

# **ASSOCIATION-CUM-INTEGRATION: THE EU-UKRAINE ASSOCIATION AGREEMENT AND ‘ASSOCIATION LAW’ AS AN INSTITUTION OF UKRAINE’S EUROPEAN INTEGRATION**

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*Summary: In the Court of Justice’s case law, association agreements have been recognised as forming part of the communitarian legal system since the famous ‘Haegeman’ judgment in 1974. The new-generation association agreements concluded by the EU with its Eastern neighbour states explicitly offer a ‘stake in EU law’ as one of the incentives for neighbour states to adapt to the Union’s normative transfer. Less pronounced are perspectives on ‘association law’ itself which derives from the respective association agreements, as a distinct normative order with its own regulatory content that can influence both the associated country’s legal system as well as the EU’s and its Member States’ legal orders. This article aims to address this gap in the literature by first defining and outlining the features of the EU ‘association law’ phenomenon; it then aims to provide an account of the legal nature, regulatory content as well as the legal institutional and functional features of the EU-Ukraine ‘association law’ derived primarily from the Association Agreement between the European Union, its Member States and Ukraine, which entered in force on 1 September 2017, as well as the burgeoning secondary association law, including joint-institutional acts. In what follows, the article will discuss the notion of EU ‘association law’ in the context of the European Neighbourhood Policy and the so-called ‘new-generation association agreements’. It will then outline the teleological nature and instrumental logic of the EU-Ukraine ‘association law’ as an institution of integration, just as it will also disentangle the many layers of the institution of ‘association law’ – from participatory to instrumental and integration-oriented association modalities.*

## **1 Introduction: European Union ‘association law’ as an institution of law**

In its 30th Annual Report on Monitoring the Application of EU Law (2012), the European Commission voiced its concerns about multiple

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incoming complaints on the application and interpretation of certain provisions of ‘the EU-Turkey association law’, in particular with regard to ‘the alleged violation by a number of Member States of the standstill clauses set out in the instruments governing the relations between Turkey and the European Union’.<sup>1</sup> A year later, by referring Austria to the Court of Justice on 16 October 2014, the European Commission initiated the infringement procedures against its Member State for the alleged non-compliance with the ‘EU-Turkey association law based on the Ankara agreement’.<sup>2</sup> These two cases marked the moment when an EU institution had *expressis verbis* embraced the notion of EU ‘association law’. Although the European Court of Justice had recognised the *association acquis*, ie the regulatory content of the EC/EU’s association agreements, as part of the EC/EU legal system long ago, it was indeed the inside-out perspective on the matter that has shaped by far the understanding of association law as a legal exercise in extending the regulatory content of EU law to third countries. The Court was quite explicit on this in a series of its judgments since the *Haegeman* (1974) dictum on association agreements forming part of the communitarian legal system.<sup>3</sup> However, both the implementation and interpretation of the Ankara Agreement, as well as the active engagement of the EU-Turkey Association Council in developing further the association *acquis*, revealed the trend of an interactionist, rather than one-way subordinate, relationship between the EU legal system and the EU-Turkey association law, thus endowing the latter with some features of a normative order-shaping institution *per se*. The variety of the EU’s contemporary and legacy association agreements concluded worldwide, which constitute all possible models of contractual association from ‘free trade plus 1% to membership minus 1%’, as famously put by the Commission’s first President Walter Hallstein, suggests that there is much more diversified interaction between the EU’s own and associated legal orders. This cannot but even further increase

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<sup>1</sup> Commission, ‘30th Annual Report on Monitoring the Application of EU Law (2012)’ Commission Staff Working Document SWD(2013) 433.

<sup>2</sup> Commission, ‘Commission Takes Austria to Court of Justice over Non-compliance with EU-Turkey Association Agreement’ (2014) (Press release) IP/14/1143 <[http://europa.eu/rapid/press-release\\_IP-14-1143\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1143_en.htm)> accessed 12 February 2015.

<sup>3</sup> In 1974, the ECJ ruled in the *Haegeman* case that the ‘Athens Agreement’ (the EC-Greece Association Agreement of 1961), including its protocols and annexes, ‘form an integral part of Community law’ from their entry into force. See Case 181/73 *R & V Haegeman v Belgian State* ECLI:EU:C:1974:41. When delivering judgment in the *Demirel* case in 1987, the ECJ confirmed that the provisions of association agreements ‘form an integral part of the Community legal system’. See Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400. A couple of years later, in 1990, the Court extended the scope of the stake of the (EU-Turkey) ‘association law’ in the EU’s legal system by deciding, in the *Sevince* case, that decisions adopted by Association Councils form part of Union law, as association agreements, as from their entry into force, themselves do. See Case C-192/89 *Sevince* ECLI:EU:C:1990:322.

‘the rising complexity of EU law’<sup>4</sup> and invite scholarly deliberations on the nature and effects of particular association laws and – proxy – legal orders, with their distinct teleology and regulatory content. Whereas legal and political scholarships have produced a number of analyses of the EC/EU’s association agreements, only a handful have attempted to study this type of EU agreement with third states from the perspective of socio-legal institutional analysis – ie treating ‘association law’ as a specific normative order. Along with the pioneering case of the Ankara association law,<sup>5</sup> the literature features accounts on the association law of the EU’s Stabilisation and Association Agreement with Bosnia and Herzegovina,<sup>6</sup> EEA law,<sup>7</sup> and, more recently, the EU-Ukraine Association Agreement.<sup>8</sup>

The European Union law perspective on the association agreements invites, inter alia, yet another differentiation between the levels of ‘association law’ norms.<sup>9</sup> Thus, the body of EU association law in each case can, in principle, be divided into the *primary law of association* agreed upon by the contracting parties themselves (ie Association Agreements, concluded as mixed agreements between the EU, its Member States and a third country) and the *secondary law of association* added by decisions of the joint body in the wake of primary law application and implementation (ie non-EU institutional acts, such as the decisions of respective Association Councils). Certainly, this (yet another kind of) primary and secondary law only further contributes to the rising complexity of EU law – but it is also necessary to understand the dynamics of it. A rather hesitant – though steadily increasing – use of the ‘association law’ term in the EU’s official institutional discourse,<sup>10</sup> accompanied by an all too infrequent account of

<sup>4</sup> Peter-Christian Müller-Graff and Ola Mestad (eds), *The Rising Complexity of European Law* (BWV Verlag 2014).

<sup>5</sup> Belgin Akçay and Sebnem Akipek (eds), *Turkey’s Integration into the European Union: Legal Dimension*. (Lexington Books 2013).

<sup>6</sup> Zlatan Meškić and Darko Samardžić, ‘The Application of International and EU Law in Bosnia and Herzegovina’ in Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer-Verlag 2015).

<sup>7</sup> Carl Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2016).

<sup>8</sup> Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration Without Membership* (Brill 2016).

<sup>9</sup> This kind of differentiation between the levels and kinds of contractual association norms is particularly popular in German literature, where the notions of ‘primary law of association’ (*‘primäres Assoziationsrecht’*) and ‘secondary law of association’ (*‘sekundäres Assoziationsrecht’*) feature quite frequently. See, for instance, Kirsten Schmalenbach, ‘Article 51 TEU and Article 217 TFEU’ in C Calliess and M Ruffert (eds), *EUV/AEUV Kommentar* (4th ed, Verlag CH Beck 2011) paras 16-33.

<sup>10</sup> The *EUR-Lex* (<http://eur-lex.europa.eu>) search for ‘association law’ returns so far only six relevant results, all of them being documents issued by the European Commission since 2013 which, as a matter of fact, exclusively deal with the ‘EU-Turkey association law’ (also known as the ‘Ankara association law’). See, eg, Commission Staff Working Documents SWD(2013) 433 of 22 October 2013; SWD(2015) 134 final of 9 July 2015; SWD(2016) 231

the notion in the scholarly literature, invite an effort to provide an operating definition of the term. Herewith, ‘EU association law’ is defined as *an institution of law that creates a distinct normative order embedded in both the EU’s and the third country’s legal systems and provides for two-way interaction between them, rather than one-way rule transfer*. Such an institutional-legal perspective encompasses not only the well-elaborated view from the literature on the transfer of EU law and norms to third states, but also the largely neglected facet of the effects that the EU’s international agreements<sup>11</sup> – and the related ‘association law’ orders – wield upon the European Union legal system and its Member States, as set out in the ECJ’s growing case law on the subject matter and the Commission’s statements.

Such an understanding of the EU ‘association law’ phenomenon draws on the synthetic structural-functionalist view of law-as-institution and the exercise of neofunctionalist extraterritoriality. The *institutional character* of European Union ‘association law’ is enshrined in the structure of legal authority (norms and practices) that frames the interpretation and implementation of the Union’s association agreements. The power of legal authority rests on prescribed action in a manner endowed with specific meaning (norm application) and sanction in the case of deviant (in)action (norm enforcement). Being action- and thus practice-related *law* – as a system of rules enforceable through social institutions to govern behaviour – can *itself* be treated as an institution.<sup>12</sup> La Torre<sup>13</sup> defines law-as-institution as ‘the constitutive rule or norm of a practice’ that is ‘the condition for the conceivability (*ex ante*) and perceivability (*ex post*), and hence possibility, of a sphere of action’. To put it simpler in the author’s own words: ‘The institution is here effective and structured praxis’.<sup>14</sup> Given that the exercise of such practice extends beyond the EU legal order strictly defined, this endows the *proxy* normative order of association law with the features of *extraterritoriality* and *functional extension* that is necessary to ensure the interaction between at least

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final of 15 July 2016. The first mention of the ‘association law’ notion used *expressis verbis* in EU-institutional, ie non-academic, discourse is apparently traceable to AG Trstenjak’s Opinion delivered on 13 March 2008 in Case C-204/07 P *CAS SpA v Commission of the European Communities* ECLI:EU:C:2008:175, where she clearly differentiated between the ‘implementation of the [EU-Turkey] Association Agreement and association law derived from it’, thus pointing to the distinct and institutionalised nature of the ‘association law’ phenomenon in the EU legal order.

<sup>11</sup> Mario Mendez, *The Legal Effects of EU Agreements* (OUP 2013).

<sup>12</sup> See, for instance, the following well-founded accounts on ‘law as an institution’, and ‘law as institutional normative order’: Massimo La Torre, *Law as Institution* (Springer 2010); Hamish Ross, *Law as a Social Institution* (Hart Publishing 2001); Maksymilian Del Mar and Zenon Bankowski, *Law as Institutional Normative Order* (Ashgate 2009).

<sup>13</sup> La Torre (n 12) 117.

<sup>14</sup> *ibid.*

three distinct legal orders – ie the EU’s own legal order, the national legal orders of EU Member States, and the third country’s legal order. De Búrca’s<sup>15</sup> neofunctionalist perspective on law finely embraces the idea of functional extension of EU law via the practice of ‘association law’, while building on such constructs as the instrumental self-interest of actors enjoying legal authority as a motivating force for integrationist behaviour, the substantial spill-over effect of adjudication in EU’s legal order, geographical spill-over, and extraterritorialisation of the Union’s law, etc. Scott’s<sup>16</sup> seminal pieces on the ‘extraterritoriality and territorial extension of EU law’ allow us to grasp the inside-out logic of European Union rule(s) travelling abroad. Although the author admits that ‘the enactment of extraterritorial legislation by the EU is extremely rare’, nevertheless, ‘the EU makes frequent recourse to a legislative technique that [can be] term[ed] territorial extension, in order to gain regulatory traction over activities that take place abroad’.<sup>17</sup> In a way, such practice of territorial extension enables the European Union ‘to govern activities that are not centered upon the territory of the EU and to shape the focus and content of third country and international law’.<sup>18</sup> This resonates with international relations and political science literature on the ‘functionalist extension’ of EU governance to the neighbour-state domestic orders.<sup>19</sup> The literature is, however, rather silent on the outside-in effects of the ‘association law’ normative bodies on the EU’s own and its Member States’ legal orders. The rising volume of the Court of Justice’s case law and institutional acts on this matter, as well as the distinct scope of the related regulatory content in each case, point to the need to include this aspect in scholarly deliberations on the nature of the European Union’s multiple and varying proxy normative orders of ‘association law’.

This article aims to address this gap in the literature by first defining and outlining the features of the EU ‘association law’ phenomenon; it then aims to provide an account of the legal nature, regulatory scope and content as well as legal-institutional and functional features of the EU-Ukraine ‘association law’ derived from the Association Agreement between the European Union, its Member States and Ukraine, which entered in force on 1 September 2017, as well as the burgeoning secondary association law, including joint-institutional acts. In what follows, the

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<sup>15</sup> Gráinne De Búrca, ‘Rethinking Law in Neofunctionalist Theory’ (2005) 12(2) *Journal of European Public Policy* 310.

<sup>16</sup> Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ (2014) 62(1) *American Journal of Comparative Law* 87; Joanne Scott, ‘The New EU ‘Extraterritoriality’’ (2014) 51(5) *CML Rev* 1343.

<sup>17</sup> Scott 2014 ‘Extraterritoriality and Territorial Extension in EU Law’ (n 16) 87.

<sup>18</sup> *ibid*, 89.

<sup>19</sup> See, for instance, Sandra Lavenex, ‘The Power of Functionalist Extension: How EU Rules Travel’ (2014) 21(6) *Journal of European Public Policy* 885.

article will discuss the notion of EU ‘association law’ in the context of the European Neighbourhood Policy and the so-called ‘new-generation association agreements’. It will then also outline the teleological nature and instrumental logic of the EU-Ukraine association law as an institution of integration, and will disentangle the many layers of the ‘association law’ institution – from participatory to instrumental and integration-oriented association modalities.

