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LAW 2014/09
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The EU-Ukraine Association Agreement:
Assessment of an Innovative Legal Instrument

Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov

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EUI Working Paper **LAW** 2014/09

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Author Contact Details:

Guillaume Van der Loo - PhD Researcher

Ghent European Law Institute (GELI)

Universiteitstraat 4

9000 Gent / Belgium

Guillaume.vanderloo@ugent.be

Peter Van Elsuwege - Professor of EU Law

Ghent European Law Institute (GELI)

Universiteitstraat 4

9000 Gent / Belgium

Peter.vanelsuwege@ugent.be

Roman Petrov – Jean Monnet Chair in EU Law

National University of Kyiv-Mohyla Academy

Max Weber Postdoctoral Fellow 2006-2008

Skovorody vul. 2

04655 Kyiv / Ukraine

petroveulaw@gmail.com

Abstract

This paper analyses the EU-Ukraine Association Agreement (AA). It argues that this new legal framework, which has the objective to establish a unique form of political association and economic integration, is characterised by three specific features: *comprehensiveness*, *complexity* and *conditionality*. After a brief background of the EU-Ukraine relations, the following aspects are scrutinised: legal basis and objectives, institutional framework and mechanisms of enhanced conditionality and legislative approximation. In addition, constitutional challenges for the effective implementation of the EU-Ukraine AA are discussed. Based upon a comparison with other EU external agreements, it is demonstrated that the AA is an innovative legal instrument providing for a new type of integration without membership.

Keywords

European Union – Ukraine – Association Agreement – Deep and Comprehensive Free Trade Area – Integration – Legislative Approximation

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THE EU-UKRAINE ASSOCIATION AGREEMENT: ASSESSMENT OF AN INNOVATIVE LEGAL INSTRUMENT

Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov

Introduction

“We are here to sign the Association Agreements between the European Union and each of your countries. These are not just any other agreements - but milestones in the history of our relations and for Europe as a whole. In Kiev and elsewhere, people gave their lives for this closer link to the European Union. We will not forget them”.¹

This statement of the President of the European Council was made on 27 June 2014 at the signing ceremony of the bilateral Association Agreements (AAs) between the European Union (EU) and Ukraine, Moldova and Georgia. This new generation of AAs will replace the outdated Partnership and Cooperation Agreements (PCAs) as the basic legal framework for the bilateral relations between the EU and those countries.

According to Herman Van Rompuy, the AA with Ukraine – which served to a large extent as a template for the agreements with Moldova and Georgia² – is “the most advanced agreement of its kind ever negotiated by the European Union”.³ A cursory reading of the agreement, counting around 2,140 pages in the Official Journal including 46 annexes, 3 protocols and a joint declaration, already reveals that it is unprecedented both in terms of scope and level of detail.⁴ The agreement essentially aims to deepen the political and economic relations between Ukraine and the EU through the establishment of an enhanced institutional framework and innovative 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”.⁵

¹ European Council, ‘Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine’, Brussels, 27 June 2014, EUCO 137/14. Available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143415.pdf>, accessed 30.06.2014.

² However, in the light of the European Neighbourhood Policy’s (ENP) principles of differentiation and joint ownership, all AAs are tailored to the needs and requirements of the parties involved. Key differences between the EU-Ukraine AA and the Moldova or Georgia AAs are, for example, that Georgia is referred to in the preamble of the Georgia AA as an “*Eastern* European country” (emphasis added) and that both the Georgia and Moldova AAs do not include a non-discrimination clause for treatment and mobility of workers, corresponding to Articles 17 and 18 of the EU-Ukraine AA. In the trade part, important differences are, *inter alia*, that approximation clauses in the area of competition and “internal market treatment” in the area of establishment are not foreseen under the Georgia and Moldova Deep and Comprehensive Free Trade Areas (DCFTAs). Also the provisions on trade-related energy and intellectual property rights are less detailed in the Moldova and Georgia DCFTAs.

³ European Council, Press Remarks by H. Van Rompuy, President of the European Council, following the EU-Ukraine Summit, Brussels, 25 February 2013, EUCO 48/13. Available at: <http://europa.eu/rapid/press-release_PRES-13-74_en.htm>, accessed 30.06.2014.

⁴ Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part, OJ, 2014, L 161.

⁵ The explicit reference to “Ukraine’s gradual integration in the EU Internal Market” as one of the AA’s objectives (Art. 1 (d)) is quite remarkable. In comparison, the Euro-Mediterranean Association Agreements (EMAAs) and pre-accession instruments such as the Stabilisation and Association Agreements (SAAs) with the Western Balkan countries do not include such a reference in their corresponding articles. For example, the objectives of the SAAs only aim “to promote harmonious economic relations and develop gradually a free trade area” (Art. 1(1)(f) EU-Serbia SAA, OJ, 2010, L 28/2).

Accordingly, the AA belongs to the selected group of “integration-oriented agreements”, i.e. agreements including principles, concepts and provisions of EU law which are to be interpreted and applied as if the third State is part of the EU.⁶ Such agreements are an exceptional phenomenon in the practice of the EU’s external action. Apart from the well-known multilateral examples of the European Economic Area (EEA) agreement, the Energy Community Treaty (EnC Treaty) and the European Common Aviation Area Agreement (ECAA),⁷ a limited number of specific bilateral agreements also deserve this qualification.⁸

It will be argued that the EU-Ukraine AA is unique in many respects and, therefore, provides a new type of integration without membership.⁹ The agreement can be characterised by three specific features: *comprehensiveness*, *complexity* and *conditionality*.

First, the AA is a *comprehensive framework agreement* covering the entire spectrum of EU-Ukraine relations. Hence, it includes provisions dealing with the whole array of EU activities, including cooperation and convergence in the field of common foreign and security policy (CFSP) as well as cooperation in the area of freedom, security and justice (AFSJ).¹⁰ Moreover, due to the inclusion of provisions on nuclear energy and areas falling within Member State competences, the European Atomic Energy Community (Euratom) and all EU Member States are also contracting parties to the agreement. Whereas the Treaty of Lisbon significantly facilitates the conclusion of what used to be called ‘cross-pillar agreements’, the comprehensive scope of the agreement necessarily generates a certain complexity. For instance, the AA provisions dealing with the AFSJ do not bind the United Kingdom and Ireland as EU Member States as a result of the ‘opt-out’ granted under Protocol 21 to the EU Treaties. Yet, those countries are bound as separate contracting parties due to the mixed nature of the agreement and can decide to ‘opt in’ as part of the EU after notifying Ukraine. A specific regime also applies to Denmark, in accordance with Protocol 22 to the EU Treaties. The comprehensive scope of the AA also implies that in certain areas of cooperation there is an overlap with existing agreements and obligations. Pursuant to Article 479 of the EU-Ukraine AA, such (existing) agreements “shall be considered part of the overall bilateral relations as governed by this Agreement and as forming part of a common institutional framework.” As a result, the AA includes various provisions clarifying the relationship with other bilateral and multilateral agreements aiming to ensure a coherent legal framework for EU-Ukraine relations.¹¹ This again contributes to the complexity of the agreement, for instance as far as dispute settlement mechanisms are concerned (cf. *infra*).

Second, the *complexity* of the AA is not only related to its comprehensive scope but also to its level of ambition, in particular the aim to achieve Ukraine’s economic integration in the EU internal market through the establishment of a DCFTA. The objective of ‘deep’ integration requires extensive

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The EMAAs aim to “establish the conditions for the gradual liberalisation of trade in goods, services and capital” (Art. 1(2) EU-Morocco EMAA, *OJ*, 2000, L 70/2).

⁶ The expression “integration-oriented agreements” is borrowed from M. Maresceau. See: M. Maresceau, “Les accords d’intégration dans les relations de proximité de l’Union européenne”, in Claude Blumann (Ed.), *Les frontières de l’Union européenne* (Bruylant, 2013), 151-192.

⁷ S. Blockmans, B. Van Vooren, ‘Revitalizing the European ‘Neighbourhood Economic Community’: The Case for Legally Binding Sectoral Multilateralism’, 17(4) *European Foreign Affairs Review* (2012), pp. 577-604. For texts, see *OJ*, 2006, L 198/18 (EnC Treaty) and *OJ*, 2006, L 285/3 (ECAA).

⁸ For a comprehensive overview, see M. Maresceau, *op. cit. supra* note 6.

⁹ A. Lazowski, ‘Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union’, 45 (2) *Common Market Law Review* (2008), 1433-1458; G. Van der Loo, ‘The EU-Ukraine Deep and Comprehensive Free Trade Area: a coherent mechanism for legislative approximation?’, in P. Van Elsuwege, R. Petrov (Eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?*, (Routledge, 2014), 63-88.

¹⁰ See Title II and III of the EU-Ukraine AA.

¹¹ See e.g. Art. 265 on relationship with the WTO and Art. 278 on relationship with the EnC Treaty.

legislative and regulatory approximation including sophisticated mechanisms to secure the uniform interpretation and effective implementation of relevant EU legislation.¹²

Last but not least, the EU-Ukraine AA is based on a strict *conditionality* approach. 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.*”¹³ 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) and the Eastern Partnership (EaP). 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.¹⁴

In what follows the specific features of the EU-Ukraine AA are analysed in more detail in order to illustrate that the agreement opens a new chapter in the EU’s relations with its neighbouring countries and, more generally, in its external relations practice. After a brief introduction to the background of the new AA, its legal basis and objectives are discussed. Subsequently, specific attention is devoted to the institutional framework, mechanisms of conditionality and the procedures for legislative approximation and dispute settlement. A final section deals with the constitutional challenges for the effective implementation of the EU-Ukraine AA.

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

The AA will replace the Partnership and Cooperation Agreement (PCA) as the basic legal framework of EU-Ukraine relations.¹⁵ The PCA, which was signed in 1994, entered into force in March 1998 for an initial period of ten years.¹⁶ Pursuant to Article 101, the agreement is automatically extended each year unless either side informs the other party of its denunciation at least six months before the expiry date. Whereas, from a legal point of view, the PCA could therefore continue to apply without formal problems, a revision of the legal framework was urgently needed.¹⁷ Due to internal developments in both the EU and Ukraine, several provisions of the PCA are out of date and no longer reflect the current ambition of the bilateral relationship. The preamble and Article 1, for instance, refer 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 includes general and broadly defined provisions on economic co-operation¹⁸ but stops short of any regional trade integration. Article 4 PCA only provides that the parties consider

¹² A. Lazowski, op. cit. *supra* note 9, 1433.

¹³ Emphasis added.

¹⁴ 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).

¹⁵ Art. 479 EU-Ukraine AA.

¹⁶ Council and Commission Decision of 26 January 1998 on the conclusion of the PCA between the EC and their Member States and Ukraine, *OJ*, 1998, L 49.

¹⁷ A similar reasoning applies for the PCAs with Russia, Moldova, Georgia, Armenia and Azerbaijan. With Belarus, a PCA was signed in 1995 but never entered into force due to political reasons.

¹⁸ The title “Economic Cooperation” in the PCA contains provisions on industrial cooperation, investment promotion and protection, public procurement, co-operation in the field of standards and conformity assessment, education and training,

“whether circumstances allow the beginning of negotiations on the establishment of a free trade area”.¹⁹ Like many other provisions of the agreement, this so-called ‘evolutionary clause’ is essentially a declaration of intent without any direct legal consequences.

