
EU-Ukraine Association Agreement's Effective Implementation into the Legal Order of Ukraine. Challenges and Successes

Roman Petrov*

Summary: This article focuses on challenges and successes of the implementation and application of the EU-Ukraine Association Agreement, which triggered unprecedented political, economic and legal reforms in Ukraine. This article focuses on the constitutional challenges that have arisen for Ukraine in the course of implementing the Association Agreement into its legal system. Two issues form the core of the paper. The first issue is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second issue is compatibility between the Association Agreement and the Ukrainian Constitution. The latest political and legal developments in Ukraine are analyzed through the prism of effective implementation of the Association Agreement and the rise of pro-European judicial activism in Ukraine. In conclusion it is argued that the EU-Ukraine Association Agreement enhanced the adaptability of the national constitutional order to the European integration project and European common values.

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

1. Introduction

Ukraine's road towards the signature and entry into force of the EU-Ukraine Association Agreement (the Association Agreement) was highly dramatic.¹ Following unprecedented economic and political pressure from Russia, on 21 November 2013 the Government of Ukraine decided to suspend the process of

* Jean Monnet Centre of Excellence, Jean Monnet Chair in EU Law at the National University of Kyiv-Mohyla Academy, Kyiv, Ukraine. Email: petroveulaw@gmail.com

¹ VAN ELSUWEGE, P., VAN DER LOO, G., PETROV, R. The EU-Ukraine Association Agreement: a New Legal Instrument of Integration without Membership? *Kyiv-Mohyla Law and Politics Journal*, 2015, vol. 1, pp. 1–19.

preparation for signature of the Association Agreement.² Further events led to the ‘Maidan’ revolution, which claimed more than 100 victims and led to the dismissal of President Victor Yanukovich on 22 February 2014, the annexation of Crimea by Russia in March 2014, and bloody military conflict in the Donbass area. However, the Association Agreement instigated far-reaching economic, political and profound constitutional reforms in Ukraine which will determine its future geopolitical orientation and economic stability.

Taking the above as a starting point, the aim of this chapter is to highlight the constitutional challenges that have arisen for Ukraine on the road of the implementation of the Association Agreement into its legal system. The paper focuses on two major features of this intricate process. The first feature is effective implementation and application of the Association Agreement within the Ukrainian legal order. The second feature is compatibility between the Association Agreement and the Ukrainian Constitution.

2. Impact of the EU-Ukraine Association Agreement on the Ukrainian legal system

The Association Agreement is destined to have a profound effect on the Ukrainian legal system for several reasons. First, it has already triggered and is likely to trigger further constitutional amendments aimed at ensuring that Ukraine effectively shares common EU democratic values and implements the Association Agreement. Second, the provisions of the Association Agreement and the relevant EU *acquis* must be effectively applied by the Ukrainian judiciary, raising the issue of direct effect within the Ukrainian legal system. Third, decisions by the common institutions set up under the Association Agreement will become part of the national legal system and find effective application by the national executive and judiciary.

2.1. Objectives and specific features of the Association Agreement with Ukraine

The AA is the most voluminous and ambitious among all EU association agreements with third countries (7 titles, 28 chapters, 486 articles, 44 annexes on about 2000 pages). This is comprehensive mixed agreement based on Article 217 TFEU (association agreements) and Articles 31(1) and 37 TEU (EU action

² Decision of the Ukrainian Cabinet of Ministers No 905-p of 21 November 2013. Available at: <http://zakon0.rada.gov.ua/laws/show/905-2013-%D1%80>

in area of Common Foreign and Security Policy). There are many novelties introduced to these agreements. Most prominent of them are strong emphasis on comprehensive regulatory convergence between the parties and possibility for the application of the vast scope of the EU *acquis* within the Ukrainian, Moldovan and Georgian legal orders. Of particular significance of the AA is the ambition to set up a Deep and Comprehensive Free Trade Areas (DCFTA), leading to gradual and partial integration of Ukraine into the EU Internal Market. Accordingly, the AA belong to the selected group of 'integration-oriented agreements', i.e. agreement including principles, concepts and provisions which is to be interpreted and applied as if the third country is part of the EU. It is argued that the AA is unique in many respects and, therefore, provide a new model of integration without membership.

The AA is characterised by three specific features: *comprehensiveness*, *complexity* and *conditionality*. The AA is *comprehensive framework agreement* which embrace the whole spectrum of EU activities from setting up deep and comprehensive free trade areas (DCFTA) to cooperation and convergence in the field of foreign and security policy as well as cooperation in the area of freedom, security and justice (AFSJ).³

The *complexity* of the AA reflects a high level of ambition of Ukraine achieve economic integration in the EU Internal Market through the establishment of the DCFTAs and to share principles of the EU's common policies. This objective requires comprehensive legislative and regulatory approximation including advanced mechanisms to secure the uniform interpretation and effective implementation of relevant EU legislation into national legal order of Ukraine. In order to achieve this objective the AA is equipped by multiple specific provisions on legislative and regulatory approximation including detailed annexes specifying the procedure and pace of the approximation process for different policy areas in more than 40 annexes and based on specific commitments and mechanisms identified in both the annexes and specific titles to the agreement.

