the Appendices are identical in substance to corresponding [EU provisions], those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Union[29].

Such a provision is also incorporated in other agreements such as in the EEA Agreement, however, Article 6 EEA Agreement only refers to the case law developed *prior* to the signature of the EEA Agreement. With regard to the post-signature case law, Article 105(3) EEA Agreement provides that:

> <...> the EEA Joint Committee shall keep under constant review the development of the case-law of the Court of Justice of the European Communities and the EFTA Court. To this end judgments of these Courts shall be transmitted to the EEA Joint Committee which shall act so as to preserve the homogeneous interpretation of the Agreement[30].

Article 322 EU-Ukraine AA does not make such a distinction between pre-signature and post-signature case law[31]. Of course, another major difference with the EEA Agreement is that in the case of the EU-Ukraine AA this obligation of consistent interpretation only applies to a specific DCFTA chapter and not to the entire agreement.

[29] Association agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. 21 March 2014 <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf> (accessed: 05.05.2019).

[30] Agreement on the European Economic Area. 2 May 1992 <https://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf> (accessed: 05.05.2019).

[31] Other examples of similar provisions which also make a difference between pre- and post-signature case law are Art. 16 ECAA and Art. 16(2) EU-Switzerland Agreement on the free movement of persons (OJ, 2002, L 114/6). An example of an integration agreement which does not make this difference is Art. 21(5) EU-Georgia Aviation Agreement (OJ, 2012, L 321/3).

References to the CJEU's case law by the Ukrainian Judiciary

The Ukrainian judiciary already occasionally referred to fundamental principles of EU law and some elements of the EU *acquis* as well as to case law of the CJEU before the signature of the EU-Ukraine AA[32].

There is no formal requirement for Ukrainian judges to possess general knowledge on foundations of EU law and the CJEU's case law. First, the Ukrainian judges are obliged to study and to apply in their judgements relevant case law of the European Court of Human Rights (ECtHR). Though more and more of the ECtHR decisions are being translated into Ukrainian it is important for the Ukrainian judges to read them in original language. Second, the Ukrainian judges actively take part in numerous expert meetings and trainings wherein they are introduced to the most contemporary ECtHR and the CJEU's judgements that are relevant for Ukraine. Third, new generation of Ukrainian lawyers who assist the judges are being trained in foundations of EU law that is a mandatory part of law curriculum at many Ukrainian law faculties.

There is a long track record of applying the EU *acquis* by the Ukrainian judiciary (including the Constitutional Court of Ukraine) as a persuasive source of law before the signature of the EU-Ukraine AA. For example, the Ukrainian courts recognised priority of the EU-Ukraine AA's predecessor (EU-Ukraine PCA) over conflicting provisions of national law[33]. Furthermore, in cases relating to state liability, the Ukrainian administrative courts have imported from the EU legal system the concept of legal certainty, previously unknown to the Ukrainian legal system. For example, in the *Person v Kiev City Centre for Social Assistance case*[34], the Administrative Court of the Kiev District provided that the rights of the disabled to claim social and financial assistance from the State flow from the principle of legal certainty. It means that a State cannot justify its failure to guarantee constitutional rights by the absence of a specific national law. For this purpose, the Administrative Court of the Kiev District referred to the CJEU judgment in the *van Duyn v the Home Office* case[35], wherein it is specified that nationals may rely on the State's obligations, even in cases when these obligations are provided in law

[32] R Petrov, 'Regulatory Convergence and Application of EU Law in Ukraine' in Elsuwege P Van and Petrov R (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (Routledge 2014) 137-158.

[33] Judgment of the High Commercial Court of Ukraine on 2 February 2005, No. 12/267. Also Judgment of the High Commercial Court of Ukraine on 25 March 2005 *(Closed Stock Company 'Chumak' v Kherson Custom Office)*, No. 7/299. Also Judgment of the High Commercial Court of Ukraine on 22 February 2005 ('Odek' LTD v Ryvne Custom Office) No. 18/303.

