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EU-Armenia Comprehensive and Enhanced Partnership Agreement: What Does It Mean for Armenian Legal System?

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This article provides the legal analysis of the newly signed EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) and characterizes its potential influence on the Armenian legal system. In particular, the author focuses on CEPA's place in the domestic legal order (with specific attention paid to the status and the mechanisms of implementation of the binding decisions of the institutions established by the Agreement), the institutional framework of partnership under CEPA, essential elements and conditionality mechanisms of the Agreement, as well as mechanisms of legislative approximation to the EU acquis. *Being signed with a country-participant of the Eastern Partnership (EaP) which, at the same time, is a member of the Eurasian Economic Union, CEPA is a unique legal instrument. Within the EaP region, it significantly differs from both Partnership and Cooperation Agreements (PCAs) concluded with the post-Soviet countries in 90s and Association Agreements (AAs) of new generation signed with Georgia, Moldova and Ukraine. The article makes an attempt to outline the main differences between CEPA and other EU agreements with third countries. It is shown, in particular, that in the same way as AAs with Georgia, Moldova and Ukraine, CEPA contains two types of conditionality mechanisms: "common values" conditionality and "market access" conditionality. These two types of conditionality serve to export EU values in the former case, and EU* acquis *(as a set of rules) in the latter case. It is argued that, in order to promote "common" values in Armenian legal order, CEPA uses the following instruments: incorporating values into the so called essential element clauses; requiring to join to and implement relevant international agreements and making the implementation of values an element of conditionality mechanisms. One of the main elements of 'market' conditionality is the requirement to implement relevant legal reforms, in particular, through gradual approximation of Armenian legislation to the EU* acquis. *The author distinguishes three types of mechanisms of legislative approximation employed by CEPA and provides their detailed*

characteristic. Furthermore, it is argued that, in addition to the approximation commitments, other requirements (e.g. the requirement of predictability of legal regulation and legal certainty) can also stimulate further development of Armenian legal system. The author underlines the role of judiciary in ensuring proper implementation of the Agreement.

Keywords
EU-Armenia relations, Eastern Partnership, CEPA, regional integration, legislative approximation, shared values, conditionality

Introduction

Regardless its 'U-turn' towards the membership in the Russia-led Eurasian Economic Union (EAEU) in September 2013, Armenia, as one of the participants of the Eastern Partnership initiative (EaP), still aims to preserve active dialog with the EU. In these circumstances, the Comprehensive and Enhanced Partnership Agreement (CEPA)[1] signed on November 24 2017 and establishing the legal basis for the new format of the EU-Armenia relations becomes an important instrument of further Europeanization of Armenian legal system.

As High Representative of the European Union for Foreign Affairs and Security Policy / Vice-President F. Mogherini observed, the newly signed agreement is "the first of its kind, as it is concluded with a partner country which is at the same time a member of Eurasian Economic Union and in the Eastern Partnership."[2] Indeed, CEPA is a unique legal instrument: within the EaP region, it significantly differs

[1] Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (not yet in force), *OJ* L 23, 26.1.2018, pp. 4–466, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22018A0126(01)&qid=1523193570030 (15.02.2018).

[2] Remarks by High Representative/Vice-President **Federica Mogherini** following the signing of the European Union-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) with Edward Nalbandian, Minister of Foreign Affairs of Armenia, Brussels, 24 November 2017, https://eeas.europa.eu/delegations/armenia/36208/remarks-hrvp-federica-mogherini-following-signing-european-union-armenia-comprehensive-and_en (26.11.2017).

from both Partnership and Cooperation Agreements (PCAs) concluded with the post-Soviet countries in 90s and Association Agreements (AAs) of new generation signed with Georgia, Moldova and Ukraine.

Being a unique case of cooperation with both EU and EAEU, today's Armenia can serve as a laboratory to observe and study the intertwined processes of post-Soviet transformation, Europeanization and regional integration of different vectors, levels and formats. This particularity makes the newly signed EU-Armenia Agreement extremely interesting for scholarly examination.

This article provides legal analyses of CEPA as an instrument framing the EU-Armenia relations and characterizes its potential influence on the Armenian legal system. In particular, the focus is made on CEPA's place in the domestic legal order, the institutional framework of partnership under CEPA, essential elements and conditionality mechanisms of the Agreement, as well as mechanisms of legislative approximation to the EU *acquis*.

CEPA' s place in the domestic legal order

According to Art. 116 (2) of the Constitution of Armenia, international treaties shall be ratified through law[3]. Article 5 of the Constitution of RA establishes the hierarchy of norms in Armenian legal order and prescribes that "[i]n case of conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties shall apply" (Art. 5(3)). International treaties contradicting the Constitution may not be ratified (Art. 116 (3)). The Constitutional Court of RA, prior to the ratification of an international treaty, determines the compliance of the commitments enshrined therein with the Constitution (Art. 168 (3)).

On 16 March 2018, the Constitutional Court of RA reviewed CEPA in the light of its conformity with the Constitution and held that there was no contradiction between the Constitution and the

[3] This requirement to ratify "through law" is one of the novelties introduced into Armenian Constitution as a result of the constitutional reform of 2015; previously, international treaties were ratified through adoption of a decision of the Parliament.

commitments under the Agreement[4]. CEPA was subsequently ratified by the National Assembly of the Republic of Armenia on 11 April 2018[5]. The Agreement is not yet in force. In accordance with Art. 385 (2), it shall enter into force on the first day of the second month following the date of deposit of the last instrument of ratification or approval. However, the Parties may provisionally apply this Agreement in whole or in part, in accordance with their respective internal procedures and legislation, as applicable (Art. 385 (5)).