Furthermore, the AA is founded on a strict *conditionality* approach which links the third country's performance and the deepening of its integration with the EU. 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) (Art. 2 EU-Ukraine AA), the AA contains common

³ VAN ELSUWEGE, P., VAN DER LOO, G., PETROV, R. (eds.). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument, *EUI Working Papers (Law)*, 2014/09.

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” [Art. 2 EU-Ukraine AA].

Apart from the more general ‘common values’ conditionality, the AA contains a specific form of ‘market access’ conditionality, which is explicitly linked to the process of legislative approximation. Hence, it is one of the specific mechanisms introduced to tackle the challenges of integration without membership. Of particular significance is a far-reaching monitoring of Ukraine’s efforts to approximate national legislation to EU law, including aspects of implementation and enforcement [Art. 475 (2) EU-Ukraine AA]. To facilitate the assessment process, the government of Ukraine is obliged to provide reports to the EU in line with approximation deadlines specified in the Agreements. 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.” [Art. 475 (3) EU-Ukraine AA].

2.2. Enhanced Conditionality in the Association Agreement with Ukraine

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 AA. Two different forms of conditionality can be distinguished in these agreements. On the one hand, the AA include 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 DCFTAs 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 these countries 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.⁴

⁴ PETROV, R. Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia: Legal and Constitutional Challenges’. In: KERIKMAE, T., CHOCHIA, A. (eds.). *Political and Legal Perspectives of the EU Eastern Partnership Policy*. Cham: Springer International Publishing, 2016, pp. 153–165.

2.2.1. '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. Such a mechanism is also included in the AA (Art. 2 in conjunction with Art. 478 EU-Ukraine AA). Yet, the common values conditionality in the AA differs from similar provisions included in, for instance, the SAA 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), a specific reference to human rights and fundamental freedoms is included in the AA's provisions on "dialogue and cooperation on domestic reform" and in the AA's provisions dealing with EU cooperation with Ukraine on justice, freedom and security (Art. 7 EU-Ukraine AA). Second, the essential elements of the 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". 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 development and effective multilateralism" are not included in the definition of essential elements. Rather, they are considered to "underpin" the relationship between the parties and are "central to enhancing" this relationship. 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 (Art. 478 EU-Ukraine AA).

2.2.2. 'Market access' conditionality

Apart from the more general 'common values' conditionality, the AA entail a specific form of 'market access' conditionality, which is explicitly linked to the process of legislative approximation in Ukraine. 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 these countries'

efforts to approximate national legislation to EU law, including aspects of implementation and enforcement [Art. 475 (2) EU-Ukraine AA]. 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 [Art. 475 (3) EU-Ukraine AA]. 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." 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.⁵

2.3. Protection of EU Values in the Association Agreement with Ukraine via EU's sanctions towards third countries

Principles of sovereignty and territorial integrity, inviolability of borders and independence considered as core values of the AA and must be shared and respected by the EU and Ukraine. Furthermore, in case of the EU-Ukraine AA, these principles constitute essential elements of the agreement.

The overall security situation in the EU's neighbouring countries for the last decade has gradually deteriorated. Currently Moldova and Georgia have unresolved border security conflicts either with other EU's neighbouring countries or with third countries (mainly with the Russian Federation). Ukraine has been plunged into flames of bloody civil conflict since April 2014.

Moldova experiences prolonged conflict with its breakaway part Transnistria (so called Pridnestrovian Moldovan Republic). This territory is not recognised by any of the UN members and formally constitutes part of the Republic of Moldova (Transnistria autonomous territorial unit with special legal status). However, *de facto*, Transnistria is an independent state with strong presence of Russian military troops. The EU is engaged in solving the Transnistrian conflict via the European Border Assistance Mission to Moldova and Ukraine (EUBAM). This structure as part of the EU Common Security and Defence Policy helps to control traffic on borders between Moldova and Ukraine around Transnistria in order to prevent illegal movements of people and goods from and to Transnistria.⁶

Georgia went through a military conflict with Russia over the breakaway areas of Abkhazia and South Ossetia. The conflict took place August 2008 and

⁵ VANDER LOO, G. *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area*. Brill/Nijhoff, 2015.

⁶ KUROWSKA, X., TALLIS B. Border Assistance Mission: Beyond Border Monitoring? *EFARev*, 2009, vol. 14, no. 1, pp. 47–64.

led to many casualties and loss of control of Georgia over Abkhazia and South Ossetia. Currently Russian military troops are stationed in Abkhazia and South Ossetia and *de facto* control their territories.

The EU played quite modest role in settling the conflict in the Caucasus allowing some EU Member States to lead the peace process in the region.⁷ No sanctions were applied by the EU in the aftermath of the Georgian-Russian conflict.

