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TOWARDS EFFECTIVE IMPLEMENTATION OF THE EU-UKRAINE ASSOCIATION AGREEMENT

Abstract

The new generation of the EU Association Agreements with the EU's eastern neighbors substituted outdated partnership agreements which were concluded in 1994–1998. The main conditions for a successful AA/DCFTA implementation: stronger coordination within the Government; more effective government-parliament cooperation on all stages of legal process, a sense of realistic prioritization and allocation of relevant resources (human and financial), proper ownership and advocacy at top level and coherent communication – both internally (within key target audiences and stakeholders), as well as externally (notably with EU), building necessary institutional capacity for legal approximation. Taking into account the wide range of issues governed by the EU-Ukraine Association Agreement, its provisions will affect almost all the spheres of Ukrainian society. Most importantly, this Agreement will provide the outer framework for implanting the European standards and for urgent internal systemic reforms in Ukraine. There should be a thorough and systematic approach to the implementation mechanism of the most ambitious bilateral international treaty in Ukraine's history. It is stressed in the article that Ukraine faces a task to complete the reform of public governance, taking into account European standards and recommendations expressed by Western experts and the governing bodies of the EU. The present paper focuses on the main results & answers on

challengeable current issues that the implementation of EU-Ukraine AA/DCFTA, accompanied by reforms, will bring about the comprehensive approximation with EU legislation and standards leading to the gradual economic integration of Ukraine in the EU internal market and therefore to the creation of an economic area.

Key words: EU, Ukraine, Association Agreement, Deep & Comprehensive Free Trade Area, harmonization, implementation.

1. Introduction

On 1 Sep 2017 the Association Agreement (AA), including its Free and Comprehensive Free Trade Area (AA/DCFTA), between the European Union (EU) and Ukraine entered into force, carrying the potential for closer integration between Ukraine and the EU. Implementation started during the phase of 3 years of provisional application (Nov 2014 and for the DCFTA part Jan 2016). This agreement is one of the most comprehensive and ambitious one the EU has signed with a third country. It is a link to overall reforms process in the country and presents concrete roadmaps for reforms: for modernization, prosperity, security and advancing UA goal of even closer relations with EU.

The solemn signing of the AAs between the EU and Ukraine, Moldova and Georgia took place at the EU Summit in Brussels on 27th June 2014, followed by ratifications by national parliaments in Moldova, Georgia and Ukraine¹. Signing and ratification of the Association Agreement between Ukraine and the European Union is undoubtedly an important event both for domestic political development, and for relations with the EU. Towards the signing of EU-Ukraine Association Agreement there were external, as well as internal Ukrainian challenges due to the domestic Ukrainian political reforms and changings of international policy.

In January 2016 Ukraine's Deep and Comprehensive Free Trade Agreement (DCFTA) with the EU came into force. One of the most complex accords since the Treaty of Lisbon, it envisages a reciprocal and gradual opening of the two parties' markets. Implementation requires Kyiv to carry out extensive legal approximation across key economic sectors and many in Ukraine hope the agreement will help transform the country into a modern economy.

2. Theoretical Background.

Research of legal foundations to regulate the EU's relations with third countries is important both for national legal science and international legal practice of Ukraine. Central aspects here are to determine the nature and content of organizational and legal foundations for regulation of relations with third countries, as well as to clarify the specifics of establishment and functioning of agreements with third countries. Research of nature and peculiarities of integration processes of legal regulation in the EU is important primarily for definition of optimum legal forms and mechanisms of Ukraine's integration into the European Union.

