

# SWITCHING GEAR: LAW APPROXIMATION IN UKRAINE AFTER THE APPLICATION FOR EU MEMBERSHIP

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*Abstract: In the wake of a full-scale Russian invasion, Ukraine applied for EU membership on 28 February 2022. In a matter of months, it was formally confirmed by the European Council as a candidate country. This has had a plethora of consequences; one of them is the obligation to approximate its national law with the EU *acquis* in its entirety. Unless there is a change of paradigm in EU pre-accession policy, transitional arrangements are strictly the exception to the rule, and therefore the law approximation effort has to go way beyond existing commitments under the EU-Ukraine Association Agreement, the Energy Community Treaty, and the Civil Aviation Agreement. Such switching of gear in the law approximation process comes with additional layers of complexity. For instance, compliance with the horizontal provisions of the Treaty on the Functioning of the European Union governing freedoms of the internal market requires comprehensive screening of national law before any legislative changes are made. Furthermore, law approximation with EU legal acts which can only apply when a country becomes a Member State must be carefully planned and timed. The legal system must be ready to accommodate EU law, with all the principles governing enforcement, including the direct application of EU regulations. While this is all doable, it must be handled with care, especially in a country whose economy and society at large have been shattered by war.*

*Keywords: law approximation, dynamic approximation, pre-accession policy, membership of the European Union, association agreements, rapprochement.*

## 1 Introduction

On 28 February 2022, in the most dramatic circumstances of a full-scale illegal Russian invasion, Ukraine applied for EU membership. This bold move has had many consequences. As is well known, submitting a bid for EU membership is *par excellence* a political act, albeit with con-

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siderable economic and legal implications, especially when an aspiring country is granted candidate status. The latter, in relation to Ukraine, materialised very quickly on 23 June 2022.<sup>1</sup> Since then, against all odds, Ukrainian authorities have proceeded with the necessary reforms to make a deeper *rapprochement* with the European Union a reality, not just a figurative exercise. All of this has taken place despite the war and all the atrocities that have come with it. Leaving the assessment of the political and economic implications of an application for EU membership to representatives of other genres of science, the centre of gravity of this article is on the legal implications of this new trajectory that Ukraine has embarked on. In particular, the analysis that follows looks at the obligation to approximate Ukrainian law with the EU *acquis*. As the starting point, we put under the microscope the existing obligations to align the domestic legal order with EU law, which stem from the EU-Ukraine Association Agreement<sup>2</sup> as well as the Energy Community,<sup>3</sup> and the Civil Aviation Agreement (section 2).<sup>4</sup> In turn, we proceed beyond the existing bilateral and multilateral frameworks to assess how the application for EU membership has translated into a switching of gear when it comes to regulatory alignment. Despite the hazy legal basis, there is no doubt that Ukraine has now the obligation to approximate its domestic law with the EU *acquis* in its entirety. This, as demonstrated in section 3, is a way more nuanced exercise than it has been so far under the terms of the Association Agreement and related legal instruments. Conclusions are offered in section 4.

## 2 Law approximation under existing EU-Ukraine agreements

### 2.1 Introduction

At the time of Russia's full-scale aggression, Ukraine is at the point where the prospect of membership in the European Union, and joining the European family, is more real than ever. This, however, is connected with the extremely complex and difficult task of approximating the Ukrainian legal system with the EU *acquis*. In normal circumstances, it is a gargantuan exercise in itself, but – in the case of Ukraine – the challenge is exacerbated by the war and the impact it has had on society at large, the economy, and the business community, as well as the political players. There is no doubt that law approximation, and the ability to implement newly adopted rules, serve as litmus tests to gauge the levels

<sup>1</sup> See, para 11 of European Council Conclusions, 23-24 June 2022, EUCO 24/22 <[www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf](http://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf)> 2 December 2023.

<sup>2</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 [hereinafter: EU-Ukraine AA].

<sup>3</sup> The Energy Community Treaty [2006] OJ L198/18.

<sup>4</sup> Common Aviation Area Agreement Between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part [2021] OJ L387/3.

of maturity and readiness of Ukraine, its state authorities, including the judiciary, to join the European Union. After all, the EU is not a classic international organisation but a supranational entity, constructed on a new legal order where the principles of primacy and direct effect determine the application of rules in the national courts.<sup>5</sup>

One should not be under the impression that law approximation is a novelty for Ukraine. Nothing could be further from the truth. Ukraine has been proceeding with this exercise for many years, albeit with mixed results.<sup>6</sup> For a host of reasons, it has not been an easy ride. While we leave this story for others to tell, it is necessary to emphasise that over the last thirty years Ukraine has been engaged in building its statehood on the ashes of the Soviet Union, and this has been happening against precarious economic, societal, and political circumstances.<sup>7</sup> Furthermore, just like other countries of the region, it has been recovering from questionable 'joys' of staying – for decades – in the Council of Mutual Economic Assistance.<sup>8</sup> From the formal point of view, Ukraine has had the obligation to proceed with law approximation as of the entry into force of the Partnership and Cooperation Agreement (hereinafter: EC-Ukraine PCA).<sup>9</sup> As explained in section 2.2 below, it envisaged only a very general obligation in this respect. For the first time ever, gears were switched with the EU-Ukraine AA, which not only transformed the obligation to approximate from the best endeavours clause to the obligation to achieve high levels of alignment, but also provided lists of the EU *acquis*, or parts thereof, pencilled in for law approximation. It is now supplemented by commitments undertaken by Ukraine as a result of accession to the Energy Community, as well as the conclusion of the Common Aviation Area Agreement with the EU and its Member States. As alluded to earlier in the introduction to this article, with the application for EU membership, the gears of law approximation switched once again. All the above is addressed in turn.

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<sup>5</sup> See, *inter alia*, K Lenaerts, P Van Nuffel and T Corthaut, *EU Constitutional Law* (OUP 2021) 629–653.

<sup>6</sup> See, *inter alia*, R Petrov, 'How Far to Endeavour? Recent Developments in the Adaptation of Ukrainian Legislation to EU Laws' (2003) 8 *European Foreign Affairs Review* 125; R Petrov, 'Legislative Approximation and Application of EU Law in Ukraine' in R Petrov and P Van Elswege (eds), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge 2014).

<sup>7</sup> See, *inter alia*, T Kuzio, *Ukraine: State and Nation Building - Routledge Studies of Societies in Transition* (Routledge 1998); S Yekelchuk, *Ukraine: What Everyone Needs to Know* (2nd edn, OUP 2020).

<sup>8</sup> Council for Mutual Economic Assistance was an economic cooperation endeavour for the Soviet Union and satellite countries. The assistance was one sided and ultimately the only beneficiary remained the Soviet Union, Russia in particular. See further, *inter alia*, J Brine, *Comecon: The Rise and Fall of an International Socialist Organization* (Transaction Publishers 1992).

<sup>9</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] OJ L49/3.

## 2.2 Early days of law approximation in Ukraine: EC-Ukraine Partnership and Cooperation Agreement

Ukraine relations with the then European Community had begun much earlier than with the entry into force of the Association Agreement. After gaining independence in 1991, Ukraine was the first of the former Soviet republics to sign a Partnership and Cooperation Agreement with the European Communities in 1994 (hereinafter: EC-Ukraine PCA).<sup>10</sup> Despite this important and symbolic step, the EC-Ukraine PCA could be called rather soft, especially in terms of law approximation obligations. It was also not very ambitious as far as trade was concerned. While it envisaged liberalisation of trade, it fell shy of creating a free trade area. With the benefit of hindsight, it should be perceived as an important political step, determining the general direction of travel, yet without specifics regarding the development of further relations between the European Union and Ukraine. It is notable that similar agreements were concluded with many other independent States that emerged after the collapse of the USSR, and neither on the side of those states nor on the EU side was there any appetite to deepen bilateral relations beyond the basic frameworks that the PCAs had to offer.<sup>11</sup> Unlike the three Baltic States, Ukraine was no exception and, at this point in history, it was very much torn apart in its – *prima facie* – binary choice of *rapprochement* with the West or with Russia.<sup>12</sup>

As far as law approximation was concerned, Article 51 EC-Ukraine PCA was of the essence. It provided:

1. The Parties recognize that an important condition for strengthening the economic links between Ukraine and the Community is the

<sup>10</sup> See, *inter alia*, A Lewis (ed), *EU and Ukraine: Neighbours, Friends, Partners?* (Federal Trust 2002).