However, the next security challenge within the country which was on the road of signing the AA compelled the EU to act and to apply sanctions against one of the leading geopolitical players on the European continent – the Russian Federation. It happened after self-proclaimed authorities the Autonomous Republic of Crimea hold unrecognised referendum under Russian military presence in March 2014. As a result of this the integral part of Ukraine – the Autonomous Republic of Crimea and the city of Sevastopol – were annexed by the Russian Federation and incorporated by the Russian Federation as own federal subjects on March 21, 2014. The fact of annexation is not recognised by Ukraine and the United Nations UN [General Assembly Resolution 68/262 (2014)] and is universally considered as blatant violation of international public law by the Russian Federation.⁸

Following turbulent events in Crimea the EU decided to apply wide scale sanctions against Russia. The EU sanctions led to a complete halt in the EU-Russia relations (suspension of bilateral talks on visa matters and on new EU-Russia agreement, cancellation of the EU-Russia summit) and to imposing measures against 'certain persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine' (travel bans and asset freezes). The list of these persons is constantly increasing and covers leading Ukrainian, Russian and Crimean politicians related to the fact of the Crimea's annexation. The EU had to extend the scope of sanctions against Russia after the security situation in Ukraine has drastically deteriorated by the end of the summer 2014. The world was shocked when Malaysia Airline flight MH17 was shot down above the part of Eastern Ukraine controlled by pro-Russian separatists. This incident caused the loss of 298 lives and drastically deteriorated security situation in the region and in the EU. Bloodshed conflict between Ukraine and armies of self-proclaimed 'peoples republics' of Donetsk and Lugansk led to several thousand casualties and about a million refugees from the East of Ukraine (UN Report on the human rights situation in Ukraine in 2017). The EU Member States had to speak with one voice in order to show their solidarity against direct

⁷ VASILYAN, S. The External Legitimacy of the EU in the South Caucasus. *EFARev*, 2011, vol. 16, no. 3, pp. 341–357.

⁸ MARXSEN, C. The Crimea Crisis – An International Law Perspective. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, vol. 74, no. 2, pp. 367–391.

Russian involvement into civil conflict in Ukraine. As a result, the EU Member States agreed on new level of sanctions against Russian and Ukrainian officials and nationals involved in supporting the separatists' movement in the Donbass region of Ukraine. Hitherto, the EU's sanctions against Russia concerned the following issues: diplomatic measures (cancellation of the EU-Russia political dialogue and dismantling of G8); restrictive measures (asset freezes and visa bans of persons and entities responsible for actions against Ukraine's territorial integrity); restrictions for Crimea and Sevastopol; "economic" sanctions against Russia (prohibition of exports of arms, energy and military related technologies and dual use goods, freezing economic cooperation).

The EU sanctions were issued upon unanimous decision of all the EU Member States on basis of Article 215 TFEU as part of the Common Foreign and Security Policy (CFSP). This fact represents evident solidarity of all EU Member States facing a violation of territorial integrity of one of its nearest neighbours which is about to enter into association relations with the EU.

It is hoped that the procedure of political dialogue and institutional framework of the AA will be effectively used to protect the principles of sovereignty and territorial integrity, inviolability of borders and independence considered as core values of the AA.

3. Constitutional Amendments Caused by the Implementation of the EU-Ukraine Association Agreement

One of the first 'post-Maidan' constitutional amendments took place in June 2016 when the *Verkhovna Rada* adopted the 'Law on amending the Ukrainian Constitution (as to justice)'.⁹ These constitutional amendments were proposed by President Poroshenko in light of the fight against corruption and the independence of the judiciary in Ukraine. The constitutional amendments sparked considerable public debate in Ukraine and beyond. Externally, the European Commission for Democracy through Law (Venice Commission) twice scrutinized the draft amendments for their compliance with European standards and issued several important reservations.¹⁰ Internally, on the one hand, the draft amendments were

⁹ Ukrainian Law 'On amending the Constitution of Ukraine (as to justice)' *Zakon Ukrainy* "Pro Vneshennia Zmin do Konstitutsii Ukrainy (shodo pravosuddia)" (02 June 2016) No 1401-VIII, VVR (2016) No 28.

¹⁰ The reservations mainly concerned the scope of judges' immunity and preserving the balance of power in the procedure for appointing judges and prosecutors (election of the Supreme Law

criticized for giving extended powers to the President of Ukraine to influence the appointment of judges, narrowing the scope of judges' immunity, and for keeping a complicated system of specialized courts in Ukraine. On the other hand, the position of the Office of the President of Ukraine was that the constitutional amendments were crucial to achieve the objectives of the Association Agreement in terms of sharing common values, fighting corruption and improving access to the judiciary. In particular, the constitutional amendments ensure that Ukraine observes the essential elements of the Association Agreement, such as respect for the principle of the rule of law,¹¹ and meets the objectives of Title III of the Association Agreement on justice, freedom and security, which call on Ukraine to consolidate the rule of law, to improve the efficiency of the judiciary, to safeguard the independence and impartiality of the judiciary, and to combat corruption.¹²