Legal issues on relations regulation between Ukraine and the EU were researched by Ukrainian scientists: M.Buromenskyi, O.Hrinenko, V.Kopiyka, M.Mykiyevych, V.Muravyov, R.Petrov, K.Smyrnova and others. Western European doctrine also paid a great attention to

¹ The Moldovan Parliament expediently ratified the Association Agreement on 2nd July 2014. It was shortly followed by ratification by the Georgian Parliament on 18th July 2014. The final accord was played during the simultaneous ratification of the Association Agreement by the Ukrainian Parliament and the European Parliament (ratified all three agreements) on 16th September 2014. Meanwhile, all three Association Agreements were under a lengthy process of ratification by parliaments of the EU Member States. Therefore, the interim application of the Association Agreements was taking place in accordance with the EU Council's decisions (Council Decision 2014/295/EU of 17th March 2014 and COM(2014)609). The EU-Ukraine Association Agreement formally came into full force on 1 September 2017 following ratification of the Agreement by all signatories.

these issues (M. Cremona, C. Hillion, Guillaume Van der Loo, P. Van Elsuwege, A. Ott & K. Inglis, K. Wolczuck, etc). The issue of establishing an association between Ukraine and the EU was raised in the works of scientists, such as R.Petrov, I.Berezovska, J. Kostyuchenko and others. However, new realities of cooperation between Ukraine and the EU require further study of this issue.

3. Argument of the paper.

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 EU².

Taking into account the wide range of issues governed by the EU-Ukraine Association Agreement, its provisions will affect almost all the spheres of Ukrainian society. Most importantly, this Agreement will provide the outer framework for implanting the European standards and for urgent internal systemic reforms in Ukraine. There should be a thorough and systematic approach to the implementation mechanism of the most ambitious bilateral international treaty in Ukraine’s history.

Implementation of the Association Agreement promotes approaching of the Ukrainian regulatory environment to that of the EU, and therefore - not only the customs duties are eliminated, but non-tariff trade barriers as well, that contribute to integration of Ukraine into the European economic and legal field in general, and into the internal market of EU and the European Economic Area, in particular.

One key provision underpinning the Association Agreement sets out the concept of gradual approximation of Ukraine’s legislation to EU norms and standards. Specific timelines are set within which Ukraine should approximate its legislations to the relevant EU legislation. These timelines vary between 2 and 10 years after the entry into force of the Agreement³.

Considering the afore, the Association Agreement induces to implementation of measures on administrative modernization in the system of law enforcement and judicial authorities in order to improve their effectiveness, to guarantee the independence and impartiality, as well as to develop measures on fight against corruption.

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 EU⁴.

4. Arguments to support the thesis.

The AAs are not just ordinary international agreements, but complex framework legal structures that contain not only specific norms that govern the functioning of the association relations and DCFTA between the EU and Ukraine, but also envisage a possibility of application of a vast scope of the pre-signature and post-signature EU acquis within the legal system of the eastern neighbouring countries, in particular Ukraine. The scope of the EU acquis to be applied by Ukraine covers not only primary and secondary EU

² The expression “integration-oriented agreements” is borrowed from Marc Maresceau. See: Marc Maresceau, “Les accords d’intégration dans les relations de proximité de l’Union européenne,” in *Les frontières de l’Union européenne*, ed. Claude Blumann (Bruxelles: Bruylant, 2013), 151–92.

³ “Guide to the Association Agreement” http://eeas.europa.eu/images/top_stories/140912_eu-ukraine-association-agreement-quick_guide.pdf

⁴ For example, the preamble to the EU-Ukraine AA 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” [emphasis added]

laws, but also EU legal principles, common values, and even case law of the ECJ, as well as specific methods of interpretation of the relevant EU *acquis* within legal system. Hitherto, the Ukrainian legal system has not faced the necessity to implement and effectively apply a dynamic legal heritage of an international supranational organization. Subsequently, adherence of Ukraine, to the dynamic EU *acquis* via the AA will encapsulate a plethora of challenges to national legal order.

Implementation and application of the EU-Ukraine AA within the legal system of Ukraine is governed by national constitutional laws. Ukraine has to develop its own solutions to the problem of legislation harmonizing with EU law, because realization of this mechanism provides opportunities for EU law action under national legal order. This applies primarily cases of EU directives transposition into Ukrainian internal legislation under the Agreement on Association, and direct application of EU law's certain provisions at national level. However, it should be taken into account that the legislation harmonizing process of Ukraine with the right of European integration organizations has its own characteristics due to level of relations between partners.

