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THE IMPACT OF THE EU ACQUIS AND VALUES ON THE INTERNAL LEGAL ORDER OF UKRAINE

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Introduction

One of the main forms of the European Union's (EU) co-operation with third countries and international organisations is treaty-making practice. The European Neigbourhood Policy proclaimed by the European Union in 2003 - 2004 envisages the conclusion with neighbouring countries, including Ukraine, of new agreements aiming to deepen the parties' integration. By means of concluding such agreements the EU is going to form around it the area of stability and economic, political and legal cooperation. The EU law becomes one of the most powerful legal instrument for the creation of such an area.

Therefore, research into the effect that EU law has on the character and content of international agreements of the European Communities (EC) thus creating the legal prerequisites for the expansion of the acquis beyond the EU is a topical problem for the contemporary science of international and European law and its resolution can have practical implications. However, there have been practically no publications analyzing these issues. So, the author of this research paper is seeking to fill the existing gap.

The PCA as a legal instrument for the expansion the acquis into the legal order of Ukraine

The penetration of EU primary and secondary legislation into third countries' legal orders is most often achieved as a result of the conclusion of international agreements whose provisions reproduce the prescriptions laid down in the treaties establishing European integration organisations in acts adopted by institutions of the European Union. However, by no means all international agreements concluded between the European Communities and third countries can ensure such penetration by provisions of EU law into the internal legal orders of non-member countries. The most typical kinds of international agreements capable of serving as a basis for provisions of EU law to penetrate into the internal legal orders of third countries are association agreements, partnership agreements, and also agreements on trade and co-operation. These may also include acts adopted by organs of the association or co-operation — namely, resolutions or conventions constituting part of the institutional mechanism of such agreements.

There are several major routes — through the conclusion of international agreements — for EU primary and secondary law to penetrate into third countries' legal orders: the incorporation of the provisions of EU law into international agreements or acts of co-operation bodies set up within the

framework of such agreements and references by the international agreements or by co-operation bodies' acts to provisions of EU primary and secondary law (the founding Treaties and Acts of EU institutions).

In this regard, association agreements and agreements on trade and co-operation may appear to be different from partnership and co-operation agreements in that the former, firstly, appear to reproduce a somewhat greater number of provisions of EU primary and secondary law and, secondly, the association or co-operation bodies created on the basis of their provisions are empowered to adopt binding acts containing the provisions of primary law of the European Union and references to secondary legislation acts of the European integration organisations.

As far as the reproduction of the prescriptions laid down in the treaties establishing European integration organizations is concerned some founding Treaty provisions intended to trace the major freedoms of the common market have been included in the PCA with Ukraine. For instance, Article 20 of the PCA reproduces Article 30 of the EC Treaty (exceptions to prohibitions or quantitative restrictions on imports between Member States), Article 41.1 in fact reproduces the provisions of or have references to Article 46.1 of the EC Agreement (lawful restrictions on the realization of the rights of establishment), Articles 46.3 almost entirely reproduces the provisions of Article 58.1 (the application by the Member States of their tax laws which distinguish between tax—payers which are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested), Article 48.3 reproduces the provisions of Article 56.2 (abolitions of all restrictions on free movement of capital between the Member States and the third countries) and Articles 48.6 - the provisions of Article 59 (the right of the Member State to take protective measures in order to alleviate difficulties in the functioning of the economic and monetary union). At the same time, the PCA does not contain any references to provisions of EC legislation on economic relations in many other sectors of the common market. Furthermore, acts adopted by the cooperation bodies do not envisage the incorporation of EU institutions' acts into the internal legal order of Ukraine by way of transposition of or references to EU law rules therein.

Similar approaches have also been applied in all other European agreements on association with Central and Eastern European countries.

In our view, such a relatively rare occurrence of references to EU law rules in the PCA or acts of cooperation bodies may be explained by the fact that the European integration is being extended within the European Union to the Ukraine with taking into consideration the transitional character of its economy. National economy of Ukraine needs to be gradually adapted to legal regulation mechanisms of the European Union. Therefore, the body of the EC's *acquis communautaire* to be accepted by Ukraine so as to be able to create preconditions for its further integration into the EU.

In this connection, there arises a question to what extent the EU legal order is capable of influencing the legal order of Ukraine.

