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CONUNDRUM OF MIGRATION ISSUES IN THE EU-UKRAINE ASSOCIATION AGREEMENT

The article focuses on issues relating migration provisions in EU-Ukraine Association Agreement. It analyzes the Title III of Ukraine–EU Association Agreement on "Justice, Freedom and Security" that aims to regulate migration issues between the EU and Ukraine. The EU-Ukraine Association Agreement includes a general provision on the mobility of workers stating that the existing facilities of access to employment for Ukrainian workers accorded by Member States under bilateral agreements "should be preserved and if possible improved" and other Member States shall examine the possibility of concluding similar agreements. In this regard, such articles as the Article 16 concerning cooperation on migration, asylum and border management, the Article 17 concerning treatment of workers, the Article 18 concerning mobility of workers and the Article 19 concerning movement of persons are of a high importance for this aspect of multilateral relations.

Key words: EU, Ukraine, Association Agreement, migration, free movement, direct effect.

The Ukraine–European Union Association Agreement is a treaty between the European Union (EU), Euratom, the EU's 28 Member States and Ukraine that establishes a political and economic association between the parties. AAs represent a relatively new instrument used by the EU in the context of the European Neighbourhood Policy (ENP). Having launched the first one in 2004, their key objective is to facilitate a closer political association and economic integration with the countries within the EU 'Neighbourhood' and thereby promote stability and security in the region. The Eastern Partnership initiative, a strand of the ENP, was launched in 2009 and focuses on strengthening EU cooperation with the six Eastern European countries – Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine[1].

The agreement with Ukraine has not yet entered into force, but some parts of it are being applied provisionally. The Agreement, with its The Deep and Comprehensive Free Trade Area (DCFTA), is no silver bullet to cure Ukraine's political system and economy of all their problems. However, its provisions do interfere with a substantial part of Ukraine's political and economic reform agenda. Since the provisions of the Agreement and DCFTA are numerous and quite complex, there will be a lot of 'learning by doing' processes for both Ukraine and the EU. One important feature of it is that there are some notable flexibility and scope in fulfilling the commitments, with procedures in place for extending the timetable and amending the detailed legislative references if both parties agree.[2]

The political provisions of the treaty were signed on 21 March 2014, shortly followed by the economic part of the Ukraine–European Union Association Agreement on 27 June 2014.

The EU-Ukraine Association Agreement comprises in total over 1200 pages and consists of a Preamble as an introductory statement of the Agreement, setting out the its purpose and underlying philosophy; seven Titles which concern: General Principles; Political Cooperation and Foreign and Security Policy; Justice Freedom and Security; Trade and Trade related matters (DCFTA); Economic and Sector Cooperation; Financial Cooperation with Anti-Fraud Provisions, as well as Institutional, General and Final Provisions; 43 Annexes setting out EU legislation to be taken over by a specific date and three Protocols[3].

As of January 2016 the Agreement has been applied provisionally (Titles III, V, VI and VII, and the related Annexes and Protocols have been provisionally applied since 1 November 2014, while Title IV has been applied from 1 January 2016).

Title III of Ukraine–EU Association Agreement relates to "Justice, Freedom and Security". The EU

[1] Adarov, A., Havlik, P. (2016). Benefits and Costs of DCFTA: Evaluation of the Impact on Georgia, Moldova and Ukraine. *Joint Working Paper*.
[2] Emerson, M., Movchan, V. (2016). *Deepening EU-Ukrainian Relations: What, why and how?* Centre for European Policy Studies and Institute for Economic Research and Policy Consulting.
[3] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014). *OJ L 161,* 3-2137.

and Ukraine commit through to increase their dialogue and cooperation on migration, asylum and border management. Quite important aspect is the introduction of a visa free travel regime for the citizens of Ukraine that is to be provided in due course, given that all conditions for well-managed and secure mobility are in place.

The title makes a special on such the provisions of the Article 16 concerning cooperation on migration, asylum and border management, Article 17 concerning treatment of workers, Article 18 concerning mobility of workers and Article 19 concerning movement of persons.

Pursuant to Article 16, the Parties of the Association Agreement "reaffirm the importance of joint management of migration flows between their territories and shall further develop the comprehensive dialogue on all migration-related issues, including illegal migration, legal migration, smuggling of and trafficking in human beings, as well as the inclusion of migration concerns in the national strategies for economic and social development of the areas from which migrants originate". The cooperation will, in particular, focus on: tackling the root causes of migration, pursuing actively the possibilities of cooperation in this field with third countries and in international fora; admission rules, the rights and status of persons admitted, and the fair treatment and integration of lawfully-residing non-nationals; developing an effective return policy, including in its regional dimension; exchanging views on the informal employment of migrants, etc.

According to Article 17, "treatment accorded to workers who are Ukrainian nationals and who are legally employed in the territory of a Member State shall be free of any discrimination based on nationality as regards working conditions, remuneration or dismissal, compared to the nationals of that Member State".

In accordance with Article 18, "the existing facilities of access to employment for Ukrainian workers accorded by Member States under bilateral agreements should be preserved and, if possible, improved".