## **2 Association-cum-integration: the EU ‘association law’ in the context of the European Neighbourhood Policy and the new-generation association agreements**

The dilemma that the European Union faces when developing contractual links with its immediate neighbourhood is that of a choice between ‘enlargement or empire’, as densely featured in both public and political discourses in Europe and beyond. Whereas the first one presents the case of the EU’s inclusive approach, ie through establishing accession-oriented association relationships, the latter builds on a rather politicised premise of the EU’s exclusionary association below membership. As a matter of fact, association agreements – especially in their new-generation fashion – provide for a meaningful stake in EU law and the communitarian legal system, thus not being all that exclusionist per se. Furthermore, the elements that provide for sustainable and far-reaching interdependence between the EU and third states, such as Deep and Comprehensive Free Trade or Political Dialogue and Association, endow the new-generation association agreements with a more encompassing and inclusive rationale, thus stimulating integration through association – even if below the EU full-fledged membership level. The ‘integration through association’ (or ‘association-cum-integration’) approach is what characterises the new generation of the EU’s ‘association law’ that allows for a third country’s stake in EU law and the internal market, and it also gives EU Member States a stake in third countries’ legal systems. These features provide for the EU’s ‘special’ contractual association with the countries embraced within the European Neighbourhood Policy Framework.<sup>20</sup> Certainly, the asymmetry comes to profile that kind of legal system interaction, where the EU’s regulatory content is essentially extended to the neighbouring normative orders. The mechanisms of legislative and regulatory approximation extend the enforceable rule (*law export*) of the European Union to the associated neighbourhood. Export of norms and the extended normative impact do not indeed safeguard the (a) credibility or determination and (b) capability of neighbour state governments

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<sup>20</sup> Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014) 470-474.



to enforce the translation of these norms into domestic rule. Enforcement or compliance is only possible in conditions of effective regulatory impact, ie extended rule. Significantly, the *EuroNest* Parliamentary Assembly's 2013 resolution expressly pinpoints the difference between legislative and regulatory approximation and the challenge emerging from it for the EU's engagement in the neighbourhood:

the main challenge for the Eastern partnership countries does not lie so much in the approximation of their legal texts as in the transformation and adaptation of their respective administrations, justice systems and societies to the conditions necessary to ensure that the legislation is defective and well implemented.<sup>21</sup>

The 2009 Prague Eastern Partnership Summit had also been attentive to this issue. In its Joint Declaration, it designated new association agreements as tools for achieving greater legislative and regulatory approximation with the Eastern neighbours:

New Association Agreements, beyond existing opportunities for trade and investment, will provide for the establishment or the objective of establishing deep and comprehensive free trade areas, where the positive effects of trade and investment liberalization will be strengthened by regulatory approximation leading to convergence with EU laws and standards.<sup>22</sup>

Legislative and regulatory approximation is crucial to those partner countries willing to make progress in coming closer to the EU.<sup>23</sup>

Such a goal is truly ambitious and poses considerable challenges for the uniform interpretation and effective application of exported EU norms in the non-member states.<sup>24</sup> Yet it is truly difficult to assess the effectiveness of legislative approximation in the Eastern Partnership countries, which has been promoted by the EU for almost half a decade as a successful Europeanisation mechanism, while the regulatory element of the Union's influence in the neighbourhood evidently gains incremental significance.

<sup>21</sup> EuroNest Parliamentary Assembly, 'Resolution on Approximation of the National Legislation of Eastern Partnership Countries with EU Legislation in the Economic Field' (28 May 2013) para 6 <[www.euronest.europarl.europa.eu/euronest/webdav/shared/general\\_documents/third\\_ordinary\\_session\\_2013/Resolutions/resolution\\_econ\\_28052013\\_en.pdf](http://www.euronest.europarl.europa.eu/euronest/webdav/shared/general_documents/third_ordinary_session_2013/Resolutions/resolution_econ_28052013_en.pdf)> accessed 28 May 2016.

<sup>22</sup> Council of the European Union, 'Joint Declaration of the Prague Eastern Partnership Summit' 8435/09 (7 May 2009) para 5 <[http://ec.europa.eu/europeaid/where/neighbourhood/eastern\\_partnership/documents/prague\\_summit\\_declaration\\_en.pdf](http://ec.europa.eu/europeaid/where/neighbourhood/eastern_partnership/documents/prague_summit_declaration_en.pdf)> accessed 18 June 2015

<sup>23</sup> *ibid*, para 9.

<sup>24</sup> Adam Łazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration Without Membership in the European Union' (2008) 45 CML Rev 1433.

In terms of extending its regulatory governance (at least) to the ‘near abroad’, the European Union finds itself in a well-suited setting of premises, which include: first, the constitutionalised mandate for active engagement in external relations, along with the specific ‘transformative’ or ‘neighbour-state building’ mandate as set by article 8 TEU; second, successful evidence from ‘integration without membership’ attained via extending the EU’s regulatory governance to the countries of the European Economic Area and Switzerland; third, sophisticatedly devised and legally binding new regulatory mechanisms such as (enhanced) association agreements that include deep and comprehensive free trade areas; fourth, experience in building functional states by integrating them into the EU’s organisational and regulatory boundaries; and, fifth, a unique opportunity to stabilise the neighbourhood and mitigate the exclusionism effects by deploying a differentiated strategy and opening up European Union *law as an institution to share*.

Along with the introduced institutional and polity-related changes (abolition of the EU’s pillar structure), the Treaty of Lisbon innovatively constitutionalised the Union’s external relations with the neighbouring countries, including the neighbourhood policies. Inclusion of a legal basis for the European Union’s relations with neighbours into the primary law corpus, ie the founding treaties, is of crucial significance – as excellently explained by Hillion:

By constitutionalising it, the Lisbon Treaty has modified the *nature* of the Union’s neighbourhood policy, particularly in view of the mandatory language it contains. By locating it in the Common Provisions of the TEU, the treaty drafters have given a considerable prominence to neighbourhood policy in the Union’s action, confirming its all-encompassing dimension and endowing it with a bold *finalité* by reference to EU values.<sup>25</sup>

Along with the provisions of articles 3(5) and 21 TEU, which express an imperative for the action of the European Union in international relations to be guided by the values and principles that inspired its own creation and development, this is precisely article 8 TEU, which even further specifies and *oblige*<sup>26</sup> the Union to engage in its neighbourhood. The use of the ‘shall’ formulation in the article indicates that such an engagement is compulsory and thus constraining upon the Union’s institutions. Failure to comply, ie to act, on the part of the EU may be qualified as an unlawful ‘failure to act’ which is subject to judicial proceedings under

<sup>25</sup> Christophe Hillion, ‘The EU Neighbourhood Competence under Article 8 TEU’ (2013) 3 SIEPS European Policy Analysis 5 <[http://sieps.se/sites/default/files/2013\\_3epa.pdf](http://sieps.se/sites/default/files/2013_3epa.pdf)> accessed 17 June 2015.

<sup>26</sup> Schütze (n 20) 471.



article 265 TFEU before the European Court of Justice, in line with past practices. Hillion<sup>27</sup> denotes that, due to this peculiarity, ‘the exercise of the neighbourhood competence differs significantly from that of enlargement’ which is hardly a compulsory mandate under both primary and secondary EU law. Moreover, the exercise of an active neighbourhood policy (in the mode of ‘active’, or ‘constitutive’ engagement) is not subject to any conditions, wherefore [t]he neighbourhood competence could thus be equated with other EU common policies, such as agriculture, transport or the common commercial policy, which all involve a strong command for the Union to act’.<sup>28</sup> It is increasingly due to the rising effects of the internal/external security nexus that the conditionality approach is being made partly inappropriate: the Union’s strategic interests as security consumer (and not only provider) in the neighbourhood cannot be made dependent upon neighbour-states’ willingness and capability to cohere and comply. A proactive policy of neighbour-state transformation and extension of European regulatory governance to the neighbourhood is thus the rationale beyond the wording of article 8 TEU, the innovatory ‘transformative’ or ‘neighbour-state building’ mandate.<sup>29</sup>

Obviously, in order to accomplish such a programme of extended governance and simultaneous statebuilding, genuinely effective regulatory mechanisms are needed which would go beyond approximating standards (norms) and entail regulating or enforceable elements (rule). An enhanced version of contractual association agreements, encompassing deep and comprehensive free trade areas, is increasingly seen in the literature to present such a tool. In fact, the association agreements are probably the most extensively used legal instrument of EU external relations, ie the most recognisable EU foreign-political ‘brand’ – and, as such, it has experienced a genuine boom, or inflation, of ‘associated countries’, with the agreements concluded in the early 1960s with Greece and Turkey as the initial point of reference in this regard. In recent years, however, the European Union has developed a new, more ambitious model of contractual association that includes a deep and comprehensive free trade area. This new generation of agreements, primarily designed for regulating the EU’s relations with Ukraine, but lately also extended to Moldova and Georgia (as well as offered to other Eastern Partnership countries, but so far declined by Armenia and Azerbaijan), is sought to

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<sup>27</sup> Christophe Hillion, ‘Anatomy of EU Norm Export Towards the Neighbourhood: The Impact of Article 8 TEU’ in Peter Van Elsuwege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (Routledge 2014), 16.

<sup>28</sup> *ibid.*, 17.

<sup>29</sup> Andriy Tyushka, ‘Building the Neighbours: The EU’s New Association Agreements and Structural Power in the Eastern Neighbourhood’ (2017) 25(1) *Journal of Contemporary Central and Eastern Europe* 45.

embody what Gänzle<sup>30</sup> regards as the process of ‘externalising the EU governance’ beyond borders. As a matter of fact, this would mean, in structural-institutional terms, bringing the neighbouring countries as close as possible, although stopping short of granting them Member State status. Delcour and Wolczuk single out the explicitly regulative and truly transformative nature of the enhanced association agreements with the DCFTA components as their integral parts:

Deep economic integration is not just about legal and regulatory convergence with EU standards. [...]. DCFTAs thus give flesh to the EU’s blueprint for its neighbourhood policy. They are a ‘vital trade instrument for building up long-term economic relationships’ with Eastern neighbours and their impact goes far ‘beyond purely trade issues, also influencing the state of democracy, the rule of law and other common standards’ [...]. The EU thus bestows upon DCFTAs transformative power: they are expected to modernise partner countries’ economies and bring about broad political changes.<sup>31</sup>

Building long-term special relationships and the establishment of shared regulatory spaces, along with the granted stake in the EU’s internal market, are thus sought not only to transform the states in the neighbourhood according to a phenomenal (even though difficultly palatable and identifiable) ‘European statehood’ template, but also to serve as domestic legitimation and exclusionism mitigating narratives, primarily through the reflexive medium of (shared) law. The debates around the European Neighbourhood Policy strongly revolve around its ‘distinct-from-membership’ nature, which inevitably tends to frame the narratives of exclusionism and ‘otherness’ in the neighbouring countries. Calling for reconsideration of the concept of ‘neighbour’, Meloni contends that the current narrative of ‘this term, far from being uncontested, fundamentally implies an “othering” practice’.<sup>32</sup> Structured and possibly the closest policy-oriented cooperation, along with economic integration, framed by the discourse of shared law, may facilitate the reconstituting of the ‘we’ vs ‘non-we’ identities with the EU’s closest – direct – neighbours. In Smith’s firm belief, the ‘intensive structured dialogues with the most significant outsiders in [the neighbourhood] is a creative way of attempting to move “beyond boundary”’.<sup>33</sup> The boundaries of ins and outs, while ‘sharing

<sup>30</sup> Stefan Gänzle, ‘Externalizing the EU Governance and the European Neighbourhood Policy: Towards a Framework for Analysis’ (Paper prepared for the Annual Meeting of the Canadian Political Science Association, UBC, Vancouver, 4–6 June 2008) <[www.cpsa-acsp.ca/papers-2008/gaenzle.pdf](http://www.cpsa-acsp.ca/papers-2008/gaenzle.pdf)> accessed 21 June 2016.

<sup>31</sup> Laure Delcour and Kataryna Wolczuk, ‘Beyond the Vilnius Summit: Challenges for Deeper EU Integration with Eastern Europe’ European Policy Centre – Policy Brief, 31 October 2013, 4. <[www.epc.eu/documents/uploads/pub\\_3889\\_beyond\\_the\\_vilnius\\_summit.pdf](http://www.epc.eu/documents/uploads/pub_3889_beyond_the_vilnius_summit.pdf)> accessed 21 January 2015,

<sup>32</sup> Gabriella Meloni, ‘Who’s My Neighbour?’ (2007) 7 *European Political Economy Review* 24, 24.

<sup>33</sup> Michael Smith, ‘The European Union and a Changing Europe: Establishing the Bounda-

everything but institutions’, ought to incrementally get blurred, where the language of law, so to say, replaces the language of power, to paraphrase Kratochwil.<sup>34</sup> Ultimately, the associated states are by definition part of the European Union legal system, and this is the institution of European law, which the Union can effectively share with the associated neighbourhood.

### 3 The EU-Ukraine ‘association law’ as an institution of integration

For the entire past decade, the notion and scope of new contractual relationships between the EU and Ukraine have remained one of the most debated topics in academia and among policy makers. To a great extent, this was due to the agreement’s anticipated innovatory and model nature, yet it was sought to serve as a point of reference and actual ‘template’<sup>35</sup> for other agreements establishing enhanced association links between the Union and – the essentially non-associated eastern European – neighbourhood, given that some of the southern neighbour countries embraced by the ENP framework have already been contractually associated with the European Union.

The EU-Ukraine Association Agreement goes substantially ‘beyond and above’ the Union’s former Partnership and Cooperation Agreement with Ukraine, but also with regard to other association agreements that the EU has concluded with third countries across the globe. This is specifically the case because of the genuine integrative nature of the *institution of association law* established with the EU-Ukrainian association agreement. It enables not only a ‘stake in the EU internal market’, which is explicitly declared as an association objective, but also provides for an implicit ‘stake in the Union law’ as well, yet – by both the definition and EC/EU adjudication – the associated countries are part of the EU normative-legal system. Notably, the very process of European integration, which has led to the creation of the European Union, has been essentially driven by law. To agree with Eriksen:

The European integration process has been driven by law, which is a *reflexive medium* for solving problems and conflicts in modern societies. Law is a conscious and self-referential medium, which cannot be fully auto-poetic for a long time without ‘irritating’ (pace Niklas Luhmann) other social forces.<sup>36</sup>

ries of Order’ (1996) 34 *Journal of Common Market Studies* 5, 17.

<sup>34</sup> Friedrich V Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1995).