Inasmuch as some of the PCA provisions, which apply to entrepreneurial activity and investment, expressly define rights and duties for natural and legal persons in respect of the right of employment (Article 24), non-discrimination of enterprises, including those who render services in Ukraine through their commercial representatives (Articles 30.2, 43), the right of enterprises to enjoy the key personal (Article 35), and the right to access the market of international maritime transport and shipment on commercial bases (Article 39), there arises the question whether it is possible to implement these provisions judicially.

It is to be noted that, being an international agreement, the PCA envisages the creation of an international legal mechanism for regulating disputes between the EC and Ukraine under the provisions of Article 96. Such mechanism is the Cooperation council. The Cooperation council may also settle disputes of natural and legal persons but only on condition that one of the parties intends to raise such an issue at a meeting in the framework of this body. As is evident from the practice of relations between Ukraine and the EU, this mechanism for settling disputes is currently used in administering a prevailing majority complains against violation of the PCA. This looks reasonable. The matter is that the EU representatives who were drafting the PCA did their best to prevent the parties from treating PCA provisions as directly applicable. At the same time the PCA contains a

number of provisions which meet the requirements set by the ECJ to those that may have direct effect. Though, the ECJ has not received any application so far as to the conformity of the PCA provisions with Ukraine with these requirements. It non the less pertains to the legal order of the EEC.

On the other hand, the PCA does include provisions that open opportunities for natural and legal persons to apply to national courts to defend their rights under the Agreement. In particular, Article 93 reads: "Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of other Party have access free of discrimination in relation to its own nationals to the competent courts or administrative organs of the Parties to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property."

Thus, the incorporation of the PCA into internal legal order of Ukraine only provides opportunities for the national courts to apply those provisions of Agreement that do not require the adoption of any subsequent measure for their implementation. Though, such opportunities may not be actually used unless there exist the respective mechanisms or judicial practice.

It should be noted that, prior the conclusion of the PCA, Ukraine had already adopted legislative acts that envisaged the application of international agreements by the national courts. The possibility of applying rules of international law by courts is also implied by Article 9 of the Constitution of Ukraine. The Constitution also provides for the direct effect of its provisions (Article 8). The respective mechanism for this application has been created by now. However, Ukraine's legislation does not contain any provision that would stipulate the operation of norms of international customary law within the internal legal order. It should also be pointed out that neither the Constitution nor any other legislative act has a provision as to what status acts of international organizations should enjoy in the internal legal order of Ukraine.

All the above mentioned is fully applicable to the effect of provisions of EU law in the internal legal order of Ukraine. The further process of Ukraine's integration into the EU will necessarily require the introduction of the respective provisions into the internal legislation so that Ukraine could create the preconditions for the operation of primary and secondary legislation of the EU within the internal legal order. The main emphases should be made on the mechanism for applying rules of the international and the EU law within the internal legal order.

ECJ rulings on the effect of the provisions of the EC international agreements in the internal legal orders

EC law rules referred to or reproduced in international agreements and acts of co-operation bodies set up within their framework raise the question in regard to the interpretation of these provisions and a possible direct effect of some of them on the EC's legal order as well as the legal orders of the third countries parties to these agreements. So, it would be appropriate to enlarge specifically upon the most important issues connected with the interpretation of the EC's international agreements in the context of the effect that the EC's law rules have on the legal orders of third countries.

As seen from the practice, the power to interpret provisions of the international agreements between the Community and non-member States is vested in courts and other authorities specifically established by the parties on the basis of such agreements and also in the ECJ. The competence of these judicial authorities and co-operation bodies is based on provisions of the respective international agreement and the EC Treaty.

There exist some means to ensure that international agreements of the Community are interpreted in accordance with EC law rules. In particular, the EC's international agreement as such may provide the ECJ with jurisdiction to interpret its provisions so as the provisions could be appropriately applied in the third countries parties to this agreement. An example of such an approach is the First Agreement Establishing the European Economic Area, which recognized the relevant jurisdiction of the ECJ. However, in view of the ECJ, such jurisdiction would be consistent with the EC Treaty only if the ECJ judgments are binding upon the parties of the mentioned agreement. Thus, a separate mechanism to settle disputes between the parties with

the ECJ involvement has been created within the Second Agreement on the European Economic Area, which is currently in force.

Furthermore, nothing prevents the parties to the EC's international agreement from giving the international court a jurisdiction to interpret relevant provisions of the agreement. According to the ECJ, the international court's judgments, if they do not contradict the European integration organisations, may be binding upon Community institutions, including the ECJ itself. In its Opinion 1/91, the Court noted, in particular, that the EC's competence in international matters and its legal capacity to conclude international agreements generate inevitably the powers to seek decisions before a court established on the basis of the agreement concerned or defined by the agreement as empowered to interpret or apply provisions of such agreements.

