

Peculiarities of legal approximation clauses in EU-Ukraine AA: way through "Europeanization"

Prof. K.Smyrnova, Doctor of Jur. Sciences (Dr.hab),
Institute of International Relations
Taras Shevchenko National University of Kyiv,
Jean Monnet Center of Excellence



With the support of the
Erasmus+ Programme
of the European Union

Evolutionary tale on EU-Ukraine relations (legal & political factors)

- 2007 - negotiations started on “new type” of agreement
- 2008 – negotiations started on a FTA
- 2009 – EU-Ukraine Association Agenda – as a legal instrument of implementation of AA
- 2011 – negotiations finished
- 2012 – initializing of EU-Ukraine AA
- November 2013 decision on refusal of AA signing reflected a Dignity Revolution in Ukraine
- 2014 – signing (partially: political & economic parts)
- September 2014 – simultaneous ratification of AA by Verkhovna Rada & European Parliament
- Spring 2014 - the EU unilaterally imposed trade preferences for Ukraine
- 2015 – revised version of Association Agenda endorsed by the Association Council
- 2016 – DCFTA entered into force
- 1 September 2017 – AA entered into force fully

Key features of the EU-Ukraine Association Agreement

- EU-Ukraine AA belongs to the selected group of “integration-oriented agreements”, i. e., agreements including principles, concepts and provisions of EU law that are to be interpreted and applied as if the third State is part of the EU
- The EU-Ukraine Association Agreement, as a so-called mixed agreement signed by the EU and its 28 Member States, requires ratification by all parties before it can enter into force.
- Key features of the Association Agreements are:
 - ✓ very broad scope providing for multidimensional co-operation;
 - ✓ based on “more for more” model with vast legal approximation related effort required to move to the next stages – “conditionality”
 - ✓ dynamic approximation with Association Councils empowered to change the annexes with long lists of EU *acquis* to be complied with,
 - ✓ no direct effect (see Council Decisions on signature: “The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals”).

Deep & Comprehensive Free Trade Area: starts from 1 January 2016

- One of the most complex accords since the Treaty of Lisbon, it envisages a reciprocal and gradual opening of the two parties' markets.
- One of the most **complex** and 'largest' FTAs ever concluded by the EU (e.g. Ukraine AA: 2140 pages in OJ, 46 annexes)
- "is the most **ambitious** deal of its kind ever negotiated by the EU in terms of economic integration" (K. De Gucht on Ukraine DCFTA)
- gradual process which will take over 10 years

Main objectives:

- DESIROUS of achieving economic integration, inter alia through a Deep and Comprehensive Free Trade Area (DCFTA) as an integral part of this Agreement, in compliance with rights and obligations arising out of the World Trade Organisation (WTO) membership of the Parties, and through *extensive regulatory approximation*";
- COMMITTED to *gradually approximating* Ukraine's legislation with that of the Union along the lines set out in this Agreement and to effectively implementing it;
- Article 1 of the AA states that the purpose of the association is 'to establish conditions for *enhanced economic and trade relations* leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the *progressive approximation of its legislation to that of the Union*;

EU-Ukraine AA as basis for *acquis* implementation

- **Framework commitment**
- art. 474 AA:
- «Ukraine will carry out gradual approximation of its legislation to EU law».
-



It is reflected in the specific measures and mechanisms defined in the text of the AA, in the Annexes and Protocols to the AA, which contain a list of references to EU secondary legislation and thus enshrine the obligation to implement a significant part of *acquis*.

The AA contains Ukraine's obligation to apply, implement or incorporate into the national legal order the harmonized list of the EU *acquis* set out in the Annexes to the AA.

