

APPROXIMATION OF LAWS IN THE EU-UKRAINE ASSOCIATION AGREEMENT

The article considers the scope of “approximation” of laws provisions in the EU-Ukraine Association Agreement that is the most voluminous and ambitious among all EU association agreements with third countries. There are many novelties introduced to this agreement. Most prominent of them are strong emphasis on comprehensive regulatory convergence between the EU and Ukraine and possibility for application of the EU acquis within the Ukrainian legal order. The process of effective implementation of the Association Agreement will constitute the greatest challenge for Ukraine. It has to prove their adherence to the EU’s common democratic and economic values, and ensure the proper functioning of their deep and comprehensive free trade areas.

Keywords: association agreement, approximation, transposition, EU acquis.

1. Introduction

Association agreements between the EU and third countries have become one of the most recognisable brands of the EU external policy. In particular, this relates to the countries of the EU’s eastern neighbourhood (Ukraine, Moldova, Belarus and the Caucasus countries) which have either already started negotiations on association agreements with the EU, or are about to do so in the nearest future. According to Herman Van Rompuy, President of the European Council, it is “the most advanced agreement of its kind ever negotiated by the European Union”. The new generation of the EU association agreements with the EU’s eastern neighbours will substitute outdated partnership and association agreements which were concluded in 1994–1998. The first eastern neighbourhood country to start negotiations on association agreement was Ukraine. The negotiations were launched in September 2008 and successfully completed in December 2011. The initialising of the agreement on association (AA) and deep and comprehensive free trade area (DCFTA) took place on 30 March 2012. The Ukrainian government declined the offer of the EU to sign the AA at the Eastern Partnership Summit in Vilnius in November 2013. It happened due to severe political and economic pressure from Russia and inability of the Ukrainian government to meet considerable economic costs of the approximation of legislation envisaged in the EU-Ukraine AA. The EU-Ukraine Association Agreement (AA) is the most voluminous and ambitious among all EU association agreements with third countries. It comprises 7 titles, 28 chapters, 486 articles, 43 annexes. This is a comprehensive mixed agreement based on Article 217 TFEU

[1, p. 1]. There are many novelties introduced to this agreement. Most prominent of them are strong emphasis on comprehensive regulatory convergence between the EU and Ukraine and possibility for application of the EU acquis within the Ukrainian legal order.

2. The “approximation of law” clause in the EU-Ukraine AA

Approximation of legislation is proclaimed as one of the key objectives of the EU-Ukraine AA. Major “carrots” of the association – deep economic integration and access to the EU Internal Market are conditional upon effective exercise of “extensive regulatory approximation” by Ukraine [2, article 1(d)]. The approximation clauses are of binding nature and prioritise the regulatory approximation between the Parties in order to secure effective functioning of the EU-Ukraine free trade area and the Ukraine’s access to the EU Internal Market. The EU-Ukraine AA approximation clauses go far beyond the approximation clauses in the EU association agreements with other third countries by committing Ukraine not only to ensure conformity of national legislation with relevant EU acquis but to “follow the principles and practices” laid down in the EU acquis [2, article 56]. In everyday practice it means that Ukraine will be expected to follow not only provisions of the EU acquis in the agreement’s annexes but also to comply with relevant EU soft law and general principles of EU Law relevant to the EU sectoral acquis.

Unlike most EU’s association agreements with third countries the EU-Ukraine AA contains not just one “general approximation clause” but a “general

approximation clause” underpinned by a constellation of “standard approximation clauses” linked to specific areas of the EU-Ukraine sectoral cooperation. The “general approximation clause”, which is titled as “gradual approximation”, states that Ukraine “will carry out gradual approximation of its legislation to EU Law as referred to in Annexes...[to this Agreement], based on commitments identified in [Titles] of this Agreement” without prejudice to any specific principles and obligations on regulatory approximation under the Title IV on trade and related matters [2, article 474]. The “standard approximation clauses” are present in each chapter on economic cooperation between the EU and Ukraine and refer to the list of the EU sectoral acquis in the annexes to the agreement with specific timetables for its implementation. For instance, the approximation clause in the chapter on technical barriers to trade provides that Ukraine “shall take the necessary measures in order to gradually achieve conformity with EU technical regulations and EU standardization, metrology, accreditation, conformity assessment procedures and the market surveillance system, and undertakes to follow the principles and practices laid down in relevant EU Decisions and Regulations” [2, article 56]. This objective must be achieved by three means: 1) incorporation of the relevant EU acquis (listed in the annexes to the association agreement with deadlines for implementation) into the legislation of Ukraine; 2) to execute administrative and institutional reforms to implement the association agreement; 3) to provide “effective and transparent administrative system” to fulfill the regulatory convergence between Ukraine and the EU. The wording of the “standard approximation clauses” in the EU-Ukraine AA is not uniform. However, the “standard approximation clauses” commit Ukraine to pursue gradual approximation of national legislation and even alignment of national administrative and enforcement practices in line with to the EU sectoral acquis. The “standard approximation clauses” in the EU-Ukraine AA deal with: sanitary and phytosanitary and animal welfare legislation (Article 64); customs legislation (Article 84); establishment, trade in services and electronic commerce (Articles 114, 124, 133); public procurement (Article 153); domestic environmental and labour protection and sustainable development policies (Article 290), employment, social policy and equal opportunities (Article 424), communicable diseases, blood, tissues and cells (Article 428), financial management (Article 459 (2)). Annexes to the EU-Ukraine AA provide detailed list of the relevant EU sectoral acquis and timetables for its approximation into the legal system of Ukraine.