Pursuant to Article 19, "the Parties shall ensure the full implementation of: the Agreement between the European Community and Ukraine on the Readmission of Persons of 18 June 2007; the Agreement between the European Community and Ukraine on the Facilitation of the Issuance of Visas of 18 June 2007. The Parties shall also endeavour to enhance the mobility of citizens and to make further progress on the visa dialogue. The Parties shall take gradual steps towards a visa-free regime in due course, provided that the conditions for well-managed and secure mobility, set out in the two phase Action Plan on Visa Liberalization presented at the EU-Ukraine Summit of 22 November 2010, are in place".

What concerns the treatment of workers, Article 17 of the EU-Ukraine Association Agreement states that subject to the laws, acts and procedures applicable in each Member State and the EU, workers who are Ukrainian nationals and who are legally employed in the territory of a Member State shall be treated free of any discrimination based on nationality with regards to working conditions, remuneration or dismissal, compared to the nationals of that Member State. Conversely, this applies equally to EU nationals legally employed in Ukraine. The explicit and clear commitment in this provision ("shall be free") goes beyond previously applied Article 24 PCA Ukraine which only stated that the parties 'shall endeavour to ensure' non-discrimination for legally employed nationals of the other party. Since Article 17 of the EU-Ukraine Association Agreement is identical to Article 23 PCA Russia (which states that the Union and its Member States 'shall ensure' non-discrimination), it can be argued that, in the light of the ECJ's Simutenkov ruling[1], it lays down "in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating on grounds of nationality, against Ukrainian workers vis-a-vis their own nationals". Considering that the Court already confirmed the direct effect of provisions identical to Article 17 in other association agreements, it is obvious that the "purpose and nature" of EU-Ukraine Association Agreement nothing prevents Article 17 from acquiring direct effect. Therefore, this provision can be relied upon by a Ukrainian national lawfully employed in the territory of a Member State before any of its courts as a basis for requesting that court to disapply discriminatory provisions.

Despite the Commission proposal for a single Decision on the basis of Article 217 TFEU,[2] the Council opted to 'split off' the provision relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (i.e. Article 17 EU-Ukraine AA). This provision formed the subject of a separate Council Decision adopted on the basis of Article 79(2)(b) TFEU, which

[1] Case C-265/03, Simutenkov, [2005], ECR I-02579; see also Hillion, C. (2008). Annotation: Case C-265/03, Simutenkov'. *Common Market Law Review, 45,* 815–833.

[2] European Commission. *Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part* (2013).

refers to the rights of third-country nationals residing legally in the Union[1].

In this context, it has to be noted that the Council Decisions on the signing the EU-Ukraine Association Agreement include a remarkable provision stating that "the Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals" (Article 7 of the Council Decision on the signing 2014/668/EU of 23 June 2014)[2]. This reference fits in a recent trend whereby the EU precludes direct effect of its international agreements, especially of their trade-related provisions.

The option of the 'split legal basis' for the EU-Ukraine AA is a very unusual procedure and not undisputable. The preamble of these Council Decisions state that "the aim and content of [Article 17 AA] is distinct from and independent of the aim and content of the other provisions of the Agreement to establish an association between the parties". Under G.Loo's opinion this is a rather weak legal argument to justify a separate Council Decision for Article 17 AA[3]. It is difficult to see in the light of the ECJ case-law on the absorption doctrine how the aim and content of Article 17 is "distinct from and independent of" the broad objectives and content of the other provisions of the EU-Ukraine AA[4].

Although the non-direct effect provision in the Council Decisions regarding the EU-Ukraine Association Agreement – arguably – targets the trade-related provisions of this agreement (i.e. the Deep Comprehensive Free Trade Agreement (DCFTA), it also covers the other Association Agreement's provisions, including Article 17 on treatment of workers. However, this does not necessarily imply that the direct application of this non-discrimination clause is automatically excluded[5].

Contrary to recent EU Free Trade Agreements, the EU-Ukraine Association Agreement does not include a general clause that precludes direct effect of the entire Association Agreement. Instead, only some specific DCFTA provisions are prevented from acquiring direct effect by provisions in the main text of Association Agreement. Thus, direct effect of other EU-Ukraine Association Agreement's provisions, such Article 17, is only excluded through the approving Council Decisions. Even though it appears difficult for the Court to ignore the clear-cut instructions of the Council, the implications of these Council Decisions on the direct effect of Article 17 – and the other non-trade related EU-Ukraine Association Agreement's provisions – are far from being straightforward. As Advocate General Saggio observed in his Opinion in case C-149/96 Portugal v. Council [1999]: "it need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot – outside the system of reservations – limit the effects of the agreement itself"[6]. Arguably, the objective content of textual provisions of the agreement takes priority over wishes expressed in separate unilateral declarations. This seems to be in line with the rules of customary international law, according to which "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The text of the treaty is the primary source of interpretation, while external aids, such as preparatory work, constitute a supplementary source". As noted above, it appears that the "purpose and nature" of the EU-Ukraine Association Agreement paves the way for the direct application of its provisions. Moreover, it should be noted that the preclusion of direct effect of Article 17 would lead to a paradoxical situation where an old and less ambitious PCA with Russia could have more far-reaching direct legal implication than the EU-Ukraine Association Agreement.