The minimalistic approach of the PCA is 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 proclaims that Ukraine “*shall endeavour to ensure* that its legislation be gradually made compatible with that of the Community [now Union]”.²⁰ This can 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 is only an obligation to act but without a requirement to achieve particular results or a sanction in case the approximation of laws obligation is not fulfilled. Moreover, the approximation clause includes a long list of “priority areas” for legislative action²¹ but fails to provide clear guidelines on the scope and content of the EU laws to be taken as the basis for approximation nor does it include a link with the objective to establish a Free Trade Area (FTA) in the future.²²

The launch of the ENP in the wake of the EU’s eastward enlargement provided new impetus to EU-Ukraine relations. In this context, the European Commission proposed to move beyond mere cooperation to a significant degree of economic integration in return for concrete progress in terms of legal approximation.²³ 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.²⁴

Regarding the objective of trade liberalisation and economic integration, the first Commission Communications were ambitious but vague, stating that the ENP Partners should be offered “a prospect of a stake in the EU’s Internal Market”.²⁵ These ambitions were further developed in the context of the EU’s 2006 “Global Europe Strategy”, the new trade policy agenda set out by the European Commission.²⁶ According to this new approach, the EU would seek to go beyond WTO commitments in promoting trade liberalisation and integration, by tackling issues which are not ready for multilateral discussion.²⁷ This implies the ambition to conclude a new generation of comprehensive and ambitious free-trade agreements, including far-reaching liberalization of services and investment and the abolition of non-tariff barriers through regulatory convergence with regard to issues such as

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energy, environment, cooperation in science and technology, tourism, monetary policy, social cooperation, money laundering, regional development, information and communication, statistical cooperation, etc.

¹⁹ Art. 4 EU-Ukraine PCA.

²⁰ Art. 51 EU-Ukraine PCA, emphasis added.

²¹ Art. 51 (2) EU-Ukraine PCA refers to customs law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and transport.

²² R. Petrov, ‘Recent Developments in the Adaptation of Ukrainian Legislation to EU law’, 8(1) *European Foreign Affairs Review* (2003), 125-141, at 131.

²³ European Commission, ‘Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’, COM (2003) 104 final, 11 March 2003.

²⁴ 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).

²⁵ European Commission, *op.cit.*, footnote 23, 10.

²⁶ European Commission, ‘Global Europe: Competing in the World’, COM (2006) 567 final, 4 October 2006.

²⁷ *Ibid.*, 7.

the protection of intellectual property rights, competition law, rules of origin, labour standards and environmental protection. At the end of 2006, the Commission announced its intention to negotiate “deep and comprehensive free trade agreements” (DCFTAs) with the EU’s neighbours including “substantially all trade in goods and services” and “strong legally-binding provisions on trade and economic regulatory issues”.²⁸

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 as part of a general revision of the bilateral legal framework. Negotiations on the DCFTA were only launched in February 2008 after Ukraine’s accession to the WTO. A political agreement was reached in December 2011 and the AA was initialled in March 2012.²⁹ On 15 May 2013, the Commission adopted the proposals for a Council Decision on the signing and conclusion of the EU-Ukraine AA.³⁰ Nevertheless, this agreement was not immediately signed due to demands on behalf of the EU to abandon the practice of selective justice and to align the Ukrainian judiciary and law enforcement systems with European standards.³¹ Eventually, on the eve of the EaP Summit in Vilnius, the Ukrainian Government decided to suspend the process of preparation for signature of the AA in order “to ensure the national security of Ukraine and to recover trade and economic relations with the Russian Federation”.³² Following this news, hundreds of thousands of Ukrainians went to the streets. The ensuing *Maidan* revolution led to the dismissal of President Victor Yanukovich on 22 February 2014 and the establishment of an Interim-Government under the leadership of Arseniy Yatsenyuk. Proceeding with the signature of the EU-Ukraine AA was a clear short-term objective for the new authorities in Kiev.³³

Despite the political pressure to act quickly, this was not an evident option. Under the Ukrainian Constitution, the President is responsible for the signature of international agreements.³⁴ After the escape of Victor Yanukovich, Ukraine only had an acting President (Olexander Turchynov) who was appointed by the Parliament without elections. Taking into account the legal and political significance of the AA, including long-term and far-reaching commitments of legislative approximation with the EU, this clearly raised some questions of legitimacy. At the same time, there was also a growing understanding that a clear message of solidarity to the Ukrainian people was needed in light of the mounting Russian pressure on Crimea and the Eastern part of Ukraine. In this context, the EU Heads of State or Government announced on 6 March 2014 that “as a matter of priority” all the political chapters of the AA would be signed first. In addition, the adoption of autonomous trade measures “would allow Ukraine to benefit substantially from the advantages offered in the Deep and Comprehensive Free Trade Area.”³⁵ The signature of the political provisions of the AA effectively

²⁸ European Commission, ‘Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy’, COM (2006) 726 final, 4 December 2006, 4.

²⁹ The DCFTA part was only initialled, after legal scrubbing, in July 2012.

³⁰ European Commission, ‘Signature of Association Agreement with the EU will depend on Ukraine’s performance’, *Press Release*, 15 May 2013, IP/13/436.

³¹ 3209th Foreign Affairs Council Meeting, Council Conclusions on Ukraine, 10 December 2012

³² Decision of the Cabinet of Ministers of Ukraine from 21st November 2013, N 905-p. Arguably, 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 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.

³³ G. Gotev, ‘Ukraine ready to sign Association Agreement during March EU Summit’, *Euractiv.com*, 27 February 2014, available at <<http://www.euractiv.com/europes-east/ukraine-wants-sign-association-a-news-533818>>, accessed 30.06.2014.

³⁴ Art. 106 (3) of the Ukrainian Constitution.

³⁵ Statement of the Heads of State or Government on Ukraine, Brussels, 6 March 2014, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141372.pdf>, accessed 30.06.2014.

took place on 21 March 2014³⁶ and on 14 April 2014, after a ‘fast track’ approval process, the European Parliament and the Council adopted a Regulation “on the reduction or elimination of customs duties on goods originating in Ukraine.”³⁷ Accordingly, Ukraine can benefit from the EU’s unilateral trade preferences in accordance with the schedule of concessions set in out in annex I-A of the AA in anticipation of the (provisional) application of the entire agreement.³⁸

It is noteworthy that the political and economic parts of the EU-Ukraine AA remain part of a single legal instrument.³⁹ In other words, the partial signature of the agreement on 21 March 2014 may essentially be regarded as a political gesture underlining the parties’ commitment to shared values and the objectives of the envisaged association. The direct legal implications are fairly limited because the political provisions are rather general in nature. In addition to a list of general principles underlying the bilateral relationship, they include the establishment of a multi-level political dialogue and convergence in the field of CFSP. Moreover, this partial signature did not result in the entry into force of these ‘political’ chapters, neither to their provisional application. It was only after the final signature of the entire agreement on 27 June 2014 by the newly elected President Petro Poroshenko that the ratification procedure for the entire agreement could be initiated. Because the EU-Ukraine AA is a mixed agreement, which needs to be ratified by all 28 EU Member States, this procedure can take several years. In order to circumvent this long ratification procedure, Article 486 of the EU-Ukraine AA provides for the possibility of the provisional application of the agreement.⁴⁰ Given the political significance of the EU-Ukraine AA, the Council agreed on an exceptional wide scope for provisional application, including, *inter alia*, the entire title on General Principles (Title I) and Financial Cooperation (Title VI), almost the entire DCFTA (Title IV), Institutional, General and Final Provisions (Title VII) and several provisions regarding political dialogue (Arts. 4-6), Justice, Freedom and Security (Arts. 14 and 19) and economic and sectoral cooperation.⁴¹ This broad scope could raise

³⁶ The ‘political provisions’ of the agreement which were signed on 21 March 2014 include the preamble, Article 1 (objectives), Title I (general principles), II (Political dialogue and reform, political association cooperation and convergence in the field of CFSP) and VII (institutional, general and final provisions). See: Final Act of the Summit between the EU and its Member States, of the one part, and Ukraine, of the other part, as regards the association agreement, available at <http://eeas.europa.eu/delegations/ukraine/documents/association_agreement/final_act_text_en.pdf>, accessed 30.06.2014. It must be noted that Title III (Justice, Freedom and Security) can also be considered as a ‘political chapter’ of the AA. However, several Member States opposed the signature of this chapter on 21 March 2014 as it includes ‘sensitive’ provisions on treatment and mobility of workers and movement of persons (Arts. 17-19) (Interview with EEAS official, 22 April 2014).

³⁷ Regulation (EU) No 374/2014 of the European Parliament and of the Council of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine (*OJ*, 2014, L 118/1).

³⁸ The unilateral trade preferences apply until the DCFTA part of the AA (provisionally) enters into force and in any case no later than 1 November 2014. It is noteworthy that the EU did not request a WTO waiver for the adoption of the autonomous measures (under Art. IX:3 WTO) because they anticipate the (provisional) application of the EU-Ukraine DCFTA. Hence, the EU’s *démarche* is deemed to be in conformity with GATT Article XXIV. See, on the development of this line of argumentation, the response of the Commission’s representative to questions during the meeting of the European Parliament Committee on International Trade (INTA), Brussels, 19-20 March, available at <http://www.parliament.gv.at/PAKT/EU/XXV/EU/01/82/EU_18238/imfname_10451522.pdf>, accessed 30.06.2014.

³⁹ Final Act of the Summit between the EU and its Member States, of the one part, and Ukraine, of the other part, as regards the association agreement, available at <http://eeas.europa.eu/delegations/ukraine/documents/association_agreement/final_act_text_en.pdf>, accessed 30.06.2014.

⁴⁰ For a detailed analysis of the provisional application of international agreements concluded by the EU, see C. Flaesch-Mougin, I. Bosse-Platière, ‘L’application provisoire des accords de L’Union Européenne’, in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World. Essays in Honour of Marc Mareseau*, (Martinus Nijhoff Publishers, 2014), 293-323.

⁴¹ Combined reading of the Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble,

questions on the provisional application of ‘mixed’ elements of the AA. In this view, it is stated in the Council Decisions on the signing of the AA that these listed provisions shall be applied on a provisional basis “only to the extent that they cover matters falling within the Union’s competence, including matters falling within the Union’s competence to define and implement a common foreign and security policy”.⁴² In addition, the Council, Commission and High Representative adopted a Joint Statement providing that the provisional application of the General Principles set down in Article 2 “is without prejudice to the division of competences between the Union and the Member States on the matters referred to therein”.⁴³

Legal Basis and Objectives

The comprehensive and complex nature of the AA is reflected in the choice of legal basis. The Council Decision on the signing and provisional application of the political provisions, adopted on 17 March 2014, combines the legal basis for EU action in the area of CFSP (Arts. 31(1) and 37 Treaty on the EU (TEU)) with the traditional provision on association (Art. 217 Treaty on the Functioning of the EU (TFEU)).⁴⁴ From a procedural point of view, the presence of a CFSP legal basis does not make a major difference because association agreements already require unanimity in the Council.⁴⁵ Moreover, the CFSP dimension of the AA is too limited to overrule Art. 218(6)a(i) TFEU which requires the consent of the European Parliament for the conclusion of association agreements.⁴⁶ Nevertheless, the combination of CFSP/TFEU legal bases may be regarded as a logical consequence of the continuing bipolarity of the EU’s external action as reflected in Article 40 TEU.⁴⁷ The EU-Ukraine AA is one of the first examples of this new practice, which stems from the Lisbon Treaty

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Article 1, and titles I, II and VII thereof (OJ, 2014, 161/1) and Council Decision [...]2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III, IV, V, VI and VII of the Agreement, as well as the related Annexed and Protocols (not yet published in the *OJ*, on file with the authors). It must be noted that the Commission even proposed a broader scope for provisional application, including, *inter alia*, the entire Title on Political Dialogue and Reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy (Title II) (European Commission, ‘Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part’, COM(2013) 289 final, 15 May 2013).

