

Empowered to Deliver: The Institutional Model and Implementation Arrangements under the EU-Ukraine Association Agreement

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Abstract: *In the context of truly politicised and geopolitically discoursed public and academic debates around the pioneering and, at the same time, revolutionary EU-Ukrainian association deal, this article seeks to present a pragmatic law and politics view on one of the cornerstone issues in the newly launched EU association policy towards Ukraine, i.e. the institutional and implementation framework. It therefore explores possible modalities and the actually arranged implementation model of the EU-Ukraine Association Agreement, and assesses the strengths and weaknesses thereof. The challenges posed by the recent unduly 'flexibilisation' and postponement of the agreement's provisional application are analysed, and the procedural requirements for transitional implementation and full enactment are disclosed. Finally, the association's institutional engineering is given thorough legal and political scrutiny, that allowed to contend that the truly empowered institutional framework and selected implementation model are deemed to gear the process of political association and economic integration, yet these heavily draw on explicit conferral of dynamic powers and implicit integration-oriented functional rationale.*

Keywords: *European Union, Ukraine, association agreement, application, implementation model, institutional framework*

Introduction

The process of negotiating and concluding with Ukraine the first of the European Union's 'new generation' association agreements has been anything but an easy and smooth political development. The Agreement's economic and political weight, against the backdrop of highly politicised geopolitical narratives, but also its very comprehensive and complex legal nature are to a large extent responsible for such a procedural intricacy. To share Hillion's (2007) view, one has to reckon here with an inherent axiomatic peculiarity

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of EU's contractual links with the third countries: 'In EU external relations, the rule is almost as follows: the more ambitious the agreement, the more difficult its conclusion' (Hillion 2007: 177). In the case of the EU-Ukraine Association Agreement, the difficulty is not only reflected in negotiating and drafting the content of the agreement, it lies the more so in arranging the treaty's implementation framework and complying therewith.

The comprehensiveness and complexity of the newly concluded Association Agreement between the European Union and Ukraine quasi by default imply significant challenges for the effective implementation of the treaty – both in terms of its implementation modes and models (transitional implementation period, suspension clause, institutional implementation models), substantial and procedural implementation policies (legislative and regulatory approximation, institutional association policy) as well as legal effects (constitutional tolerance, direct applicability, direct effect, interpretation rules, dispute settlement mechanism).

The agreement involves moreover high implementation costs, especially as regards such policy areas as the internal market *acquis* transposition, customs regulations, environment policy, agriculture (and land reform) policy, and also transport, energy and nuclear safety policies. Significant institutional and personnel costs are also to be accounted for in the context of the agreement's effective implementation policy. In addition to these, in principle, anticipated challenges to the implementation of the EU-Ukraine Association Agreement, the process has been already formidably impeded by – earlier – unexpected Russian invasion in the Ukrainian peninsula of Crimea, its annexation and further aggression on the country's Eastern borderlands. This poses additional legal and political problems both for the territorial scope of the agreement's application, and the implementation arrangements themselves that become hostage of political gambling and blackmailing on the Russian side. Hence, not only rules of origin and the heavyweight part of the EU-Ukraine Association Agreement, the DCFTA, have grown therewith into the biggest concerns for the agreement's effective implementation – the very application and implementation model agreed according to the norms of international law between the parties to the agreement is being amended under pressure of the external factor. Recent postponement of the initially agreed provisional application² of the EU-Ukraine Association Agreement has already impeded the envisaged implementation arrangements and – should the latter ones be further neglected and forcibly 'flexibilised' under the external pressure – may have dramatic implications for the European Union's association politics with its Eastern neighbourhood as such.

Against this background, this article seeks to explore these allegedly tangled modalities of the association agreement's application, disentangle its implementation model, and assess the association implementing capacities of the envisaged institutional framework.

² In response to Russian calls and allegations, the EU and Ukraine agreed – following the Minsk trilateral ceasefire negotiations held in August 2014 – 'to propose additional flexibility' and thus delay the provisional application of the DCFTA part of the EU-Ukraine Association Agreement until 31 December 2015, cf.: European Commission (2014).

National policy coordination framework and association implementation model

The implementation of the EU-Ukraine Association Agreement poses perhaps the greatest challenge in view of the by far lacking comprehensive institutional support and the overall institutional policy and coordination model at the national level. In previous years, several attempts have been made to launch an institutional framework for the implementation of Ukraine's European integration strategy and the process of legislative approximation. Following the change of government in the wake of the 'Orange revolution', several advisory and executive bodies have been established since early 2005, including the State Department on the Adaptation of Ukrainian Legislation³ within the system of the Ministry of Justice (abolished in 2011). The other – no longer active – bodies included the Bureau of European Integration at the Secretariat of the Cabinet of Ministers (the so-called 'Coordination Bureau' which has been substituted since 2012 by the Department of Association and Integration into the EU⁴) and the Department on Adaptation of Legislation at the Ministry of Justice (ceased to exist in 2011, due to the reorganization of executive agencies). The only still active national executive body in the domain of European integration and legislative approximation, that has survived the administrative reform of 2011, is the Coordination Council on the Adaptation of Ukrainian Legislation to European Union Laws ('Coordination Council')⁵. In addition, the Committee on European Integration⁶ of the Verkhovna Rada is active in the parliamentary dimension of coordinating Ukraine's legislative approximation and integration policies.