<sup>11</sup> Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States and the Russian Federation [1997] OJ L327/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Moldova [1998] OJ L181/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Georgia [1999] OJ L205/3; Partnership and Cooperation Agreement between the European Communities and their Member States and the Republic of Kazakhstan [1999] OJ L196/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part [1999] OJ L246/3; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Kyrgyz Republic, of the other part [1999] OJ L196/48; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part [1999] OJ L229/3; Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part [2009] OJ L350/3. For an academic appraisal, see Ch Hillion, 'Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union' (1998) 3 *European Foreign Affairs Review* 399.

<sup>12</sup> For a historical account, see, *inter alia*, S Plokhly, *The Russo-Ukrainian War* (Penguin 2023).

approximation of Ukraine's existing and future legislation to that of the Community. Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

2. The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, technical rules and standards, nuclear laws and regulations, transport.

As already alluded to, this was merely a best endeavours obligation. Put differently, Ukraine had the obligation to act, not to achieve a particular result. An indicative list of areas was also provided and focused on the internal market *acquis*. In many respects, the law approximation clause in question was not original. In fact, it was a standard clause which, at the time, could be found in Europe Agreements with Central and Eastern European countries,<sup>13</sup> and later also in the Stabilisation and Association

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<sup>13</sup> Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [1993] OJ L348/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part [1993] OJ L347/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part [1994] OJ L360/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L359/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part [1994] OJ L357/2; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L358/3; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part [1998] OJ L51/3; 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 [1998] OJ L26/3; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1998] OJ L8/3; Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part [1999] OJ L51/3. For a comparative analysis of law approximation clauses in Europe Agreements, see A Łazowski, 'Approximation of Laws' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (TMC Asser Press 2002). More generally on Europe Agreements, see, *inter alia*, M Maresceau, "Europe Agreements": A New Form of Co-operation between the European Community and Central and Eastern Europe' in P-Ch Müller-Graff (ed), *East Central European States and the European Communities: Legal Adaptation to the Market Economy* (Nomos 1993); M Maresceau and E Montaguti, 'The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal' (1995) 32 CML Rev 1327.

Agreements with the Western Balkan States.<sup>14</sup> Having said that, according to Eugeniusz Piontek, with the applications for EU membership of one country after another,<sup>15</sup> the respective law approximation clauses laid down in the Europe agreements and Stabilisation and Association Agreements have had to be reinterpreted into strict obligations to approximate and implement EU-based rules.<sup>16</sup> This, of course, was not the case with Ukraine as Article 51 EC-Ukraine PCA had become a part of legal history before Ukraine applied for EU membership.

### **2.3 The EU-Ukraine Association Agreement in context**

With the EU accession of Poland, Slovakia, and Hungary in 2004, and Romania in 2007, Ukraine became a direct neighbour of the European Union. This did not immediately lead to an upgrade of bilateral treaty relations. At that time, the EU paid more attention not to target cooperation with Ukraine but to develop relations within the framework of the newly established European Neighbourhood Policy (hereinafter: ENP), and later its regional dimension, the Eastern Partnership (hereinafter: EaP). The ENP and the EaP aimed to create policy *chapeaux* through which the EU would spread common European values among the 'close circle of friends' and promote political association as well as economic

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<sup>14</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/1; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo\*, of the other part [2016] OJ L71/3. See further, D Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?' (2003) 8 *European Foreign Affairs Review* 77.

<sup>15</sup> In the order of submission: Hungary (31 March 1994), Poland (5 April 1994), Romania (22 June 1995), Slovakia (27 June 1995), Latvia (13 October 1995), Estonia (24 November 1995), Lithuania (8 December 1995), Bulgaria (14 December 1995), Czech Republic (17 January 1996), Slovenia (10 June 1996).

<sup>16</sup> See, in relation to the Europe Agreements, E Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union. A Polish Perspective' (1997) 1 *Yearbook of Polish European Studies* 73. See also A Łazowski and S Blockmans, 'Between Dream and Reality: Approximation of Domestic Laws with EU Law in the Western Balkans' in R Petrov and P Van Elsuwege (eds), *The Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge 2013).

integration with the freshly expanded European Union.<sup>17</sup> However, initial implementation of these initiatives was based on existing EU agreements with countries covered by the ENP/EaP. This, apart from anything else, created a good deal of asymmetry, as Ukraine, just like Moldova, Georgia, and Armenia, had only modest PCAs in place,<sup>18</sup> while many countries of the Mediterranean, also covered by the ENP, had free trade agreements with the European Union.<sup>19</sup> The implementation of these initiatives with Ukraine, Moldova, Georgia, and Armenia became the foundation for negotiations of the future Association Agreements. In the case of Ukraine – without exaggeration – it became a turning point for its fate. As one would expect, closer *rapprochement* with the European Union was not seen favourably by Russia, which continued with its imperialistic drive, attempting to force the ENP *avant garde* to join the Eurasian Economic Union instead.<sup>20</sup> To achieve that goal, the authorities in Moscow exercised a fair

<sup>17</sup> See, *inter alia*, S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016); S Poli (ed), *The European Neighbourhood Policy: Values and Principles* (Routledge 2016). As to the future of the ENP and Eastern Partnership, see S Blockmans, *The Obsolescence of the European Neighbourhood Policy* (Rowman and Littlefield International 2017); A Łazowski, 'Where Do We Go from Here? EU Relations with the Eastern Partnership Avant Garde' in W Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Springer/TMC Asser Press 2021).

<sup>18</sup> While the Partnership and Cooperation Agreement with Belarus was negotiated, it never entered into force as a direct consequence of the Lukashenko dictatorship. On current and future EU relations with Belarus, see, *inter alia*, M Karliuk, 'The EU and Belarus. Current and Future Contractual Relations' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

<sup>19</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L70/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part [2006] OJ L143/2; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265/2; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304/39; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129/3; Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part [1997] OJ L187/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147/3; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97/2. For an academic appraisal, see, *inter alia*, K Pieters, *The Mediterranean Neighbours and the EU Internal Market: A Legal Perspective* (TMC Asser Press 2010).

<sup>20</sup> See R Vilpišauskas, 'European Union or Eurasian Union? A Dilemma for the Eastern Partnership Countries' in S Gstöhl and D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2016). Further on the evolution of the Eurasian Economic Union, see M Karliuk, *The Emerging Autonomous Legal Order of the Eurasian Economic Union* (CUP 2023).

amount of pressure and forced Ukrainian and Armenian leaders to do a last-minute reverse ferret. While Armenia backed down without major drama,<sup>21</sup> in Ukraine it triggered a revolution which came down in history as Maidan 2.0 or the revolution of dignity. The uprising proved that for many Ukrainians, especially generations born in the terminal years of the Soviet Union or early years of the freshly independent Ukraine, the European choice was irreversible and they felt capable of resolutely defending European values.<sup>22</sup> While the upheaval led to a change of guard in Kyiv, and the signing of the EU-Ukraine AA, it also contributed to the Russian invasion of Crimea and Donbass in early 2014.<sup>23</sup> As for the EU-Ukraine AA itself, it also suffered from ratification drama in the European Union, as the Netherlands, following a referendum of dubious credentials, initially refused to ratify the Agreement.<sup>24</sup> Solutions were eventually found, allowing for parts of the Association Agreement to apply partly,<sup>25</sup> before its full entry into force on 1 September 2017.

It should be noted that association agreements are not a uniform category.<sup>26</sup> Considerable time has passed since one of the first association agreements was concluded between the European Coal and Steel

<sup>21</sup> Eventually, the European Union and Armenia negotiated a new agreement which is an upgrade of the EC-Armenia Partnership and Cooperation Agreement, yet it does not go as far as the Association Agreements with Georgia, Moldova, and Ukraine. See Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part [2018] OJ L23/4. For an academic appraisal, see A Khvorostiankina, 'The EU-Armenia Comprehensive and Enhanced Partnership Agreement: A New Instrument of Promoting EU's Values and the General Principles of EU Law' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

<sup>22</sup> For a detailed account of these events, see, *inter alia*, C Miller, *The War Came to Us. Life and Death in Ukraine* (Bloomsbury Continuum 2023) 79-119.

<sup>23</sup> *ibid* 120-235.