⁴² See Art. 4 Council Decision 2014/295/EU, *ibid*.

⁴³ General Secretariat of the Council, ‘Relations with Ukraine - Joint Statement in the Council minutes’, Brussels, 20 June 2014, Interinstitutional File 2013/0155 (on file with the authors). In addition, this Statement declares that the provisional application of cooperation in Art. 14 of the EU-Ukraine AA on the rule of law and respect for human rights and fundamental freedoms “does not constitute an exercise by the European Union of competence pursuant to Title V of Part III [TFEU]”. On this issue, see also the Statements made by Hungary and Portugal and the Council. For an analysis of the provisional application of mixed agreements, see F. Hoffmeister, ‘Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States’, in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited*, (Hart Publishing, 2010), 257.

⁴⁴ Council Decision 2014/295/EU of 17 March 2014, *op. cit.*, footnote 41.

⁴⁵ Art. 218 (8) TFEU.

⁴⁶ According to Art. 218(6) TFEU an association agreement can only be concluded without the consent of the European Parliament if it relates “exclusively” to CFSP. In recent Case C-658/11, *Commission v. Council*, the Court of Justice clarified that the substantive legal basis of a Council decision adopted for the conclusion of an international agreement determines the procedures to be followed. Hence, only when the substantive legal basis exclusively relates to the area of CFSP, the European Parliament does not play a role in this process.

⁴⁷ See, on this new form of mixity: A. Dashwood, “The continuing bipolarity of EU external action”, in: I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau*, (Martinus Nijhoff Publishers, 2014), 3-16 and, in the same volume, S. Adam, “The Legal Basis of International Agreements of the European Union in the Post-Lisbon Era”, 65-86.

amendments to the procedural code for negotiating and concluding international agreements on behalf of the EU.⁴⁸

A more controversial question concerned the adoption of two separate Council Decisions for the signature and provisional application of the remaining titles of the EU-Ukraine AA on 27 June 2014.⁴⁹ Despite the Commission proposal for a single decision on the basis of Article 217 TFEU, the Council opted to ‘split off’ the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the parties (Art. 17 EU-Ukraine AA). The latter formed the subject of a separate Council Decision adopted on the basis of Article 79(2)(b) TFEU.⁵⁰ The main reason for this complexity is the specific status of the United Kingdom and Ireland in respect of the EU competences in the Area of Freedom Security and Justice (AFSJ). Pursuant to Protocol 21 to the Treaty of Lisbon, both countries have the discretionary power to decide whether or not they want to take part in the adoption of legislative acts under this title.⁵¹ Taking into account that Article 17 of the EU-Ukraine AA falls within the scope of the AFSJ, in particular Article 79(2)(b) TFEU on the rights of third-country nationals residing legally in the EU Member States, a separate Council Decision was deemed necessary. Nevertheless, this option is not undisputable. Article 17 AA is an integral part of the established association and it seems far-fetched to argue that the aim and content of this provision is distinct from and independent of the aim and content of the other provisions of the AA. Moreover, in its recent judgment *Commission v Council* (Case C-377/12), the Court of Justice of the EU (Court of Justice) considered the addition of specific legal bases relating to readmission of third-country nationals (Art. 79(3) TFEU, transport (Arts 91 and 100 TFEU) and environment (Art. 191(4) TFEU) unnecessary and unlawful for the signature of a Framework Agreement on Partnership and Cooperation between the EU and the Republic of the Philippines.⁵² In the Court’s view, the broad scope of Articles 207 and 209 TFEU dealing, respectively, with common commercial policy and development cooperation was sufficient to cover the entire agreement. Of course, the context and the objectives of the EU-Ukraine AA are entirely different. Nevertheless, the argument may be made that Article 217 TFEU on association is a ‘catch-all’ provision, which does not require the adoption of a separate Council decision related to one specific provision of the agreement. This interpretation was not only strongly supported by the European Commission⁵³ but also by several Member States.⁵⁴ Taking into account the political importance of the EU-Ukraine AA, it seems unlikely that the final decision to use a ‘split’ legal basis will be challenged before the Court of Justice.

Remarkably, the Council Decisions on the signature of the provisional application of the AA remain silent on Article 8 TEU.⁵⁵ The latter provision, entitled ‘The Union and its neighbours’, was

⁴⁸ The unified procedure for the negotiation and conclusion of international agreements on behalf of the EU is laid down in Art. 218 TFEU.

⁴⁹ This concerns Title III (freedom, security and justice), IV (trade and trade-related matters), V (economic and sector cooperation) and VI (financial cooperation with anti-fraud provisions).

⁵⁰ Council Decision [...]/2014 on the signing, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (not yet published in the *OJ*, on file with the authors).

⁵¹ Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, *OJ*, 2010, C 83/295.

⁵² Case C-377/12, *Commission v Council*, Judgment of 11 June 2014, nyr.

⁵³ In a Statement on this Council Decision, the Commission declared that it has made one proposal for one Decision based on Art. 217 TFEU and, therefore, “disagrees with the addition of legal bases, in particular Article 79(2)(b), with the effect in particular of splitting the Decision” (General secretariat of the Council, op. cit. *supra* footnote 43)

⁵⁴ For example, Austria, Italy, Romania and the Czech Republic adopted Statements in support of Art. 217 TFEU as a single legal basis, *ibid.*

⁵⁵ Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, COM (2013) 290 final.

introduced with the Treaty of Lisbon and endows the Union with an explicit competence to conclude specific agreements with neighbouring countries.⁵⁶ Article 8 TEU envisages a duty of the EU to “develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on co-operation”. Both procedural and political arguments may help to explain the absence of Article 8 TEU as a legal basis for the new AA with Ukraine.

First, the procedure for concluding association agreements under Article 217 TFEU is well-defined whereas the EU Treaties do not include any procedural guidelines for agreements to be concluded under Article 8 TEU. Taking into account also its unusual location under Title I ‘Common Provisions’ of the TEU, it is even questionable whether Article 8 TEU can be used as an autonomous substantive legal basis. Rather, it may be regarded as a mainly political instrument alongside the substantive legal provisions on EU external action in the TFEU. In any event, from a legal point of view, a reference to Article 8 TEU is not required for the conclusion of an association agreement, even when the partner is a neighbouring country of the Union.

Second, anything less than formal association based on Article 217 TFEU would not be perceived by the Eastern neighbours as an enhancement of their existing contractual relations.⁵⁷ In contrast to Article 217 TFEU, Article 8 TEU has a clear *finalité*, i.e. “to establish an area of prosperity and good neighbourliness characterised by close and peaceful relations based on cooperation”. This focus on ‘good neighbourliness’ sits uncomfortably with the European aspirations of certain Eastern partners, in particular Ukraine. In this context, it is noteworthy that from the very start of the negotiations, the Ukrainian authorities opposed against the use of the ‘neighbourhood’ label for the new agreement arguing that Ukraine is a part of Europe and not of the European neighbourhood.⁵⁸ Only after a period of uncertainty about the legal status of what was diplomatically called an ‘enhanced agreement’, a Joint Declaration adopted on the occasion of the September 2008 EU-Ukraine Summit made an end to all speculations as it unequivocally provided that “the new agreement between the European Union and Ukraine will be an association agreement”.⁵⁹ This offer was later extended to all Eastern Partnership countries.⁶⁰

Arguably, this evolution of the ENP has implications for the potential use of Article 8 TEU. Whereas this article was introduced as a basis for the conclusion of special ‘neighbourhood agreements’, the explicit offer to negotiate and conclude formal association agreements makes it difficult if not impossible to avoid the traditional provision of Article 217 TFEU.⁶¹

⁵⁶ For an analysis of Art. 8 TEU, see e.g. R. Petrov and P. Van Elsuwege, ‘Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?’, 36 *European Law Review* (2011), 688-703; C. Hillion, ‘Anatomy of EU norm export towards the neighbourhood: The impact of Article 8 TEU’, in P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?*, (Routledge, 2014), 13-20.

⁵⁷ C. Hillion, ‘Mapping-out the new contractual relations between the European Union and its neighbours – Learning from the EU-Ukraine enhanced agreement’, 12 *European Foreign Affairs Review* (2007), 175.

⁵⁸ *Ibid.*

⁵⁹ EU-Ukraine Summit, *Joint Declaration*, 9 September 2008, 12812/08 (Presse 247). It is noteworthy that the European Parliament also did not consider Art. 8 TEU as a necessary legal basis (Report containing the European Parliament’s recommendation to the Council, the Commission and the EEAS on the negotiations of the EU-Ukraine Association Agreement, 22 November 2011 (2011/2132(INI))).

⁶⁰ Eastern Partnership Summit, *Joint Declaration*, Prague, 7 May 2009, 8435/09 (Presse 78).

⁶¹ Arguably, Article 8 TEU could be reserved for agreements with neighbouring countries that are not necessarily interested in formal association and/or that do not aim for a recognition of their ‘European perspective’ like Russia, Switzerland and European micro-states. On this point, see R. Petrov and P. Van Elsuwege, *op. cit. supra* footnote 56.

The conclusion of association agreements with European countries is often perceived as a stepping-stone towards EU membership.⁶² 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.⁶³ 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”. This formulation is somewhat reminiscent of the formula used in the old Europe Agreements with the countries of Central and Eastern Europe.⁶⁴ 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,⁶⁵ however, it neither 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.”⁶⁶ 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,⁶⁷ they are also an integral part of the established political dialogue⁶⁸ and cooperation in the area of freedom, security and justice.⁶⁹ At the economic level, the establishment of a DCFTA is regarded as an instrument “to complete [Ukraine’s] transition into a functioning market economy”.⁷⁰ 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”.

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”.⁷¹ 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. 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

⁶² D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press, 1999).

⁶³ A. Rettman, ‘Georgia, Moldova and Ukraine cement EU ties’, EUobserver, 27 June 2014, available at <<http://euobserver.com/foreign/124792>> accessed 30.06.2014.

⁶⁴ For instance, in the preamble to the EA with Poland the parties recognized “the fact that the final objective of Poland is to become a member of the Community and that this association [...] will help to achieve this objective”. In other words, accession was regarded as a clear ambition of the associated states but not as a mutual objective. See: B. Lippert, ‘Shaping and Evaluating the Europe Agreements – The Community Side’, in B. Lippert, H. Schneider (Eds.), *Monitoring Association and Beyond: The European Union and the Visegrad States* (Europa Union Verlag, 1995), 227-229.