<sup>35</sup> According to the GAERC’s 2007 statement, ‘certain aspects of [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future’. See Press Release of the General Affairs and External Relations Council meeting on 18 June 2007, 10657/07 (Presse 138).

<sup>36</sup> Erik O Eriksen, *The Normativity of the European Union* (Palgrave Macmillan 2014) 5-6.

Neyer and Wiener also emphasise in this regard the ‘constitutive importance of law’<sup>37</sup> in the process of the most recent Eastern enlargement that was pursued via the EU’s pre-accession association. Similarly, the EU-Ukrainian enhanced association is built on the firm premise of association law that – translated into association politics – presents a potentially effective mode of ‘outsider’ integration, ie integration through law.

Against this backdrop, understanding of the substance and effects of association law and modalities of stake in EU law, including along the lines of the legal imperative of consistent (EU law-conform) interpretation of association law, is extremely significant for grasping the integrative nature of the EU-Ukrainian association model. Herewith, the notion of the *EU-Ukraine ‘association law’* is understood as a compound normative and regulatory corpus formed by the *primary association law* (the EU-Ukraine Association Agreement itself, including its Annexes and Protocols, as well possible future declarations and amendments) and the *secondary association law* (the burgeoning association legislation, including first and foremost decisions of the association bodies made in the wake of the application and implementation of the Agreement).<sup>38</sup>

Owing to the multi-layered and proxy constitutive structure of this specific body of law, its different position in the *hierarchy of norms* within the European Union’s and Ukrainian legal orders warrants special attention. Whereas the incorporation of international law, first and foremost in the form of international treaties (agreement), follows in the case of the European Union a seemingly monist approach, it is the semi-dualist approach that, to a certain extent, defines the Ukrainian legal system’s view of international law, thus necessitating the passing of legislation (law on ratification) that ‘translates’ the international agreement in question into Ukrainian law. In both cases, however, international agreements concluded by the EU or Ukraine, respectively, enjoy ‘supra-legislative’ status, thus prevailing over (legislative and non-legislative) acts of the

<sup>37</sup> Jürgen Neyer and Antje Wiener, *Political Theory of the European Union* (OUP 2011) 37.

<sup>38</sup> In view of the fact that the EU-Ukraine Association Agreement became fully enacted relatively recently (1 September 2017), the body of the EU-Ukraine association law does not yet feature considerable legislation and legal practice (secondary association law) – thus being mainly formed by the text of the association agreement itself (primary association law). This might invite thinking on the very existence of the EU-Ukraine association law as a premature idea. Such an approach, however, would inevitably neglect the nature and role of the existing multi-layered primary EU-Ukraine association law in creating a distinct legal order. Furthermore, the legal practice of EU relations with contractually associated countries would also suggest that both the nature and scope of the association agreement and the dynamic development, which it is exposed to on its application and implementation path, cannot deny the existence of a distinct normative order of association as such. As the practice of the Ankara Agreement since 1963 has showcased, the body of association law is a dynamic and evolving phenomenon, with secondary association legislation being – progressively – responsible for this throughout the agreement’s application and implementation framework.

European Union or Ukraine's legislative acts (both adopted in the anterior and posterior manner). At the same time, the concluded international agreements cannot have priority over Ukraine's national or the EU's supranational constitutive acts, ie the Ukrainian Constitution or the EU founding treaties, respectively. It follows that the EU-Ukraine primary association law (the provisions of the association agreement) prevails over the potentially conflicting provisions of the EU's legislative and non-legislative acts, as well as over those of Ukraine's national legislation. In the event of a collision of norms forming part of primary association law, on the one hand, with the EU's supra-constitutional norms or Ukraine's national constitutional norms, on the other, each of the latter two will be given priority.<sup>39</sup> In the hierarchy of law within the EU legal system, EU-Ukraine secondary association law is below primary association law, thus sharing – in a rather non-hierarchical fashion – the same position as the EU's institutional acts. In the Ukrainian legal system, the positioning is even more complicated, not least due to the so far missing precedents of this sort in practice, as well as the general characteristics of the dualist legal system which is not based on precedents; secondary association law, adopted in the wake of the EU-Ukraine Association Agreement's implementation, should enjoy the same level as the agreement itself. In a similar fashion, the positioning of EU-Ukraine primary and secondary association law will, too, differ in its third dimension, ie among the twenty-eight national legal orders of the EU Member States, depending on their – monist or dualist – approach to international law and the extent to which their national legal systems have meanwhile become 'Europeanised'. Therefore, the distinction between two levels of the EU-Ukraine association law has intrinsic practical repercussions for the (direct) application<sup>40</sup> and

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<sup>39</sup> Whereas EU case law has consistently held that international agreements concluded by the EU are binding upon its institutions (and, consequently, prevail over EU institutional acts), they cannot overrule or prejudice the EU's supra-constitutional meta-norms, ie the constitutional principles of the founding treaties, as ruled in the *Kadi* case. See Case C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461. On the possibilities and limits of incorporating international (association) law in the EU legal order, see Koen Lenaerts, 'Direct Applicability and Direct Effect of International Law in the EU Legal Order' in Inge Govaere, Erwan Lannon, Peter Van Elsuwegem and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Marc Mareseau* (Martinus Nijhoff Publishers 2014). On the challenges of incorporating association law in the Ukraine's constitutional order, see Roman Petrov, 'Constitutional Challenges for the Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia,' (2015) 21(2) *European Public Law* 241.

<sup>40</sup> In assessing the legal effects of the EU-Ukraine association law, as constituted by the dynamic body of primary and secondary legal norms and practices, two different, albeit intertwined, concepts need to be drawn into analysis: direct applicability and direct effect. The matters of direct effect with regard to the EU-Ukraine association law will be discussed below in the text (n 115). The question of the *direct applicability* of the EU-Ukraine Association Agreement and the enacted (as well as future) secondary association law in the form of Association Council decisions needs to be assessed distinctively (ie separately from one another) and individually (for each of the three normative orders involved). First, in the EU's case, the EU institutions are bound by the EU-Ukraine Association Agreement (as per the

(effective) implementation of the EU-Ukraine Association Agreement in the EU, its Member States and in Ukraine.

Beyond the text of the association agreement itself, the corpus of the *EU-Ukraine primary association law* also includes, since 2016, two further types of normative acts. This is reflected in the – so far – five-tier structure of the EU-Ukraine primary association law, now comprising:

- a) *the international – ‘mixed’ – agreement* concluded between the European Union, its Member States and Ukraine: the ‘Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part’ concluded on 21 March 2014 (Preamble, Article 1, Titles I, II and VII) and 27 June 2014 (Titles III, IV, V, and VII; related Annexes and Protocols), provisionally applicable since 1 November 2014 (Titles III, V, VI and VII – to the extent it is EU competence) and 1 January 2016 (Title IV – to the extent it is EU competence), fully effective since 1 September 2017;<sup>41</sup>
- b) *an additional international agreement* adopted in the form of ‘Decision’ made in the framework of the European Council: the ‘Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council’ of 15 December 2016, annexed to the European Council Conclusions on Ukraine;<sup>42</sup>

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Council Decisions listed in n 43 and n 44 below) and the resulting secondary association legislation. By virtue of its comprehensive nature and specific logic, the EU-Ukraine Association Agreement should, in principle, be able to be directly applicable (see Lenaerts (n 39) 45-46) – unless the contracting parties, either explicitly or implicitly, agreed otherwise in view of the necessary implementing measures. The question arises whether the stipulations of arts 5 and 3 of Council Decisions 2017/1247 (n 43) and 2017/1248 (n 44), respectively, can be interpreted as statements on the necessary further implementation measures. Second, the Decision of 28 EU Member States (n 42), adopted as a separate international agreement, pinpoints the concurrent ‘intention’ of the second party to this agreement not to render its provisions direct enforceability. Finally, third, in Ukraine’s case, it needs to be distinguished between the primary association law, which – by virtue of being part of Ukraine’s legislation (article 9 of the Constitution of Ukraine) – is potentially capable of being directly enforced, and the secondary association law, which most probably will necessitate implementing measures (laws) in order to be directly applicable.

<sup>41</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/3; Uгода pro Asotsiatsiyu mizh Ukrayinoyu, z odniyeyi storony, ta Yevropeyskym Soyuzom, Yevropeyskym Spivtovarystvom z Atomnoyi Energiiyi i jikhnimy derzhavamy-chlenamy, z inshoyi storony [Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part]. Verkhovna Rada, doc no. 984\_011 (version as of 30 November 2015) <[http://zakon3.rada.gov.ua/laws/show/984\\_011](http://zakon3.rada.gov.ua/laws/show/984_011)> accessed 7 November 2017. The texts of the EU-Ukraine Association Agreement in other official languages of the European Union are authentic and thus also form part of this tier of the EU-Ukraine primary association law.

<sup>42</sup> Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, annexed to the European Council Conclusions on Ukraine of 15 December 2016 (EUCO 34/16) <[www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf](http://www.consilium.europa.eu/media/24151/15-euco-conclusions-ukraine.pdf)> accessed 7 November 2017.



- c) *twenty-eight EU-Ukraine association agreement ratification documents* adopted by the EU Member States;
- d) *two EU institutional acts* on the conclusion and application of the association agreement: Council Decisions (EU) no 2017/1247<sup>43</sup> and no 2017/1248<sup>44</sup> of 11 July 2017 on the conclusion of the EU-Ukraine Association Agreement on behalf of the European Union;
- e) *the legislative act of the Ukraine's Verkhovna Rada* on the ratification of the EU-Ukraine Association Agreement: Law of Ukraine no 1678-VII of 16 September 2014.<sup>45</sup>

The Association Agreement between the European Union and Ukraine accounts for more than two thousand pages and is structurally composed of a preamble, seven parts, 43 annexes and 3 protocols.<sup>46</sup> Thereby, the provisions on economic and sector cooperation, including those on the establishment of a deep and comprehensive free trade area, account for nearly 95% of the whole agreement content (see Table 1 annexed for an illustrative structure and content outline of the main part of the EU-Ukraine Association Agreement).

The corpus of the *EU-Ukraine secondary association law* is largely in its inception stage. The EU-Ukraine Association Council, operative since 1 November 2014 (as per start of the agreement's provisional application), has issued up until now three – constitutive and procedural – decisions, including on the rules of procedure,<sup>47</sup> the establishment of two sub-committees,<sup>48</sup> and on the delegation of certain powers by the Association

<sup>43</sup> Council Decision (EU) 2017/1247 of 11 July 2017 on the conclusion, 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, 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 [2017] OJ L181/1.

<sup>44</sup> Council Decision (EU) 2017/1248 of 11 July 2017 on the conclusion, 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 provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party [2017] OJ L181/4.

<sup>45</sup> *Zakon Ukrainy pro Ratyfikatsiyu Ugody pro Asotsiatsiyu mizh Ukrainoyu, z odniyeyi storony, ta Yevropeyskym Soyuzom, Yevropeyskym Spivtovarystvom z Atomnoyi Energiyi i jikhnimy derzhavamy-chlenamy, z inshoyi storony* [Law of Ukraine on Ratification of the EU-Ukraine Association Agreement] Nr 1678-VII, 16.09.2014, *Vidomosti Verkhovnoyi Rady Ukrainy (2014) no 40, 2021*.

<sup>46</sup> See the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part OJ L 161/3.

<sup>47</sup> Decision No 1/2014 of the EU-Ukraine Association Council of 15 December 2014 adopting its Rules of Procedure and those of the Association Committee and of Subcommittees [2015/977] OJ L157/99.

<sup>48</sup> Decision No 2/2014 of the EU-Ukraine Association Council of 15 December 2014 on the establishment of two Sub-Committees [2015/978] OJ L157/110.

Council to the Association Committee in Trade configuration.<sup>49</sup> It may be assumed, however, that further secondary association legislation in the context of the EU-Ukraine Association Agreement is in traction – especially as regards the territorial scope of the agreement’s application in view of the ongoing conflict in Ukraine’s eastern region and the currently Russia-occupied territory of the Crimean peninsula. In a similar context of a frozen conflict, with the *de facto* state of the Pridniestrovian Moldavian Republic (PMR) existing, since 1990, within the *de jure* territorial jurisdiction of the Republic of Moldova, the newly operational EU-Moldova Association Council made one of its first decisions on the application of Title V (Trade and Trade-related matters) of the EU-Moldova Association Agreement ‘to the entire territory of the Republic of Moldova’.<sup>50</sup> The EU-Ukraine Association Council should be expected to regulate this aspect of the EU-Ukraine Association Agreement application as well – just as it will have to deal, at some point, with the issue of the unilaterally precluded direct effect of the agreement in the EU legal order as per Council Decisions (EU) no 2017/1247<sup>51</sup> and no 2017/1248,<sup>52</sup> as will be discussed below.

One may preliminarily conclude that the EU-Ukraine association law displays a double (r)evolutionary nature. First, the revolutionary nature of the EU-Ukraine Association Agreement itself, as a benchmarking contractual deal for the Union’s enhanced association policy, is essentially derived from its far-reaching teleology and integration-oriented elements of the agreement content. The latter is not narrowly framed by a classical FTA scope; nor is it constrained by the EU’s exclusive competences. Covering policy areas and issues that extend beyond the Union’s powers, it draws on complementary EU Member States’ commitments for providing broader framework of EU-Ukraine interaction and closer cooperation – and, as such, it opens up a new dimension of political dialogue, along with economic integration. Second, the evolutionary nature of both the primary association law and the burgeoning secondary association legislation endows this enhanced contractual association relationship with dynamic development tools. The latter come to be seen as crucial in leveling the EU-Ukraine relationship, as has already been advocated by the Ukrainian party in its efforts to put the perspective of a customs union

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<sup>49</sup> Decision No 3/2014 of the EU-Ukraine Association Council of 15 December 2014 on the delegation of certain powers by the Association Council to the Association Committee in Trade configuration [2015/980] OJ L158/4.

<sup>50</sup> Decision No 1/2015 of the EU-Republic of Moldova Association Council of 18 December 2015 on the application of Title V of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, to the entire territory of the Republic of Moldova [2015/2445] OJ L336/93.

<sup>51</sup> Council Decision (n 43).

