5. ГІСТЬ НОМЕРА

Dr. Agata B. Capik,
M.A.S. (European Integration),
Executive M.B.L.-HSG, Luxembourg

UKRAINIAN CONSTITUTIONAL ADJUDICATION FRAMEWORK VIA ASSOCIATION AGREEMENT TOWARDS THE EUROPEAN UNION

Розглянуто питання про те, що Угода про асоціацію між Європейським Союзом та Україною зумовлює виникнення безліч нових питань у співвідношенні Європейського правопорядку та внутрішніх законів. Традиційно ці питання стають предметом судового діалогу між Судом Європейського Союзу та національними конституційними судами. Однак Угода про асоціацію визначає цей діалог у дещо іншому напрямі, що може зумовити потенційні зіткнення. Останнє розглядається з позиції конституційного права.

Ключові слова: *Угода про асоціацію, судовий діалог, конституційне право ЄС, співвідношення законодавство ЄС – національне законодавство, інтерпретація законодавства ЄС.*

Рассмотрен вопрос о том, что Соглашение об ассоциации между Европейским Союзом и Украиной обусловливает возникновение множество новых вопросов в соотношении Европейского правопорядка и внутренних законов. Традиционно данные вопросы становятся предметом судебного диалога между Судом Европейского Союза и национальными конституционными судами. Однако, Соглашение об ассоциации определяет этот диалог в несколько ином направлении, что может привести к потенциальным столкновениям. Последнее рассматривается с позиции конституционного права.

Ключевые слова: *Соглашение об ассоциации, судебный диалог, конституционное право ЕС, соотношение законодательство ЕС – национальное законодательство, интерпретация законодательства ЕС.*

The Association Agreement between the European Union and Ukraine brings a set of new questions within the relations between European legal order and domestic laws. Traditionally such a relation has been settled mainly in the way of the judicial dialogue between the Court of Justice of the European Union and the national constitutional courts. However, the Association Agreement sets out this dialogue in slightly different way, which may lead to the very potential clash. The latter is discussed from the constitutional law perspective.

Keywords: *Association Agreement, Judicial dialogue, Constitutional EU law, Relation EU law – national law, Interpretation of EU law.*

Table of content:

I. Introduction

By signing the Association Agreement Ukraine began a new chapter in its complex history. This challenge certainly constitutes only an ambitious prologue and undoubtedly requires learning the hard way in political, economical and legal respect. The new generation of Association Agreements (AAs) replaces the outdated Partnership and Cooperation Agreements (PCAs) as the basic legal framework for the bilateral relations between the European Union and the countries concerned. The agreement aims at establishing a deep political association and economic integration between the EU and Ukraine as well as providing mutual free market access.

Thus, the new legal framework has, generally speaking, the objective of setting up a form of political association, economic integration and legislative approximation. The latter requires, however, to consider the legal developments at the EU level on the one hand and to enshrine the relationship between the EU and Ukraine towards a membership of the latter in the European integrated structures on the other. It therefore requires a comprehensive legislative and regulatory approximation including a set of mechanisms to ensure uniform interpretation and effective implementation of relevant legislation of the European Union.

Considering the foregoing, this paper briefly addresses a relationship between EU and domestic law, as created by means of judicial dialogue between the national courts and the Court of Justice of the European Union (CJEU). In this context, a set of issues regarding a potential conversation between the Ukrainian Constitutional Court and the CJEU within the framework provided by the Association Agreement under EU law umbrella are highlighted.

II. Relation between EU and domestic law – a few general remarks

It is well known that the relation between the EU legal order and the domestic legal systems of the EU member States has been created, defined and put forward by the Court of Justice over the past decades. It was the Court, which created the autonomy of the EU legal order in its seminal judgment *Van Gend en Loos*. The result of this concept has been put forward in *Costa v. E.N.E.L.*, *Internationale Handelsgesellschaft* and *Simmenthal*, enshrining and developing the principle of primacy of the EU legal order over the national laws of the EU Member States. This complex relationship has in fact, until today, not found its formal regulation, but is much more a subject of dialogue between the domestic courts and the Court of Justice of the EU by means of the preliminary references system, provided for in the provision of Article 267 TFEU.

