Ukrainian Private Law and the European Area of Justice

Edited by
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and RAINER KULMS

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Mohr Siebeck

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EU Private Law in Ukraine

The Impact of the Association Agreement

Jürgen Basedow

The Association Agreement (AA) concluded in 2014 between the European Union (EU) and Ukraine[1] will have far-reaching consequences for the future of private law in Ukraine, a topic which will be explored in this paper. It will set out with a general survey of the Association Agreement (I.), then turn to its impact on private law (II.) and finally outline some considerations relevant to implementation (III.).

I. The EU–Ukraine Association Agreement

1. The agreement and the external policy of the Union

The Treaty on the Functioning of the European Union (TFEU)[2] distinguishes two types of association agreements: those concluded with former colonies and dependant territories of some Member States, and those transacted with

[1] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, done at Brussels on 21 March 2014, OJ 2014 L 161/3.

[2] Treaty on the Functioning of the European Union, consolidated version in OJ 2016 C 202/47.

other countries. The former are specifically regulated in Part IV, see Articles 198–204, and have lost much of their significance in the course of decolonization.[3] The latter are just one type of international agreement which the Union may conclude in accordance with Title V of Part V, see Article 217. The EU–Ukraine Association Agreement is a treaty of the second kind, based upon Articles 217 and 218(5) and (8) TFEU.[4]

From treaty practice several types of association agreements emerge:[5] Alongside agreements on "development association" based upon the abovementioned Article 198 TFEU, there are treaties concluded under what is now Article 217 TFEU providing for a "free trade association", such as the one with South Africa,[6] and others establishing an "accession association" considered as a first step of the respective country on the road towards full membership in the EU; many countries which are now Member States have in fact concluded such association agreements some years before their accession, laying down clear commitments on both sides to allow the non-EU party to "participate in the process of European integration".[7] The EU–Ukraine Agreement appears to fall into a fourth group of agreements providing for a close cooperation, in particular a Deep and Comprehensive Free Trade Area (DCFTA), without however making explicit the Contracting Parties' intention of a future accession.[8] Since this agreement was concluded in the context of

[3] See *A. Zimmermann,* Vorbemerkung 1 zu Art. 198 AEUV, in: von der Groeben/Schwarze/Hatje (eds.), Europäisches Unionsrecht, 7th ed. Baden-Baden 2015.

[4] Council Decision (2014/295/EU) of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof, OJ 2014 L 161/1.

[5] On the following classification see *Bungenberg* in: von der Groeben/Schwarze/Hatje, supra n. 3, Art. 217 AEUV, para. 90.

[6] Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, done at Pretoria on 11 October 1999, OJ 1999 L 311/3.

[7] See for example for Latvia the second paragraph of the preamble of the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part, done at Luxembourg on 12 June 1995, OJ 1998 L 26/3.

[8] See on this issue *Tiede/Spiesberger/Bogedain,* Das Assoziierungsabkommen zwischen der EU und der Ukraine – Weichensteller auf dem Weg in die EU?, KritV 2014, pp. 151–159, in particular p. 153 f. Contrary to the Europe Agreement of Latvia, previous n., paragraph 6 of the preamble of the EU–Ukraine Agreement simply points out that the EU "acknowledges the European aspirations of Ukraine", but it does not contain a political or legal commitment of the EU to accept Ukraine as a full member; this is considered as a novel concept designated as 'integration without membership' by *Van der Loo,* The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area, Leiden and Boston 2016, pp. 175 ff.

the Neighbourhood Policy of the EU, one may refer to this type of association as a "neighbourhood association".

Although the EU–Ukraine Agreement does not express the Union's commitment to further integration of Ukraine, it provides for a far-reaching assimilation of structures and an approximation of laws, see below. This may be perceived as a certain contradiction between legal means and political objectives, enhanced by the trade-related provisions concerning third States. Articles 25 and 26 AA confine the free trade envisaged to "trade in goods originating in the territories of the Parties", excluding goods from third States, in particular Russia. While this may appear as a normal corollary of a bilateral trade agreement, it cannot be ignored that Russia is the most important trading partner of Ukraine[9] and that some manufacturing industries in both countries are closely integrated due to the common history. The exclusionary character of the EU–Ukraine Agreement is further exacerbated by the prohibition, enshrined in Article 39(1) AA, against maintaining or establishing customs unions or free trade areas with other States which are in conflict with the trade arrangements of the EU–Ukraine Agreement. These observations explain the critical assessment of the Agreement by some leading politicians.[10]

2. Liberalization and approximation

a) The Internal Market

The core element of the European Union is the Internal Market. It has brought about unprecedented prosperity on the continent and contributed to an integration of peoples that was previously unthinkable. Consequently, all applicants for membership have primarily been attracted by the Internal Market, and the various association agreements have mainly pursued the objective of preparing the candidate States for the later participation in the Internal Market. This is also the general thrust of the EU–Ukraine Agreement.[11]