Looking for an institutional policy and coordination model that would be best suited for the effective implementation of the EU-Ukraine Association Agreement, the Civic Expert Council set up within the Ukrainian part of the EU-Ukraine Cooperation Committee favoured the centralised executive model with a special status, out of four, in principle, available policy coordination models as described below (KAS 2012: 12):

- *Model A: 'decentralised'*, as it currently is (most functions in policy coordination will be the responsibility of the MFA);
- *Model B: 'highly centralised' or 'presidential'* (with the Department for European integration set up directly in the Presidential Administration as a centre of policy-making);
- *Model C: 'centralised' or 'Cabinet-based'* derived from the recent example of the Coordinating Bureau for European and Euro-Atlantic Integration (which operated as part of the Secretariat of the Cabinet of Ministers) and based on the premises of proven successful horizontal coordination pursued at the sub-level of the Government's apparatus; and
- *Model D: 'a central executive body (CEB) with a special status'*, a model that has been offered (though not eventually adopted) for the first time in 2008 within the implementation policy framework of the Ukraine's European integration strategy.

³ According to the Decree of the Cabinet of Ministers of Ukraine no.1742 of 24 December 2004 (invalid since 2011).

⁴ Decree of the Cabinet of Ministers no.1202-2012-п of 26 December 2012.

⁵ Established as per Decree of the Cabinet of Ministers no.1365 of 15 October 2004, amended as per Decree of the CMU no.338 of 30 March 2011. Cf., for the Coordination Council's working profile, <http://www.kmu.gov.ua/control/uk/publish/article%3Fart_id=223287414&cat_id=223281453>.

⁶ Committee on European Integration of the Verkhovna Rada of Ukraine (website), <http://w1.c1.rada.gov.ua/pls/site2/p_komity?pidid=2369>.

The last model seems to be most promising also in view of the fact that precisely this pattern of institutional policy and coordination was chosen by EU accession candidates in the past. It also has been chosen by the recent associated neighbours of the EU in the east, namely Georgia and the Republic of Moldova. In Georgia, the State Ministry for European and Euro-Atlantic Integration⁷ was set up on 17 February 2004. In Moldova, the Ministry of Foreign Affairs has become a CEB with a special status also in the area of Moldovan European integration policy, so as on 14 April 2005 it was reformed into the Ministry of Foreign Affairs and European Integration of the Republic of Moldova⁸.

After a lengthy intra-institutional negotiation process in Ukraine, the ‘centralised’ or ‘Cabinet-based’ model (*model C*) has been chosen. On 13 August 2014, the Cabinet of Ministers of Ukraine established, with the Decree no.346⁹, the *Government’s Bureau for European Integration*¹⁰ that would become the key coordination body within the national system of institutional and governmental coordination of the EU-Ukraine Association Agreement’s implementation. The Bureau is structurally embedded within the Secretariat of the Cabinet of Ministers of Ukraine. On 21 August 2014, the *Governmental Committee* headed by the Prime Minister Arseniy Yatseniuk was established to guideline the coordination activities of the Bureau. On the same day, *European integration affairs deputy ministers* of the profile ministries directly related to the implementation of the EU-Ukraine Association Agreement, which also have set up earlier the national institutional framework for Ukraine’s European integration¹¹, have been appointed¹². Therewith, the creation of a renewed national executive system of policy coordination in the domain of Ukraine’s European integration and implementation of the EU-Ukraine Association Agreement has been accomplished.

Implementation arrangements in flux: Challenging ‘flexibilisation’ of provisional application and transitional implementation

The EU-Ukraine Association Agreement aims inter alia at ‘Ukraine’s *gradual* integration in the EU Internal Market’ [emphasis added] (Art 1 para.2(d) EU-Ukraine AA). Gradually, the establishment of the Deep and Comprehensive Free Trade Area, an integral part of the agreement and the envisaged economic integration of Ukraine in the European Union’s internal market will also be achieved. In technical terms, such a ‘gradualist’ approach

⁷ State Ministry for European and Euro-Atlantic Integration of Georgia (website), <<http://eu-integration.gov.ge>>.

⁸ Ministry of Foreign Affairs and European Integration of the Republic of Moldova (website), <<http://www.mfa.gov.md>>. For details on Moldovan Law no.23 from 14.04.2005 on amendments to the law on government of 1990, cf.: <<http://lex.justice.md/viewdoc.php?action=view&view=doc&id=312229&lang=2>>.

⁹ Cf. Decree of the Cabinet of Ministers of Ukraine no. 346-2014-п of 13 August 2014.

¹⁰ Press-release on the establishment of the Government’s Bureau for European Integration, 13.08.2014, <http://www.kmu.gov.ua/control/uk/publish/article?art_id=247521935&cat_id=244274160>.

¹¹ Ministries setting up the national institutional framework for the implementation of Ukraine’s European integration policy are Ministry of Foreign Affairs, Ministry of Justice, and Ministry of Economic Development and Trade, as defined by the Cabinet of Ministers, cf., <http://www.kmu.gov.ua/control/uk/publish/article?showHidden=1&art_id=230525707&cat_id=223236991>.

¹² Press-release of the Cabinet of Ministers of Ukraine, 21.08.2014, <http://www.kmu.gov.ua/control/uk/publish/article?art_id=247539437&cat_id=244276429>.

will be pursued through transitory implementation policy supported by the incremental legislative and regulatory approximation, with a transitional period of a maximum of ten years¹³ and for some areas, even longer. The DCFTA and economic integration are therefore sought to be implemented progressively in terms of both substantive provisions and procedural requirements.