The fact that the Association Agreement does not provide preparation for Ukraine's accession to the European Union defines the boundaries of cooperation in legal field and particularly in legislation harmonizing⁵. On the other hand, as practice shows harmonizing implementation at EU level as well as in community relations with other countries (especially with those, which are under the Association Agreement), it is almost impossible to clear definition of process boundaries. Therefore, Ukraine has enough opportunities for forcing or, alternatively, suspending the legislation harmonizing process with EU law. This relates directly to goals, means and organizational and legal mechanism for harmonizing.

The question of the existence of an effective body for European integration is central to ensuring the success of the process as a whole. So, it is necessary to analyze the system of central bodies of state power, which are empowered in the sphere of AA implementation.

Generally EU-Ukraine AA implementation coordination mechanism is presented by three levels of state authorities: the President (and the competence of the Administration of the President); the Verkhovna Rada (Parliament) and the Cabinet of Ministers (the executive branch of power).

The powers of *the President of Ukraine*, envisaged by Article 106 of the Constitution of Ukraine regarding the ensuring of the state independence, national security, representing the state in international relations, administering the foreign political activity of the State, in the context of the aim of the political dialogue provided for in the Agreement (Article 4 of the Agreement):

- to deepen political association and increase political and security policy convergence and effectiveness;
- to promote international stability and security based on effective multilateralism;
- to strengthen cooperation and dialogue between the Parties on international security and crisis management, particularly in order to address global and regional challenges and key threats;
- to develop dialogue and to deepen cooperation between the Parties in the field of security and defence.

These issues covered by EU-Ukraine Summits as the forum for political dialogue and dialogue regarding policy at the highest level where the President of Ukraine participates.

Moreover, the President of Ukraine has implemented his mandate for advisory and other subsidiary bodies and services, establishing the National Council of Reforms. In

⁵ Arts 114(1), 124(1), 133(1) of the EU-Ukraine AA state that 'Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*.'

accordance with the Regulation on the National Council for Reforms (Decree of the President of Ukraine dated August 13, 2014, No. 644/2014): "The decisions of the National Council for Reforms, if necessary, shall be implemented through the publication of the acts of the President of Ukraine in accordance with the established procedure, the submission by the President of Ukraine of relevant draft laws to the Verkhovna Rada of Ukraine or taking by the appropriate members of the National Council of Reforms of public obligations to implement the right to legislative initiative, the right to initiate the adoption of acts of the Cabinet of Ministers of Ukraine and acts of the National Bank of Ukraine, which are documented by public agreements of such members of the National Council of Reforms".

An important role here is played by the legislature of the country. The Rules of Procedure of the *Verkhovna Rada of Ukraine* stipulate that the Committee on European Integration shall consider draft laws regarding their compliance with the international legal obligations of Ukraine in the field of European integration (Article 93 of the Rules). These findings should be submitted by the Committee to the main committee responsible for reviewing the draft law within 21 days.

The institutional and functional components of the coordination system in the *executive* branch are made up of the following levels:

- Cabinet of Ministers of Ukraine, which directs, coordinates and controls the activities of ministries and other central executive bodies⁶;
- Governmental Committee on European, Euro-Atlantic Integration, International Cooperation and Regional Development;
- The Government Office for the Coordination of European and Euro-Atlantic Integration of the Secretariat of the Cabinet of Ministers of Ukraine (hereinafter - the Government Office GOCEEAI), which performs a number of functions related to the coordination, monitoring and control of the preparation and execution of program documents, examination of draft regulations, as well as functions of the secretariat of the EU-Ukraine Association Council and Association Committee;
- Deputy Ministers for European Integration and specialized units of the ministries responsible for formulating and implementing state policy in the areas of their competence, drafting legal acts in the field of European integration and their implementation, interaction with relevant structural units of EU institutions and agencies.

The Government Office (GOCEEAI) plays the leading role in institutional support of legal approximation of the Ukrainian legislation, as it currently ipso facto performs coordinating activities for approximation of legislation within the framework of the tasks of the Association Agreement implementation.

