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# The realization of the resolutions of the association institutions in the associated states

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**Summary:** The article is devoted to the analysis of the mechanisms of the realization of the resolutions of the Association Institutions created within the framework of the Association Treaties. Association agreements between the European Union and the third countries provide for legal mechanisms for their implementation. The agreements empower the association institutions with competence to endorse resolutions, some of which are binding for the parties. The institutional mechanism of the association reflects to some extent the supranational character of the EU. Special attention is paid to the resolutions of the association institutions serve as legal tools for the realization and amendments to the treaties. It is underlined that the binding resolutions of the association institutions may have direct effect in the EU internal legal order. Each of the associated states determines the ways and means of the realization of the resolutions of the associations institutions. The prerequisites for the implementation of the resolutions of the association institutions are enshrined in the constitutions and other legal acts of the associated states. In Ukraine the legal mechanism for the implementation of the resolution of the association institutions is in the process of its formation. The ways of the improvement of the legal mechanism of the realization of the EU law in the internal legal order of Ukraine are considered.

**Keywords:** Association Treaties, Constitutions, EU law, implementation, legal mechanism, resolution, decision, *acquis*, supranational character, Association Council.

One of the main forms of the European Union's (EU) co-operation with third countries and international organizations is an association. The Eastern Partnership Policy proclaimed by the European Union in 2008 foresees a substantial upgrading of the level of political engagement with eastern partners, including the prospect of a new generation of Association agreements, far-reaching integration

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into the EU economy, easier travel to the EU for citizens providing that security requirements are met, enhanced energy security arrangements benefiting all concerned, and increased financial assistance<sup>1</sup>. By means of concluding association agreements the EU is going to form around it the area of stability and economic, political and legal cooperation<sup>2</sup>. The association with the EU becomes one of the most powerful legal instruments for the creation of such an area.

Association agreements of the European Union are mainly framework treaties many provisions of which are to be realized by other legal acts. Association agreements may appear to differ from partnership agreements, and agreements on trade and co-operation in that the formers, firstly, appear to incorporate a great volume of the EU acquis<sup>3</sup> and, secondly, the association institutions created on the basis of their provisions are empowered to adopt various legal acts including binding decisions for the parties. Such agreements reflect to a large extent the legal policy of the EU and contribute to the expansion of the EU law in the legal orders of the associated countries.

The Treaty on Functioning of the European Union (TFEU) does not mention the requirement to establish some institutional structure for the Association agreements. It states only that agreements establishing associations are involving reciprocal rights and obligations, common action and special procedure (article 217)<sup>4</sup>. However, all the association agreements provide for the formation of an institutional structure. By concluding association agreements, the Union and third countries or international organizations form an institutional mechanism of the association that is the association institutions, specify their competence and the legal acts, which they are supposed to approve. The supranational nature of the Union is transferred to some extent to treaty and institutional mechanisms of associations.

The institutional mechanism created on the basis of the association agreements with the aim to ensure that the provisions of the agreement and the EU legislative acts are properly implemented by the parties is quite complex. The most often institutional structure established by the association agreements includes a Council, a Committee and a Parliamentary Committee. A Council and

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<sup>1</sup> Communication from the Commission to the European Parliament and the Council (Eastern Partnership), Brussels, 3.12.2008, COM. [online]. Available at: <[http://www.euronest.europarl.europa.eu/euronest/webdav/shared/general\\_documents/COM\(2008\)823.pdf](http://www.euronest.europarl.europa.eu/euronest/webdav/shared/general_documents/COM(2008)823.pdf)>

<sup>2</sup> European Neighbourhood and Partnership Instrument. Ukraine. Country Strategy. Paper 2007 – 2013. [online]. Available at: <[enpi\\_csp\\_ukraine\\_en.pdf](http://enpi_csp_ukraine_en.pdf)>

<sup>3</sup> GIALDINO, Carlo. Some Reflection on the Acquis Communautaires. *Common Market Law Review*, 1995, vol.32, no. 3, pp.1089-1121.

<sup>4</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. [online]. Available at: <<http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>>

a Committee may approve the binding legal acts and a Parliamentary Committee may approve recommendations<sup>5</sup>.