“Soft approximation clauses” in the EU-Ukraine AA avoid binding wording inherent to the “standard approximation clauses” but, nevertheless, eagerly encourage Ukraine to pursue gradual approximation of national legislation to the EU sectoral acquis in areas of: energy cooperation (Article 337), macro-economic cooperation (Article 343), statistics (Article 358), transport (Article 368), financial services (Article 385), information and electronic cooperation (Article 394), audio-visual policy (Article 397), agriculture and rural development (Article 403). The “soft approximation clauses” are underpinned by annexes to the EU-Ukraine AA that provide detailed list of the relevant EU sectoral acquis and timetables for its approximation into the legal system of Ukraine.

The “approximation clauses” in the EU-Ukraine AA are of binding nature and commit Ukraine to ensure full compatibility of its existing and future legislation with the EU sectoral acquis. In some areas (e.g. public procurement) “due account shall be taken of the corresponding case law of the European Court of Justice and the implementing measures adopted by the European Commission as well as, if this should become necessary, of any modifications of the EU acquis occurring in the meantime” which implies not only the application of the ECJ case law but also the adoption of the dynamic EU sectoral acquis [2, article 153 (2)]. Furthermore, the effective regulatory convergence of the Ukrainian legislation with the EU acquis and its implementation constitute the so called “acquis conditionality”. It means that positive results in regulatory convergence the Ukrainian legislation with the EU acquis are directly linked to the reciprocal granting of market access of Ukrainian goods and services to the EU Internal Market.

The EU-Ukraine AA contains a detailed provision on dispute settlement related to regulatory approximation. This provision extends the ECJ’s jurisdiction on preliminary ruling on decisions of the EU-Ukraine Arbitration Tribunal. It means that the EU-Ukraine dispute settlement body can ask the ECJ to provide a binding interpretation of an act of the EU institutions in disputes related to the regulatory convergence in priority areas of the EU-Ukraine regulatory convergence (technical barriers to trade, sanitary and phytosanitary measures, services, establishment and electronic commerce, public procurement) [2, article 322 (1)].

The process of effective implementation of the Association Agreement will constitute the greatest challenge for Ukraine. It has to prove their adherence to the EU’s common democratic and economic values, and ensure the proper functioning of their

deep and comprehensive free trade areas. The latter objective may be achieved only under the condition of establishing truly competitive market economies and the adoption of international and EU legal standards. Ukraine will be bound by decisions of the dispute settlement body established by an association agreement. Furthermore, the process of approximation of law in Ukraine is subject to regular monitoring of implementation by the EU-Ukraine common institutions [2, article 64 (3)].

3. Concluding remarks

The process of approximation of laws and regulatory convergence of Ukrainian legislation with that of the EU will imply application of the EU acquis by the Ukrainian governmental bodies and judiciary. The Ukrainian governmental bodies will face the necessity to follow relevant practice of the EU institutions, especially in areas of technical standards, competition, standardisation, and public procurement. This practice presumes the Ukraine's awareness about new dynamic EU sectoral acquis, the EU institutions' interpretation of the EU sectoral acquis and various forms of soft law. The Ukrainian judiciary will be in a position to deal with many challenges. For instance, three challenges deserve our attention. First, the EU-Ukraine AA grants national treatment to European national and companies on the territory of Ukraine as well as provides abolition of discrimination of European goods and services. Consequently, the Ukrainian

judiciary will be asked to rule on direct effect of provisions of the EU-Ukraine AA within the Ukrainian legal order. Second, the EU-Ukraine regulatory convergence implies not only adoption of the EU sectoral acquis but also of principles and doctrines of EU law. It means that the Ukrainian judiciary will eventually deal with interpretation of general principles of EU law in course of applying provisions of the EU-Ukraine AA. Third challenge is the legal force of decisions of the EU-Ukraine common institutions set up under the framework of the EU-Ukraine AA which are binding for the Parties [2, article 463 (1)]. Hitherto, the issue of applying decisions of institutions of international organisations, in particular the ECtHR case law, has been solved by issuing a specialised law, like the Law "On execution of judgments on application of practice of the ECtHR". However, the Ukrainian legislature and judiciary never ruled on legal force of common institutions set up under a framework of a bilateral agreement with an international organisation. Logically, either the Ukrainian legislature or the Constitutional Court of Ukraine has to clarify this issue with reference to the legal force of decisions of the EU-Ukraine AA's common institutions within the national legal order. In our opinion, the best solution will be to adopt a specialised law granting the decision of the EU-Ukraine AA's common institutions on level of the Ukrainian secondary legislation and giving preference to the latter in case of conflict with the former.

References

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ПОЛОЖЕННЯ ПРО ЗБЛИЖЕННЯ ЗАКОНОДАВСТВА В УГОДІ ПРО АСОЦІАЦІЮ МІЖ ЄВРОПЕЙСЬКИМ СОЮЗОМ І УКРАЇНОЮ

У статті розглядаються положення про «зближення» законодавства в Угоді про асоціацію між Україною і ЄС. Ця угода є найбільш об'ємною та амбітною серед угод про асоціацію ЄС з третіми країнами. У ній наголошується пріоритет комплексного зближення українського законодавства з правом ЄС та всебічне застосування законодавства ЄС в українському законодавстві. Реалізуючи Угоду про асоціацію, Україна повинна довести свою прихильність до європейських спільних демократичних та економічних цінностей та забезпечити належне функціонування глибокої і всеосяжної зони вільної торгівлі з ЄС.

Ключові слова: асоціація, зближення, транспозиція, acquis ЄС.

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