<sup>24</sup> This experience triggered a wider discussion about the difficulties with the ratification of EU mixed agreements, which, in order to enter into force, require approval by the EU, all of its Member States, and a non-EU party (parties). See, *inter alia*, P Van Elsuwege, 'The Ratification Saga of the EU-Ukraine Association Agreement: Some Lessons for the Practice of Mixed Agreements' in S Lorenzmeier, R Petrov, and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021); G Kübek, 'The Non-Ratification Scenario: Legal and Practical Responses to Mixed Treaty Rejection by Member States' (2018) 23 *European Foreign Affairs Review* 21; G Van Der Loo and RA Wessel, 'The Non-Ratification of Mixed Agreements: Legal Consequences and Options' (2017) 54 *CML Rev* 735. More generally on the EU procedure for the conclusion of international agreements, see J Heliskoski, 'The Procedural Law of International Agreements: A Thematic Journey through Article 218 TFEU (2020) 57 *CML Rev* 79.

<sup>25</sup> The political part of the EU-Ukraine AA began to be temporarily applied as of 1 November 2014. This was followed by the temporary application of the economic part of the Agreement as of 1 January 2016.

<sup>26</sup> See further P Van Elsuwege and M Chamon, *The Meaning of 'Association' under EU Law. A Study on the Law and Practice of EU Association Agreements* (European Parliament 2019) <[www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL\\_STU\(2019\)608861\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608861/IPOL_STU(2019)608861_EN.pdf)> accessed 20 December 2023.



Community and the United Kingdom.<sup>27</sup> They have, however, one common aim: the creation of privileged relations between the European Union and a non-EU country or countries, which is short of partial membership.<sup>28</sup> Apart for the post-Brexit EU-UK Trade and Cooperation Agreement,<sup>29</sup> association agreements have always served as upgrades of formal relations, and, in the case of countries meeting the eligibility criteria laid down in Article 49 TEU, potentially leading to membership of the European Union.<sup>30</sup> Association agreements may also vary in their structure, content, and levels of underlying ambitions. Among the characteristic features of all association agreements, the following can be distinguished: the mutual rights and obligations they provide for; the joint actions and special procedures they envisage; special privileged relations with the EU; the participation of a third country in the EU system, yet without full institutional involvement.<sup>31</sup> While each and every association agreement is tailor-made to a specific non-EU State, it is customary to distinguish 'generations' of association agreements designed for particular groups of countries.<sup>32</sup> With this in mind, the association agreements with Ukraine,

<sup>27</sup> Agreement concerning the relations between the United Kingdom of Great Britain and Northern Ireland and the European Coal and Steel Community < [www.cvce.eu/en/recherche/unit-content/-/unit/5cc6b004-33b7-4e44-b6db-f5f9e6c01023/9f64d11c-0f79-4eeb-983d-b2700fc62cfd/Resourcess#de859fe5-dd07-4666-89b0-4f1ef2825b13\\_en&overlay](http://www.cvce.eu/en/recherche/unit-content/-/unit/5cc6b004-33b7-4e44-b6db-f5f9e6c01023/9f64d11c-0f79-4eeb-983d-b2700fc62cfd/Resourcess#de859fe5-dd07-4666-89b0-4f1ef2825b13_en&overlay) > accessed 20 December 2023. For a commentary, see C Lord, 'Lessons from the Past? The 1954 Association Agreement between the UK and the European Coal and Steel Community' in M Westlake (ed), *Outside the EU. Options for Britain* (Agenda Publishing 2020).

<sup>28</sup> As per Article 217 of the Treaty on the Functioning of the European Union: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'.

<sup>29</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10. See further, *inter alia*, A Łazowski, 'Mind the Fog, Stand Clear of the Cliff! From the Political Declaration to the Post-Brexit EU-UK Legal Framework (Part I)' (2020) 5 *European Papers* (2020) 1105; J Larik and R A Wessel, 'The EU-UK Post-Brexit Trade and Cooperation Agreement: Forging Partnership or Managing Rivalry?' in A Łazowski and A Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar Publishing 2022).

<sup>30</sup> See, *inter alia*, A F Tatham, *Enlargement of the European Union* (Kluwer Law International 2009).

<sup>31</sup> These factors also influence interpretation of association agreements by the Court of Justice of the European Union. See seminal Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd* ECLI: EU:C:1987:400. For recent developments in this respect, see, *inter alia*, N Ghazaryan, 'Who Are the "Gatekeepers"? Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements' (2018) 37 *Yearbook of European Law* 27.

<sup>32</sup> See YM Kostyuchenko, 'The Evolution of the Conclusion of Association Agreements by the European Union with Third Countries and/or International Organizations: Theoretical and Historical Aspects' (2017) 3 *Journal of European and Comparative Law* 14, 20-22.

Georgia,<sup>33</sup> and Moldova<sup>34</sup> belong to the ‘new generation’ of association agreements, which differ in complexity and conditionality from any association agreement concluded before (*sans* the European Economic Area).<sup>35</sup>

After the entry into force of the EU-Ukraine AA, many myths emerged about what this Agreement amounted to. For example, one such myth was that the Association Agreement was a promise of future EU membership. This myth was helped, on the one hand, by the preamble to the AA, and, on the other hand, by the fact that there are indeed association agreements overtly aimed at preparing non-EU States for EU membership. A good example are the stabilisation and association agreements with the Western Balkan States.<sup>36</sup> So far, however, only the EU-Croatia Stabilisation and Association Agreement has gone full circle.<sup>37</sup> Furthermore, as the Association Agreement with Turkey proves, even if the end-game is explicitly EU membership, accession is not *fait accompli*.<sup>38</sup> In the case of Ukraine, although membership is not explicitly mentioned, the preambular proviso confirms that:

the European Union acknowledges the European aspirations of Ukraine and welcomes its European choice, including its commitment to building a deep and sustainable democracy and a market economy.

<sup>33</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261/4. See further M Emerson and M Kovziridze (eds), *Deepening EU-Georgia Relations. What, Why and How?* (2nd edn, CEPS 2018).

<sup>34</sup> 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 [2014] OJ L260/4. See further M Emerson and D Cenusă (eds), *Deepening EU-Moldovan Relations. What, Why and How?* (2nd edn, CEPS 2018).

<sup>35</sup> Agreement on the European Economic Area [1994] OJ L1/1. See further F Arnesen and others (eds), *Agreement on the European Economic Area. A Commentary* (CH Beck, Hart Publishing, Nomos Verlag 2018); C Baudenbacher (ed), *The Handbook of EEA Law* (Springer 2015).

<sup>36</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84/1; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/116; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108/3; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part [2013] OJ L278/14; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2015] OJ L164/2; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2016] OJ L71/3.

<sup>37</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2005] OJ L26/3.

<sup>38</sup> See, *inter alia*, E Baracani, *EU-Turkey Relations. A New Direction for EU Foreign Policy?* (Edward Elgar Publishing 2021).

Arguably, this does not amount to a well-veiled promise of EU accession.<sup>39</sup> Now that Ukraine has applied for EU membership, the question is whether the Association Agreement needs to reflect this very fact, and therefore should be revised. According to the present authors, this is not required. A case in point to prove it may be, for instance, the EU-Poland Europe Agreement which contained merely a unilateral declaration of the Polish authorities as to the direction of travel.<sup>40</sup> This did not stop the Europe Agreement from serving as a vehicle for accession; it was merely subject to reorientation.<sup>41</sup>

Accession to the European Union is heavily drenched in conditionality and benchmarks.<sup>42</sup> This, although on a different scale, is the case with the European Neighbourhood Policy and Eastern Partnership.<sup>43</sup> Ukraine has already had a taste of rule of conditionality as domestic political shenanigans led to delays in the signing of the Association Agreement.<sup>44</sup> It is also embedded in the Association Agreement itself and will become a dominant theme as Ukraine proceeds with its *rapprochement*.<sup>45</sup> The Preamble to the Association Agreement establishes unequivocally:

the political association and economic integration of Ukraine into the European Union will depend on the results of the implementation of this Agreement, as well as ensuring that Ukraine respects common values and achieving rapprochement with the EU in the political, economic and legal spheres.

<sup>39</sup> It is interesting to note that Ukraine expressed a desire to include EU membership as a long-term objective already in the EC-Ukraine PCA. That request was not entertained, though. See G Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Trade Area. A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016) 66.

<sup>40</sup> Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [1993] OJ L348/2.

The last recital of the Preamble reads: 'Recognising the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective'.

<sup>41</sup> K Inglis, 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' (2000) 37 CML Rev 1173.

<sup>42</sup> For a comprehensive overview, see E Gateva, *European Union Enlargement Conditionality* (Palgrave 2015).

<sup>43</sup> See, *inter alia*, N Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis* (Hart Publishing 2014); S Şemşit, 'The EU's Enlargement and Neighbourhood Policy Strategies: The Role of Political Conditionality' in S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016).

