

THE EU-UKRAINE ASSOCIATION AGREEMENT AND THE 2016 REFERENDUM IN THE NETHERLANDS

Key words: *Association Agreement, European Union, Netherlands, Ukraine, ratification, referendum.*

Introduction. The European Union has long recognized the importance of bordering non-member states, particularly those in Eastern Europe. As a result, it has created various strategies and mechanisms in order to deepen its relationship with these countries and to achieve its strategic goals in its broader neighborhood. One of the latest and most comprehensive of these is the so-called „new generation” [1] of Association Agreements, such as the one signed between Ukraine and the European Union. However, as shall be seen, this Agreement was not universally welcomed by the whole population of the European Union, with particularly strong and organized opposition being found among a substantial segment of the Dutch population, leading to a citizen sponsored referendum in 2016 in relation to the ratification of the Association Agreement by the Dutch government. Here there shall be a brief overview of the background and character of this Agreement, and then a survey of the 2016 referendum that took place in relation to the issue, including its causes, results and consequences.

Background and Overview of the Association Agreement [2]. The basis of legal relations between the Soviet Union and the European Community had been the 1989 Trade and Cooperation Agreement (TCA), which was inherited by Ukraine, as well as the other former Soviet states, upon the attainment of independence [3]. However, this was an agreement relating only to matters of trade, seeking to encourage economic cooperation and investment, lacking a legislative approximation dimension [4]. In this context it was necessary for new agreements to be made with the post-communist states in order to establish parameters and frameworks which would act as the basis of future relations. With regards to the Central European countries that would later go on to become EU Members States, the Europe Agreements were created for this purpose [5]. In the case of former Soviet states such as Ukraine, it was acknowledged there was a need for a new, „intermediate type of agreement”, whose nature would go beyond the TCA, but which would not be as deep and comprehensive as the Europe Agreements [6]. As a result, on October 5 1992 a resolution was adopted by the Council of the European Union empowering the European Commission to conduct negotiations in order to create Partnership and Cooperation Agreements with the newly independent states that came into being after the fall of the Soviet Union [7], which would act as a mechanism in order to establish contractual bilateral relations [8].

Ukraine signed such an agreement with the European Communities on June

16 1994, and which came into force in 1998 [9]. This development may be described as the first great concrete legal manifestation of Ukraine's orientation towards and integration into Europe, and which acted as the initial basis for relations between Ukraine and the EU, a process which initially began with the recognition of Ukrainian independence by the European Community and its Member States [10]. As to its main, overriding goal, the Agreement stated that it aimed to strengthen the „links and to establish partnership and co-operation” between the European Community and Ukraine [11]. In addition, Article 51 stated that the parties recognize the importance of „the approximation of Ukraine's existing and future legislation to that of the Community. Ukraine shall endeavor to ensure that its legislation will be gradually made compatible with that of the Community” [12].

Eventually, however, it was decided that a more comprehensive and deeper framework for EU-Ukraine relations was needed, and so negotiations began on an Association Agreement in 2007 [13]. The European Union has a long tradition of signing Association Agreements with third parties, and their common characteristic is to establish an institutional and legal framework for developing close and privileged cooperation, particularly in the realm of politics and economics [14]. The Ukraine-EU Association Agreement follows in this tradition [15]. This Association Agreement, similarly to the ones signed by Georgia and Moldova, belong to the so-called „New Generation” of Association Agreements, which go beyond anything seen previously in this area, and its defining features have been described as „comprehensiveness, complexity and conditionality [16].”

It is comprehensive because it covers all aspects of EU-Ukraine relations [17]. It has been described as complex because it is ambitious, in that it wishes to integrate Ukraine into the EU internal market through establishing a Deep and Comprehensive Free Trade Agreement, which requires regulatory and legislative approximation to EU norms and standards [18]. And the conditionality aspect of the AA is very explicit, stating in the preamble that “political association and economic integration of Ukraine within the European Union will depend on progress in the implementation of the current agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas.”

The Agreement is divided into: The Preamble, plus Seven Titles, which are: 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; There are also 43 Annexes setting out EU legislation to be taken over by a specific date and Three Protocols [19]. The political provisions of the Agreement were signed on 21 March 2014 while the economic part was signed 27 June 2014, in the aftermath of the Euromaidan Revolution [20]. From January 2016 the whole of the AA has applied provisionally,[21] awaiting ratification by all Member States, the last of which to do so was the Netherlands [22].

2016 Referendum in the Netherlands [23]. Dutch law requires that in

order for an Association Agreement to be successfully ratified it must be approved by both the House of Representatives and the Senate, in line with the parameters set out in the 2015 Ratification Act [24]. On 7 April 2015 the Dutch Parliament's lower chamber approved the AA, which was followed by the Senate on 7 July, both with a large majority [25]. This was followed by royal promulgation by King Willem-Alexander on July 8 [26]. However, a hurdle was encountered in the ratification of the Agreement with the invoking of the right to a referendum on the issue within the framework of the Consultative Referendum Law which came into force in the Netherlands on 1 July 2015, which allows for citizen initiated referendums of a non-binding, advisory nature relating to treaties and laws adopted by the country's parliament, including EU treaties [27]. The law stipulates that with regards to the triggering of the referendum proposal, ten thousand signatures are required, and in order for the referendum to be officially announced and the campaigning to begin there must be the signatures of at least 300,000 citizens [28]. These criteria was successfully fulfilled by those who wished to put the issue of the ratification of the AA to a referendum [29].