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[9] According to statistics provided by the private statistics portal Statista, 32.4% of Ukrainian imports from the year 2012 originated in Russia, while 31.0% originated in all EU Member States. 24.9% of the exports had a destination in the EU and 25.7% in Russia, see <https://de.statista.com/infografik/1944/importe-und-exporte-der-ukraine> (13 August 2016). The author *Andreas Gries* concludes that Ukraine needs both the EU and Russia. Statistics for the year 2014 published by the Broad College of Business of the Michigan State University indicate a share of 23.3% of Ukrainian imports coming from Russia and a share of 18.2% of all exports going to Russia; although these shares are lower than those given for 2012, Russia is still by far the most important trading partner, see <www.globaledge.msu.edu/countries/Ukraine/tradestats> (13 August 2016).

[10] The Wikipedia entry "Assoziierungsabkommen zwischen der Europäischen Union und der Ukraine" cites critical statements by three former German Chancellors: *Helmut Schmidt, Helmut Kohl* and *Gerhard Schröder*.

In *economic* terms the Internal Market is a market, i.e. a device governing the production and distribution of goods and services. The demand and supply of such goods and services are balanced by the price mechanism: a shortage of supply will lead to rising prices, which incentivize suppliers to offer additional products and buyers to change to substitutes or reduce demand. By the same token, an excess of supply will have the converse effect, through falling prices, on both supply and demand. It is essential for this mechanism that prices be determined by the free interplay of supply and demand and that neither the State nor private third parties interfere, i.e. that resources can freely flow to the place of their most efficient use and that competition and freedom of contract are undistorted.

These objectives were enshrined and enlarged, from the national to the European scale, by the Rome Treaty of 1957,[12] under the designation of the Common Market, which was re-named the Internal Market by the Single European Act of 1986.[13] As a *legal* concept, the Internal Market is defined as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured […]."[14] These basic freedoms are secured and specified by Articles 34 f. TFEU (free movement of goods), 45 (free movement of workers), 49 (freedom of establishment), 56 (freedom to provide services) and 63 (free movement of capital and payments). They are meant to protect the Internal Market against interference by Member States. In addition, Protocol no. 27 annexed to the TFEU makes clear that the Internal Market "includes a system ensuring that competition is not distorted",[15] and Articles 101 ff. TFEU in fact prohibit certain types of private anti-competitive conduct.

In the real world the free flow of resources encounters numerous obstacles. Many of them are caused by legislation of the various Member States: technical standards for goods; licence, education and quality requirements for services; currency exchange regulations; intellectual property rights; mandatory provisions relating to the establishment of companies, contracts and liability; etc. They all make it difficult and costly for foreign competitors to adjust, or even exclude, their operation in a national market; as a result, competition is distorted. Consequently, in order to be effective the liberalization ensured by the basic freedoms has to be supplemented by an approximation of the national rules governing the operation of the markets. The TFEU pro-

[11] *Tiede/Spiesberger/Bogedain,* An der Schwelle zum Binnenmarkt: Wirtschaftlicher Teil des Assoziierungsabkommens zwischen der EU und der Ukraine, WiRO 2014, pp. 321–324.

[12] Treaty establishing the European Economic Community, done at Rome on 25 March 1957, 298 UNTS 11.

[13] Single European Act, done at Luxembourg on 17 February 1986, OJ 1986 L 169/1.

[14] See now Article 26(2) TFEU.

[15] Protocol (no. 27) on the Internal Market and Competition, see OJ 2016 C 202/308.

vides for such approximation in many contexts; the most important provision is Article 114 TFEU, which allows for harmonization measures for the "establishment and functioning of the Internal Market". They are adopted by the approval of the European Parliament and by a qualified majority of the Council, i.e. even against the opposition of individual Member States.

b) The Association Agreement

This model has guided the drafters of the EU–Ukraine Association Agreement. The objective of free trade is laid down in Article 25 AA; the ban on prohibitions and restrictions of imports and exports, and of all measures having an equivalent effect, is stated in Article 35 AA. With regard to the right of establishment and the cross-border supply of services, both sides grant each other treatment no less favourable than the treatment accorded to subsidiaries, branches etc. of their own companies, Articles 88, 94 AA ("national" treatment); however, the cross-border supply of services is only liberalized in accordance with specific commitments relating to single sectors, Article 93 AA and Annexes XVI B and XVI E. The freedom of payments is ensured by Article 144 AA, and the free movement of capital is regulated in greater detail in Article 145 AA. Private anticompetitive practices and conduct are declared to be incompatible with the Association Agreement in Article 254. It is only the free movement of workers that is not enunciated as an objective; decisions on greater mobility of workers are reserved for the future and left to the Association Council, Article 18 AA.