<sup>44</sup> See Plokhly (n 12).

<sup>45</sup> It should be remembered that in accordance with the principle of non-regression, the rule of law standards cannot be lowered once a candidate country becomes a Member State. See Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311. For an academic commentary, see, *inter alia*, A Łazowski, 'Strengthening the Rule of Law and the EU Pre-accession Policy: *Repubblika v Il-Prim Ministru*' (2022) 59 CML Rev 1803; M Leloup, D Kochenov and A Dimitrovs, 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*' (2021) 46 EL Rev 692.

For this purpose, the parties conduct continuous assessment of progress in the implementation of the EU-Ukraine AA and of all domestic laws adopted to implement the obligations that Ukraine has. Article 476 EU-Ukraine AA envisages a monitoring mechanism, the results of which determine the next steps in the gradual access to chunks of the EU internal market, for example access to public procurement markets or recognition of freedom to provide services. Conditionality is linked not only to compliance with specific provisions of the Agreement or legislation adopted in its implementation, but also to respect for EU values. For example, Article 478 EU-Ukraine AA stipulates that:

2. In the selection of appropriate measures, priority shall be given to those which least disturb the functioning of this Agreement. Except in cases described in paragraph 3 of this Article, such measures may not include the suspension of any rights or obligations provided for under provisions of this Agreement, mentioned in Title IV (Trade and Trade-related Matters) of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations in accordance with paragraph 2 of Article 476 of this Agreement, and of dispute settlement in accordance with paragraph 3 of Article 476 and Article 477 of this Agreement.

3. The exceptions referred to in paragraphs 1 and 2 above shall concern:

(a) denunciation of the Agreement not sanctioned by the general rules of international law, or

(b) violation by the other Party of any of the essential elements of this Agreement, referred to in Article 2 of this Agreement.

The reference to Article 2 of the EU-Ukraine AA makes it clear that the main elements of the Agreement include respect for democratic principles, human rights and fundamental freedoms, as well as respect for the rule of law. That is, in essence, the consolidation of EU values as mandatory standards for Ukraine, the violation of which by a party can lead to the suspension of the free trade area which is at the heart of the EU-Ukraine AA.<sup>46</sup> Since Ukraine is now fully covered by the EU pre-accession policy, a comprehensive monitoring exercise is done by the European Commission on an annual basis.<sup>47</sup> It extends to both respect for EU values and compliance with the EU *acquis* in all 35 negotiation chapters.<sup>48</sup>

<sup>46</sup> For more details on the value of the EU for Ukraine, see T Komarova, 'The Principle of Judicial Independence as a Component of the Rule of Law and a Key Element of the Association Agreement' (Human Rights and Democracy: collection of science articles based on the materials of the 4<sup>th</sup> All-Ukrainian Scientific and Practical Conference, 12 May 2023, Kharkiv) 3-7.

<sup>47</sup> The first report on the progress of Ukraine, delivered as part of the Enlargement Package, was issued on 8 November 2023.

<sup>48</sup> European Commission, 'Staff Working Paper. Analytical Report following the Communication from the Commission to the European Parliament, the European Council and the Council Commission Opinion on Ukraine's application for membership of the European Union' SWD (2023) 30 final.

### 2.3 Switching gear for the first time: EU-Ukraine Association Agreement

As already alluded to, the EU-Ukraine AA requires legal approximation with sways of the EU *acquis*. Relevant provisions put great emphasis on both ensuring that the law book is fully compliant with relevant EU legislation and that the Ukrainian legislation adopted for that purpose is fully implemented by state authorities, including courts. However, to use the words of Helen Xanthaki, we are dealing here with legal transplants.<sup>49</sup> Until the date of accession, this exercise is all about the application of a certain body of EU law on the territory of Ukraine without its membership in the organisation. Of course, unless it is provided in a bilateral agreement between the EU and a non-EU country, one cannot talk about the extraterritorial application of EU law as the EU-Ukraine AA does not create a common legal space between the parties.<sup>50</sup>

In general terms, the EU-Ukraine AA can be divided into political and economic parts. As for the latter, according to many authors, it is extremely ambitious as it has laid down the foundations for the creation of the unprecedented Deep and Comprehensive Free Trade Area.<sup>51</sup> Its unique nature lies in the fact that it aims at the gradual and partial integration of Ukraine into the EU internal market based on the approximation of Ukrainian legislation to the EU *acquis*.<sup>52</sup> This is precisely what is achieved through the implementation of approximation clauses which, compared to the predecessor EC-Ukraine PCA, are strict and require not only action but, first and foremost, the achievement of specific results.<sup>53</sup>

The lists of EU legal acts, or their parts, and deadlines for transposition into the Ukrainian legal system, are – with some exceptions – con-

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<sup>49</sup> See H Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659.

<sup>50</sup> See A Łazowski, 'Enhanced Bilateralism and Multilateralism: Integration without Membership' (2008) 45 *CML Rev* 1433.

<sup>51</sup> See G 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 Nijhoff 2016); M Emerson and V Movchan (eds), *Deepening EU-Ukrainian Relations. What, Why and How?* (CEPS 2018).

<sup>52</sup> See further, *inter alia*, R Petrov, 'The EU-Ukraine Association Agreement as a General Framework of Contemporary EU-Ukraine Relations' in H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023).

<sup>53</sup> For an evaluation of the implementation process, the Government of Ukraine established in 2017 a unique system of online monitoring of the implementation of the EU-Ukraine AA – 'Pulse of Agreement' (<https://pulse.kmu.gov.ua>). Moreover, in 2023 the government started work on the development of a new online information system for managing Ukraine's European integration activities 'Pulse of Accession', which will replace the existing 'Pulse of Agreement' and will provide automation of planning processes, interdepartmental interaction, as well as monitoring and evaluation of task performance.

tained in the annexes to the EU-Ukraine AA.<sup>54</sup> This form of shaping the obligation to approximate is very effective. Firstly, the scope of required effort is presented in a very transparent way, and from the point of view of civil servants in charge of law approximation, it makes this exercise easier to navigate. To prove the point, it is enough to juxtapose the EU-Ukraine AA to the SAAs with the Western Balkan countries. The vague law approximation clauses laid down therein frequently make planning of law approximation akin to fishing in the dark.<sup>55</sup> Secondly, by placing the lists in the annexes, and by empowering the EU-Ukraine association institutions to update them, necessary revisions are made easier than if every time a full-scale revision of the EU-Ukraine AA were required. It also contributes to the dynamism of the EU-Ukraine AA, which reflects the dynamism of EU law as such.<sup>56</sup> As is well known, standing still is not part of the DNA of EU law. There is no one-size-fits-all approach when it comes to updates to the EU-Ukraine AA. The general rules are provided in Article 463(3) EU-Ukraine AA. It reads:

3. The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, without prejudice to any specific provisions included in Title IV (Trade and Trade-related Matters) of this Agreement.

From the wording, it is clear that making changes to the annexes is not an obligation but is subject to a voluntary decision of the Association Council.<sup>57</sup> One could argue that Ukraine has discretion in this regard.

<sup>54</sup> One of the exceptions is the area of competition law, where the list is included also in the main body of the EU-Ukraine AA. See Article 256 EU-Ukraine AA. See further on law approximation in this area, H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023); K Smyrnova, 'Europeanization of Competition Law: Principles and Values of Fair Competition in Free Market Economy in the EU and Association Agreements with Ukraine, Moldova, and Georgia' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

<sup>55</sup> On the challenges of EU accession for public administration, see, *inter alia*, A Łazowski and M Vlašić Feketija, 'The Seventh EU Enlargement and Beyond: Pre-Accession Policy vis-à-vis the Western Balkans Revisited' (2014) 10 *Croatian Yearbook of European Law and Policy* 1.

<sup>56</sup> For more details on amendments to the Annexes to the Association Agreements with Ukraine, Georgia, and Moldova, see G Van der Loo and T Akhvediani, *Catch Me If You Can: Updating the Eastern Partnership Association Agreements and DCFTAs* (CEPS 2020) <[www.ceps.eu/wp-content/uploads/2020/05/GVDL-and-TA-Updating-AA-DCFTAs.pdf](http://www.ceps.eu/wp-content/uploads/2020/05/GVDL-and-TA-Updating-AA-DCFTAs.pdf)> accessed 20 December 2023.

