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Achieving the Homogeneous Application of EU State Aid Law Under the EU-Ukraine AA/DCFTA: Mission (Im)Possible?

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Summary

The EU-Ukraine Association Agreement (EU-Ukraine AA/DCFTA) was signed in 2014 and became fully effective in 2017. It includes a detailed section on State aid, which is based on EU law. There is also a provision (Art. 264), which requires Ukraine to use EU law instruments during State aid control enforcement. The language employed presupposes that both the Union and Ukraine strive to achieve the homogeneous application of the EU State aid rules. Thus, this thesis aims to analyse to what extent the EU-Ukraine AA/DCFTA leads to this goal.

The thesis starts with the delineation of the Union's and Ukraine's implementation goals. Then follows the identification and assessment of the legal and institutional obstacles to the homogeneous application of EU State aid law in Ukraine. These hurdles are inferred from three main sources: the EU-Ukraine AA/DCFTA, the EU and Ukrainian legal systems. The final point is an analysis of the identified obstacles. It is argued that the homogeneous application of EU State aid law is threatened from different angles. However, not all the identified stumbling blocks are decisive. Three critical points of tension are defined.

First, the lack of clearly pronounced mid-term prospects of Ukraine's accession to the EU. It might lead to the lack of political will on the Ukrainian side in the proper implementation of EU State aid law. This point is exemplified by the deficient transposition of the EU-Ukraine AA/DCFTA State aid rules into the Ukrainian legislation and the lack of the full-fledged independence of the Ukrainian regulator (Antimonopoly Committee of Ukraine, AMCU).

Second, the complex and dynamic character of EU State Aid law. For Ukraine, the challenge is reinforced by the lack of Ukrainian stakeholder's expertise in EU law and the absence of a direct dialogue along the lines 'CJEU-Ukrainian Judiciary' and 'Commission-AMCU'.

Third, the one-tier nature of Ukrainian State aid control institutional architecture. Without an intricate legal and institutional framework (like in the EU or the EEA), the EU's model of State aid control cannot survive the export into a third country without losing most of its crucial features.

It is concluded that the EU-Ukraine AA/DCFTA did not lead to the homogeneous application of EU State aid law. The most efficient solution to the problem is to create an EEA-style common economic space with at least the 'Association Trio' (Ukraine, Georgia, Moldova) with a two-tier State aid control system.

Acknowledgments

In November 2013, the former Government and President of Ukraine refused to sign the long-awaited Association Agreement between Ukraine and the EU. This event sparked the protests called ‘Euromaidan’. I was there too, and I rooted for the Association. This revolution has shaken my beloved Motherland to the core. Luckily, the Euromaidan has won, and the Agreement was signed. Since then, Ukraine is on the right path to reconnecting with a big European family, where it belongs. However, I must admit that ironically, at that time, I was not entirely aware of how vast and significant the Association Agreement is. My trip to Lund and work on this master thesis helped me realise its full prominence and weight.

I want to thank my supervisor Marja-Liisa Öberg for her insightful and valuable remarks while writing the thesis. At some point, I must admit that I was a bit lost, but her guidance always put me back on track. I also want to thank the Law Faculty’s teaching staff, especially Xavier Groussot, Eduardo Gill-Pedro and Max Hjærtström.

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List of Abbreviations

AA	Association Agreement
CAA	Common Aviation Area
CEECs	Central and East European Countries
CCEJ	Consultative Council of European Judges
CJEU	Cour of Justice of the European Union
DCFTA	Deep and Comprehensive Free Trade Area
DSP	Dispute Settlement Procedure
EaP	Eastern Partnership
ECAA	European Common Aviation Area
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EnCT	Energy Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EU	European Union
HQCJ	High Qualification Commission of Judges of Ukraine
GBER	General Block Exemption Regulation
GDP	Gross domestic product
IFAC	International Federation of Accountants
FTA	Free trade area
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
PCA	Partnership and Cooperation Agreement
SAA	Stabilisation and Association Agreement
SGEI	Service of General Economic Interest
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

1 Introduction

1.1 Background

State aid rules comprise a distinctive area of EU law.¹ The Union started more actively to ‘export’ its State aid acquis to third countries since the 1990s.² The EU is the most persistent in such a transfer when sharing the internal market is at stake. The reasons are obvious – if the EU grants access to all or some parts of the internal market, it wants to secure the level playing field. This rationale proves to be right in the case of Ukraine. The attempts of export of EU State aid law to Ukraine got some tangible results only after the Union decided to grant partial access to the internal market via the Deep and Comprehensive Free Trade Area (DCFTA) with Ukraine.

Ukraine made its first ‘legal’ acquaintance with the notion of State aid in 1994 when the Partnership and Cooperation Agreement (EC-Ukraine PCA) was signed.³ Nevertheless, no specific national legislation was adopted back then.⁴ In 2011 Ukraine joined the Treaty establishing the Energy Community (EnCT).⁵ Arts. 18 and 19 thereof require the implementation of the key EU State aid rules. Yet again, Ukraine did not enact the necessary legislation.⁶

Only on 1 July 2014, Verkhovna Rada (the Parliament of Ukraine) finally adopted the Law ‘On State Aid to Undertakings’ (Law on State Aid), which became effective on 2 August 2017.⁷ This enactment aimed to meet Ukraine’s implementation obligations under the newly signed EU-Ukraine Association Agreement (EU-Ukraine AA/DCFTA).⁸

Suffice it to say, the route to the EU-Ukraine AA/DCFTA was a thorny one.⁹ Negotiations on the conclusion of the Agreement started in 2007,¹⁰ and it was signed only on 27 June 2014.¹¹ It includes the DCFTA provisions (Title IV), with the State aid rules in chapter 10, section 2,

¹ Kelyn Bacon, *European Union Law of State Aid* (3rd edn, OUP 2017) para 1.03; Eugene Stuart and Iana Roginska, ‘State Aid Regulation and Future Industrial Policy in Ukraine’ (2016) 15 (1) *European State Aid Law Quarterly* 59.

² Juan Jorge Piernas López, *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (OUP 2015), 54.

³ Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine [1998] OJ L 49/3 (EC-Ukraine PCA), art 49(2).

⁴ Although there were unsuccessful attempts in 2004 and 2007 – see Stuart and Roginska (n 1) 62.

⁵ Treaty establishing the Energy Community [2006] OJ L198/18 (EnCT).

⁶ Energy Community Secretariat, ‘Case ECS 08/14: Ukraine / Competition’ (2014) <<https://www.energy-community.org/legal/cases/2014/case0814UA.html>> accessed 25 May 2021.

⁷ Law of Ukraine no 1555-VII ‘On State Aid to Undertakings’, 1 July 2014 (Law on State Aid).

⁸ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3 (EU-Ukraine AA/DCFTA).

⁹ The ‘long and winding’ road to the conclusion of the AA is described in details in Guillaume Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership* (Brill Nijhoff 2016), 100-129.

¹⁰ Council of the European Union, ‘EU-Ukraine Summit Kiev, 14 September 2007: Joint Statement’ <https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/d-ua20080221_05/d-ua20080221_05en.pdf> accessed 25 May 2021.

¹¹ European Council, ‘Ukraine: Council adopts EU-Ukraine association agreement’ (2017) <<https://www.consilium.europa.eu/en/press/press-releases/2017/07/11/ukraine-association-agreement/>> accessed 25 May 2021.

Arts. 262-267 and Annex XXIII. The DCFTA part became provisionally applicable on 1 January 2016, and the whole Agreement became fully-fledged effective on 1 September 2017.¹²

From the Union's side, the EU-Ukraine AA/DCFTA is considered to be 'the main tool for bringing Ukraine and the EU closer together, promoting deeper political ties, stronger economic links and respect for common values'.¹³ The alignment with the EU State aid rules is an essential milestone in this direction.

Art. 264 EU-Ukraine AA/DCFTA states that the Parties

'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 [TFEU], including the relevant jurisprudence of the [CJEU], as well as relevant secondary legislation, frameworks, guidelines and other administrative acts in force in the [EU]'.¹⁴

The wording employed presupposes that both the Union and Ukraine strive to achieve a similar application of the EU-Ukraine AA/DCFTA State aid rules, inspired by their EU law counterparts. One can even trace some hints of the implied homogeneity there.

'Homogeneity' in its general meaning is 'the quality or state of being of a similar kind or of having a uniform structure or composition throughout'.¹⁵ This term or its derivatives are not explicitly mentioned in the EU-Ukraine AA/DCFTA. However, 'homogeneity' is famously utilised in the Agreement on the European Economic Area (EEA Agreement), regulating the relations between the EU and EFTA Member States (Iceland, Norway and Lichtenstein).¹⁶ Homogeneity is a peculiarity and the sacrosanct principle of the EEA Agreement. It secures the 'quasi-membership' of EEA states in the EU internal market.¹⁷ As the CJEU clarified, due to the high level of secured uniform interpretation, 'the internal market established within the European Union is extended to the EFTA States'.¹⁸

The EEA homogeneity 'resembles the unity rather than uniformity of the EU legal order', as they '[b]oth strive towards integration through the creation of a single market in which total commonality is not a decisive factor'.¹⁹ This statement holds true to the EU-Ukraine AA/DCFTA. This conclusion is valid even though the AA/DCFTA has less strictly pronounced interpretation requirements and a much less ambitious institutional structure than the EEA Agreement.²⁰ Thus,

¹² Commission, Country reports and info sheets on implementation of EU Free Trade Agreements Accompanying the document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2016 - 31 December 2016, SWD/2017/0364 final, 29.

¹³ European Council, 'Ukraine: Council adopts EU-Ukraine association agreement' (n 11).

¹⁴ Emphasis added.

¹⁵ 'Homogeneity' (*Merriam-Webster Dictionary*) <<https://www.merriam-webster.com/dictionary/homogeneity>> accessed 25 May 2021.

¹⁶ Agreement on the European Economic Area [1994] OJ L1/3 (EEA Agreement), art 1(1). Concerning competition rules, see also art 58 thereof.

¹⁷ Kjell A Eliassen and Nick Sitter, 'Ever Closer Cooperation? The Limits of the 'Norwegian Method' of European Integration' (2003) 26 (2) *Scandinavian Political Studies* 125, 133-135.

¹⁸ Case C-897/19 PPU *Ruska Federacija* EU:C:2020:262, para 50.

¹⁹ Marja-Liisa Öberg, *The Boundaries of the EU Internal Market: Participation without Membership* (CUP 2020), 115.

²⁰ Van der Loo (n 9) 311.

it may be presumed that the homogeneous interpretation and application is implied as a goal in the implementation of the core EU State aid rules in Ukraine.

Throughout this thesis, the term ‘homogeneous application’ is mainly employed as an overarching notion. The homogeneous application presupposes that the rules are duly transposed and interpreted. Without one of these elements, it would be incorrect to say that the homogeneous application is achieved.

1.2 Purpose and Research Questions

The purpose of this thesis is to analyse to what extent the EU-Ukraine AA/DCFTA is instrumental in achieving the homogeneous application of EU State aid law in Ukraine.

The homogeneous application might be even seen as a benchmark for defining the efficiency of EU State aid law export to third countries. The higher level of the homogeneous application of EU State aid law can be achieved – the more successful export is, and vice versa. Therefore, the central research question of this thesis is *whether the EU-Ukraine AA/DCFTA can lead to the homogeneous application of EU State aid law in Ukraine.*

Finding an answer to the main question necessitates addressing the following three sub-questions:

- ▶ What are the objectives of incorporating and implementing EU State aid law by Ukraine?
- ▶ What are the legal obstacles to the homogeneous application of EU State aid law in Ukraine?
- ▶ What are the institutional obstacles to the homogeneous application of EU State aid law in Ukraine?

1.3 Methodology and Materials

The thesis utilises a toolbox consisting primarily of three methods. First and foremost, this thesis employs the doctrinal method. This method broadly presupposes that ‘the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter in hand’.²¹ The comparative method is the second. Its core lies in comparing different legal systems, which is the case here, since Ukrainian State aid law is compared to EU one.²² Third, to a limited extent, the thesis employs some methods of comparative politics, namely analysis and deduction from the perspective of normative theory (i.e., what are the objectives of the Union and Ukraine ought to be).²³ They are used to find and assess the implementation goals of the EU and Ukraine and to identify potential solutions to the issues outlined.

EU State aid law serves as a template for Ukraine in the implementation process. Thus, the Union’s legal sources (the case law of the EU Courts, legislation and soft law), EU official documents and

²¹ Terry Hutchinson, ‘Doctrinal research: researching the jury’ in D Watkins and M Burton (eds) *Research Methods in Law* (1st edn, Routledge 2013), 9-10.

²² See Edward J Eberle, ‘The Methodology of Comparative Law’ (2011) 16 *1 Roger Williams University Law Review* 51, 52.

²³ See Todd Landman, *Issues and Methods in Comparative Politics: An Introduction* (Taylor & Francis 2000), 15.

scholars' works are mainly employed. However, this thesis also revolves around the Ukrainian perspective in implementing the EU-Ukraine AA/DCFTA State aid provisions. This fact necessitates the usage of Ukrainian legal sources (including the case law) and the contributions from Ukrainian commentators.

The structure of this thesis is built around the above-formulated sub-questions.²⁴ The answers to them will pave the way to the response to the primary research question. Thus, three main elements will be tackled, and the research proceeds as follows.

First, the implementation goals of the EU and Ukraine are delineated. They are inferred from the EU-Ukraine AA/DCFTA, the legislation and official documents from both the EU and Ukraine. Based on this, the comparison and analysis of the concordance between the Parties' objectives are conducted.

Second, the legal obstacles to the homogeneous application of EU State aid law are identified and analysed. The obstacles stemming from the EU-Ukraine AA/DCFTA and EU law are determined for establishing their potential ramifications to the homogeneous application of EU State aid law in Ukraine. Ukrainian legal obstacles are assessed through the lens of EU law, comparing between the Law on State Aid and the EU State aid acquis. The assessment of the defined hurdles supplements the analysis in terms of the risks they potentially entail for the homogeneous application of EU State aid law in Ukraine.

Third, the institutional obstacles to the homogeneous application of EU State aid law are explored and analysed. The obstacles emanating from the EU-Ukraine AA/DCFTA institutional setup are established and compared with the EEA Agreement institutions. In addition, Ukrainian aspirations in the enhancement of the cooperation with the EU are also noted to suggest alternative solutions for State aid control institutional setup. Obstacles on the Ukrainian side are analysed based on the current institutional setup of State aid control and the place of the Ukrainian regulator within the governmental system. In addition, the practice of application of EU law in general and State aid rules in particular are taken into account. The part on Ukraine additionally involves limited statistical data and analysis of the pre-selected Ukrainian case law.

Based on the findings within the outlined points, an integrated conclusion is made to answer the main research question. In addition, some potential solutions to the identified problems are suggested.

1.4 Delimitations

The main research question is tested by analysing whether and how the aims of the Parties to the EU-Ukraine AA/DCFTA and identified obstacles affect the application of EU State aid law in Ukraine.

²⁴ Choice of legal and institutional aspects was inspired by M-L Öberg's work concerning the participation of third countries in the EU internal market without formal membership in the Union. Her research was built upon analysing (1) EU constitutional limitations and (2) institutional constraints. See Öberg, *The Boundaries of the EU Internal Market* (n 19) 3-4.

This thesis will not go into the details of EU State aid control. The main objective is to outline EU State aid law rather briefly to give an impression of what challenges are faced by Ukraine in implementing similar rules within its own national system. Moreover, such a brief overview helps in clarifying whether EU law concepts can survive such an export. Internal Ukrainian law matters will also be outlined in general.

Some economic and political information will be provided to the minimum extent necessary. The goal is merely to explain the impact of State aid measures and whether the export of State aid control model is beneficial for both the EU and Ukraine. However, the debate on the EU-Ukraine AA/DCFTA Parties' adherence to the identified goals will be limited.

The issue of the territorial scope of the EU-Ukraine AA/DCFTA is left outside the ambit of this thesis. The Agreement was negotiated before the Russian annexation of Crimea and occupation of some districts of the Donetsk and Luhansk regions. Thus, it is silent on its application within these parts of Ukraine.²⁵ So far, the matter is irrelevant for this thesis since Ukrainian authorities cannot exercise their powers in these territories in full and, consequently, provide State aid there.

1.5 State of the Art

The issues of expanding the EU internal market to third countries have been already extensively discussed in the literature.²⁶ The same goes for the expansion and promotion of the Union's rules and standards outside its borders.²⁷ The works focused on the EU-Ukraine AA/DCFTA hold a prominent position in the discussion and are used throughout this thesis.²⁸ Ukrainian scholars have contributed to examining the place of the EU-Ukraine AA/DCFTA and EU law sources in general within the Ukrainian legal system.²⁹ The exporting issues of the EU State aid rules have also been

²⁵ See Van der Loo (n 9) 185.

²⁶ See Peter Van Elsuwege, *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession to the European Union* (Martinus Nijhoff Publishers 2008); Roman Petrov, *Exporting the Acquis Communautaire through European Union External Agreements* (Nomos Verlagsgesellschaft 2011); Marja-Liisa Öberg, 'Internal Market Acquis as a Tool in EU External Relations: From Integration to Disintegration' (2020) 47 (2) *Legal Issues of Economic Integration* 151; Öberg, *The Boundaries of the EU Internal Market* (n 19).

²⁷ See Marise Cremona, 'The Single Market as a Global Export Brand: Exporting the Single Market' (2010) 21 (5) *European Business Law Review* 663; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020); Melanie Theisinger, 'New Approaches in the Promotion of EU Standards' in W Th Douma and others (eds) *The evolving nature of EU external relations law* (Asser Press / Springer 2021).