<sup>52</sup> Council Decision (n 44).

between the EU and Ukraine on the table – not least in the framework of the most recent 2017 Eastern Partnership Summit in Brussels.<sup>53</sup> Future joint-institutional acts, adopted in the form of EU-Ukraine Association Council decisions on the (a) application, and/or (b) implementation of the EU-Ukraine Association Agreement, will only further contribute to the advancement of this bilateral integration-by-association agenda facing multiple internal and external challenges, including the challenge of legal interpretation of the shared legal provisions and political interpretation of the agreement's scope and teleological core. Already ahead of the November 2013 Eastern Partnership Summit in Vilnius, it became indispensable to dispel the myths about the EU-Ukraine Association Agreement, then expected to be signed in the wake of this high-level event held biannually, which were spread mainly by the Russian media and officials, as well as channelled throughout Europe, let alone Ukraine, by the extensive Russian propaganda machinery. Štefan Füle, then European Commissioner for Enlargement and Neighbourhood Policy, demolished many of the myths surrounding the public and political discourse of the EU-Ukrainian association deal, and the EEAS issued a memo paper thereon.<sup>54</sup> Füle put it quite unequivocally: 'We have been hearing a lot of myths recently about the impact of the AA/DCFTA: passing sovereignty to Brussels, costly exercise – absolute nonsense'.<sup>55</sup>

To make (any) sense of what the deal in fact implies, one would indeed have to scrutinise the legal, political and economic virtue of the agreement's content, which constitutes – along with being a source of the anchored formula of 'political association and economic integration' – a source of the association law per se, ie the legally binding framework for the establishment of a rules-based complex multi-layered normative order. The innovative nature of this association law not only consists in the fact that it is the first Eastern Neighbourhood Association Agreement ever drafted, but – more importantly – in the very acknowledgement that this is a genuinely comprehensive deal containing 'integration-oriented elements', and thus allowing access to and a '*stake in EU law*', to an extent similar to that of the European Economic Area. Secondly, the innovativeness is derived from the idea of an 'FTA+' (as it was initially called) or the 'DCFTA' formula that is – for the first time – designed to be sufficiently

<sup>53</sup> Poroshenko khoche chotyry soyuzy z Yevropoyu' [Poroshenko Aims at Four Unions with Europe]. *Dzerkalo Tyzhnia*, 24.11.2017 <[https://dt.ua/POLITICS/poroshenko-hoche-chotiri-soyuzi-z-yevropoyu-261276\\_.html](https://dt.ua/POLITICS/poroshenko-hoche-chotiri-soyuzi-z-yevropoyu-261276_.html)> accessed 24 November 2017.

<sup>54</sup> See, for instance, European External Action Service, 'Myths about the EU-Ukraine Association Agreement – Setting the Facts Straight' (23 May 2014) <[http://eeas.europa.eu/delegations/ukraine/documents/myths\\_aa\\_en.pdf](http://eeas.europa.eu/delegations/ukraine/documents/myths_aa_en.pdf)> accessed 25 May 2015.

<sup>55</sup> Štefan Füle, 'EU-Ukraine: Dispelling the Myths about the Association Agreement' (Speech at the International Conference 'The Way Ahead for the Eastern Partnership', Kyiv, 11 October 2013) <[http://europa.eu/rapid/press-release\\_SPEECH-13-808\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-13-808_en.htm)> accessed 16 July 2014.

flexible to allow the deep and comprehensive economic integration of Ukraine into the European Union's internal market, ie to allow a 'stake in the EU internal market'.

Innovatively enshrined in the treaty text itself, a kind of enhanced political association and economic integration formula can be derived through an analysis of the agreement content from two perspectives – political and economic: from the substantive provisions on the principles of association, political dialogue, free movement of goods, movement of workers, establishment and supply of cross-border services, to those on payments, capital, competition, and other economic provisions, energy cooperation as well as cooperation in other areas, as provided below.

Assessing the content of the EU-Ukraine Association Agreement and revealing its meaning, including that of the specific concepts it introduces into EU-Ukraine relations, such as 'association' and 'deep and comprehensive free trade area', requires the interpretation of its wording against the teleological rationale of the agreement and contextual background of both the EU's Ukraine policy and Ukraine's European integration policy, including in the agreement's post-signature stage. The 1966 statement of the International Law Commission holds that the 'interpretation of documents is to some extent an art, not an exact science'.<sup>56</sup> As such, it has to follow at least some principal general rules in order to be possibly similar and objectively 'understandable the same way' for both the parties of the treaties and the stakeholders, as well as interested third parties. Article 31 of the 1969 *Vienna Convention on the Law of Treaties* sets out the general rule for treaty interpretation which consists of: a) establishing the *ordinary meaning* of the terms implied, in their context and in the light of the treaty's object and purpose derived from both the body text and the wording of the preamble, annexes, protocols, etc; b) establishing a *special meaning* of the terms implied, which can be invoked by a party (burden of proof of the special meaning is herewith presupposed).

Hence, the interpretation of international treaties requires a *double approach* – a 'textual' (or 'literal') approach that prescribes the examination of the content of the treaty, and an 'effective' ('functional' or 'teleological') approach that gives no less weight to the supposed intentions of the parties, or the object and purpose of the treaty. The context should be taken into account in both cases, and it has to refer to both the events, acts and practices that preceded the conclusion of the agreement (pre-

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<sup>56</sup> Quoted after Antony Aust, *Modern Treaty Law and Practice* (3rd edn, OUP 2013) 205. For more on treaty interpretation cannons in legal scholarship, see Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers 2010); Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007).

signature context) as well as those subsequent to its enactment and implementation (post-signature context). In light of the aforementioned, the EU-Ukraine Association Agreement will have to be scrutinised herewith through its textual analysis, teleological and contextual analysis, followed by a discourse analysis. The meaning of the ‘association’ concept, a tailor-made formula for relations between the European Union and Ukraine, as well as that of the ‘deep and comprehensive free trade agreement’, constituting the second cornerstone of the association deal, will be explored and explained through an analysis of concept-relevant parts of the body text and the text of the annexes and protocols, including context and discourse, and will be mainly divided into two analytical parts: substantive provisions on ‘association’ and substantive provisions on ‘deep and comprehensive free trade area’ that are sought to correspond with the so-called political and economic dimension of the EU-Ukraine Association Agreement.

### **3.1 The teleology of the EU-Ukraine ‘association law’: an enhanced ‘political association’ and ‘economic integration’**

The EU-Ukraine Association Agreement has been the first of the drafted ‘new generation’ association agreements of the European Union to establish *a new and unique model of association* explicitly based on two components – (enhanced) political association and (the most far-reaching) economic integration that has ever bound a third country with the European Union. As remarked by the President of the European Council Herman van Rompuy,<sup>57</sup> this agreement is ‘the most advanced agreement of its kind ever negotiated by the European Union’. Pointers to the advanced and innovative nature of the EU-Ukraine Association Agreement are self-entailed in the agreement’s body text itself, which sets out the framework for an enhanced association via constitutive principles, aims and features.

Articles 2 and 3 EU-Ukraine AA lay down the premises of the association between the European Union and Ukraine, which is sought to be established on a twofold principles basis: democratic principles and principles of a free market economy. On the one hand, the essential constituting elements of the association agreement are entailed according to article 2 EU-UA AA in respect of *democratic principles*, human rights and fundamental freedoms, the rule of law, promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction, related materials and their means of delivery. On the other hand, progressive relationships between the EU and Ukraine, including

<sup>57</sup> H Van Rompuy, ‘Press Remarks by the President of the European Council following the EU-Ukraine Summit’ EUCO 48/13 (Brussels, 25 February 2013).

the establishment of a deep and comprehensive free trade area within the innovative association formula, grant centrality to the *principles of a free market economy* that pursuant to article 3 EU-UA AA should underpin this bilateral relationship; these also include, along with the re-emphasised rule of law, the principles of good governance, the fight against corruption, the fight against different forms of trans-national organised crime and terrorism, and the promotion of sustainable development and effective multilateralism.

Principled in this way, the association between the European Union and Ukraine aims at six objectives that constitute the teleological framework of this ‘ambitious and innovative’ relationship, as follows:

*Article 1. Objectives* [emphasis added]:

1. An association between the Union and its Member States, of the one part, and Ukraine, of the other part, is hereby established.

2. The aims of this association are:

- a) to promote *gradual rapprochement between the Parties based on common values and close and privileged links*, and increasing *Ukraine’s association with EU policies and participation in programmes and agencies*;
- b) to provide an appropriate framework for *enhanced political dialogue in all areas of mutual interest*;
- c) to promote, preserve and strengthen *peace and stability in the regional and international dimensions* in accordance with the principles of the United Nations Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990;
- d) to establish conditions for *enhanced economic and trade relations* leading towards *Ukraine’s gradual integration in the EU Internal Market*, including by setting up a *Deep and Comprehensive Free Trade Area* as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the *transition into a functioning market economy* by means of, inter alia, the *progressive approximation of its legislation to that of the Union*;
- e) to *enhance cooperation* in the field of *Justice, Freedom and Security* with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms;
- f) to *establish conditions for increasingly close cooperation in other areas of mutual interest*.

Interpretation of these provisions of article 1 EU-Ukraine AA, in light of the implicit purpose and explicit considerations that underpinned the



conclusion of this agreement, as *expressis verbis* enshrined in its preamble, will allow us to decipher the EU-Ukrainian ‘association formula’<sup>58</sup> as provided below.

### **3.2 Convergence-oriented participatory association: values, gradual rapprochement, increasingly close and open-ended relationship**

Based on the *values* that inspired the creation of the European Union itself and framed by a close and privileged relationship, the association between the EU and Ukraine is meant to bring about gradual rapprochement (up to genuine convergence) and increasing alignment of Ukrainian politics with the policies of the European Union, including committal participation in their implementation via respective programmes and agencies.

Given the overall *politically conditional* nature of the political association and economic integration of Ukraine with the European Union, which depends on progress in the implementation of the association agreement as well as ‘Ukraine’s track record in ensuring respect for common values, and progress in achieving convergence with EU in political, economic and legal areas’ (Preamble, indent 8 EU-UA AA), this association is based on a regime of extended (and thus monitored and controllable) – rather than simply exported – values of the European Union. Article 2 TEU determines that the Union is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’ that ‘are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. Similarly, Ukraine and the EU are bound to be committed, via association links, to a ‘close and lasting relationship’ that is based on these values, namely ‘respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, [and] human dignity’ (Preamble, indent 2 EU-UA AA). ‘Commitment to the principles of a free market economy, which would facilitate the participation of Ukraine in European policies’, which is added to the list of values within the same indent of the EU-Ukraine AA Preamble, as well as the anchoring thereof under the general principles section, pinpoints the overarching and inseparable nature of the free market economy principles for

<sup>58</sup> In contrast to a widely (mis)perceived understanding of association in purely political terms, this article elaborates on the *integral conception of ‘association’* that, in an integrative holistic way, encompasses ‘the political association and economic integration’ (as stipulated in indent 8 of the Preamble of the EU-Ukraine AA) of Ukraine with the European Union.

the integrative association concept. A separate enlisting of the common values, such as democracy, respect for human rights and fundamental freedoms, and the rule of law (Preamble, indent 7 EU-UA AA), with the remark that these are the ‘essential elements’ of the agreement, may signify that their observance will be strictly monitored and subjected to the general suspension clause which grants the Council of the European Union (according to article 218 para 9 TFEU) the right to suspend the application of an(y) association agreement in the case of a serious breach of its essential elements.

The ‘*gradual rapprochement*’ and ‘*increasingly close relationship*’ clauses – used throughout the agreement’s text body but also in a number of Council, Commission, and other EU institutional acts, along with the empowered institutional framework of the association<sup>59</sup> – endow this bilateral deal with the capability of being adjusted and updated according to the state of the art in the EU-Ukrainian relationship. Consequently, they provide for flexibility and dynamism but also the durability and stability of this innovative contractual association. This *finalité*-open formulation of both the substantive and strategic content of the association between the European Union and Ukraine is often lamented by policy makers, as well as by political scholarship, for being the agreement’s Achilles heel. This article considers such a substantive and strategic open-endedness, as anchored with the ‘gradual rapprochement’ and ‘increasingly close relationship’ clauses, as both a compromised tribute to persistent non-favourable political constellations, and a distinctive ‘enabler’ of, rather than a constraint to, a more ambitious stage of association relationship, including possible membership in the European Union. The interconnectedness and inter-determination of substantive and strategic open-endedness allow for the introduction of the strategic *finalité*, with a respective amendment to the substantive one, at a later stage of agreement implementation, with lesser procedural pressure – provided that the necessary political will is developed.

Therefore, notwithstanding a truly extensive substantive scope of economic integration that features the listed current (and also implied future) *acquis*, political association, in general, does not follow an exhaustive *substantive* rapprochement programme. Although the major scope for political association has been defined in the agreement, and includes enhanced political dialogue and convergence with EU policies in the domain of foreign and security policy as well as in the area of justice, freedom and security, no exhaustive and no restrictive agenda has been set therewith. In view of the unlimited duration of the EU-Ukraine Association

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<sup>59</sup> See, for instance, Andriy Tyushka, ‘Empowered to Deliver: The Institutional Model and Implementation Arrangements under the EU-Ukraine Association Agreement’ (2015) 15(1) Romanian Journal of European Affairs 5.

Agreement, a possible expansion of the substantive programme (in terms of both policy areas and scope of the policies themselves), ie a sort of substantive association ‘spillover’, is thereby conceived and envisaged. An empowered institutional framework of the EU-Ukraine association, which includes the Association Council, with its authority to issue legally binding decisions (pursuant to article 463 para 1 EU-UA AA), is sought to monitor the application and implementation of the agreement, as well as to review its functioning in light of its objectives (article 461 EU-UA AA). In doing so, the Association Council can detect further areas in which rapprochement would be necessary in pursuit of the association objectives – in particular, the objective of ‘establish[ing] conditions for increasingly close cooperation in other areas of mutual interest’ (article 1 para 2(f) EU-UA AA), or suggest a deepening of the treaty-designated political association areas.