Aiming, in particular, "to enhance the comprehensive political and economic partnership and cooperation between the Parties, based on common values and close links, including by increasing the participation of the Republic of Armenia in policies, programmes and agencies of the European Union"[6], CEPA replaces the outdated EU-Armenia Partnership and Cooperation Agreement (PCA) signed in 1996[7]. It is expected that the new Agreement "will strengthen [EU-Armenia] cooperation in many different fields such as energy, transport and environment, and lead to increased mobility" and will "lead to an improved business environment and to new opportunities in trade and investments".[8]

The implementation of the Agreement is to be facilitated through the EU-Armenia Partnership Priorities signed on 21 February, 2018[9].

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[4] DCC-1407 of 16 March 2017 "On the Case of Conformity of the Obligations Stipulated by Comprehensive and Enhanced Partnership Agreement between the Republic of Armenia, of the One Part, and the European Union and the European Atomic Energy Community and Their Member States, of the Other Part, signed in Brussels on 24 November 2017 with the Constitution of the Republic of Armenia", http://concourt.am/armenian/decisions/common/2018/pdf/sdv-1407.pdf (in Armenian).

[5] National Assembly of Armenia ratified Armenia-EU new framework agreement. Press Release, 11.04.2018, http://www.mfa.am/en/press-releases/item/2018/04/11/dfm_na_cepa/ (11.04.2018).

[6] Article 1(a) of CEPA.

[7] Article 380 of CEPA.

[8] Remarks by High Representative/Vice-President **Federica Mogherini** following the signing of the European Union-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA) with Edward Nalbandian, Minister of Foreign Affairs of Armenia, Brussels, 24.11.2017, https://eeas.europa.eu/delegations/armenia/36208/remarks-hrvp-federica-mogherini-following-signing-european-union-armenia-comprehensive-and en (26.11.2017).

[9] European Union and Armenia sign Partnership Priorities, Bruxelles, 21/02/2018 - 14:17, UNIQUE ID: 180221_5, https://eeas.europa.eu/headquarters/headquarters-

This document will replace another 'soft' law document – the ENP Action Plan adopted in 2006 and will "shape the agenda for regular political dialogue meetings and sectoral dialogues as defined in the new Agreement" [10]. Being in line with the priorities set out in the ENP Review[11] and reflecting the focuses of CEPA, the Partnership Priorities include (1) strengthening institutions and good governance; (2) economic development and market opportunities; (3) connectivity, energy efficiency, environment and climate action; and (4) mobility and people-to-people contacts.

As it was stated above, one of the particularities of the Agreement is that it was concluded in the circumstances of Armenia's membership in another economic integration project – the EAEU. Kostanyan and Giragosian observe that the negotiators of CEPA relied on the text of the failed EU-Armenia Association Agreement[12] adjusting it to the new format of the EU-Armenia relations. Thus, the 'political dialogue' part of CEPA is similar to that in the EU-Armenia AA; while its 'economic part', due to the concurring international obligations of Armenia under the Eurasian Economic Union (EAEU) Treaty and in contrast with the AAs, does not foresee the creation of the Deep and Comprehensive Free Trade Area (DCFTA). Arguably, this not only lows the level of economic integration and narrows the scope of economic cooperation between the Parties, but also significantly influences CEPA's conditionality mechanisms taking away the incentives of gradual integration into EU Internal Market offered in the AAs.

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homepage/40181/european-union-and-armenia-sign-partnership-priorities_en (1.12.2017).

[10] Recommendation No 1/2017 of the EU-Armenia Cooperation Council of 20 November 2017 on the EU-Armenia Partnership Priorities [2018/315], *OJ* L 60, 2.3.2018, pp. 51–55, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1522643453339&uri=CELEX:22018D0315 (15.11.2017).

[11] 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, 18.11.2015 JOIN (2015) 50 final, http://eeas.europa.eu/archives/docs/enp/documents/2015/151118_joint-communication review-of-the-enp en.pdf (1.12.2017).

[12] **Kostanyan H., and Giragosian R.,** EU-Armenian Relations: Charting a Fresh Course (November 15, 2017). *CEPS Research Report* No. 2017-14, November 2017, p. 12, SSRN: https://ssrn.com/abstract=3075166 (30.12.2017).

Although the new Agreement takes "full account of Armenia's obligations as a member of the Eurasian Economic Union"[13], this, however, does not exclude the possibility of potential conflicts between EAEU norms and provisions of CEPA[14].

Another important issue is the place of the decisions of the institutions established under CEPA in the Armenian legal order. As it will be shown below, two bodies established under CEPA (namely, Partnership Council and Partnership Committee) are entitled to take binding decisions. Arguably, such decisions can be classified as follows: (1) the decisions of the Council by which the Annexes to CEPA have to be updated to take into consideration the development of the EU legislation to be approximated to (Article 371); and (2) other decisions. According to Armenian constitutional law, implementation of the decisions of the first type presupposes ratification of the amendments to the Annexes in the same manner as the Agreement itself is ratified[15] (including the preliminary control by the Constitutional Court).

As regards the second type of decisions, the Constitution of Armenia does not contain any provisions specifying the place of the acts of the bodies established under the international treaties in domestic legal order. Arguably, in case of decisions adopted by CEPA institutions, the legal positions formulated by the Constitutional Court in relation to the EAEU Treaty are applicable. In particular, in its Decision DCC-1175 of November 14, 2014 in Case on Conformity of the Obligations Stipulated in the "Treaty on the Accession to the Treaty of May 29, 2014 On The Eurasian Economic Union Signed by the Republic of

[13] Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1511682870752&uri=CELEX:52017JC0036 (29.11.2017)

[14] Notably, in the course of negotiations, "to ensure that the values underpinning CEPA remain firm", the EU rejected a "carve-out clause" proposed by the Armenian side which would allow Armenia "to opt out of the commitments enshrined in CEPA in areas where the Eurasian Economic Union might make new provisions" (**Kostanyan H., and Giragosian R.**, *Op. cit*. referring to the interview with an EU official (Brussels, 5 September 2016), p. 7).