⁶⁵ 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”.

⁶⁶ 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” (op. cit. *supra* footnote 1). 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. A stronger EU membership perspective was contested by several Member States such as France and the Netherlands, available at <<http://euobserver.com/foreign/123078>>, accessed 30.06.2014.

⁶⁷ Preamble EU-Ukraine AA.

⁶⁸ Art. 6 EU-Ukraine AA.

⁶⁹ Art. 14 EU-Ukraine AA.

⁷⁰ Art. 1(2)d EU-Ukraine AA.

⁷¹ Art. 1(2)(a) EU-Ukraine AA.

systems of third countries.⁷² 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.

A Reinforced Institutional Framework

The EU-Ukraine AA establishes a multi-level institutional framework that is based on practices of other EU association agreements but bears some considerable novelties. Summit meetings at the highest political level shall take place on an annual basis providing overall guidance for the implementation of the agreement and an opportunity to discuss issues of mutual interest.⁷³ This is a confirmation of an already existing practice even though the EU-Ukraine PCA did not include such an explicit provision. A more significant development for the EU-Ukraine relations is the creation of an Association Council, meeting at Ministerial level, with decision-making capacities.⁷⁴ The Association Council plays a crucial role in the process of legislative approximation. It operates as a forum for exchange of information on EU and Ukrainian legislative acts and is competent to update or amend the agreement's annexes to keep pace with evolutions in EU law.⁷⁵ An Association Committee with representatives at senior civil servant level assists the Association Council in the performance of its duties.⁷⁶ Moreover, specific sub-committees can be established.⁷⁷ With regard to the DCFTA, a specific role is played by the Trade Committee and specialised sub-committees dealing with issues such as sanitary and phytosanitary measures (SPS), geographical indications or trade and sustainable development (see *infra*). Continuing the existing practice under the EU-Ukraine PCA, a Parliamentary Association Committee exchanges views and can make recommendations to the Association Council.⁷⁸ A complete novelty in the EU's association practice is the introduction of a bilateral Civil Society Platform consisting of members of the European Economic and Social Committee (EESC), on the one hand, and representatives of civil society on the side of Ukraine, on the other.⁷⁹ Civil society cooperation forms a specific chapter of the AA and aims, amongst others, to ensure a better mutual knowledge and understanding between the parties.⁸⁰ Civil Society institutions are expected to play a role in the field of trade and sustainable development⁸¹ and to be involved in social and cultural dialogues.⁸² This civil society component reflects its importance within the framework of the Eastern Partnership and complements the multilateral Civil Society Forum that was established after the 2009 Prague Eastern Partnership Summit.⁸³

⁷² A. Lazowski, op. cit. *supra* note 9, p. 1433.

⁷³ Art. 460 EU-Ukraine AA.

⁷⁴ Under the EU-Ukraine PCA there was only a Co-operation Council which could only adopt recommendations but no binding decisions.

⁷⁵ Art. 463 EU-Ukraine AA. Specific procedures are applicable with regard to legislative approximation in areas related to the DCFTA, see G. Van der Loo, op. cit. *supra* note 9.

⁷⁶ Art. 464 EU-Ukraine AA.

⁷⁷ Art. 466 EU-Ukraine AA.

⁷⁸ Art. 467 EU-Ukraine AA.

⁷⁹ Art. 469 EU-Ukraine AA.

⁸⁰ Chapter 26, including Arts 443-445 of the EU-Ukraine AA.

⁸¹ Art. 299 EU-Ukraine AA.

⁸² Art. 421 and 438 EU-Ukraine AA.

⁸³ More details on the Eastern Partnership Civil Society Forum are available at <http://www.eap-csf.eu>, accessed 30.06.2014.

Enhanced Conditionality in the EU-Ukraine AA

Conditionality is one of the key strategic tools of the ENP and it is, therefore, no surprise that this instrument also occupies a prominent place in the EU-Ukraine AA. 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 European values of democracy, rule of law and respect for human rights and fundamental freedoms ('common values' conditionality). On the other hand, the part on the DCFTA is based on an explicit 'market access' conditionality implying that Ukraine will only be granted additional access to a section of the EU Internal Market if the EU decides, after a strict monitoring procedure, that Ukraine successfully implemented its legislative approximation commitments. Both forms of conditionality bear some revolutionary features in comparison to other external agreements concluded between the EU and third countries.

Common values conditionality

International agreements concluded on behalf of the EU include standard conditionality clauses. In general, an 'essential element clause' defining the core common values of the relationship is combined with a 'suspension' clause including a procedure to suspend the agreement in case of violation of those essential elements.⁸⁴ Such a mechanism is also included in the EU-Ukraine AA.⁸⁵ Yet, the common values conditionality in the EU-Ukraine AA differs from similar provisions included in, for instance, the SAAs with the Western Balkans. First, 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 European Convention on Human Rights and Fundamental Freedoms),⁸⁶ a specific reference to human rights and fundamental freedoms is included in Article 6 AA on "dialogue and cooperation on domestic reform"⁸⁷ and in Article 14 AA dealing with EU-Ukraine cooperation on justice, freedom and security.⁸⁸ Second, the essential elements of the EU-Ukraine AA contain common values that go beyond classical 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".⁸⁹ Third, "the principles of free market economy" as well as a list of other issues such as "rule of law, the fight against corruption, the fight against the different forms of trans-national organised crime and terrorism, the promotion of sustainable

⁸⁴ See L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005).

⁸⁵ Art. 2 in conjunction with Art. 478 EU-Ukraine AA.

⁸⁶ Art. 2 EU-Ukraine AA. The same principles and legal instruments are mentioned in Art. 2 of the SAA with Serbia (op. cit. *supra* note 5).

⁸⁷ This dialogue foresees that the parties "shall cooperate in order to ensure that their internal policies are based on principles common to the parties in particular stability and effectiveness of democratic institutions and the rule of law and on respect of human rights and fundamental freedoms".

⁸⁸ Remarkably, Art. 80 of the SAA with Serbia only refers to "reinforcement of institutions and the rule of law" in relation to cooperation in the field of justice, freedom and security whereas the largely Art. 14 of the EU-Ukraine AA is entitled "rule of law *and respect for human rights and fundamental freedoms*" [emphasis added]. It also explicitly provides that "respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security." Such a sentence is absent in Art. 80 of the SAA with Serbia and comparable provisions in other SAAs.

⁸⁹ Art. 2 EU-Ukraine AA. In comparison, Arts. 2 and 3 of the SAA with Serbia only include full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and non-proliferation of weapons of mass destruction as essential elements of the agreement. On the other hand, Art. 2 of the SAA includes a general reference to "respect for principles of international law", which is not in Art. 2 of the EU-Ukraine AA.

development and effective multilateralism” are not included in the definition of essential elements.⁹⁰ Rather, they are considered to “underpin” the relationship between the parties and are “central to enhancing” this relationship.⁹¹ In other words, a distinction is made between hard core common values related to fundamental rights and security and a range of other general principles that are deemed crucial for developing closer relations but which cannot trigger the suspension of the entire agreement.⁹²

Market access conditionality

Apart from the more general ‘common values’ conditionality, the EU-Ukraine AA entails 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 a far-reaching monitoring of Ukraine’s efforts to approximate national legislation to EU law, including aspects of implementation and enforcement.⁹³ To facilitate the assessment process, the Ukrainian government is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreement.⁹⁴ 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.”⁹⁵ 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 (cf. *supra*). 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.⁹⁶ 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.⁹⁷ 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.

Because market access conditionality is so closely intertwined with legislative approximation, its key mechanisms will be further illustrated in the next chapter on legislative approximation and dispute settlement.

⁹⁰ Art. 3 EU-Ukraine AA. In contrast, Art. 2 of the SAA with Serbia includes the principles of the market economy in the list of essential elements.

⁹¹ *Ibid.*

⁹² Art. 478 EU-Ukraine AA foresees that a suspension of the entire agreement, including the part on Trade and Trade-related measures, is only possible in case of violation of the essential elements or in accordance with the general rules of international law.

⁹³ Art. 475 (2) EU-Ukraine AA.

⁹⁴ Art. 475(2) EU-Ukraine AA.

⁹⁵ Art. 475 (3) EU-Ukraine AA.

⁹⁶ 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).

⁹⁷ Art. 475(6) EU-Ukraine AA.

Mechanisms of Legislative Approximation and Dispute Settlement

In contrast to the PCA, which only includes a very general ‘best endeavour clause’ (cf. *supra*),⁹⁸ the new AA contains multiple specific provisions on legislative and regulatory approximation including detailed annexes specifying the procedure and pace of the approximation process for different policy areas.⁹⁹ The various approximation clauses differ in the sense that for some areas the annexes contain detailed lists of relevant EU legislation whereas others are more general in nature or even lack a clear legal obligation to approximate. To a certain extent, the variation between these approximation provisions is the result of the different objectives of each chapter.

Not surprisingly, the most advanced mechanisms of legislative approximation are to be found in chapters related to the establishment of the DCFTA. The AA also includes several mechanisms to deal with the dynamic evolution of the incorporated EU *acquis* as well as sophisticated forms of dispute settlement.

A patchwork of legislative approximation clauses

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 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”¹⁰⁰ and cannot be considered as approximation clauses *sensu stricto* because there is no clear obligation to incorporate EU legislation.

In the Title on Economic and Sector Cooperation, most chapters share a similar ‘standard approximation clause’ providing that Ukraine shall gradually approximate its legislation to the EU *acquis* as set out in the annex to the chapter concerned.¹⁰¹ Each of these annexes provides a list of specific EU legislation and a timetable for approximation.¹⁰² Even though the annexes state that Ukraine only “undertakes” to gradually approximate to the selected EU legislation, they provide a strict deadline against when the selection of EU *acquis* “shall be implemented”.¹⁰³ Other

⁹⁸ Largely comparable ‘best endeavour’ clauses are also included in the SAAs and in the Euro-Mediterranean Association Agreements (EMAs). Of course, the pre-accession process develops the voluntary nature of the SAA approximation clauses into a firm obligation considering Article 49 TEU and the Copenhagen criteria. Regarding the EMAs, it is noteworthy that the nature of the obligation is even softer than under the PCAs as they only prescribe that “*cooperation*” [emphasis added] shall be aimed at helping [the Mediterranean partner] to bring its legislation closer to that of the Community” (Art. 52 EMAA Morocco (*OJ*, 2009, L 107/166) or that the parties “shall use their best endeavours to approximate *their respective laws* [emphasis added] in order to facilitate the implementation of this agreement” (Art. 48 EMAA Egypt (*OJ*, 2004, L 304/39)).

⁹⁹ Art. 474 of the EU-Ukraine AA, however, recapitulates the entire scope of Ukraine’s legislative approximation commitments “as referred to in Annexes I to XLIV to this Agreement, based on the commitments identified in Titles IV, V and VI of this Agreement, and according to the provisions of those Annexes”.

¹⁰⁰ Art. 15 EU-Ukraine AA.

¹⁰¹ Also Title VI on Financial cooperation contains such a standard approximation clause (Art. 459 EU-Ukraine AA).