²⁸ See Roman Petrov, Guillaume Van der Loo and Peter Van Elsuwege 'The EU-Ukraine Association Agreement: A New Legal Instrument of Integration Without Membership?' (2015) 1 *Kyiv-Mohyla Law and Politics Journal* 1; Van der Loo (n 9); Peter Van Elsuwege and Merijn Chamón, 'The meaning of "association" under EU law. A study on the law and practice of EU association agreements' (2019) Study for the AFCO committee of the European Parliament <[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 25 May 2021.

²⁹ See Roman Petrov and Paul Kalinichenko, 'The Europeanization of Third Country Judiciaries Through the Application of the EU Acquis: The Cases of Russia and Ukraine' (2011) 60 *ICLQ* 325; Olha Streltsova, 'Constitutionalisation of the Process of Ukraine's Association with European Union' (UKR: 'Конституціоналізація процесу асоціації України з Європейським Союзом') (Doctor of juridical sciences thesis, Taras Shevchenko National University of Kyiv 2017); Mykola Koziubra, 'The Correlation of Constitutional and International Law: The Ukrainian Case' (2020) 6 *Kyiv-Mohyla Law and Politics Journal* 177; Roman Petrov, 'The Impact of the Court of Justice of the European Union on the Legal System of Ukraine' in A Reich and Hans-W Micklitz (eds), *The Impact of the European Court of Justice on Neighbouring Countries* (OUP 2020).

dealt with.³⁰ Some commentators have addressed introducing the EU-like State aid control in Ukraine (including the analysis of the Law on State Aid).³¹

However, the previous contributions have not analysed the issue of the homogeneous application of the exported EU State acquis in a third neighbouring country like Ukraine. This thesis aims precisely to close this knowledge gap.

1.6 Outline

The thesis begins with Chapter 2, containing a succinct overview of the goals of the Union and Ukraine in the implementation of the State aid rules by Ukraine. Chapter 3 seeks to delineate legal obstacles for the homogeneous application of State aid rules derived from the EU-Ukraine AA/DCFTA itself, the EU legal system and Ukrainian law. Chapter 4 deals with institutional obstacles to the homogeneous application of EU State aid law. Chapter 5 concludes with an integrated answer to the main research question.

³⁰ See Eugene Stuart, 'State Aid Control to EU Standards Expectations and Implications in the Context of Stabilisation and Association Agreement' (2001) 3 *Revija za evropsko pravo* 5; Michael Blauburger and Rike U Krämer, 'European Competition vs. Global Competitiveness: Transferring EU Rules on State Aid and Public Procurement beyond Europe', (2010) CCP Working Paper 10-10, <www.researchgate.net/publication/228149120_European_Competition_vs_Global_Competitiveness_Transferring_EU_Rules_on_State_Aid_and_Public_Procurement_Beyond_Europe> accessed 25 May 2021.

³¹ See Stuart and Roginska (n 1); Olha Kulyk, 'The State Aid System in Ukraine: How European Requirements Can Make It More Effective' (UKR: 'Система державної допомоги в Україні: як європейські вимоги можуть зробити її більш ефективною') (2019) Research Paper for NGO 'Ukrainian Centre for European Policy' <www.civic-synergy.org.ua/wp-content/uploads/2018/04/Systema-derzhavnoyi-dopomogy-v-Ukrayini-yak-yevropejski-vymogy-mozhut-zrobyty-yiyi-bilsh-efektyvnoyu-1.pdf> accessed 25 May 2021; Oksana Terletska, 'State Aid Policy Under the EU-Ukraine Association Agreement: Promising Fruits From a Terra Incognita' (2019) 3DCFTAs Youth Essay Competition <<https://3dcftas.eu/publications/state-aid-policy-under-the-eu-ukraine-association-agreement-promising-fruits-from-a-terra-incognita>> accessed 25 May 2021; Yevhen Dudnyk, 'Ukraine' (2019) 18 (2) *European State Aid Law Quarterly* 216; Kseniia Smyrnova and Erika Szyszczak, 'Modern Approaches to State Aid: Ukraine' (2020) 19 (1) *European State Aid Law Quarterly* 8.

2 Goals of the Implementation of EU State Aid Law by Ukraine

Even though the thesis focuses on the homogeneous application of EU State aid law *in Ukraine*, the implementation process requires two to tango. Success here depends on the Union as well. Establishing the objectives (as they ought to be) would reveal to what extent both Parties to the EU-Ukraine AA/DCFTA are inclined to ensure the proper implementation of the State aid rules in Ukraine.

It is argued that both the EU and Ukraine have substantial interests in securing the proper application of EU State aid law in Ukraine. Nevertheless, the flaws, which might affect the process, exist as well.

2.1 Goals Pursued by the EU

One may distil three main objectives pursued by the Union concerning the implementation of the State aid rules by Ukraine. The first objective is the ensuring the level playing field between the EU and Ukraine in the sectors of the EU internal market shared with Ukraine. The second objective concerns the decreasing of regulatory divergence between the EU and Ukraine. Finally, the third objective is the reinforcement of the Union's role as a modern 'regulatory trendsetter'.³²

2.1.1 Ensuring the Level Playing Field

Contrary to widespread belief, trade without (almost no) barriers has its flaws. Among other things, it generates competition not only between undertakings but also between states. It leads, in turn, to a situation where states (both politically and economically) have an incentive to support their economic operators.³³ Generally speaking, State aid measures are tantamount to distortions in the internal market to the disadvantage of both competitors and consumers.³⁴ State aid rules are designed precisely to protect this side of the competition. Subsequently, State aid control within the EU aims to ensure the level playing field between competitors.

The EU-Ukraine AA/DCFTA, among its objectives, does not directly mention this goal. However, Art. 1(2)(d) thereof explicitly refers to 'Ukraine's gradual integration in the EU Internal Market'. It may be inferred from this wording that the Agreement aims to give Ukraine access to part of the EU internal market. The Union tries through such bilateral agreements to enhance trade with

³² Referred as such in the context of, e.g., privacy regulation – see Anna Artyushina, 'The EU is launching a market for personal data. Here's what that means for privacy' (2020) MIT Technology Review <<https://www.technologyreview.com/2020/08/11/1006555/eu-data-trust-trusts-project-privacy-policy-opinion/>> accessed 25 May 2021.

³³ Erika M Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart Publishing 2007), 177.

³⁴ *Ibid* 23.

neighbours and to achieve ‘a pan-European market resembling a domestic market as closely as possible’.³⁵

Access to the EU internal market naturally comes at a cost to third countries. The Commission emphasised in 2020 that ‘foreign subsidisation (...) needs to be controlled to avoid undermining competitiveness and the level playing field in the EU market’.³⁶ The Union wants guarantees that third country’s undertakings will not be favoured compared to the Union’s ones.³⁷ In other words, access otherwise would not be given if a third country could not secure proper protection of the competition within its borders. That is where the homogeneous application of the EU State aid rules by Ukraine is vital for its smooth access to the internal market.

2.1.2 Decreasing of the Regulatory Divergence

The regulatory similarity is essential for both the EU and its undertakings. Basically, ‘the EU wants to trade with neighbouring countries but on the same, or very similar, regulatory terms to its own internal policies’.³⁸ It should be noted that the State aid rules are aimed to regulate first and foremost activities of states and not undertakings.³⁹ Still, decreasing regulatory divergence is relevant for the Union’s economic operators. They might be eligible for Ukrainian State aid. They can also enforce the Ukrainian State aid rules against their competitors, unlawfully favoured by Ukraine.

The phenomenon of the regulatory divergence is an antipode to the ‘regulatory similarity’. It presupposes ‘inconsistencies in regulation between different jurisdictions, which may reasonably arise from cultural differences, domestic policy priorities, or other factors’.⁴⁰ The main issue with the regulatory divergence is that it might lead ‘to duplication costs of compliance and testing requirements, resulting in even costlier delays of market entry’.⁴¹ Export of the EU rules is beneficial for the Union’s authorities as well since it helps the Union with taking part in (and even leading of) shaping the commercial policy of its neighbours.⁴²

Art. 1(2)(d) EU-Ukraine AA/DCFTA does not explicitly refer to this goal. It states, however, that one of the Agreement’s objectives is ‘to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, *the progressive approximation of its legislation to that of the Union*’.⁴³

³⁵ Öberg, ‘Internal Market Acquis as a Tool in EU External Relations: From Integration to Disintegration’ (n 26) 176-7.

³⁶ Commission, ‘White Paper on levelling the playing field as regards foreign subsidies’ COM (2020) 253 final, section 2.1.

³⁷ Stuart (n 30) 15-6.

³⁸ Smyrnova and Szyszczak (n 31) 8.

³⁹ Bacon (n 1) para 1.05.

⁴⁰ IFAC and Business at OECD, ‘Regulatory Divergence: Costs, Risks and Impacts’ (2018) Report from IFAC and Business at OECD, 4 <<https://www.ifac.org/knowledge-gateway/contributing-global-economy/publications/regulatory-divergence-costs-risks-and-impacts>> accessed 25 May 2021.

⁴¹ Theisinger (n 27) 24.

⁴² Blauburger and Krämer (n 30) 24; Marise Cremona, ‘Expanding the Internal Market: An External Regulatory Policy for the EU?’ in B Van Vooren and others (eds) *The EU’s Role in Global Governance: The Legal Dimension* (OUP 2013), 176.

⁴³ Emphasis added.

State aid control is a new area for Ukraine. Since it is basically expected to be copied from the EU,⁴⁴ such export of rules would not create a diverging area (in theory), and the EU undertakings could quickly adapt. Hence, the homogeneity in applying the State aid provisions plays a vital role. Simple copying, however, will not lead to a decrease in regulatory divergence if the EU State aid rules are interpreted in a very different way.

2.1.3 Reinforcing the Role of the Union as a ‘Regulatory Trendsetter’

The EU is a success story of regional international organisations. The Union has proven to be ‘a strongly coherent and efficient regulator’,⁴⁵ and it ‘still acts as an attractive role and rule model for other regional integration areas globally and third countries integrated into the European Legal Space regionally’.⁴⁶

The EU tries to expand its regulatory models to third countries, including Ukraine. In the literature, several names are used for this phenomenon: ‘market power Europe’,⁴⁷ ‘normative power’,⁴⁸ ‘global rule-maker’,⁴⁹ ‘soft power’.⁵⁰ Sometimes even the notion of the Union’s ‘imperialism’ is employed.⁵¹ Leaving outside the ambit of this thesis the debate on this matter, the export of the EU State aid rules to Ukraine can be seen as one of many manifestations of the ‘EU as a global rule-maker’ phenomenon.

The Union’s objective to exert the regulatory influence on Ukraine is not explicitly mentioned in the EU-Ukraine AA/DCFTA. However, from its substantive dimension, namely the stringent provisions of the State aid section, this goal can be deemed as implied.

The Union has a long story since the 1990s of attempts to impose its State aid control on the third countries.⁵² On the level of the World Trade Organization (WTO) rules, the EU failed to cover the issues of State aid control.⁵³ To some extent, the emergence of the WTO in 1995 can be deemed a rationale for exporting EU internal policies to third countries.⁵⁴

The EU pushes towards the application of EU State aid law-like rules through strategic litigation within the WTO. A notable example is the Canada-Renewable Energy/FIT case,⁵⁵ where the Union

⁴⁴ Although, as will be shown in Chapter 3, not all the rules were transposed correctly by Ukraine.

⁴⁵ Theisinger (n 27) 27.

⁴⁶ Andrea Ott, ‘The Building Blocks and Stumbling Stones of Constructing the European Legal Space’ in W Th Douma and others (eds) *The evolving nature of EU external relations law* (Asser Press / Springer 2021), 207.

⁴⁷ Chad Damro, ‘Market Power Europe’ (2012) 19 (5) *Journal of European Public Policy* 682.

⁴⁸ Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235.

⁴⁹ Ott (n 46) 207.

⁵⁰ Joseph S Nye ‘Soft Power’ (1990) 80 *Foreign Policy* 153.

⁵¹ See, e.g., Jan Zielonka, ‘Europe as a Global Actor: Empire by Example?’ (2008) 84 *International Affairs* 471, 475; Raffaella A Del Sarto, ‘Normative Empire Europe: The EU, Its Borderlands and the Arab Spring’ (2016) 54 *Journal of Common Market Studies* 215, 222–24. For the discussion of these views and opposition to them, see Bradford (n 27) 248.

⁵² Piernas López (n 2) 54.

⁵³ Stuart (n 30) 7; Smyrnova and Szyszczak (n 31) 9.

⁵⁴ Bradford (n 27) 18.

⁵⁵ WTO Appellate Body Report, ‘Canada Certain Measures Affecting the Renewable Energy Generation Sector/Measures Relating to the Feed-In Tariff Program WT/DS/412/AB/R, WT/DS/426/AB/R’, adopted 24 May 2013.

litigators succeeded to apply *the Altmark*-like test⁵⁶ against Canada.⁵⁷ However, such a strategy cannot be seen as the most stable one.

The failure to implement the rules on the WTO level implies that the most apparent route for the Union now is to insert the State aid rules in its international agreements. So far, the EU's success is mixed. Provisions on State aid can be found in several bilateral agreements, not only with European states (e.g., in agreements with South Africa and Chile, however, with light-touch formulations).⁵⁸ In addition, multilateral agreements (like the EnCT⁵⁹ and the Agreement on the Establishment of the European Common Aviation Area)⁶⁰ also refer to the State aid rules.

It is argued that the efficiency of the EU acquis introduction to third countries depends on the distance between the Union and the third country and its trade power.⁶¹ When the EU deals with a weaker trade partner, it has better leverage in negotiations due to its market size.⁶² Ukraine is both an immediate neighbour⁶³ and a weaker trade partner⁶⁴ for the EU; thus the EU-Ukraine AA/DCFTA contains quite detailed State aid rules.

2.2 Ukrainian Goals

Two main Ukrainian objectives can be distinguished. The first one is access to the EU internal market. The second objective is the improvement of the Ukrainian economy. Potentially, further accession to the EU as a goal, inextricably linked to the first aim, could also be mentioned. Nevertheless, this matter tends to be highly controversial due to the lack of clearly spelt by the EU and its Member States mid-term perspectives of Ukraine in joining the Union.

2.2.1 Access to the EU Internal Market

As indicated before, the EU-Ukraine AA/DCFTA is aimed at Ukraine's gradual integration into parts of the Union's internal market. The so-called 'market access conditionality' is noted in the

⁵⁶ The *Altmark* test, named after the case, requires four conditions to be fulfilled in order for a measure not to be treated as State aid: (1) clear definition of public service obligations (PSO) on the recipient; (2) the metrics for defining the compensation amount for fulfilling PSO must be defined transparently and ahead; (3) this compensation cannot be more than what is required to cover the expenses for fulfilling PSO; (4) either the recipient must be chosen in a public procurement procedure, or the amount of compensation is calculated based on a comparison with potential expenses of 'a typical undertaking, well run' and properly equipped for the PSO fulfilment – Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* EU:C:2003:415, paras 89-93.

⁵⁷ See Luca Rubini, 'The wide and the narrow gate: Benchmarking in the SCM Agreement after the Canada-Renewable Energy/FIT Ruling' (2015) 14 *World Trade Review* 211, 225-226.

⁵⁸ Blauburger and Krämer (n 30) 18.

⁵⁹ EnCT (n 5) arts 18-19.

⁶⁰ Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area [2006] OJ L 285/3 (ECAA Agreement), Annex III.

⁶¹ Theisinger (n 27) 36.

⁶² Bradford (n 27) 71.

⁶³ Ukraine borders with four EU Member States: Romania, Hungary, Slovak Republic and Poland.

⁶⁴ As of 2019, 'Ukraine is the 18th trading of the EU accounting for around 1,1% of EU's total trade', while '[t]he EU is Ukraine's largest trading partner, accounting for more than 40% of its trade' – see Commission, 'Countries and regions' (last update 26 April 2021) <<https://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/>> accessed 25 May 2021.

context of such integration, when access to the market depends on Ukrainian success/failure in keeping up with its obligations under the AA/DCFTA.⁶⁵ This type of conditionality is a specific feature of the DCFTA.⁶⁶

It is observed that the competition chapter of the EU-Ukraine AA/DCFTA (including the State aid provisions) is not directly linked to the market access conditionality.⁶⁷ However, it is only to state a half-truth since the hints of indirect conditionality can be seen in Art. 266 EU-Ukraine AA/DCFTA. This provision is dedicated to the scope of State aid provisions and directly mentions ‘the mutually agreed decision on market access’.⁶⁸ In addition, Art. 475(5) EU-Ukraine AA/DCFTA (which deals with Association Council’s decision on further market opening) refers to implementing and enforcing the ‘necessary measures’ mentioned in the DCFTA in general, so the State aid provisions are also included. Therefore, subsequent market access also depends on the success in the proper application of the EU State aid *acquis* by Ukraine.

Ukraine has more strict and concrete duties concerning State aid control introduction in line with EU law, as compared to the previous EC-Ukraine PCA.⁶⁹ To exemplify the matter, Art. 267 EU-Ukraine AA/DCFTA requires Ukraine to adopt the legislation and institutional structure within the pre-established deadlines.⁷⁰

From these provisions and Art. 264 EU-Ukraine AA/DCFTA follows that it can be deemed an integration agreement concerning the State aid rules. The CJEU does not utilise ‘integration agreement’ wording in the case law.⁷¹ Some hints of this phenomenon can be observed in the Court’s language, used in Opinion 1/00,⁷² where it is stated that such agreements aim ‘to extend the *acquis communautaire* to new States, by implementing in the larger geographical area rules which are essentially those of [Union] law’.⁷³ To be seen as an integration agreement, it has to oblige a country ‘to effectively apply a predetermined selection of EU *acquis*, or to transpose or implement it in its domestic legal order’.⁷⁴ The State aid section of EU-Ukraine AA/DCFTA requires Ukraine to implement EU State aid law, thus in this part the EU-Ukraine AA/DCFTA is an integration agreement.