The official position of the EU institutions regarding constitutional reform in Ukraine was rather supportive. The annual report on progress in implementing the Association Agreement hailed the constitutional amendments of 2016 as legislation that "strengthens judicial independence and [reorganizes] the court system, by streamlining the judicial instances (from four to three) and by subjecting the sitting judges to examinations and mandatory electronic asset declarations".¹³ Furthermore, it should be acknowledged that the most recognized impact of the Association Agreement¹⁴ on constitutional reform in Ukraine can be seen in revised Article 124 of the Constitution, wherein it is stated that "Ukraine may recognize the jurisdiction of the International Criminal Court (ICC) as provided for by the Rome Statute of the International Criminal Court". This amendment overrules a decision of the Ukrainian Constitutional Court in 2001 which explicitly considered recognition of the jurisdiction of the ICC as incompatible with the national Constitution, thus ruling out ratification of the former by the Ukrainian Parliament.¹⁵ The wording of revised Article 124 of the Ukrainian Constitution

Council, which is responsible for appointing judges (qualified majority voting) and the right of the Ukrainian Parliament to veto the appointment and removal of Ukraine's General Prosecutor). European Commission for Democracy through Law (Venice Commission), Opinion №803/2015 of 26 October and 3 December 2015.

¹¹ Preamble, Art. 1(2)(e) and Art. 2 Association Agreement, *OJ*, 2014, L 161/1.

¹² Art. 14 Association Agreement, *OJ*, 2014, L 161/1.

¹³ Joint Staff Working Document 'Association Implementation Report on Ukraine' [SWD(2016) 446 final].

¹⁴ Art. 8 Association Agreement, *OJ*, 2014, L 161/1.

¹⁵ Vysnovok Constitutsiynoho Sudu Ukrainy shodo Vidpovidnosti Constitutsii Ukrainy Rymському Statutu Mizhnarodnogo kriminalnogo sudu (Decision of the Ukrainian Constitutional Court on the Statute of the International Criminal Court) (July 11, 2001), Case No 1–35/2001, where the Ukrainian Constitutional Court stated that in accordance with the Rome Statute the International Criminal Court complements the system of national judiciaries. For example, the International Criminal Court may exercise its jurisdiction on the territory of States Parties to the Rome Statute.

opens a possibility for the Ukrainian Parliament to ratify the Rome Statute in the near future. However, ratification of the Rome Statute is likely to be postponed until eventual implementation of the ‘Minsk II Agreement’ regarding the military conflict in Eastern Ukraine (Donbass area) which directly or indirectly involves multiple actors. In particular, those involved in the conflict must ensure an effective ceasefire, effective control by Ukraine of its eastern border with Russia and guarantee an amnesty for illegally armed belligerents. These actions must take place before ratification of the Rome Statute in order to avoid entrenching a legal war between the government of Ukraine and the Russian government and the governments of the self-proclaimed separatist republics in eastern Ukraine.¹⁶

Another test of Ukraine’s devotion to common EU values as enshrined in the Association Agreement took place in September 2017, when the Verkhovna Rada adopted a new education law. This immediately sparked a controversial reception and protests by representatives of national minorities (mainly the Hungarian minority) in Ukraine.¹⁷ This law foresees a reduction in the scope of instruction in the mother tongue of a national minority at secondary education level. According to the new education law, only primary school education can be given in the mother tongue of a national minority in Ukraine. Secondary and higher education must be offered only in the official language (Ukrainian) with the possibility to study the mother tongue as one of the courses. The Hungarian government fiercely protested against the new educational law on the ground that it violates the rights of the Hungarian minority in Ukraine.¹⁸ Furthermore, the Hungarian government asserted that the Ukrainian education law is in conflict with the objectives and human rights commitments by Ukraine in the Association Agreement.¹⁹ In order to prevent the escalation of tension with some EU Member States, the Ukrainian authorities submitted Article 7 of the education law for assessment by the Venice Commission. In its assessment issued on 11 December 2017, the Venice Commission noted the vague nature of the relevant provisions

This contradicts Title VIII “Judiciary” of the Ukrainian Constitution, under which (Art. 124) “delegation of the competences of the national judiciary is not permitted”.

¹⁶ Briefing of the European Parliament “Ukraine and the Minsk II agreement: On a frozen path to peace?”. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573951/EPRS_BRI\(2016\)573951_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573951/EPRS_BRI(2016)573951_EN.pdf)

¹⁷ Law of Ukraine “On Education”, *Zakon Ukrainy* “Pro Osvity” (05 September 2017) No 2145-VIII, *VVR* (2017) No 38–39.