On the one hand, customs duties on Ukraine's part have to be progressively eliminated, generally over the period of five to ten years, whereas the European Union obliged itself through the association agreement to eliminate the tariff barriers without any transitory period. Article 29 para.1 EU-UA AA determines that the parties shall reduce or eliminate customs duties on goods originating from their respective territories in accordance with the schedules set out in Annex I-A, pursuant to which the main transition period constitutes one to seven years and in some areas, also up to ten years. With some exceptions, almost 95% of the import custom duties will have to be eliminated, the rest – significantly reduced. In some cases, agreed by the Parties upon, the tariff rates quotas (TRQs) are applicable. Flexibility of the association agreement, as anchored particularly in the respective clause of Article 29 para.4 EU-UA AA, allows however to review these premises in a five-year term and accelerate or broaden the scope of the elimination of customs duties on trade within the EU-Ukrainian DCFTA. As regards exports, any customs duties thereon have to be eliminated, since Article 31 para.1 EU-UA AA prescribes that both the EU and Ukraine 'shall not institute or maintain any customs duties, taxes or other measures having an equivalent effect imposed on, or in connection with, the exportation of goods to the territory of each other'. Unlike the EU that is obliged to eliminate export customs duties immediately, Ukraine will enjoy a transitional period (in accordance with the Schedule included in Annex I-C to EU-UA AA) to phase out the existing customs duties or measures having equivalent effect¹⁴. Pursuant to Article 31 para.2 EU-UA AA, a *safeguard clause* may be deployed by Ukraine for export duties on certain kinds of goods as set out in Annex I-D, however with a strict observance of deadline periods for expiry of safeguard measures. This will provide time necessary for adopting Ukraine's economy and business for the market access of European goods.

On the other hand, gradual rapprochement in domains of DCFTA-related legislation and regulatory politics is reasonably dispersed within the decade-long timespan allowed for transitory implementation of the EU-Ukraine Association Agreement. As scrupulously calculated by Burakovsky and Movchan (2014: 130), the greatest approximation 'burden' falls to the third and tenth year's lot, with 68 and 56 normative acts to be approximated per annum, respectively. In respect to the policy domains, six areas will be 'burdened' by the legislative and regulatory approximation imperative at most, with thirty normative acts in average to be adopted in accordance with respective EU *acquis*. These six policy domains include industrial standards and regulation, financial services, agriculture, environment, transport, and social policy.

¹³ Article 25 EU-Ukraine AA stipulates that 'The Parties shall progressively establish a free trade area over a transitional period of a maximum of 10 years starting from the entry into force of this Agreement [...]... '[u]nless otherwise provided in Annexes I and II to this Agreement', as stated in the footnote to the Article.

¹⁴ According to Article 31 para.2 EU-UA AA.

Hence, contrary to the contravariant discourse framed by the belief that Ukraine will have to painfully adopt all the EU rules and *acquis* immediately after entry into force of the association agreement, the treaty itself foresees a reasonably diversified transitional implementation period that, along with the flexibility elements and safeguard clauses, is meant to provide a strictly enforceable framework for the effective implementation of Ukraine's commitments under the association accord. It will be noted hereto as well that, ahead of the agreement's enactment, the Verkhovna Rada has already adopted many of EU *acquis*-conform laws which will provide advantage for the scheduled legislative and regulatory approximation process.

Provisional application, (full) enactment and implementation

Simultaneously ratified by the European Parliament and the Verkhovna Rada of Ukraine on 16 September 2014, the EU-Ukraine Association Agreement has entered a lengthy second stage of ratification where all the twenty-eight member states have to accomplish the process and present their national ratification instruments. In principle, one month after the Association Agreement is ratified by the last EU member state, it will enter into force (pursuant to Article 486 para.2 EU-UA AA). Apparently, the process of ratification may last for years and there is no guarantee that it will be completed successfully. Taking it into account, the parties have agreed to enable provisional application mechanism prior to the full enactment of the Agreement:

'[...] the Union and Ukraine agree to provisionally apply this Agreement in part, as specified by the Union, as set out in paragraph 4 of this Article, and in accordance with their respective internal procedures and legislation as applicable' (Article 486 para.3 EU-UA AA).

This so-called provisional or interim (temporal) application was an expected and necessary measure to mitigate the adverse effects of the lengthy ratification procedure. Provisional application is either enacted by signing of an interim agreement or foreseen by a special provision in the body of the agreement's text itself, as a rule – in final provisions. The EU-Ukraine Association Agreement followed the second path and thus it rules out this mechanism by its Article 486 'Entry into force and provisional application' contained in the general and final provisions section. The activation of the mechanism is subject to approval or ratification by each of parties, respectively. Article 486 para. 4 EU-Ukraine AA stipulates that the 'provisional application shall be effective from the first day of the second month following the date of receipt by the Depositary' of 'the Union's notification on the completion of the procedures necessary for this purpose' and 'Ukraine's deposit of the instrument of ratification in accordance with its procedures and applicable legislation'. Thereby, the European Union owns the right to determine which parts of the Agreement will be provisionally applied. Consequently, the interim application of the Association Agreement does not technically require conclusion of a separate interim agreement per se¹⁵, it only needed, on the part of the Union, an adoption of a written decision on the

¹⁵ By contrast, the EU has signed (29 April 2008) the Interim Agreement on Trade and Trade-Related Issues along with the signing of the Stabilisation and Association Agreement between Serbia and the EU (SAA).