⁶⁵ Van der Loo (n 9) 16-7.

⁶⁶ *ibid* 210.

⁶⁷ *ibid* 276.

⁶⁸ ‘The provisions of this Section shall apply to goods and to those services which have been listed in Annex XVI to Chapter 6 (Establishment, Trade in Services and Electronic Commerce) of Title IV of this Agreement, *in accordance with the mutually agreed decision on market access*, with the exception of subsidies to products covered by Annex 1 to the WTO Agreement on Agriculture and other subsidies covered by the Agreement on Agriculture’ (emphasis added).

⁶⁹ Smyrnova and Szyszcak (n 31) 10; Kulyk (n 31) 7.

⁷⁰ E.g., till 1 January 2019 Ukraine had to establish an ‘operationally independent authority which is entrusted with the powers necessary for the full application of Article 262 of this Agreement’- EU-Ukraine AA/DCFTA (n 8) art 267(1). In line with Art. 486(5) EU-Ukraine AA/DCFTA, the deadlines in Art. 267(1) are calculated from when the DCFTA became provisionally applicable, i.e., from 1 January 2016.

⁷¹ Although AG Jääskinen briefly referred to it in his Opinion concerning the Agreement between the European Community and the Swiss Confederation on Air Transport – see Case C-547/10 P *Swiss Confederation v European Commission* EU:C:2013:139, Opinion of AG Jääskinen, para 86 and footnote 40.

⁷² Van der Loo (n 9) 26.

⁷³ Opinion 1/00 *Proposed agreement between the European Community and non-Member states on the establishment of a European Common Aviation Area* EU:C:2002:231, para 3.

⁷⁴ Van der Loo (n 9) 30-1.

2.2.2 (Lack Of) The Mid-Term Perspectives to Join the EU

Geographically Ukraine is eligible for EU membership.⁷⁵ However, it is not enough to be held as an immediate candidate for accession. Based on Copenhagen criteria (1993), the EU's enlargement requires that an acceding state has aligned legislation, including State aid control.⁷⁶

Even though the EU-Ukraine AA/DCFTA is 'an innovative legal instrument',⁷⁷ the State aid provisions therein are not that novel. Provisions on State aid were included in Europe Agreements with CEECs in the 1990s. Those states were also unfamiliar with State aid control before.⁷⁸ More recent examples can be observed in Stabilisation and Association Agreements (SAA) with Western Balkan states. For instance, only two articles are dedicated to competition and State aid issues in the EC-Albania SAA (Arts. 71-72).⁷⁹ They use mainly the same or even less ambitious formulations than the EU-Ukraine AA/DCFTA. Strikingly, Art. 71(2) EC-Albania SAA omits reference to the EU case law. In contrast, the EU-Ukraine AA/DCFTA (Art. 264) unambiguously requires Ukraine to take into account 'the relevant jurisprudence of the [CJEU]' while implementing the State aid rules.

Ukraine is not recognised as a candidate country in contrast to Albania.⁸⁰ Such a status was presupposed in the preamble to EC-Albania SAA. Whereas the EU-Ukraine AA/DCFTA entirely omits any clear perspective of Ukraine being recognised as a future candidate for accession.⁸¹

Since 2019 Ukrainian aspirations to join the EU are unequivocally pronounced in the Constitution of Ukraine.⁸² The current President of Ukraine reaffirmed the continuation of this course.⁸³ He recently initiated signing the 'Declaration on European Perspective of Ukraine' with several EU Member States leaders. This Declaration so far was signed by the heads of Poland, Lithuania, Estonia,⁸⁴ Latvia.⁸⁵

⁷⁵ See, e.g., Van Elsuwege (n 26) 170–1.

⁷⁶ Blauburger and Krämer (n 30) 14.

⁷⁷ Petrov et al 'The EU-Ukraine Association Agreement' (n 28) 17.

⁷⁸ See Blauburger and Krämer (n 30) 14.

⁷⁹ 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 L 107/166 (Albania SAA).

⁸⁰ Albania got an official status of candidate country in 2014 – Commission, 'EU candidate status for Albania' (24 June 2014) <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_14_207> accessed 25 May 2021.

⁸¹ See Van der Loo (n 9) 175-6.

⁸² Ukrainian Constitution of 1996 (Ukrainian Constitution), arts 85(5), 102(3) and 116(1-1), as inserted by the Law of Ukraine no 2680-VIII 'On Amendments to the Constitution of Ukraine (concerning the strategic course of the state for the acquisition of full membership of Ukraine in the European Union and in the North Atlantic Treaty Organization)', 7 February 2019.

⁸³ President of Ukraine, 'President: Ukraine will continue the strategic course enshrined in the Constitution - gaining full membership in the EU and NATO' (17 December 2020) <<https://www.president.gov.ua/news/prezident-ukrayina-prodovzhit-zakriplenij-u-konstituciji-str-65605>> accessed 25 May 2021.

⁸⁴ President of Ukraine, 'Signing of the Declaration on Ukraine's European Prospect brings full integration into the European Union closer - Volodymyr Zelenskyy' (4 May 2021)

<<https://www.president.gov.ua/en/news/pidpisannya-deklaraciyi-pro-yevropejsku-perspektivu-ukrayini-68257>> accessed 25 May 2021.

⁸⁵ President of Ukraine, 'Presidents of Ukraine and Latvia signed a joint Declaration on Ukraine's European prospect' (8 May 2021) <<https://www.president.gov.ua/en/news/prezidenti-ukrayini-ta-latvii-pidpisali-spilnu-deklaraciyu-68333>> accessed 25 May 2021.

On the Union's side, however, consensus concerning potential Ukraine's accession is absent. The EU-Ukraine AA/DCFTA, being a mixed agreement,⁸⁶ had to be ratified not only by the EU and Ukrainian parliament but also by some Member States following their constitutional laws. Such a setting has led to a controversy with the Dutch ratification. On 6 April 2016, an advisory referendum on ratification of the EU-Ukraine AA/DCFTA took place in the Netherlands. Most participants of it voted against ratification.⁸⁷ In December 2016, to mitigate the results of this referendum, the European Council had to state explicitly that 'the Agreement does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future'.⁸⁸ Such a situation can be symptomatic of an 'enlargement fatigue' of the EU.⁸⁹

The Union's approach to future enlargement could be understood. With new-generation AA/DCFTA's, the EU can proceed with the flexible extension of the (parts of) internal market without the obligation to admit new members into the club.⁹⁰ Such flexibility, nevertheless, is a double-edged sword. It takes away the primary political motivator to pursue coherent and effective State aid control.⁹¹ To put it simply - there would always be a temptation for Ukrainian authorities to circumvent or bend the State aid rules while the mid-term perspectives to join the EU are absent, especially since market access conditionality is only partially attached to the implementation of EU State aid law.

2.2.3 Improvement of the Ukrainian Economy

State aid control can contribute to the Ukrainian economy improvement from two angles: limiting unnecessary/excessive state expenditure and decreasing the level of corruption.

Poorly planned state expenditure is treated in the Union 'as a waste of public money, and its use prevents the necessary restructuring and innovation which are necessary to keep the European economy competitive'.⁹² The same idea holds true for the Ukrainian economy. In theory, State aid

⁸⁶ 'Agreements that are concluded simultaneously by the European Union (EU) and all of the Member States are commonly called mixed agreements' – Jan Wouters, Frank Hoffmeister, Geert de Baere and Thomas Ramopoulos, *The law of EU external relations: cases, materials, and commentary on the EU as an international legal actor* (3rd edn, OUP 2021), 101.

⁸⁷ Government of the Netherlands, 'Advisory referendum – reaction Dutch government' (07 April 2016) <<https://www.government.nl/latest/news/2016/04/07/advisory-referendum-%E2%80%93-reaction-dutch-government>> accessed 25 May 2021.

⁸⁸ European Council, 'European Council conclusions on Ukraine, 15 December 2016' (15 December 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/12/15/euco-conclusions-ukraine/>> accessed 25 May 2021.

⁸⁹ On the 'enlargement fatigue' notion see Kristian L Nielsen and Maili Vilson, 'The Eastern Partnership: Soft Power Strategy or Policy Failure?' (2014) 19 (2) *European Foreign Affairs Review* 243, 244.

⁹⁰ Öberg, *The Boundaries of the EU Internal Market* (n 19) 112. Such AAs can be seen as 'a new and unique form of EU integration without membership' - Van der Loo (n 9) 3.

⁹¹ See Van der Loo (n 9) 360-361; Adam Łazowski, 'Where Do We Go from Here? EU Relations with the Eastern Partnership *Avant Garde*' in W Th Douma and others (eds) *The evolving nature of EU external relations law* (Asser Press / Springer 2021), 238. In the context of CEECs accession of 2004, it was argued that speed of reforms in these states was high exactly because there was a credible membership perspective to motivate governments – Frank Schimmelfennig and Ulrich Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe' (2004) 11(4) *Journal of European Public Policy* 661, 678.

⁹² Szyszczak (n 33) 22.

control works as an effective antidote against excessive measures to support ineffective undertakings.

Like most Eastern European states after the dissolution of the Soviet Bloc, Ukraine ‘embarked on an arduous “triple transition”’: from communist dictatorship to pluralistic democracy; from centrally administered to market economies; and from Soviet imperial hegemony to fully independent national statehood.’⁹³ With such a legacy, it was thus quite common for Ukraine to support the economy with the help of state interventions.⁹⁴ Traditionally, Ukrainian state support to undertakings was ineffective and opaque.⁹⁵ In the 2015 study (i.e., two years before the Law on State Aid became effective), it was noted that only the direct subsidies to public and private sector undertakings amounted to 1.9% of GDP (2011) and 3% of GDP (2012).⁹⁶ Ukrainian economic state support lacked ‘strategic approach, transparency and predictability of the decision-making process for State support measures’.⁹⁷ It remains to be seen, however, how State aid control will affect this trend.

The second aspect of economic improvement relates to the fight against corruption. Naturally, corruption decreases attractiveness for foreign investors. It was stated in the 2019 EU implementation report on the EU-Ukraine AA/DCFTA that ‘[o]ne of the biggest obstacles to investment remains concern over the rule of law and levels of corruption’.⁹⁸ European Parliament also emphasised that ‘delivering tangible results in the fight against corruption is essential [...] to improve the business environment and attract foreign direct investments’.⁹⁹

Even though State aid control is rather a market integration instrument, it can contribute to the fight against corruption by enhancing the transparency of awarding state support. Some commentators also noted positive effects for anti-corruption efforts.¹⁰⁰

It is important to remember that State aid control is not a panacea for economic prosperity. Instead, it is a long-term building block, the effects of which are dependent not just on the correct transposition of legal rules but also on their effective enforcement. It should be taken into account at the outset that Ukraine is a country with weak administrative capacity, while State aid control is quite a complex and costly matter to enforce.¹⁰¹

⁹³ Robert Bideleux, ‘Bringing the East back in’ in R Bideleux, R Taylor (eds) *European Integration and Disintegration. East and West* (Routledge 1996), 225.

⁹⁴ See Stuart and Roginska (n 1) 67; Smyrnova and Szyszczak (n 31) 10.

⁹⁵ Dudnyk (n 31) 216.

⁹⁶ Heinrich Hölzler, Ella Libanova, Tetiana Iefymenko, Yaroslav Kotlyarevsky, Svitlana Taran, Denys Chernikov, Valentin Dereviankin, Eugene Stuart, ‘Study on State Support to Undertakings in Ukraine’ (UKR: ‘Звіт про результати дослідження державної підтримки суб’єктів господарювання в Україні’) (March 2015), 162 <<http://www.amc.gov.ua/amku/doccatalog/document?id=120932&schema=main>> accessed 25 May 2021.

⁹⁷ *ibid* 163.

⁹⁸ Commission and High Representative of the Union for Foreign Affairs and Security Policy, ‘Association Implementation Report on Ukraine’ SWD (2019) 433 final (Implementation Report 2019), 11.

⁹⁹ , ‘Report on the implementation of the EU Association Agreement with Ukraine 2019/2202(INI)’ (2020) A9-0219/2020, para 37.

¹⁰⁰ Stuart and Roginska (n 1) 70-1.

¹⁰¹ See Iana Dreyer, ‘Trade Policy in the EU’s Neighbourhood. Ways Forward for the Deep and Comprehensive Free Trade Agreements’ (2012) *Notre Europe Paper*, 39 <https://institutdelors.eu/wp-content/uploads/2020/08/i.dreyer_tradepolicyineighbourhood_ne_may2012-1.pdf> accessed 25 May 2021.

2.3 Interim Conclusions

The objectives of both the EU and Ukraine in the Ukrainian implementation of State aid control are complementary. Mostly they are beneficial for both Parties, albeit from different angles. For example, ensuring the level playing field is instrumental for the Union in securing the competitiveness of its undertakings in Ukraine within the shared sectors of the internal market. As for Ukraine, the level playing field implies equal terms of competition also within its own borders, resulting in strengthening the economy. Decrease of the regulatory divergence works in both ways too. Since Ukrainian undertakings now will face State aid control, they would be prepared to apply them within the Union borders for their own benefit. Improvement of the Ukrainian economy is in the Union's interests as well, since 'stable, secure and prosperous countries in [the EU's] near vicinity are key to the EU's own stability and security'.¹⁰²

Contentious matter, however, lies with the mid-term prospects of Ukraine's accession to the EU. The EU-Ukraine AA/DCFTA State aid provisions have an integration aspect. They are an indirect precondition of access to the EU internal market. The Union met its goal of reinforcing its position as a 'regulatory trendsetter' by imposing on Ukraine the duty to introduce State aid control. Plus, the EU has extended parts of the internal market without further enlargement. This model promises a quite flexible arrangement for the Union, which leans towards an option of sharing the internal market without accepting new members.

Nevertheless, without clearly spelt perspectives of joining the Union, Ukraine might lack the political will to ensure homogeneous application of the State aid rules. One thing is to insert into international agreement the rules; another thing is to enforce them and ensure that these rules are further transposed and interpreted homogeneously. In this regard, the absence of pre-agreed prospects of Ukraine to join the EU (like in the case of Albania and Western Balkans in general) looks problematic. The Union might simply fall short of its ambitions to extend the EU-like State aid control model to Ukraine in a homogeneous manner.

¹⁰² Commission and High Representative of the Union For Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Review of the European Neighbourhood Policy' (2015) JOIN(2015) 50 final, 21.

3 Legal Obstacles to the Homogeneous Application of EU State Aid Law

The legal obstacles to homogeneity occur when either the rules in two systems differ or are interpreted asymmetrically. An additional point of tension might arise when the exported legal area is particularly complex, as is the case with EU State aid law. The legal obstacles for the homogeneous application of EU State aid law derive from three sources: the EU-Ukraine AA/DCFTA, the EU legal system and the Ukrainian legal system.

3.1 Legal Obstacles Stemming From the EU-Ukraine AA/DCFTA

Two main obstacles may be identified. The first one is the issue of the direct effect of State aid provisions. In particular, the focus is placed on the service of general economic interest (SGEI) exemption, as enshrined in Arts. 106(2) TFEU and Art. 262(4) EU-Ukraine AA/DCFTA. The second hurdle is the lack of a list of EU State aid law acts to be transposed by Ukraine. However, this obstacle might also be counterintuitively beneficial.

3.1.1 Direct Effect of the EU-Ukraine AA/DCFTA

It is a well-worn dogma that direct effect is one of the keystone principles of EU law. According to it, provisions of a legal act within EU law may be invoked before national courts only if they are ‘sufficiently clear, precise and unconditional’.¹⁰³

Not all TFEU State aid provisions are directly effective within EU law. For example, enforcement of Art. 107 TFEU is solely the Commission’s competence,¹⁰⁴ so individuals cannot invoke it before Member States’ national courts. On the other hand, Art. 108(3) TFEU (a standstill obligation) has a direct effect. It can be invoked if any new State aid measure, not approved by the Commission, started being implemented.¹⁰⁵ As for Art. 106(2) TFEU (SGEI exemption), its direct effect in the area of State aid law is not entirely clear. Even though individuals can invoke it before the national courts in competition and free movement areas,¹⁰⁶ concerning State aid law the Court has not adjudicated yet on the matter.¹⁰⁷

¹⁰³ Paul Craig and Grainne de Burca, *EU Law. Text, Cases and Materials* (6th edn, OUP, 2015) 184. See also Case 26/62 *Van Gend en Loos* EU:C:1963:1 13.

¹⁰⁴ See Case 78/76 *Steinike & Weinlig* EU:C:1977:52, para 9; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires* EU:C:1991:440, para 9; Case C-272/12 P *Commission v Ireland and Others* EU:C:2013:812, para 48.

¹⁰⁵ Case C-368/04 *Transalpine Ölleitung in Österreich* EU:C:2006:644, para 41. See also Szyszczak (n 33) 199.

¹⁰⁶ Case 66/86 *Ahmed Saeed Flugreisen* EU:C:1989:140, paras 55–7; Case C-260/89 *ERT* EU:C:1991:254, para 34; Case C-320/91 *Corbeau* EU:C:1993:198, para 20; Case C-393/92 *Almelo* EU:C:1994:171, paras 50–1.