Nor does the association follow a defined *strategic* rapprochement programme. The noncommittal formulation of the final objective in Ukraine’s gradual rapprochement with the European Union underpins the establishment of a bilateral relationship, which should be both special and privileged<sup>60</sup> (as compared to other cooperative links of the EU with third countries), gradually evolving and – in an ‘ambitious and innovative way’ – ever closer to the Union, but – in its current conception – stopping short of full membership. However, no prejudice or rigidity encrusts this formula, which is why the open-endedness of the strategic rapprochement programme should not be treated as a constraint to the ambitions of the parties per se. Indent 28 of the Preamble of the EU-Ukraine Association Agreement makes it clear that ‘this Agreement will not prejudice and leaves open future developments in EU-Ukraine relations’. Furthermore, the ‘evolving relationship’ clause, anchored in the Preamble’s first indent, posits that a ‘close historical relationship and progressively closer links’ between the EU and Ukraine ‘as well as their desire to strengthen and widen relations in an ambitious and innovative way’ are given due account by the current association agreement. References in the agreement to Ukraine’s ‘European choice’ and the EU’s welcoming thereof,<sup>61</sup> in conjunction with the ‘noted’ European identity of Ukraine and acknowledged

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<sup>60</sup> The ‘*privileged relationship*’ as established with the EU-Ukraine contractual association should be regarded as a status in flux since it may take different forms, ranging from little more than a free trade agreement to a level of integration which comes short of membership, as axiomatically postulated in the so-called ‘*Hallstein formula*’. Although the initial scope of association depends indeed on the outcome of negotiations, the actual status of such a privileged relationship is thus to be monitored and updated in line with the progress of economic and political rapprochement between Ukraine and the European Union. For more on the formats of the privileged relationship between the EU and Ukraine, see Andriy Tyushka, *Between Membership and Non-Membership in the European Union: Ukraine’s Actual and Potential Status* (LAP 2010) especially 65-119.

<sup>61</sup> EU-UA AA, Preamble, indents 5 and 6.

commonness of values,<sup>62</sup> denote that there are, in principle, no formal obstacles – in light of article 49 TEU<sup>63</sup> – for upgrading the relationship to the membership level, provided that substantial obstacles (the missing political will) will have been overcome as well. This fait accompli can be detected and established through the envisaged comprehensive review procedure. Following article 481 para 1 EU-UA AA, the planned comprehensive review of the achievement of objectives will take place within five years of the agreement's entry into force, ie by the end of 2022. The flexibility of this clause, which stipulates that the objectives' achievement review may take place earlier 'at any other time by mutual consent of the Parties' (article 481 para 1 EU-UA AA), lays down the premises for the even earlier possibility to upgrade the association goals to an 'accession association', and thus ultimately define the strategic *finalité*. The latter will have to be followed by a respective upgrade of the substantive rapprochement programme under the introduced accession association.

### **3.3 Instrumental association: political dialogues, convergence in FSP and AFSJ regulatory regimes**

Convergence-oriented participatory association, broadly conceived as outlined in the previous section, presents an overarching framework for the attainment of the programmatic 'political association and economic integration' (Preamble, indent 8 EU-UA AA). The programme of 'political association' extends, over political dialogue, to convergence-oriented reform policy and political alignment in manifold aspects of broader domains of foreign and security policy, as well as policy in the area of justice, freedom and security. Although not expressly defined by the agreement itself, political association, as an integral component of the EU-Ukraine association *sensu largo*, should not be misperceived as equalling political dialogue – the latter has its own objectives, including the deepening of political association (article 4 para 2(a) EU-UA AA). Nor does political association imply sole convergence in the field of foreign and security policy – the same article 4 para 2(a) EU-UA AA provides for 'political and security policy convergence and *effectiveness*' as goals of political dialogue. Consequently, the dialogue should serve the broader aim of political association, with rapprochement in policy and governance styles, as well as participation in their advancement, as implied objectives. Such a conception endows, therefore, the very political association with both a passive (political convergence or alignment) and an active (effectiveness-oriented policy) mandate for the implementation of the defined EU policies. In addition to dialogue and cooperation on domestic

<sup>62</sup> *ibid*, indents 3 and 4.

<sup>63</sup> Art 49 TEU, the '*EU accession clause*', determines that: 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. [...]'

reforms, as stipulated in article 6 EU-UA AA (which should still be carried forward on the basis of the EU's policy in the domain of the promotion of democracy and democratic institutions, as determined in article 14 EU-UA AA<sup>64</sup>), the European Union policies mandated for alignment within the EU-Ukrainian political association include: foreign and security policy,<sup>65</sup> promotion of peace and international justice (cooperation on criminal matters),<sup>66</sup> regional peace and stability,<sup>67</sup> conflict prevention and crisis-management policies, including military-technological cooperation,<sup>68</sup> non-proliferation of weapons of mass destruction,<sup>69</sup> disarmament, arms controls, arms export control and the fight against illicit trafficking of arms,<sup>70</sup> as well as the fight against terrorism.<sup>71</sup> A broad conception of these policies under the political association mandate is dictated by the expressed 'desir[e] of achieving an ever-closer convergence of positions on *bilateral, regional and international issues* of mutual interest, taking into account the Common Foreign and Security Policy (CFSP) of the European Union, including the Common Security and Defence Policy (CSDP)' (Preamble, indent 12 EU-UA AA [emphasis added]). Although not listed within Title II of the EU-Ukraine Association Agreement, political association should also imply compliance (the next stage of convergence, an 'enforceable convergence' that is singled out in both the agreement's chapter on 'trade-related energy' and the external regulatory framework – the Energy Community Treaty, EnCT) with EU energy policies, including the energy security policy that has a direct link to regional peace and stability. As expressed in the agreement's preamble, the EU and Ukraine are committed, under association links, to

enhancing energy security, facilitating the development of appropriate infrastructure and increasing market integration and regulatory approximation towards key elements of the EU *acquis*, promoting energy efficiency and the use of renewable energy sources as well as achieving a high level of nuclear safety and security (Preamble, indent 20 EU-UA AA).

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<sup>64</sup> In view of the fact that Title II of the EU-Ukraine AA (entitled 'Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy') entails cross-references to the next Title III 'Justice, Freedom and Security', it is reasonable to argue that the notion of 'political association' is not constrained by sole convergence in the field of foreign and security policy (as often mistakenly characterised), but encompasses wider policy alignment areas, including rapprochement in the governance styles themselves.

<sup>65</sup> EU-UA AA, art 7.

<sup>66</sup> *ibid*, art 8.

<sup>67</sup> *ibid*, art 9.

<sup>68</sup> *ibid*, art 10.

<sup>69</sup> *ibid*, art 11.

<sup>70</sup> *ibid*, art 12.

<sup>71</sup> *ibid*, art 13.

In light of further commitments under the EU-Ukraine association – including the commitment ‘to increasing dialogue [...] and cooperation on migration, asylum and border management, with a comprehensive approach paying attention to legal migration and to cooperating in tackling illegal immigration, and trafficking in human beings, and ensuring the efficient implementation of the readmission agreement’ (Preamble, indent 21 EU-UA AA) – and the recognised importance of mobility of persons (as per Preamble, indent 22 EU-UA AA) – the notion of political association will have to inevitably include policy domains that have not been listed under Title II of the EU-Ukraine AA. It would certainly be wrong to exclude from the political association scope further policy areas that are singled out under the separate title of the EU-Ukraine Association Agreement (Title III ‘Justice, Freedom and Security’), such as: migration, asylum and border management policy,<sup>72</sup> including the liberalisation of the movement of persons<sup>73</sup> and employed persons (workers),<sup>74</sup> money laundering and terrorism financing,<sup>75</sup> the fight against illicit drugs,<sup>76</sup> crime and corruption,<sup>77</sup> terrorism,<sup>78</sup> as well as judicial cooperation in civil and criminal matters.<sup>79</sup> These policies fall under the distinct regulatory regime within the EU governance system, and thus also enjoy a different status and regulatory framework under the EU-Ukraine Association Agreement, including the special opt-out regimes for some of the EU Member States. They will nevertheless constitute an integral substantive scope of political association between the European Union and Ukraine, since enhanced cooperation ‘in the field of Justice, Freedom and Security with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms’ (article 1 para 2(e) EU-UA AA) is defined as one of the six association aims. It should be noted, however, that the convergence-oriented provisions of political association in this field, ie the area of justice, freedom and security, as well as those of the domain of foreign and security policy, are unable to directly establish specific rights or obligations for individuals and legal entities, wherefore they cannot be directly applicable and enforced under the agreement itself. Compliance and enforcement mechanisms will be offered, however, through separate international legal and political frameworks, such as agreements or arrangements that have already been concluded and will be concluded within the scope of enhanced political association between Ukraine, the EU and its Member States.

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<sup>72</sup> *ibid*, art 16.

<sup>73</sup> *ibid*, art 19.

<sup>74</sup> *ibid*, arts 17 and 18.

<sup>75</sup> *ibid*, art 20.

<sup>76</sup> *ibid*, art 21.

<sup>77</sup> *ibid*, art 22.

<sup>78</sup> *ibid*, art 23.

<sup>79</sup> *ibid*, art 24.



The new bilateral relationship, established with EU-Ukraine political association links, is therefore sought to trigger enhanced convergence-oriented participatory cooperation (up to alignment) in the implementation of various EU policies within the aforementioned CFSP and AFSJ governance regimes, in addition to the well-articulated economic integration realm. Being in its essence policy-oriented, the political association will be achieved *inter alia* by way of deploying an enhanced political dialogue, which in turn is based on the general association rationale. The inextricability of causal relationships between association and political dialogue provides for a twofold interpretation of political association: on the one hand, such a policy-oriented association will be achieved through enhanced political dialogue (*political association* as a desired outcome of the dialogue) whereas, on the other hand, the association framework constitutes a prerequisite for political dialogue and its extensive regulatory mechanism (*association* as the premise for the dialogue).<sup>80</sup>

*Political dialogue*, as laid down by the EU-Ukraine Association Agreement, will 'promote gradual convergence on foreign and security matters with the aim of Ukraine's ever-deeper involvement in the European security area' and cover 'all areas of mutual interest [that] shall be further developed and strengthened between the Parties' (article 4 para 1 EU-UA AA). Thereby one should not be misled by a narrow reading of the 'European security area' as if implying an exclusively external or foreign security domain. The European security area encompasses an environment 'of increasingly open borders in which the internal and external aspects of security are indissolubly linked',<sup>81</sup> as defined in the 2003 *European Security Strategy*. As a result, both external security issues covered by the CFSP governance regime (such as terrorism, proliferation of WMD, regional conflicts), and internal security issues addressed within the AFSJ governance regime (state failure, including bad governance, corruption, abuse of power, weak democratic institutions and lack of accountability, along with organised crime) present threats to European security.<sup>82</sup> The EU's 2010 *Internal Security Strategy* binds the Union moreover to 'consolidate a security model, based on the principles and values of the Union: respect for human rights and fundamental freedoms, the rule of law,

<sup>80</sup> Against this backdrop but also including further arguments as provided above, this article contends that 'association' and 'political association' should be treated as distinct (but not diverging) concepts, with the subordination relationship in which '*association*' is a broader concept with political, legal and economic features that encompasses two subordinated notions – those of '*political association*' and '*economic integration*'.

<sup>81</sup> Council of the European Union, 'European Security Strategy: A Secure Europe in a Better World' (2003) 2 <[www.consilium.europa.eu/en/documents-publications/publications/2009/pdf/european-security-strategy-secure-europe-better-world/](http://www.consilium.europa.eu/en/documents-publications/publications/2009/pdf/european-security-strategy-secure-europe-better-world/)> accessed 22 June 2015.

<sup>82</sup> *ibid*, 3-5.

democracy, dialogue, tolerance, transparency and solidarity'.<sup>83</sup> A broad reading of the 'European security area' as a domain for Ukraine's 'ever-deeper involvement' (article 4 para 1 EU-UA AA) under the EU-Ukraine Association Agreement is therefore a key to comprehending the 'political association' concept and the implied internal-external security nexus as the domain for an enhanced political dialogue between the European Union and Ukraine. The objectives of political dialogue as listed in article 4 para 2 EU-UA AA make it clear that both internal and external security policies of the European Union are covered by the convergence and alignment mandate as set up under political association, since the political dialogue aims:

(a) to deepen political association and increase political and security policy convergence and effectiveness; (b) to promote international stability and security based on effective multilateralism; (c) to strengthen cooperation and dialogue between the Parties on international security and crisis management, particularly in order to address global and regional challenges and key threats; (d) to foster result-oriented and practical cooperation between the Parties for achieving peace, security and stability on the European continent; (e) to strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, and to contribute to consolidating domestic political reforms; (f) to develop dialogue and to deepen cooperation between the Parties in the field of security and defence; (g) to promote the principles of independence, sovereignty, territorial integrity and the inviolability of borders (article 4 para 2 EU-UA AA).

In order to achieve those aims, political dialogue should be conducted at distinct levels and on both a regular and permanent basis. Article 6 EU-UA AA defines the eligible fora for the conduct of political dialogue, including a regular, ad hoc, and permanent basis. *Regular* frameworks include (a) meetings at Summit level (article 5 para 1 EU-UA AA), (b) meetings between representatives of the Parties at Foreign Minister level (article 5 para 2 EU-UA AA), (c) meetings at Political Directors, Political and Security Committee and expert level, including on specific regions and issues, between representatives of the European Union on the one hand, and representatives of Ukraine on the other (article 5 para 3(a) EU-UA AA), as well as (d) meetings both at the level of high officials and of experts of the military institutions of the Parties (article 5 para 3(c) EU-UA AA). *Permanent*

<sup>83</sup> Council of the European Union, 'Draft Internal Security Strategy for the European Union: Towards a European Security Model' 5842/2/10 (Brussels, 23 February 2010) 8 <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205842%202010%20REV%202>> accessed 22 June 2015.

political dialogue should be conducted (a) at ministerial level, within the Association Council format (article 5 para 2 EU-UA AA), and (b) at parliamentary level, within the Parliamentary Association Committee (article 5 para 5 EU-UA AA). Occasionally, political dialogue will be pursued on an *ad hoc* basis through (a) ‘all diplomatic and military channels between the Parties, including appropriate contacts in third countries and within the United Nations, the OSCE and other international fora’ (article 5 para 3(b) EU-UA AA), (b) any other means, including expert-level meetings (article 5 para 3(d) EU-UA AA), and (c) other procedures and mechanisms for political dialogue, including extraordinary consultations (article 5 para 4 EU-UA AA). The aforementioned allows it to be argued that the envisaged political association, as broadly scoped by the EU policies in the field of foreign and security policy as well as in the area of freedom, security and justice, will be achieved via extensive monitoring and regulatory institutional mechanisms.