<sup>57</sup> Despite the fact that the Association Council has considerable powers to amend the Agreement, however, it has not used this discretion widely yet. See, *inter alia*, A Tyushka, 'The Power and Performance of "Association Bodies" under the EU's Association Agreements with Georgia, Moldova and Ukraine' (2022) 60 *Journal of Common Market Studies* 1165. These powers of the Association Council may be delegated further to other EU-Ukraine bilateral institutions established under the Agreement. See, *inter alia*, G Van Der Loo, 'The Institutional Framework of the Eastern Partnership Association Agreements and the Deep and Comprehensive Free Trade Areas' in S Gstöhl and D Phinnemore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2019).

Here, too, the progressiveness of the state authorities involved in approximation and their awareness of novelties in EU law, which are not reflected in the EU-Ukraine AA, are of great importance. Arguably, nothing prevents Ukraine from approximating its domestic legal order with new EU legislation. It should be emphasised that the Ukrainian authorities do not have to wait for information from the EU institutions or a request for revision of the AA as per Article 463 EU-Ukraine AA. Put differently, the Ukrainian government may decide on a unilateral basis to proceed with approximation extending to more recent EU legislation, especially now that it is a candidate country with a very ambitious *rapprochement* agenda. It is easy to imagine a situation whereby approximation with a new EU regulation or directive would bring political benefits in accession negotiations. Yet, at the same time, the expediency and technical possibilities of such a leap forward should be weighed. This was so before 24 February 2022, and even more so since Russia started the full-scale invasion of Ukraine. In simple terms, approximation with newly adopted EU legislation may not be a desired solution if it proves costlier for the Ukrainian business community than the *acquis* listed in the EU-Ukraine AA. Either way, it is necessary for the domestic authorities to follow developments in EU law to be in a position to make an early assessment of how pending revisions of EU law may affect the implementation of the EU-Ukraine AA.

Apart from Article 463 EU-Ukraine AA, tailor-made *modi operandi* for dynamic approximation are provided in the DCFTA part of the Agreement. For instance, Article 3 of Annex XVII (Regulatory approximation) envisages almost automatic adaptation of the Annex by the Trade Committee:

2. In order to guarantee legal certainty, the EU Party will inform Ukraine and the Trade Committee regularly in writing on all new or amended sector-specific EU legislation.

3. The Trade Committee shall add within three months any new or amended EU legislative act to the Appendices. Once a new or amended EU legislative act has been added to the relevant Appendix, Ukraine shall transpose the legislation into its domestic legal system in accordance with Article 2(2) of this Annex. The Trade Committee shall also decide on an indicative period for the transposition of the act.

Consequently, Ukraine has less room for manoeuvre in this area when compared with areas falling under the general clause of Article 463 EU-Ukraine AA.

Another example is the area of energy, where the obligations are split between the EU-Ukraine AA and the Energy Community Treaty.<sup>58</sup> As per paragraphs 1-2 ANNEX XXVII-A to the EU-Ukraine AA:

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<sup>58</sup> See further in section 2.4 below.

1. The European Commission shall promptly inform Ukraine about any European Commission proposals to adopt or amend, and about any EU act altering, the EU *acquis* listed in this Annex.
2. Ukraine shall ensure the effective implementation of the approximated domestic acts and undertake any action necessary to reflect the developments in Union law in its domestic law in the energy sector, as listed in Annex XXVII-B.

On top of this, in para 5, Ukraine has the obligation to coordinate all legislative proposals in the energy sector with the European Commission. Another example is Annex XVII to the EU-Ukraine AA, which concerns such service sectors as financial services, telecommunications services, and international transportation services and provides that the EU side will inform Ukraine and the Trade Committee on a permanent basis about all new legislative acts or changes to EU legislation in a specific sector. The Trade Committee, in turn, introduces any new or amended EU legislation into the annexes to the Association Agreement within three months. Again, this considerably limits room for manoeuvre.

A reminder is fitting at this stage that both the EU-Ukraine AA as well as the prospect of accession to the European Union require way more than just fixing the law book. It is necessary to emphasise the importance of transposition not only of the letter but also the spirit of EU law. Put differently, Ukrainian laws approximated with the EU *acquis* should be properly interpreted and implemented by domestic authorities, including Ukrainian courts. For anyone *au courant* with EU law, it is very clear that interpretation of approximated rules needs to be applied not in siloes but as part of the system. With this in mind, recourse should be made to available instruments supporting interpretation of EU secondary legislation, including soft law instruments, reports on the experience of Member States in the transposition and application of particular pieces of legislation, as well as the case law of the Court of Justice.<sup>59</sup> It is interesting to note that while the EU-Ukraine AA does not create general obligations in this regard, it does, in Article 264, provide that:

The Parties agree that they will apply Article 262, Article 263(3) or Article 263(4) of this Agreement using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the Treaty on the Functioning of the European Union, including the relevant jurisprudence of the Court of Justice of the European Union, as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the European Union.

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<sup>59</sup> See T Komarova, *The Court of Justice of the European Union: The Development of Judicial System and Practice of Interpretation of EU Law* (Pravo 2018).



While such a broad sweep approach is required for state aid,<sup>60</sup> arguably with the application for EU membership in place, it should be considered for other areas covered by the EU-Ukraine AA. Bearing in mind the challenges of the implementation of EU law in Ukraine, such a bold desideratum may seem, *prima facie*, to be bordering on the naïve.<sup>61</sup> Yet, it should be noted that the Ukrainian judiciary has taken a fairly active pro-European position and successfully uses the interpretation of EU law, the decisions of the Court of Justice, and the practice of the European Commission as sources of interpretation. One of the latest examples is the Decision of the Constitutional Court of Ukraine in Case no 3-53/2022(126/22) of 1 November 2023 in which the Court stated that it took into account the *acquis communautaire* as a whole and the relevant legal acts of the European Union which were connected with the subject of constitutional control. Moreover, the Constitutional Court of Ukraine, applying the principle of proportionality, considered the case law of the CJEU.<sup>62</sup> Furthermore, there is practice regarding the direct application of the provisions of the Association Agreement by different Ukrainian courts.<sup>63</sup> Last but not least, CJEU case law seems to be taken into account at least by some law drafters. As argued by Liliia Oprysk, it influenced the shaping of the new Copyright Law adopted in 2023.<sup>64</sup>

#### **2.4 Legal approximation under the Energy Community Agreement and the Civil Aviation Agreement**

As already alluded to, the EU-Ukraine bilateral and multilateral framework goes beyond the Association Agreement. While some of the supplementing agreements have no major law approximation relevance, two do indeed stand out. Firstly, as of 2011, Ukraine is a member of the Energy Community. This sectoral international organisation was established primarily to serve as a vehicle to integrate the Western Balkan States into the EU energy framework. It has, however, expanded now also

<sup>60</sup> See K Smyrnova, 'The "Europeanization" of Competition Law in Ukraine' in H Richter (ed), *Competition and Intellectual Property Law in Ukraine* (Springer 2023).

<sup>61</sup> On the implementation of the EU-Ukraine AA, see R Petrov, 'Challenges of the EU-Ukraine AA's Effective Implementation into the Legal Order of Ukraine' in S Lorenzmeier, R Petrov and C Vedder (eds), *EU External Relations Law. Shared Competences and Shared Values in Agreements Between the EU and Its Eastern Neighbourhood* (Springer 2021).

<sup>62</sup> Constitutional Court of Ukraine, Decision no 9-p(II)/2023.

<sup>63</sup> T Komarova, 'Practice of the Court of Justice of the European Union Regarding Association Agreements: Ukrainian Perspectives. (The Association Agreement as a Tool of Legal Reforms in Ukraine: Materials of the international conference, 23 October 2017, Kharkiv) 76-84; R Petrov, 'The Impact of the ECJ on the Legal System of Ukraine' in A Reich and H-W Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (OUP 2020).

<sup>64</sup> See L Oprysk, 'Harmonisation with the EU Acquis amid the Resistance to Russian Aggression as a Catalyst of Ukrainian (Copyright) Recovery' in A Pintsch and M Rabinovych (eds), *Ukraine: A New EU Member State? From 'Integration without Membership' to 'Integration through War'* (Routledge 2024) forthcoming.

to Ukraine, Moldova, and Georgia.<sup>65</sup> The Energy Community Agreement creates the obligation to approximate national laws with the EU energy and environment *acquis* as listed in the Agreement and its annexes.<sup>66</sup> Furthermore, in 2021 the EU, its Member States, and Ukraine signed the Agreement on the Common Aviation Space. When the present article was completed, the Agreement was provisionally in force, awaiting ratification by all EU Member States.<sup>67</sup> Again, the list of the EU aviation *acquis* that requires approximation is provided in the annex to the Agreement.<sup>68</sup> Both of these frameworks constitute *leges speciales* to the EU-Ukraine AA.