[34] Judgment of the District Administrative Court of Kiev on 25 November 2008, No. 2/416. Apparently, this judgment became pattern for subsequent decisions by Ukrainian administrative judges, see: Judgment of the District Administrative Court of Kiev on 24 November 2008, No. 5/503. Judgment of the District Administrative Court of Kiev on 1 December 2008, No. 5/451. Judgment of District Administrative Court of Kiev on 10 November 2008, No. 5/435.

[35] Case 41/74 *van Duyn v Home Office*, EU:C:1974:133.

without direct effect. Furthermore, Ukrainian courts developed the principle of legitimate expectations in the case of *Person v Darnitsa District of Kiev Center for Social Assistance*[36], concerning the rights to benefits of those who took part in the operation during the Chernobyl catastrophe. The Kiev District Administrative Court provided that the principle of state liability to offer compensation to those involved in the Chernobyl disaster flows from the *van Duyn v Home Office* case. In particular, the Administrative Court of the Kiev District stated that if the State formally acknowledged its commitment to offer compensation to those involved in the Chernobyl disaster, it could not refer to its own failure to fulfil its commitments in order to avoid liability before own nationals (in this case it was failure to issue a relevant legal act by competent state authorities), which would also violate the legitimate expectations of Ukrainian nationals.

Such bold judicial activism of administrative judges, previously unknown in a post-Soviet legal system, was not welcomed by all representatives of the Ukrainian establishment. The government of Ukraine under President Yanukovich questioned case law of the administrative courts related to compensation to those involved in the Chernobyl disaster in the Constitutional Court of Ukraine. In the judgment of 25 January 2012, the Constitutional Court overruled the established case law of the administrative courts on the ground that social support of Ukrainian nationals guaranteed by the Constitution of Ukraine must be provided in line with the financial capacities of the state in accordance with the principles of proportionality and justice[37]. The Constitutional Court did not consider the relevance of the principle of legal certainty at all but referred to selected decisions of the ECtHR in justification of its own position. This controversial decision of the Constitutional Court was widely criticized by the expert community in Ukraine and even by some judges of the Constitutional Court in their dissenting opinions for lack of reasoning, pro-governmental position and misleading references to the case law of the ECtHR[38]. The situation became even worse when the Highest Disciplinary Body for judges in Ukraine opened a disciplinary procedure against administrative judge who referred to case law of the CJEU in their decisions related to the compensation to those involved in the Chernobyl disaster. The disciplinary procedure against this judge took place in 2013 on the eve of the refusal of President Yanukovich to sign the EU-Ukraine AA at the Eastern Partnership summit in Vilnius in December 2013. However, the disciplinary procedure was cancelled just after the "EuroMaidan revolution"

[36] Judgment of the District Administrative Court of Kiev on 26 June 2008, No. 4/337.
[37] Decision of the Constitutional Court of Ukraine on January 23d 2012, Case No 1-11/2012.
[38] For example, see Dissenting Opinion of the Judge of the Constitutional Court Viktor Shishkin on Decision of the Constitutional Court on January 23d 2012, Case No 1-11/2012.

in February 2014. Furthermore, following the "Chernobyl case" saga, the High Administrative Court of Ukraine issued an official letter on the possibility of referring to the CJEU case law by Ukrainian administrative judiciary[39].

Further dramatic political events in Ukraine and the *Maidan* Revolution in 2013–2014 which led to the signature of the EU-Ukraine AA in June 2014 reinvigorated the debate over the application of the EU *acquis* and case law of the CJEU by the Ukrainian judiciary. At the end of 2014, the High Administrative Court decided to interfere and to fill in this gap in a traditional way for post-Soviet courts – to issue an informational letter to all administrative judges in Ukraine[40]. Therein the High Administrative Court of Ukraine stated that EU founding treaties do not bind Ukraine and, therefore, EU law and case law of the CJEU cannot be considered as part of the Ukrainian legal system[41]. Furthermore, the High Administrative Court confirmed that:

> <...> legal positions as they are formalised in decisions of the CJEU can be taken into consideration by administrative courts as argumentation, reflection regarding harmonious interpretation of Ukrainian legislation in line with established standards of the EU legal system, but not as a legal foundation (source of law) of a situation that caused a legal dispute[42].

