Comparative, legal and operational perspective of the Ukraine-EU Association Agreement

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Structure of the presentation:

• History of the EU-Ukraine cooperation;
• Legal basis and objectives of the EU-Ukraine AA;
• Place of the EU-Ukraine AA among other EU’s association agreements;
• Structure of the EU-Ukraine AA;
• EU-Ukraine political cooperation within the EU-Ukraine AA.
History of the EU-Ukraine cooperation

- 1994/98 – EC-Ukraine Partnership and Cooperation Agreement;
- 2004 – European Neighbourhood Policy;
- 2008 – Eastern Partnership;
- 2009 – Association Agenda.
- 2011 – Eastern Partnership revision (“more for more” principle);
- 2014 – Signature of the EU-Ukraine AA;
- 2017? – full entrance into force of the EU-Ukraine AA and visa free regime.
What is “association” and how to define it?

• What is linguistic meaning of “association”?
• What is meaning of “association” in international and national law?
• What is meaning of “association” in EU law?
Legal basis and objectives of the EU-Ukraine AA

• Art. 217 TFEU (association agreements)

• “The Union may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”;

• **Case Demirel [1987]** “ASSOCIATION AGREEMENT CREATING SPECIAL, PRIVILEGED LINKS WITH A NON-MEMBER COUNTRY WHICH MUST, AT LEAST TO A CERTAIN EXTENT, TAKE PART IN THE COMMUNITY SYSTEM”;

• Art. 31(1) and 37 TEU (CFSP);

• **No** Art. 8 TEU (privileged relations with neighbouring countries)

  • “The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

  • 2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.”
Objectives of the EU’s external policy and the AAs

• Legal base of the AA complies with objectives of the EU external policy in Art. 2 and 21 TEU:

• “1) The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

• 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity.”
Are there EU Common Values in the EU-Ukraine AA?

- Where to find the scope of the EU common values in EU law?
- Do EU common values differ from recognised principles of international law?
- What does EU law mean by “safeguarding EU common values”?
- Where to find the scope of the EU common values in the EU-Ukraine AA?
- What may happen if Ukraine does not share the EU common values? What are the legal consequences?
Objectives of the EU-Ukraine AA

• no automatic link between association and accession prospects (Preamble of the AA - “the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice”, “this Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations”);

• Ukraine may apply for the EU membership in accordance with Art. 49 TEU “Ukraine as a European country shares a common history and common values with the Member States of the EU and is committed to promoting those values” as was acknowledged by the EP;

• the Copenhagen and Madrid criteria, strong conditionality policy, transposition of the EU acquis.
What group of association agreements the EU-Ukraine AA belongs to?

• “EU membership oriented” EU association agreements (AAs with the Central and Eastern European countries (Europe Agreements), (Stabilisation and Association Agreements with Balkan countries);

• “Full access to the EU internal market without EU membership” association agreements (European Economic Area, EU-Swiss AAs);

• “Political, legal and economic Integration but you never join” Euro - Mediterranean Association Agreements with North African countries and Israel plus Turkey;

• “Enhanced” EU-Kazakhstan PCA signed on 21.12.15;

• “PCA+” and “PCA++”, new agreements being negotiated with Armenia and Azerbaijan.
European Economic Area Agreement

- The EEA Agreement aims at “a high degree of integration” to establish a “fundamentally improved free trade area”.
- The EEA Agreement is “an international agreement sui generis that have created a legal order of its own” (EFTA Court Case Erla Maria Sveinbjörnsdottir).
- “A dynamic and homogeneous EEA” is based on “common rules and equal conditions of competition” supplemented with “the adequate means of enforcement including at the judicial level”.
- The key method is homogeneity “a uniform interpretation and application of this Agreement and those provisions of Community legislation which are substantially reproduced in this Agreement”.

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European Economic Area Agreement’ acquis

- The relevant EU act must be applied in accordance with the EEA Agreement objectives, since the mere fact of reference to an EU act does not imply identical application within the EEA legal order.

- The Parties to the EEA Agreement are bound by the ECJ case law acquis adopted prior the signature of the EEA Agreement.
Homogeneity procedure - the “post-signature” relevant acquis in the European Economic Area Agreement

• 1) the timely implementation of EU legislation into the EEA Agreement;
• 2) the uniform interpretation of the adopted acquis communautaire and the EFTA rules.
• In practice, the principle of homogeneity means that as soon as a relevant EU rule has been formally adopted by the Council or the Commission, the EEA Joint Committee must take a decision concerning the appropriate amendment of the EEA Agreement “with a view to permitting a simultaneous application” of legislation in the EU and the EEA countries.
Structure of the EU-Ukraine AA

• Cross-pillar, EU exclusive and mixed competences;
• Comprehensive document – about 2000 pages, 486 articles, 46 annexes, 3 protocols;
• Provisional application of the AA does not cover supporting competences of the EU Member States.
Legal issues of the implementation of the EU-Ukraine AA.