application of the agreement in the extent which explicitly falls within the scope of EU competences. Interim application can only be applied thus to the issues and areas covered by EU's exclusive competences – the issues falling within the scope of EU member states competences, such as area of freedom, justice and security, must undergo national ratification procedures for their enactment and further application. The DCFTA-related part of the Association Agreement as swiftly enabled by the Council's decision on provisional application (which was made simultaneously with the decision on the signing of the Agreement)¹⁶ required thus only ratification by the Ukrainian Parliament. As observed Sushko et al. (2012: 10), '[t]ypically, ratification of an interim agreement is done within a period of up to six months from the date of its signing'. On 3 October 2013, shortly before the Vilnius Summit, European Commissioner for Trade Karel de Gucht made it clear that 'Ukraine can expect that almost 100% of the DCFTA part of the Association Agreement will be provisionally applied', which means that 'all relevant substance of the DCFTA comes into practice before the DCFTA is ratified by all the EU member states' (cf. EU Delegation to Ukraine 2013). Given that the Agreement has been non-typically signed in two attempts, first the 'political' part and then the 'economic' component of it, the provisional application mechanism has been also sanctioned by two decisions of the Council. The first decision of 17 March 2014 (2014/25/EU)¹⁷ granted provisional application to the Preamble, Article 1, and Titles I, II, and VII of the EU-Ukraine Association Agreement, 'but only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy', as stipulated by Article 4 of the Decision. The second Council's decision on the signing and provisional application of the EU-Ukraine Association Agreement made on 23 June 2014¹⁸ granted provisional application to the remaining part of the treaty, its 'economic' heavyweight: Titles III¹⁹ ('Justice, Freedom and Security'), IV ('Trade and Trade-related Matters'), V ('Economic and Sectoral Cooperation'), VI ('Financial Cooperation, with Anti-Fraud Provisions'), and VII ('Institutional, General and Final Provisions'), as well as related Annexes and Protocols.

Provisional application of the EU-Ukraine Association Agreement as described above is an intermediary measure enabling application of the treaty before its full and unconditional enactment. It has to be noted thereby that the agreement's provisions become applicable earlier than provided for in the treaty itself (through the reference passages 'date of entry into force of this Agreement'). Misinterpretation of the terms and misunderstanding of procedural law and politics in the context of EU-Ukraine Association Agreement may have serious repercussions for the treaty application and adjudication of related therewith claims, especially due to the anticipated problem with a fake 'retroactive effect'²⁰. Guided by the legal certainty principle, the Association Agreement of the European Union with Ukraine has not been granted retroactive effect, but once entered into force (which can be

¹⁶ Council Decision no.2014/669/EU of 23 June 2014. *Official Journal of the European Union*, 20.09.2014, L 278/6.

¹⁷ Council Decision no. 2014/295/EU of 17 March 2014. *Official Journal of the European Union*, 29.05.2014, L 161/1.

¹⁸ Council Decision no.2014/669/EU of 23 June 2014. *Official Journal of the European Union*, 20.09.2014, L 278/6.

¹⁹ With the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party.

²⁰ 'Retroactive effect' of law refers to extending, via rulemaking (including treaties along with legislation), the scope or effect of norms to matters that have occurred in the past, before adoption of the respective rule.

a several years later *fait accompli*) it will cover the preceding period, starting with the date from which the agreement will be provisionally applicable²¹. Article 486 para.5 EU-UA AA puts it in this regard in a clear way:

‘For the purpose of the relevant provisions of this Agreement, including its respective Annexes and Protocols, any reference in such provisions to the “date of entry into force of this Agreement” shall be understood to the “date from which this Agreement is provisionally applied” in accordance with paragraph 3 of this Article’ (Article 486 para.5 EU-UA AA).

Within the period of provisional application, i.e. before the treaty enters into force, the EU-Ukraine Association Agreement is in principle subject to revision on the EU’s part provided that the Court of Justice of the European Union is consulted thereupon and provided an adverse opinion on either formal or substantive validity of the agreement. Enjoying the jurisdiction to give preliminary rulings on the interpretation of the foundational treaties (Art 267(a) TFEU), i.e. the TEU and the TFEU, along with the jurisdiction to give preliminary rulings concerning ‘the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union’ (Art 267(a) TFEU), the Union’s judiciary is obliged to exercise its jurisdiction upon the request or action brought by eligible litigants. Teleological interpretation of Article 19(3)(a-c) TEU, in conjunction with Article 218 para.11 TFEU, allows us to argue that it is, in principle, the Council, the Commission, the European Parliament or a Member State that may ask the Court to verify both the formal validity (compliance with the relevant adoption procedure) and the substantive validity (compliance with the *acquis communautaire*) of the EU-Ukraine Association Agreement. An adverse opinion of the Court will lead to the obligatory revision of the agreement before it can enter into force.

Once the consultation of the Court is skipped or overcome, and the treaty is ratified as provided for in Article 486 para.1 EU-UA AA, with notification procedure subsequently duly accomplished, the Association Agreement between the European Union and Ukraine shall enter into force with a one-month delay:

‘This Agreement shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval’ (Article 486 para.2 EU-UA AA).

Complexity of the agreement’s scope and its legal nature of a mixed agreement in the EU legal order with durable and far-reaching effects for EU’s and Ukraine’s legal systems within the framework of international law almost by default provides for complexity of the agreement’s application and implementation both before its full enactment and thereafter.

First, a transitory implementation period has to be duly accounted for. As anticipated by Hillion (2007: 172) back in time when the specific content of both political and economic components of the EU-Ukraine deal was only negotiated, ‘the FTA, and *a fortiori* a deep FTA, will not be put in place immediately after the new agreement enters into force’ – it

²¹ The requirement of provision of ‘sufficient information’ as regards the procedure of enacting EU law has actually been already fulfilled by the publication of the EU-Ukraine Association Agreement in the *Official Journal of the European Union* on 29 May 2014.

will certainly be subject to transitory implementation²². Such an implementation mode has been inherently provided for in the EU's recent Stabilisation and Association Agreements (SAAs) with the Western Balkan countries, as it also was put in effect for the earlier Europe Agreements with the countries of Central and Eastern Europe.