¹⁸ “Hungary Threatens to Block Ukraine’s EU Approach”, *EU Observer* (27 September 2017). Available at: <https://euobserver.com/tickers/139173>. HRYNEVYCH, L. Ukraine Education Law Does Not Harm Minorities, *EU Observer* (20 October 2017). Available at: <https://euobserver.com/opinion/139550>

¹⁹ “Hungary seeks to recognize Ukraine violator of Association Agreement over educational law”. Available at: <https://www.unian.info/politics/2190089-hungarian-foreign-minister-to-put-ukraines-education-law-on-agenda-of-ua-eu-association-councils-meeting.html>

of the national education law and recognized the narrowing of access by national minorities to obtaining secondary education in their mother tongue. The Venice Commission recommended adopting further implementing legislation in order to ensure a sufficient level of teaching in languages of the EU Member States in Ukraine. However, the Venice Commission recognized discrimination against the languages of national minorities that are not official languages of the EU (Russian) and called on Ukraine not to endanger “the preservation of the minorities’ cultural heritage and the continuity of minority language education in traditional schools”.²⁰ The Ukrainian government welcomed the findings of the Venice Commission and agreed to follow most of them in the course of drafting and adopting further education legislation and to ensure a transitional period for implementation of the education law until 2020.²¹ Meanwhile, the EU’s reaction to the language issue in the education law and its compatibility with the objectives of the Association Agreement remains neutral.²² However, it is possible that the Venice Commission’s recommendations may be taken on further board by EU institutions and become part of the EU conditionality requirements towards Ukraine in the process of further implementation and application of the Association Agreement in area of protection of human rights.

One of the most significant constitutional developments caused by the implementation of the EU-Ukraine Association Agreement is the introduction of so-called “European integration clauses” in February 2019.²³ These clauses were amended to the preamble and provisions of the Ukrainian Constitution on the competences of the President of Ukraine, the *Verkhovna Rada* and Cabinet of Ministers of Ukraine. The aim of the “European integration clauses” is twofold. On one hand, these clauses formalize the irrevocability of the strategic course of Ukraine and its legislature, executive and judiciary towards the full membership in the EU and NATO. Furthermore, these clauses may encourage and legitimize

²⁰ Opinion of the European Commission for Democracy Through Law (Venice Commission) ‘On the Provisions of the Law of Education of 5 September 2017’, 11 December 2017, Opinion No 902/2017.

²¹ Statement of the Ukrainian Ministry of Education and Science on the findings of the Venice Commission, 11 December 2017. Available at: <https://mon.gov.ua/ua/news/poziciya-mon-shodo-opublikovanogo-visnovku-venecijskoyi-komisiyi-ministerstvo-dyakuye-za-robotu-komisiyi-ta-gotove-implementuvati-rekomendaciyi>

²² Joint Staff Working Document, Association Implementation Report on Ukraine, (07 November 2018), SWD(2018) 462 final.

²³ Law of Ukraine “On Amendment to the Constitution of Ukraine (regarding strategic course of the state towards the acquisition of the full membership in the EU and NATO)”, (07 February 2019), No 2680-VIII. The amended relevant provision of the preamble of the Constitution of Ukraine reads as “strengthening civil accord on the Ukrainian soil and confirming the European identity of the Ukrainian peoples and irrevocability of the European and Euroatlantic course of Ukraine”.

the pro-European activism of the Ukrainian judiciary that implies application of the relevant CJEU's case law. On the other hand, the "European integration clauses" were adopted on the eve of the presidential and parliamentary elections in Ukraine in March 2019 that led to the arrival into the office of a new President of Ukraine, political newcomer, former comedian Volodymyr Zelenskiy. Therefore, these clauses were introduced as a constitutional guarantee with a purpose to prevent possible change of course of Ukrainian foreign and domestic policies caused by potential change of the ruling political power and elite in Ukraine as a result of the presidential and parliamentary elections in 2019.

4. Application and Direct Effect of the EU-Ukraine Association Agreement in the Ukrainian legal order

The Ukrainian judiciary already occasionally referred to the fundamental principles of EU law and some elements of the EU *acquis* as well as to CJEU case law before signature of the Association Agreement.²⁴ A combination of external and internal factors may explain this observation. First, since 2004 Ukraine's pro-European foreign policy has been underpinned by a national program for approximating Ukrainian legislation to EU law. This has served as vital encouragement for the few Ukrainian judges with expertise in EU law to refer to the relevant EU *acquis* in their decisions. Second, the EU has been offering result-oriented, technical and financial support to the Ukrainian judiciary. This support has resulted in significant internal institutional reforms within the Ukrainian judiciary, such as establishment of a system of administrative courts. According to the case law of the Ukrainian courts, mostly administrative judges have been inclined to pioneer application of the EU *acquis* within the Ukrainian judiciary.²⁵ A third factor is the increased transparency of the Ukrainian judiciary. A national registry of Ukrainian case law was launched in 2006 and drew positive feedback from among the Ukrainian legal community. Judges and lawyers are regularly informed about developments in EU law via workshops and courses in Ukrainian higher legal education institutions. The law 'On the All State Program on the

²⁴ PETROV, R. Regulatory Convergence and Application of EU Law in Ukraine. In: VAN ELSUWEGE, P., PETROV, R. (eds.). *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* Oxford: Routledge Press, 2014, pp. 137–158.