Drafted in the founding Treaties for the purposes of ensuring an effective and uniform application of EU law on the one hand and preventing divergent interpretation on the other, the mechanism of preliminary ruling has become an important tool of cooperation between national and European judiciary, as a direct channel of communication, aiming from the very beginning to develop a healthy dialogue between the CJEU and national judges with a mutual regard to their respective jurisdictions. More precisely, the system of preliminary references "*is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary*. Needless to say, national courts are thus Union courts and as such are prescribed to do everything necessary to ensure that the system of preliminary references functions as efficiently as possible, safeguarding a uniform application of European law.

II.1. Judicial dialogue towards the constitutionalisation of EU law

Having said this, one might underline that within the European legal order, the notion of judicial dialogue is significantly contributing to the Europeanization of constitutional law. Furthermore, as the wishful movements at the domestic level of the EU Member States takes place as over the past years, an increasing number of domestic constitutional courts have concurred to that development, taking an active role at the European level, interpreting and enforcing EU standards and especially making use of the preliminary ruling procedure. Consequently, the European Union constitutional legal space is becoming more and more interconnected. Both international law and EU law standards are now becoming a benchmark in the process of constitutional adjudication, while significantly influencing the domestic constitutional standards, sometimes determining a modification of the latter. Constitutional review has thus expanded not only geographically but also in its mission and function, acquiring new subject areas, roles and responsibilities. Furthermore, the theories such as *constitutional pluralism* and *multilevel governance* have become the subject headings of European Integration scholars over the past decades. These processes have doubtlessly eroded many *dicta* of the traditional *Kelsenian* legal hierarchy, including the position of the constitutional courts as guardians of the (national) constitutional supremacy.

Against this backdrop, in the post-Lisbon legal environment, particular attention should be drawn to the abovementioned constitutional courts, having not only the right but also an obligation to refer cases to the CJEU when the foreseen conditions are met. The functioning of this dialogue is traditionally shaped as follows: whereas the task of the Court of Justice is to ensure that EU law is observed, the objective of constitutional courts is to protect the national constitutions. Such point of departure draws attention to the fact that these judicial conversations are part of a never-ending supremacy discussion, mirrored by the struggle of judiciaries over who in this dialogue has the last word, in case of conflict between European and national constitutional norms.

To this end, it is argued that the European constitutional space is created not only by the EU legislator and its Court, but also by jurisprudence of the national constitutional courts, which usually play a major role in shaping the domestic constitutional legal framework. Particularly therefore these courts should thus efficiently

engage in a fruitful dialogue with the CJEU, providing a pivotal contribution to the ongoing debate concerning *constitutionalisation* of the European Union and the role national and European courts play in this process.

III. Classical clash under the EU-Ukraine Association Agreement

One cannot wonder that the abovementioned settings arrived to a certain extent also into the Ukrainian legal framework together with the ratification of the AA. It is rather a natural consequence that after entering into force of the AA's provisions classics such as the relation between the agreement itself on the one hand and domestic constitutional norms on the other hand, as well as the division of jurisdiction between the CJEU and the Ukrainian Constitutional Court, especially in the areas of law introduced by the AA, call to be reflected on and re-addressed.

III.1. Constitutional level

Considering the foregoing, it should be clearly noted that already the implementation of the EU-Ukraine AA creates significant challenges from the perspective of Ukrainian constitutional law.