As noted above, within the limits of its powers, specified by the founding Treaties on the European integration organisations, the ECJ has on occasions had to deal with issues of interpretation of the EC's international agreements with third countries and international organisations. Although such judgments of the ECJ relate first of all to the effect that the international agreements have on the legal order of the European Union, they have also an indirect bearing upon the issues of applying the provisions of the agreements in the respective contracting States.

The ECJ case law in regard to the interpretation of the EC's international agreements on trade, co-operation, partnership, and association arises from the necessity to ensure a uniformed and harmonized application of law of European integration organizations within the Community. To some extent, this is also true for provisions of the EC's international agreements, since the agreements to which the EC is a party become an integral part of Community law and its legal system as soon as they come into force. The incorporation of EC's international agreements into the EU legal system suggests that provisions of these international documents acquire the character of rules of Community law in accordance with the objectives of this law. Considering the character of these rules as rules of Community law, the interpretation and effect of the provisions of the international agreements should not be dependent on the legal order of any particular Member State — that is, where, for instance, they have direct effect within one legal order and not have it within another. In accordance with this interpretation, the effect of these provisions should not depend on whether their implementation is within the competence of Community institutions or its Member States.

As is known, the power to ensure the harmonized and uniformed application of law of European integration organisations is vested in the ECJ—namely, it should interpret the provisions of the EC's international agreements as an integral part of the Community law. However, the situation with the ECJ's interpretations of the international agreements concluded by the EC with third countries and international organisations is not unambiguous. Here, we should bear in mind that the ECJ has no direct jurisdiction under the EC Treaty to interpret the EC's international agreements. It does have the power to do this, where the interpretation of the international agreement has to determine whether the act of the EC's institution is valid or how the act itself should be interpreted, if it has to deliver preliminary rulings in respect of such acts (Art. 234(l b) of the EC Treaty) in instances where the EC is recognized as a legal successor of its Member States in an international organisation (in the case of the GATT). According to the ECJ, such an interpretation is to ensure the application of the relevant provisions of the international agreements between the EC, on the one hand, and third countries or international organisations, on the other, within the European integration organisations.

Admittedly, the interpretation given by the ECJ to the EC's international agreements is not binding upon non-member States of the European Union. However, it can actually have a considerable influence on the interpretation of the relevant provisions of the agreements on co-operation with the EC in the countries parties to such agreements, since this helps to clearly determine the content and character of the norms laid down in the agreement. In other words, the interpretation of the EC's international agreements given by the ECJ within the European Union has also an indirect effect on the issue of applying their provisions in the States parties to the agreements with the Community.

We should mention the general approaches by the ECJ to the interpretation of an international agreement as part of EU law. They are based on a special attention which the ECJ attaches to the objectives and the context of the document concerned. Provisions of the agreement are analyzed in terms of its object and the goal. The ECJ is also to take into consideration the general spirit of the agreement and the terminology used therein. It has taken the view that the effect that the provisions of the international agreement have within the legal system of the European Union should be determined with taking into account the international origin of such agreements. The parties to the agreement may, in accordance with the principles of international public law, determine clearly what effect the provisions of the agreement have within the parties' legal orders. In practice, the parties have rarely resort to such means and, therefore, where they have not done it, the ECJ is likely to deal with the issue. This, in its turn, would raise a problem of interpreting the international agreement.

However, the ECJ may interpret international agreements within the context of the Community — namely, exclusively in the light of the relevant provisions of EU law — and may even not consider the international legal space within which the agreement remains to be in force. In this connection, it should be noted that the ECJ has very rarely referred in its rulings to generally recognized interpretation rules laid down in Article 31 of the 1969 Vienna Convention on the Law of Treaties.

In particular, when interpreting an international agreement within the context of the Community, the ECJ has repeatedly noted that the EC Treaty creates a new and unique legal order, though the Treaty itself was concluded in the form of an international agreement. The founding Treaty is a constitutional charter of the Community, which is based on the rule-of-law principle. The Member States have restricted their own sovereign rights. Community law has primacy over domestic law of the Member States and a great number of its provisions have direct effect. The EC Treaty sets forth certain aims and objectives to be implemented by means of establishing the common market and ensuring that the Member States' economic policies become closer to each other so as the national markets could be united into a common market having national-internal-market attributes. Provisions of the founding Treaty do not constitute a self-objective but rather just a means to achieve objectives of the EC by progressively advancing towards European unity. The ECJ has often referred also to specific features of the institutional structure of the founding Treaty and to the fact that the Community has in its disposal some organisational legal instruments to achieve a uniform application of EC law and a progressive elimination of distinctions in the Member States' legislation.