Peculiarities of legal approximation

1. This approximation of Ukrainian legislation differs from similar processes in EU MS or previously associated states that have joined the EU.
2. The UA does not contain prospects for Ukraine's membership in the EU.
3. The purpose of approximation of legislation is the gradual integration of Ukraine into the EU internal market.
4. Conditionality of Ukraine's access to the EU market by the level of approximation of legislation. The pace of deepening integration with the EU depends on the effectiveness of approximation.
5. Unlike the EEA Agreement, the AA does not aim to ensure the uniformity (homogeneity) of the legislation of the parties.

- **AA commitments do not preclude formal automatic application of EU Law in the legal order of Ukraine.**

Scope & object of legal approximation

Acquis EC – 28 spheres

(≠ EU legislature):

- binding acts
- recommendations
- ECJ jurisprudence

+ external sources

- Energy Community Treaty
 - WTO agreements
 - MAGATE standards
- international standards in financial services
- Council of Europe recommendations (Venice Commission);
 - OECD etc....

Object

Legislature of Ukraine

- + enforcement practice:
- administrative
 - judicial

PECULARITIES OF LEGAL APROXIMATION

Different spheres use different legal terminology

- Rapprochement
- legislative approximation
- regulatory approximation
- progressive approximation
- Approximation of technical regulations, standards, and conformity assessment
- horizontal adaptations
- recognition of equivalence of measures
- recognition of equivalence
- Mutual recognition
- transposition

Preliminary stage – approximation planning

Requirements for approximation of legislation in accordance with the Association Agreement and other obligations

- type of obligations
- Volume (amount) of commitments
- deadlines

Document planning

- Horizontal and sectoral plans for the implementation of AA
- existing / to be developed / to be updated

Strategies / road maps / concepts of laws

- Relationship with domestic reform strategies / policies and other international commitments
- Budgeting and broad impact and impact assessment

In the process of approximation of legislation must be taken into account

«**letter**» **ta** «**spirit**» **AA** (art. 476 (1) AA)

Volume (amount) of commitments (full / partial approximation)

EU Common values (rule of law, legal certainty, the principle of proportionality, the principle of non-discrimination...)

Type of the EU source of law (regulation, directive, decision, opinion, recommendation, ECJ decision....)

belonging of the act to the type of EU competence (exclusive, shared, supplemented)

interpretation & enforcement practice of EU act

Dynamism (evolutionary) manner of the EU Law

Types of legal approximation clauses

Detailed

In the EU-Ukraine AA text:

Ukraine shall approximate its competition laws and enforcement practices to the part of the EU acquis as set out below:

1. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid

down in Articles 81 and 82 of the Treaty. (art. 256)

In annexes:

Gradual approximation to the EU customs legislation as laid down in the EU and international standards shall be carried

out, as set out in Annex XV to this Agreement.(art. 84 AA).

Undetailed

As a way to achieve the objectives in the sphere of sustainable development policies, Ukraine shall approximate its laws, regulations and administrative practice to the EU acquis.(art 290(2) AA)

recognise and commit themselves to implementing the principles of good governance in the tax area, i.e. the principles of transparency, exchange of information and fair tax competition....(art. 350 AA)

Volume (amount) of commitments

In most cases - the implementation of all provisions of EU legislation are listed in the Association Agreement:

- *"Adoption of national legislation and designation of the competent authority (ies)"*
- Exemptions:
 - Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries — *section 3 Quantitative limits*
 - *Annex: these provisions of the Directive must be implemented within 3 years of the entry into force of this Agreement*
 - Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC
 - — *Article 1*
 - *Annex: these provisions of the Directive must be implemented within 2 years of the entry into force of this Agreement*

Approximation commitments – deadlines

Directive 2001/37/EC concerning the manufacture, presentation and sale of tobacco products

- shall be implemented within 2 years of the entry into force of this Agreement (**but**-this directive was repealed by Directive 2014/40/EU – (?))

Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles

- Shall be implemented within 2 years of the entry into force of this Agreement except art 9 that shall be implemented within 8 years of entry into force of AA.

Directive 99/62/EC on the charging of heavy goods vehicles for the use of certain infrastructures

- Shall be implemented after introduction of tax & fees on infrastructure.