Second, in contrast to the spirit of the EU-Ukraine Partnership and Cooperation Agreement of 1994 that prescribed a 'best endeavour' *modus operandi* for the parties, the letter of the newly concluded Association Agreement between the European Union and Ukraine envisages strict compliance *modus*. Non-compliance may result in suspension of obligations or general non-execution of the agreement. Along with the principles of a free market economy (Article 3 EU-UA AA) that underpin the association relationship, Ukraine has committed itself, through this contractual association with the EU, to the democratic principles, including respect for human rights and freedoms (according to Article 2 EU-UA AA), that constitute 'essential elements' of the EU-Ukraine Association Agreement. Failed compliance or serious breach of essential elements of the EU-Ukraine association deal may (and in cases of a special urgency – also will) be followed by appropriate remedy measures procedurally determined in the so-called suspension clauses²³. The Ukrainian suspension clause differentiates between non-compliance and non-fulfilment of obligations as grounds for evoking the suspension clause. Article 315 EU-Ukraine AA envisages suspension of obligations 'arising from any provision contained in the Chapter on the free-trade area' as a temporary remedy in case of *non-compliance*. *Non-fulfilment of obligations* under the EU-Ukraine Association Agreement will activate the general non-execution or suspension clause (anchored in Article 478 EU-UA AA), not applicable however in principle to the DCFTA matters that have to be ruled out by the aforementioned non-compliance suspension clause.

Last but not least important, any irregularities or further 'flexibilisations' in response to whatever external factors and political distress with regard to Russia, trigger the perils of failure for the entire eastwards association politics of the European Union. Even though the delayed provisional application of the EU-Ukraine DCFTA as instigated in mid-September 2014 is justified by the EU as a 'symbolic act' and 'business as usual' meant to lessen tensions with Russia, 'appease' it and – what is even more ridiculous – 'accommodate' its interests, such a sacrifice of procedural legal stringency presents rather a bad bargain and dangerous precedent. To fully agree with Speck (2014), delaying the provisional application of the DCFTA is a mistake, since it 'gives Russia incentives to raise the pressure because it opens a large window of opportunity to prevent the DCFTA from entering into force' by whatever pressure means be those diplomatic, economic or military. Another side of the coin is the perilousness of an unduly precedent both in political and legal terms. Allowing Russia to partake in the EU's – bilateral – negotiations with any partner in the world undermines the very idea of bilateral agreements and the enshrined therein EU's conditionality policy

²² For details on the scheduled transitional implementation period, especially in light of the legislative and regulatory approximation process, cf.: Burakovskyy and Movchan (2014: 130).

²³ Practice of EU association politics knows two types of suspension clauses – a general non-execution clause (aka '*Bulgarian clause*') and an immediate suspension clause (aka '*Baltic clause*'), found respectively in EU's association accords with Bulgaria and the Baltic States. For a detailed comparative analysis of these two suspension clauses, cf. Elsuwege (2008: 116).

as well as its principles-based actorness. In addition to this ‘principles-*lite*’ conception of EU’s international partner role, (further) European Union’s concessions on the already concluded and half-way ratified international agreement, open a minefield for international lawyers and the association law itself. Political compromises have thus to be arranged and reached in future outside the stringent structure of EU-Ukrainian association law.

Empowered institutional framework of the EU-Ukraine enhanced association

In addition to the national implementation model, the implementation of the EU-Ukrainian Association Agreement will be monitored and enforced by bilateral association institutions, as created by the agreement itself – the Association Council, the Association Committee, and specific Sub-Committees (as the Trade Committee or specialized Sub-Committee on Sanitary and Phytosanitary Measures, those on geographical indicators or trade and sustainable development) that make up a ‘reinforced’²⁴ and genuinely empowered institutional framework.

The EU-Ukraine Association Agreement establishes a powerful and multilevel institutional system devised to advance the implementation of this comprehensive contractual association. Although not involved in the EU’s own institutional and decision-making arrangements, just as any kind of Union’s association frameworks (Phinnemore 1999: 56-62), the envisaged institutional machinery of the EU-Ukrainian association will enjoy the full decision-making capacities with regard to association law, which – by definition – is part of the EU’s legal system. Legal foundations for the institutional arrangement are laid down in treaty’s Chapter 1 ‘Institutional Framework’ of the Title VII ‘Institutional, General and Final Provisions’ (Articles 460 to 470 EU-UA AA). In principle, the treaty provides for a seven-level institutional setting, with five levels to be mandatory established right after the agreement’s entry into force:

- *at the highest political level*, the annual Summits will provide overall guidance for the implementation of the agreement and be a forum for political and policy dialogue;
- *at ministerial level*, the Association Council will operate as a permanent body empowered to make legally binding decisions on all matters of association;
- *at senior executive level*, the Association Committee will operate as an assisting body to the Association Council, and act as a coordination body for (lower-level) sub-committees – special committees or bodies – that can be established by the Association Council and in certain cases also by the Association Committee;
- *at parliamentary level*, the Parliamentary Association Committee will operate as a forum for Members of the European Parliament and of the Verkhovna Rada of Ukraine;
- *at civil society level*, the Civil Society Platform will monitor the implementation of the EU-Ukraine Association Agreement and inform wider public in the EU and Ukraine thereabout.

²⁴ If compared to the institutional framework of the EU-Ukraine PCA, cf.: Van der Loo et al. (2014: 11).

Annual *Summit* meetings²⁵ at the highest political level, involving the President of the European Council and the President of the European Commission on the EU's side and the President of Ukraine on the Ukrainian side, will provide 'overall guidance for the implementation of this Agreement as well as an opportunity to discuss any bilateral or international issues of mutual interest' (Article 460 para.1 EU-UA AA). The agreement does not preclude, in principle, either more frequent (in case of necessity) or shifted (due to certain particular constraints) Summit meetings. This institutional level has been actually established in the wake of EU-Ukraine PCA implementation and successfully maintained despite the fact that it was not an explicit treaty-induced institutional arrangement.