For these reasons, the ECJ has emphasized that the interpretation and application of the EC Treaty and similar provisions of an international agreement should be based on various approaches, methods and concepts so as to take into account the character of each of these agreements and their special objectives. Thus, the ECJ has found that various groups of international agreements to which the Communities are parties set forth the objectives that are different from and narrower than those of the Community. In contrast to the EC Treaty, such international agreements only provide for the parties' rights and obligations and do not ensure the delegation of sovereign powers to intergovernmental institutions established on the basis of the agreements. This is first of all true for agreements on free trade areas and co-operation agreements. A similar situation also exists with association agreements. However, to the extent to which these agreements are aimed at preparing the associated country for EU membership, they are closer to the EC Treaty than ordinary agreements on free trade and co-operation. Consideration should also be given to functions are performed by the respective provisions and the extent to which they agree with the functions of similar formulations of the EC Treaty.

In general, in the ECJ view, the interpretation of EC Treaty provisions may not be applied by analogy to provisions of other international agreements, even if the similar formulations are used in both agreements. As the ECJ has repeatedly noted, the use of the same terminology is not a sufficient ground for the application of the EC's case law to the provisions of the international agreement concerned. Such an approach by the ECJ to the interpretation of the EC's agreements should be borne in mind since the EC's international agreements on trade, partnership, co-operation, or associations with third countries reflect to some extent the formulations of the EU primary and secondary law. Therefore, the interpretation of

provisions of one of these agreements may be of importance for determining the content of other international agreements.

As regards the concept of direct effect of the EC's international agreements within the legal order of the EU and the legal orders of the third countries parties to these agreements, it should be noted that the ECJ has, in its practice, reviewed its preliminary conclusions and found that there is no need to defend the existence of an interdependence between the direct effect that the international agreement with the third country has within the legal order of the Community and the effect it has within the legal order of the country concerned. At the same time, the Court emphasizes the importance of the balance of interests or mutual benefit, etc. Step by step, the ECJ has come to a conclusion that international agreements with non-member States may have direct effect within the legal order of the EC. It is so, even if this creates for subjects of third countries' national law a more favourable regime within the territory of the EU that the regime existing within the legal order of third countries for subjects of law of European integration organisations where the third country has not recognized the direct effect of provisions of the international agreement in its territory. For this purpose, the ECJ has proceeded from the concept of a common approach within the Community.

In determining whether any particular provision of an international agreement is of direct-effect character, the ECJ has applied-the same criteria on which the direct effect of EU law rules is based. According to the Court, provisions of an international agreement concluded by the Community with third countries should be regarded as having direct effect if, considering the formulations as well as the aim and the character of the agreement itself, these provisions contain clear and distinct obligations that do not require any further act for these obligations to be implemented or applied.

In the Court's view, decisions of Association Councils should meet the same requirements as those set for the purpose of determining direct effect of provisions of the EC's international agreements.

It should be noted that the Court's practice of determining whether EU law rules have direct effect is of great significance, since EU law contains a considerable body of legislative acts (regulations and directives) to be implemented in respect of international agreements. It is generally believed that, if provisions of these acts of Community secondary legislation have direct effect, this removes the necessity to find out whether the international agreement which these provisions implement has direct effect by itself. However, the issue of an international agreement's direct effect becomes especially relevant if no implementing act has been adopted

Noteworthy is the fact that only in several cases the ECJ has found that provisions of the associated agreements and Association Councils' decisions directly connected with provisions of these agreements — as their aim is to implement them — have direct effect. Furthermore, the Court has not denied that this approach may also be applied to free trade area agreements. Recently the ECJ recognized that even the provisions of the partnership and cooperation agreements may have direct effect. It is worthy of note that the ECJ's conclusion was based on one of general principles of international law concerning a *bona fide* application of provisions of each agreement — this principle is laid down in Article 26 of the Vienna Convention on the Law of Treaties. As the ECJ has noted, in the absence in the agreement itself of special provisions on implementation, international law does not point to legal means necessary for implementing obligations of the parties to the full extent. Therefore, each party to the agreement decides on this issue individually. Accordingly, the situation where the legal system of one of the parties to the agreement recognizes direct effect of the international agreement concerned, whereas the legal system of the other party does not is a mere reflection of those independent approaches to which each party to the agreement resorts while using the means for its implementation. Such a situation is not in itself a sufficient indication of an absent reciprocity in implementing of the international agreement concerned. In particular, if the agreement aims to promote the economic development of one of the parties, the absence of the parties' balance of obligations may be built in the very character of the agreement. In the ECJ view, it may be similarly believed that, where the parties have established a special institutional mechanism for consultations and negotiations for implementing the international agreement, this does not necessarily mean an essential exclusion of the possibility for direct effect of the document's provisions.