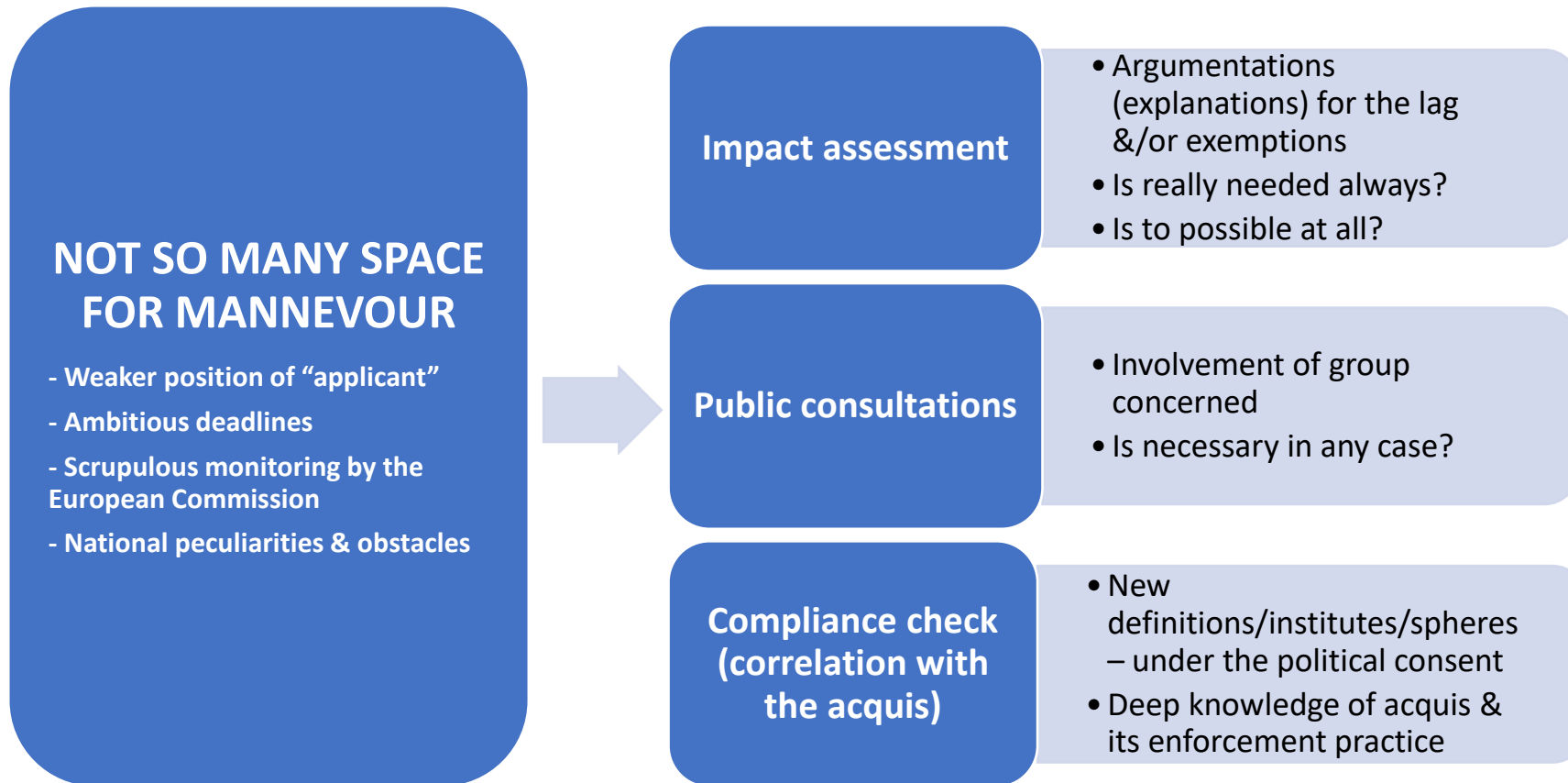
Freedom of capital & services – art. 63 TFEU

- In 5 years of the entry into force of the Agreement, Commission in trade configuration shall decide on deadlines of approximation of these provisions.