¹⁰⁷ Bacon (n 1) para 3.48. She also mentions that ‘differing views have been expressed by its Advocates General: cf Case C-53/00 *Ferring* [EU:C:2001:627], AG Tizzano opinion, paras 78–81 (direct effect); and Case C-280/00 *Altmark* [EU:C:2003:415], second opinion of AG Léger, paras 56–8 (no direct effect).’

Art. 108 TFEU is not replicated in the EU-Ukraine AA/DCFTA. Thus, the main threat to the homogeneous application is a possible difference between the CJEU and the Ukrainian judiciary's views on the direct effect of Art. 262(4) EU-Ukraine AA/DCFTA, which is a cousin of Art. 106(2) TFEU. The divergence may arise if the CJEU will decide that Art. 106(2) TFEU does not have a direct effect in State aid matters, while the Ukrainian judiciary would grant direct effect to Art. 262(4) AA/DCFTA (or vice versa).

The EU-Ukraine AA/DCFTA contains neither a general provision precluding direct effect of the Agreement,¹⁰⁸ nor an individual clause denying direct effect for the State aid provisions. However, Art. 5 of the Council Decision 2014/295/EU explicitly states that '[t]he Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals'.¹⁰⁹ The legal effects of this EU's unilateral declaration are questioned in the doctrine since the other party (Ukraine) has not given its consent to them.¹¹⁰ Advocate General Saggio noted (concerning Council's decision on the conclusion of the WTO Agreement) that '[i]t need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot – outside the system of reservations – limit the effects of the agreement itself'.¹¹¹

The CJEU has established in its seminal ruling in the *Demirel* case that provisions of an Association Agreement (in that case – between the EU and Turkey) can be directly applicable.¹¹² The test is complied with when 'the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.¹¹³ Art. 262(4) EU-Ukraine AA/DCFTA, as Art. 106(2) TFEU (provisionally) meets these criteria.

In 2018 the Ukrainian Commercial Cassation Court established that the EU-Ukraine AA/DCFTA provisions might have a direct effect in the Ukrainian legal system. It was a trademark law case (*Zentiva*), and the provision at stake was Art. 198 AA/DCFTA.¹¹⁴ The conclusion that this norm is directly effective in Ukrainian law was confirmed in several subsequent rulings.¹¹⁵ The striking aspect of this application is that Ukrainian courts rely on a provision, which requires active

¹⁰⁸ See Van der Loo (n 9) 196.

¹⁰⁹ Council Decision 2014/295/EU [2014] OJ L161/1, art 5.

¹¹⁰ Van Elsuwege and Chamon (n 28) 29; Van der Loo (n 9) 196–7.

¹¹¹ Case C-149/96 *Portugal v. Council* EU:C:1999:574, Opinion of AG Saggio in para 20. See also Van der Loo (n 9) 197.

¹¹² Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* EU:C:1987:400.

¹¹³ *ibid* paras 14, 23. See also Case C-192/89 *Sevince* EU:C:1990:322, para 14; Case C-171/01 *Wählergruppe Gemeinsam* EU:C:2003:260, para 54.

¹¹⁴ Ukraine: Judgment in case no 910/14972/17 (*Zentiva*) of the Commercial Cassation Court of 17 July 2018. For an overview of the case, see Anastasiia Kyrylenko, 'Direct effect in Ukraine of IPR provisions from the EU/Ukraine Free Trade Agreement: a principled approach to the *Zentiva* case' (2019) 14 (9) *Journal of Intellectual Property Law & Practice* 716. It must be noted that in accordance with Art. 17(1) of the Law on State Aid administrative courts adjudicate on the AMCU's decisions in State aid matters. Pursuant to the Law of Ukraine 'On the Judiciary' the judicial system consists of the courts of three instances: (1) local courts, (2) appellate courts, and (3) the Supreme court. The latter is the highest in the judicial hierarchy, and it consists of five chambers (the Grand Chamber and four cassation courts, including Administrative one). The Grand Chamber is basically 'the first among equals'. It has a higher hierarchy solely if other chambers act as courts of the first instance in specific cases. In addition, the Grand Chamber adjudicate in cases when ensuring 'the uniform application of the law' is required following specialised procedural codes – Law of Ukraine no 1402-VIII 'On the Judiciary', 2 June 2016, arts 17(3), 36(1), 37(2), 45(2).

¹¹⁵ Ukraine: Judgment in case no 910/4947/18 (*Kanzhut LLC v TVI.UA and Ministry for development of economy and trade*) of the Commercial Cassation Court of 04 July 2019; Ukraine: Judgment in case no 761/18983/18 of the Commercial Cassation Court of 19 January 2021.

measures taken by the state. Art. 198(1) EU-Ukraine AA/DCFTA provides that '[t]he Parties *shall provide* that a trade-mark shall be liable to revocation if...'.¹¹⁶ The Commercial Cassation Court, however, did not apply a traditional EU-like test for direct effect. Instead, it merely relied on the fact that the Ukrainian parliament duly ratified EU-Ukraine AA/DCFTA, which is a valid part of national legislation. Furthermore, in *Zentiva*, the Cassation Court mentioned the principle *pacta sunt servanda* (as per the 1969 Vienna Convention on the Law of Treaties).¹¹⁷

Unlike Art. 198, Art. 262(4) EU-Ukraine AA/DCFTA does not require the adoption of any implementing legislation. Thus, there is a high probability that, at least in Ukraine, Art. 262(4) might be granted direct effect. That is where the potential threat to homogeneous application occurs, in case if the CJEU comes to a different conclusion concerning the direct effect of Art. 106(2) TFEU. Example with the Ukrainian case law on Art. 198 EU-Ukraine AA/DCFTA also uncovers the potential auxiliary problem with the difference in understanding and applying the principle of direct effect by Ukrainian courts.

3.1.2 Absence of a Clear-Cut List of EU State Aid Law Acts to Be Transposed

The EU-Ukraine AA/DCFTA introduces several types of lists of EU legal acts to be approximated by Ukraine. The issue with AAs is that their negotiation time is quite long. For instance, in the case of Ukraine, it took more than six years to sign the Agreement, and it became applicable in full only ten years later.¹¹⁸ Thus, the pre-signature *acquis* mentioned in EU-Ukraine AA/DCFTA is partly outdated. It leads to the need for integrating into the text the 'post-signature incorporated *acquis*', and this selection is amended after the signature of an agreement.¹¹⁹

The most common mechanism for listing the *acquis* to be approximated is the usage of annexes, where the list of acts to be transposed is provided.¹²⁰ The Association Council can update such annexes (see Art. 463(3) EU-Ukraine AA/DCFTA), but an amendment protocol enshrined 'can hardly be seen as a "dynamic" procedure'.¹²¹

In this regard, the AA/DCFTA State aid provisions are quite peculiar. Even though they mention that EU legal acts and instruments are to be used to interpret the TFEU-inspired provisions, there is no list of them to be transposed – neither in the main text of the EU-Ukraine AA/DCFTA nor in the Annexes to it. Such omission can be explained by the fact that the wording of Art. 264 AA/DCFTA concerning EU State aid law ('using as sources of interpretation') does not presuppose strict incorporation obligation for Ukraine and requires a more nuanced approach.

The main drawback here is the threat to legal certainty in applying the State aid rules in Ukraine. As indicated above, most of the EU-Ukraine AA/DCFTA State aid provisions do not have a direct

¹¹⁶ Emphasis added.

¹¹⁷ *Zentiva* (n 114).

¹¹⁸ See Section 1.1.

¹¹⁹ Roman Petrov, *Exporting the Acquis Communautaire* (n 26) 102. See also Van der Loo (n 9) 39.

¹²⁰ See e.g., EU-Ukraine AA/DCFTA (n 8) art 84 and Annex XV to Chapter 5 'Approximation of Customs Legislation'.

¹²¹ Van der Loo (n 9) 205.

effect. They are applied primarily by the Antimonopoly Committee of Ukraine (AMCU)¹²² and not by individuals or State aid providers. Such a situation provides for asymmetry in applying the State aid rules when mainly the AMCU is responsible for applying the EU State aid interpretative instruments at its own discretion. Without proper implementation of the key provisions of the Union's acts, affected parties are prevented from adequately evaluating their legal position during the State aid control enforcement. This problem is reinforced by the vastness of EU State aid law. The task to find the correct provision to be applied is challenging even within the EU legal system. Naturally, the problem is doubled for practitioners unfamiliar with EU law and who must also consider differences between the EU and Ukrainian economy. Thus, the divergences in the application of the secondary EU State aid law are almost imminent.

The absence of the list, however, might have its positive sides as well. The Union's State aid secondary legislation (including the Commission's soft law) comprises approximately over 1 000 pages of detailed rules.¹²³ The benefits are following. First, the absence of a clear-cut list of acts to be transposed supports a more dynamic update. A rigid list would inadvertently raise the implementation costs for Ukrainian authorities.¹²⁴ Second, EU State aid secondary legislation cannot be simply copy-pasted. It requires a more nuanced approach, as can be exemplified by block exemptions. The General Block Exemptions Regulation (GBER)¹²⁵ was adopted based on '[t]he Commission's experience in applying Regulation (EC) No 800/2008'¹²⁶ and in pursuance of Communication on EU State Aid Modernisation.¹²⁷ So, it is an instrument designed for the particular economic circumstances of the Union and its economy. The thresholds used in GBER are not economically justified for Ukraine. Moreover, the adoption of local block exemptions is not welcomed by the Commission if there is no significant State aid inventory.¹²⁸

3.2 Legal Obstacles Ingrained In the EU Legal System

Two stumbling blocks for the homogeneous application of the EU State aid *acquis* are stemming from Union law. The first one is that EU State aid law is a highly dynamic complex area, which constantly undergoes evolutionary changes. It poses its own challenges for application even within the EU legal system. In Ukraine, these issues are reinforced by the difference in institutional architecture and lack of expertise within the stakeholders.¹²⁹

The second hurdle is the application of the principle of consistent interpretation by the CJEU. Following the *Polydor* doctrine,¹³⁰ the similarity in wording between the TFEU and the EU-Ukraine AA/DCFTA State aid provisions would not necessarily result in their identical

¹²² Which is designated by the Law on State Aid as 'an operationally independent authority which is entrusted with the powers necessary for the full application of Article 262 [EU-Ukraine AA/DCFTA]', as per EU-Ukraine AA/DCFTA (n 8) art 267(1).

¹²³ Stuart and Roginska (n 1) 59.

¹²⁴ See Van der Loo (n 9) 326.

¹²⁵ Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1 (GBER).

¹²⁶ *ibid* recital 4.

¹²⁷ *ibid* recital 2.

¹²⁸ Smyrnova and Szyszczak (n 31) 14; Kulyk (n 31) 43.

¹²⁹ On these issues see Chapter 4.

¹³⁰ Case 270/80 *Polydor and Others v Harlequin and Others* EU:C:1982:43.

interpretation. Such a course of action of the Union judiciary might also lead to divergence in EU State aid law application.

3.2.1 Complex and Dynamic Nature of EU State Aid Law

State aid law emerged in 1957 with the creation of the European Economic Community (EEC), the predecessor of the EU. The emergence of State aid control can be explained by the lack of a common industrial policy of the EEC¹³¹ and the need to avoid the subsidy race between Member States.¹³²

It must be emphasised that EU State aid law is different from WTO subsidy control. Even though the concept of State aid shares some similarities with subsidies (as per WTO law), it has a broader scope.¹³³ Furthermore, EU State aid control is *ex ante*, while WTO subsidy control works *ex post*.¹³⁴

The intricacy of EU State aid law derives from the long course of development resulting in an extensive number of cases from the EU Courts and supporting documents (both secondary legislation and soft law, developed by the Commission). A concomitant issue related to the vastness of the EU case law is the absence of the doctrine of binding precedents within the CJEU.

EU State aid law developed for more than sixty years.¹³⁵ The case law and enforcement practice during different stages were not the same. For instance, between 1958 to the early 1970s, there was a limited number of cases before the first EEC enlargement.¹³⁶ The main reasons were (1) novel character of the rules, (2) lack of procedural provisions and (3) unwillingness of Member States to engage in the notification of State aid measures.¹³⁷ Here the parallels with the current Ukrainian experience could be drawn. State aid control for Ukraine is also a new area. The Parliament of Ukraine and the Cabinet of Ministers of Ukraine (CMU)¹³⁸ are left outside the scope of State aid control, even though they are, in fact, among the key actors in the provision of State aid measures.¹³⁹

Subsequently, EU State aid control became more effective due to further clarification of the key concepts and more active enforcement of the State aid rules. As E. Szyszczak puts it, only in the 1990s ‘the state aid provisions of the EU were transformed from the Cinderella of competition law to a significant tool in controlling state intervention in the economy’.¹⁴⁰

¹³¹ Stuart and Roginska (n 1) 60; Szyszczak (n 33) 21.

¹³² Szyszczak (n 33) 21.

¹³³ See Case 30/59 *De gezamenlijke Steenkolenmijnen* EU:C:1961:2, 18; Case C-387/92 *Banco Exterior de España* EU:C:1994:100, para 13; Case C-129/03 *AEM Torino* EU:C:2005:224, para 38.

¹³⁴ Claus-Dieter Ehlermann and Martin Goyette, ‘The Interface between EU State Aid Control and the WTO Disciplines on Subsidies’ (2006) 5 (4) *European State Aid Law Quarterly* 695, 696.

¹³⁵ On the comprehensive overview of the development of EU State aid law up until 2015 see Piernas López (n 2).

¹³⁶ Stuart (n 30) 13.

¹³⁷ Piernas López (n 2) 240.

¹³⁸ The government, central authority in the executive branch of power in Ukraine – Ukrainian constitution (n 82) art 113(1).

¹³⁹ See Subsection 3.3.1.2.

¹⁴⁰ Szyszczak (n 33) 208.

The evolution of EU State aid law, however, is still an ongoing process. Recently this legal area was shaped by several crises, namely the 2008 banking crisis¹⁴¹ and a current COVID-19 pandemic.¹⁴² There is, moreover, a continuing saga concerning the tension between Member States' tax incentives for foreign investors (like Apple and Starbucks) and State aid control.¹⁴³

All these developments demonstrate that in no way 'State aid' was and is a predetermined dogma. Instead, it is a 'fluid' notion.¹⁴⁴ State aid control and its supporting concepts have to be dynamic by nature since governments constantly search for ways to circumvent the control over their spending.¹⁴⁵

The long development process resulted in an immense number of soft law instruments (e.g., guidelines). On the one hand, they provide clarity to affected subjects, but on the other - they also reinforce the complexity of State aid law.¹⁴⁶

The intricacy of EU State aid law is also ingrained in the vast number of the CJEU's rulings in this area.¹⁴⁷ A complementary issue is the absence of a formal, common law-style doctrine of legally binding judicial precedents in the CJEU.¹⁴⁸ However, it should be noted that the Court's rulings in lights of the principles of primacy and effectiveness have 'a quasi-normative effect (...) vis-à-vis national courts'.¹⁴⁹ The CJEU precedents' legal value was also 'accepted by the political constituencies to such an extent that it can now be said to have a quasi-normative character'.¹⁵⁰

Such a duality of the legal significance of the EU case law is in no way an easy task to reconcile. In some instances, it is quite effortful to identify whether a case (especially an old one) is still a 'good law'. This challenge is reinforced for Ukrainian lawyers who are mostly not familiar with EU law.

The CJEU explicitly overrules its previous cases on rare occasions, and its approach to this process 'appears more ad hoc and less structured than that of the European Court of Human Rights or the US Supreme Court'.¹⁵¹ The most prominent example of overruling is, perhaps, the *Keck* case.¹⁵² There the Court because of 'the increasing tendency of traders' to use Art. 36 TFEU for

¹⁴¹ See Piernas López (n 2) 216-232.

¹⁴² See Antonios Bouchagair, 'State aid in the context of the COVID-19 outbreak, including the Temporary Framework 2020' (2021) EUI RSCAS, 2021/03, Florence School of Regulation, [Energy Union Law] <<https://hdl.handle.net/1814/69678>> accessed 25 May 2021; Alessandro Rosanò, 'Adapting to Change: COVID-19 as a Factor Shaping EU State Aid Law' (*European Papers*, 07 May 2020) <<https://www.europeanpapers.eu/en/europeanforum/adapting-to-change-covid-19-shaping-eu-state-aid-law>> accessed 25 May 2021.

¹⁴³ See Dimitrios Kyriazis, 'Apple: One Case to Rule Them All' (*Kluwer International Tax Blog*, 22 July 2020) <<http://kluwertaxblog.com/2020/07/22/apple-one-case-to-rule-them-all/>> accessed 25 May 2021.

¹⁴⁴ Piernas López (n 2) 4, who borrowed the terminology of Gráinne de Búrca in 'Unpacking the concept of discrimination in EC and international trade law', in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002), 182.

¹⁴⁵ See Blauberger and Krämer (n 30) 8; Richard Plender, 'Definition of Aid' in A Biondi, P Eeckhout and J Flynn (eds), *The Law of State Aid in the European Union* (OUP 2003), 3-39; Szyszczak (n 33) 180.

¹⁴⁶ Bacon (n 1) para 1.06.

¹⁴⁷ See analysis of the main cases in EU law state aid (up to 2015) in Piernas López (n 2).

¹⁴⁸ Karen Davies, *Understanding European Union Law* (6th edn, Routledge 2015), 62.

¹⁴⁹ Takis Tridimas, 'Precedent and the Court of Justice: A Jurisprudence of Doubt?' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (OUP 2012), 329.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.* 330.