As a supplement to these provisions on liberalization, Ukraine has accepted a great many obligations to adjust its law to EU standards. Article 474, which has a general bearing on all parts of the Agreement, provides that "Ukraine will carry out gradual approximation of its legislation to EU law as referred to in Annexes I to XLIV to this Agreement, based on commitments identified in Titles IV, V and VI of this Agreement, and according to the provisions of those Annexes." Title IV on trade and trade-related matters (Articles 25–336 AA) and Title V on economic and sector cooperation (Articles 337–452 AA) contain numerous provisions that stipulate the approximation of Ukrainian law to legislative acts of the Union; long annexes specify these commitments in terms of both content and timeframe.[16] Apparently, the

[16] On the interaction between the general and the specific approximation rules see *Van der Loo,* supra n. 8, pp. 301 ff. Specific approximation rules are to be found in Articles 56 and Annex III for technical standards, 64 and Annex V for sanitary, phytosanitary and animal welfare regulations, 114 and Annex XVII for postal and courier services, 124 and Annex XVII for electronic communication, 133 and Annex XVII for financial services, 138 and Annexes XVII and XXXII for transport services, 152 f. and Annex XXI for public procurement, 256 for competition law, 387 and Annexes XXXIV to XXXVI for company law, 394 and Annex XVII for the information society, 397 and Annex XXXVII for broad-

law of intellectual property had the greatest significance for the drafters; its adjustment is not left to the Annexes but is regulated with regard to both substance and enforcement in not less than ninety-six articles by the Association Agreement itself.[17] Some of the commitments relating to private law will be dealt with further in Part II below.

While the overall structure and content of the Agreement resemble the European Treaties, there are some profound differences. In particular, not a single provision of the Agreement can be construed as conferring rights or imposing obligations which can be directly invoked in court proceedings.[18] The lack of direct applicability has the effect of reserving for both sides the possibility of withdrawing from any undertaking laid down in the Agreement. If Ukraine does not implement the legal changes it has promised and an EU Member State therefore declines to grant one of the freedoms to Ukrainian products or nationals, no judicial remedy will be available in the EU. This clearly differs from the direct and unconditional effect of some provisions of the EU Treaties, in particular the basic freedoms[19] and the rules on competition.[20] At some points the Association Agreement even goes a step further, indicating that access to the Internal Market will be granted only after progress in the area of approximation has been ascertained by the Trade Committee.[21] Thus, the Association Agreement, while binding in terms of public international law, rather constitutes a programmatic scheme from the perspective of private actors in the markets.

II. The impact on private law

1. Private law of the EU – General aspects

The purpose of the European Union was not the unification of laws but the integration of markets. To date, the Treaties do not contain a mandate for

casting and television, 405 and XXXVIII for agriculture, 417 and Annex XXXIX for consumer protection, 424 and Annex XL for employment and social policy, 428 and Annex XLI for public health.

[17] See Articles 157 to 252 AA; see *Van der Loo,* supra n. 8, pp. 284 ff.

[18] This has explicitly been stated in Article 5 of the Council Decision, cited supra in n. 4.

[19] See CJEU 8 November 1979, case 251/78 (*Denkavit*), [1979] ECR 3369 para. 3 for the prohibition of import restrictions (now Article 34 TFEU); CJEU 21 June 1974, case 2/74 *(Reyners),* [1974] ECR 631, paras. 29–32 for the right of establishment; CJEU 3 December 1974, case 33/74 *(van Binsbergen),* [1974] ECR 1974, 1299, paras. 18–27 on the freedom to provide services; CJEU 4 December 1974, case 41/74 *(van Duyn),* [1974] ECR 1337, paras. 4–8 for the free movement of workers.

[20] CJEU 30 January 1974, case 127/73 *(BRT v. SABAM),* [1974] ECR 51, paras. 15–16.

[21] See Article 154 AA on public procurement and Article 4 of Annex XVII on access to some services markets.

harmonization or unification of private law or business law at large. But as pointed out above, market integration is not possible without a certain approximation of the legal standards which determine the cost of production and distribution; where the national standards differ too greatly, the Member States will decline to open their markets to foreign products and nationals.[22]

Over more than fifty years, three layers of EU law have emerged which impact private law. The first consists of the Treaty provisions which are directly applicable. In the circumstances of the case they may determine private law relations; thus, anticompetitive agreements are void under Article 101(2) TFEU. Second, the Court of Justice has given effect to, or rather "discovered", certain general principles of law which serve for interpreting EU law or filling gaps, and sometimes even for reviewing the compatibility of national law with EU law.[23] The third and most important layer is legislation approximating the national laws of the Member States that has been enacted ever since the late 1960s; such legislation has been adopted by EU institutions based upon numerous provisions of the TFEU, in particular Article 114.