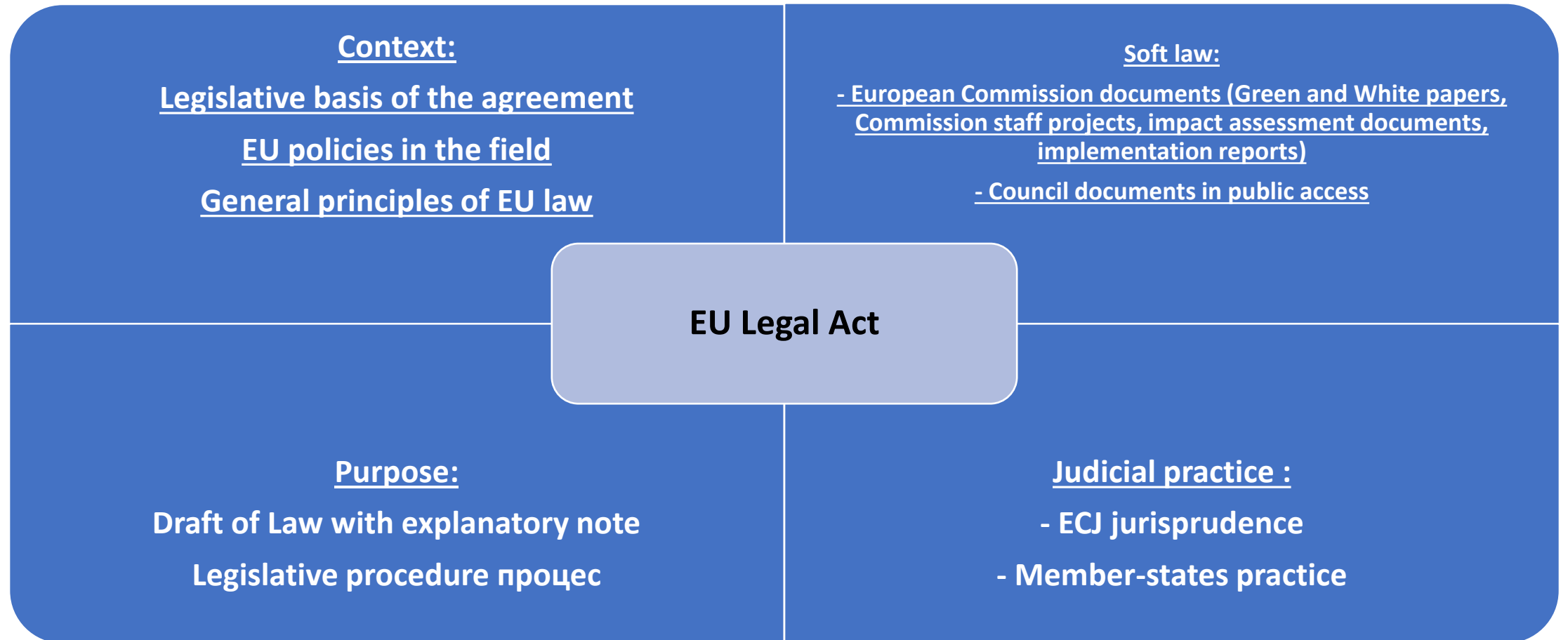
Directive 2011/64/EU on the structure and rates of excise duty applied to manufactured tobacco

- Shall be implemented in 2 years of the entry into force of this Agreement, except art. 8, 9, 10, 11, 12 Art. 14.1, 14.2, 14.4, art. 18 and art. 19 . For them the deadlines should be settled by Association Council.