[15] See the Decision of the Constitutional Court DCC-1407 cited above (para. 11).

Armenia" Signed on October10, 2014 in Minsk with the Constitution of the Republic of Armenia,[16] the Court pointed out the existence of specific constitutional requirements in Armenian legal order to the acts of international / supranational organizations. In addition to the principles of sovereignty, legal equality and mutual expediency of international cooperation, the Court (1) highlighted that the restrictions on human rights [possibly resulting from participation in a supranational organization] should be in accordance with the norms and principles of international law and (2) recognized that operation of the decisions of supranational bodies in Armenia is possible only within the scope of accordance with the Constitution of RA.[17] The Court formulated the legal position of general applicability holding that "any decision adopted by any supranational body with the participation of the Republic of Armenia which is not in conformity with these requirements in not applicable in the Republic of Armenia. In the case of following these requirements, cooperation of RA with any international or regional organization will not raise the issue of constitutionality"[18].

In the Decision DCC-1381 of 10 October 2017 on the conformity of the obligations stipulated by the Agreement on the Customs Code of the Eurasian Economic Union signed on April 11, 2017, with the Constitution of RA[19], the Constitutional Court differentiated between the legal acts of international and supranational nature. While the acts of the first category, in the Court's view, regulate 'horizontal' relations between the subjects of international legal relations, the acts of the second category regulate vertical relations between the state and the subjects within the state, thus directly affecting the individuals. As a consequence, the supranational acts in the process of their implementation can

[16] Decision DCC-1175 of 14 November 2014 in Case on Conformity of the Obligations Stipulated in the "Treaty on the Accession to the Treaty of 29 May, 2014 On The Eurasian Economic Union Signed by the Republic of Armenia" Signed on 10 October, 2014 in Minsk with the Constitution of the Republic of Armenia, The English version of the Decision DCC-1175, http://concourt.am/english/decisions/common/pdf/1175.pdf (15.10.2017).

[17] Para. 7 of the Decision.

[18] *Ibid.*

[19] The Armenian version is available at: http://concourt.am/armenian/decisions/common/2017/pdf/sdv-1381.pdf (13.11. 2017).

potentially violate the constitutional rights; […]. The evaluation [of constitutionality of such acts] is possible only when there is a practice of application of a supranational act[20].

What regards the interrelation of the decisions of the CEPA's institutions with domestic legislation, arguably, the analogy with Article 55 of Law of the Republic of Armenia "On International Treaties" regulating the status of acts adopted by the international organizations can be applied. According to this article, the acts of international organizations have to be implemented in accordance with the treaty establishing the organization and their legal force is defined by such treaties. If it is defined that such acts are binding, then, according to Article 55 (3), the relevant national agency responsible ensures the implementation of the decision of an international organization, *if necessary*: (1) by adopting a normative or other legal act; (2) by drafting a relevant regulatory act of the President, Government or Prime-Minister and submitting it for the consideration of the Government. If it is concluded that the implementation of the decision of an international organization requires adoption of a new or amending of the existing legislative acts, the relevant national agency has to draft such act and submit it for the consideration of the Government. Importantly, in case of a conflict between Armenian legislation and the decision of international organizations, the latter is not applicable until necessary amendments are introduced to the relevant domestic legal acts. The interpretation of this provision in conjunction with other provisions of Art. 55 allows concluding that it is obligatory for the national authorities to adopt the required legislative acts in this case.

[20] See argumentation in para. 5 of the Decision.

Institutional framework

The institutional framework of the EU-Armenia relations is regulated by Title VIII of CEPA. The bodies established include: Partnership Council, Partnership Committee, sub-committees and other bodies assisting the Partnership Committee, Partnership Parliamentary Committee and Civil Society Platform. This institutional framework is similar to the institutional framework under AAs[21].

According to Article 362 of CEPA, *the Partnership Council* shall supervise and regularly review the implementation of the Agreement. This body consists of representatives of the Parties at ministerial level and meets at regular intervals, at least once a year, and when circumstances require. The Partnership Council may meet in any configuration, by mutual agreement. The Partnership Council is entitled to examine any major issues arising within the framework of the Agreement and any other bilateral or international issues of mutual interest for the purpose of attaining the objectives of this Agreement. It is chaired alternately by a representative of the European Union and a representative of the Republic of Armenia.

Importantly, according to the same article, the Partnership Council shall have the power to *take binding decisions* within the scope of this Agreement in cases provided for therein. The Partnership Council may also make recommendations. It shall adopt its decisions and recommendations by agreement between the Parties, with due respect for the completion of the Parties' respective internal procedures. Furthermore, the Partnership Council has the power to update or amend the Annexes, without prejudice to any specific provisions under Title VI.

[21] With the exception of the Summit meetings at the highest level which provide overall guidance for the implementation of the EU-Ukraine AA as well as an opportunity to discuss any bilateral or international issues of mutual interest (see Article 460 (1) of EU-Ukraine AA). Article 404 of EU-Georgia AA prescribes that Periodic high-level policy dialogue shall take place within the Association Council and within the framework of regular meetings between representatives of both Parties at ministerial level by mutual agreement.

This body also serves as "a forum for the exchange of information on the legislation of the European Union and of the Republic of Armenia, both under preparation and in force, and on implementation, enforcement and compliance measures" (Art. 362). Thus, one may conclude that the Partnership Council can play significant role in directing and ensuring the effectiveness of the legislative approximation processes.

As Article 363 of CEPA prescribes, the Partnership Council "in the performance of its duties and functions" is assisted by *the Partnership Committee.* It is composed of representatives of the Parties, in principle at senior official level and chaired alternately by a representative of the European Union and a representative of the Republic of Armenia. It meets at least once a year. The Partnership Council may delegate to the Partnership Committee any of its powers, *including the power to take binding decision;* additionally, this body adopts binding decisions in cases provided for in the Agreement. The decisions are to be adopted by agreement between the Parties, subject to the completion of the Parties' respective internal procedures.