Given the historical purpose of the Union, the lack of a comprehensive legal basis, the complicated legislative procedure of the Union and the sovereignty claims of Member States, EU legislation has only tackled specific issues which are considered to be obstacles to the operation of the Internal Market. As a result, EU law in general and EU private law in particular is fragmentary; there is no overarching concept or system. While more recent years have witnessed attempts at consolidation in more comprehensive legal acts, the basic approach is still to pinpoint individual problems. Thus, there is no general contract law but a directive on distance contracts,[24] and not even a general sales law but only a directive dealing with certain aspects of the sale of consumer goods.[25]

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[22] See supra section I.2.a), the text following n. 15.

[23] See *Metzger,* Extra legem, intra ius: Allgemeine Rechtsgrundsätze im europäischen Privatrecht, Tübingen 2009; *Basedow,* General Principles of European Private Law and Interest Analysis – Some Reflections in the Light of Mangold and Audiolux, European Review of Private Law 2016, pp. 331–352.

[24] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19, now replaced by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

[25] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

EU law is enacted in different forms of legislation:[26] the most frequent one for private law is the *directive,* which does not apply as such in national courts but has to be implemented by the Member States in accordance with their own legal systems. By contrast, *regulations* are directly applicable in the Member States. Some of them are compulsory in the sense that they supersede national law; we find examples in the field of competition law[27] and transport law.[28] Others are optional, allowing private parties to avail themselves of the legal regime laid down in the regulation as an alternative to the otherwise applicable national law; examples are the Community Trade Mark[29] and the Societas Europaea, a corporation established under EU law.[30] *Decisions* are a further form of EU legislation; they are primarily issued for the implementation of international conventions concluded by the EU in the internal law of the Union; an example is the Hague Convention on Choice of Court Agreements.[31] These different forms are of course irrelevant for the EU–Ukraine Association Agreement, which does not produce any direct effect anyway and simply lays down obligations requiring Ukraine to approximate its law to the various EU instruments; it does not matter whether these instruments are directly applicable in EU courts or not.

The private law of the Union is not clearly separated from public law; the policy orientation of EU legislation often leads to a mix of private and public law rules, which are both considered as tools for achieving certain policy goals. The body of private and business law which Ukraine will have to adjust to is immense and covers multiple areas, including company law, consumer law and labour law.[32] Some exemplary remarks must suffice in this context. They will touch upon financial services, infra 2., and consumer law,

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[26] See Article 288 TFEU, where three binding forms are listed; the regulation exists in dual format, see the following text.

[27] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1, dealing with exemptions from the prohibition and invalidity of vertical agreements restricting competition.

[28] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/1.

[29] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version), OJ 2009 L 78/1.

[30] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 2001 L 294/1.

[31] Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ 2014 L 353/5.

[32] See supra n. 16.

infra 3., and will finally deal with legislation that Ukraine is not obliged to adopt, infra 4. and 5.

2. Financial services

Annex XVII of the EU–Ukraine Association Agreement specifies a variety of financial services: banking, insurance, trade in securities, collective investments in transferable securities (investment funds), market infrastructure (settlement mechanisms), payments and money laundering. For these areas a total of almost sixty binding EU instruments are listed which Ukraine promises to adopt. Most of these acts relate to the regulatory framework of financial services and are of a public law nature, but some contain provisions on private law as well. To illustrate the meaning of this obligation, the following remarks will focus on the example of the Solvency II Directive for insurance.[33]

The original version of the Solvency II Directive comprises 312 articles and five annexes. Some of them simply codify provisions dealing with the conditions for the establishment and the cross-border provision of insurance services that had been enacted in several "generations" of directives for non-life and life insurance since the early 1970s; that is the "old" part of the Directive. While insurance contract law is still mainly in the hands of the Member States, Articles 178 ff. contain provisions of a private law nature, in particular on the policyholder's right of withdrawal from the contract, on information requirements and on the law applicable to the insurance contract. The "new" part aims at a risk-oriented regulation of insurance companies, regarding in particular the assessment of the risks they accept and the equity and solvency they need to cope with those risks.

The original version of the Directive prescribed an implementation of the "new" part into Member State law by March 2012 (Article 309). It turned out that this deadline was too short for the complicated adjustment which Member States and insurers had to carry out. Consequently the Union extended the deadline for implementation to March 2013,[34] and when this again proved too short, to March 2015.[35] Thus, Member States could take up to five and a half

[33] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast version), OJ 2009 L 335/1.

[34] Directive 2012/23/EU of the European Parliament and of the Council of 12 September 2012 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives, OJ 2012 L 249/1.