A counterfort of association politics will become however another institution introduced with the EU-Ukraine Association Agreement, the *Association Council*²⁶. From the very beginning of negotiations on, then, the 'new enhanced agreement', Ukraine has been extremely interested in having the possibility to better influence policy-making in the European Union, as it anticipated it would be offered under the NEA and, later on, the EU-Ukraine Association Agreement. Although the association agreement in fact does not empower Ukraine with any voting rights in the decision-making system of the European Union itself, it will enjoy an *equal* with the EU right to make decisions within the association institutions, primarily the Association Council. In this regard, one would also agree with Mayhew (2008: 35) that, as a matter of fact, 'through enhanced political dialogue, [Ukraine] also will have a better chance of both being informed about policy developments in the Union and of influencing those policy decisions before they are taken'. The Association Council will functionally share with the Summit level the task of channeling (regular) political and policy dialogue and act as a highest level of it in the meantime between the Summit meetings, at least this may have been implied with placing respective provisions on both institutions within the same Article 460 EU-UA AA that opens the institutional framework chapter of the agreement. Along with operating as a forum for regular political and policy dialogue, the Association Council will perform three types of functions – control (supervisory)²⁷, monitoring²⁸ and conciliation (dispute settlement)²⁹. In addition, it is entrusted to periodically revise³⁰ and empowered to renew³¹ the Association Agreement, including its Annexes, in light of its objectives and functioning. Article 461 para.2 EU-UA AA prescribes that the Association Council will meet at ministerial level 'at regular intervals, at least once a year, and when circumstances require'; at other levels ('all necessary configurations'), the Association Council will meet

²⁵ Article 460 para.1 EU-UA AA.

²⁶ Article 460 para.2, and essentially Articles 461 and 462 EU-UA AA.

²⁷ Article 461 para.1 EU-UA AA.

²⁸ Article 461 para.1 EU-UA AA. As part of the monitoring function, the Association Council shall serve, pursuant to Article 463 para.2 EU-UA AA, as a forum for exchange of information on European Union and Ukrainian legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures. Accordingly, it shall play a crucial role in legislative approximation process.

²⁹ Article 461 para.3 EU-UA AA.

³⁰ Article 461 para.1 EU-UA AA.

³¹ Article 463 para.3 EU-UA AA. In view of the dynamic evolution of EU law (both secondary legislation and judge-made law) and the obligatory commitment of Ukraine to approximate its legislation with both the existing and future EU *acquis* (according to Art 153 para.2 EU-UA AA), the Association Council shall also serve – in the context of Article 463 para.3 EU-UA AA – as an institutional tool to ensure due account of the evolution of EU law.

on an ad hoc basis, determined by mutual agreement (flexible composition and negotiable agenda). At ministerial level, the Association Council will consist, pursuant to Article 462 para.1 EU-UA AA, of members of the Council of the European Union and members of the European Commission, on the one hand, and of members of the Government of Ukraine, on the other (fixed composition at senior political level). The institution will be chaired in turn by a representative of the EU and a representative of Ukraine³². Unlike the established under the EU-Ukraine PCA Cooperation Council that has been endowed with advisory mandate and thus allowed to adopt only recommendations, the Association Council will enjoy full decision-making capacities and thus is allowed to make both recommendations and decisions legally binding upon both parties³³. The Association Council will adopt several kinds of decisions as follows: (a) on implementation of specific agreement's provisions³⁴, (b) on organisational and procedural issues³⁵, (c) on delegation of powers³⁶, (d) on extended institutional arrangement of the association³⁷, (e) on dispute resolution³⁸, and finally (f) on amendments and supplements to the agreement itself³⁹. Notably, the institution will not be endowed with supranational powers, since the decisions of the Association Council will have to be taken 'by agreement between the Parties, following completion of the respective internal procedures' (Article 436 para.1 EU-UA AA), i.e. by consensus. Once adopted, the effect of decisions made by the EU-Ukraine Association Council might however be crucial for advancement of the association scope⁴⁰. Similarly, through the decisions taken by the bilaterally established EU-Turkey Association Council⁴¹, have been significantly developed – when compared to the original wording of the EC-Turkey Association Agreement ('Ankara Agreement') – particularly the legal regime of the movement of workers between the European Community and Turkey as well as the establishment of the EC-Turkey Customs Union itself.

An *Association Committee* established within the agreement⁴² will be composed of representatives from both parties at senior civil servant level⁴³ and lead by rotating chairmanship⁴⁴.

³² Article 462 para.3 EU-UA AA.

³³ Article 463 para.1 EU-UA AA.

³⁴ Cf., for instance, Article 18 para.2 EU-UA AA.

³⁵ Article 462 para.2 EU-UA AA.

³⁶ Article 465 para.2 EU-UA AA.

³⁷ Article 466 para.2 EU-UA AA.

³⁸ Article 477 especially paras 1 and 4 EU-UA AA.

³⁹ Article 463 paras 2 and 3 EU-UA AA.

⁴⁰ The precedent was set by the ECJ already in 1989, where the decision of the Greek Association Council was deemed to have direct effect (as further specified in the 1990 judgement in *Sevince* case) and constitute, along with the agreement itself, an integral part of the then-Community legal system, cf.: Case 30/88 *Greece v. Commission* [1989] ECR3711, para.13; Case C-192/89 *Sevince v. Staatssecretaris van Justitie* [1990] ECR1-3461, para.14.

⁴¹ In this regard, cf., for instance, Case 230/03 *Mehmet Sedef*, judgment of 10 January 2006. Cf. also: Opinion of Advocate General Bot in Case C-325/05 *Derin*, 11 January 2007.

⁴² Article 464 para.1 EU-UA AA.

⁴³ Article 464 para.2 EU-UA AA.

⁴⁴ Article 464 para.3 EU-UA AA.

The Association Committee will, in principle, meet annually⁴⁵ and basically assist the Association Council in the performance of its duties⁴⁶; specific functions and functioning modus of the Association Committee has to be determined by the Association Council⁴⁷. Along with power to adopt (a) decisions on issues and in the cases provided for in the agreement⁴⁸, the Association Committee may also adopt (b) decisions in areas in which the Association Council has delegated its powers to it, including the power to take binding decisions⁴⁹.