Firstly, according to the provisions of Article 9 of the 1996 Constitution, "[*i*]*nternational treaties that are in force, agreed to be binding by the Verkhovna Rada [Parliament] of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine*." Such a wording of this provision implies not only that the EU-Ukraine AA becomes an integral part of the Ukrainian legal order, but that the ratification of the AA, and then its subsequent entering into force, calls openly for certain constitutional amendments. Consequently, the primacy of the national constitution over the norms of the international treaties needs to be reconsidered from the EU law perspective. Pursuant to the provisions of Article 19(2) of the Law on international treaties of Ukraine, the EU-Ukraine AA will enjoy priority over conflicting national legislation. This 'primacy principle', however, does not apply in the case of conflict between the AA agreement's provisions with and the provisions of the Ukrainian constitution. Furthermore, the supremacy of the national constitution within the Ukrainian legal order is even reinforced *expressis verbis* by Law regulating the functioning of the Constitutional Court. Thus, the role of the latter becomes crucial and should be taken into consideration in this context, particularly in the light of these provisions, which provide for the supremacy of the national constitution, while stating that: "*The task of the Constitutional Court of Ukraine shall be to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the State throughout the territory of Ukraine.*"

III.2. Implementation towards legislative approximation

Keeping in mind that the Ukrainian organs and institutions are not involved in the decision-making processes at the EU level, the issue concerning the approximation of the Ukrainian legislation to the EU *aqcuis* should be addressed. Its particular importance concerns the fundamental constitutional principles, such as legality and sovereignty. It is argued that these principles should be given a pro-European interpretation, whereas the need of certain constitutional amendments should be considered, despite its political sensitivity. The latter holds particularly true in the light of the provisions of Article 5 of the Ukrainian Constitution, providing that '[*t*]*he people are the bearers of sovereignty and the only source of power in Ukraine'* and that '[*t*]*he right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials.'*

Furthermore, it should also be mentioned that there is no direct effect of international agreements under the Ukrainian law. Consequently, the domestic legal system in Ukraine has never experienced the necessity of direct application of any binding acts enacted by the institutions under the framework of an international agreement. Therefore the question obviously arises as to how the decisions of the Association Council will be applied in Ukraine and enforced under Ukrainian domestic law. Additionally, the direct effect of the AA is expressively excluded by Council Decision providing that '[*t*]*he Agreement shall not be construed as conferring rights or imposing obligation which can be directly invoked before Union or Member State courts or tribunals.*' However, such a norms setting calls for a question as to what extent indeed a Council Decision, not being a part of the AA itself, can preclude a direct effect of clear, precise and unconditional provisions of the latter.

Consequently, the *sine qua non* condition of responding to the challenges of a legislative approximation seems to be an adoption of an implementation law, clarifying the implications of the AA for the correct application and interpretation of domestic legislation. Needless to say, the role of the Ukrainian Constitutional Court in further European-friendly interpretation of both EU-Ukraine AA and domestic norms will be crucial in ensuring the correct approximation of Ukrainian legislation.

Last but not least, the notion of the judicial dialogue should be mentioned in the underlined context. Remarkably, '[w]*here a dispute raises a question of interpretation of an act of the institutions of the European Union, the arbitration tribunal shall not decide the question, but request the Court of Justice of the European*

Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration tribunal.' In other words, the effective control and enforcement, with the EU's decisions having the force of law, is given not to Ukrainian courts, but to the CJEU in Luxembourg. Such a construction asks for a great possibility of divergent interpretation conducted by the Ukrainian Constitutional Court, having under domestic law the jurisdiction in ruling on constitutionality of national legislation, and the interpretation given by the CJEU. Under such regulation, the potential conflicts are only a question of time, particularly when it is not a Constitutional Court, but a special tribunal only, entitled to refer the case to the CJEU.

IV. Concluding remarks

Considering the foregoing, a clash seems to be at hand. More than that, there are more questions than clear answers or solutions provided by the AA legal framework. Therefore an analysis as to whether the Ukrainian Constitutional Court will be able to adapt its role and function to the challenging legal framework provided for in the EU-Ukraine AA should be carefully conducted, also from the EU constitutional law perspective and future developments within the relationship between the EU on the one hand and Ukraine on the other. The position of the constitutional courts as guardians of the (national) constitutional supremacy might therefore receive a new feature, defined or rather provoked, by the new generation of AAs.