Once a year the Partnership Committee shall meet in a specific configuration to address all issues related to Title VI (Trade and Trade-Related Matters).

As Article 364 of CEPA stipulates, the Partnership Committee shall be assisted by subcommittees and other bodies established under this Agreement. The latter include, for example, Sub-Committee on Customs (Article 126) and Sub-Committee on Geographical Indications (Article 240).

Parliamentary Partnership Committee, in accordance with Article 365 of CEPA, consists of members of the European Parliament, on the one hand, and of members of the National Assembly of the Republic of Armenia, on the other, and is a forum for them to meet and exchange views. The Parliamentary Partnership Committee may make recommendations to the Partnership Council and create parliamentary partnership subcommittees.

The Agreement underlines the importance of civil societies and civil-society dialogue for its implementation. In specific areas, the Agreement explicitly indicates of importance of involvement of civil-society organizations in the policy development and reforms of Armenia

and cooperation between the Parties (see Article 86 of Chapter 15 Employment, Social Policy and Equal Opportunities of Title V). Chapter 21 of Title V is devoted to civil-society cooperation between Armenia and EU and establishes a regular dialogue on these issues (Article 104 of CEPA).

A specific institution - *Civil Society Platform* – is established to enable the involvement of civil societies into the implementation of CEPA. According to Article 366 (2), a Civil Society Platform is established as a forum "to meet and exchange views for, and consist of representatives of civil society on the side of the European Union, including members of the European Economic and Social Committee, and representatives of civil-society organisations, networks and platforms on the side of the Republic of Armenia, including the Eastern Partnership National Platform". Article 366 further defines the forms of cooperation between the Civil Society Forum and other institutions (exchange of information and views (Article 366 (5), 366 (7); making recommendations by the Platform to the Partnership Council, the Partnership Committee and Parliamentary Partnership Committee (Article 366 (6)). Article 284 of CEPA specifically indicates that cooperation and dialogue with regard to sustainable development issues that arise in the context of trade relations between EU and Armenia "shall involve relevant stakeholders, in particular social partners, as well as other civil-society organisations, in particular through the Civil Society Platform established under Article 366".

Apparently, the institutional framework of CEPA is significantly more advanced than one of the PCA and resembles the institutional framework of the association agreements.

CEPA's conditionality mechanisms and essential elements

According to the definition provided by Schimmelfennig and Sedelmeier, a policy of conditionality is "one in which international organizations promise rewards (such as financial assistance or membership) to target states on the condition that the states fulfill one or more conditions (such as policy adjustments or institutional change) set by the international

organizations" ;[22] the "dominant logic underpinning EU conditionality is a bargaining strategy of reinforcement by reward"[23].

In the same way as in AAs with Georgia, Moldova and Ukraine, in CEPA two types of conditionality can be distinguished: "common values"[24] conditionality and "market access" conditionality[25]. These two types of conditionality serve to export EU values in the former case, and EU *acquis* (as a set of rules) in the latter case[26].

As S. Poli argues, there are four main ways for the EU to promote its values through external action: (1) considering them as 'essential elements' of legally binding agreements with partner countries and associating non-execution clause in case of breach; (2) encouraging the third countries to ratify and implement the legally binding multilateral agreements based on universal values; (3) making the values a prerequisite for receiving financial assistance from the EU (in particular,

[22] **Schimmelfennig F., Sedelmeier U.,** Candidate Countries and Conditionality. In: *Europeanization. New Research Agendas*, Ed. by Graziano & Vink, Palgrave Macmillan UK, 2008, pp. 88-101.

[23] **Schimmelfennig F., Sedelmeier U**., Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe, *Journal of European Public Policy*, 11:4, August 2004, pp. 661-679.

[24] The concept of "common" or "shared" values is used in the context of ENP (see European Neighbourhood Policy. Strategy Paper COM(2004) 373 final) and is specifically underlined in the new agreements with EaP countries; in a broader context of relations between EU and third countries, the concepts of "political" or "Human Rights" conditionality are used (see Communication on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries', Brussels May 23, 1995, COM(95)216 final).

[25] The classification is offered in: **Petrov R., Van der Loo G., Van Elsuwege P**., The EU-Ukraine Association Agreement: A New Legal Instrument of Integration Without Membership? *Kyiv-Mohyla Law and Politics Journal,* 1 (2015), 1–19. http://ekmair.ukma.edu.ua/bitstream/handle/123456789/7874/Petrov_The_EU-Ukraine_Association.pdf?sequence=1&isAllowed=y; **Petrov R.,** EU values in integration-oriented agreements with Ukraine, Moldova and Georgia. In: *The European Neighbourhood Policy – Values and Principles*, Ed. by Sara Poli, Routledge, 2016.

[26] For the detailed description of differences in methodologies of export of values and rules see: **Kochenov D**., The Issue of Values. *Roman Petrov and Peter Van Elsuwege (eds.), The Application of EU Law in the Eastern Neighbourhood of the European Union*, London: Routledge, 2014, pp. 46-62.

within European Neighbourhood Instrument) and (4) applying sanctions in case of the failure to respect democracy[27].

It is suggested that, in part of values promotion, CEPA relies on the first, second[28] and third ways identified below; however, the third way should be viewed broader than in the classification provided by Poli. Namely, it should be defined as making the implementation of values a prerequisite within the conditionality mechanisms (the incentives of which obviously cannot be restricted to the receiving of financial assistance only[29]).