¹⁰² Chapter 4 Taxation (Art. 353- Annex XXVIII), Chapter 6 Environment (Art. 363- Annex XXIX), Chapter 7 Transport (Art. 368- Annex XXXI), Chapter 13 Company Law, Corporate Governance, Accounting and Auditing (Art. 387- Annex XXXIV and XXXV), Chapter 15 Audio Visual Policy (Art. 397- Annex XXXVII), Chapter 20 Consumer Protection (Art. 417- Annex XXXVIII), Chapter 21 cooperation on Employment, Social Policy and Equal Opportunities (Art. 424- Annex XXXIX) and Chapter 22 Public Health (Art. 428- Annex XL). The approximation clauses of Chapter 12 Financial Services (Article 385) and Chapter 14 Information Society (Art. 394) make a cross reference to DCFTA Chapter 6 on Establishment, Trade in Services and Electronic Commerce.

¹⁰³ *Ibid.*

approximation clauses in this title are less ambitious as they do not list a selection of EU *acquis* in an annex¹⁰⁴ or because they lack a firm binding obligation to approximate.¹⁰⁵

The most elaborate approximation clauses can be found in Title IV on the establishment of the DCFTA. In several DCFTA Chapters, the process of legislative approximation is clearly linked to additional access to the EU Internal Market. For example, in the area of technical barriers to trade,¹⁰⁶ Ukraine must “incorporate the relevant EU *acquis*” in line with the timetable set out in Annex III. It is only when the “EU Party” has determined that Ukraine has fully approximated its legislation to the listed EU *acquis* that additional access to its Internal Market will be offered in the form of the conclusion of an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA).¹⁰⁷ Remarkably, Annex III does not contain a clear selection of EU *acquis* such as in the standard approximation clauses but refers to “sectors” of horizontal (framework) and vertical (sectoral) legislation. The absence of a precise selection of EU legislation in this Annex can be explained by the fact that contracting Parties to an ACAA are still free, to a certain extent, to establish and maintain own regulations and standards.¹⁰⁸

Similarly, in the area of Sanitary and Phytosanitary Measures (SPS), Ukraine “shall” approximate its sanitary, phytosanitary and animal welfare legislation to that of the EU as set out in Annex V.¹⁰⁹ In this case, the conditional market access offered to Ukraine takes the form of the “determination of equivalence”, which means that the EU shall accept, under conditions, Ukraine’s SPS measures as equivalent, even if these measures differ from the Union’s standards, and *vice versa*.¹¹⁰ Again, this determination of equivalence will only be initiated once the EU-Ukraine SPS Sub-Committee decides, after regular monitoring, that Ukraine’s approximation process, as set out in Annex V, is achieved.¹¹¹ Initially, Annex V does not provide a clear list of EU legislation. However, three months after the entry into force of the AA, Ukraine must submit a “Comprehensive Strategy” to the SPS Sub-Committee. This document will be incorporated in Annex V of the EU-Ukraine AA and serve as a reference document for the implementation of this Agreement into the legal system of Ukraine.¹¹²

The most detailed provisions on legislative approximation are included in DCFTA Chapter 6 on Services, Establishment and Electronic Commerce, more specific in its sub-sections on Postal and Courier Services, Electronic Communications, Financial Services and International Maritime Transport Services.¹¹³ 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

¹⁰⁴ Chapter 9 Cooperation in Science and Technology (Art. 375(1) EU-Ukraine AA) and Chapter 18 Fisheries and Maritime Policy (Art. 410 EU-Ukraine AA).

¹⁰⁵ For example, Art. 405 EU-Ukraine AA on Agriculture and Rural Development states that the Parties shall “support” gradual approximation to EU legislation. See also Arts. 410 and 435 EU-Ukraine AA for similar non-binding approximation clauses.

¹⁰⁶ Chapter 3 DCFTA, Title IV EU-Ukraine AA.

¹⁰⁷ Art. 57 EU-Ukraine AA. ACAAs are a specific type of mutual recognition agreements according to which the contracting parties agree that products listed in the ACAA, fulfilling the requirements for being lawfully placed on the market of one party, may be placed on the market of the other party. See for example the EU-Israel ACAA (*OJ*, 2013, L 1/2).

¹⁰⁸ European Commission, ‘Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs)’, SEC(2004) 1071, 25 August 2004, p. 6.

¹⁰⁹ Art. 64(1) EU-Ukraine AA.

¹¹⁰ Art. 61(21) EU-Ukraine AA.

¹¹¹ Combined reading of Arts. 64(3), 66(4) and para. 2(B) of Annex IX EU-Ukraine AA.

¹¹² Combined reading of Art. 64(4) and Annex V EU-Ukraine AA. This document must be divided into three priority areas as foreseen in Annex IV.

¹¹³ These Sub-Sections, respectively Sub-section 4-7, are part of Section 5 “Regulatory Framework”.

acquis".¹¹⁴ These are the only provisions in the AA explicitly obliging Ukraine also to approximate its "future" legislation to the EU *acquis*. Moreover, these provisions are further fleshed out in Annex XVII which defines specific horizontal rules and principles on legislative approximation and a clear selection of EU legislation. This annex refers to over more than 80 specific EU Directives and Regulations and a strict timetable against when (parts of) these EU acts must be implemented.¹¹⁵ The annex also contains "General principles and obligations" on legislative approximation which determines how the listed EU legislation will be made binding upon the Parties and "made part of Ukraine's internal legal order".¹¹⁶ Reflecting but not copying Article 288 TFEU, Article 2 of this Annex specifies that an act in this Annex corresponding to an EU Regulation or Decision "shall as such be made part of the internal legal order of Ukraine" whereas an act corresponding to an EU Directive "shall leave to the authorities of Ukraine the choice of form and method of implementation".¹¹⁷ This provision only appears in a limited number of integration agreements and was first used in the EEA Agreement.¹¹⁸ The difference, of course, is that in the case of the EU-Ukraine AA, this provision only applies to a limited part of the annexed EU *acquis* (*i.e.* Annex XVII). Also similar to the EEA Agreement are the "Horizontal Adaptations and Procedural Rules",¹¹⁹ which stipulate which adaptations must be made to the EU acts listed in this Annex in order to be implemented in Ukraine's legal system.¹²⁰

The reason for this far-reaching parallelism with the EEA Agreement is that legal approximation in this particular field will lead to the granting of "internal market treatment". This unprecedented access to the EU Internal Market means that juridical persons of Ukraine will have the same freedom of establishment and will be able to provide services in the EU as juridical persons of EU Member States.¹²¹ Again, this internal market treatment goes hand in hand with strict market access conditionality: it will only be granted to the services concerned if the Trade Committee decides, after a strict monitoring procedure, that Ukraine has achieved its legislative approximation commitments.¹²² The monitoring procedure, clearly inspired by the Union's pre-accession policy, requires that Ukraine submits for each sector roadmaps, progress reports and "transposition tables" to the Commission to prove the correct application of its approximation obligations.¹²³

The last DCFTA Chapter that contains a clear legislative approximation obligation linked to additional market access is public procurement. Ukraine is obliged to make its public procurement legislation "compatible" with the EU public procurement *acquis*".¹²⁴ In return, after a positive evaluation of the Trade Committee, Ukraine and the EU will grant access to contract award procedures to companies of the other Party pursuant to their procurement rules under treatment no less favourable than that

¹¹⁴ Respectively Arts. 114, 124, 133 and 138 EU-Ukraine AA. The latter has however a slightly more nuanced formulation.

¹¹⁵ Appendix XVII-2 to XVII-5 EU-Ukraine AA.

¹¹⁶ Art. 2 Annex XVII EU-Ukraine AA.

¹¹⁷ In the EU, a Regulation is "directly applicable" in all the Member States whereas acts listed in the Annex corresponding to an EU Regulations (or Decision) "must be made part" of Ukraine's legal order, which means that the act still has to be transposed into Ukraine's legal system.

¹¹⁸ Art. 7 EEA. See also Art. 3 ECAA.

¹¹⁹ Appendix XVII-1 EU-Ukraine AA contains horizontal adaptations regarding, *inter alia*, specific terminology of EU acts, references to Member States, territories and institutions and the entry into force of the relevant acts.

¹²⁰ In the EEA Agreement, the "Horizontal Adaptations" are added to the Agreement in Protocol 1. Also the ECAA contains such "Horizontal adaptations and certain Procedural Rules" (Annex II ECAA).

¹²¹ Art. 4(3) Annex XVII EU-Ukraine AA.

¹²² *Ibid.*

¹²³ Appendix XVII-6 EU-Ukraine AA.

¹²⁴ Art. 153 EU-Ukraine AA.

accorded to its own companies.¹²⁵ Again, this constitutes “an unprecedented example in allowing possible access of Ukraine, as a non EEA Member to EU Public Procurement Market”.¹²⁶ The scope of EU public procurement legislation to which Ukraine must approximate is listed in Annex XXI and focuses on Public Procurement Directives 2004/18/EC and 2004/17/EC.¹²⁷ However, these Directives do not have to be incorporated in their entirety and at once. This Annex dissects these Directives in “Basic Elements”, “Mandatory Elements”, “Non-mandatory Elements” and “Provisions outside the scope of the process of legislative approximation” and provides an indicative time schedule with five phases, each indicating the scope of EU legislation to be approximated and the specific type of market access which will be granted. The Trade Committee shall evaluate each phase and the reciprocal granting of market access will only take place after a positive assessment by that Committee.¹²⁸ It is clear that the drafters of this agreement envisaged with this procedure an incremental approach for legislative approximation in order to support the effective implementation of Ukraine’s approximation obligations.

Finally, the DCFTA contains several other approximation clauses of which the fulfilment is not directly linked to additional market access. For example, in the area of competition, Ukraine must approximate its competition laws to the selected EU *acquis*, listed in Article 256 of the agreement.¹²⁹ Also noteworthy is the DCFTA Chapter on Trade-Related Energy.¹³⁰ Regarding transport of electricity and gas, Ukraine must adapt the selection of EU legislation listed in Annex XXVII. Interesting is that this Annex incorporates several of Ukraine’s approximation obligations under the EnC Treaty and, moreover, even goes beyond that by including EU legislation on areas such as energy efficiency and nuclear energy.¹³¹ In the event of a conflict between the DCFTA Trade-Related Energy provisions and the EnC Treaty, the provisions of the EnC Treaty prevail.¹³² Other approximation clauses can be found in the area of Customs and Trade Facilitation,¹³³ and Trade and Sustainable Development.¹³⁴

Hence, 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 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 EEA. Third, in comparison to

¹²⁵ Art. 154 EU-Ukraine AA.

¹²⁶ European Commission, *op. cit.*, footnote 41.

¹²⁷ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ*, 2004, L 134/114 and Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *OJ*, 2004, L 134/1.

¹²⁸ Annex XXI EU-Ukraine AA. The Trade Committee shall only proceed to the evaluation of a next phase once the measures to implement the previous phase have been carried (Art. 153(3) EU-Ukraine AA).

¹²⁹ It is remarkable that the list of the EU competition *acquis* that must be approximated by Ukraine is incorporated in the body of the agreement (Art. 256 EU-Ukraine AA), and not in an Annex. This implies that the Association Council cannot amend this selection of EU *acquis* according to Article 463 EU-Ukraine AA (cf. *infra*).