## 2.5 *Interim conclusions: plus ça change?*

With the application for EU membership accepted and the decision to open accession negotiations taken by the European Council in December 2023, not much and yet very much has changed when it comes to law approximation under the existing bilateral and multilateral EU-Ukraine frameworks. This contrapuntal conclusion is arguably sound, despite its *prima facie* lack of logic. Let us start with the first part: no change. All three discussed agreements, the EU-Ukraine AA, the Energy Community Treaty, and the Civil Aviation Agreement are destined to continue to have a life of their own, in parallel to the accession process. Their annexes will continue to serve as beacons for navigation for the Ukrainian authorities when it comes to planning law alignment activities and their implementation. Yet, at the same time, a big change will come. Following the footsteps of Europe Agreements, the EU-Ukraine AA is likely to continue to be reorientated into a pre-accession vehicle. In this respect, at least three aspects of what is yet to come need attention. Firstly, thus far, despite the existence of all *modi operandi* discussed earlier, the EU-Ukraine AA, in particular its annexes, have not been updated in a very

<sup>65</sup> See further. *inter alia*, D Buschle, K Talus (eds), *The Energy Community: A New Energy Governance System* (Intersentia 2015); D Buschle, 'Challenges in Exporting the Internal Market: Lessons from the Energy Community' in S Gstöhl (ed), *The European Neighbourhood Policy in a Comparative Perspective. Models, Challenges, Lessons* (Routledge 2016); D Buschle and R Karova, 'The EU's Sectoral Communities with Neighbours: The Case of the Energy Community' in S Gstöhl, D Phinmore (eds), *The Proliferation of Privileged Partnerships between the European Union and Its Neighbours* (Routledge 2019).

<sup>66</sup> For instance, Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94.

<sup>67</sup> Council Decision (EU) 2021/1897 of 28 June 2021 on the signing, on behalf of the European Union, and provisional application of the Common Aviation Area Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2021] OJ L387/1.

<sup>68</sup> This includes parts of dozens of EU legal acts on, *inter alia*, market access, aviation safety, pilot licences, environmental protection, working conditions, consumer protection.

dynamic fashion, making parts of the lists out of date.<sup>69</sup> While the reason for the snail's pace of the updates may be of a multifarious nature, this will have to be attended to, bearing in mind the direction of travel that Ukraine opted for when it applied for EU membership.<sup>70</sup> At the same time, any potential updates need to be handled with care. For reasons which deserve no explanation, such changes will have to take into account the state of the Ukrainian economy, societal change, and – above all – they must not undermine the war effort and the post-war recovery. Secondly, it may be useful to consider, as a starting point, a revision of the annexes taking into account a dramatic change of circumstances, permitting for regression in terms of some commitments. For instance, with the dramatic impact of the war on the environment, including the effects of environmental crimes committed by Russian forces, it is hard

<sup>69</sup> The list of revisions of the EU-Ukraine AA, including its annexes, includes: Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018 updating Annex XXI to Chapter 8 on Public Procurement of Title IV — Trade and Trade-Related Matters of the Association Agreement and giving a favourable opinion regarding the comprehensive roadmap on public procurement [2018] OJ L175/1; Decision No 2/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018 on recalculating the schedule of export duty elimination and safeguard measures for export duties set out in Annexes I-C and I-D to Chapter 1 of Title IV of the Association Agreement [2018] OJ L188/17; Decision No 1/2018 of the EU-Ukraine Customs Sub-Committee of 21 November 2018 replacing Protocol I to the EU-Ukraine Association Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation [2019] OJ L20/40; Decision No 1/2018 of the EU-Ukraine Association Council of 2 July 2018 supplementing Annex I-A to Chapter 1 of Title IV 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 [2019] OJ L192/36; Agreement in the form of an exchange of letters between the European Union and Ukraine amending the trade preferences for poultry meat and poultry meat preparations provided for by 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 [2019] OJ L206/3; Decision No 1/2019 of the EU-Ukraine Association Council of 8 July 2019 as regards the amendment of Annex XXVII to 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 [2019] OJ L248/88; Decision No 1/2019 of the EU-Ukraine Sanitary and Phytosanitary Management Sub-committee of 18 November 2019 modifying Annex V to Chapter 4 of the Association Agreement [2020] OJ L59/31; Decision No 1/2021 of the EU-Ukraine Association Committee in Trade Configuration of 22 November 2021 amending Appendix XVII-3 (Rules applicable to telecommunication services), Appendix XVII-4 (Rules applicable to postal and courier services) and Appendix XVII-5 (Rules applicable to international maritime transport) to Annex XVII to 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 [2021] OJ L447/23; Decision No 1/2022 of the EU-Ukraine Association Committee in Trade Configuration of 25 October 2022 as regards the update of Annex XV (Approximation of customs legislation) to 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 [2022] OJ L301/214; Decision No 1/2023 of the EU-Ukraine Association Committee in Trade configuration of 24 April 2023 modifying Appendix XVII-3 (Rules applicable to telecommunication services) of Annex XVII to 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 [2023] OJ L123/38.

<sup>70</sup> G Van Der Loo and T Akhvediani, *Catch Me If You Can: Updating the Eastern Partnership Association Agreements and DCFTAs* (CEPS 2020).

to imagine Ukraine fully approximating and implementing its obligations laid down in the environmental chapter of the EU-Ukraine AA. Thirdly, a big change may also come to the bilateral EU-Ukrainian institutions. As announced by the European Commission in its Communication on revised pre-accession policy, institutions based on association agreements are now, apart from being engaged in the functioning of the agreements themselves, also involved in the accession process. The exact parameters are yet to be determined, though.<sup>71</sup>

### **3 Law approximation beyond the existing bilateral and multilateral EU-Ukraine frameworks**

#### **3.1 Introduction**

Having looked at the existing law approximation commitments resting on the shoulders of the Ukrainian authorities, in this section the analysis moves to legal approximation falling outside the bilateral and multilateral frameworks currently in force. As a starting point, we should like to investigate if Ukraine, following its application for EU membership, is under a general obligation to approximate its domestic law with the EU *acquis* in its entirety (section 3.2). Having dealt with this fundamental issue, we proceed to look more closely at the idiosyncrasies of law approximation in the pre-accession context. Bearing in mind the wide suite of EU sources of law, approximation with EU primary law (section 3.3) and EU secondary legislation and other sources (section 3.4) are discussed in turn.

#### **3.2 Alignment with the EU *acquis* as a *conditio sine qua non* of EU membership**

As already discussed in part 2 of the article, the EU-Ukraine AA, the Energy Community Treaty, and the Civil Aviation Agreement provide lists of EU legal acts which Ukraine has the obligation to approximate its laws with. The legal character of these obligations varies from a strict obligation to comply by pre-determined dates to the best endeavours clauses. Unlike the former EU-Ukraine PCA or the Stabilisation and Association

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<sup>71</sup> Commission, 'Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Enhancing the accession process - A credible EU perspective for the Western Balkans' COM (2020) 57 final.