²⁵ PETROV, R., KALINICHENKO, P. The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine. *International and Comparative Law Quarterly*, 2011, vol. 60, no. 2, pp. 325–353.

adaptation of Ukrainian legislation to EU laws' of 2004 encouraged the Ukrainian judiciary to use the EU *acquis* as an important source of reference.²⁶ This law, which is already outdated today, envisages export of the whole 'accession *acquis*' into Ukraine's legal system.²⁷

There is a long track of the Ukrainian judiciary (including the Ukrainian Constitutional Court) applying the EU *acquis* as a persuasive source of law even before signature of the Agreement. For example, the Ukrainian courts recognized the priority of the Association Agreement's predecessor (the EU-Ukraine PCA) over conflicting provisions of national law.²⁸ Furthermore, in cases related to state liability, the Ukrainian administrative courts imported from the EU legal system the concept of legal certainty, previously unknown to the Ukrainian legal system. For example, in the *Person v Kiev City Centre for Social Assistance* case,²⁹ the Kiev District Administrative Court held that the rights of the disabled to claim social and financial assistance from the state flow from the principle of legal certainty. This means that a state cannot justify its failure to guarantee constitutional rights by the absence of a specific national law. For this purpose, the Kiev District Administrative Court referred to the CJEU judgment in *van Duyn v the Home Office*,³⁰ wherein it was held that nationals may rely on the state's obligations, even in cases when those obligations are contained in a law without direct effect. Furthermore, the Ukrainian courts developed the principle of legitimate expectations in the case of *Person v Darnitsa District of Kiev Center for Social Assistance*,³¹ concerning the right to benefits of those who took part in the liquidation operation during the Chernobyl catastrophe. The Kiev District

²⁶ Law of the Verkhovna Rada of Ukraine 'About the All State Programme of adaptation of Ukrainian legislation to that of the EU' (official translation): *Zakon Ukrainy "Pro Zagalnodержavnu Programu Adaptatsii Zakonodavstva Ukrainy do Zakonodavstva Evropeyskogo Soyuzu"* (18 March 2004) No 1629-IV, VVR (2004) No 29.

²⁷ The main objective of this law is 'alignment of the Ukrainian legislation with the *acquis communautaire*, taking into consideration criteria specified by the EU towards countries willing to join the EU'.

²⁸ Ukrainian High Commercial Court judgment of 2 February 2005, No. 12/267. Also Ukrainian High Commercial Court judgment of 25 March 2005 (*Closed Stock Company 'Chumak' v Kherison Custom Office*) No. 7/299. Also Ukrainian High Commercial Court judgment of 22 February 2005 (*'Odek' LTD v Ryvne Custom Office*) No. 18/303.

²⁹ Kiev District Administrative Court judgment of 25 November 2008, No. 2/416. Apparently, this judgment became a pattern for subsequent decisions by Ukrainian administrative judges, see: Kiev District Administrative Court judgment of 24 November 2008, No. 5/503. Kiev District Administrative Court judgment of 1 December 2008, No. 5/451. Kiev District Administrative Court judgment of 10 November 2008, No. 5/435.

³⁰ Case 41/74 *van Duyn v Home Office*, EU:C:1974:133 (on free movement of workers between EU Member States and direct effect of EU Directives).

³¹ Kiev District Administrative Court judgment of 26 June 2008, No. 4/337.

Administrative Court held that the principle of state liability to offer compensation to those involved in the liquidation of the Chernobyl disaster also flows from the same CJEU case *van Duyn v Home Office*. Therein, the Kiev District Administrative Court found that if the state formally acknowledged its commitment to offer compensation to those involved in the Chernobyl disaster, it could not refer to its own failure to fulfil its commitments in order to avoid liability, which would also violate the legitimate expectations of Ukrainian nationals.

Such bold judicial activism of administrative judges, previously unknown for a post-Soviet legal system, was not welcomed by all representatives of the Ukrainian establishment. In response to a growing number of similar decisions by the administrative courts, the Ukrainian government under President Yanukovich went to the Ukrainian Constitutional Court to question the compensation-related case law of the administrative courts concerning those involved in liquidation of the Chernobyl disaster. In its judgment of 25 January 2012, the Constitutional Court overruled the established case law of the administrative courts on the ground that social support for Ukrainian nationals guaranteed by the Ukrainian Constitution must be provided in line with the financial capacities of the state in accordance with the principles of proportionality and justice.³² The Constitutional Court did not consider the relevance of the principle of legal certainty at all but referred to selected decisions of the ECtHR in justifying its own position. This controversial decision by the Constitutional Court was widely criticized – by the expert community in Ukraine and even by some Constitutional Court judges in their special opinions – for lack of reasoning, a pro-governmental position and misleading references to ECtHR case law.³³ The situation became even worse when the Supreme Disciplinary Body for judges in Ukraine opened a disciplinary procedure against those administrative judges who referred to CJEU case law in their compensation-related decisions concerning those involved in the Chernobyl disaster.

Further dramatic political events in Ukraine and the *Maidan* Revolution in 2013–2014 – which led to signature of the Association Agreement in June 2014 – reinvigorated the debate on application of the CJEU case law by the Ukrainian judiciary. At the end of 2014, the Ukrainian High Administrative Court decided to intervene and to fill this gap in a traditional way for post-Soviet courts – to issue an announcement (information letter), to all administrative judges in Ukraine,³⁴ in which the Ukrainian High Administrative Court stated that the EU founding

³² Ukrainian Constitutional Court decision of January 23, 2012, Case No 1–11/2012.