Originally it was established on August 13, 2014 by the Resolution of the Cabinet of Ministers of Ukraine No. 346⁷ as a separate structural subdivision of the Secretariat of the Cabinet of Ministers of Ukraine. The main tasks of the Government Office are to provide the activities of the Cabinet of Ministers of Ukraine, the Prime Minister of Ukraine and the Deputy Prime Minister of Ukraine for European and Euro-Atlantic Integration. Undoubtedly, the appearance of such an institution is a progressive step, but the status and functions of the Government Office (GOCEEAI) are mainly "coordinating". In particular, the GOCEEAI does not draft legal acts, is not entitled to legislative initiative (submission of normative legal acts drafts for consideration by the Cabinet of Ministers), does not negotiate with the European counterpart at higher levels, has no right to issue instructions to other bodies of state power (only through the Prime Minister and only in exceptional

⁶ In accordance with the Resolution of the Cabinet of Ministers of Ukraine of 11.05.2016 № 330, the composition of the Governmental Committee on European, Euro-Atlantic Integration, International Cooperation and Regional Development was approved.

⁷ Currently - Government Office for the Coordination of European and Euro-Atlantic Integration (according to the Resolution of the Cabinet of Ministers of Ukraine dated October 4, 2017 No. 759)

cases). Its main task is to monitor the general situation what is considered to be not sufficient for the role of the sole and main coordinator of European integration in the country.

It is worth mentioning that draft legislation is being considered on a weekly basis by the Governmental Committee for European, Euro-Atlantic Integration, International Cooperation and Regional Development. Coordination of activities regarding drafting of legal acts, as well as their expertise, is carried out by the Government Office for the Coordination of European and Euro-Atlantic Integration of the Secretariat of the Cabinet of Ministers of Ukraine (GOCEEAI). The Office is constantly interacting with the ministries where the positions of Deputy Ministers on European Integration were established.

The GOCEEAI also serves as a moderator between the ministries and the European Commission experts. However, precisely the ministries bear the responsibility for the quality and timing of the implementation activities, their compliance with EU law or other international standards.

Organizational, expert-analytical and informational support of the Cabinet of Ministers of Ukraine activities in the field of European and Euro-Atlantic integration is carried out by the Government Office (GOCEEAI). In the field of European integration, the GOCEEAI has the authority to develop and materialise measures for the implementation of the Agreement, other international treaties of Ukraine and agreements between Ukraine and the European Union; cooperation between Ukraine and the European Union, as well as the Members States of the European Union in accordance with their powers under the TFEU; approximation of the Ukrainian legislation to the European Union law (EU acquis); implementation of international treaties of Ukraine and agreements between Ukraine and the European Union; activities of the bilateral bodies envisaged by the Agreement and other international treaties of Ukraine; the target direction of budget financing; the employment and use of international aid from the European Union and other donors aimed at supporting the implementation of tasks; informing the public; involvement of citizens in the process of adoption by the Cabinet of Ministers of Ukraine and other executive authorities of relevant legal acts.

The Government Office (GOCEEAI), in accordance with the tasks entrusted to it, conducts an expertise of draft regulations and other documents (by-laws) submitted to the Cabinet of Ministers of Ukraine for their compliance with the program documents in the field of European integration and the aims of the AA, according to the achieved results the Office drafts conclusions and recommendations and expertise of the compliance of draft legal acts, which are introduced for consideration by the Cabinet of Ministers of Ukraine, with international legal obligations of Ukraine in the field of European integration, and also taking into account the provisions of the EU law (EU acquis) (Paragraph 2, Article 12, Clause 4 of the Regulation on the Government Office on European and Euro-Atlantic Integration of the Secretariat of the Cabinet of Ministers of Ukraine).

In the coordination mechanism of ensuring the implementation of European integration issues in the central executive authorities, there is a significant progress that reveals the strong euro integration commitments of Ukraine: every ministry established the position of deputy minister for European integration, created special units responsible for the euro integration direction.

Ukraine has chosen its strategic direction namely the integration into European economic, political and legal area. Joining the European Union is defined as the main priority and strategic objective of Ukraine at the highest state level. The Verkhovna Rada (Ukraine's Parliament) has backed amendments to the Constitution of Ukraine's path to the European Union & NATO.