Agreements with the Western Balkan countries,<sup>72</sup> neither of the existing EU-Ukraine binding agreements envisages a horizontal law approximation clause. This, rightly so, triggers a pivotal question about whether Ukraine, as a candidate country, has the obligation to approximate its law beyond the scope of the current commitments analysed earlier. Arguably, in strictly legal terms, there is no binding provision explicitly requiring Ukraine to do so, although it is neither a problem nor a matter that should be remedied by revision of the EU-Ukraine AA. It is submitted that such a horizontal obligation to approximate stems implicitly from Article 49 TEU. Be that as it may, the application for EU membership, followed by the decisions of the European Council to grant Ukraine candidate status and to open the accession negotiations, has put the wheels of Article 49 TEU in motion, meaning that in order to successfully complete its *rapprochement*, Ukraine has to comply with the membership criteria laid down in Article 49 TEU, and specified further in the Copenhagen Conclusions adopted by the European Council in 1993.<sup>73</sup> Thus, for Ukraine to join, it needs to approximate its domestic law with the EU *acquis* in its entirety. The only exceptions will be selected pieces of EU secondary legislation covered by transitional periods regulated in the act on conditions of accession, which will form part of an accession treaty.<sup>74</sup> Traditionally, at that stage, no permanent opt-outs are available to newcomers.<sup>75</sup>

<sup>72</sup> For instance, Article 70 of SAA EU-Albania reads:

1. The Parties recognise the importance of the approximation of Albania's existing legislation to that of the Community and of its effective implementation. Albania shall endeavour to ensure that its existing laws and future legislation shall be gradually made compatible with the Community *acquis*. Albania shall ensure that existing and future legislation shall be properly implemented and enforced.
2. This approximation shall start on the date of signing of this Agreement, and shall gradually extend to all the elements of the Community *acquis* referred to in this Agreement by the end of the transitional period as defined in Article 6.
3. During the first stage as defined in Article 6, approximation shall focus on fundamental elements of the internal market *acquis* as well as on other important areas such as competition, intellectual, industrial and commercial property rights, public procurement, standards and certification, financial services, land and maritime transport — with special emphasis on safety and environmental standards as well as social aspects — company law, accounting, consumer protection, data protection, health and safety at work and equal opportunities. During the second stage, Albania shall focus on the remaining parts of the *acquis*. Approximation will be carried out on the basis of a programme to be agreed between the Commission of the European Communities and Albania.
4. Albania shall also define, in agreement with the Commission of the European Communities, the modalities for the monitoring of the implementation of approximation of legislation and law enforcement actions to be taken.

<sup>73</sup> European Council Conclusions, Bulletin EU 6-1993, point 13.

<sup>74</sup> For the most recent example, see A Łazowski, 'EU Do Not Worry, Croatia Is Behind You: A Commentary on the Seventh Accession Treaty' (2012) 8 *Croatian Yearbook of European Law & Policy* 1.

<sup>75</sup> For a comprehensive overview, see A Łazowski, 'Permanent Derogations and Transitional Arrangements for New Member States of the European Union: Accession Conditiones Sine Quibus Non' in D Fromage (ed), *(Re-)defining Membership: Differentiation in and outside the European Union* (OUP 2024) forthcoming.

### 3.3 Approximation with EU primary law

Thus far, Ukraine and its law approximation effort have remained largely immune to EU primary law. With the application for membership submitted, and the commencement of accession talks expected in the coming years, the legal alignment needs to expand also to primary sources of EU law. While it is true that the EU Founding Treaties, the Charter of Fundamental Rights, and other primary sources will apply directly to Ukraine upon accession, some legislative changes are required before EU membership materialises.<sup>76</sup> This extends, in particular, to the provisions of the Treaty on the Functioning of the European Union which regulate the basics of the freedoms of the internal market, which are of particular relevance when no secondary legislation has been adopted by the EU to harmonise or unify domestic laws. In this respect, law approximation is not, however, a straightforward affair. *Au contraire*, it is quite a nuanced exercise, indeed. As is well known and firmly established in EU law, including the case law of the Court of Justice, none of the EU Internal Market freedoms is unlimited. Put differently, impediments, obstacles, or outright restrictions to the free movement of goods, persons, services, capital, or right of establishment are permissible providing they serve legitimate objectives and meet the proportionality test.<sup>77</sup> Thus, before accession, it is essential to conduct screening of national laws as to their compliance with the internal market principles, including the case law of the CJEU. As experience proves, it is a resource-thirsty task, which requires time and perseverance. In general terms, it can be conducted in three main stages. As a starting point, it is essential to adopt a roadmap for the screening exercise, which may include a necessary legislative framework. For the European Union, completion of stage 1 may constitute a benchmark that needs to be complied with as a condition for the opening of the internal market chapters as part of Cluster 2 of the EU negotiation framework.<sup>78</sup> Stage 2 comprises a large scale screening exercise whereby national authorities of the candidate country identify national measures which fall within the scope of the relevant provisions of the TFEU (for instance, Article 34 TFEU), verify if they meet one of the TFEU exceptions as well as the case-law-driven mandatory requirements or objective justifications and, if so, whether they meet the proportionality test. A cliché it may be, but successful implementation of stage 2

<sup>76</sup> In accordance with the principle of immediate effect, accession treaties always envisage the principle of immediate effect, meaning that EU law applies to a newcomer as of the date of accession. See S L Kalėda, 'Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?' (2004) 10 *European Law Journal* 102; S L Kalėda, 'Intertemporal Legal Issues in the European Union Case Law Relating to the 2004 and 2007 Accessions' in A Łazowski (ed), *The Application of EU Law in the New Member States*. *Brave New World* (TMC Asser Press 2010).

<sup>77</sup> See P Koutrakos, N Nic Shuibhne, and P Syrpis (eds), *Exceptions from EU Free Movement Law. Derogation, Justification and Proportionality* (Hart Publishing 2019).

<sup>78</sup> This was the case with Serbia. See Screening Report Serbia, Chapter 1, 20 <[www.mei.gov.rs/upload/documents/eu\\_dokumenta/Skrining/screening\\_report\\_ch\\_1.pdf](http://www.mei.gov.rs/upload/documents/eu_dokumenta/Skrining/screening_report_ch_1.pdf)> accessed 20 December 2023.

requires in-depth knowledge of internal market principles, including the case law of the Court of Justice of the European Union. It is important to note that depending on the freedom of the internal market, the screening exercise may not be limited only to EU primary law, but it should also extend to secondary legislation. Directive 123/2006 on services is a case in point in this respect.<sup>79</sup> Put differently, the screening exercise should encompass all sectors included in the Directive as well as a long list of excluded sectors but covered by the TFEU and case law.<sup>80</sup> Finally, in stage 3, when the screening exercise is complete, a decision is made on which national measures need to be revised or repealed, and which may stay in place as justified and proportionate.

It goes without saying that even despite the best efforts, not all national measures will be caught at the early stages of *rapprochement*. Some may simply slip through the net which, after EU membership materialises, may come with a risk of heavy litigation in national courts. The Polish example of the tax discrimination of second-hand cars, falling under the prohibition laid down in Article 110 TFEU, may be a very good example.<sup>81</sup> The complexity of the accession process makes such cases inevitable.

### **3.4 Approximation with EU secondary legislation not listed in existing EU-Ukraine agreements**

By now, Ukrainian administration and law makers are familiar with legal approximation with EU regulations and directives. After all, the annexes to the EU-Ukraine AA (and, for that matter, to the Energy Community Treaty and the EU-Ukraine Civil Aviation Agreement) are filled with lists of such legal acts. However, with EU membership on the horizon, numerous layers of complexity are added to the mix.

To begin with, the existing practice of not differentiating between EU regulations and directives for law approximation purposes requires a fundamental change. While in a pure association context, equalising these two legal instruments did have merits and was openly envisaged by the EU-Ukraine AA,<sup>82</sup> it is no longer fit for purpose when it comes to EU accession. This is a direct consequence of the different legal character assigned to EU regulations and directives by the creators of the former European Economic Community. In accordance with Article 288 TFEU,

<sup>79</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

<sup>80</sup> See further U Stelkens, W Weiß and M Mirschberger (eds), *The Implementation of the EU Services Directive. Transposition, Problems and Strategies* (TMC Asser Press and Springer 2012).

<sup>81</sup> Case C-313/05 *Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie* ECLI:EU:C:2007:33. See further A Łazowski, 'Half Full and Half Empty Glass: The Application of EU Law in Poland (2004-2010)' (2011) 48 CML Rev 503.

<sup>82</sup> For instance, Article 2 of Annex XVII to the EU-Ukraine AA provides that: 'an act corresponding to an EU Regulation or Decision shall as such be made part of the internal legal order of Ukraine'.

EU regulations are directly applicable in the Member States and, as per consistent case law of the Court of Justice, national laws may not replicate EU regulations, but their role is limited, if at all, to filling in the gaps left by the EU legislator or adopting domestic legal acts to facilitate direct applicability.<sup>83</sup> Consequentially, many existing and future Ukrainian laws and bylaws which approximate the national law with EU regulations will have to be repealed as of the date of accession to the European Union. They will be replaced by directly applicable EU regulations, which by the time of accession should be published in the Ukrainian language in a Special Edition of the Official Journal of the European Union.

Compliance with EU regulations may, however, be tricky at a number of levels. For instance, Regulation 492/2011 on the rights of workers, which gives effect to the principle of non-discrimination as laid down in Article 45 TFEU, is – *prima facie* – fully self-executing.<sup>84</sup> However, in order to comply with its crystal-clear prohibitions of discrimination in terms of access to jobs, remuneration, trade unions, domestic laws and practices will have to be scrutinised. Furthermore, as per established case law of the Court of Justice, the right to education for children of migrating workers creates for primary carers, who cannot benefit from the immigration rights under Directive 2004/38 on EU citizens' rights,<sup>85</sup> the right to reside in the host Member State of the European Union.<sup>86</sup> This will have to be reflected in the Ukrainian immigration law.