[35] Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I), OJ 2013 L 341/1.

years to comply with their obligation to implement the Directive – or rather: only the "new" part of it.

By contrast, the period allowed to Ukraine for the implementation of the whole Directive, including the "old" part, is only four years. It is difficult to imagine that the implementation in this period of time will be more than just a mechanical transformation, i.e. the literal translation of the Directive and its publication in the official gazette. In light of the highly technical and complex nature of many provisions, it appears unlikely that the personnel of the supervisory authority, of the courts and of the insurance industry will become sufficiently familiar with the regulations in order to allow their having any practical effect in the Ukrainian insurance sector in the imminent future; an adjustment of the law in action cannot be expected in the years ahead. It is an open question why the EU Commission demanded such haste from a country which is supposed to remain a neighbour and not become a Member State.

3. Consumer protection

A criticism of a different nature is appropriate with regards to consumer law. Annex XXXIX lists sixteen binding acts of EU law which Ukraine has promised to adopt. Four of them deal with product safety and can be regarded as corollaries of free trade: if goods are permitted for import they must comply with the safety standards of the import country. But the commitment of Ukraine goes beyond these instruments and covers a number of directives protecting the commercial interests of consumers as well. It has correctly been observed by a leading European expert on consumer law that "consumer protection is considered to represent one of the 'core aspects' of the ENP policy"[36] and that the "2014 SAAs with Georgia, Moldova and Ukraine pay particular attention to consumer protection".[37]

Under Annex XXXIX, Ukraine will indeed have to implement in its internal law, within the next three years, the most important consumer law directives: the Unfair Contract Terms Directive[38], the Unfair Commercial Practices Directive,[39] the Consumer Sales Directive,[40] the Distance Contracts Di-

[36] *Stuyck/Durovic,* The external dimension of EU consumer law, in: Cremona/Micklitz (eds.), Private law in the external relations of the EU, Oxford 2016, pp. 227–248 (241). ENP = European Neighbourhood Policy.

[37] *Stuyck/Durovic,* previous n., p. 243. SAA = Stabilization and Association Agreement.

[38] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29.

[39] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/

rective,[41] the Doorstep Selling Directive,[42] the Package Travel Directive,[43] the Timeshare Directive[44] and the Consumer Credit Directive.[45] These instruments provide for minimum standards of consumer protection and allow for a better protection by national law. It is unclear whether this permission of higher standards is still valid where, in the meantime, minimum harmonization has been replaced within the EU by full harmonization; this has to a large extent occurred with the Distance Contracts Directive and the Doorstep Selling Directive, which were merged into the Consumer Rights Directive in 2011.[46] Since the Association Agreement was concluded only in 2014 and does not mention the 2011 Consumer Rights Directive, Ukraine appears not to be bound.

The question is, however, whether the imposition of minimum standards of consumer protection on Ukraine makes sense. It is not an indispensable precondition for cross-border trade with the EU, and it is of doubtful benefit at the domestic level. The need for consumer protection arises subsequent to consumption. Without consumption, consumer protection is redundant and a costly luxury. Consumer law emerged in the Western world when private wealth increased at a larger scale and broad parts of the population started to invest in more or less expensive consumer goods, such as cars and boats, furniture and kitchen appliances. This occurred in the USA in the 1960s[47] and

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2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ 2005 L 149/22.

[40] See supra n. 25.

[41] See supra n. 24.

[42] Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31.

[43] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

[44] Directive 2008/122/EC of the European Parliament and of Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, OJ 2009 L 33/10.

[45] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ 2008 L 133/66.

[46] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ 2011 L 304/64.

[47] The rise of consumer law is usually attributed to US President *Kennedy*'s consumer message of 1962, see President *John F. Kennedy,* "Special Message to the Congress on Protecting the Consumer Interest, 15 March 1962", in: Public Papers of the Presidents of the United States, John F. Kennedy, containing the Public Messages, Speeches and Statements of the President, January 1–December 31, 1962, pp. 235–243, here cited from the reprint in: *von Hippel,* Verbraucherschutz, 2nd ed. Tübingen 1979, pp. 225–234.

in Western Europe in the 1970s and 1980s (at a time when private budgets available for consumption emerged from the previous poverty that had prevailed in the aftermath of World War II).

Is Ukraine already in a similar economic situation? Ukraine is one of the poorest countries in Europe. According to the International Monetary Fund its gross domestic product (GDP) per capita amounted to 7,519 US-$ in 2015, which ranked the country as no. 115 in the world. In the World Bank statistics, Ukraine ranked as no. 107 with a per capita GDP of 8,666 US-$ in 2014. The poorest EU Member States of Bulgaria and Romania rank around no. 60, with a per capita GDP more than twice as high as that of Ukraine, and the per capita GDP of the more prosperous Member States such as France, Germany or the Netherlands ranges from 40,000 to 50,000 US-$.[48] In fact, Article 43 AA explicitly acknowledges that Ukraine qualifies as a developing country for the purposes of some instruments of world trade law.