### **3.4 Integration-oriented association: the DCFTA, a stake in the EU internal market and a stake in EU law**

Instrumental and programmatically convergence-oriented in the realm of political association, the EU-Ukraine contractual association also yields a stronger integration-oriented magnitude. Desirous of ‘contributing to the gradual economic integration’ (Preamble, indent 14 EU-UA AA), the Association Agreement between the European Union and Ukraine defines, as one of the association goals, the establishment of conditions for ‘enhanced economic and trade relations leading towards Ukraine’s gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area’ (article 1 para 2(d) EU-UA AA). This treaty passage entails two significant implications. First, it denotes that the envisaged economic integration between the EU and Ukraine is much broader in scope than the DCFTA alone – it actually includes the latter among other essentials for gradual economic integration, not least legislative and regulatory approximation.<sup>84</sup> Indent 17 of the Preamble to the EU-Ukraine AA recognises the necessity of ‘the broader process of legislative approximation’ that, being linked to the Deep and Comprehensive Free Trade Area, ‘will contribute to further economic integration with the European Union Internal Market’. Second, the EU-Ukraine association model explicitly aims at Ukraine’s gradual integration in the Union’s Internal Market that is remarkable in a number of ways: first, as an ambitious and comprehensive economic integration commitment commensurate, for instance, with that of the European Economic Area; second, as

<sup>84</sup> Indent 16 of the Preamble to the EU-Ukraine AA enlists – in a non-exclusive way – at least three elements that should facilitate the achievement of the envisaged ‘economic integration’: (1) a DCFTA; (2) the WTO regulatory regime; and (3) extensive regulatory approximation between the EU and Ukraine.

an innovative integration commitment if compared to other association deals of the EU with both the near and wider neighbourhood,<sup>85</sup> and, finally, as a complex integration mechanism, built on the concepts of ‘enhanced economic and trade relations’ and ‘economic integration’ while designed to be driven by the implied gears of gradual legislative and regulatory approximation (harmonisation of law and procedural politics) – all meant to facilitate Ukraine’s aimed gradual integration in the EU Internal Market.

The significance of these association elements lies in their genuinely integrative nature. In his study of bilateral association agreements of the EU with third countries, Maresceau called them ‘*integration oriented elements*’<sup>86</sup> which, in turn, gave birth to the concept of ‘*integration-oriented agreements*’ (‘*les accords d’intégration*’) coined by the same author<sup>87</sup> to designate the Union’s association agreements with the countries of its proximity. Implying economic integration, legislative and regulatory approximation, as well as ‘convergence with the EU in political, economic and legal areas’ (as explicitly stated in indent 8 of the Preamble to the EU-UA AA), the Association Agreement between the European Union and Ukraine, as one of the so-called ‘integration-oriented agreements’, envisages the obligatory observance of the Union’s principles and values, as well as EU law-conform interpretation of the substantive association law. These premises lead to a quasi-amalgamation not only of economic but also of legal orders, and thus to a *legal fiction*<sup>88</sup> of Ukraine being part

<sup>85</sup> Comparing the provision of article 1 para 2(d) EU-Ukraine AA to similar stipulations of the EU’s association agreements with the Mediterranean states (EMAAs) and even pre-accession association agreements with the Western Balkans states (SAAs), Van der Loo et al highlight the remarkability of Ukraine’s ‘economic integration’ clause that innovatively extends beyond the ‘conventional’ establishment of a free trade area or the gradual liberalisation of trade in goods, services and capital as targeted by the latter two groups of EU agreements. See Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, ‘The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument’ (2014) EUI Working Paper LAW 2014/09, 1-2 <[http://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20WP\\_2014\\_9%20.pdf](http://cadmus.eui.eu/bitstream/handle/1814/32031/LAW%20WP_2014_9%20.pdf)> accessed 16 February 2015.

<sup>86</sup> Marc Maresceau, ‘Integration Oriented Elements in Bilateral Agreements Concluded by the EU with Third States: A Few Examples’ (Speech delivered at the book launch seminar ‘Integration and Differentiation in the European Union: A Legal Approach’ Nicosia 24 June 2010) <[www.europarl.cy/ressource/static/files/ADDRESS\\_PROF\\_MARESCEAU\\_20100624.pdf](http://www.europarl.cy/ressource/static/files/ADDRESS_PROF_MARESCEAU_20100624.pdf)> accessed 16 July 2013.

<sup>87</sup> Marc Maresceau, ‘Les accords d’intégration dans les relations de proximité de l’Union européenne’ in Claude Baumann (ed), *Les frontières de l’Union européenne* (Bruylant 2013).

<sup>88</sup> *Legal fiction* is a rule employed in judicial reasoning to avoid difficulties in the operation of law assuming that something is true even if it may be not. A very concise functional definition of legal fiction can be found in Canadian Justice Scarth’s reasoning in the case *Staufen v BC* 2001 BCSC 779: ‘(A) legal fiction is an assertion accepted as true (though probably fictitious) to achieve a useful purpose, especially in legal matters’. See *Staufen v British Columbia (Attorney General)* 2001 BCSC 779 (CanLII) <<http://canlii.ca/t/4xcm>> accessed 2 August 2014. Legal fictions bear real judicial (reasoning by Courts) but also political (state domestic and international politics) consequences. On the real consequences of the legal fiction in diplomatic protection, see Vermeer- Annemarieke Künzli, ‘As If: The Legal

of the Union's legal system. Such a 'stake in EU law' as created by this legal fiction will become palpable through the practice of the application and obligatory interpretation of the agreement's provisions (principles, values, concepts, norms) in conformity with European Union law, both (a) the existing and (*sic!*) future *acquis*, and (b) treaty-based law, as well as law developed in the process of the ECJ's adjudication. This is due to the dictum of ensuring uniform interpretation and application of the EU *acquis* in the European Union's external agreements, especially those that establish contractual association.<sup>89</sup> Remarkably, in the context of the EU-Ukraine association, such a judicial dimension of relationship had to be observed also in the Ukrainian legal system. Furthermore, the reciprocity effects of the stake in EU law granted to Ukraine had been observable even at the agreement's provisional – not full – application mode from 2014/2016 until late 2017. Petrov and Kalinichenko<sup>90</sup> emphasise that the Constitutional Court of Ukraine endeavours to interpret the provisions of the national Constitution in line with international and European legal standards by applying the EU *acquis* as a persuasive source of law. In addition, Ukrainian administrative courts appear to justify the application of ECJ case law, as evidenced in their adjudication from the agreement pre-signature times. In *Person v Kyiv City Centre for Social Assistance*,<sup>91</sup> the Kyiv District Administrative District imported the principles of legal certainty from EU law and referred, in its ruling on the case, to the ECJ's judgment in *van Duyn v Home Office*.<sup>92</sup>

By providing for the modality of stake in the EU internal market and inevitably enabling at the same time a stake in the Union's law, the EU-Ukraine Association Agreement presents, to use the wording of Van der Loo et al, 'an exceptional phenomenon in the practice of the EU's external action',<sup>93</sup> attributable to the European Common Aviation Area Agreement (ECAA) and the Energy Community Treaty (EnCT), along with the

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Fiction in Diplomatic Protection' (2007) 18(1) *European Journal of International Law* 37. For a general legal theoretic analysis of legal fictions, see: Nancy J Knauer, 'Legal Fictions and Juristic Truth' (2010) 23(1) *St. Thomas Law Review* 1; Maksymilian Del Mar, 'Legal Fictions and Legal Change' (2013) 9(4) *International Journal of Law in Context* 442; Michael Quinn, 'Fuller on Legal Fictions: A Benthamic Perspective' (2013) 9(4) *International Journal of Law in Context* 466; Karen Petroski, 'Legal Fictions and the Limits of Legal Language' (2013) 9(4) *International Journal of Law in Context* 485.

<sup>89</sup> Guillaume Van der Loo, 'The EU-Ukraine Deep and Comprehensive Free Trade Area: A Coherent Mechanism for Legislative Approximation?' in Peter Van Elswege and Roman Petrov (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?* (Routledge, 2014) 68-70.

<sup>90</sup> Roman Petrov and Paul Kalinichenko, 'The Europeanization of Third Country Judiciaries through the Application of the EU *Acquis*: The Cases of Russia and Ukraine' (2011) (60(2) *International & Comparative Law Quarterly* 325, 325.

<sup>91</sup> Judgment of the District Administrative Court of Kiev on 26 June 2008, No 4/337.

<sup>92</sup> Case C-41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133.

<sup>93</sup> Van der Loo et al (n 85) 2.

well-known example of the European Economic Area (EEA). Equipped with the integration-oriented elements akin to those contained in these agreements, the EU-Ukraine association deal presents a legal instrument for the establishment of an ‘*association-cum-integration*’<sup>94</sup> model, or ‘*integration through association*’,<sup>95</sup> to use Hillion’s wording. Naturally, economic integration, with the DCFTA as its axial component, lies at the heart of this phenomenon. Thereby, association law, including the DCFTA’s substantial and procedural law, presents an institution, which is sought to both enable and enforce the envisaged integration process.

The integration process within the EU-Ukrainian contractual association will mainly be carried out within the scope of the Deep and Comprehensive Free Trade Area, accompanied by the processes of legislative and regulatory approximation that will eventually lead to the desired economic integration. Two crucial elements of new generation free trade areas, from their inception in the EU-Ukraine association deal, need to be explained herewith, namely the concept-determining notions of ‘comprehensiveness’ and ‘depth’. A ‘comprehensive’ FTA encompasses both liberalisation of trade in goods and services, covering – in the case of goods – even ‘sensitive’ goods such as agricultural, steel and textile products. Hence, it stands for a scope of liberalisation that, in the case of the EU-Ukraine Association Agreement, substantially goes beyond classical or conventional FTAs. A ‘deep’ FTA refers to the inextricable and significant role of the regulatory approximation instrument. Whereas in classical free trade areas, legislative approximation is sufficient to safeguard the free flow of goods across borders (reduction or abolition of tariffs, ie technical barriers to trade), the deep and comprehensive free trade areas require outreach and regulatory tools to make sure that the free trade in goods and services is not constrained as well ‘beyond borders’, for instance, via non-technical barriers to trade. There is no way in which further ‘economic integration’ and a ‘stake in the EU internal market’, both declared as objectives in the EU-Ukraine Association Agreement, could be achieved without ensuring – along with the legislative approximation and standards harmonisation – effective regulatory approximation and uniform interpretation of the agreement stipulations. Unlike traditional free trade areas (FTAs), deep and comprehensive free trade areas (DCFTAs) go therefore much further in regulating the liberalisation of trade, but also in stipulating harmonisation of legislation and – what is essentially significant – the regulatory practices of norms implementation. It is not only tariff-free mutual market access for goods which is to be granted thereby,

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<sup>94</sup> This concept essentially draws on the related notions of ‘*enhanced association*’ or ‘*association plus*’, as advanced by earlier accounts of the current author. See Tyushka (n 60).

<sup>95</sup> Christophe Hillion, ‘Integrating an Outsider: An EU Perspective on Relations with Norway’ (2011) *Europautredningen, Rapport 16* (August 2011) 9 <[www.europautredningen.no/wp-content/uploads/2011/04/Rap16-EØS-sett-fra-EU.pdf](http://www.europautredningen.no/wp-content/uploads/2011/04/Rap16-EØS-sett-fra-EU.pdf)> accessed 12 July 2015.



but also non-tariff barriers to free trade in goods and services, as well as to free movement of capital and (to a certain extent) persons, that have to be abolished under enhanced association agreements, drafted after the EU-Ukraine accord template.

Access to, and a stake in, the European Union internal market, substantively granted via the DCFTA, will become feasible for the Ukrainian economy and citizenry mainly due to the enabled four market freedoms, in addition to economic and regulatory convergence in a number of sectors, including energy. It should be noted, however, that, unlike in the case of the EU's internal market, the four freedoms to be granted under the EU-Ukraine Association Agreement are rather constrained in scope, each to a different extent, with the only exception being for the free movement of goods. The movement of services, payments and capital, as well as the movement of Ukrainian workers legally employed in the territory of an EU Member State, are subject to certain conditions, while relying on the principles and rules which guide the functioning of the Union's own internal market.<sup>96</sup>

#### 3.4.1 Free movement of goods

The implementation of the free movement of goods requires that the parties to the DCFTA, the European Union, and Ukraine abolish all measures constituting a barrier to trade within the envisaged free trade area. In contrast to the Europe Agreements concluded by the EU with the CEECs in the early 1990s, the EU-Ukraine Association Agreement – akin to the EEA Agreement<sup>97</sup> – aims at the abolition of both technical<sup>98</sup> and non-technical<sup>99</sup> barriers to the free movement of goods and provision of services<sup>100</sup> within the DCFTA. The movement of persons and capital is, however, still subjected more to restrictions than the freedoms it is enabled to enjoy. Consequently, it would make sense to refer to *free* movement only with regard to trade in goods.

The free trade area, which pursuant to article 25 EU-UA AA has to be established over a transitional period of a maximum of 10 years starting from the entry into force of the agreement (hereby, a date when the Association Agreement starts to be provisionally applied should be

<sup>96</sup> Tyushka (n 29) 52-53.

<sup>97</sup> Called by Marc Maresceau (n 86) 'a real intellectual master-piece of legal thinking on integration', in view of the fact that the EEA Agreement 'not only identified a very large part of the substantive EU *acquis* including the four freedoms, competition law, horizontal and flanking policies to be applied in the EFTA countries but also provided a sophisticated institutional framework to guarantee homogeneity in interpretation and application' 3.

<sup>98</sup> EU-UA AA, arts 53-58.

<sup>99</sup> *ibid*, arts 25-39, and especially arts 34 and 35.