Another very good example is EU legislation on judicial cooperation in civil and commercial matters. *Prima facie*, it may look like a simple exercise. In the great majority of cases, it is composed of EU regulations, which will become directly applicable after accession to the European Union.<sup>87</sup> However, as the recent self-screening exercise conducted by the

<sup>83</sup> See, *inter alia*, Case 39/72 *Commission of the European Communities v Italian Republic* ECLI:EU:C:1973:13. For an academic appraisal, see, *inter alia*, RH Lauwaars, 'Implementation of Regulations by National Measures' (1983) 10 *Legal Issues of European Integration* 41; A Łazowski, 'Regulations as a Source of EU Law' in A Łazowski and A Sikora (eds), *EU Regulations in Practice. Legislative and Judicial Approaches* (Hart Publishing 2024) forthcoming.

<sup>84</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

<sup>85</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77. For an academic appraisal, see, *inter alia*, E Guild, S Peers and J Tomkin, *The EU Citizenship Directive: A Commentary* (2nd edn, OUP 2019).

<sup>86</sup> See, for instance, Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* ECLI:EU:C:2010:80; Case C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* ECLI:EU:C:2010:83.

<sup>87</sup> See, for instance, 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) [2012] OJ L351/1.



Ukrainian Ministry of Justice shows, at some point before accession, it will have to be verified whether Ukrainian law will require changes to facilitate the direct application of the EU regulations in question.<sup>88</sup> EU regulations, while almost fully self-executing, may come with a fair amount of case law of the Court of Justice. For instance, Regulation 261/2004 on compensation for flight delays and cancellations has been supplemented by very prolific jurisprudence coming from the Court at Kirchberg.<sup>89</sup> This, too, has to be taken into account when approximation efforts are made by Ukraine.

In contrast to EU regulations, EU directives are not directly applicable, and they always require transposition to national law.<sup>90</sup> In this respect, the application for EU membership does not change much as the same law approximation methodology applies in the association and the membership context. Accession to the European Union, however, will bring in this respect one big qualitative change. Ukrainian laws and by-laws giving effect to EU directives will be legal transplants no more as they will become formal transposition measures due for notification to the European Commission.

Since the obligation to approximate extends now to the EU *acquis* in its entirety, attention will have to be paid to EU legal instruments other than EU regulations and directives. Firstly, contrary to the common perception and wording of Article 288 TFEU, EU decisions are not always individual acts akin to administrative decisions known from domestic legal systems. *Au contraire*, some EU decisions are applicable *erga omnes*, thus requiring legal approximation.<sup>91</sup> Secondly, in the realm of criminal law, many pre-Lisbon instruments remain in force and require transposition to Ukrainian law. This, in particular, extends to EU framework decisions which in the period between the Treaty of Amsterdam and the Treaty of Lisbon remained the key legal instrument for EU criminal law.<sup>92</sup> Bearing in mind the similarities between EU directives and framework decisions, the same law approximation methodology will have to be fol-

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<sup>88</sup> Legal Gap Assessments on file with the authors courtesy of the PravoJustice Project, which is assisting the Ukrainian Ministry of Justice.

<sup>89</sup> 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 [2004] OJ L46/1. See further M Bobek and J Prassl (eds), *Air Passenger Rights. Ten Years On* (Hart Publishing 2018).

<sup>90</sup> See, *inter alia*, S Prechal, *Directives in EC Law* (2nd edn, OUP 2005).

<sup>91</sup> For a comprehensive assessment, see F Cherubini, 'Decisions under the Law of the European Union: "You May Be Six People, But I Love You"' (2022) 41 *Yearbook of European Law* 117.

<sup>92</sup> See further, *inter alia*, A Łazowski and B Kurcz, 'Two Sides of the Same Coin? Framework Decisions and Directives Compared' (2006) 25 *Yearbook of European Law* 177; MJ Borgers, 'Implementing Framework Decisions' (2007) 44 *CML Rev* 1361. On the changes introduced by the Treaty of Lisbon, see C Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method' (2008) 4 *European Constitutional Law Review* 20.

lowed to ensure compliance. This includes the flagship instrument of EU criminal law – the European Arrest Warrant – which will be a difficult EU legal act to approximate.<sup>93</sup> It is a far-reaching fast extradition mechanism based on cooperation between courts, without the involvement of political institutions (as is the case with traditional extradition). Furthermore, it requires extradition of own citizens, and therefore full compliance by Ukraine will require revision of Article 25 of the Ukrainian Constitution.<sup>94</sup>

Overall, more attention will also have to be paid to EU soft law instruments, which may take many shapes and forms, not to mention varied functions.<sup>95</sup> As already argued, taking account of the prolific case law of the Court of Justice is a *conditio sine qua non*.

A final point is required at this stage of the analysis. While it would have been tempting to plan and to proceed with law approximation in fast-track mode, this may not always be an optimal solution. As already mentioned, many pieces of EU secondary legislation may be approximated as legal transplants, perfectly operational ones, even way ahead of accession. However, in the case of many other EU legal acts, their application is inextricably linked to EU membership. Put differently, they can start to apply only when a country becomes an EU Member State, and thus it makes very little sense to approximate national law when the prospect of EU accession is far on the horizon. To demonstrate this phenomenon, it is fitting to put under the microscope a selection of legal acts forming EU criminal law.<sup>96</sup> As far as the first group of legal acts

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<sup>93</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

<sup>94</sup> For an academic appraisal, see, *inter alia*, S Alegre and M Leaf, *European Arrest Warrant. A Solution Ahead of Its Time?* (Justice 2003); R Blekxtoon and W van Ballegooij (eds), *Handbook on the European Arrest Warrant* (TMC Asser Press 2005); N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (TMC Asser Press 2009); L Klimek, *European Arrest Warrant* (Springer 2015); A Łazowski and V Mitsilegas (eds), *The European Arrest Warrant at Twenty. Coming of Age?* (Hart Publishing 2024) forthcoming.

<sup>95</sup> See, *inter alia*, M Eliantonio, E Korkea-aho and O Stefan (eds), *EU Soft Law in the Member States. Theoretical Findings and Empirical Evidence* (Hart Publishing 2021); P L Láncoş, N Xanthoulis and L A Jiménez, *The Legal Effects of EU Soft Law. Theory, Language and Sectoral Insights* (Edward Elgar 2023).

<sup>96</sup> See V Mitsilegas, *EU Criminal Law* (2nd edn, Hart Publishing 2022).

is concerned, the defence rights directives are a case in point.<sup>97</sup> Each of them may be approximated in the early stages of *rapprochement*. As the recent self-screening exercise conducted by the Ukrainian Ministry of Justice proves, Ukrainian law is largely in compliance with this package of EU legal acts. At the same time, it is way too early to proceed with approximation with EU legal acts governing mutual recognition in criminal matters.<sup>98</sup> Since they may only apply when Ukraine becomes a Member State, the law approximation effort should be pushed back until the last stages of *rapprochement*.

#### 4 Conclusions

Approximation of national law with the EU *acquis* goes back, in the case of Ukraine, almost as far as its independence from the Soviet Union. From the early days of its Statehood, Ukraine concluded the EU-Ukraine PCA, which envisaged a general obligation to make the best endeavours to approximate in selected areas of EU law listed in Article 51(2) of the EU-Ukraine PCA. While this provision belongs now to a bygone era, it did make a difference, even though, for a myriad of legal and political reasons, legal alignment has not always been a success. With profound consequences, a lot hinged on the simple fact that for many years Ukraine and its society were torn between *rapprochement* with the West and with the East. The EU-Ukraine AA, signed in dramatic consequences, has tilted the centre of gravity to the West. Since then, Ukraine has switched gear in the approximation of its laws with the EU *acquis*. In the wake of

<sup>97</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

<sup>98</sup> See, *inter alia*, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20; Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

the full-scale Russian invasion, Ukraine has made its final choice and applied for EU membership. As this article argues, this means that the law approximation gear has been switched once again. At the same time, it has added complexity to the process of bringing the Ukrainian lawbook and practice up to EU standards. Many changes will come at this precarious time for Ukraine, the Ukrainian nation, and its business community. Thus, legal alignment and the steps leading to accession in the European Union will have to be handled with care.



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