¹³⁰ Chapter 11 DCFTA.

¹³¹ Annex XXVII EU-Ukraine AA.

¹³² Art. 278(1) EU-Ukraine AA. Art. 278(2) EU-Ukraine AA also foresees that, in implementing this section, preference shall be given to the adoption of EnC Treaty-consistent legislation.

¹³³ Art. 84 EU-Ukraine AA.

¹³⁴ Art. 290(2) EU-Ukraine AA.

the EEA model, the EU-Ukraine 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.¹³⁵

It is noteworthy that in the AA, and especially in the DCFTA, different legal terms are used interchangeably and inconsistently to refer to the process of legislative approximation. Almost every DCFTA Chapter uses different terminology in its approximation clauses. This results in a mishmash of legal concepts and obligations according to which Ukraine must “approximate to”, “align to” or “achieve conformity with” the EU *acquis* or make its domestic legislation “compatible” with the EU *acquis* or “incorporate” it in its domestic legal order.¹³⁶ Moreover, one single DCFTA provision can include several different approximation terms.¹³⁷ The main reason for this inconsistency appears that the different DCFTA chapters were negotiated by different negotiating teams of DG Trade or other Commission DGs, using each their own legal vocabulary to define these approximation obligations.¹³⁸ Because all these different terms refer to the same process, a more horizontal and consistent use of these terms, including precise definitions, would have been beneficial for the legal clarity of this agreement.¹³⁹

Procedures to amend or update the incorporated EU acquis

Due to the constant evolution of EU law, applying a selection of EU *acquis* is for a third country as shooting on a moving target. Moreover, it could be that the Parties want to broaden the level of integration at a later stage and, therefore, envisage extending the selection of the incorporated EU *acquis*. In other words, a crucial challenge for the EU-Ukraine AA, and by extension for all EU integration agreements, is to keep the agreement up to date and in line with the evolving EU legislation. This can be based on either ‘dynamic’ or ‘static’ mechanisms depending on whether or not there is an obligation to adopt automatically every amendment to the EU *acquis* that is covered under the agreement.¹⁴⁰

The most developed dynamic model for keeping track with changes in EU legislation is certainly incorporated in the EEA Agreement. Pursuant to Article 102 EEA, every modification to the EU *acquis* covered by the scope of this agreement must be discussed within the EEA Joint Committee, which shall amend the relevant EEA annexes in order to allow a simultaneous application of legislation in the entire EEA. A more static approach to the obligation of legislative approximation can be found in the EnC Treaty, which provides that the Energy Community “may take measures to implement amendments to the *acquis*” in the form of a decision or a recommendation of the

¹³⁵ 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).

¹³⁶ See, for example, respectively, Arts. 64(1), 56(5), 56(1), 153(1) and Annex XVII EU-Ukraine AA.

¹³⁷ For example, Art. 56 AA refers to process of “achieving conformity with”, “approximation to”, “incorporating into the legislation of Ukraine” and “aligning with” the annexed EU TBT *acquis*.

¹³⁸ Interview EEAS official, 22 April 2014; Interview DG Trade official, 12 June 2013.

¹³⁹ For an analysis of this ‘approximation terminology’, see A. Matta, ‘Differentiating the methods of *acquis* export – the case of the Eastern Neighbourhood and Russia’, in P. Van Elsuwege, R. Petrov (Eds.), op. cit. *supra*, footnote 9, pp. 21-45.

¹⁴⁰ For the difference between static and dynamic procedures, see A. Lazowski, op. cit. *supra* note 9, 1444. A dynamic procedure does not mean that every modification at the level of the EU law must automatically be transposed to the Agreement, however, the parties must at least consider to do so. Nevertheless, in some cases, the refusal to update the incorporated EU *acquis* can lead to the (partial) suspension or termination of the agreement (e.g. Art. 102(5) EEA)).

Ministerial Committee (or Permanent High Level Group provided it is authorised by the Ministerial Committee).¹⁴¹

Again, the EU-Ukraine AA differs from other models of integration without membership. There is no single mechanism to amend the incorporated EU *acquis*, covering the entire agreement, but many different ones, varying from ‘static’ to ‘dynamic’ procedures.

According to Article 463(3) AA, the Association Council “may” update or amend the Annexes to the Agreement “[to take] into account the evolution of EU law”, without prejudice to any specific provisions included in the DCFTA. In addition, the Association Council will also be the forum for exchange of information on EU and Ukrainian legislative acts, “both under preparation and in force”. Because this allows the Ukrainian administrations to be consulted and to express their opinions and concerns on draft amendments of relevant legislation, this procedure can be considered as a limited form of “decision-shaping”. However, this Article can hardly be seen as a dynamic procedure since the Association Council is not obliged to consider updating the Annexes to each and every modification of relevant EU legislation. Moreover, because the Association Council, which comprises both EU and Ukrainian representatives, must take decisions “by agreement”, Ukraine can always veto this process.¹⁴²

Specific provisions in several DCFTA Chapters go beyond this general clause of Article 463(3) EU-Ukraine AA. For example, Annex XVII to the Chapter on Services and Establishment contains a more elaborate dynamic procedure to amend the EU *acquis* included in this Annex. Different procedures are applicable before and after internal market treatment is granted in a specific sector. In the former case, “in order to guarantee legal certainty”, the EU must inform Ukraine and the Trade Committee regularly on all new or amended relevant legislation. Then, the Trade Committee “shall” add within three months “any” new or amended EU legislation to the Annex,¹⁴³ which implies that Ukraine cannot refuse to update the annexes.¹⁴⁴ In the case internal market treatment is already granted, not automatically all amendments or new legislation must be added to the Annex as the Trade Committee can still decide whether or not to add them.¹⁴⁵ Nevertheless, if no agreement can be reached on the inclusion of new or amended EU legislation, the EU may decide to suspend the granting of internal market treatment in the sector concerned.¹⁴⁶ A more static procedure can be found in the area of public procurement. Here, Ukraine is obliged to take “*due account*”¹⁴⁷ [...] of any modifications of the EU *acquis*” in the process of legislative approximation.¹⁴⁸ Hence, even within the DCFTA part of the EU-Ukraine AA, various updating procedures are foreseen, again depending on the level of integration with the EU Internal Market and the objectives of each specific chapter.

Dispute Settlement and the role of (the case law) of the Court of Justice

The complex nature of the EU-Ukraine AA is also reflected in the provisions on dispute settlement. For disputes concerning the interpretation, application or implementation of the AA, a standard dispute settlement mechanism (DSM) is provided according to which the Association Council can

¹⁴¹ Arts. 25, 47, 53 and 76 EnC Treaty.

¹⁴² Combined reading of Arts. 462(1) and 463(1) EU-Ukraine AA.

¹⁴³ Art. 3 Annex XVII EU-Ukraine AA.

¹⁴⁴ However, the Trade Committee may decide whether Ukraine, under exceptional circumstances, can be “partly and temporarily” exempted from transposing this new or amended EU *acquis* (Art. 3(3) Annex XVII EU-Ukraine AA).

¹⁴⁵ Art. 5 Annex XVII EU-Ukraine AA.

¹⁴⁶ Art. 5(5) Annex XVII AA. This provision is similar to Article 102(5) EEA.

¹⁴⁷ Emphasis added.

¹⁴⁸ Art. 153(2) EU-Ukraine AA (emphasis added).

settle disputes by way of a binding decision.¹⁴⁹ If an agreement cannot be reached in the Association Council after three months, the complaining Party is allowed to take “appropriate measures”.¹⁵⁰ For disputes concerning the interpretation or application of provisions of the DCFTA (Title IV), a separate and more elaborate DSM is established.¹⁵¹ This DSM is modelled upon the WTO Dispute Settlement Understanding and is included in most of the recent EU FTAs.¹⁵² It foresees, after a consultation period, in the establishment of an arbitration panel which shall rule on the dispute. Rulings of the arbitration panel are binding¹⁵³ and each Party must take any measure necessary to comply with them.¹⁵⁴ If the Party complained against fails to take such measures without offering a temporary compensation, the other Party is entitled to suspend obligations arising from the DCFTA “at a level equivalent to the nullification or impairment caused by the violation”.¹⁵⁵ In the light of the recent gas-conflicts between Russia and Ukraine and its impact of several eastern EU Member States, the DCFTA DSM establishes shorter procedures regarding disputes concerning an interruption of any transport of natural gas, oil, or electricity or a threat thereof.¹⁵⁶ Moreover, for several DCFTA Chapters, a mediation mechanism is provided.¹⁵⁷

Significantly, the DCFTA part of the agreement also includes a unique 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”.¹⁵⁸ If a dispute in relation to one of those chapters concerns a question of interpretation of a provision of EU law, the arbitration panel 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.¹⁵⁹ This provision is unique in the sense that in no other agreement, concluded by the EU, an arbitration panel is given the competence to ask for a preliminary ruling to the Court of Justice. In a limited number of other EU integration agreements, the Court of Justice can respond to preliminary questions from a national court or tribunal.¹⁶⁰

¹⁴⁹ Art. 477 EU-Ukraine AA.

¹⁵⁰ Art. 478 EU-Ukraine AA.

¹⁵¹ Chapter 14 DCFTA. Significantly, this DSM does not exclude action under the WTO framework. Yet, Art. 324 precludes parallel actions for identical obligations under the AA and under the WTO agreement.

¹⁵² See for example Art. 14 EU-Korea FTA, (*OJ*, 2011, L 127/6). For analysis, see I. G. Bercero, ‘Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?’, in L. Bartels, F. Ortino, *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, Oxford, 2006), pp. 383-406.

¹⁵³ The agreement precludes, however, that rulings of the arbitration panel acquire direct effect (Art. 231(2) EU-Ukraine AA).

¹⁵⁴ Art. 311 EU-Ukraine AA.

¹⁵⁵ Art. 315(2) EU-Ukraine AA. According to Art. 478(2) AA, the denunciation of the Agreement not sanctioned by the general rules of international law or the violation of the essential elements of Article 2 AA can also lead to the suspension of DCFTA rights or obligations.

¹⁵⁶ Arts. 307(8), 308(4) 309, 310(3) and 314 EU-Ukraine AA.

¹⁵⁷ Chapter 15 DCFTA of the EU-Ukraine AA.

¹⁵⁸ 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).

¹⁵⁹ Art. 322(2) EU-Ukraine AA.

¹⁶⁰ 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).

The procedure of Article 322 EU-Ukraine AA is crucial to preserve the Court of Justice's exclusive jurisdiction to interpret the EU *acquis*.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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 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 Court of Justice by means of a preliminary ruling.¹⁶⁴

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.¹⁶⁵ Of course, the situation is different when express provisions on identical interpretation are laid down in an agreement itself.¹⁶⁶ 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:

"[i]nsofar 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".

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 "[t]he 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."¹⁶⁷ Article 322 EU-Ukraine AA does not make such a

¹⁶¹ 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 C. Hillion, P. Koutrakos (Eds.), *Mixed Agreements Revisited* (Hart Publishing, 2010), 192-199.

¹⁶² 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.