¹⁵² Case C-267/91 *Keck and Mithouard* EU:C:1993:905.

challenging any rules limiting access to their goods in other markets considered that it is ‘necessary to re-examine and clarify its case-law on this matter’.¹⁵³ The formulation used seems to be quite nebulous, which only bolsters the complexity in finding whether a particular CJEU case is still relevant.

That is where the challenge for Ukraine arises since Ukrainian legal practice is ‘positivistic’, with a tendency to strictly, rigidly prescribe the definitions and procedures in the legislation without further flexibility. First, the Ukrainian legal system is a continental one, and the doctrine of binding precedents is not embraced in Ukraine.¹⁵⁴ Second, Ukraine has to rapidly develop its own State aid control system without having sixty plus years for gradual refinement as the Union had.¹⁵⁵ State aid law thus is not an easy legal area to implement. Eventually, the complexity of this legal area is reinforced by the lack of expertise among the stakeholders.¹⁵⁶

3.2.2 Consistent Interpretation and the CJEU

In EU law, the notion of ‘consistent interpretation’ means that ‘a norm of [EU] law is used as an aid to the interpretation of another rule; the latter is the one actually being applied by a court (or other authority) but is construed in the light of the former’.¹⁵⁷

This doctrine is relevant not only in the EU context but also in relations with third countries which have access to the Union’s internal market. It would be problematic otherwise to expect effective integration into the extended market.¹⁵⁸ In the case of the EU-Ukraine AA/DCFTA State aid rules, consistent interpretation is explicitly required in Art. 264.¹⁵⁹

That said, the consistent interpretation is a two-way street. The issues on the Ukrainian side with conformity in EU State aid law application will be elaborated on below.¹⁶⁰ This Subsection will instead focus on the potential problems with the CJEU’s interpretation.

Consistent interpretation is required for three EU-Ukraine AA/DCFTA articles: 262, 263(3) and 263(4). All these provisions originate from EU law. Art. 262(1) AA/DCFTA introduces all the main elements of State aid definition as per Art. 107(1) TFEU: economic advantage, involvement of state resources, distortion of competition, selectivity and effect on trade.¹⁶¹

Arts. 262(2)-(3) EU-Ukraine AA/DCFTA introduce almost the same list of compatibility criteria as enshrined in Arts. 107(2)-(3) TFEU. Several differences, however, should be highlighted. First, for obvious reasons, criterion listed in Art. 107(2)(c) TFEU was not inserted, as it concerns German reunification and is irrelevant for Ukraine. Second, the list in the EU-Ukraine AA/DCFTA

¹⁵³ *Keck* (n 152) para 14. For the discussion of this case in light of the issue of the overruling of previous CJEU precedents, see *Tridimas* (n 149) 317.

¹⁵⁴ Petrov, ‘The Impact of the Court of Justice of the European Union on the Legal System of Ukraine’ (n 29) 187.

¹⁵⁵ See Smyrnova and Szyszczak (n 31) 17.

¹⁵⁶ See Subsection 4.2.2.

¹⁵⁷ Gerrit Betlem, ‘The Doctrine of Consistent Interpretation—Managing Legal Uncertainty’ (2002) 22 (3) *Oxford Journal of Legal Studies* 397, 397-8.

¹⁵⁸ Öberg, *The Boundaries of the EU Internal Market* (n 19) 158.

¹⁵⁹ Emphasis added.

¹⁶⁰ See Section 3.3 and Subsection 4.2.2.

¹⁶¹ For the definition of state aid under EU law, see Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] OJ C262/1, para 5.

does not include a provision like Art. 107(3)(e) TFEU ('other categories of aid as may be specified by decision of the Council on a proposal from the Commission'). If such categories, therefore, will be adopted, the AA/DCFTA should be amended respectively. Third, Art. 262(3) includes litras '(e)' and '(f)', which are missing in the TFEU. However, these entries are still in line with and inspired by EU secondary law (namely by the EU horizontal block exemption regulations and horizontal and sectoral state aid rules, and environmental EU Directives listed in the Annexes to the AA/DCFTA).

Art. 262(4) EU-Ukraine AA/DCFTA replicates Art. 106(2) TFEU with one notable discrepancy. Unlike its TFEU counterpart, the AA/DCFTA SGEI exemption is narrower in scope since it applies only to competition and the State aid rules. At the same time, within EU law, it is argued that Art. 106(2) TFEU can also be applied to the free movement rules.¹⁶²

The effect on trade in the internal market (Art. 262(1) EU-Ukraine AA/DCFTA) is arguably a quite different concept than an effect on trade between the Union (and Member States) and Ukraine. The choice of wording is probably motivated by the fact that only parts of the internal market are to be opened to Ukraine. A difference in the formulation of the concept of 'common interest'/'interest of the Union' is also striking. The EU-Ukraine AA/DCFTA in Arts. 262(2)-(3) employs the term – 'interest of the Parties', which is different from the original TFEU notions. That said, even though the EU-Ukraine AA/DCFTA State aid provisions are not 100% the same, they bear an uncanny resemblance with EU law concepts. However, even if the outlined differences would be absent, in line with the *Polydor* doctrine¹⁶³ there still could be a risk that despite similarities in the main wording, the CJEU might provide a different interpretation to the provisions of the EU-Ukraine AA/DCFTA.

Polydor concerned interpreting the free movement of goods and copyright provisions of the 1972 EEC-Portugal Free Trade Agreement (FTA).¹⁶⁴ The Court noted that some FTA free movement provisions 'are expressed in terms which in several respects are similar to those of the EEC Treaty on the abolition of restrictions on intra-Community trade'.¹⁶⁵ Nevertheless, the closeness in wording was not enough.¹⁶⁶ The possibility of applying the Court's case law to the FTA required that the goals under the EEC Treaty and the FTA be the same.¹⁶⁷ Since the EEC-Portugal FTA was less ambitious (in terms of access to the single market), the previous EU case law could not be applied for interpreting the FTA provisions at stake.¹⁶⁸

The bottom line of the *Polydor* doctrine can be summarised as follows: 'identical wording of provisions contained in the EU Treaties and in international agreements does not entail automatic uniformity of interpretation'.¹⁶⁹ Currently, this doctrine applies to a specific rule rather than to the whole agreement.¹⁷⁰ There are both types of cases where the Court did and did not interpret the

¹⁶² On this issue, see Szyszczak (n 33) 111.

¹⁶³ *Polydor* (n 130).

¹⁶⁴ *ibid* para 6.

¹⁶⁵ *ibid* para 14.

¹⁶⁶ *ibid* para 15.

¹⁶⁷ *ibid* paras 16-7.

¹⁶⁸ *ibid* para 18. For an overview of this case in the context of consistent interpretation, see also Öberg, *The Boundaries of the EU Internal Market* (n 19) 159-61.

¹⁶⁹ Marja-Liisa Öberg, 'From EU Citizens to Third Country Nationals: The Legacy of *Polydor*' (2016) 22 (1) *European Public Law* 97, 101.

¹⁷⁰ Öberg, *The Boundaries of the EU Internal Market* (n 19) 160.

relevant AA/FTA/PCA provisions in conformity with the previous interpretations of the Treaties.¹⁷¹

This situation can be described as a disconnection of the rules of the Union's international treaties from EU law sources (to use the terminology suggested by M. Cremona).¹⁷² Basically, despite the same source, similar rules can be interpreted by the CJEU differently, depending on the legal instrument at stake. Such a scenario threatens the homogeneous application of the EU-Ukraine AA/DCFTA State aid provisions on the Union's side.

3.3 Legal Obstacles Stemming From the Ukrainian Legal System

Three main hurdles can be derived from the Ukrainian legal system. The first issue concerns the imperfect transposition of the EU-Ukraine AA/DCFTA State aid rules into Ukrainian legislation. The second obstacle relates to the place of the EU-Ukraine AA/DCFTA and the Law on State Aid within the Ukrainian legal system. The third stumbling block is the place within the said legal system of the EU interpretative instruments enshrined in Art. 264 EU-Ukraine AA/DCFTA.

3.3.1 Deficient Transposition of the EU-Ukraine AA/DCFTA State Aid Rules

The Law on State Aid is the primary legal act that transposed the EU-Ukraine AA/DCFTA State aid provisions. EU implementation reports concerning the AA/DCFTA are traditionally brief on the State aid matters, dedicating not more than a paragraph.¹⁷³ For example, the 2019 Report provides that 'the [Ukrainian] rules in place are not fully in line with EU state aid rules'.¹⁷⁴ Other than that, deficiencies in the transposition of legal rules were mainly omitted. This fact, though, does not mean that the discrepancies are entirely absent.

Commentators are divided in their views on the Law on State Aid compatibility with the EU-Ukraine AA/DCFTA. Some scholars claim that, generally, the Law is 'in line with EU standards and creates a basis for a fully functioning State aid system.'¹⁷⁵ Nevertheless, there is also a point

¹⁷¹ Examples of the conform interpretation: Case C-162/00 *Pokrzeptowicz-Meyer* EU:C:2002:57 concerning the EC-Poland AA; *Wählergruppe* (n 113) concerning the EEC-Turkey AA; and Case C-265/03 *Simutenkov* EU:C:2005:213 concerning the EC-Russia PCA. Examples when conform interpretation was denied: Case C-63/99 *Gloszczuk* EU:C:2001:488 concerning the EC-Poland Association Agreement; Cases C-235/99 *Kondova* EU:C:2001:489 and C-101/10 *Pavlov and Famira* EU:C:2011:462 concerning the EC-Bulgaria AA. These examples are taken from Öberg, 'From EU Citizens to Third Country Nationals: The Legacy of Polydor' (n 169) 102-3.

¹⁷² Cremona, 'The Single Market as a Global Export Brand: Exporting the Single Market' (n 27) 680.

¹⁷³ See Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Association Implementation Report on Ukraine' SWD (2017) 376 final (Implementation Report 2017), 12; Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Association Implementation Report on Ukraine' SWD (2018) 462 final (Implementation Report 2018), 12-13; Implementation Report 2019 (n 98) 17; Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Association Implementation Report on Ukraine' SWD (2020) 329 final (Implementation Report 2020), 19.

¹⁷⁴ Implementation Report 2019 (n 173) 17.

¹⁷⁵ Stuart and Roginska (n 1) 64.

that the Law on State Aid is not entirely compliant with the EU-Ukraine AA/DCFTA and requires significant amendments.¹⁷⁶

In its 2018 Annual Report, the AMCU itself noted several discrepancies in the Law on State Aid.¹⁷⁷ For instance, the regulator mentioned the absence of effect on trade criterion for evaluation of compatibility of State aid, inconsistencies of several definitions (like ‘undertaking’ and ‘state aid to undertakings’), disparity of the rules on SGEI concept and some procedural deficiencies.¹⁷⁸

Indeed, the Law on State Aid has some significant deficiencies, which might affect the homogeneous application of EU State aid law in Ukraine. The analysis provided below is in no way exhaustive. The focus is placed solely on the three key discrepancies which might (and in some instances already do) affect the homogeneous application of EU State aid law in Ukraine.

3.3.1.1 Definition of ‘State Aid’

The ‘effect on trade’ criterion is omitted in the current version of the Law on State Aid.¹⁷⁹ Some legal practitioners claim this goes ‘in line with the current approach of the authority to skip this test as not expressly required by the national state aid legislation’.¹⁸⁰ However, the AMCU marked this omission as a drawback of the current version of the Law on State Aid.¹⁸¹

In principle, the lack of the ‘effect on trade’ notion does not make the Law on State Aid incompatible with the EU-Ukraine AA/DCFTA. The CJEU shifted from strict requirements for demonstrating the effects on trade to their mere possibility of presence in the *Leeuwarder* case.¹⁸² The EU case law additionally might deem that this condition fulfilled where there is an existing pattern of international trade,¹⁸³ even if a beneficiary of aid is not active in it.¹⁸⁴

Nevertheless, due to the limited administrative capacities of the AMCU, this situation restrains the authority’s possibilities to tackle more significant cases effectively. The AMCU has to deal with notifications of all the potential State aid measures, even those clearly not affecting the EU-Ukraine trade. It is emphasised that adding this criterion to the Law on State Aid ‘may pave the [way] for de minimis measures to operate at a local level without infringing the State aid provisions.’¹⁸⁵

¹⁷⁶ Dudnyk (n 31) 218; Kulyk (n 31) 37-46.

¹⁷⁷ AMCU, Annual Report on Granting of State Aid to Undertakings in Ukraine for 2018’ (2019) (AMCU Annual State Aid Report 2019)

<https://amcu.gov.ua/storage/app/sites/1/Docs/zvity/richni_zviti_dergavna_dopomoga/2018/SA%20Report%202018%20UKR%20ENG.pdf> accessed 25 May 2021.

¹⁷⁸ AMCU Annual State Aid Report 2019 (n 177) 8-9.

¹⁷⁹ Law on State Aid (n 7) art 1(1)(1).

¹⁸⁰ Igor Svechkar and Sergey Glushchenko, ‘State Aid: Ukraine’ (Global Competition Review, last update 28 October 2020), question 64 <<https://globalcompetitionreview.com/insight/know-how/state-aid/report/ukraine>> accessed 25 May 2021.

¹⁸¹ AMCU Annual State Aid Report 2019 (n 177) 8-9.

¹⁸² Joined cases 296 and 318/82 *Leeuwarder* EU:C:1985:468, para 24.

¹⁸³ See Case C-256/97 *DM Transport* EU:C:1999:332, para 29; Case C-113/00 *Spain v Commission* EU:C:2002:507, para 50; Case C-114/00 *Spain v Commission* EU:C:2002:508, para 65.

¹⁸⁴ Joined cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* EU:C:2006:403, para 35.

¹⁸⁵ Smyrnova and Szyszczak (n 31) 12.

3.3.1.2 Definition of ‘State Aid Providers’

In EU law, a measure is regarded as State aid only if it is imputable to the state.¹⁸⁶ Aid derived from legislation measure is naturally viewed as imputable to the state.¹⁸⁷ In line with these tenets, Art. 262(1) EU-Ukraine AA/DCFTA explicitly mentions ‘[a]ny aid granted by Ukraine’.¹⁸⁸

That is where the definition of ‘state aid providers’ gains importance. The Law on State Aid did not include in this definition the President of Ukraine, the Parliament of Ukraine and the CMU.¹⁸⁹ It goes contrary to the EU-Ukraine AA/DCFTA and the general logic of State aid control. However, it must be noted that, at the same time, the Law on State Aid provides that the AMCU has the power to forward recommendations to the CMU if it suspects that the current legislative act contradicts the Law on State Aid.¹⁹⁰ That said, such recommendations are not binding on both the CMU and the Parliament of Ukraine.¹⁹¹ Moreover, as will be exemplified below, this power does not effectively work as a safeguard against adopting new laws granting State aid.

The current state of affairs shows that both the Parliament of Ukraine and the CMU are involved in providing State aid. As of 16 April 2021, neither the Parliament of Ukraine nor the CMU has notified new State aid measures.¹⁹²

The most common route for the Parliament to provide State aid is to grant tax incentives. The Law on State Aid explicitly marks ‘granting tax benefits’ as a form of providing State aid¹⁹³ (which makes it even odder that the Parliament was not recognised as a State aid provider). In November 2020, due to COVID-19, the Parliament of Ukraine provided tax rebates to the hotel industry (e.g., the lowered tax rate on income tax – 7% instead of ordinary 18%).¹⁹⁴ In contrast, both in the EU and the EEA, similar general measures for supporting tourism and hotel industries were cleared as eligible *State aid*, after notifications from Croatia¹⁹⁵ and Iceland,¹⁹⁶ respectively. Other examples of (alleged) State aid, granted by the Parliament of Ukraine, include tax preferences to the cinema

¹⁸⁶ Case C-482/99 *France v Commission* EU:C:2002:294, para 24; Case C-329/15 *ENEA* EU:C:2017:671, para 20; Case C-405/16 P *Germany v Commission* EU:C:2019:268, paras 50-53.

¹⁸⁷ See Case T-358/94 *Air France v Commission* EU:T:1996:194; Case T-251/11 *Austria v Commission* EU:T:2014:1060, para 87.

¹⁸⁸ Emphasis added.

¹⁸⁹ Law on State Aid (n 7) arts 1(1)(6), 1(2) in conjunction with the Law of Ukraine No 2210-III ‘On protection of economic competition’, 11 January 2001, art 1. See also Kulyk (n 31) 40.

¹⁹⁰ Law on State Aid (n 7) art 14(4).

¹⁹¹ *Smyrnova and Szyszczak* (n 31) 16.

¹⁹² AMCU, Letter-response to M. Balatsenko ‘About consideration of the request for public information’ from 16 April 2021 No 100-17/02-5980 (available with the author), 1.

¹⁹³ Law on State Aid (n 7) art 4(1)(3).

¹⁹⁴ Law of Ukraine no 962-IX ‘On Amendments to the Tax Code of Ukraine Regarding State Support of Culture, Tourism and Creative Industries’, 4 November 2020, recital 12.

¹⁹⁵ Commission Decision SA.60265 COVID-19 *Aid to the tourism and sport sectors* [2021] C(2021) 186 final.