PLANNING & PREPARATORY WORK FOR APPROXIMATION ACTS



Understanding of EU legislation



Assessment evaluation – compliance check of

Art. 93 Parliament Regulation

para. 3 § 35 Cabinet of Ministers Regulation

Certificate of compliance with Ukraine's obligations in the field of European integration

The project belongs to the areas in which legal relations are regulated by the EU acquis

Determining the content and scope of commitments

Legal-comparative analysis (comparative table) → analysis of “gaps”

Main conclusion

It is difficult to determine the degree of conformity in%

Coordination mechanism of European integration policy

President of Ukraine + Office of the President of Ukraine

Parliamentary Committee – on European Integration

Cabinet of Ministers of Ukraine + Vice-Prime-Minister on European Integration + Governmental Office on coordination of European & Euroatlantic Integration under the Secretariat of Cabinet of Ministers of Ukraine

Vice-Ministers on European Integration (in all Ministries) + specialized departments

= Eurointegrational portal <http://eu-ua.org/>

+ “Pulse of the Agreement”: interactive monitoring map of the realization of Action Plan on EU-Ukraine AA Implementation - <https://pulse.eu-ua.org/>

2020: Commission for Coordination of the Implementation of the Association Agreement between Ukraine and the EU.

The main tasks of the Commission: to ensure the preparation of proposals for the development of relations with the EU in the field of European integration, taking into account the current state of cooperation and to promote coordination of executive bodies in this matter, improving the legal framework

EXPEDIENCY OF
LEGISLATIVE
SETTLEMENT OF
EXISTING PRACTICAL
CHALLENGES

- **ADOPTION OF THE LAW "ON
THE IMPLEMENTATION OF
EU-UKRAINE ASSOCIATION
AGREEMENT"**

Extending the impact of EU law on the internal legal systems of third countries

- The extent of such dissemination depends on the objectives of the relevant EU international agreement.
- The basis of the legal norms by which such influence of the EU law is provided is the *acquis*.
- Art. 474 AA: general commitment that "Ukraine will gradually approximate its legislation to EU law"
- Purpose? - Integration without membership - access to the market

The place of the Association Agreement in the legal system of Ukraine

- International agreement (with a special procedure for implementation)
- Lack of a framework law on the implementation of the Association Agreement
- However: Resolution of the Plenum of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases № 13 of December 19, 2014: "On the application by courts of international treaties of Ukraine in the administration of justice":

✓ "International treaties of Ukraine that have entered into force, and may, due to their priority over the norms of the relevant legislative acts of Ukraine, change the regulation of legal relations established by the legislation of Ukraine "

✓ "courts in the administration of justice may apply the norms of international treaties directly as part of the legislation of Ukraine, if the adoption of appropriate measures falls within the competence of the court or if they are formulated in the international treaty as norms of direct action... As norms of direct effect in Ukraine, which enshrines human rights and fundamental freedoms"

- = similarity of the test of the Court of Justice !!!!!

- Articles that contain rights and obligations for entities, which may be conditioned by both direct application and acts of implementation.

Attempts by Ukrainian courts to use the Association Agreement and the acquis

- Supreme Court (case № 9901/460/18 - 2018 (case on judiciary system): In accordance with the AA, Ukraine has undertaken, in particular, to ensure the gradual adaptation of its legislation to EU law (EU acquis) in accordance with the areas set out in this agreement, and to ensure its effective implementation.
- County administrative court of Kyiv (case №826/10631/17 - 2018): «subjects of power and courts... should take into account the law enforcement practice... ..in particular the decisions of the Court of Justice, the case law of the European Commission....»
- Commercial Court of Kyiv (case 910/4013/18 - 2018): confirmed the obligation in accordance with Art. 256 Association Agreements on the implementation of EU competition rules in Ukraine

Practice:

- Zentiva Case:

Supreme Court (Chamber for Commercial cases) – case № 910/14972/17 - 2018 (**Zentiva case**) applied the priority of Art. 198 Association Agreements in comparison with the national legislation of Ukraine.