This statement on behalf of the High Administrative Court of Ukraine played a dubious role. On the one hand, it repudiated any formal grounds for Ukrainian judges to apply various sources of the EU *acquis* in their decisions. On the other hand, it gave a green light for Ukrainian judges to refer to general principles, doctrines and case law of the CJEU as a persuasive source of interpretation in their decisions. Unfortunately, the High Administrative Court did not go far and kept silent on the issues of application of the EU *acquis* referred to in the text of the EU-Ukraine AA and of binding decisions of the EU-Ukraine Association Council. Ironically, new constitutional amendments of 2016 envisage the abolishment of the system of high specialised courts in Ukraine, thereby undermining the value of this information letter of the High Administrative Court of Ukraine for the Ukrainian judiciary.

Beyond any expectation, the clarification of the High Administrative Court of Ukraine on application of CJEU case law found wide support among judges of common and administrative courts in Ukraine. In the period of 2015–2016, Ukrainian general, specialised and high courts referred to the EU-Ukraine AA and case law of the CJEU in dozens of their decisions. Detailed information

[39] Informational Letter of the High Administrative Court of Ukraine on November 18 2014, No 1601/11/10/14-14.
[40] Ibid.
[41] About the All State Programme of adaptation of Ukrainian legislation to that of the EU: Law of Ukraine, 18 March 2004, No. 1629-IV.
[42] Judgment of the District Administrative Court of Kiev (n 36).

on case law of the Ukrainian judiciary is public and can be accessed at the portal of the Register of judicial decisions at <http://www.reyestr.court.gov.ua>. This register covers decisions of all Ukrainian courts with exemption to the Constitutional Court of Ukraine which possesses its own database. For example, the analysis of decisions of Ukrainian courts issued in 2014 and in 2016 indicates significant rise in references to the EU-Ukraine AA and various sources of EU *acquis* (fundamental principles, secondary acts, case law of the CJEU). In most cases Ukrainian judges who already possess considerable experience and knowledge in application of the ECHR and case law of the ECtHR strengthened their argumentation with frequent references to the EU acquis and the EU-Ukraine AA in decisions concerning protection of fundamental human rights in Ukraine. For instance, since 2015 most decisions of administrative courts on rights of pensioners provide a standard statement that the court applies the principle of rule of law in line with case law of the ECtHR and the CJEU. In these cases Ukrainian judges cite the information letter of the High Administrative Court of Ukraine on taking into account the case law of the CJEU as a source of argumentation concerning harmonious interpretation of Ukrainian law with the EU *acquis*[43]. Some judges went even further and considered the entry into force of the EU-Ukraine AA in Ukraine as an obligation to apply the EU common values in Ukraine[44]. References to the EU-Ukraine AA and relevant EU acquis found application in cases regarding Ukrainian natural persons and companies who claimed the direct effect of these provisions in cases concerning the payment of customs duties when crossing Ukrainian border[45]; supply and trade of natural gas[46]; definition of origin of goods (honey)[47]; or the legality of legislative drafts by the President of Ukraine[48]. However, the Ukrainian courts have not yet recognised (mainly avoided the recognition of) the direct effect of provisions of the EU-Ukraine AA in their decisions. The issue of direct effect of the EU-Ukraine AA may find relevance in case of possible litigation on correspondence of Ukrainian laws and other legal acts to the objectives, principles and "essential elements" of the EU-Ukraine AA before the Constitutional Court and general courts. Among the most recent examples are the Executive Order of the President of Ukraine on banning the Russian social networks (on the matter of national