In such a country most people struggle hard to keep their heads above water; their primary concern is consumption, not consumer protection, and they have to generate sufficient income for their daily needs. Correspondingly, traders and producers will generally offer low-priced goods which often are of modest quality but meet the purchasing power of the population. From an economic policy perspective the government of such a country should avoid all regulations that raise prices, and it would be well-advised to think of consumer protection only at a later stage.

4. Inconsistencies

The selection of the EU instruments listed in the Annexes for approximation purposes sometimes appears fortuitous. While consumers receive particular attention, see above, small and medium-sized enterprises (SMEs) such as start-ups do not, although their activities foster economic growth and the emergence of a middle class. But the Association Agreement refers neither to the Directive on commercial agency, which ensures that agents will get the reward for their investment even after termination of the agency contract,[49] nor to the Directive on combating late payment, which through the imposition of high interest rates helps protect SMEs against the deferral of payment by their dominant contracting partners.[50]

A further example is provided by the law on product safety. Under Article 56 AA, Ukraine commits itself to gradually adjusting its laws to EU tech-

[48] The data are reproduced in a Wikipedia entry on "List of countries by GDP (PPP) per capita"; they can be retraced on the websites of the institutions mentioned above.

[49] Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, OJ 1986 L 382/17.

[50] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), OJ 2011 L 48/1.

nical regulations and standards, and Annex III specifies the field of "general product safety" as being part of that obligation. The respective EU standards are laid down in the Directive on general product safety which, thus, will have to be adopted by Ukraine.[51] While this Directive deals with the safety conditions for the marketability of products, the EU has also harmonized the consequences of damage caused by defective products, imposing strict liability on producers and importers.[52] From a holistic perspective both instruments address the problem raised by defective products: one is preventative, the other compensatory; where a product does not meet the standards laid down in the Product Safety Directive, the producer's liability is triggered under the Product Liability Directive or national tort law.[53] Yet, the Association Agreement does not mention the Product Liability Directive.

A third example is the law on passenger rights in the field of transport. Over the years the EU has adopted regulations dealing with this area and in particular with the carrier's liability for air transport,[54] rail transport,[55] sea transport[56] and road transport.[57] As shown by the case law of the CJEU, the Air Passenger Regulation is of great importance in legal practice.[58] Nevertheless, some individuals will doubt whether these regulations are indispensable elements of the approximation of Ukrainian law to EU standards. But even for such critics, it is difficult to understand why Annex XXXII requires Ukraine to adopt the instruments on rail and sea transport but not those on air and bus transport. The only possible explanation for all these inconsistencies

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[51] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ 2002 L 11/4.

[52] Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 L 210/29.

[53] *Marburger,* Produktsicherheit und Produkthaftung, in: Festschrift für Erwin Deutsch, Köln 1999, pp. 271–289 (281 ff., 285); the author points out that compliance with the Product Safety Directive does not immunize the producer against liability however, see pp. 282 f.

[54] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, OJ 2004 L 46/1.

[55] Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ 2007 L 315/14.

[56] Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ 2009 L 2009 L 131/24.

[57] Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004, OJ 2011 L 55/1.

[58] See *Bobek/Prassl (eds.),* Air Passenger Rights – Ten Years On, Oxford and Portland 2016.

is that different people within the bureaucracy of the EU Commission have listed the various instruments Ukraine is expected to adopt and that there was no general survey and oversight.

5. Blind spots in private international law

The absence in the Association Agreement of specific rules on the further development of private international law as between the EU and Ukraine is to be deplored. Article 24 AA only highlights the agreement of both Parties "to further develop judicial cooperation in civil […] matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial." The second paragraph states that the Parties agree to "facilitate further EU–Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."

There is no specific obligation for Ukraine to adjust its law to any of the numerous EU-instruments in this field. Instead, Article 24 refers to international instruments which are inexistent in many areas that matter for international commerce. The blind spot of the Agreement is understandable with regard to some issues; for example, the mutual recognition of judgments established by the Brussels I Regulation[59] cannot be extended to a third State, but could the Agreement not have provided for negotiations on a pertinent treaty?

The EU *acquis* also includes several acts dealing exclusively with the applicable law, which do not affect the sovereignty of the States involved. For example, the Rome II Regulation establishes the law applicable to non-contractual liability not only for intra-European fact situations but also in cases where the law applicable is that of a third State such as Ukraine.[60] Ukrainian private international law differs from the Rome II Regulation[61] on several points; a uniformity of outcome is therefore difficult to achieve as between the EU and Ukraine as far as non-contractual liability is concerned. From the viewpoint of a European Neighbourhood Policy it would have reflected significant progress had the Association Agreement secured a harmo-

[59] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

[60] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/4.