- + more then 300 cases under this analogy



**Supreme Court
(Chamber for
administrative cases)
Case № 640/65/19
- 2020**

- «.... In Ukraine, there are no criteria for assessing the eligibility of state aid in the field of transport, adopted in accordance with part two of Article 6 of the Law of Ukraine "On State Aid to Undertakings", pursuant to Article 264 of the Association Agreement, according to which the parties agreed that they Articles 262, 263 (3) or 263 (4) of the Agreement will apply, using **as a source of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, in particular the relevant case law of the Court of Justice. legislation, framework provisions, guidelines and other applicable administrative acts of the European Union...**»

References on ECJ jurisprudence:

- «The inability to qualify the services provided by [transport company] as SGEI also makes it impossible to apply the notification of the European Commission on the application of state aid rules of the European Union to compensation for services of general economic interest (OJ C 8/4 of 11.01.2012) and relevant criteria set out in this Communication and previously set out in the Judgment of the Court of Justice in Case C-280/00 Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH (hereinafter - the Altmark Judgment)
- Thus, the applicant's allegation that the Committee erred in its use of European Union law sources in Decision № 652-r is erroneous, unfounded, unsubstantiated, and contrary to the law and the case file.»

Agenda to be
solved:

Europeanization of legal
order of
Ukraine:

- development of a unified approach to the coordination of the rule-making process + monitoring
- uniform application and interpretation of the acquis
- taking into account EU law enforcement practice
- binding decisions of the association and their place in the legislation of Ukraine
- dynamism of the acquis (keeping up with EU Law)

Recommended literature & sources:

Jean Monnet Center of Excellence web-page: <http://www.iir.edu.ua/en/jean-monnet-center/>

Database of Teaching and Research information on the EU, Jean Monnet Centre of Excellence: <https://e-learning.iir.edu.ua/course/view.php?id=29&lang=en>

1. Smyrnova K., Berezovska I. ASSOCIATION AGREEMENTS AS MEANS OF EASTERN PARTNERSHIP MEMBER STATES' EUROPEANIZATION // Social and Human Sciences. Polish-Ukrainian scientific journal, 2018, Vol. 04 (20).
2. Smyrnova K. Dispute settlement mechanisms provided by the Association Agreements concluded by the European Union with third countries // Вісник НАПрН України. №3. 2020 С. 63-79 Doi: 10.37635/jnalsu.27(3).2020.63-79
3. Смирнова К.В., Святун О.В. EU-UKRAINE ASSOCIATION AGREEMENT IMPLEMENTATION COORDINATION MECHANISM // Actual problems of international relations. Release 142. 2020. – P. 50-61.
4. A trilogy of handbooks, the edited volumes on progress towards good governance in Eastern Europe, and the five unresolved conflicts of the post-Soviet space: <https://3dcftas.eu/publications/>
5. 100 Ideas for Upgrading the Association Agreements and DCFTAs with Georgia, Moldova and Ukraine: <https://www.ceps.eu/ceps-publications/100-ideas-for-upgrading-the-association-agreements-and-dcftas-with-georgia-moldova-and-ukraine/>
6. Evolution of trade between the EU and its associated states: five years after the signing of the DCFTAs: [HTTPS://3DCFTAS.EU/PUBLICATIONS/EVOLUTION-OF-TRADE-BETWEEN-THE-EU-AND-ITS-ASSOCIATED-STATES-FIVE-YEARS-AFTER-THE-SIGNING-OF-THE-DCFTAS](https://3dcftas.eu/publications/evolution-of-trade-between-the-eu-and-its-associated-states-five-years-after-the-signing-of-the-dcftas)



With the support of the Erasmus+ Programme of the European Union within the Jean Monnet Centre of Excellence Project № 611625-EPP-1-2019-1-UA-EPPJMO-CoE “Advancing European Studies in Ukraine: Interdisciplinary Approach”.

The European Commission's support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.