[1] Council Decision 2014/669/EU of 23 June 2014 on the signing, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (2014). *OJ, L 278/6.*

[2] 2014/668/EU: Council Decision of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (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) and Titles IV, V, VI and VII thereof, as well as the related Annexes and Protocols (2014). *OJ L 278*, 1–3.

[3] Van der Loo, G. (2016). *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A new legal instrument for EU integration without membership*. Leiden, Boston, Brill Nijhoff, 170.

[4] On this point, see G. Van der Loo, P., Van Elsuwege, R. Petrov (2009). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument. *EUI Working Paper, LAW 2014/09,* 8.

[5] On this point, see G. Van der Loo, P., Van Elsuwege, R. Petrov (2009). The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument. *EUI Working Paper, LAW 2014/09,* 8.

[6] Judgment of the Court of 23 November 1999, Portuguese Republic v Council of the European Union, case C-149/96. *European Court reports 1999 Page I-08395*.

Remarkably, Council could have easily avoided this legal uncertainty regarding the direct effect of this non-discrimination clause without clearing the way for direct effect of the other (trade related) provisions.

As analyzed previously, a separate "split" Council Decision was adopted just for Article 17. This Decision gave the Council the option not to unilaterally exclude direct effect of only this single provision. However, the Council also included the same non-direct effect provision as in the other Council Decisions for the conclusion of the Association Agreement.

Thus, Article 17 seems to give Ukrainian nationals, legally employed in the EU, the same rights in the field of working conditions and remuneration as the Stabilization and Association Agreements (SAAs) and several Euro-Mediterranean Agreements Establishing an Association (EMAAs) grant to workers of, respectively, the Western Balkans and several Maghreb countries. However, this EU-Ukraine Association Agreement provision is less ambitious than its corresponding provision in the SAAs which additionally specifies that also the legally resident spouse and children of a worker legally employed in the territory of a Member State "shall have" access to the labour market of that Member State, during the period of that worker's authorized stay of employment.

In addition to the non-discrimination clause of Article 17, the EU-Ukraine Association Agreement includes a general provision on the mobility of workers stating that the existing facilities of access to employment for Ukrainian workers accorded by Member States under bilateral agreements "should be preserved and if possible improved" and other Member States shall examine the possibility of concluding similar agreements. Moreover, the Association Council shall examine the granting of other more favourable conditions in additional areas, "taking into account the labour market situation in the Member States and in the EU". Unfortunately, this can hardly be seen as a strong commitment on the part of the EU and its Member States.

The last important novelty concerns the Decision of European Council on Ukraine adopted in Brussels on 15 December 2016[1]. The Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one hand, and Ukraine, on the other hand, have decided to adopt the following provision, which is to take effect once the Kingdom of the Netherlands finally ratifies the Agreement and the European Union finalizes its conclusion: "while setting out the objective of enhancing the mobility of citizens, the Agreement does not grant to Ukrainian nationals or Union citizens, respectively, the right to reside and work freely within the territory of the Member States or Ukraine. The Agreement does not affect the right of Member States to determine volumes of admission of Ukrainian nationals to their territory in order to seek work, whether employed or self-employed"[2]. Thus, the above discussions and analyses are now clarified.

Given all the above, we can conclude that Title III of Ukraine–EU Association Agreement on "Justice, Freedom and Security" aims at regulating migration issues between the EU and Ukraine. In this regard the articles like Article 16 concerning cooperation on migration, asylum and border management, Article 17 concerning treatment of workers, Article 18 concerning mobility of workers and Article 19 concerning movement of persons are of a high importance for this aspect of multilateral relations.

At the same time, the application of Article 17 has some ambiguities. The European Court of Justice has already confirmed the direct effect of provisions identical to Article 17 of the EU-Ukraine Association Agreement in other association agreements. Moreover, it is obvious that the "purpose and nature" of EU-Ukraine Association Agreement does not prevent Article 17 from acquiring the direct effect. However, the Decision of European Council on Ukraine adopted in Brussels on 15 December 2016 states that "while setting out the objective of enhancing the mobility of citizens, the Agreement does not grant to Ukrainian nationals or Union citizens, respectively, the right to reside and work freely within the territory of the Member States or Ukraine". Therefore, this Article cannot have a direct effect, despite the case law and other indications in favour of that concept.

[1] *European Council Conclusions on Ukraine*. Brussels, 15 December 2016, 1-5. <http://www.consilium.europa.eu/en/meetings/european-council/2016/12/15-euco-conclusions-ukraine/>. (2016, December, 28).

[2] *European Council Conclusions on Ukraine*. Brussels, 15 December 2016, 1-5. <http://www.consilium.europa.eu/en/meetings/european-council/2016/12/15-euco-conclusions-ukraine/>. (2016, December, 28).

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