According to Article 2 General Principles of CEPA:

> 1. Respect for the democratic principles, the rule of law, human rights and fundamental freedoms, as enshrined in particular in the UN Charter, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe of 1990, as well as other relevant human rights instruments such as the UN Universal Declaration on Human Rights and the European Convention on Human Rights, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of this Agreement (emphasis added – A.Kh.).
>
> 2. The Parties reiterate their commitment to the principles of a free-market economy, sustainable development, regional cooperation and effective multilateralism.
>
> 3. The Parties reaffirm their respect for the principles of good governance, as well as for their international obligations, in particular under the UN, the Council of Europe and the OSCE.

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[27] **Poli S.**, Introduction, *The European Neighbourhood Policy –Values and Principles*. Routledge, 2016, p. 2.

[28] The second way can be illustrated, in particular, with Article 6 of CEPA stressing the values of peace and international justice and requiring ratification and implementation of the Rome Statute of the International Criminal Court and its related instruments, taking into account the legal and constitutional frameworks of the Parties.

[29] Although the conditionality based on the "financial assistance" incentive can also be found in CEPA: see Article 344 stating the amount of financial assistance provided by EU to Armenia "shall take into account the Republic of Armenia's needs, sector capacities and progress with reforms, in particular in areas covered by this Agreement".

> 4. The Parties commit themselves to the fight against corruption, the fight against the different forms of transnational organised crime and terrorism, the promotion of sustainable development, effective multilateralism and the fight against the proliferation of WMDs and their delivery systems, including through the EU Chemical Biological Radiological and Nuclear Risk Mitigation Centre of Excellence Initiative. This commitment constitutes a key factor in the development of the relations and cooperation between the Parties and contributes to regional peace and stability.

What does the status of "an essential element" (Article 2(1)) entail? According to Article 60 (3)(b) of Vienna Convention on the Law of Treaties of 1969, the violation of "a provision essential to the accomplishment of the object or purpose of the treaty" constitutes a material breach of a treaty. As Article 60 (1) of the Convention states, "a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for *terminating the treaty or suspending its operation in whole or in part*" (italics added - A. Kh.). Basing on the reasoning of this provisions, the essential element clauses in the EU agreements with third countries are usually accompanied with the non-execution clauses[30]. Additionally, the importance of the "commitments" under the essential element clauses are stressed in a preamble.

As one can note, the provision of Article 2 (1) defines the democratic principles, the rule of law[31], human rights and fundamental freedoms as an *essential element* of the Agreement; it contains an extensive and open-ended list of international instruments in the field of human rights and fundamental freedoms (of both binding 'hard' law and

[30] The essential clauses in trade agreements are discussed, in particular, in: **Hachez N**., 'Essential elements' clauses in EU trade agreements making trade work in a way that helps human rights? *Working Paper* No. 158, April 2015, https://ghum.kuleuven.be/ggs/publications/working_papers/2015/158hachez.

[31] The rule of law is further stressed in Article 12 of CEPA as a basis for cooperation of the Parties in the area of freedom, security and justice. Under this article, the consolidation of the rule of law includes "the independence of the judiciary, access to justice, the right to a fair trial as provided for by the European Convention on Human Rights, and procedural safeguards in criminal matters and victims' rights".

non-binding '*s*oft' law nature)[32] which, according to the Agreement, the Parties must adhere to in their domestic and external policies. The principles of a free-market economy, sustainable development, regional cooperation and effective multilateralism, good governance and respect to international obligations etc. are not included in the essential element clause; however, they are fundamental for the relations under the Agreement.

Another essential element of CEPA is included in Art. 9 Weapons of mass destruction, non-proliferation and disarmament[33]. This essential element is standard for the EU's agreements with third countries. As M. Cremona observes, the WMD clauses have been included to such instruments since 2003[34]. The same "essential elements" can be found, in particular, in the AAs with Georgia, Moldova, and Ukraine[35].

Art. 379 of CEPA addresses the appropriate measures in case of non-fulfilment of obligations. In case of failing to fulfil an obligation under the Agreement by one Party, the other Party (if a matter in dispute is not resolved within three months of the date of notification of a formal request for dispute settlement) may take appropriate measures. However, the requirement of three-month consultations is not applied in case of violation of one of the essential elements of the Agreement (Article 379 (1) and (3)). According to Article 379 (2), "in the selection of appropriate

[32] The variations of drafting of the essential element clauses as part of standard human rights clauses in the EU agreements with third parties are discussed, for example in: **Ghazaryan N**., A new generation of human rights clauses? The case of Association Agreements in the Eastern neighbourhood. *European Law Review*, 2015, 40 (3), 391-410, http://eprints.nottingham.ac.uk/34536/1/Human%20Rights%20Clauses.pdf.

[33] According to Art. 9, "the Parties consider that the proliferation of WMDs and their means of delivery, both to State and non-State actors, such as terrorists and other criminal groups, represents one of the most serious threats to international peace and stability. The Parties therefore agree to cooperate in and contribute to countering the proliferation of WMDs and their means of delivery, in full compliance with, and national implementation of, their existing obligations under international disarmament and non-proliferation treaties and agreements as well as other relevant international obligations. The Parties agree that this provision constitutes an essential element of this Agreement".

[34] **Cremona M**., The ENP and Multilateralism, *Sara Poli (ed.) European Neighbourhood Policy – Values and Principles,* Routledge, 2016, pp. 85-86.

[35] Article 10 of EU-Georgia AA; Article 9 of EU-Moldova AA; Article 11 of EU-Ukraine AA.

measures, priority shall be given to those which least disturb the functioning of this Agreement"; "such measures may not include the suspension of any rights or obligations provided for under provisions of this Agreement, set out in Title VI" (trade and trade-related matters) with the exception of cases of violation of an essential provision.

It can be concluded from the provisions analysed above that the essential element clauses in combination with non-fulfilment clause and preambular references to the Parties' commitments constitute one of the mechanisms of value conditionality, according to which the all the provisions of CEPA (including the provisions on economic cooperation and trade relations) effectively operate only if the specific principles are respected by the Parties.