[43] For example, Judgment of the District Court of the city of Chernigyv on 26 June 2016, No. 750/5197/16-a.
[44] For example, Judgment of the Interdistict Court of the City of Kolomya on 07 July 2016, No. 346/3499/16-c contains a rather emotional passage 'The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the ratification by the supreme legislative body (the Verkhovna Rada Ukraine), Ukraine, as a state aspiring the full membership in the EU, must respect private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must by complied by all Member States and by associated countries'.
[45] Judgment of the Appellate Court of the region of Lviv on 06 April 2016, No. 33/783/241/16.
[46] Judgment of the District Administrative Court of the city of Kiev on 13 April 2016, No. 826/594/16.
[47] Judgment of the District Court of the city of Tsyrypinsk on 29 April 2016, No. 664/906/16-c.
[48] Judgment of the High Administrative Court of Ukraine on 26 April 2016, No. 800/251/16.

security and sanctions against the Russian Federation caused by the annexation of Crimea in 2014 and military aggression in the East of Ukraine)[49] and the Law of Ukraine on banning the St. George (Guards') Ribbon (as propaganda of the Russian military aggression in the East of Ukraine)[50]. These legislative acts raise some concerns regarding their compliance with the objectives of the EU-Ukraine AA, in general, and freedom of expression and the principle of proportionality (as they are applied and interpreted within the ECHR and the EU Charter of Fundamental Rights), in particular[51].

Conclusions. The objective of effective implementation of the EU-Ukraine AA is to enhance the adaptability of the national constitutional order to the European integration project and European common values. Internally, Ukraine went through a dramatic transformation from a country which pursued a multi-vector foreign policy aimed at appeasing two conflicting integration projects (European and Eurasian) to a country with a firm pro-European policy as cemented in the Association Agreement. Externally, Ukraine committed itself to the demanding conditionality and monitoring processes envisaged in the EU-Ukraine AA in return for better access to the EU internal market, establishing a Deep and Comprehensive Free Trade Area and abolishing the visa regime with the EU.

The EU-Ukraine AA established a sustainable institutional and legal framework for application of the EU *acquis* including CJEU case law and comprehensive legislative approximation between Ukrainian and EU law. However, the institutional reforms that have already taken place cannot be regarded as fully sufficient. The Ukrainian Parliament has failed to establish substantive and procedural foundations for applying and implementing the EU-Ukraine AA in the Ukrainian legal order. However, this gap is being partially filled by a surprising judicial activism in Ukraine. The Ukrainian judiciary has already started referring to the EU-Ukraine AA and relevant parts of the EU *acquis*, thereby laying a foundation for regular application of general principles of EU law in applying the provisions of the EU-Ukraine AA. Undoubtedly, this is a great challenge for the Ukrainian legal system. A significant role in this process is expected from the Ukrainian Constitutional Court, which must eventually clarify the status of the EU-Ukraine AA within the Ukrainian legal order, and the newly formed Ukrainian Supreme Court, which has recruited EU-minded judges and academics.

[49] Executive Order (Ukaz) of the President of Ukraine on 15 May 2017, No. 133/2017.

[50] Amending the Administrative Code regarding the ban on production and propaganda of the St. George (Guards') Ribbon: Law of Ukraine on 16 May 2017, No. 2031-VIII.

[51] P Van Elsuwege, *'Ukraine's Ban on Russian Social Media: On The Edge Between National Security and Freedom of Expression'* (*VerfBlog*, 06.02.2017) <http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression> (accessed: 10.01.2019).

Current decisions of the Ukrainian courts show that the quantity and quality of references to the CJEU by Ukrainian judiciary is gradually improving. This phenomenon can be explained by several factors.