<sup>100</sup> *ibid*, art 94.

understood), will eventually result in the elimination of customs duties, fees and other charges,<sup>101</sup> export subsidies and equivalent measures,<sup>102</sup> other technical barriers to trade,<sup>103</sup> as well as non-tariff measures.<sup>104</sup> The principle of non-discrimination, anchored in the ‘national treatment’ formula,<sup>105</sup> will facilitate the strict observance of discrimination prohibition, one of the foundational principles of the EU’s internal market. A ‘standstill’ clause, as stipulated in article 30 EU-UA AA, will prevent any deliberation on the part of either the European Union or Ukraine as regards introducing any new customs duty or increasing an existing one, even if this is the case for a party’s trade with non-DCFTA partners.

The scope of the free trade in goods seems, however, to be narrower than that within the Union’s internal market, for two reasons. First, the DCFTA between the EU and Ukraine will only cover goods ‘originating in the territories of the Parties’ (article 26(1) EU-UA AA). In the EU’s internal

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<sup>101</sup> *ibid*, art 27.

<sup>102</sup> *ibid*, art 32.

<sup>103</sup> *ibid*, arts 53-58.

<sup>104</sup> Art 35 EU-UA AA stipulates: ‘No Party shall adopt or maintain any prohibition or restriction or any measure having an equivalent effect on the import of any good of the other Party or on the export or sale for export of any good destined for the territory of the other Party, except as otherwise provided in this Agreement or in accordance with Article XI of GATT 1994 and its interpretative notes. [...]’. The rationale of the article is derived from the ECJ’s case law applicable in the EU legal order that – pursuant to the EU-Ukraine Association Agreement – will also be applicable in the framework of the EU-Ukrainian contractual association, due to the anchored therewith imperative of EU law-conform interpretation of the treaty stipulations. In addition to the general prohibition of tariff and quantitative restrictions, the European Court of Justice has developed a formula of ancillary prohibition of measures having equivalent effect to quantitative restrictions (MEQR) that are capable of impeding free trade. In its *Dassonville* judgment, the ECJ held in 1974 that ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade, are to be considered as measures having an equivalent effect to quantitative restrictions’. See Case 8/74 *Dassonville* ECLI:EU:C:1974:82, para 5. The *Dassonville*-posterior development of EU case law and legislation contributed to the extension of the MEQR normative scope, now embracing, for instance, technical regulations and selling arrangements of sorts – in addition to the originally understood ‘trading rules’. See, for instance, an overview by the Commission’s Enterprise and Industry DG: Commission, ‘Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods’ Ares(2013)3759436 (18 December 2013).

<sup>105</sup> Art 34 EU-UA AA: ‘Each Party shall accord national treatment to the goods of the other Party [...]’. This ‘*national treatment*’ clause is significant in view of the possible and, in principle, justifiable protectionist policies that, as a matter of principle, are legally not permissible under the DCFTA. It is clear that the most obvious form of protectionism will occur not through customs duties or charges themselves, but through customs duties or charges which have an equivalent effect, with the object of rendering foreign goods more expensive than their domestic counterparts. In this regard, national treatment formula, in conjunction with the prohibition of non-tariff barriers to trade, will eliminate such possibilities for protectionism by either Ukrainian or European Union economies. In addition, the substantive provisions of arts 59 to 74 EU-UA AA on sanitary and phytosanitary measures (SPS) will facilitate free trade in commodities which are covered by these measures and which have to be harmonised between the EU and Ukraine to ensure their non-discriminatory application.

market based on the customs union, freedom of movement applies not only to goods originating in Member States, but also to products coming from third countries which are in ‘free circulation’ in Member States (article 28(2) TFEU). Hence, products from third countries are also in free circulation once inside the Union, which certainly extends the scope and coverage of trade in goods as only based on the ‘rules of origin’ principle, applicable within the EU-Ukraine AA. Second, the definition of ‘goods’ itself is narrower. The footnote to article 26(1) EU-UA AA stipulates that, for the purposes of the agreement, ‘goods’ means ‘products as understood in GATT 1994 unless otherwise provided in this Agreement’. Within the EU’s internal market, there is a free circulation of *the* ‘goods’, which – in their definitional scope – extend beyond a common, GATT-derived understanding. The European Court of Justice has defined ‘goods’ as ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions’.<sup>106</sup> Consequently, the rules on free movement of goods are applicable within the EU’s internal market to articles of artistic, historic, archaeological or ethnographic value, as well as, for instance, to non-recyclable waste.<sup>107</sup>

Importantly, the treaty provides enforcement mechanisms for ensuring the observance of free trade in goods between the parties. Trade remedies defined in articles 40 to 52 EU-UA AA include both international safeguard measures (under the GATT and WTO frameworks) and agreement-specific measures and mechanisms (such as anti-dumping and countervailing measures,<sup>108</sup> consultations,<sup>109</sup> and dialogue on trade remedies<sup>110</sup> in the form of a permanent forum for cooperation in trade remedies matters). Thereby, the dispute settlement mechanism, as defined in Chapter 14 of Title IV of the EU-Ukraine AA, is not applicable within the trade remedies framework.

### 3.4.2 (*Rights to free*) movement of persons, establishment, supply of services and e-commerce

The EU-Ukraine Association Agreement chapters on the movement of workers, establishment and supply of services,<sup>111</sup> an inseparable part of the so-called ‘human dimension’ of the association, constitute a stumbling

<sup>106</sup> Case 7/68 *Commission v Italy* ECLI:EU:C:1968:51, para 428.

<sup>107</sup> Case C-2/90 *Commission v Belgium* ECLI:EU:C:1992:310, paras 23-28.

<sup>108</sup> EU-UA AA, arts 46-50.

<sup>109</sup> *ibid*, art 50.

<sup>110</sup> *ibid*, art 51.

<sup>111</sup> See Chapter 6 ‘Establishment, trade in services and electronic commerce’ (arts 85-96), Chapter 7 ‘Current payments and movement of capital’ of Title IV of the EU-UA AA. On movement of persons, see Section 4 ‘Temporary presence of natural persons for business purposes’ and Sub-section 2 of Section 5 ‘Regulatory framework’ of Chapter 6 pertaining to Title IV, along with arts 17-19 located in Title III of the EU-UA AA.

block in the implementation of the agreement's objectives. The free movement of persons is one of the four fundamental freedoms in the European Union internal market. The movement of persons (Ukraine's citizens) and employed persons (workers) under the EU-Ukraine AA is apparently not commensurate with the freedom of movement as established by the EU treaties or even the EEA treaty. This will be distinguished between three kinds of freedoms granted under this 'human dimension' of the EU-Ukrainian association, namely the (liberalised, but not unconditionally free) movement of employed persons (workers), the self-employed and of companies (establishment and services, including e-commerce), and the general movement of persons not covered by the previous two categories (Ukraine's citizens who are not yet legally employed on the territory of an EU Member State, and neither are they part of the personnel of a company that operates business with outreach to the EU's internal market, nor self-employed persons or persons running an e-commerce business). The movement of so-called 'economic operators' (workers, the self-employed and of companies, including establishment regulations) and 'ordinary' citizens (persons) is ruled out by the EU-Ukraine AA provisions falling both under the scope of the DCFTA's trade and trade-related matters (ie within the same-titled Title IV) and Title III 'Justice, Freedom and Security'. Inclusion of the provisions on the movement of persons and employed persons (workers) within Title III has been apparently conditioned by the special regime of this policy within the EU itself, with Denmark, the UK and Ireland enjoying the opt-out rights therein. Therefore, it makes sense to speak of (conditional) *rights to free movement*, rather than free movement as such, granted by virtue of the EU-Ukraine Association Agreement to Ukrainian citizens, both qualifying for workers or self-employed categories of persons, or persons other than those.

In the EU's internal market, even persons other than workers or self-employed persons having the nationality of a Member State enjoy the advantages of free movement.<sup>112</sup> In the 'best endeavour' clause manner, article 19 paras 2 and 3 of the EU-Ukraine AA expressly attaches the 'freedom' of movement of persons other than workers of self-employed persons to the establishment of a visa-free regime:

The Parties shall also endeavour to enhance the mobility of citizens and to make further progress on the visa dialogue.

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<sup>112</sup> The ECJ's case law and EC/EU legislation has extended enjoyment of certain rights to (1) members of the families of employed persons, (2) self-employed persons, and (3) other persons on whom the EU law confers a right of residence, regardless of their nationality. See, respectively, Case 40/76 *Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669, para 9; Directive 68/360; Regulation no 1612/68; Regulation no 1251/70; Directive 73/148 and Directive 75/34, since replaced by Directive 2004/38.

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 (article 19 paras 2 and 3 EU-UA AA).

Consequently, the freedom of movement of Ukrainian citizens has not been granted by default through the association agreement itself, but was made dependent on the visa regime liberalisation. It was only in May 2017 that the Council granted visa-free travel to Ukrainian citizens, effective as of 11 June 2017.<sup>113</sup>

Neither does the EU-Ukraine Association Agreement establish the right of access to the European Union's labour market – it only grants a right to equal treatment<sup>114</sup> to workers that are (already) legally employed in the territory of a Member State. The provision on non-discrimination of workers as laid down by article 17 EU-UA AA is reciprocal, ie it also obliges Ukraine to accord equal treatment to EU nationals that are already employed in Ukraine:

*Article 17. Treatment of workers*

1. Subject to the laws, conditions and procedures applicable in the Member States and the EU, 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.

2. Ukraine shall, subject to the laws, conditions and procedures in Ukraine, accord the treatment referred to in paragraph 1 of this Article to workers who are nationals of a Member State and who are legally employed in its territory.

Excluding social security matters for certain reasons, this non-discrimination rule is only applicable to the workers' working conditions, remuneration or dismissal, as exhaustively listed in article 17 para 1 EU-UA AA. There exists, however, room for action for the EU-Ukraine Association Council that can, similar to the EC-Turkey Association Council, develop workers' rights, including the provision of access to social security

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<sup>113</sup> Regulation (EU) 2017/850 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Ukraine) [2017] OJ L133/1.

<sup>114</sup> A distinction between 'access to employment' and 'treatment in employment' in the context of third-country nationals' rights within the EU internal market was clearly drawn by Advocate General FG Jacobs. See Case C-162/00 *Pokrzeptowicz-Meyer* ECLI:EU:C:2001:474, Opinion of Advocate-General Jacobs, para 43.

systems, by their agreement-implementing decisions. The respective ‘enabler’, ie the treaty-based authorisation of the Association Council, is contained in article 18 para 2 EU-UA AA:

The Association Council shall examine the granting of other more favourable provisions in additional areas, including facilities for access to professional training, in accordance with laws, conditions and procedures in force in the Member States and in the EU, and taking into account the labour market situation in the Member States and in the EU’ (article 18 para 2 EU-UA AA).

It should be emphasised that the general equal treatment provision (or discrimination prohibiting provision) as per article 17 of the EU-Ukraine AA is directly applicable to working conditions, remuneration and dismissal for legally employed workers and thus can, in principle, be *directly invoked (enforced)* by the affected individuals in front of the national courts within the EU and Ukrainian judiciary systems.<sup>115</sup> In the case of the European Union, the precedent was set by the ECJ in *Pokrzepowicz-Meyer*<sup>116</sup> and developed later in *Deutscher Handballbund*.<sup>117</sup> In the latter case, the European Court of Justice did not interpret the prohibition to discriminate restrictively against legally employed ‘associated workers’ and therewith fully extended the rights for equal treatment (applicable to workers from the EU Member States within the Union’s internal market) to market-present workers from associated countries. As a

<sup>115</sup> In light of arts 5 and 3 of the respective Council Decisions (n 43) and (n 44) on the conclusion of the EU-Ukraine Association Agreement, the *direct effect* of the association agreement provisions seems to have been explicitly precluded, for both provisions are firm in their statement that ‘[t]he Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member States courts or tribunals’. The issue of the explicitly precluded direct effect of EU-Ukraine association law is, however, less straightforward than it first appears. Direct effect, as known in EU law, is a political and a legal question at the same time. In its *political dimension*, the issue of direct effect can be *positively* or *negatively* settled by the signatory parties to the agreement themselves, as pointed out in the judgment in Case 104/81 *Hauptzollamt Mainz v Kupferberg & Cie* ECLI:EU:C:1982:362. The aforementioned Council Decisions on the conclusion of the EU-Ukraine Association Agreement exemplify the case of the negative direct effect settlement. Given the lengthy ten-year transitional period of market liberalisation between the EU and Ukraine, this *political* preclusion of direct effect can reasonably be seen as a temporary and conditional ‘political hurdle’, the overcoming of which should open the way to the less problematic in this regard legal dimension of direct effect that the EU-Ukraine association law is, *in principle*, capable of developing – in view of the ‘clear and precise enough’ formulations of certain rights and obligations in the agreement’s text. On the other side, however, the EU-Ukraine Association Agreement’s direct references to, and, in some instances, identical provisions with, EU law do complicate the *prima facie* ‘simplicity’ of the political preclusion of direct effect – not least by way of challenging that kind of effect of the EU’s internal law itself, which ‘is today *presumed* to be capable of direct effect’. Schütze (n 20) 345.

<sup>116</sup> Case C-162/00 *Pokrzepowicz-Meyer* ECLI:EU:C:2002:57.

<sup>117</sup> Case C-438/00 *Deutscher Handballbund eV v Maros Kolpak* ECLI:EU:C:2003:255.



result, direct and indirect forms of discrimination on grounds of nationality should be regarded as prohibited under the EU-Ukraine contractual association and are therefore fully entitled to judicial remedies.<sup>118</sup> In the case of Ukraine, the provisions of the EU-Ukraine Association Agreement should be regarded as those that may be directly invoked – although a sort of commensurate direct effect doctrine has not been developed in the Ukrainian legal tradition.<sup>119</sup> As part of the national legislation,<sup>120</sup> however, clear and precise provisions of the EU-Ukraine Association Agreement that endow Ukrainian citizens and companies with certain rights and obligations should be directly applicable<sup>121</sup> and enforceable (ie having direct effect).