Another specific conditionality mechanism in political part of the Agreement can be found in Article 15 of CEPA under which the Parties are obliged to fully implement Visa Facilitation and Readmission Agreements. *In case of fulfilment of these obligations and provided that conditions for well-managed and secure mobility are in place*, the Parties shall *consider in due course the opening of a visa-liberalisation dialogue*. Taking into account the experience of the EaP associated countries in the field of visa liberalization, the visa liberalization dialogue will focus, in addition to the security benchmarks, on the benchmarks related to fundamental rights[36].

As it was stated before, the political part of CEPA reproduces the political part of the failed EU-Armenia AA and is mostly similar (with some reservations) to the political parts of the AAs with Georgia, Moldova and Ukraine. This is not the case, however, in regard to the economic part of the Agreement and the relevant "market access" conditionality mechanisms. Taking into consideration the absence of the DCFTA incentives and narrower scope of economic and trade cooperation, market access conditionality is significantly "weaker" in CEPA's case.

[36] Visa liberalisation with Moldova, Ukraine and Georgia, https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/visa-liberalisation-moldova-ukraine-and-georgia_en (15.11.2017).

According to Article 373 (2), "if the Parties agree that necessary measures covered by Title VI[37] [including the legislative approximation to the EU *acquis*] have been implemented and are being enforced, the Partnership Council […] shall decide on further market opening where provided for in Title VI".

The examination of the relevant provisions of Title VI reveals the conditionality mechanisms of different level of specification. For example, in case of establishment[38], "with a view to *progressively liberalising* the establishment conditions, the Partnership Committee, when meeting in trade configuration, shall *regularly review the legal framework and the environment for establishment*". Here the precise benchmarks for evaluation of the implementation of the Parties' commitments are not specified.

More precise is Article 152 related to the cross-border supply of services. In particular, "with a view to progressively liberalising the cross-border supply of services between the Parties, the Partnership Committee, meeting in trade configuration, shall regularly review the list of commitments referred to in Articles 149 to 151 [market access commitments]. *That review shall take into account, inter alia, the process of gradual approximation*, referred to in Articles 169, 180 and 192, and its impact on the elimination of remaining obstacles to the cross-border supply of services between the Parties" (*italics added* – A.Kh). The listed articles regulate the approximation to the EU *acquis* related to postal services, electronic communication networks and transport services respectively.

Taking into account its role in the implementation of the objectives of the Agreement, the issue of legislative approximation deserves specific attention. In the following part of the article, the mechanisms of legislative approximation will be analysed.

[37] Trade and trade-related matters.

[38] Chapter 5 Trade in services, establishment and electronic commerce of Title VI of CEPA.

Legislative approximation under CEPA

The mechanisms of legislative approximation enshrined in CEPA resemble the mechanisms of the AAs, although are less advanced and ambitious due to CEPA's more modest objectives. At the same time, in contrast with the EU-Armenia PCA containing only one general and legally non-binding approximation clause[39], CEPA's approximation mechanisms are significantly more elaborated, diverse and framed in the provisions of binding nature.

Regardless the previous attempts of legislative approximation in Armenia under PCA and ENP Action Plan and some achievements in specific legislation and policy sectors (especially during the negotiations about conclusion of the failed Association Agreement and DCFTA), this process generally hardly can be defined as successful. The process of legislative approximation lacked coherence, systematic approach and common methodological ground. In addition, as Ghazaryan and Hakobyan observe, the measures adopted by the governmental bodies quite often were "formalistic and deficient and aimed at rather technical fulfilment of the EU's requirements" and the proper enforcement of the approximated legislation by judiciary faced the problems common to the Armenian legal system generally and inherited from the Soviet times[40].

In contrast with PCA, CEPA underlines the importance of not only gradual approximation of Armenian legislation to the EU norms, but also implementation and enforcement of the approximated legislation[41]. Article 372 of CEPA establishes specific mechanisms of monitoring and assessment of approximation which "shall include aspects of implementation and enforcement" (Article 372 (2)). In addition to the reporting on the progress made with regard to approximation, the assessment "may include on-the-spot missions, with the participation of institutions of the European Union, bodies and agencies, non-

[39] Articke 43 of PCA.
[40] **Ghazaryan N., Hakobyan A**., Legislative Approximation and Application of EU Law in Armenia, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union.* Routledge, 2014, p. 214.
[41] See, in particular, Preamble and Article 372 of CEPA.

governmental bodies, supervisory authorities, independent experts and others, as necessary" (Article 372 (3)).

Similarly to the AAs, two types of legislative approximation provisions can be differentiated in CEPA: (1) those establishing mechanisms of approximation in the specific sectors of cooperation (transport, energy, environment, employment, social policy and equal opportunities etc.) and (2) 'horizontal' provisions supplementing the sectoral approximation mechanisms.

In the first group of provisions, the following types of legal approximation can be differentiated:

- The provisions requiring implementation of the international instruments and compliance with the international standards; these commitments can be general[42] or specifically defined[43];
- The provisions containing the requirement to approximate to the EU *acquis* without specification of the relevant acts. The binding character and formulation of such requirement varies. According to Article 169, 180, and 192 of Title VI Trade and Trade-Related Matters which are key for the liberalization of cross-border supply of services conditionality, "parties *recognise the importance* of gradual approximation" of Armenian legislation on postal services, electronic commerce and transport services to that of the EU; according to Article 189, "the Republic of Armenia shall approximate its regulation of financial services, *as appropriate*, to the legislation of the European Union". Article

[42] For example, under Article 13 Protection of personal data, the Parties "agree to cooperate in order to ensure a high level of protection of personal data in accordance with the international legal instruments and standards of the European Union, Council of Europe and other international bodies". According to Article 24 **Public sector internal control and auditing arrangements,** the Parties shall cooperate in the areas of public internal control and external audit, in particular, with the objective of "further developing and implementing the public internal control system in accordance with the principle of decentralised managerial accountability, including an independent internal audit function for the entire public sector in the Republic of Armenia, by means of approximation with generally accepted international standards, frameworks and guidance and European Union good practice, on the basis of the public internal financial control reform programme approved by the Government of the Republic of Armenia;

[43] For example, the provisions requiring implementation of the specific Conventions in the field of intellectual property.