First factor, the pro-European foreign policy of Ukraine, which prioritises integration into the EU and effective implementation of the EU-Ukraine AA, significantly contributes and encourages pro-European activism of the Ukrainian judiciary and their references to the CJEU caselaw. In 2018 President of Ukraine Petro Poroshenko initiated "European integration" amendment to the Constitution of Ukraine in order to fix the objective of full membership in the EU and NATO on the constitutional level[52]. The Constitutional Court of Ukraine considered and approved the constitutionality of this amendment in 2018[53]. The effective implementation of the EU-Ukraine AA remains one of the domestic and external priorities of the Ukrainian politics. The Ukrainian government's actions are being regularly monitored by the EU institutions and other international organisations. The progress in reforming the Ukrainian judiciary is being one of the priorities of the monitoring process.

Second factor, the Ukrainian judiciary has undergone through fundamental transition from a "Soviet-style" judiciary to a "European-style" judicial body. The process of the transition was inspired by the "Dignity Revolution" in Ukraine in December 2013-February 2014. The EU-Ukraine AA prioritised the Rule of Law and judicial reform as one of the priorities and essential elements of the agreement. As a result, the Ukrainian judiciary has been receiving consistent technical assistance from the EU and other international organisations that among other objectives also promoted foundations of the EU legal system and relevant CJEU caselaw. The major consequence of the judicial reform in Ukraine was the complete reshuffle of the Supreme Court judges and introduction of the Anti-Corruption Court. These processes smoothed the change of the judicial body on senior level and allowed the flow of young judges with academic background to top judicial positions in Ukraine.

Third factor, the process of the application of the EU-Ukraine AA brings more cases for consideration by the Ukrainian judiciary that require considering the relevant CJEU caselaw. As results of our study indicate the Ukrainian courts gradually increase their references to the relevant CJEU caselaw in areas of competition, state aid and intellectual property.

[52] The preamble of the Constitution of Ukraine will contain the reference 'confirming European identity of the Ukrainian peoples and irrevocability of European and Euroatlantic [foreign policy] of Ukraine'.
[53] Decision of the Constitutional Court of Ukraine on 22 November 2018 No. 3-в/2018.

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ВПЛИВ СУДУ ПРАВОСУДДЯ ЄВРОПЕЙСЬКОГО СОЮЗУ НА ПРАВОВУ СИСТЕМУ УКРАЇНИ*

Анотація. У статті досліджено вплив Суду Європейського Союзу (ЄС) на впровадження і застосування Угоди про асоціацію між Україною та ЄС, що викликало безпрецедентні політичні, економічні та правові реформи в Україні. Зокрема, розглядаються конституційні виклики, які постали перед державою під час виконання Угоди в правовій системі.

Крім того, досліджено два питання. Перше – ефективне впровадження та застосування Угоди про асоціацію між Україною та ЄС в українській правовій системі. Друге – сумісність і відповідність Угоди Конституції України. Проаналізовано останні політичні та правові події в Україні через призму ефективної реалізації Угоди про асоціацію між Україною та ЄС і зростання проєвропейського правового активізму в державі. На закінчення стверджується, що Угода про асоціацію між Україною та ЄС посилює пристосованість національного конституційного устрою до цілей досягнення європейської інтеграції та застосування європейських спільних цінностей в Україні.

Угода про асоціацію між Україною та ЄС створила стійку інституційну та правову основу для застосування *acquis* ЄС (правового доробку ЄС), включаючи прецедентне право ЄС та комплексне законодавче наближення між законодавством України та ЄС. Однак інституційні реформи, які вже відбулися, не можна вважати цілком достатніми. Верховній Раді України не вдалося запровадити основні та процедурні засади для застосування та впровадження Угоди в правовий порядок України. Однак ця прогалина частково заповнюється зростаючим судовим активізмом в Україні. Вітчизняні судді вже почали посилатися на Угоду про асоціацію між Україною та ЄС і відповідні частини *acquis* ЄС у своїх рішеннях, тим самим закладаючи основу для регулярного застосування загальних принципів права ЄС у процесі виконання й імплементації Угоди про асоціацію між Україною та ЄС.

Ключові слова: Угода про асоціацію; Конституція України; міжнародне право; європейські спільні цінності; прецедентне право; конституційні зміни.

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