As a rule, the institutions of an association are formed on the bilateral platform. The functioning of such mechanism is largely based on the agreement's provisions and at the top of it is the Association Council composed of the representatives of the EU Council and the EU Commission, on the one hand, and representatives of the associated country on the ministerial level, on the other.

One of the Association Council's objectives is to exercise permanent control over the realization of Association Agreement. The Association Council may consider the issues of bilateral and international relations. It may serve as a forum for the exchange of information concerning the internal legal acts of both parties which are in force and those which are prepared as well as their implementation measures, their enforcement and their realization.

The Association Council approves by mutual consent the decisions which are binding to the parties and recommendations.

What is important is that the Association Council can amend the annexes to the association agreements that contain the lists of the EU legal acts with which the national legislation of the associated state is to be harmonized taking into account the standards in force fixed in international legal instruments and in the EU legislation.

The Association Council may settle any dispute between the parties concerning interpretation, implementation or execution in good faith of the association agreement. The Association Council may settle the dispute by taking the binding decisions.

The Association Committee assists to the Association Council and consists of the representatives of the members of the EU Council and the representatives of the members of the EU Commission, on the one hand, and representatives of the associated country on the level of state civil servants – on the other.

The Association Council may delegate to the Association Committee any powers including the power to adopt binding decisions. The decisions of the Association Committee delivered on the bases of the delegated powers are taken by mutual consent and are binding for the parties (Art. 465).

The Parliamentary Committee composed of the members of the European Parliament and the national parliaments. It has no say in the decision-making. The Parliamentary Committee may only make requests to the Association Council and the Association Committee concerning the implementation of the Association Agreements. It also is to be informed about the decision of the Association Council and may pass recommendations (Art. 468).

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<sup>5</sup> Association Agreement between the European Union and its Member States, of the one Part, and Ukraine, of the other Part. [online]. Available at: <[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2013/0290/COM\(2013\)0290\(PAR2\)\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2013/0290/COM(2013)0290(PAR2)_EN.pdf)>

The supranationality of the institutional mechanism of the Associations with the third states reflects to a large extent the supranational character of the institutions of the European Union. The powers to decision-making are vested to a large extent to the executive authorities of the parties and the representative bodies, like parliaments, exercise foremost consultative functions only. On the other hand, vesting the Association Council and the Association Committee with the powers to pass binding decisions may be justified by the necessity to provide the efficient implementation of the association agreement. The experience of functioning of the EU association agreements only confirms this<sup>6</sup>.

The legal nature of the decisions approved by the association's institutions is rather difficult to define. The problem is that an association between EU and third countries or international organizations as such is neither international organizations nor a kind of interstate unions. It is rather a kind of an alliance based on international treaty and having its own institutions.

This explains to a large extent the fact why the associated states after the conclusion of the association agreements have to define the status of the decisions of the association bodies in their internal legal orders and the legal instruments of their implementation.

The status of decisions may be quite different in the legal order of the EU and associated states. In the EU they may have direct effect in the EU legal order<sup>7</sup>. In the associated states each country defines their status in the national legal order by itself.

National constitutions vary rarely mention the decisions of international organizations or international institutions among the international legal acts<sup>8</sup>. The same applies to the decisions of the association institutions. Therefore, all the time the states define this status ad hoc. This may create the problems for the realization of the acts of the association institutions in the internal legal order of the associated states.

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<sup>6</sup> MURAVIOV, Viktor. The Supranational Character of the European Union Associations with Third Countries. *Limitations of National Sovereignty through European Integration*. Dordrecht: Springer, 2016, pp.197-206.

<sup>7</sup> Judgment of the Court of 20 September 1990. – S. Z. Sevince v Staatssecretaris van Justitie. – Reference for a preliminary ruling: Raad van State – Netherlands. – EEC-Turkey Association Agreement – Decisions of the Association Council – Direct effect. – Case C-192/89. [online]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli:ECLI:EU:C:1990:322>>

<sup>8</sup> Decision 94/1/CE of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, 3.1.1994. [online]. Available at: <[http://europa.eu/legislation\\_summaries/internal\\_market/living\\_and\\_working\\_in\\_the\\_internal\\_market/em0024\\_en.htm](http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/em0024_en.htm)>