130 Cooperation in the field of technical barriers to trade states that "the Parties *shall endeavour to establish and maintain a process* through which *gradual approximation of the technical regulations, standards and conformity assessment procedures* of the Republic of Armenia to those of the European Union can be achieved". In accordance with Article 81 related to the consumer protection, the parties "shall cooperate in order to ensure a high level of consumer protection and to achieve *compatibility between their systems* of consumer protection". Article 70 states that the Parties "shall cooperate to promote agricultural and rural development, in particular through *progressive convergence* of policies and legislation". There are also a number of provisions based on "taking into account" and "making efforts" approaches[44];

- The provisions containing standard approximation clause with the indication of specific acts of the EU and the timeframes for their transposition (in the Annexes to the Agreement)[45]. Such provisions can be found in Title V (Other cooperation policies)

[44] For example, according to Article 30 of Chapter 3 statistics of Title IV of CEPA, "the national statistical system shall respect the UN Fundamental Principles of Official Statistics and ***take into account*** the EU *acquis* in the field of statistics, including the European Statistics Code of Practice, in order to ***align national statistical production*** with European norms and standards" Efforts shall be directed towards further alignment with the EU *acquis* in statistics, on the basis of the national strategy for the development of the statistical system of the Republic of Armenia, and taking into account the development of the European Statistical System (emphasis added – A.Kh.). Under Article 33, "***efforts shall be directed towards further alignment*** with the EU *acquis* in statistics, on the basis of the national strategy for the development of the statistical system of the Republic of Armenia, and taking into account the development of the European Statistical System" emphasis added – A.Kh.). According to Article 35, "Gradual approximation of the legislation of the Republic of Armenia to the EU *acquis* in statistics shall be carried out in accordance with the annually updated Statistical Requirements Compendium as produced by Eurostat, which is considered by the Parties as annexed to the Agreement".

[45] These are: Article 41 with Annex I (transport), Article 44 with Annex II (energy), Article 50 with Annex III (environment), Article 56 with Annex IV (climate), Article 65 with Annex V (information society), Article 83 with Annex VI (consumer protection), Article 90 with Annex VII (employment, social policy and equal opportunities), Article 361 with Annex XII (anti-fraud regulations).

and Title VII Financial Assistance, And Anti-Fraud and Control Provisions. They do not lead to the opening of the market but may be elements of other conditionality mechanisms. The lists of the EU acts provided in Annexes include such types of the sources of the EU law as regulations and directives. Although in the context of the EU law the difference between these acts is significant (it concerns the, first of all, the direct effect and applicability of these acts), for the purposes of the legislative approximation this difference is insignificant since both types of the acts are to be transposed into domestic legal system and are not directly applicable. Moreover, in contrast with the EU Member States, the obligations of Armenia can be restricted to the implementation of specific provisions and not the whole of the relevant EU acts[46].

Other areas of cooperation (company law, accounting and auditing, and corporate governance, industrial and enterprise policy, cooperation in the areas of banking, insurance and other financial services) do not presuppose legislative approximation; however, the Armenian legal system may benefit from the improvement of national legislation through the exchange of information and best practices. Furthermore, the legislative approximation can be done on a voluntary basis and go beyond the formal requirements of CEPA.

[46] This is due to the specific nature of approximation in contrast with legal processes taking place within EU. As A. Matta notes, there several methods or models of norm/values export "depending on particular integration objectives set in the respective agreements": "very complex and highly demanding methods such as 'homogeneity', 'mutual' recognition' and 'binding harmonization' (aiming at accession to the Union)" and "less demanding but more frequently used method of 'legislative approximation' to the EU acquis" (see **Matta A.,** Differentiating the methods of acquis export, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union,* Routledge, 2014, p. 35). Both approximation and harmonization (in contrast with homogeneity and recognition) "may vary in objectives and intensity depending on the context in which they are used"; "for approximation this variation depends on the level and intensity of the integration objectives towards the EU, such as compatibility or convergence, as well as on the attitude of the actors involved" (**Matta A.,** *Op. cit*, pp. 37-38).

The second group ('horizontal' legislative approximation provisions) includes *inter alia* Article 370 setting out the general obligation of Armenia to "carry out gradual approximation of its legislation to EU law as referred to in the Annexes, based on commitments identified in this Agreement, and in accordance with the provisions of those Annexes" while making the exceptions for "specific provisions under Title VI". Article 371 is titled "Dynamic"[47] approximation. It states that "in line with the goal of the gradual approximation of the legislation of the Republic of Armenia to EU law, the Partnership Council shall periodically revise and update the Annexes to this Agreement in order, *inter alia*, to reflect the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, taking into account the completion of the Parties' respective internal procedures". As the Constitutional Court of Armenia held with the reference to its case-law, such revision of the Annexes will be considered as amendment of the Agreement and will require ratification in the same manner as the Agreement itself[48].

It is important to mention that legislative approximation mechanisms established by Articles 169, 180, 189 and 192 (although not defining the lists of the EU acts for approximation) presuppose specific procedure of dispute settlement. In particular, under Article 342 (2), "where a dispute raises a question of interpretation of a provision of Union law, the arbitration panel shall request the Court of Justice of the European Union to give a ruling on the question provided that question is necessary for the decision of the arbitration panel. […] The ruling of the

[47] On the basis of comparative analysis of this provision with the relevant clauses in other agreements with third countries, it may be argued that the established mechanism is rather static than dynamic, since, in as Van Der Loo defines, "there is no obligation to automatically adopt every amendment to the EU acquis that could potentially be relevant to the agreement" (**Van Der Loo G**., The EU-Ukraine DCFTA, In: Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Routledge, 2014, p. 78).