On September 20, 2018 The Verkhovna Rada sent to the Constitutional Court a presidential bill amending Ukraine's Constitution regarding the strategic course of the state

for obtaining full membership of Ukraine in the EU & NATO (No. 9037). On November 22, 2018, the Constitutional Court of Ukraine green-lighted this Bill. And the same day the Verkhovna Rada adopted the Bill in its first reading. These amendments to Constitution of Ukraine entered into force on February 21, 2019.

These amendments focused on Ukraine's irreversible course toward European & Euro-Atlantic integration be stipulated in the preamble of the Constitution of Ukraine along with the confirmation of European identity of the Ukrainian people. Article 85 suggests defining that the powers of domestic and foreign policy, implementing the state's strategic course for obtaining full membership of Ukraine in the European Union and NATO. Article 102 is supplemented with the provision that 'the President of Ukraine is the guarantor of the implementation of the state's strategic course for obtaining Ukraine's full membership in the EU & NATO'. Article 116 is amended with a new clause, according to which the Cabinet of Ministers 'ensures the implementation of the state's strategic course for obtaining Ukraine's full membership in the EU & NATO'.

In order to ensure the irreversibility of Ukraine's European and Euro-Atlantic course, based on the third part of Article 102 of the Constitution of Ukraine the special act was adopted - Decree of President of Ukraine "European and Euro-Atlantic integration matters" №155/2019 dated April 20, 2019, that contains Action Plan for implementation of the State's strategic course towards obtaining by Ukraine of the full membership in the European Union and in the North Atlantic Treaty Organisation. This Decree of the President of Ukraine excludes the possibility of diverting from the strategic course since it enshrines the functions and responsibilities of all authorities in Ukraine to implement this course.

Under this document The Cabinet of Ministers of Ukraine shall ensure the implementation, in cooperation with the relevant state authorities, of the Action Plan for implementation of the State's strategic course towards obtaining by Ukraine of the full membership in the European Union and in the North Atlantic Treaty Organisation, as approved by this Decree, and informing, on a quarterly basis, the President of Ukraine of the status of its implementation; and ensure the reporting on the implementation of the aforementioned Action Plan within the prescribed time periods.

The Action Plan itself consists of 31 items with various objectives for the period of 2019-2020. In particular, the Plan contains an item on the elaboration of proposals for revision of the Association Agreement between Ukraine and the EU in December this year, and during 2019-2020 for working with the EU side on further trade liberalization, the conclusion of an Agreement on the Conformity Assessment and Acceptance of Industrial Goods (Agreement ACAA); integration into the EU internal markets in the fields of energy and digital economy; cooperation in the field of justice, freedom and security.

5. Arguments to argue the thesis.

The objective of effective implementation and application of the EU-Ukraine AA may be achieved by issuing a special implementation law that will clarify all potential conflicts of provisions of this agreement with Ukrainian legislative acts.

The most important question in the process of AA implementation is the legal force of decisions of the Association Councils and the way how they should be applied in Ukrainian legal order. Direct applicability of the Association Councils' decisions will depend on their undisputed acceptance by national judiciaries.

Nowadays this draft law is elaborating by expert, government civilians & parliament members.

The main problems in the process of preparation for the implementation of the Agreement are as follows:

- 1) No provisions were made to implement the Agenda of the EU-Ukraine Association on time and in full;
- 2) National mechanism for implementation of Association Agreement was not determined and not presented at the state level;
- 3) The National Association implementation program which should provide for the detailed list of activities for step by step implementation of the Agreement and their due dates was not approved.

6. Conclusions

Thus, at the present stage of modernization of Ukraine shall be carried out taking into account the chosen path towards European integration. Ukraine faces a task to complete the reform of public governance, taking into account European standards and recommendations expressed by Western experts and the governing bodies of the EU. The overall progress in legal harmonisation in the framework of the AA implementation is improved and the speed of the legislative process at all stages is accelerated. Government coordination, monitoring, reporting and evaluation capacities, processes and tools of the AA/DCFTA implementation are significantly improved, sustainability ensured and links to the general Government and Parliament planning activities established. So, the implementation of EU-Ukraine AA/DCFTA, accompanied by reforms, will bring about the comprehensive approximation with EU legislation and standards leading to the gradual economic integration of Ukraine in the EU internal market and therefore to the creation of an economic area.

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