¹⁹⁶ EFTA Surveillance Authority Decision 039/21/COL *COVID-19 amendments to the digital gift voucher scheme* (11 May 2021).

industry¹⁹⁷ and to the aircraft industry,¹⁹⁸ financial incentives for generators of energy from alternative sources.¹⁹⁹

The CMU acts as a central authority in the executive branch of power. Usually, State aid is provided by individual ministries (for example, by the Ministry of Finance of Ukraine²⁰⁰ and the Ministry of Infrastructure of Ukraine).²⁰¹ At the same time, it would be wrong to assume that the CMU is irrelevant in providing State aid. For example, the CMU exercises its powers when it includes undertakings into the lists of recipients of the state financial support²⁰² or when it designates the terms on which the state resources are to be used.²⁰³

3.3.1.3 Lack of Bylaws

The Law on State Aid itself is a framework document. Effective State aid control in the EU is premised not only on Arts. 106-109 TFEU, but also on extensive secondary legislation and the Commission's soft law. As mentioned above, due to differences in economies, simple translation and copy-pasting of EU rules would not suffice. Such a course of action 'fails to take into account the reality on the ground.'²⁰⁴ That said, Ukrainian authorities, mainly the CMU (not the AMCU), need to adopt a range of supporting bylaws.²⁰⁵ It is indeed a 'daunting task', considering that secondary EU State aid rules comprise more than 1 000 pages.²⁰⁶ Without such rules, however, further implementation of the Law is restrained.

For instance, currently, the Eligibility criteria for State aid in the field of environmental protection are not yet adopted. The AMCU has submitted the first draft to the CMU, empowered to adopt this act, but it was returned with the comments back to the AMCU.²⁰⁷ The second (amended) draft

¹⁹⁷ Law of Ukraine no 821-IX 'On Amendments to the Tax Code of Ukraine to Support and Increase the International Competitiveness of the Video and Film Production Industry', 21 July 2020.

¹⁹⁸ Law of Ukraine no 1796-VIII 'On Amendments to the Customs Code of Ukraine and the Law of Ukraine "On the Development of the Aircraft Industry" on Support of the Aircraft Industry', 20 December 2016.

¹⁹⁹ Law of Ukraine no 810-IX 'On Amendments to Some Laws of Ukraine Concerning Improvement of Conditions for Support of Production of Electric Energy from Alternative Energy Sources', 21 July 2020.

²⁰⁰ It provides State aid in the form of state guarantees in the amount, defined by the CMU, to borrowers - business entities of micro, small and medium enterprises, which have suffered losses due to the introduction of quarantine restrictions and overcoming their consequences caused by COVID-19 – AMCU, 'On the Results of Consideration of the Notification of State Aid' (2021) Decision no 33-p/TK of the Interim Administrative Board of the AMCU.

²⁰¹ It has provided State aid to JSC 'Ukrposhta' in the form of a state guarantee to ensure the fulfilment of debt obligations on borrowing, which will be attracted by JSC 'Ukrposhta' from the European Bank for Reconstruction and Development for the Rural Branch investment project - AMCU, 'On the Results of the Case on State Aid' (2020) Decision of the AMCU no 840-p.

²⁰² See Resolution of the Cabinet of Ministers of Ukraine no 349 of 24 April 2019 'On Amendments to the List of Aircraft Entities for Which Temporary Measures of State Support Are Implemented', according to which five companies were added to the list of the recipients of budget costs designated for support of the aircraft industry. See also Resolution of the Cabinet of Ministers of Ukraine no 1116 of 16 November 2020 'On Amendments to the List of Cultural and Art Institutions Maintained or Provided with Financial Support from the State Budget', according to which one undertakings was added to the list of the recipients of budget costs designated for support of the institutions of culture and art.

²⁰³ Resolution of the Cabinet of Ministers of Ukraine no 30 of 25 January 2017 'On Approval of the Procedure for the Use of Funds Provided in the State Budget for Financial Support of the Joint-Stock Company "National Public Television and Radio Company of Ukraine"'.
²⁰⁴ Łazowski, 'Where Do We Go from Here?' (n 91) 238.

²⁰⁵ On the bylaws which the CMU must adopt see Law on State Aid (n 7) arts 6(2), 14(2) and section 9 recital 6.

²⁰⁶ Stuart and Roginska (n 1) 66.

²⁰⁷ See AMCU, 'Report of the Antimonopoly Committee of Ukraine for 2020' (2021) (AMCU Report 2020), 131 <<https://amcu.gov.ua/storage/app/uploads/public/605/4a0/e26/6054a0e268fc0702551413.pdf>> accessed 25 May 2021.

is still ongoing the review within the AMCU.²⁰⁸ The question arises whether, without these specific Eligibility criteria, the AMCU may authorise environmental State aid measures. It can be argued that in the current situation, the AMCU must apply directly the EU interpretative instruments mentioned in Art. 264 EU-Ukraine AA/DCFTA.

However, there might be two potential problems with that. First, the place of these legal instruments within the Ukrainian legal system is still quite nebulous, as will be elaborated below in further Subsections. Second, the absence of a complete inventory of bylaws poses a material threat to the legal certainty in the enforcement of the State Aid rules within Ukraine. The same issue emerges as was mentioned above with relation to the lack of a list of acts to be transposed under the EU-Ukraine AA/DCFTA. State aid providers and recipients are prevented from adequately evaluating their legal position during State aid control enforcement. Nevertheless, despite these issues, such a course of action seems to be the only valid option at the time.

3.3.2 Place of the EU-Ukraine AA/DCFTA within the Ukrainian Legal System

The EU-Ukraine AA/DCFTA State aid provisions' place within the hierarchy of rules in the Ukrainian legal system cannot be defined by the EU-Ukraine AA/DCFTA or EU law provisions. It is an internal Ukrainian law matter.

In the Ukrainian legal system, an international treaty becomes a part of national law following its ratification by the Parliament of Ukraine. The EU-Ukraine AA/DCFTA was ratified by the Parliament on 16 September 2014.²⁰⁹ Ukrainian scholars argue that the EU-Ukraine AA/DCFTA can be directly applicable within the national legal system as part of Ukrainian law.²¹⁰ The case law of the Ukrainian Supreme Court follows this conclusion.²¹¹

The hierarchical place of the EU-Ukraine AA/DCFTA within the Ukrainian legal system is not straightforward. The Ukrainian Constitution recognises the special role of international law in the Ukrainian legal system but is silent on whether international treaties' provisions have a priority over the Constitution.²¹² It is argued that due to such formulation of the Constitution, it should be recognised that within the realm of Ukrainian law, the Constitution has a priority over the international treaties,²¹³ thus - over the AA/DCFTA as well. Then the next question arises – does the EU-Ukraine AA/DCFTA prevail over the ordinary laws? A simple (although arguable) answer would be 'yes', following Art. 19(2) of the Law of Ukraine 'On International Treaties of

²⁰⁸ AMCU Report 2020 (n 207) 131.

²⁰⁹ Law of Ukraine no 1678-VII 'On Ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand', 16 September 2014.

²¹⁰ Streltsova (n 29) 436.

²¹¹ *Zentiva* (n 114); Ukraine: Judgment in case no 400/2924/18 (*PrJSC Yuzhenerhobud*) of the Administrative Cassation Court of 1 August 2019; Ukraine: Judgment in case no 260/1385/18 (*Euro-Continent LLC*) of the Administrative Cassation Court of 25 November 2021.

²¹² Ukrainian Constitution (n 82) art 9.

²¹³ Koziubra (n 29) 191.

Ukraine'.²¹⁴ Nevertheless, it is debated that the prevalence of international rules should be established either by the Constitution itself or by specific provisions within ordinary laws (like the ones mentioned explicitly in, e.g., the Civil Code of Ukraine or the Commercial Code of Ukraine).²¹⁵

Unlike some other Ukrainian laws, the Law on State aid does not have a general rule stipulating that ratified international treaties prevail over it, making blurry the dividing line between the Law and the EU-Ukraine AA/DCFTA. The Law's preamble only mentions that it is 'aimed at ensuring (...) compliance with Ukraine's international obligations in the field of State aid'. Such a provision is in no way an unequivocal one, thus creating potential implications and risks of resolving discrepancies between the AA/DCFTA and the Law in favour of the latter. The issue can be ultimately resolved only by introducing the necessary amendments to the Ukrainian Constitution or the Law itself.²¹⁶

Another concern is the place of the Law on State Aid itself within the hierarchy. Broadly speaking, EU law provisions have primacy over Member States' laws in EU State aid control.²¹⁷ Thus, national laws which contravene the EU State aid rules should be set aside. The Law on State Aid, in contrast, is an ordinary law and does not prevail over other Ukrainian laws. Therefore, the Parliament of Ukraine can adopt new State aid measures or provisions, which could contradict the State aid regime established by the Law. On the other hand, some commentators emphasise that the Law on State Aid fills in lacuna in Ukrainian legislation. Art. 42 of the Ukrainian Constitution obliges the state to protect competition in economic activity.²¹⁸ The next step from this hypothesis would be to conclude that the Law on State Aid should have a specific constitutional significance and prevail over ordinary laws.

The legislative practice of the Parliament of Ukraine, unfortunately, goes towards a narrower approach. For instance, in December 2020, the Parliament adopted the Law of Ukraine 'On State Assistance to Investment Projects with the Significant Investments in Ukraine' (also known as the 'investment nanny' law).²¹⁹ This law provides for state assistance (including tax rebates) for foreign investors who are ready to invest in the Ukrainian economy above the threshold of 20m EUR and fulfil other specific criteria (e.g., creating 80 working places).²²⁰ The 'investment nanny' law explicitly prescribes that the Law on State Aid will not apply to such support.²²¹

The place of EU-Ukraine AA/DCFTA and the Law on State Aid in the hierarchy thus poses a threat to the homogeneous application of EU State aid law. Of course, as their EU Member States' counterparts, Ukrainian authorities might treat State aid control 'as a curtailment of their sovereign

²¹⁴ 'If duly ratified international treaty of Ukraine contains other rules than a relevant national legal act of Ukraine rules of the respective international treaty should be applied.' - Law of Ukraine no 1906-IV 'On International Treaties of Ukraine', 29 June 2004, art 19(2).

²¹⁵ Koziubra (n 29) 183-4.

²¹⁶ *ibid* 184.

²¹⁷ On the primacy/supremacy principle in the EU law, see Craig and de Burca (n 103) 266-278 and Case 6/64 *Costa v E.N.E.L.* EU:C:1964:66.

²¹⁸ Kulyk (n 31) 31.

²¹⁹ Law of Ukraine no 3760 'On State Assistance to Investment Projects with the Significant Investments in Ukraine', 17 December 2020.

²²⁰ *ibid* art 5.

²²¹ *ibid* art 2(3).

powers and the scope of their industrial and economic policies'.²²² However, it should be emphasised that it is a mandatory consequence of meeting the international obligations, which impose a limit on 'the choices available to policy-makers'.²²³

3.3.3 Place of the EU Case Law and the EU Secondary State Aid Legislation (Including Soft Law) In the Ukrainian Legal System

Another hurdle ingrained in the Ukrainian legal system is the place of the sources mentioned in Art. 264 EU-Ukraine AA/DCFTA. Some Ukrainian practitioners claim that these instruments should legally bind national authorities and courts.²²⁴ However, there are two obstacles to such a conclusion. First, as was mentioned before, the doctrine of binding judicial precedent is not embraced in Ukraine.²²⁵ Second, as some commentators pointed, only the EU-Ukraine AA/DCFTA provisions themselves should be treated as a source of law, and the same status should not be extended to principles reflected in the Agreement.²²⁶ By extension, this conclusion could (but, as will be explained further, should not) be deemed relevant for the CJEU jurisprudence and secondary EU State aid law as well. Therefore, the issue is twofold. The first angle is whether the sources mentioned in Art. 264 EU-Ukraine AA/DCFTA can be treated as valid sources of law within the Ukrainian legal system. The second angle is whether these sources are binding.

Following case no 9901/460/18 of the Administrative Cassation Court,²²⁷ it could be argued that EU law instruments (referred to in Art. 264 EU-Ukraine AA/DCFTA) can be deemed as sources of law in Ukraine. The plaintiff in this case sought annulment of certain clauses of the Regulations of the High Qualification Commission of Judges of Ukraine (HQCJ).²²⁸ One of the pleas before the Cassation Court was that the HQCJ could not rely on the Opinions of the Consultative Council of European Judges (CCEJ) from 2014²²⁹ and 2015²³⁰ since there is no explicit provision in the legislation attributing to these acts the status of a valid legal source. The Administrative Cassation Court refused this plea with reference to Arts. 1(2)(e)²³¹ and 14²³² of the EU-Ukraine AA/DCFTA. Basically, with these provisions, the Ukrainian Court made a bridge between the AA/DCFTA and the rules, which are not even mentioned there and exist within the ambit of the Council of Europe.

²²² Szyszczak (n 33) 178.

²²³ Karin M Bruzelius, 'International Legal Obligations as Barriers to National Policy: Challenges for National Courts', in C Baudenbacher and H Bull (eds), *European Integration Through Interaction of Legal Regimes* (IUSEF nr. 50, Centre for European Law, University of Oslo 2007), 87.

²²⁴ Svechkar and Glushchenko (n 180) questions 28, 32, 53.

²²⁵ Petrov, 'The Impact of the Court of Justice of the European Union on the Legal System of Ukraine' (n 29) 187.

²²⁶ Koziubra (n 29) 188.

²²⁷ Ukraine: Judgment in case no 9901/460/18 of the Administrative Cassation Court of 18 September 2018.

²²⁸ Approved by the decision of the HQCJ dated October 13, 2016 no 81/зп-16.

²²⁹ CCEJ, 'Opinion No. 17 (2014) On the Evaluation of Judges' Work, the Quality of Justice and Respect for Judicial Independence' (2014).

²³⁰ CCEJ, 'Opinion No. 18 (2015) "The position of the judiciary and its relation with the other powers of state in a modern democracy"' (2015).

²³¹ Which lists as one of the objectives of the EU-Ukraine AA/DCFTA an enhancement of 'cooperation in the field of Justice, Freedom and Security with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms'.

²³² Which emphasises 'particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the [area] (...) of justice in particular' within the process of the Parties' cooperation on justice, freedom and security'.

Such application presupposes that, by analogy, EU law instruments (explicitly mentioned in Art. 264 EU-Ukraine AA/DCFTA) must be deemed sources of law in Ukraine.

However, these interpretative instruments (even if recognised as sources of law) are not binding in Ukraine. In 2019 the Grand Chamber of the Supreme Court clarified that the EU case law could be deemed a valid point of reference and ‘may be taken into account by administrative courts as arguments’.²³³ That said, in the same paragraph, the Grand Chamber also added that the EU case law could not serve as a ‘legal basis’ for judgment, thus denying to grant binding character.²³⁴

The application practice of the outlined approaches within the area of State aid is still forming. A notable example is the judgment of 31 March 2020, where the Administrative Cassation Court made an explicit reference to *Altmark* in the case concerning SGEI. However, this reference is relatively brief, and the Ukrainian Court has omitted elaboration on the status of the EU case law in State aid matters.²³⁵ In a similar vein, the same *Altmark* judgment was used several times by appellate courts, with no further explanation of its role as a source of law within the Ukrainian legal system.²³⁶ Thus, it can be stated for now that the Ukrainian judiciary applies the EU case law, but only with an interpretative (non-binding) role. It is not deemed to be a full-fledged, binding source of law, unlike, for example, the case law of the European Court of Human Rights (ECtHR).²³⁷

As for EU State aid soft law, it does not have a strictly binding force even within the EU. It plays a role of ‘a supplement to hard law when a tough line on member state compliance is deemed necessary’.²³⁸ As the CJEU clarified in the *Kotnik* case, the Commission’s guidelines impose limitations on the Commission in its discretion but cannot impose ‘independent obligations on the Member State’.²³⁹ A salient point here lies with the wording Art. 264 EU-Ukraine AA/DCFTA itself. If Ukrainian authorities would grant EU state aid soft law binding character, the divergence between the Union’s and Ukrainian enforcement of the State Aid rules might arise. This conclusion stems from *Kotnik*, which recognised that soft law is not binding on the Member States (which are also the EU-Ukraine AA/DCFTA signatories).

3.4 Interim Conclusions

The first EU-Ukraine AA/DCFTA obstacle concerns potential issues with the direct effect of the SGEI exemption (Art. 262(4) EU-Ukraine AA/DCFTA, which is inspired by Art. 106(2) TFEU).

²³³ Ukraine: Judgment in case no 9901/636/18 of the Grand Chamber of the Supreme Court of 12 March 2019, emphasis added.

²³⁴ *ibid.*

²³⁵ Ukraine: Judgment in case no 640/65/19 (*Department of Energy, Transport and Communications of Vinnytsia City Council vs the AMCU*) of the Administrative Cassation Court of 31 March 2020, para 77.

²³⁶ Ukraine: Judgment in case no 640/7137/20 (*Department of Transport Infrastructure of the Kyiv City State Administration vs AMCU*) of the Sixth appellate court of 9 September 2020; Ukraine: Judgment in case no 640/21523/1 (*Department of Construction and Housing of the Kyiv City State Administration vs AMCU*) of the Sixth appellate court of 18 March 2020; Ukraine: Judgment in case no 640/2454/20 (*Municipal Enterprise ‘Engineering Center’ of the Kyiv City State Administration vs AMCU*) of the Sixth appellate court of 9 December 2020.

²³⁷ Which, on the contrary, is treated as a binding source of law - Law of Ukraine no 3477-IV ‘On Execution of Judgments and Application of Case Law of the European Court of Human Rights’, 23 February 2006, art 17.

²³⁸ Michelle Cini, ‘The Soft Law Approach: Commission Rule-Making in the EU’s State Aid Regime’ (2001) 8 (2) *Journal of European Public Policy* 192, 204-5.

²³⁹ Case C-526/14 *Kotnik* EU:C:2016:570, paras 40-5.