[48] Para 11 of Decision DCC-1407 cited above.

Court of Justice of the European Union shall be binding on the arbitration panel"[49].

Similar mechanisms (although with a wider list of provisions where the specific procedure of dispute settlement is applicable) can be found in the AAs with the EaP countries. Notably, in contrast with CEPA, these provisions contain the lists of the EU acts to be transposed. As Van Der Loo observes in relation to Ukrainian AA, the established mechanism is a novelty in the EU practice of bilateral relations and is called to ensure the uniform interpretation of the EU *acquis* in such relations.

The focus of CEPA on the implementation and enforcement of the approximated legislation indicates the significant role of judiciary in the process of Europeanization of Armenian legal system. Although there is no strict requirement in CEPA, taking into account the case-law of the Court of Justice of the EU by Armenian judges may be necessary to secure the appropriate implementation of the approximated legislation. Using the EUCJ case-law in the judicial argumentation could be facilitated through certain legislative drafting techniques. In particular, the preambular references to the relevant EU acts in the approximated domestic legislation could serve as a ground for using both these acts and the case-law interpreting them to construct the arguments based on the purposive and 'legislator's intent' approaches[50]. In the same manner as in case of ECtHR judgments, application of the EUCJ judgments will be challenging for the domestic judiciary. In particular, the application of such source as EUCJ case-law will require not only specific knowledge and skills, but also the change of legal mentality based on the philosophy of legal positivism inherited from the Soviet period[51].

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[49] **Van Der Loo G**., The EU-Ukraine DCFTA, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union.* Routledge, 2014, p. 82.

[50] The said legislative technique is used, for example, in Moldova (see **Khvorostiankina A**., Legislative Approximation and Application of EU Law in Moldova, *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* Edited by Roman Petrov, Peter Van Elsuwege, Routledge, 2014, pp. 159-178).

[51] See, for example: **Kühn Z**., The Application of European Law in the New Member States: Several (Early) Predictions, *German Law Journal*, 6(3)m (2005),

It is necessary to stress that, in addition to the legislative approximation requirements in specific sectors, other commitments are also directed to the improvement of legislative regulation in Armenia generally. In particular, according to Article 308, "[r]ecognising the impact which their respective regulatory environment may have on trade and investment between them, the Parties shall provide a *predictable regulatory environment* and *efficient procedures* for economic operators, in particular for SMEs". Under Article 313, the Parties shall cooperate in promoting *regulatory quality and performance* and support the principles of *good administrative behaviour*. Title VI (Trade and trade-related matters) sets out the requirements of *legal certainty*. Specifically, according to Article 309 (1), each Party shall ensure that measures of general application[52] adopted after the entry into force of this Agreement:
(a) are *promptly and readily available* via an officially designated medium, including electronic means, in such a manner as to enable any person to become acquainted with them;
(b) *clearly state* to the extent possible, the objective of and rationale for such measures; and
(c) allow for a *sufficient period* of time between publication and entry into force of such measures, except in duly justified cases.

Undoubtedly, these provisions have the potential to positively influence the development of Armenian legal system in case of their full and proper implementation. This will require both the improvement of legislatives techniques and establishing and maintaining the high standards of administrative and judicial procedures.

pp. 563- 582, p. 564; **Meleshevych A., and Khvorostyankina A**., 'Ukraine', *L. Hammer and F. Emmert (eds), The European Convention on Human Rights and fundamental freedoms in Central and Eastern Europe*, The Hague: Eleven International Publishing, 2012, pp. 557-596.

[52] As defined in Article 307 (a), "measures of general application" include laws, regulations, decisions, procedures and administrative rulings of general application that may have an impact on any matter covered by this Agreement.

Conclusion

The newly signed EU-Armenia Comprehensive and Enhanced Agreement is a unique legal instrument regulating the relations between the EU and a country which is a member of another economic integration organization – Eurasian Economic Union. Armenia's Participation in the EAEU caused the necessity to adapt the text of the failed EU-Armenia Association Agreement to take into consideration the international obligations under EAEU Treaty. As a result, the new Agreement - CEPA - does not presuppose the creation of the DCFTA thus lacking one of the most significant incentives the EU can offer to the countries without membership perspectives and aspirations. This, undoubtedly, weakens the mechanisms of the EU rules and values transfer in comparison with the AAs with Georgia, Moldova and Ukraine. In addition, in course of implementation of both CEPA and EAEU acts, it is possible that the legal collisions will appear between them and will require resolving using the domestic legal instruments.

Nevertheless, the transformative potential of CEPA is still significant. In addition to the reformation of domestic legislative regulation through its approximation to the EU *acquis*, proper and full implementation of the provisions requiring legal certainty and predictability, regulatory quality, transparency of regulation, good administrative behaviour etc. will surely contribute to further improvement of Armenian legal system. Apparently, this may be achieved only under the circumstances of comprehensive and systematic governmental approach to the implementation of the required reforms.

Significant role in the ensuring proper implementation of the Agreement will be played by Armenian judiciary, since CEPA stresses the importance of implementation and enforcement of the approximated legislation, as well as maintaining of high standards of judicial procedures based on the principle of the rule of law. It is obvious, that achieving the objectives of CEPA (including the objectives in the economic field) is not possible without proper level of Human Rights protection and fair trial guarantees. Consequently, the systematic changes in the judicial system will be required. Additionally, the implementation of CEPA will demand new skills, knowledge and methodological

approaches from Armenian judges. This is caused, in particular, by the necessity to take into consideration the case-law of the CJEU. Even though there is no such a requirement in CEPA (in contrast with AA and some other EU external agreements), this may be essential for proper interpretation and implementation of the 'Europeanized' legislation.