In our opinion, the roots of this problem lie in the uncertainty of the positions of States as a whole concerning the implementation of resolutions of international organizations. As a rule, the national Constitutions of the associate countries do not contain provisions regarding the validity of resolutions of the Association institutions in the national legal orders. In particular, among all the associated countries which had European Agreement with the EU, only the Constitution of the Slovak Republic, even before the entry into force of the European Agreement contained art. 120, which provides the Government with the authority to make regulations to implement the provisions of the European Agreement with the EU<sup>9</sup>. In other associated countries all changes and amendments to national Constitutions, related to cooperation with the EU have been taken only on the eve of EU accession. They concerned mainly the issues of the transfer of the powers to the Institutions of the Union, the primacy and direct effect of the EU law in the national legal orders, i.e. dealt with the acts of the EU Institutions and not with the acts of the association bodies.

In the association agreements there are also no provisions on the effect of the resolutions of the association institutions in the national legal orders of the associated countries, since they do not presuppose the transfer of powers from the associate countries to the association bodies. The questions of validity of resolutions of the association organs in the internal legal orders of the associated countries are to be solved by the associated countries. Each associated state resolves this problem by its own legal means.

As a rule, the resolutions of the association institutions are made in the form of decisions, which are binding, and recommendations. In particular, the Agreement on the European Economic Area between the EU and Norway, Iceland and Liechtenstein (EEA) states that the decision of the Joint Committee of the Association is mandatory for the parties to the agreement (article 104). The association agreement between the EU and Ukraine, states that the Association Council has the authority to make decisions. The decision is binding on the parties which shall take the measures for the implementation of decisions (article 463). It is important to emphasize that the Association Agreement provides for the adoption of binding decisions by the Council to achieve the goals of the agreement within its sphere of action in the cases stipulated by it (Article 463).

One can identify a few spheres in which decisions are made in the framework of the Association. In particular, the adoption of decisions by the Council or a Committee of the Association is provided for:

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<sup>9</sup> Constitution of the Slovak Republic, 01.10.1992. [online]. Available at: <<https://www.prezident.sk/upload-files/46422.pdf>>

- Updating and amending Annexes to the association agreements, which contain the list of acts of the European Union, which are to be implemented in the associated countries;
- Implementation of the provisions of the association agreements;
- Formation of the organizational mechanism of the association.

In practice, there are several similar mechanisms to implement the resolutions of the Association institutions. In the EEA countries, in particular, when it is necessary to introduce changes in the annexes to the Association agreement, the Joint Committee makes a decision for each case of the changes. Thereafter, such a decision is to be ratified by the parties of the agreement in accordance with their constitutional requirements (Article 103).

In countries that have had with the EU European Agreement, the practice of implementing the decisions of the Association bodies varies. To some extent it is affected by the doctrinal approaches to the issue of the relationship between the norms of international and domestic law. In particular, in Poland the decisions of the association institutions could be recognized as having direct effect when such possibility was provided in the European agreement with the country. In Czech Republic in accordance with the doctrine the same criteria for recognition of them as having direct effect should be applied both to the provisions of the European Agreement and the decisions of the Association bodies. In Estonia and Latvia, the publication of decisions of the association institutions was sufficient to ensure their application. In Hungary, Malta and Slovakia, the decisions of the Association had to be necessarily ratified with the purpose of their transformation into national law. The same practice had existed in Bulgaria, Slovenia and Cyprus<sup>10</sup>.

However, it is important to mention that the effect of the decisions of the Association bodies in the countries with which the EU has had European Agreements largely was alleviated by the fact that the Association institutions practically did not take the decisions aiming at amending the protocols to those agreements, since the White Paper for these countries had been adopted with a list of acts of the European Union, with which these countries were to harmonize its legislation<sup>11</sup>. The White Paper to a large extent had replaced those protocols to the agreements.

In Ukraine, where the Association Agreement came into force only on 1 September 2017, there is no any practice of applying the decisions of the Association institutions. As any other association agreements, the Association Agreement with Ukraine provides for the institutions that are to take the decisions mandatory

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<sup>10</sup> OTT, Andrea; INGLIS, Kirstin. *Handbook on European enlargement. A Commentary on the Enlargement Process*. Asser press, 2002, pp. 1116-1131.