[61] See *Dovgert,* Ukraine, in: Basedow/Rühl/Ferrari/de Miguel Asensio (eds.), Encyclopedia of Private International Law, vol. III, Cheltenham 2017, pp. 2602–2611.

nization of the conflict rules that apply in the courts of the Member States of the EU as well as in the courts of its neighbour Ukraine.

III. Implementation

In accordance with the obligations incurred in the Association Agreement, Ukraine will have to adjust its private law legislation to a vast array of EU enactments in the years ahead. While Ukraine's commitment is limited to what has been promised in the Agreement, the country is of course free to approximate its laws in other areas, such as those outlined above,[62] as well. This will certainly affect the overall understanding of private law in Ukraine, which should therefore be highlighted as a first step, see infra 1. The present survey also has an impact on another question raised in this context, i.e. how Ukraine should proceed when implementing EU private law in its own private law, infra 2.

1. Private law in Ukraine

As a part of the former Soviet Union, after its declaration of independence Ukraine adopted the Soviet legislation on civil law, in particular the Ukrainian Civil Code of 1963, which was based on the USSR's Foundations of Legislation on Civil Law of 1962,[63] and the 1969 Code on Marriage and Family.[64] It is well-known that the Soviet legislation reduced the private sphere to next to naught, in accordance with *Lenin's* famous statement that "we do not recognize anything as 'private', for us everything in the field of the economy is of a public-law and not of a private-law nature."[65] Some basic rules emerged from this approach, notably the dependence of contracts and their validity on the central economic plan and on other administrative measures, which completely blurred the borderline between the public and the private sphere and between public and private law.

After the collapse of the USSR, work on a re-codification – intended to cope with Ukraine's transition to national sovereignty, to the rule of law, to

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[62] See supra sections II.4. and 5.

[63] A German translation of these Foundations *(Grundlagen der Zivilgesetzgebung)* has been published in: Die Grundlagen der sowjetischen Gesetzgebung, Moskau 1977, pp. 355–427; cf. *Reich,* Sozialismus und Zivilrecht, Frankfurt am Main 1972, pp. 303 ff., in particular, pp. 311–323.

[64] See *Kossak,* General Principles of Private Law in Ukraine, in: Jessel-Holst/Kulms/Trunk (eds.), Private Law in Eastern Europe – Autonomous Developments or Legal Transplants?, Tübingen 2010, pp. 87–92.

[65] Cited after *Reich,* supra n. 63, p. 133 (my translation from the German translation, J.B.).

the recognition of human rights and to a market economy based on individual liberty – was carried out from the mid-1990s onwards. It ultimately led to the adoption of a new Civil Code, the Economic Code and a new Family Code as well as further laws on land, corporations etc. in 2003/2004.[66]

Yet new legislation is not always equivalent to new law. The law in action is often impregnated by methodological traditions and underlying principles which dominate minds in a society and which do not lose their practical impact by legislative command. This has repeatedly been highlighted in the context of the transformation of the former Soviet republics into independent states having a purportedly Western orientation.[67] One of the leading private law scholars on Ukraine points out that Ukrainian law has mainly been formed by the traditions of socialist law in the former USSR, in particular by its version of "normativism": actions were considered as lawful only where explicitly provided by law. According to his assessment, present-day Ukraine has not conceived of "how to design the transition from Soviet-style law, with its normativism and unjustified state interference with private life, towards the liberal conception of law that is familiar in Western European countries and that is a determinant factor for the implementation of the requirements of the Copenhagen criteria for Ukrainian membership in the EU."[68]

It is in this context neither possible nor necessary to go into further detail. What matters is the outright contradiction between the societal model of the EU Member States and the one that apparently is still alive in Ukraine. The "unjustified state interference with private life" is the opposite of what generally is referred to as party autonomy, i.e. a private sphere where individuals take their own free decisions on the course of their lives. One of its components is the freedom of contract[69] and the binding effect of such contracts irrespective of state intervention. But it has other aspects as well, many of

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[66] See *Kossak,* supra n. 64, p. 87; *Maydanyk,* Die Entwicklung des ukrainischen Privatrechts in den Jahren 1991–2016, ZEuP 2017, pp. 373–395.

[67] See e.g. *Kurzynsky-Singer,* Wirkungsweise der legal transplants bei den Reformen des Zivilrechts, in: id. (ed.), Transformation durch Rezeption?, Tübingen 2014, pp. 3–38 (6 and 13 ff.); *Pankevich,* Phenomena of Legal Transplants Related to the Social Model of the Post-Soviet Countries, ibid., pp. 39–64; at p. 62 the author points out that borrowing from the West only at the "high levels of political institutions […] enables the elites of the post-Soviet states to mimic an institutional order of their counterparts abroad […] [and] leaves the deep layers of social reality untouched."