¹⁶³ 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.

¹⁶⁴ However, due to the absence of the homogeneity objective in the AA, the arbitration panel would even in the absence Art. 322 be able to rule only on AA provisions which are textually identical to provisions of EU law, and not on EU law as such. The inclusion of the homogeneity objective would have made it impossible to dissociate the AA provisions from identical provisions of EU law (ECJ, Opinion 1/91, para. 45).

¹⁶⁵ Court of Justice, Opinion 1/91, *Ibid*, para. 14. See also Case 270/80 *Polydor v Harlequin*, [1982], ECR 329, para. 15-19.

¹⁶⁶ Court of Justice, Case C-351/08, *Christian Grimme v Deutsche Angestellten-Krankenkasse*, [2009], ECR 10777, para. 29; Case C-547/10, *Swiss Confederation v European Commission*, [2013], not yet published, para. 80.

¹⁶⁷ Art. 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice further states that in the interpretation and application of the EEA Agreement, the EFTA Surveillance Authority and Court "shall pay due account" to the principles laid down by the relevant rulings of the Court of Justice given *after* the date of signature of the EEA Agreement. Moreover, the EFTA Court confirmed that in practice, in order to maintain a homogeneous EEA, it has "consistently taken into account the relevant rulings of the CJEU [Court of Justice] given after [the date of signature]", thereby *de facto* eliminating the temporal limit of Article 6 EEA (EFTA Court, joined cases E-9/07 and E-10/07, *L'Oréal*, 2008, EFTA Ct. REP 258, para. 28).

distinction between pre-signature and post-signature case law.¹⁶⁸ 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.¹⁶⁹

Constitutional challenges for the implementation of the EU-Ukraine AA

After the long and difficult process leading to the signature and conclusion of the EU-Ukraine AA, significant challenges for the effective implementation of this ambitious legal framework need to be addressed. Three issues can be distinguished: the implications of Russia's annexation of Crimea, the status of the AA and decisions of the Association Council in the Ukrainian legal system and the potential direct effect of the AA in the EU legal order.

The Crimea question and the territorial scope of the AA

The text of the EU-Ukraine AA was already initialed before the Russian annexation of Crimea.¹⁷⁰ Consequently, this issue and its impact on the territorial scope of application of the AA are not addressed in the text of the agreement. Nevertheless, the question has important implications, in particular for the DCFTA part and the determination of the rules of origin.¹⁷¹

According to the European Council, the EU “strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it”.¹⁷² Consequently, it can be argued that products from the Crimea region are by the EU still considered to be goods originating in Ukraine and, therefore, benefit from the preferential trade regime foreseen in the DCFTA or in the EU's autonomous trade preferences. However, in practice, only Russian authorities will be able to issue the relevant origin certificates for products manufactured or processed in Crimea. As confirmed by the Court of Justice, the EU cannot accept the proof of origin issued by authorities other than those designed by name in the relevant (preferential) agreement.¹⁷³ Because there are no competent customs authorities in Crimea to establish the origin of the goods as ‘Ukrainian’, the products can *de facto* not benefit from preferential treatment of the DCFTA. Meanwhile, the European Council has asked the Commission to evaluate the legal consequences of the annexation of Crimea and to propose economic, trade and financial restrictions regarding Crimea for rapid implementation.¹⁷⁴ On a proposal by the Commission, the Council made a first step in this regard on 23 June 2014 when it prohibited the import of goods originating in Crimea or Sevastopol into the EU. However, goods originating in

¹⁶⁸ 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).

¹⁶⁹ Two other DCFTA Chapters contain a similar provision on Court of Justice-case law conform interpretation (*i.e.* Public Procurement and Competition), but without the same strict obligation. Ukraine must respectively take “due account” of (Art. 153(2)) or use “as sources of inspiration” (Art. 264) the relevant case law of the Court of Justice.

¹⁷⁰ On 18 March 2014, the Treaty on Accession of the Republic of Crimea to Russia was signed between representatives of Crimea and the Russian Federation after a referendum was held in Crimea on 16 March 2014.

¹⁷¹ It is noteworthy that EU preferential trade agreements with other ‘contested’ territories such as the Turkish Republic of Northern Cyprus or the Israeli settlements in the West Bank already triggered discussion on the territorial scope of these agreements and the application of their rules of origin. See: Case C-432/92, *Anastasiou (Pissouri)*, [1994] ECR I-3087; Case C-386/08, *Brita GmbH*, [2010] ECR I-01289. For analysis, see M. Maresceau, ‘The Brita ruling of the European Court of Justice: a few comments’, in I. Govaere, R. Quick, M. Bronckers (eds.), *Trade and Competition Law in the EU and Beyond* (Edward Elgar Publishing, 2011), 276-289.

¹⁷² European Council Conclusion, Brussels, 20/21 March 2014, EUCO 7/1/14, para. 29.

¹⁷³ Court of Justice, Case C-432/92, *Anastasiou (Pissouri)*, *op. cit. supra* footnote 171.

¹⁷⁴ European Council, *op. cit. supra* footnote 172.

Crimea or Sevastopol, which have been granted a certificate of origin by Ukrainian authorities, may still be imported into the EU.¹⁷⁵ Moreover, in the Final Act between the EU and Ukraine as regards the EU-Ukraine AA, the parties agree that the AA:

“shall apply to the entire territory of Ukraine as recognised under international law and shall engage in consultations with a view to determine the effects of the Agreement with regard to the illegally annexed territory of the Autonomous republic of Crimea and the City of Sevastopol in which the Ukrainian Government currently does not exercise effective control”¹⁷⁶

In this regard, it must be noted that also the rules of origin in the Moldova and Georgia DCFTA do not include specific rules on the goods originating in these countries’ ‘breakaway regions’ (Transnistria /Abkhazia and South Ossetia), despite the fact that these situations already existed at the time of negotiating these agreements.¹⁷⁷ Nevertheless, both agreements include a specific general provision on the “territorial application” of these AAs and DCFTAs.¹⁷⁸ According to these provisions, the AAs will apply “to the territory of [the Republic of Moldova/Georgia]”, however, they include specific paragraphs on the territorial application of their respective DCFTAs. It is stated that the application of the DCFTA in relation to those areas “over which the Government of [Georgia/Moldova] does not exercise effective control, shall commence once [Georgia/Moldova] ensures the full implementation and enforcement of this Agreement, or of [its DCFTA], respectively, on its entire territory”.¹⁷⁹ The Association Council shall adopt a decision when “the full implementation and enforcement” of the AA or DCFTA on the entire territory of Georgia or Moldova is ensured. This implies that both parties, including the EU, must agree and confirm that Georgia or Moldova exercise effective control over these areas and are capable to implement the AAs and DCFTAs in these areas.¹⁸⁰ Conversely, if a party considers that the implementation and enforcement cannot be guaranteed in these areas, the application of the DCFTA can be suspended in relation to the areas concerned.¹⁸¹ These procedures do not only relate to trade in goods and tariff reduction but to the entire scope of the DCFTAs. Accordingly, in these procedures, the EU-Moldova or EU-Georgia Association Council can only take a decision to suspend or apply the *entire* DCFTA and cannot only cover parts thereof.¹⁸² A similar solution may be expected to apply in relation to the territorial scope of the EU-Ukraine AA.

Ukraine regards the territory of Crimea as ‘temporary occupied territory’ and continues to consider the Ukrainian Constitution and legal system applicable therein.¹⁸³ It means that residents of Crimea and Sevastopol holding Ukrainian citizenship (and Russian citizenship if it was issued automatically without consent of an Ukrainian national) may enjoy rights under the EU-Ukraine AA on the same basis as the Ukrainian nationals. The status of Ukrainian companies established in Crimea and Sevastopol is not defined yet. However, it goes without doubt that a future Law on Implementation of the EU-Ukraine AA must determine the status of Ukrainian nationals and companies residing in Crimea and Sevastopol with regard to application of the AA in detail.

¹⁷⁵ Council of the European Union, ‘EU prohibits imports of goods from Crimea and Sevastopol’, Presse 346, 23 June 2014.

¹⁷⁶ Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement, 27 June 2014 (not yet published in the OJ, on file with the authors).

¹⁷⁷ Protocol II EU-Moldova AA and Protocol I EU-Georgia AA.

¹⁷⁸ Art. 462 EU-Moldova AA and Art. 426 EU-Georgia AA.

¹⁷⁹ Art. 462(2) EU-Moldova AA and Art. 426(2) EU-Georgia AA. The latter explicitly refers to Georgia’s regions of Abkhazia and Tskhnavali region/South Ossetia.

¹⁸⁰ The Association Council decides “by agreement”.

¹⁸¹ Art. 462(4) EU-Moldova AA, Art. 426(4) EU-Georgia AA.

¹⁸² Art. 462(5) EU-Moldova AA, Article 426(5) EU-Georgia AA.

¹⁸³ Law of Ukraine “On Protection of Rights and Freedoms of Nationals and Legal Regime on the Temporary Occupied Territory of Ukraine” of 15 April 2014, No1207-VII.

The EU-Ukraine Association Agreement and the Ukrainian Constitution

The implementation of the EU-Ukraine AA creates important challenges from the perspective of Ukrainian constitutional law. According to Article 9 of the 1996 Constitution:

International treaties that are in force, agreed to be binding by the Verkhovna Rada [Parliament] of Ukraine, are part of the national legislation of Ukraine.

The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine.¹⁸⁴

This provision implies that, after ratification, the EU-Ukraine AA will be an integral part of the Ukrainian legal order. Pursuant to Article 19(2) of the “law on international treaties of Ukraine”, it will enjoy priority over conflicting national legislation.¹⁸⁵ However, this is not the case if there is a conflict with the provisions of the Ukrainian constitution. In this respect, it is noteworthy that some of the EU-Ukraine AA provisions impose commitments on Ukraine that directly contradict the national constitution. For instance, Article 8 AA binds Ukraine to ratify and implement the Rome Statute on the International Criminal Court and its related instruments. However, in a judgment of 11 July 2001, the Constitutional Court of Ukraine concluded that several provisions of the Rome Statute were not in conformity with the national Constitution.¹⁸⁶ Consequently, the ratification of the Rome Statute on the International Criminal Court by the *Verkhovna Rada* is only possible after a constitutional revision and a positive ruling of the Constitutional Court.¹⁸⁷ Another issue concerns the approximation of Ukrainian legislation to the dynamic EU *acquis*. Taking into account that Ukrainian institutions are not involved in the decision-making process of EU legislation, the question arises to what extent this can be reconciled with fundamental constitutional principles such as legality and sovereignty.¹⁸⁸

One of the major problems to be solved in the course of implementation and application of the EU-Ukraine AA is the lack of direct enforceability of international agreements in the Ukrainian legal order.¹⁸⁹ In particular, the question arises how binding decisions of the Association Council will be applied in Ukraine. The Ukrainian legal system has never experienced the necessity to apply binding decisions of institutions established under the framework of an international agreement. This challenge has been faced by other associated countries too. For instance, in 2001 the Croatian Parliament ratified the SAA and at the same time enacted the Act on Implementation of the SAA which required implementation of all ‘association’ *acquis* but did not envisage its direct effect within the Croatian

¹⁸⁴ Full text in English is available on the website of the Ukrainian Constitutional Court at <<http://www.ccu.gov.ua/en/>>, accessed 30.06.2014.