Together with the Association Council⁵⁰, the Association Committee⁵¹ enjoys the power to set up a *sub-committee*, established with the status of a 'Special Committee' or 'Special Body'. These sub-committees will be endowed with implementation and/or monitoring functions in various areas of bilateral association politics, for instance, on the matters of sanitary and phytosanitary measures, geographical indications, trade and sustainable development, economic and sector cooperation, etc. Meant to support the Association Committee in fulfilling its functions, sub-committees will not however prevent either party from bringing any matter directly to the Association Committee, including in its Trade Committee configuration⁵².

A *Parliamentary Association Committee* established under the EU-Ukraine Association Agreement⁵³ will continue the tradition of regular inter-parliamentary exchange of views and operate in the composition of members of the European Parliament and of the Verkhovna Rada of Ukraine⁵⁴, chaired according to the principle of rotation⁵⁵. Being informed, upon request, on the specifics of the agreement's implementation, as well as, in

⁴⁵ Article 465 para.1 EU-UA AA determines that '[t]he Association Committee shall meet at least once a year'. In addition, it shall meet at least once a year in its specific configuration as a Trade Committee (according to Article 465 para.4 EU-UA AA); a possibility of a combined meeting format is not ruled out, although it is neither explicitly provided for in the agreement itself. Given its duty to prepare the meetings of the Association Council, pursuant to Article 465 para.1 EU-UA AA, and the possibility of more frequent meetings of the latter one (i.e. 'when circumstances require', as ruled out by Article 461 para.2 EU-UA AA), there can be in principle more than two meetings of the Association Committee per year.

⁴⁶ Article 464 para.1 EU-UA AA.

⁴⁷ Article 465 para.1 EU-UA AA.

⁴⁸ Article 465 para.3 EU-UA AA. It shall be noted that, pursuant to Article 465 para.4 EU-UA AA, the Association Committee shall meet in a different configuration to address all issues related to Title IV (Trade and Trade-related Matters) of the EU-Ukraine Association Agreement. Acting in this specific capacity, it shall be referred to as a 'Trade Committee' (thus the Trade Committee is not a separate institution!) and is entitled to make decisions on implementation of trade and trade related provisions as stipulated by the following articles: Article 29 para.4, Article 44 para.15, Article 96, Article 106 para.3, Article 145 para.3, Article 147 para.3, Article 149 para.3 abs.3, Article 153, Article 154, Article 222 para.3, Article 326, Article 327 para.3, and Article 331 para.6 EU-UA AA.

⁴⁹ Article 465 para.2 EU-UA AA.

⁵⁰ Article 466 para.2 EU-UA AA. The Association Council is entitled to establish sub-committees (special committees or bodies) in any domain of EU-Ukraine contractual association.

⁵¹ Pursuant to Article 466 para.3 EU-UA AA, the Association Committee may create sub-committees (special committees or bodies) *only* in the context and scope of Title V (Economic and Sector Cooperation) of the EU-Ukraine Association Agreement.

⁵² Article 466 para.6 EU-UA AA.

⁵³ Article 467 para.1 EU-UA AA.

⁵⁴ Article 467 para.2 EU-UA AA.

⁵⁵ Article 467 para.4 EU-UA AA.

an obligatory way, on the decisions and recommendations of the Association Council⁵⁶, the Parliamentary Association Committee may make recommendations to this core association institution⁵⁷, in principle, on any matters of the association law and politics. Its activity can be supported by a respectively leveled sub-committee as established at the discretion of the Parliamentary Association Committee itself⁵⁸.

Remarkably, the association between the European Union and Ukraine is institutionally covered at a novel level of civil society participation. Drawing on the significant achievements of the multilateral Civil Society Forum⁵⁹ launched in 2009 in the framework of the Eastern Partnership, a *Civil Society Platform (CSP)* established with the EU-Ukraine Association Agreement⁶⁰, will serve as a forum for meeting, mutual information, exchange of views between representatives of Ukrainian and EU's organized society. Flexible in organizational⁶¹ and operational⁶² terms, the Civil Society Platform will become an effective locus of information circulation in both top-down⁶³ and bottom-up⁶⁴ directions. As such, it will keep Ukrainian and EU societies informed of the implementation of the association agreement and, at the same time, gather their input therefor. In the context of the latter function, the Civil Society Platform can make informed recommendations to the Association Council⁶⁵. Activity of the CSP is notable in the overall context of the civil society cooperation that constitutes an integral part of EU-Ukrainian contractual association (as per Articles 443 to 445 EU-UA AA). Involvement of civil society will also be encouraged, pursuant to the agreement (Articles 421 and 438 EU-UA AA), in the context of Ukraine's policy reforms, but also social and cultural dialogue. It is worth noting that the EU-Ukraine Association Agreement also endows the Eastern Partnership Civil Society Forum⁶⁶ with advisory functions in the area of sustainable development of trade relations that have to be carried out without prejudice to the role of the Civil Society Platform⁶⁷ as established under Article 469 EU-Ukraine AA.

As revealed above, the institutional system of the EU-Ukraine association presents a genuinely upgraded and empowered functional and operational framework that covers distinct political, executive, parliamentary and civil society dimensions of association policy-making. Unlike the EU-Ukraine PCA-established bodies, the association institutions launched under the EU-Ukraine Association Agreement, will be endowed with full decision-

⁵⁶ Article 468 paras 1 and 2 EU-UA AA.

⁵⁷ Article 468 para.3 EU-UA AA.

⁵⁸ Article 468 para.4 EU-UA AA.