Since the CJEU is silent on whether this exception has a direct effect in State aid matters within the Union law, there is a clear risk that the CJEU and the Ukrainian judiciary might go in different directions concerning this question. As for the second obstacle, it is not that straightforward. The EU-Ukraine AA/DCFTA does not include a list of State aid acts to be approximated by Ukraine. On the one hand, due to their large volume, it seems to be a reasonable solution, which can be additionally justified by the dynamic nature of EU State aid law. However, from the perspective of enforcement and implementation within Ukraine, the lack of a clear-cut list of acts poses a threat to legal certainty. Nevertheless, these obstacles do not pose a decisive menace to the homogeneous application of EU State aid law.

In contrast, the stumbling blocks stemming from EU law are more menacing to the homogeneous application of EU State aid law in Ukraine. The first issue is that State aid law is a highly dynamic complex area, which constantly undergoes evolutionary changes. It poses challenges for application even within the EU. In Ukraine, these issues are multiplied by the difference in the institutional framework and the lack of expertise. The second challenge is the EU law principle of consistent interpretation. In line with the *Polydor* doctrine, it might lead to disconnection of the EU-Ukraine AA/DCFTA state aid provisions from the sources of their inspiration. Eventually, it might result in the Court's different interpretation of the TFEU and the EU-Ukraine AA/DCFTA State aid provisions despite their textual similarity.

The most threatening hurdles to the homogeneous application of EU State aid law are ingrained in the Ukrainian legal system. The first obstacle concerns the imperfect transposition of the EU-Ukraine AA/DCFTA State aid rules. The current version of the Law on State Aid contains several critical discrepancies compared to EU State aid law. The most crucial deficiency is couched in the definition of State aid providers. The exclusion of the Parliament of Ukraine and the CMU from the scope of aid providers goes against EU State aid law principles. Measures adopted by these authorities tend to be the biggest in scope (compared to other State aid providers). The practice shows that both the Parliament and the CMU are already involved in providing State aid. In the EU setting, their measures would not be left outside the Commission's scrutiny since such measures would be treated as 'imputable to the state'.

The second and third obstacles stemming from Ukrainian law relate to the hierarchy of the EU-Ukraine AA/DCFTA, the Law on State Aid and EU interpretative instruments. The AA/DCFTA does not prevail over the Constitution of Ukraine, and even its priority over ordinary laws remains disputable. As for the Law on State Aid, it cannot be above other laws adopted by the Parliament. Such a situation creates a plausible risk that the Parliament of Ukraine might disregard international obligations by adopting laws contrary to both the EU-Ukraine AA/DCFTA and the Law on State Aid. The recently adopted law on 'investment nannies' exemplifies the matter. As for the EU case law and secondary EU state aid legislation, they are not recognised as full-fledged sources of law in Ukraine and have only a non-binding character. In such a setting, Ukrainian judges may disregard them in their practice, diminishing the homogeneous application of EU State aid law.

4 Institutional Obstacles to the Homogeneous Application of the EU State Aid Law

Institutions are crucial for ensuring that the same rules are applied in the most similar way possible.²⁴⁰ To put it simply – legal rules ‘on paper’ are not enough for homogeneity unless enforced consistently. Two large groups of obstacles are identified. The first group consists of hurdles ingrained in the EU-Ukraine AA/DCFTA institutional structure. The second group is comprised of the obstacles derived from the Ukrainian institutional structure responsible for enforcing State aid control.

4.1 Obstacles Stemming From the EU-Ukraine AA/DCFTA

The EU-Ukraine AA/DCFTA does not provide an option of a direct judicial dialogue between the CJEU and Ukrainian courts. It is the first obstacle that is inextricably linked with both the EU-Ukraine AA/DCFTA and the EU institutional architecture. The second hurdle concerns the EU-Ukraine AA/DCFTA institutional setup, which does not include a separate surveillance authority (like in the EEA). The EU-Ukraine AA/DCFTA provides only for the formation of semi-political bodies composed of the representatives of both Parties on a parity basis. Such a modest setup results in limited external control over the Ukrainian implementation of the AA/DCFTA State aid rules.

4.1.1 Lack of the Judicial Dialogue Between the Union’s and Ukrainian Judiciaries

The dispute settlement procedure (DSP) under the EU-Ukraine AA/DCFTA is conducted through negotiations or, in the absence of consensus after that, an arbitration procedure.²⁴¹ The DSP applies to disputes concerning the interpretation and application of the EU-Ukraine AA/DCFTA provisions relating to regulatory approximation contained in Chapter 10 (Competition), ‘or which otherwise imposes upon a Party *an obligation defined by reference to a provision of EU law*’.²⁴² Thus, the Union may use this procedure against Ukraine in case of improper enforcement of State aid control.

The DSP (an arbitration with further involvement of the CJEU when necessary to interpret EU law) prevents irrational situations when almost the same/identical rules can be interpreted differently by the arbitration panel and the CJEU.²⁴³ However, in general, arbitration is a seldomly used remedy of last resort. So far, there was only one dispute between the EU and Ukraine concerning the Ukrainian ban on wood export, and no reference for a preliminary ruling to the

²⁴⁰ Öberg, *The Boundaries of the EU Internal Market* (n 19) 297.

²⁴¹ EU-Ukraine AA/DCFTA (n 8) art 317.

²⁴² *ibid* art 322(1), emphasis added.

²⁴³ Van der Loo (n 9) 298-9.

CJEU was made there.²⁴⁴ In its turn, State aid control requires more active involvement in nitty-gritty day-to-day matters. Unfortunately, unlike the EEA Agreement²⁴⁵ or the ECAA Agreement,²⁴⁶ the EU-Ukraine AA/DCFTA does not provide an opportunity to establish a direct dialogue between the Ukrainian judiciary and the CJEU. Such a solution would probably enhance the homogeneous application of EU State aid law, even though within the EU legal order similar dialogue ‘both strengthens and obstructs uniformity’.²⁴⁷

Another homogeneity-inspired solution would be to create an EFTA-style court for Ukraine, Moldova and Georgia as the Eastern Partnership (EaP) states that have concluded the AA/DCFTAs with the EU. This step would presuppose the creation of a joint economic area EEA-style.²⁴⁸ The EaP *avant garde* (the term coined by A. Łazowski)²⁴⁹ has already declared their common expectation that ‘new horizons should be opened in implementing the four freedoms between EU and three Associated Partners, which will also lay ground *to the creation of a common economic space*’.²⁵⁰ In addition, on 17 May 2021, Ministers of Foreign Affairs of Ukraine, Georgia and Moldova have signed the Memorandum of Understanding ‘On Establishing Enhanced Cooperation on European Integration – the “Association Trio”’.²⁵¹

However, it must be emphasised that the level of extension of the EU internal market to these states is much less ambitious than in the EEA case.²⁵² Such development of relations between the EU and the EaP is currently discussed within the Union. In the wake of the 2020 Eastern Partnership summit, the European Parliament suggested creating the common economic space and the whole EaP within the selected sectors of the EU internal market.²⁵³

Nevertheless, it must be noted that creating of the EEA-like common economic space in itself is not a ‘magic wand’. Even with the separate EFTA court, a discrepancy between EU and EEA legal

²⁴⁴ Final Report of the Arbitration Panel established under Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part, ‘Restrictions applied by Ukraine on exports of certain wood products to the European Union’ (11 December 2020).

²⁴⁵ EEA Agreement (n 16) art 107 and Protocol 34.

²⁴⁶ ECAA Agreement (n 60), art 16(2).

²⁴⁷ Öberg, *The Boundaries of the EU Internal Market* (n 19) 301.

²⁴⁸ See Łazowski, ‘Where Do We Go from Here?’ (n 91) 244.

²⁴⁹ *ibid.*

²⁵⁰ Joint Statement by the Ministers of Foreign Affairs of Georgia, the Republic of Moldova, and Ukraine on the Future of Eastern Partnership (5 December 2019, Bratislava) <<https://mfa.gov.ua/en/news/76418-ministri-zakordonnih-sprav-ukrajini-gruziji-ta-moldovi-vistupajuty-za-diferencijovanih-pidkhid-u-ramkah-iniciativi-jes-skhidne-partnerstvo>> accessed 25 May 2021, emphasis added.

²⁵¹ Ministry of Foreign Affairs of Ukraine, ‘Association Trio: Memorandum of Understanding between the Ministry of Foreign Affairs of Ukraine, Ministry of Foreign Affairs of Georgia and the Ministry of Foreign Affairs and European Integration of the Republic of Moldova’ (2021) <<https://mfa.gov.ua/en/news/association-trio-memorandum-understanding-between-ministry-foreign-affairs-georgia-ministry-foreign-affairs-and-european-integration-republic-moldova-and-ministry-foreign-affairs-ukraine>> accessed 25 May 2021.

²⁵² Van der Loo (n 9) 311.

²⁵³ ‘The European Parliament’ Recommends that the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy’ (...) (af) note the importance of deepening economic cooperation and market integration with the EaP countries through a gradual opening of the EU single market, including the full implementation of DCFTAs and compliance with legal, economic and technical regulations and standards, *as well as by establishing a common economic space*’ (emphasis added) – European Parliament, ‘European Parliament recommendation of 19 June 2020 to the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the Eastern Partnership, in the run-up to the June 2020 Summit 2019/2209(INI)’ (2020) A9-0112/2020.

systems and threats to homogeneity may occur.²⁵⁴ For instance, currently, compared to the CJEU, the EFTA court has a diverging view on how tribunals' independence, referring for an advisory opinion (EFTA court)/preliminary ruling (CJEU), should be established.²⁵⁵ Despite these issues, it is still the most effective solution for achieving the high level of homogeneity in the application of EU State aid law.

4.1.2 Limited External Control Over Ukrainian Implementation of the EU-Ukraine AA/DCFTA State Aid Rules

The institutional framework for EU-Ukraine relations under the AA/DCFTA is defined in Title VII, Chapter 1, Arts. 460-470. Differently from AA/DCFTAs with Georgia and Moldova, the EU-Ukraine AA/DCFTA provides for summit meetings between high political representatives of the Parties.²⁵⁶

The main supervisory body for monitoring the implementation and application of the EU-Ukraine AA/DCFTA is the Association Council.²⁵⁷ It consists of Members of the Commission and the Council (from the Union side) and members of the CMU.²⁵⁸ In addition to its primary functions, the Association Council is empowered to examine 'any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest'.²⁵⁹ The Association Council may adopt legally binding decisions and recommendations.²⁶⁰

The Association Committee is also established to support the activities of the Association Council.²⁶¹ It is 'composed of representatives of the Parties, in principle at senior civil servant level'.²⁶² Some of the powers (including the right to adopt binding decisions) may be delegated from the Association Council to the Association Committee.²⁶³

The EU-Ukraine AA/DCFTA provides for extensive monitoring of the Ukrainian implementation and enforcement (including approximation to EU law) of the measures covered by the Agreement.²⁶⁴ Such an oversee 'may include on-the-spot missions, with the participation of EU institutions, bodies and agencies, non-governmental bodies, supervisory authorities, independent experts and others as needed'.²⁶⁵

That said, the EU-Ukraine AA institutional framework is recognised to be more extensive than the one in the previous EC-Ukraine PCA, but it is not brand new.²⁶⁶ This setup is definitely not the

²⁵⁴ Öberg, *The Boundaries of the EU Internal Market* (n 19) 295.

²⁵⁵ See Graham Butler, 'Mind the (Homogeneity) Gap: Independence of Referring Bodies Requesting Advisory Opinions from the EFTA Court' (2020) 44 *Fordham International Law Journal* 307.

²⁵⁶ EU-Ukraine AA/DCFTA (n 8) art 460.

²⁵⁷ *ibid* art 461(1).

²⁵⁸ *ibid* art 462(1).

²⁵⁹ *ibid* art 461(3).

²⁶⁰ *ibid* art 463(1).

²⁶¹ *ibid* art 464(1).

²⁶² *ibid* art. 464(2).

²⁶³ *ibid* art 465(2).

²⁶⁴ *ibid* art 475.

²⁶⁵ *ibid* art 475(3).

²⁶⁶ Van der Loo (n 9) 204, with reference to 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

best solution for ensuring homogeneous application of the State aid rules. It provides for *ex-post* control of activities of the Ukrainian authorities (including the AMCU) in conducting State aid control without further involvement in its enforcement practice. Partially the problem could be mitigated by establishing a direct dialogue between the AMCU and the Commission. Nevertheless, in stark contrast with the neighbouring competition law section (Art. 260 AA/DCFTA), the section on State aid does not include a provision on consultations.²⁶⁷

As with the lack of judicial dialogue, one solution would be to establish a separate EEA-style surveillance authority. In the EEA, such a setup ensures an ‘independent rule enforcement’.²⁶⁸ The EEA Agreement basically provides for copy-paste of the EU institutional framework and procedures in competition matters (including State aid control),²⁶⁹ the only difference being the scope of the economy sectors covered.²⁷⁰ However, the same problems as with potential EFTA-style court occur, as was discussed in Subsection above.

4.2 Ukrainian Institutional Obstacles

Ukrainian institutional obstacles are twofold. The first hurdle is AMCU’s lack of independence. As was already elaborated in Subsection 3.3.1.2, the Parliament of Ukraine and the CMU are outside the ambit of AMCU’s scrutiny. The second obstacle is a lack of expertise on the side of State aid providers and the Ukrainian judiciary.

4.2.1 Lack of the Full-Fledged Independence of the AMCU in the Enforcement of State Aid Control

Within the EU, the Commission has exclusive competence in State aid control, subject to further review of its decisions by the CJEU.²⁷¹ State aid investigation is ‘conducted essentially as a privileged if not exclusive dialogue between the Member State concerned and the Commission’.²⁷² Thus, it can be said that ‘EU State aid control functions as a two-tier system, giving the Commission a stage for a supranational influence’.²⁷³ Such an institutional infrastructure secures the Commission’s independence in State aid control.

[2005] OJ L 265/2, arts 92–99; 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 L 278/16, arts 119–125.

²⁶⁷ However, it also should be emphasised that ‘this rule does not represent a firm commitment but merely the expression of the intention of the parties to provide each other with non-confidential information in order to improve the consultation process’ - Smyrnova and Szyszczak (n 31) 11. It also should be noted that there is a provision facilitating the exchange of information (upon request) on any State aid scheme and particular individual cases of State aid affecting trade between the Parties - EU-Ukraine AA/DCFTA (n 8) art 263(2).

²⁶⁸ Blauberger and Krämer (n 30) 13-4.

²⁶⁹ EEA Agreement (n 16) art 108.

²⁷⁰ The EEA agreement does not cover state aid measures to fisheries and agriculture, and specific provision of the EEA Agreement apply - EEA Agreement (n 16) Part II Chapter 2.

²⁷¹ See footnote 104.

²⁷² Viktor Kreuzschitz and Hanns Peter Nehl, ‘Part IV Procedures before the Commission: 1 The Administrative Procedure—the Privileged Dialogue’ in H C H Hofmann, C Micheau (eds), *State Aid Law of the European Union* (OUP 2016), 341.

²⁷³ Terletska (n 31) 3.

Unlike the EU State aid control system, the Ukrainian one can be deemed as a one-tier.²⁷⁴ The AMCU acts not as a supranational authority but as a part of the Ukrainian institutional architecture. The AMCU has a status of a central executive body, which activities are ‘directed and coordinated’ by the CMU.²⁷⁵ Unlike the Commission, the AMCU simply cannot distance itself enough from the government.²⁷⁶ Thus, the threats to its independence as a State aid surveillance authority are inherent.

Additionally, a one-tier system poses a threat if the Parliament of Ukraine or the CMU adopts a legal act according to which State aid is granted. In the EU, this would not stop the Commission from reviewing the measure substantively and ordering its recovery if aid is unlawful. In contrast, the AMCU has the power only to make a non-binding notification to the CMU that a legal act breaches the State aid rules.²⁷⁷

The conflict of interests is ingrained in the current system of Ukrainian State aid control. The Parliament adopts the framework rules (like the Law on State Aid). In contrast, the supplementary procedural bylaws are adopted by the Cabinet of Ministers of Ukraine.²⁷⁸ At the same time, these two authorities provide State aid, even despite the fact that they do not fall under the ‘State aid providers’ definition (as per the Law on State Aid).²⁷⁹ Alas, there is always a threat that in the process of rule-making, these bodies will provide loopholes for the provision of State aid support outside the scrutiny of the AMCU.²⁸⁰ Such a risk is mitigated in the Union simply because the supranational bodies legislate.

4.2.2 Lack of Expertise

4.2.2.1 State Aid Providers

In the 2019 and 2020 EU Implementation Reports, it was noted that the AMCU is still gaining experience, but in general cases tend to be minor, and larger ones are still avoiding scrutiny of the regulator.²⁸¹ That said, there are some improvements. Recently, the AMCU has put on hold a provision of 1.5bn. UAH (approx. 44.8m EUR) of illegal State aid for constructing an airfield in Dnipro, as the Ministry of Infrastructure of Ukraine did not notify the AMCU about this measure.²⁸²

²⁷⁴ Terletska (n 31) 3.

²⁷⁵ Resolution of the Cabinet of Ministers of Ukraine no 442 of 10 September 2014 ‘On Optimisation of the System of Central Executive Bodies’, section III recital 1.

²⁷⁶ See Dudnyk (n 31) 217.

²⁷⁷ Law on State Aid (n 7) art 14(4). See also Subsection 3.3.1.2.

²⁷⁸ *ibid* arts 6(2), 14(2) and section 9 recital 6.

²⁷⁹ See Subsection 3.3.1.2 above.

²⁸⁰ See Stuart and Roginska (n 1) 67.