Programme-like provisions of an international agreement can hardly meet the standard requirements set in regard to rules of direct effect. However, the ECJ considers that this may not prevent an Association Council's decisions specifically aimed at implementing the programme-like provisions of the international agreement from having direct effect. Furthermore, any failure to make the Association Council's decision public may not be regarded as the ground for depriving natural or legal persons of the powers which such a decision confers upon them. Finally, the presence of provisions envisaging the power to apply relevant safeguards — which authorizes the parties to derogate from certain provisions of the agreement — is not in itself sufficient so as to exclude essentially the possibility of recognizing that these provisions have direct effect. This suggests that the ECJ's conclusion is based on the fact that neither the character nor the structure of the agreement establishing a free trade area prevents its provisions from having direct effect in the legal system of the Community.

The direct effect of the Association Council's decision may not be changed on the ground that the rights of natural or legal persons should be provided for in provisions of the Member States' domestic legislation. The ECJ has noted that provisions of the Association Council's decisions are just intended to elucidate the Member States' obligations regarding the taking of those administrative measures which may become necessary for the implementation of these provisions without entrusting the Member States with powers to impose requirements or restrictions in regard to the application of clear and unconditional powers conferred by the Association Council's decisions.

Another important question associated with direct effect of the EC's international agreements is whether this direct effect is horizontal or vertical. It should be noted that the founding Treaties of European integration organisations contain many provisions that may have horizontal or vertical direct effect concurrently. Such a character of provisions of these agreements has been recognized in spite of the fact that their addressees are the States. This argument may also be used in interpreting other international agreements to which the Communities are parties. However, the ECJ case law on this issue is rather insignificant. To some extent, the recognition of the vertical and/or horizontal direct effect of international agreements depends on what acts of the EC's secondary legislation have applied for implementing the provisions of such agreements. Commonly, regulations have concurrently horizontal and/or vertical direct effect. The ECJ considers that secondary legislation, which serves as a means to implement international agreements, should be interpreted in best possible consistency with provisions of the agreements concerned.

Of importance for determining whether provisions of international agreements concluded between the Community and other subjects of international law have direct effect is the ECJ legal policy. The latter is seen from the influence caused by the controversial character of the ECJ rulings concerning the interpretation of the EC's primary and secondary law rules on the respective provisions of international agreements; from the ECJ uncertain conclusions to the effect that the meaning of certain provisions of international agreements should not necessarily be determined by analogous provisions of the founding Treaties of European integration organisations or by the EC's secondary legislation; from the cases where similar provisions of the EC's international agreements are interpreted differently, etc. The issues which the Court have had to deal with in this connection relate to the consistency and effectiveness, institutional structures of the agreements, dispute resolution mechanisms, mechanisms for providing a uniform interpretation, unconditional character of the obligations under the international agreements, the reciprocity principle, etc. In our opinion, the main explanation for the Court's contradictory approaches to interpreting international agreements seems to be its intention to protect the EC's and the Member States' interests in their relations with other subjects of international law, which is likely to give rise to conflicts between the EC and the third countries parties to the agreements concerned.

Conclusions

Thus, in entering into international agreements with third countries, the EC has widely relied upon the practice of including into such agreements the provisions analogous by its content to those which are fixed in acts of primary and secondary legislation of European integration organisations or which contain

references to the EC's legislative acts. This, in its turn, sets stage for the penetration of the EC's law rules as fixed in international agreements into the internal legal orders of the respective third countries. International agreements of the Community may provide for direct effect of the EC's law rules both within the legal order of the European Union and that of the third countries. The criteria for direct effect of provisions of the EC's international agreements have been worked out by the ECJ. Though, they only relate to the effect that law of European integration organisations may have within the legal order of the European Union.