⁵⁹ For more details on the *Eastern Partnership Civil Society Forum*, cf.: <<http://www.eap-csf.eu>> .

⁶⁰ Article 469 para.2 EU-UA AA.

⁶¹ Except for the obligation to hold a rotating chairmanship (according to Article 469 para.4 EU-UA AA), the Civil Society Platform (CSP) is free to determine its composition (as regards Ukrainian part – on the EU's part these are representatives of the European Economic and Social Committee that have to be members of the CSP) and frequency of meetings (Article 469 para.2 EU-UA AA).

⁶² Pursuant to entitlement granted by Article 469 para.3 EU-UA AA, the CSP is free to establish the rules of procedure on its own.

⁶³ Article 470 para.1 EU-UA AA.

⁶⁴ Article 470 para.3 EU-UA AA.

⁶⁵ Article 470 para.2 EU-UA AA.

⁶⁶ Article 299 EU-UA AA.

⁶⁷ Article 299 para.4 EU-UA AA.

making capacity, including the power of enforcement (through binding decisions), which will make them active and influential actors in implementation of the truly innovatory and enhanced association programme. To put it otherwise, contractual association between the EU and Ukraine will be advanced through the genuinely ‘empowered’ institutional ensemble. Such an empowered institutional machinery will make the integration-oriented association approach – which is herewith claimed to be followed by the EU’s new association politics towards the countries in its eastern vicinity – workable in practice, similarly to how the European Economic Area institutions have done by now⁶⁸. Under this angle, the institutional framework of the EU-Ukrainian association might be regarded to as an integration-oriented centre of bilateral decision-making. In a way, Ukraine, as well as the other two associated countries in the EU’s eastern vicinity, will be granted therewith the possibility to not only import and implement the EU’s *acquis* but also to develop it through shared spaces and practices of policy-making, even without the formal stake in the Union’s internal decision-making machinery. Ultimately, participation in the EU’s agencies and policies, as launched by the agreement, does not presuppose passive ‘downloading’ of the ready-to-use policy templates. Inclusion via networking, information sharing, and enhanced advocacy possibilities would thus facilitate the translation of ‘joint ownership’⁶⁹ into the area of association politics as well as help mitigate the effects of still vibrant repercussions of ‘exclusionism’ for Ukraine, but also the Republic of Moldova and Georgia, as regards their so far neglected membership aspirations.

Conclusions

Given that the European Neighbourhood Policy, which provides the framework for the current new association policy of the EU, is itself conceived as a long-term policy, it will be acknowledged that the EU-Ukraine Association Agreement is deemed to create a durable contractual link, rather than present a time-limited deal prone to early and/or regular renegotiation, as for instance the 1994 Partnership and Cooperation Agreement. As such, it certainly required a strategically devised implementation framework and powerful institutional machinery. This article reveals that, after a lengthy intra-institutional negotiation process in Ukraine, the ‘centralised’ or ‘Cabinet-based’ model has been chosen to follow in order to effectively implement the EU-Ukrainian association deal. A renewed national executive system of policy coordination in the domain of Ukraine’s European integration, legislative approximation and overall implementation of the EU-Ukraine Association Agreement has been established.

⁶⁸ Drawing i.a. on the imperative of application and implementation of the Agreement on the European Economic Area in conformity with current and future developments of EU law that has to be ensured by way of legally binding decision-making of the EEA institutions, Maresceau (2010: 3) qualifies the latter ones as ‘*integration-oriented elements*’ of EU-EFTA association: ‘Through common EEA institutions such as the EEA Council, the EEA Joint Committee and through specifically created EFTA institutions such as the EFTA Surveillance Authority and EFTA Court with as a main task to ensure that the EEA obligations are respected by the EFTA countries, an institutional machinery is available to make an integration-oriented approach workable in practice’ (Maresceau 2010: 3).

⁶⁹ As introduced with the Commission’s 2004 European Neighbourhood Policy Strategy Paper, cf: European Commission (2004: 8).

The complexity of the agreement's scope and its legal nature of a mixed agreement in the EU legal order, with durable and far-reaching effects for EU's and Ukraine's legal systems within the framework of international law, almost by default provides for complexity of the agreement's application and implementation both before its full enactment and thereafter. In the pre-enactment or provisional application phase, the current 'bad moves' such as postponement of agreement's provisional application, bear not only political and geopolitical consequences, but also trigger perilous developments towards legal uncertainty, with straightforward implications for the agreement's legal effects, including problematic retroactivity of the EU-Ukrainian association law.

Conceived in mid-2014, the EU-Ukrainian association law and policy presents a domain of far-reaching economic integration and political association, short of EU membership, and a sample of sophisticated institutional engineering. Permanent monitoring and enforcement mechanisms, anchored in the complex legal drafting of the EU-Ukraine contractual association, will safeguard the respective level of alignment (in foreign and security policy, but also area of justice, freedom and security) and compliance (predominantly in DCFTA matters, but also in terms of general premises of the agreement – EU's principles and values shared with Ukraine). The institutions of EU-Ukrainian enhanced association, in contrast to the ones active under the previous PCA framework, will be endowed with a full-fledged decision-making power, including the power of enforcement through legally binding decisions. The very peculiarity of this reinforced and empowered institutional machinery is to be derived from their ability to further develop the association law and thus advance the level of integration beyond the scope determined in the agreement. This allows arguing that the developed implementation model, along with the conception and dynamic empowerment of the association institutional setting, are essentially relying on extensive integration-oriented elements. As such they are deemed to dynamically implement the EU-Ukraine association agreement, while advancing not only the very scope of the association law, predominantly through enabled rulemaking capability, but also mitigating the effects of exclusionism, through the inherent powers to advance the overall political association and economic integration framework, including the status of bilateral relationship between the European Union and Ukraine.

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