²⁸¹ Implementation Report 2019 (n 98) 17; Implementation Report 2020 (n 173) 19.

²⁸² AMCU, ‘The AMCU has stopped providing UAH 1.5 billion in illegal state aid for the construction of an airfield in the Dnipro’ (11 May 2021) <https://amcu.gov.ua/news/amku-pripiniv-nadannya-15-milyarda-grn-nezakonnoiderzhavnoyi-dopomogi-na-budivnictvo-aerodromu-u-dnipri?fbclid=IwAR0VheYqzvR-t2tYKPIVrMrp6gswFM8gc_R36cq4AJzzT0p28IIwuUUbr8> accessed 25 May 2021.

State aid providers in Ukraine are quite active in notifying the AMCU of new State aid measures. In particular, in 2017, there were 133 notifications, in 2018 – 916, in 2019 – 605, in 2020 – 407,²⁸³ in 2021 (as of 16 April) – 75.²⁸⁴

Despite that, out of 2 136 notifications, only 773 of them culminated in a decision on merits.²⁸⁵ More strikingly, 558 of these 773 decisions concerned measures that could not be qualified as State aid.²⁸⁶ In 2020 out of 216 decisions on merits, 157 (over 72% of the decisions) established that the state support was not State aid.²⁸⁷ This trend demonstrates a lack of knowledge on behalf of the State aid providers, which tend to notify the AMCU in a precautionary manner.²⁸⁸ Such a situation is unsuitable for AMCU's administrative capacities since it requires the regulator to spread its resources on the more minor issues.

At the same time, it should be recognised that the AMCU tries to deal with this lack of knowledge. So far, more than 850 clarifications in the area of State aid were disseminated by the AMCU.²⁸⁹ Also, the AMCU actively cooperates with the SESAR project, funded by the EU.²⁹⁰ Together they facilitate trainings and seminars for State aid providers in different Ukrainian regions.²⁹¹ It is observed that 'raising awareness among State aid providers' is a particularly difficult task, as there are more than 700 units on the local level which have authority to spend state resources and it simply might take a long time for completion.²⁹² Nevertheless, the work conducted by the AMCU and the SESAR project must be appreciated.

4.2.2.2 Ukrainian Judiciary

The lack of expertise on the side of the Ukrainian judiciary is an almost imminent obstacle to the homogeneous application of the EU-Ukraine AA/DCFTA State aid rules. Ukrainian courts still should be able to correctly use the EU State aid case law, notwithstanding the debates of its place within the legal system. As was noted above, State aid law is a complex dynamic creature forged with the significant involvement of the CJEU. Many concepts in this area can be applied appropriately only if the Court's case law is duly considered. Ukrainian courts, thus, should use the CJEU cases, even from a comparative perspective, and they try to do that.²⁹³

²⁸³ AMCU Report 2020 (n 207) 130.

²⁸⁴ AMCU, Letter-response to M. Balatsenko (n 192) 1.

²⁸⁵ Retrieved as of 16 April 2021 at AMCU, Registry of state aid <<http://pdd.amc.gov.ua/portal/registry/registryofdecision/list>> accessed 25 May 2021.

²⁸⁶ *ibid.*

²⁸⁷ AMCU Report 2020 (n 207) 130.

²⁸⁸ See Smyrnova and Szyszczak (n 31) 12.

²⁸⁹ AMCU Report 2020 (n 207) 130.

²⁹⁰ 'Support to the Antimonopoly Committee of Ukraine for Enforcing State Aid Rules: Project description' <<https://sesar.inf.ua/en/opys-proektu/>> accessed 25 May 2021.

²⁹¹ AMCU, 'The Less Money the State Has, the More Efficiently It Should Be Spent. The AMCU and SESAR Conducted Trainings on State Aid in Zaporizhia' (19 May 2021) <<https://amcu.gov.ua/news/chim-menshe-koshtiv-u-derzhavi-tim-efektivnishe-yih-treba-vitrachati-amku-ta-sesar-proveli-u-zaporizhzh-treningi-shchodo-derzhavnoyi-dopomogi>> accessed 25 May 2021; AMCU, 'The AMCU and SESAR Conducted a Training on State Aid in Kharkiv' (28 April 2021) <<https://amcu.gov.ua/news/amku-ta-sesar-proveli-u-harkovi-trening-shchodnadannya-derzhavnoyi-dopomogi>> accessed 25 May 2021.

²⁹² Stuart and Roginska (n 1) 67.

²⁹³ As was exemplified in Subsection 3.3.3.

However, it should be noted that Ukrainian judges mostly are not proficient in the case law of the EU Courts in general²⁹⁴ and their State aid case law in particular. Ukrainian courts tend to be reluctant in the application of international cases. It happens due to the judges' views that such case law should not be pertinent in continental legal systems (such as Ukrainian) and because of the lack of the CJEU cases' translation into Ukrainian.²⁹⁵ In addition, significant workload and the lack of relevant training is noted.²⁹⁶

The language issue is, indeed, a relevant matter even within the EU legal system. Advocate General Jacobs highlighted that 'the very existence of many language versions is a further reason for not adopting an excessively literal approach to the interpretation of Community provisions, and for putting greater weight on the context and general scheme of the provisions and on their object and purpose'.²⁹⁷ Further, he added that '[t]he text can be particularly misleading in the case of technical legal terms, which, as the Court goes on to point out, may not have the same meaning in [Union] law as they have in the legal systems of the Member States'.²⁹⁸

The last statement is particularly pertinent for Ukraine. Partly because of the language issues, Ukrainian courts occasionally misinterpret the EU case law. This matter can be exemplified by the practice of *Van Duyn* application.²⁹⁹ First, recently in several instances, Ukrainian Cassation courts attributed this case to the ECtHR and not to the CJEU.³⁰⁰ Second, they applied the principle of legal certainty, employed by the CJEU in *Van Duyn*, outside the case's context. Ukrainian Administrative Cassation court simply restated that 'the principle of legal certainty means that the persons concerned may rely on the obligations assumed by the State, even when they are enshrined in a normative act which has no automatic direct effect'.³⁰¹ This statement was used to hold liable state authorities for their wrongdoings in tax matters. However, in *Van Duyn*, the CJEU used legal certainty to elaborate on the direct effect of the non-transposed directive³⁰² – the context, which is entirely irrelevant for Ukraine. Moreover, *Van Duyn* dealt with the free movement of persons and not tax law issues.

A similar example can be provided concerning the reference to the CJEU case *Meridionale Industria Salumi*.³⁰³ This judgment dealt with the interpretation of customs duties provisions in

²⁹⁴ See Petrov and Kalinichenko (n 29) 351, 353.

²⁹⁵ *ibid* 344; Petrov et al (n 28) 16. However, it should be recognised that the EU-funded project 'Association4U' arranged a translation of the key CJEU precedents into Ukrainian - see Adam Łazowski, 'Review of the Case Law of the EU Court of Justice in Fields Covered By the Association-Agreement' Review prepared for Association4U and GFA Consulting Group (2018) <https://eu-ua.kmu.gov.ua/sites/default/files/inline/files/review-of-the-case-law-of-the-eu-court-of-justice-fields-covered-by-the-association-agreement-2018.1.1.ukr_1.pdf> accessed 25 May 2021.

²⁹⁶ Petrov, 'The Impact of the Court of Justice of the European Union on the Legal System of Ukraine' (n 29) 187-8.

²⁹⁷ Case C-338/95 *Wiener v Hauptzollamt Emmerich* EU:C:1997:552, Opinion of AG Jacobs, para 65.

²⁹⁸ *ibid*.

²⁹⁹ Case 41/74 *Van Duyn v Home Office* EU:C:1974:133. The focus is not placed on EU State aid case law, since the inventory of Ukrainian cases in State aid matters is relatively insignificant at the moment. However, the problems, encountered in application of the EU case law in general tend to be common and potentially relevant to State aid matters as well.

³⁰⁰ E.g., see Ukraine: Judgment in case no 750/13452/19 of the Civil Cassation Court of 28 April 2021; Ukraine: Judgment in case no 824/668/17-a of the Administrative Cassation Court 08 April 2021, para 62.

³⁰¹ Ukraine: Judgment in case no 825/1496/17 of the Administrative Cassation Court of 15 May 2019; Ukraine: Judgment in case no 460/2764/18 of the Administrative Cassation Court of 22 December 2020; Judgment in case no 824/668/17-a (n 300) para 62.

³⁰² *Van Duyn v Home Office* (n 299).

³⁰³ Joined cases 212 to 217/80 *Meridionale Industria Salumi and Others* EU:C:1981:270.

the Council Regulation (EEC) No 1697/79 of 24 July 1979.³⁰⁴ However, on two occasions, the Ukrainian Cassation Administrative Court referred to this case in the rulings concerning the subsidies for reimbursement of the cost of housing and communal services³⁰⁵ and the actions of the state authority within the execution of a court decision on the plaintiff's pension recalculation.³⁰⁶ In both these cases, the Cassation Administrative Court used identical wording to refer to *Meridionale Industria Salumi* and applied it for the clarification of the principles of legal certainty and the protection of legitimate expectation.³⁰⁷ No further elaboration on the relevance of the CJEU case was provided.³⁰⁸

Some commentators note similar issues concerning the case law of the ECtHR when it is referred to outside the exact framework of the ECHR itself or the background of the judgment at stake.³⁰⁹

The EU supports the Ukrainian judiciary in closing this knowledge gap. For instance, the EU-funded project 'Pravo-Justice' organises trainings on EU law.³¹⁰ In principle, it is a doable task in the area of State aid law. Only three courts are involved in adjudicating on the AMCU's decisions in this area: the District administrative court of Kyiv (as a court of the first instance), the Sixth administrative court of appeal (as an appellate court) and the Ukrainian Supreme Court.

4.3 Interim Conclusions

Two groups of obstacles were identified: (1) stemming from the EU-Ukraine AA and EU system and (2) derived from Ukrainian institutional architecture.

The EU-Ukraine AA/DCFTA provides for the DSP by the arbitration panel, which is, however, used rarely and as a nuclear option. For correction of the course of State aid control enforcement in Ukraine, this institutional architecture is insufficient. State aid control requires more active involvement in day-to-day matters. Direct judicial dialogue between the CJEU and the Ukrainian judiciary would be a more optimal approach. However, unlike the EEA or the ECAA Agreements, the EU-Ukraine AA/DCFTA does not provide for such an option. The institutional setup of the EU-Ukraine AA suffers from similar drawbacks. It is primarily political, and the institutions are created on a parity basis, with representatives from both Ukraine and the EU. Such a system is insufficient for reacting to daily matters. Both obstacles could be mitigated by creating the EEA-style common economic space between the EU and the 'Association Trio' (Ukraine, Moldova,

³⁰⁴ *Meridionale Industria Salumi* (n 303) para 1.

³⁰⁵ Ukraine: Judgment in case no 826/14836/16 of the Administrative Cassation Court of 11 August 2020.

³⁰⁶ Ukraine: Judgment in case no 752/5917/17 of the Administrative Cassation Court of 30 September 2019.

³⁰⁷ *Meridionale Industria Salumi* (n 303) para 10.

³⁰⁸ Judgment in case no 752/5917/17 (n 306); Judgment in case no 826/14836/16 (n 305).

³⁰⁹ Rasim Babanly and Pavlo Pushkar, 'On the Issue of (Non) Relevant Application of the Case Law of the European Court of Human Rights: Practical Advice' (UKR: 'До питання про (не)релевантне застосування практики Європейського суду з прав людини: практичні поради') (*Legal-Judicial Newspaper Blog*, 17 May 2019) <<https://sud.ua/ru/news/blog/140972-do-pitannya-pro-ne-relevantne-zastosuvannya-praktiki-yevropeyskogo-sudu-z-prav-lyudini-praktichni-poradi>> accessed 25 May 2021; Tetiana Yushchenko, 'ECtHR PRACTICE: Rethinked Cannot Be Applied' (UKR: 'Практика ЄСПЛ: переосмислити не можна застосовувати') (Pravo.ua, 23 July 2019) <<https://pravo.ua/praktika-iespl-pereosmisлити-ne-mozhna-zastosovuvati/>> accessed 25 May 2021.

³¹⁰ High Council of Justice, 'European Union Project Support to Justice Reforms in Ukraine (Pravo-Justice)' <<https://hcj.gov.ua/page/proekt-yevropeyskogo-soyuzu-pidtrymka-reform-yustyciyi-pravosuddya-v-ukrayini-pravo-justice>> accessed 25 May 2021. See also Petrov, 'The Impact of the Court of Justice of the European Union on the Legal System of Ukraine' (n 29) 187-8.

Georgia). It would presuppose the establishment of supranational authorities, like in the EEA (i.e., a court and a surveillance authority).

Ukrainian institutional obstacles are twofold. The first issue is AMCU's lack of independence. This problem is inherent in a one-tier system, such as Ukrainian (compared to the two-tier EU State aid control system). Being part of the government, the AMCU is simply unable to act as an entirely independent authority. Moreover, the conflict of interests is ingrained in the Ukrainian system. The Parliament of Ukraine and the CMU both act as rule-makers and State aid providers (even though they are not recognised as such under the Law on State Aid).

The second obstacle is the lack of expertise on the side of State aid providers and the judiciary. When State aid providers are unsure, they tend to notify measures that are not State aid in the first place. It diminishes AMCU's administrative capacity. On its part, Ukrainian judges are struggling with the application of the case law from the EU Courts', as was exemplified by the application of *Van Duyn* and *Meridionale Industria Salumi*.

5 Conclusions

The homogeneous application of the EU State aid rules is threatened on multiple levels and from different angles. That said, not all the identified hurdles are critical. For instance, legal obstacles stemming from the EU-Ukraine AA/DCFTA potentially have a limited impact. The direct effect issue concerns only one provision (the SGEI exemption). The absence of a clear-cut list of acts to be transposed is rather a feature than a drawback. It contributes to the dynamic update of State aid law in Ukraine. Nevertheless, at least three crucial points of tension must be emphasised.

The first point concerns the lack of clearly pronounced mid-term prospects of Ukraine's accession to the EU. Even though both the EU and Ukraine aims are aligned and complementary, the absence of this 'golden carrot'³¹¹ leads to the lack of political will in Ukraine to properly implement EU State aid law. This point has manifested itself in two instances. First, it led to the deficient transposition of the EU-Ukraine AA/DCFTA State aid provisions into the Ukrainian legislation. It is inconceivable to talk about true homogeneity if rules in two legal systems significantly differ. Second, and closely connected to the first, the AMCU is not a fully-fledged independent authority in State aid control enforcement.

The second point relates to the complex and dynamic character of EU State Aid law. It is not an easy task to apply the State aid rules even within the Union. However, there it is mitigated by the vast experience of the stakeholders involved, as State aid law evolved during the last 65 years. So, this phenomenon is not problematic for the EU but definitely is for Ukraine. The challenge is reinforced by the lack of Ukrainian lawyers' (including judges) expertise in EU law. A proper application of the EU State aid acquis is merely unthinkable without the due account given to the Court's rulings in this area. An additional problem is the absence of a direct dialogue along the lines 'CJEU-Ukrainian Judiciary' and 'Commission-AMCU'.

The third and main point is linked to Ukrainian State aid control institutional architecture compared to the Union's. It is the crux of the matter. State aid control is supposed to be two-tier, as is exemplified by the Union itself and the EEA. Exporting this model to a single state can be compared to xenotransplantation when organs from one species are transplanted to another. It can be successful, but these organs do not work to their full potential simply because the donor's body is different from the recipient's. That is precisely what happened when EU State Aid law was imported into Ukraine. The prime example is when the Law on State aid notoriously left outside the scrutiny of the AMCU measures, which might be (and even already were) introduced by the Parliament of Ukraine and the CMU. According to EU State aid law, their activities would be treated as 'imputable to the state'. Thus, the Commission could review them if Ukraine would have been an EU Member State. Nevertheless, one could hardly blame Ukraine in this regard. Even within the EU, the dynamic definition of State aid exists precisely because Member States constantly look for ways to circumvent the control over their spending.³¹²

³¹¹ For usage of this term in a similar context, see Roland Dannreuther, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy' (2006) 11 *European Foreign Affairs Review* 183, 189; Van der Loo (n 9), 92.

³¹² See footnote 145.

Some might say that the Union has achieved its objectives despite all the identified problems ('the glass half full'). In contrast, the others would say that this exercise was futile ('the glass half empty'). It seems that at the end of the day, Ukrainian state aid control is a bit bleaker copy (if it could still be called a copy, though) compared to the EU original. Therefore, the EU-Ukraine AA/DCFTA did not lead to the homogeneous application of EU State aid law. An intricate legal and institutional framework is necessary for achieving homogeneity in this area. Without it, the EU's model of State aid control simply cannot survive its export to a third country like Ukraine without losing most of its crucial features.

Two solutions to mitigate this impasse could be proposed. The first one is to provide some assurances to Ukraine that with the successful implementation of the AA/DCFTA (including the State aid section), Ukraine has a plausible chance to apply for the Union membership. It would boost Ukrainian authorities' motivation for the full-fledged enforcement of State aid control. However, it is still only a band-aid solution since it does not guarantee the creation of the required complex legal and institutional infrastructure to properly enforce the State aid rules. Therefore, the second solution seems more practical. It is premised on creating an EEA-style common economic space with at least the 'Association Trio' (Ukraine, Georgia, Moldova). This option seems to be partly endorsed from the Union's side, as the European Parliament has already suggested such a course of action. The interest in this development exists within the EaP *avant garde* as well. The ball is on the Commission's, Council's and Member States' side now.

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