³³ For example, see Special Opinion of Constitutional Court Judge Viktor Shishkin in Ukrainian Constitutional Court decision of 23 January 2012, Case No 1–11/2012.

³⁴ Announcement by the Ukrainian High Administrative Court on 18 November 2014, No 1601/11/10/14-14.

treaties do not bind Ukraine and, therefore, EU law and the case law of the CJEU cannot be considered as part of the Ukrainian legal system. Additionally, the Ukrainian High Administrative Court confirmed that 'legal positions as they are formalized in decisions of the CJEU can be taken into consideration by administrative courts as argumentation, reflection regarding harmonious interpretation of Ukrainian legislation in line with established standards of the EU legal system, but not as a legal foundation (source of law) of a situation that caused a legal dispute'.

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

Beyond any expectation, this clarification by the Ukrainian High Administrative Court on applying CJEU case law found wide support among judges of common and administrative courts in Ukraine. In the period 2015–16, Ukrainian general, specialized and high courts referred to the Agreement and case law of the CJEU in dozens of decisions.³⁵ In most cases, Ukrainian judges who already possess considerable experience and knowledge in applying the ECHR and ECtHR case law strengthened their argumentation with frequent references to the EU *acquis* and the Association Agreement, in particular in decisions concerning protection of fundamental human rights in Ukraine. For instance, since 2015 most decisions by administrative courts on rights of pensioners provide a standard statement that the court applies the principle of rule of law in line with ECtHR and CJEU case law. In these cases, Ukrainian judges cite the announcement by the Ukrainian High Administrative Court on taking into account CJEU case law as a source of argumentation concerning harmonious interpretation of Ukrainian law with the EU *acquis*.³⁶ Some judges went even further and considered the

³⁵ Detailed information on the case law of the Ukrainian judiciary is Available at: <http://www.reyestr.court.gov.ua>. For example, analysis of decisions by the Ukrainian courts issued in 2014 and 2016 indicates a significant rise in references to the Association Agreement and various sources of the EU *acquis* (e.g., fundamental principles, secondary acts, case law of the CJEU).

³⁶ For example, Chernigiv District Court judgment of 26 June 2016, No. 750/5197/16-a.

entry into force of the Association Agreement in Ukraine as an obligation to apply EU common values in Ukraine.³⁷ References to the Association Agreement and relevant EU *acquis* found application in cases regarding Ukrainian natural persons and companies that claimed direct effect of these provisions in cases concerning paying customs duties when crossing the Ukrainian border;³⁸ supply and trade of natural gas;³⁹ defining the origin of goods (honey);⁴⁰ or the legality of legislative drafts by the Ukrainian president.⁴¹ However, the Ukrainian courts have not yet recognized (or have mainly avoided recognizing) the direct effect of provisions of the Association Agreement in their decisions. In particular, the issue of direct effect of the Association Agreement may find particular relevance in the case of possible litigation on the correspondence of Ukrainian laws and other legal acts with the objectives, principles and ‘essential elements’ of the Association Agreement before the Constitutional Court and general courts. Among the most recent examples are the Executive Order of the President of Ukraine on banning Russian social networks (in the matter of national security and sanctions against the Russian Federation caused by the annexation of Crimea in 2014 and military intervention in eastern Ukraine)⁴² and the Law of Ukraine on banning the St. George (Guards’) Ribbon. This was widely used by paramilitary separatist groups and Russian army units in the Donbass area and during the annexation of Crimea and thus may be considered as propaganda for Russian military intervention in Ukraine.⁴³ However, these legislative acts raise some concerns regarding their compliance with the objectives of the Association Agreement in general, and freedom of expression and the principle of proportionality (as

³⁷ For example, the Kolomyia City Court judgment of 07 July 2016, No. 346/3499/16-c contains a rather emotional passage ‘The Court notes that after the signing of the Association Agreement with the European Union by the President of our country, and after the ratification by the supreme legislative body (the Verkhovna Rada Ukraine, author), Ukraine, as a state aspiring to full membership in the EU, must respect the private property rights of every person as a basic tenet and a cornerstone of European values and inviolable foundation of the EU, which must be complied with by all Member States and by associated countries.’ (Translation by the author)

³⁸ Lviv Regional Appellate Court judgment of 06 April 2016, No. 33/783/241/16.

³⁹ Kiev District Administrative Court judgment of 13 April 2016, No. 826/594/16.

⁴⁰ Tsyrypinsk District Court judgment of 29 April 2016, No. 664/906/16-c.

⁴¹ Ukrainian High Administrative Court judgment of 26 April 2016, No. 800/251/16.

⁴² Executive Order (*Ukaz*) of the President of Ukraine of 15 May 2017, No. 133/2017.