[68] *Maydanyk,* supra n. 66, ZEuP 2017, p. 377 (my translation, J.B.).

[69] CJEU 18 July 2013, case C-426/11 *(Alemo-Herron),* ECLI:EU:C:2013:521, para. 32, where the Court bases the freedom of contract on the safeguarding of entrepreneurial freedom under Article 16 of the Charter of Fundamental Rights, infra at n. 70; see also *Basedow,* Freedom of Contract in the European Union, European Review of Private Law 2008, pp. 901–923.

which are protected by the European Human Rights Convention,[70] to which Ukraine is a Contracting State, and – in the EU – by the Charter of Fundamental Rights.[71] The difference of background raises doubts as to the effective real world implementation of the numerous EU enactments listed in the Association Agreement. It is this difference which should be addressed by appropriate measures, e.g. by conferences and continuing education for government officials, judges and practitioners.

2. Ways of implementation

On a more technical note Ukraine has to decide on the legislative procedure to be followed when implementing the EU *acquis* listed in the Association Agreement. Given the immense workload the procedure should be streamlined in order to allow for quick results. A more profound reflection and deliberation leading to further amendments could be postponed until some experience has been gained.

In light of the divergent background of the Ukrainian codes and the EU *acquis,* it is at present not advisable to implement the numerous specific EU acts through amendments of the codes; their adjustment would be time-consuming and give rise to numerous frictions. For the time being an implementation of the *acquis* in special statutes appears simpler. For greater clarity the special statutes could be integrated in collections dealing with specific areas, such as insurance, consumer protection etc. For similar reasons an implementation going beyond the provisions of the various *acquis* enactments cannot be recommended. Many EU instruments allow, for instance, for a better protection of the consumer or of workers or for other deviations in the national implementing provisions from the text of the EU act. Where a country makes use of such discretion, the discussion will soon become detailed and slow down.

Subsequent or parallel to the fast track implementation outlined above, Ukraine might think of a more thorough overhaul of its present codes, in particular the Economic Code, in order to overcome the traditional socialist structures that appear to subsist in that instrument.[72] If that project is tackled, the experience of Georgia could show the way. The government of Georgia built up a close cooperation with German experts, who are said to have deleted the relics of old Soviet law from the drafts of the Georgian Civil Code.[73]

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[70] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, 213 UNTS 221.

[71] OJ 2016 C 202/389.

[72] See *Maydanyk,* supra n. 66, ZEuP 2017, p. 380.

[73] See *Chanturia,* Codification of Private Law in Post-Soviet States of the CIS and Georgia, in: Wen Yeu Wang (ed.), Codification in International Perspective – Selected Papers from the 2nd IACL Thematic Conference, Cham 2014, pp. 93–106 (95).

This would be the right moment for considering a merger of the codes with the statutes implementing the EU *acquis*.

IV. Conclusion

The EU–Ukraine Association Agreement has been negotiated by the Union as part of the European Neighbourhood Policy, and it represents an effort to transform the Ukrainian state, economy and society with the assistance of the EU.[74] Through the establishment of a Deep and Comprehensive Free Trade Area (DCFTA), the Agreement allows for an especially strong form of association,[75] without however envisaging later membership. While only touching upon the political criticism voiced against the Agreement, this paper has focused on the obligations accepted by Ukraine to approximate her laws to EU standards as a condition for market integration.

The overall impression arising from our *tour d'horizon* relating to the law of financial services and to consumer law is that Ukraine is burdened with regulations that are excessively complicated for the country and that are redundant for or even detrimental to a country that numbers among the poorest places in Europe. In other areas clear inconsistencies emerge from a comparison of the imposed *acquis* and other EU enactments in the same field which are not mentioned in the Agreement. From the viewpoint of a neighbourhood policy, it finally appears incomprehensible that the issues of legal cooperation in civil matters have almost completely been neglected. The basic concept of a neighbourhood policy would seem to require a better understanding of what Ukraine actually needs and what could promote its relations with the Union.

Upon imposing such an immense load of EU instruments on Ukraine, it should not have gone unnoticed that over decades the history of the country has been marked by the downgrading or even complete rejection of private law as a factor ordering society. Nevertheless, when the Association Agreement takes effect the obligations it enshrines will be binding on Ukraine, which should however prefer a fast-track legislative procedure for the approximation of her laws.

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[74] *Lippert,* Europäische Nachbarschaftspolitik, Jahrbuch der Europäischen Integration 2015, pp. 277–286 (277).

[75] *Lippert,* previous n., p. 280.