Significantly, the right of establishment for self-employed persons and undertakings under the EU-Ukraine AA, along with trade in services and cooperation in electronic commerce, draws on a rather highly liberal approach aiming at the progressive reciprocal liberalisation of these domains as laid down by article 85 para 1 EU-UA AA. Again, the liberalisation does not cover the very substance of the free movement of persons – entry and residence rights – as established within the EU’s internal market. Article 85 para 5 EU-UA AA excludes from the envisaged liberalisation clause the rights to entry and residence for Ukrainian (as also for EU) citizens seeking access to the employment market:

This Chapter shall not apply to measures affecting natural persons seeking access to the employment market of a Party, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis’ (article 85 para 5 EU-UA AA).

The right of establishment does not therefore relate to activities carried out by way of gainful employment. It implies economic activities carried out by a person outside any relationship of subordination with regard to the conditions of work or remuneration under his/her own personal responsibility.<sup>122</sup> As defined in the ECJ’s *Factortame II* ruling,<sup>123</sup> the ‘establishment’ of a natural or legal person involves the actual pursuit of

<sup>118</sup> For a detailed comparative overview of the rights of third-country nationals under EU association agreements, see Daniel Thym and Margarite Zoetewij-Turhan, *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill/Nijhoff 2015).

<sup>119</sup> Unless the Ukrainian Parliament, the *Verkhovna Rada*, adopts the law(s) on the implementation of specific provision(s) of the EU-Ukraine Association Agreement.

<sup>120</sup> Art 9 of the Ukrainian Constitution stipulates that ‘[i]nternational treaties in force, consented by the *Verkhovna Rada* of Ukraine as binding, shall be an integral part of the national legislation of Ukraine’.

<sup>121</sup> Unless the Ukrainian Parliament, the *Verkhovna Rada*, adopts the law(s) on the implementation of specific provision(s) of the EU-Ukraine Association Agreement.

<sup>122</sup> As defined in the ruling in Case C-268/99 *Jany* ECLI:EU:C:2001:616, paras 34-50.

<sup>123</sup> Case C-221/89 *Factortame Limited (Factortame II)* ECLI:EU:C:1991:320, para 20.

an economic activity through a fixed establishment in another Member State for an indefinite period. The notion of ‘establishment’ is defined in article 86 para 9 EU-Ukraine AA as follows:

(a) as regards legal persons of the EU Party or of Ukraine, [‘establishment’ means] the right to take up and pursue economic activities by means of setting up, including the acquisition of, a legal person and/or create a branch or a representative office in Ukraine or in the EU Party respectively;

(b) as regards natural persons, [‘establishment’ means] the right of natural persons of the EU Party or of Ukraine to take up and pursue economic activities as self-employed persons, and to set up undertakings, in particular companies, which they effectively control’ (Article 86 para 9 EU-UA AA).

In this regard, mutual determinacy between the right of establishment and the right of entry and residence in EU Member States will be assessed through an implicit formal corollary. While not treating the problem in absolute terms and cases,<sup>124</sup> the case law of the European Union recognises nevertheless a directly applicable principal entitlement of self-employed nationals from associated countries to enter and to stay in EU Member States.<sup>125</sup>

The provisions of the EU-Ukraine Association Agreement on trade in services, enshrined within the same Chapter 6 ‘Establishment, trade in services and electronic commerce’ of Title IV, are quite specific and also, to a larger extent, protected under both the association law and the European Union law. In contrast to the ‘establishment’, which entails in the EU legal order the pursuit of an economic activity from a fixed base in a Member State for an indefinite period, the (freedom of) provision of services entails the carrying out of an economic activity for a temporary period in a Member State in which either the provider or the recipient of services is not established.

Falling under the general requirement of ‘progressive reciprocal liberalisation’ as laid down by article 85 para 1 EU-UA AA for establishment, trade in services and cooperation on electronic commerce, the supply of

<sup>124</sup> The caveats have to be accounted for as far as ‘immigration clauses’ and ‘opt-out clauses’ of several EU Member States are at stake. In the case of the EU-Ukraine Association Agreement, provisions on the movement of workers, the right of establishment and thus the equal treatment principle are subject to exclusions, due to, eg, Danish, British and Irish opt-outs as per special protocols. See, for instance, on this matter, the take of Van der Loo et al (n 85) 8.

<sup>125</sup> See basically the *Gloszczuk* case, among a number of cases the ECJ has ruled out in this context of the EU’s Europe Agreements with Poland, Bulgaria, the Czech Republic and the Slovak Republic: Case C-63/99 *The Queen v Secretary of State for the Home Department, ex parte Wieslaw Gloszczuk and Elzbieta Gloszczuk* ECLI:EU:C:2001:488.

cross-border services between the EU and Ukraine is moreover subject to the obligation to provide at least the minimally required level of liberalised market access in this domain:

With respect to market access through the cross-border supply of services, each Party shall accord services and service suppliers of the other Party treatment no less favourable than that provided for in the specific commitments contained in Annexes XVI-B and XVI-E to this Agreement (article 93 para 1 EU-UA AA).

Once in the market, the services and service suppliers may not be discriminated through either different or identical treatment that modifies, or is capable of modifying, the conditions of fair competition, as defined by articles 253 to 267 EU-UA AA. Such a 'national treatment' formula applicable to trade in services is enshrined in the wording of article 94 EU-UA AA:

*Article 94. National Treatment*

1. [...] each Party shall grant to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than that it accords to its own like service and services suppliers.
2. A Party may meet the requirement of paragraph 1 of this Article by according to services and service suppliers of the other Party either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like services or service suppliers of the other Party. [...].

A quasi '*standstill*' provision meant to prevent any new measures restricting the cross-border supply of services is also included. However, new measures are only impermissible insofar as they are incompatible with the scope, objectives and coverage of Chapter 6 in Title IV of the EU-Ukraine Association Agreement:

Each Party shall retain the right to regulate and to introduce new regulations to meet legitimate policy objectives, provided they are compatible with this Chapter (article 85 para.4 EU-UA AA).

As such, this quasi-standstill clause is not commensurate with the one introduced for trade in goods (article 30 EU-UA AA) that has a general imperative and unconditional effect.

Along with financial, postal, IT and other services briefly covered by the chapter, transport services and electronic commerce have gained more substantial elaboration. Dealt with within articles 134 to 138 (Sub-section 7 'Transport services'), the supply of cross-border transport services is sought to enjoy wide liberalisation as provided by the Chapter's scope, but also gets progressively liberalised and approximated in terms of regulation (pursuant to article 138 EU-UA AA) due to the enshrined commitments to conclude specific agreements on international maritime transport, road, rail and inland waterways transport, and air transport within the DCFTA. Importantly, the EU-Ukraine Association Agreement treats electronic commerce as 'the provision of services [...], which cannot be subject to customs duties' (article 139 para 3 EU-UA AA). In the context of EU legislation (the *E-Commerce Directive*)<sup>126</sup> and recent case law (the ECJ's judgment in the *PFDC* case of 13 October 2011),<sup>127</sup> this provision of the EU-Ukraine AA seeks to remove obstacles to cross-border online services within the DCFTA, provide legal certainty for business and citizens, and enhance competitiveness in this quickly developing domain. As such, it is another mechanism that allows the stipulated 'stake in the EU internal market' for the Ukrainian economy and 'economic operators'. Ultimately, the freedom to provide information society services belongs to one of the benefits of the EU's internal market as laid down by article 3 of the e-Commerce Directive (2000/31/EC) and will also be applicable to the provision of services within the DCFTA as to be established pursuant to the EU-Ukraine Association Agreement. The EU's most recent initiatives on the establishment of the Digital Single Market, a Commission priority under the Estonian EU Presidency in 2017,<sup>128</sup> and Ukraine's recent bid for access to it, provide an example of yet another dimension of integration that can be pursued under the dynamic framework of EU-Ukraine primary and secondary association law.

#### 4 Conclusions

The famous approach of '*sharing everything but institutions*', as introduced by former European Commission President Romano Prodi in 2003, reads slightly differently (ie not that much exclusionist) if EU law and, by extension, association law are considered from a legal-institutionalist perspective. As a matter of fact, the European Union's offer of a

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<sup>126</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1.

<sup>127</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Conseil de la concurrence* (now Autorité de la concurrence (the French Competition Authority)) ECLI:EU:C:2011:649.

<sup>128</sup> European Commission, 'Digital Single Market: Bringing down barriers to unlock online opportunities' <[https://ec.europa.eu/commission/priorities/digital-single-market\\_en](https://ec.europa.eu/commission/priorities/digital-single-market_en)> accessed 13 September 2017.

‘stake in EU law’, granted to the newly associated states, presents an offer to share the very foundational institution of European integration and the related normative order. Depending on the teleological rationale and the extent of the regulatory content, the EU’s ‘association law’ derived from its contractual association links with third states resembles yet another level of joint ownership between the EU and third states. Distinct from the EU and third country legal orders themselves in which it is embedded, the institution of ‘association law’ serves as both a junctural and transactional interface, as well as a particular proxy normative order that influences both legal systems, although with well-articulated asymmetry.

In the context of the EU-Ukraine Association Agreement, the relevant ‘association law’ currently resembles mainly a body of primary sources (the agreement itself, including the annexes to it and protocols, as well as a number of institutional and national acts on the agreement’s conclusion and ratification). The secondary association law has so far been enacted by the EU-Ukraine Association Council in a limited volume – not least because of the only recently ensuing full enactment of this mixed international agreement. Nonetheless, its effects upon the Ukrainian domestic order started unfolding even at the agreement’s provisional application stage. Notwithstanding the non-accession nature of the EU-Ukraine contractual association, the model of enhanced political alignment and economic integration seems to be sufficient to provide for the establishment of a distinct and potentially dynamic normative order of the EU-Ukraine association law. The envisaged obligatory observance of the Union’s principles and values, as well as the imperative of EU law-conform interpretation of the substantive (primary and future secondary) association law lead to a quasi-amalgamation not only of economic, but also of legal orders and, thereby, to a legal fiction of Ukraine being part of the Union’s legal system. Naturally, economic integration, with the DCFTA as its axial component, lies at the heart of this legal and political exercise in normative-order sharing. Thereby, association law, including the DCFTA’s substantial and procedural law, presents an institution of a kind which is sought to both enable and enforce the envisaged bilateral integration process. The article has shown that the institution of EU-Ukraine association law embraces several facets of integration-oriented association, including participatory (a ‘stake in the EU law and market’) and instrumental (transactional, functional) dimensions. It is the interplay of both, with the guiding rationale of the participatory association and the enabling features of the instrumental association, which provides for the effective functionalist extension and sharing of the institution of EU law while creating the opportunities for joint ownership and integration through association in the framework of the interpretation, application and implementation of EU-Ukraine ‘association law’.

## Annex I

*Table 1.* Overview of the structure and content of the EU-Ukraine Association Agreement

<b>Title</b>	<b>Titling</b>	<b>Content outline</b>
<b>I</b>	<b>General Principles</b>	objectives of the agreement (read in conjunction with the Preamble), including: establishment of association relationship, gradual convergence between the EU and Ukraine on the basis of common values, deepened economic and trade relations, strengthened cooperation on justice, freedom and security, as well as on general principles; general principles themselves that have inspired the EU's own creation, including: democratic (democratic governance, rule of law, human rights and fundamental freedoms, human dignity, equality and solidarity, multilateralism, etc) and free market economy (rule of law, good governance, fair competition, fight against corruption, sustainable development and effective multilateralism) principles;
<b>II</b>	<b>Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy</b>	convergence in foreign and security policy; international stability and security based on multilateralism; strengthening of regional stability; cooperation in defence and security; strengthening peace and international justice, in particular through the implementation of the Rome Statute of the International Criminal Court; conflict prevention, crisis management, non-proliferation, disarmament and arms control; fight against terrorism;
<b>III</b>	<b>Justice, Freedom and Security</b>	cooperation and rapprochement in law enforcement systems, migration management, personal data protection, rule of law; strengthening the judiciary – its effectiveness, independence and impartiality; judicial cooperation in civil and criminal matters; cooperation in the fight against crime and corruption; cooperation in the fight against illegal drugs; cooperation in fighting terrorism;



**IV Trade and Trade-related Matters**

establishment of a deep and comprehensive free trade area as an objective and guiding rationale of cooperation in trade and trade-related matters; economic integration ('stake in the EU internal market'); relevant agreement provisions divided into the following sections: trade in goods (national treatment and access for goods, elimination of customs duties, fees and other charges, elimination of non-tariff barriers to free trade, trade facilitation mechanisms; rules of origin, etc); trade in services (establishment, trade in services, e-commerce, national treatment and MFN clauses); movement of persons; movement of capital; regulatory harmonisation in the field of public procurement; competition, transparency, and state aid regulations (prohibition of anti-competitive practices, antitrust measures, state aid regulation, etc); protection of intellectual property; settlement of disputes; mediation mechanism;

<p><b>V</b></p> <p><b>Economic and Sector Cooperation</b></p>	<p>objectives, tasks, guidelines for and forms of trade cooperation and sustainable development in 28 areas: energy; macroeconomic cooperation; management of public finances; taxation; statistics; environment; transport; space; science and technology; industrial and enterprise policy; mining and metallurgy; financial services; company law, corporate governance, accounting and auditing; information society; audio-visual policy; tourism; agriculture and rural development; fisheries and maritime polices; cooperation on the Danube river; consumer protection; employment, social policy and equal opportunities; public health; education, training and youth; culture; sport and physical activity; civil society cooperation; cross-border and regional cooperation; participation in EU programmes and agencies;</p>
<p><b>VI</b></p> <p><b>Financial Cooperation, with Anti-Fraud Provisions</b></p>	<p>financial cooperation, prevention of and the fight against fraud, corruption and other illegal activities, EU financial assistance to Ukraine in this framework;</p>
<p><b>VII</b></p> <p><b>Institutional, General and Final Provisions</b></p>	<p>establishment, structural and functional engineering of the new institutional framework designed to facilitate the implementation of the Association Agreement, including: Association Council, Association Committee, Parliamentary Association Committee, special committees / bodies, Civil Society Platform; stipulations on provisional application; dispute settlement mechanism.</p>

Source: Author's own compilation.