A diverse and broad cross-section of Dutch politics helped to trigger the referendum procedure, including right-wing Eurosceptic, left-wing groups, environmentalists and anti-establishmentarians [30]. It must be pointed out that in fact many of the major participants in the referendum had interests and concerns which went beyond the Association Agreement, such as the desire to strengthen the democratic process in the Netherlands and also to stop any future EU enlargements, as well as some extreme eurosceptics who wish to see their country exit the EU in the future [31]. Arguments utilized during the course of the referendum debate included that the Association Agreement brought Ukraine closer to one day obtaining full EU membership, that the Netherlands would be dragged into the armed conflict taking place within Ukraine, which as a result would be problematic for its relationship with Russia, and also a fear of labor market competition [32]. Perhaps this was best put by one of the leaders of the campaign against the Association Agreement, Aryan van Dixhoorn, who said „We don't care about Ukraine” and that „A referendum on the exit of the EU has not been possible to date, this is why we shall use the options open to us to put future relations between the Netherlands and Brussels under pressure [33].” Indeed, the referendum caused alarm in the European Commission, with its President Jean-Claude Juncker stating that a rejection by voters of the Association Agreement „could open the doors to a continental crisis” [34] of which Russia would „pluck the fruits” [35].

The specific question on the ballot paper which voters were asked to respond to was „Are you in favor of or against the Act approving the Association Agreement between the European Union and Ukraine? [36]” 32.2 percent of eligible voters cast their ballot, which went beyond the 30 percent threshold necessary, with 61.1 percent voting against the Association Agreement [37]. The result of the referendum led to what one commentator has termed „an unprecedented situation” where an international EU agreement potentially could not come into force because a certain Member State was not able to ratify it, in this

case, because of the result of a non-binding referendum [38].

This placed Dutch Prime Minister Mark Rutte in a very difficult position, which was as the leader of the only country obstructing the full implementation of an Association Agreement considered of great importance to both the EU and Ukraine, which sets out the framework for their relations for years to come, while at the same time a substantial part of his own electorate had rejected ratifying the Agreement, something he could legally ignore, but which would undermine his democratic credentials. This was particularly crucial in light of the elections he was facing on March 15 of this year.

Response of the European Union. Needing to address the reality of both concerns, the Dutch government sought to gain certain concessions with regards to the understanding and interpretation of the Association Agreement, which led to the European Council Conclusions on Ukraine on the 15 December 2016 [39]. Firstly, the Conclusions affirm that “The aim of association agreements is to support partner countries on their path to becoming stable and prosperous democracies, and to reflect the strategic and geopolitical importance the European Union attaches to the regional context. Therefore, completing the ratification process remains a crucial EU objective [40].” However, it also states that “After having carefully noted the outcome of the Dutch referendum on 6 April 2016 on the bill approving the Association Agreement and the concerns expressed prior to the referendum as conveyed by the Dutch Prime Minister, the European Council takes note of a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council (Annex), which addresses these concerns in full conformity with the Association Agreement and the EU treaties [41].”

As a result, the following statement was made, “While aiming to establish a close and lasting relationship between the parties to the Agreement based on common values, the Agreement does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future [42].” In addition, it is stated that the Agreement “does not contain an obligation for the Union or its Member States to provide collective security guarantees or other military aid or assistance to Ukraine” [43], nor does the Agreement “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 [44].” Also, “The Agreement does not require additional financial support by the Member States to Ukraine, nor does it change each Member State’s exclusive right to determine the nature and volume of its bilateral financial support [45].”

It must be said that the abovementioned elements are not explicitly provided for in the Association Agreement, however the Dutch government wanted firmer statements with regards to these matters[46]. After obtaining these from its European Union colleagues, the Dutch government moved ahead with ratifying the Association Agreement. In February 2017 the Dutch House of Representatives

voted in favor of ratifying the Agreement. On May 23 debate began in the Senate of the Netherlands with regards to the Association Agreement, with a final vote held May 30, the result of which was 20 to 25 in favor of ratification of the Association Agreement [47]. Finally, on June 14 the law on the Association Agreement's ratification was officially published in the Netherlands [48]. The document is most likely to be ratified by the EU Council on July 11, with it finally coming into full effect on September 1 [49].

Conclusion. The reaction of a certain segment of the Dutch population to the EU-Ukraine Association Agreement and the utilization of domestic democratic mechanisms in response to the ratification of the Agreement serves to remind us that the European Union is composed of independent states, each with electorates that have the ability to express themselves through democratic processes. This democratic will, at times, may not always be in harmony with the broader push towards EU integration or the bloc's expansion of influence. In addition to the 2016 Dutch referendum, one need only look as far as the Brexit vote or the opposition of Belgium's Wallonia province to the EU-Canada trade deal to confirm this reality. At least with regards to the subject matter of this article, it may be said that despite the discomfort and tension caused by the results of the Dutch referendum, the various factors at work here, that is, the democratic will of the Dutch electorate and the broader aims and goals of the European Union and Ukraine, were taken into account and a compromise was reached seeking to balance the interests of the relevant parties, which has now led to the ratification of the Association Agreement by all EU Member States.

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Annotation

The article provides a brief overview of the EU-Ukraine Association Agreement and an analysis of the referendum held in the Netherlands in 2016 with regards to its ratification. This also includes a survey of the subsequent solution reached as a response to the results of the referendum.