<sup>11</sup> TATAM A. *The Law of the European Union*. K., Abris, 1998, pp. 354-362.

for the parties to the agreement and the spheres in which those decisions are taken.

On the other hand, Ukraine has no such White Paper as the Associated countries that had European agreements, therefore the institutions dealing with harmonization of legislation should be guided by the provisions of the annexes to the Association Agreement. Since, unlike in the EEA Agreement, the Association Council, in practice, is lagging behind in time to make changes to the annexes to the Agreement, taking into account the provisions of art. 474 on the harmonization of national legislation with EU legislation, it might be sensible to exercise harmonization of legislation, where appropriate, without waiting for the amendments to the annexes to the Association Agreement and harmonize Ukrainian legislation in case of entry into force of new EU legislation, although there may be a danger of misunderstanding between the legislative and the executive branches. For the Association Agreement with Ukraine it is also characteristic that the resolutions of the Association institutions are to be adopted mostly by the committees, formed on the bases of the Agreement. In particular, the Committee on Trade, which is functioning as an Association Committee in special composition to address all issues related to Part IV (trade and trade-related issues), approves the decision concerning the review of threshold values for the public contracts for works (149.3), the amendments to the chapter 14 (settlement of disputes), rules of arbitration procedure defined in Annex XXIV and to the Code of Conduct of members of the arbitration commissions and intermediaries included in Annex XXV of those chapter (article 326). The Subcommittee on management of sanitary and fito-sanitary measures of the Committee on Trade has the authority to take binding decisions for the parties concerning the amendments to the Appendix X (Verification) (art. 71.3) Annex XI part V (import inspection and inspection costs) (article 72), Appendixes V – XIV (Subcommittee on management of sanitary and fito-sanitary measures (SFSM) (74.2). Subcommittee on Customs cooperation according to article 83 of the Agreement may take decision concerning the implementation of Chapter 5 and Protocols 1 and 2 to the Agreement.

As for the Association Council, the Agreement stipulates the adoption of its mandatory decisions on opening markets (475.5), in cases of dispute settlements between the parties (article 476.3).

The decisions of the Association institutions, containing amendments to the annexes to the Association Agreement shall be registered in the Ministry of Justice. The appropriate changes are brought afterwards to the Plan of measures for the implementation of the Association Agreement between Ukraine and the European Union. The appropriate decision was taken by the Cabinet of Ministers in October 25, 2017.

With the entry into force in 2016 r. of the temporary provisions of Part IV of the Association Agreement (FTA) the new institutional mechanism for harmonization of legislation began to operate. The draft laws and by-laws shall be subjected to preliminary expertise in the Government Office for Coordination of European and Euro-Atlantic Integration as regards their compliance with the international legal obligations of Ukraine and the law of the EU. Upon their legal examination on compliance carried out by the experts of the Government Office, the draft laws are passed to the Verkhovna Rada, which approves the relevant legislative act, and by-laws – to the Cabinet of Ministers for their adoption.

However, this mechanism does not alleviate the danger of introducing changes to the draft laws and by-laws after their legal expertise in the Government Office for Coordination of European and Euro-Atlantic Integration, in particular, in the course of readings of the draft laws in the Verkhovna Rada, which in the end may not correspond to the EU *acquis*.

One more material shortcoming in the Ukrainian legislation, including the Constitution, is the lack of a solution to the question of the status of the acts of international organizations in the national legal order of Ukraine.

The mechanism for monitoring the implementation of the harmonized legislation is also missing.

Translation quality of the *acquis* into the Ukrainian language is another big problem.

However, the further development of integration of Ukraine in the European Union will necessarily require making appropriate provisions in the national legislation in order to create the preconditions for the validity of secondary legislation of the European Union in the national law of the country since that application is provided by the AA (articles 56, 96, 153).

Thus, by concluding the Association Agreement with third countries the EU makes extensive use of the practice of inclusion in those agreements of the provisions of primary and secondary law of the European Union. In order to realize the provisions of those agreements the association institutions are empowered to take resolutions which may be binding for the EU and the associated states. The by-lateral character of functioning of the association institutions makes more democratic the process of the penetration of the EU *acquis* into the internal order of the associated states thus precipitating the process of European integration. The associated countries form their own legal mechanisms for the realization of the resolutions of the association institutions which take into account the legal traditions of each of the country.