⁴³ Law of Ukraine ‘Amending the Administrative Code regarding the ban on production and propaganda of the St. George (Guards’) Ribbon’ *Zakon Ukrainy* “Shodo Zaborony Vgotovlenya i Propagandy Georgievskoy (gvardiyskoy) Strychky” (16 May 2017) No 2031-VIII, VVR (2017) No 26.

applied and interpreted within the ECHR and the EU Charter of Fundamental Rights) in particular.⁴⁴

In the course of implementation of the EU-Ukraine AA the Ukrainian judiciary increased references to the relevant CJEU decisions within the scope of the EU-Ukraine sectoral cooperation. Most of such references are in the field of competition law. For instance, the Supreme Commercial Court of Ukraine and Appellate Commercial Courts referred to the Case C-8/08 (*T-Mobile Netherlands BV and Others v Raad*)⁴⁵ with the purpose to apply the concept of 'concerted practice' that means a causal connection between concerted action and the market conduct of undertakings in competition law. Furthermore, Ukrainian administrative courts (regional appellate level) made numerous references to the CJEU case C-255/02 *Halifax plc and Others v. Commissioners of Customs & Excise*.⁴⁶ These references concerned the application of the doctrine of 'business purpose' in the course of exemption from paying the VAT.

5. Application of Decisions of the EU-Ukraine Common Institutions

The Association Agreement established a specific institutional framework (the Association Council, the Association Committee, and the Parliamentary Assembly), characterized by the competence to issue decisions and legal acts of a binding nature. The prime objective of the Association Council is to supervise and monitor the Association Agreement within the "framework of regular meetings between the representatives of the Parties."⁴⁷ For this purpose, the Association Council has the power to take decisions which are binding upon the parties. This power can be delegated to the Association Committee which assists Ukraine in achieving the results of the association.⁴⁸

The binding force of decisions and acts by joint EU-Ukraine institutions is new for the Ukrainian legal system, so that their legal effect is not as yet clarified. Hitherto, neither the EU-Ukraine Association Council nor other common

⁴⁴ VAN ELSUWEGE, P. "Ukraine's Ban on Russian Social Media: On The Edge Between National Security and Freedom of Expression", *VerfBlog*, (6 February 2017). Available at: <http://verfassungsblog.de/ukraines-ban-on-russian-social-media-on-the-edge-between-national-security-and-freedom-of-expression>

⁴⁵ Case C-8/08, *T-Mobile Netherlands BV and Others v Raad*, ECR 2009 I-4529.

⁴⁶ Case C-255/02, *Halifax plc and Others v. Commissioners of Customs & Excise*, ECR 2006 I-1609.

⁴⁷ Art. 463(1) Association Agreement, *OJ* 2014, L 161/1.

⁴⁸ Art. 465(2) Association Agreement, *OJ* 2014, L 161/1.

institutions have so far issued any decisions of a binding nature. Therefore, there has been no reason for the Ukrainian judiciary to clarify their position on this complicated issue. In the meantime, the Ukrainian Parliament and the government are working on a draft law to regulate all legal issues related to implementation and application of the Association Agreement. Unfortunately, this draft law has not yet been proposed even for a first reading in the Ukrainian Parliament. According to the draft law, decisions by common EU-Ukraine institutions will not be directly applicable but will be enforced similar to international agreements. In particular, the draft law considers binding decisions by common EU-Ukraine institutions either as international agreements,⁴⁹ or as national laws, or as secondary acts – depending on their content. In the former two cases, binding decisions of common EU-Ukraine institutions must be regarded as part of the national legal system, which takes precedence over conflicting national legislation but not over the Constitution. In the latter case, it will be regarded as a secondary legal source for the Ukrainian legal system. The draft law obliges the Ukrainian judiciary to apply these decisions as sources of law. Non-binding recommendations by common EU-Ukraine institutions can be used as a source for interpreting Ukrainian legislation and Ukraine's international obligations.

6. Conclusion

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

The Association Agreement established a sustainable institutional and legal framework for application of the EU *acquis* including CJEU case law and comprehensive legislative approximation between Ukrainian and EU law. However,

⁴⁹ Within the issues related to political, territorial, human rights, participation in international unions and organizations, collective security, usage of Ukrainian territory and natural resources, military assistance and deployment of Ukrainian troops abroad (Art. 3(2) of the Ukrainian Law on International Treaties).

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

Furthermore, the Ukrainian Constitution has already been amended in order to encompass specific requirements of the Association Agreement (such as ratification of the Rome Statute and access to the judiciary). Besides, further amendments related to implementing the Association Agreement may be expected, such as strengthening the role of international law within the Ukrainian legal system, reference to common EU values – languages of national minorities in the new education law – along with acknowledging and formalizing the potential transfer of some of Ukraine's sovereign powers to supranational international organizations. Moreover, pressure by some EU Member States with reference to the Association Agreement may persuade Ukraine to amend the education law related to minority languages.

Looking more widely at the pattern of adaptability of the Ukrainian constitutional order to the European integration project, we may conclude that external factors – such as the aims of EU-Ukraine relations, including potential membership in the EU, and introduction of a visa-free regime – play a catalytic role for constitutional change.

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