• Violation of “essential elements” of the AA (Art. 2 AA) may lead to the termination of the agreement (Art. 478 AA);

• Territorial application of the AA in Crimea and the East of Ukraine (need to define the status of Ukrainian companies therein);

• AA is integral part of the Ukrainian legislation and prevails in case of conflict with national secondary legislation;

• Challenges of the AA’s application:
  • Conflict with the Constitution (Rome Statue);
  • Decisions of the Association Council in the national legal system;
  • EU founding principles and ECJ case law in the national legal system;
  • Definition of the “EU acquis” in the national legal system;
  • Need for the implementation law related to the AA.
What is the EU *acquis*?

- The Community acquis (Acquis Communautaire) is the **body of common rights and obligations of all EU member states**. It is constantly evolving and comprises of:
  - **Primary legislation**: the content, principles and political objectives of the Treaties;
  - **Secondary legislation**: the legislation adopted in the application of the Treaties and the case law of the Court of Justice;
  - The declarations and resolutions adopted by the Union;
  - Measures relating to common foreign and security policies;
  - Measures relating to justice and home affairs; and
  - International agreements concluded by the EC as well as those concluded by EU Member States in the field of the European Union's activities.

- EU association countries like Ukraine are required to adapt their legislative, administrative and institutional frameworks in line with acquis for those areas that are affected by the AA/DCFTA. Countries’ compliance and gaps of reform are reviewed on a regular basis and published in the EU Progress Reports until full compliance has been reached and the respective *chapter is closed*. 
What type of equivalence of Ukrainian legislation to the EU acquis is provided in the EU-Ukraine AA?

• Approximation;
• Harmonisation;
• Transposition;
• Alignment;
• Unification;
• Similarity.
The process of the approximation of legislation in the EU-Ukraine AA

- The approximation of legislation implies that EU approximation countries transpose relevant elements of the acquis into their national legislation and implement it accordingly. For EU applicant countries the full acquis needs to be transposed. Formally, approximation applies only to EU Directives while decisions and regulations become effective without being transposed.

- There are three key elements in the approximation process. Government authorities must take all three elements simultaneously into account at each stage in the approximation process:
  
  - **Transposition** – The government must adopt or amend national laws, rules, and procedures so that the requirements of the relevant EU Directive are binding and fully incorporated into national laws and regulations.
  
  - **Implementation or “practical application”** – The implementing institutions need to be equipped with the capacities and budgets to ensure the full application of the laws and regulations.
  
  - **Enforcement** – Sufficiently strong controls need to take place to ensure that the laws and regulations are fully complied with.
Ministries and agencies engaged in the approximation of legislation in Ukraine

- **Ministry of Justice:** The Ministry of Justice (MoJ) used to be in charge for the legal approximation process, which was shifted in early 2015 to CMU-GOEI. Cooperation with the MoJ will be decisive in exchanging expertise when drafting laws and regulations, and undertaking compliance checks on compatibility with the EU acquis.

- **Ministry of Foreign Affairs:** The Ministry of Foreign Affairs (MoFA) is the Project’s main counterparts when working on the Visa Liberalisation Action Plan (VLAP) and the AA Chapters 1 (on Political dialogue and reform) and 2 (on Justice, freedom and security).

- **Parliamentary Committee on European Integration:** The Committee of the Verkhovna Rada of Ukraine on issues of European integration was created in 2003 to coordinate cooperation with the EU in terms of Ukraine’s ongoing European integration as part of the AA/DCFTA.
Ministries and agencies engaged in the approximation of legislation in Ukraine

• **National Agency on Civil Service** is the Government’s central executive institution on managing Ukraine’s civil service. The Agency is in charge to develop and implement coherent policies and to ensure the optimal functional administration of the civil service. It is supervised and coordinated by the Cabinet of Ministers (CMU).

• The **Centre for Adaptation of the Civil Service to the Standards of the European Union** operate under the auspices of the National Agency on Civil Service. The Centre aims to strengthen the analytical, institutional and administrative capacity of civil servants in order to facilitate the process of adapting to the standards of the EU.

• **Presidential Administration**: administrative body, which assists the President of Ukraine with respect to administrative, advisory, analytical, and legal support. The Presidential Administration also arranges communication and official statements between the President, the Verkhovna Rada, the Cabinet of Ministers, and the Constitutional Court.

• **Line Ministries and Executive Agencies**: 54 line Ministries and executive agencies, with which the Project shall cooperate. The Project will work with these bodies on various Project activities, such as AA-related restructuring, legal approximation/translation, and with respect to broad-based capacity building. Both, the Project’s experts and Fellows will assist the line Ministries in implementing their AA/DCFTA-related action plans in relevant fields, such as transport, environment, energy, regional development, public finance management.
EU acquis and legislation in English and Ukrainian

• AA in Ukrainian;
• AA in English;
• Governmental Portal on EU integration;
• EU acquis on the Ministry of Justice web portal;
• EU’s web portal;
• Web portal of the EU Delegation to Ukraine.