¹⁸⁵ Article 19(2) of Law of Ukraine “On International Treaties of Ukraine” of 29 June 2004, No 1906-IV 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”.

¹⁸⁶ Ruling of the Constitutional Court of Ukraine on compatibility of the Constitution of Ukraine to the Rome Statute of the International Criminal Court of 11 July 2001, Nr. 1-35/2001. In particular, the Constitutional Court of Ukraine found the reference in Article 1 of the Rome Statute that “[the Court] shall be complementary to national criminal jurisdictions” as contrary to provisions of the Constitution of Ukraine which prohibit delegation of judicial powers to other bodies than the Ukrainian courts and establishment of new courts that are not provided in the Constitution.

¹⁸⁷ Interim President of Ukraine Oleksandr Turchynov asked the Constitutional Court of Ukraine to rule on constitutionality of ratification of the Rome Statute of the International Criminal Court on 22 May 2014.

¹⁸⁸ Article 5 of the Constitution of Ukraine provides that “The right to determine and change the constitutional order in Ukraine shall belong exclusively to the people and shall not be usurped by the State, its bodies, or officials”.

¹⁸⁹ This happens mainly due to: 1) the belief that international case law is not relevant to continental law systems; 2) the translation of case law and jurisprudence; 3) lack of translation of case law into Ukrainian to help judges adapt 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. For more detail see 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.

legal order.¹⁹⁰ The Norwegian Parliament adopted a statutory law on implementation of the EEA Agreement in 1992. This law granted provisions of the EEA Agreement and its secondary law supremacy over conflicting national legislation. The Norwegian law on implementation of the EEA Agreement clarified that relevant EU Regulations are to be implemented without change but the implementation of EU Directives must take into account choice of form and method of implementation.¹⁹¹ In order to ensure effective application of the relevant EU *acquis* within the myriad of sectoral agreements with the EU, Switzerland adopted several implementation laws too. For example, the Swiss Federal Law on Internal Market mirrors most of the relevant EU legislation and the Swiss Law on Federal Parliament ensures “euro compatibility” of Swiss law drafts with the EU *acquis*.¹⁹²

Hence, the adoption of a special implementation law clarifying the implications of the EU-Ukraine AA for the application and interpretation of national legislation is a crucial prerequisite to tackle most challenges of legislative approximation. It is noteworthy that Ukraine has already gained some experience in ensuring the implementation of international norms after the ratification of the European Convention of Human Rights (ECHR) in 1997. The incorporation of the ensuing obligations took place by means of two laws. The first was a law on ratification of the ECHR wherein Ukraine recognised the jurisdiction of the European Court on Human Rights (ECtHR).¹⁹³ The second was a special law on the application of case law of the ECtHR in Ukraine. It imposed on Ukraine a duty of mandatory and timely execution of all ECtHR judgments.¹⁹⁴ 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.¹⁹⁵

Another relevant tool to reconcile the EU-Ukraine AA with national constitutional requirements is the so-called ‘Euro-friendly interpretation’ of national legislation. This is a common practice in most countries of Central and Eastern Europe and the Western Balkan region.¹⁹⁶ For instance, in 1997 the Polish Constitutional Tribunal rejected the binding force of EU law provisions in the EU-Poland AA within the Polish legal order but acknowledged the obligation of the Polish government and judiciary to interpret “the existing legislation in such a way as to ensure the greatest possible degree of such compatibility”.¹⁹⁷ The Czech Constitutional Court emphasised the special importance of EU law for the Czech legal system and frequently cited the EU *acquis* including the Court of Justice case law in

¹⁹⁰ S. Rodin, “Requirements of EU Membership and Legal Reform in Croatia” (2001) 38 *Politička misao* 87–105.

¹⁹¹ Statute of 27 November 1992, nr. 109. For more detail see K. Bruzelius, ‘The Impact of EU Values on Third Countries’ National Legal Orders: EU Law as a Point of Reference in the Norwegian Legal System’ in F. Maiani, R. Petrov, E. Mouliarova (Eds.), *European Integration without EU Membership: Models, Experiences, Perspectives*, European University Institute Working Papers (Max Weber Programme), 2009/10, 81-89.

¹⁹² F. Maiani, ‘Legal Europeanisation as Legal Transformation: Some Insights from Swiss “Outer Europe”’ in F. Maiani, R. Petrov, E. Mouliarova (Eds.), *European Integration without EU Membership: Models, Experiences, Perspectives*, European University Institute Working Papers (Max Weber Programme), 2009/10, 111-123.

¹⁹³ Law of Ukraine ‘On Ratification of the European Convention on Human Rights 1950, First Protocol and protocols № 2, 4, 7 and 11’ of 17 July 1997, № 475/97-BP.

¹⁹⁴ Law of Ukraine ‘On Execution of Judgments and Application of Case Law of the European Court of Human Rights’ of 23 February 2006, № 3477-IV.

¹⁹⁵ For example see the 7th Annual Report of the Committee of Ministers ‘Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights’ in 2013, available at <http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_en.pdf>, accessed 30.06.2014.

¹⁹⁶ On the challenges of the countries of Central and Eastern Europe in their pre-accession period, see: A. Albi, *EU Enlargement and the Countries of Central and Eastern Europe*, (Cambridge University Press, 2005).

¹⁹⁷ Decision of the Polish Constitutional Tribunal K. 15/97, OTK [Orzecznictwo Trybunału Konstytucyjnego, the collection of decisions of the Constitutional Tribunal], nr. 19/1997, at 380.

its jurisprudence.¹⁹⁸ Undoubtedly, the Ukrainian Constitutional Court will have a chance to rule on the Euro-friendly interpretation of the EU-Ukraine AA within the national legal order and refer to experiences of other associate countries which either already joined the EU or are on the pre-accession track. Another solution could be an amendment of the Ukrainian Constitution in order to ensure direct enforceability of the EU-Ukraine AA. In 2001, both the Czech and Slovak republics made international law directly enforceable in their domestic legal systems by amending their respective constitutions.¹⁹⁹ However, it is unlikely that Ukraine will introduce new amendments that imply at least a minimal limitation of national sovereignty. Such a scenario is politically sensitive taking into account that a threat to national sovereignty was one of the reasons for rejecting the offer to take part in the Eurasian customs union between Russia, Belarus and Kazakhstan. Be that as it may, the EU-Ukraine AA will stimulate a process of constitutional reform, not only to accommodate the relationship with international and European law but also to comply with the ambitious objectives of political association, economic integration and legislative approximation with the EU. The scope of the EU *acquis* to be adopted by Ukraine is massive and covers not only EU legislation but also EU fundamental principles, doctrines and the Court of Justice case law. In addition to formal legislative amendments, Ukrainian civil servants and judges will require in depth training in EU law in order to be able to apply the approximated legislation in their everyday activities.

The question of direct effect in the EU legal order

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 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.²⁰⁰ 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 introduction of such a statement was deemed necessary to ensure consistency with the multilateral dispute settlement mechanism of the WTO, which does not have direct effect in the EU’s legal order.²⁰¹ 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.”²⁰² 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.²⁰³

¹⁹⁸ *Skoda Auto* case, Collection of decisions of the Constitutional Court, vol.8, p.149. Therein the Czech Constitution Court stated that the EU founding treaties result from the same values and principles as the Czech constitutional law, therefore the interpretation of EU competition law by the EU institutions should be taken into account in the course of interpretation of the corresponding Czech rules.

¹⁹⁹ Z. Kühn, ‘Application of European law in Central European candidate countries’, 28 *European Law Review* (2003), 551-560.

²⁰⁰ 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.

²⁰¹ Case C-377/02, *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465.

²⁰² 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’.

²⁰³ 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

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."²⁰⁴ 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."²⁰⁵ 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.²⁰⁶

Remarkably, the Council could have easily avoided the legal uncertainty regarding the direct effect of the non-discrimination clause without opening the door to direct effect of the other (trade-related) provisions. As noted above, a separate 'split' Council Decision was adopted for Article 17 EU-Ukraine AA. This Council Decision gave the Council the option not to unilaterally exclude direct effect of this provision, however, instead it chose to do so by including the same provision as in the 'general' Council Decision for the conclusion of the AA which excludes direct effect.²⁰⁷

Even though it appears difficult for the Court of Justice to ignore the clear-cut instructions of the Council, the implications for the direct effect of the EU-Ukraine AA are not straightforward. As Advocate General Saggio observed in his Opinion in *Portugal v Council* "[i]t need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot – outside the system of reservations – limit the effects of the agreement itself."²⁰⁸ Arguably, the objective content of the textual provisions of the agreement takes priority over wishes expressed in separate unilateral declarations. This seems in line with the rules of customary international law, according to which "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The text of the treaty is the primary source of interpretation, while external aids such as *travaux préparatoires* constitute a supplementary source."²⁰⁹

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of Direct Effect in the Recently Concluded EU Free Trade Agreements", *Common Market Law Review* (2014), forthcoming.

²⁰⁴ See: Art. 5 of Council Decision 2014/295/EU and Art. 7 of Council Decision [...] /2014, op. cit. *supra* footnote 41.

²⁰⁵ Case C-265/03, *Simutenkov v. Real Federacion Española de Fútbol* [2005] ECR I-02579, para. 29.

²⁰⁶ 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.

²⁰⁷ Council Decision [...] /2014, op. cit. *supra* note 50, Art. 3.

²⁰⁸ Opinion of Advocate General Saggio in Case C-149/96, *Portugal v. Council* [1999] ECR I-8395, para. 20.

²⁰⁹ Judgment of the International Court of Justice of 3 February 1994, *Libyan Arab Jamahiriya v Chad*, quoted in the Opinion of AG Saggio in Case C-149/96, *ibid.*

Concluding Remarks

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.

It is a truly innovative legal instrument in the EU's external relations practice based on comprehensiveness, complexity and conditionality. The EU-Ukraine AA does not go as far as the EEA Agreement, which extends the entire EU Internal Market *acquis* to the participating EFTA States on the basis of homogeneity. Yet, in certain specific areas where full internal market treatment is foreseen, such as in several sections on services and establishment, certain arrangements under the EU-Ukraine AA are comparable to the mechanism for legislative approximation under the EEA Agreement. A key difference, of course, is the far-reaching market accession conditionality as foreseen under the EU-Ukraine AA. Based upon a strict monitoring process, apparently inspired by the pre-accession methodology, not only the process of legislative approximation but also – and most importantly – the effective enforcement and implementation of the EU-Ukraine AA is subject to permanent scrutiny. This market access conditionality illustrates that the EU is very cautious to open up its Internal Market for third countries which have a less stable political and economic system than the EEA countries.

As an innovative legal instrument, the EU-Ukraine AA also fundamentally differs from other agreements with the EU's neighbouring countries. It creates a single legal framework opposed to the Swiss model of sectoral bilateralism and it is not sector-specific such as the multilateral EnC Treaty or the ECAA. Rather, the EU-Ukraine AA incorporates certain bits and pieces derived from other agreements and policies. Accordingly, it forms a new type of integration without membership, with all legal complexities this entails.

