

Nona Gelashvili*

EU-Georgia Association Agreement in the Light of Direct Application of Law

As of today, the question regarding application of the Association Agreement remains unanswered. Does the Agreement apply directly in the legal systems of the EU and Georgia? Does it establish rights and obligations for individuals and legal entities? How does the Court of Justice of the European Union assess the application of international agreements, and how important is the direct application of law for the integrative communities? These questions are addressed and analyzed throughout the article.

Keywords: *European Union law, direct application, association agreement.*

1. Introduction

The Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (hereinafter: Association Agreement) entered into force on July 1, 2016. Its largest and most important part, the agreement on the Deep and Comprehensive Free Trade Area (Title IV of the Association Agreement), had been provisionally applied since September 1, 2014.¹

Due to its “comprehensive” nature and the country’s constitutionally approved external orientation towards European integration,² the Association Agreement holds a significant role in Georgia's foreign policy, influencing its legal, social, and economic development. It serves as the primary legal framework for implementing the European integration agenda.

Unlike domestic legal norms, which typically take immediate effect upon enactment, international agreements, as per rule, do not automatically have such direct applicability. While the domestic norms in force directly generate rights and obligations for individuals and legal entities, international agreements require corresponding domestic implementation measures (such as the adoption of relevant laws and regulations).

To determine whether the Association Agreement applies directly within the territory of the parties, one must consider the methods of interpreting such agreements. As an international legal

* Assistant Professor at Georgian International University; Visiting Lecturer at Caucasus International University and European University; PHD Candidate at University of Hamburg; Master of European Studies, Europa-Kolleg Hamburg; LL.M.eur, Ivane Javakishvili State University Tbilisi.

¹ For details on provisional application and entry into force, see the introductory provisions of the Association Agreement, <<https://matsne.gov.ge/ka/document/view/2496959?publication=0>> [23.05.2024].

² Constitution of Georgia, August 25, 1995, N786.

"Article 78. Integration into European and Euro-Atlantic Structures. The constitutional bodies should take all measures within their powers to ensure Georgia’s full integration into the European Union and the North Atlantic Treaty Organization” (In Georgian).

document, the Association Agreement should be interpreted first based on international law³ and then in accordance with domestic norms or judicial practices.

The second chapter of the presented article examines the direct effect of EU law as a pivotal element of EU internal integration. It highlights the significance of the direct applicability of the Association Agreement. The third chapter addresses direct applicability of the international agreements concluded by the European Union and the interpretations provided by the Court of Justice of the European Union on this matter. The fourth chapter analysis extensively the applicability of the Association Agreement. Finally, the fifth chapter presents the main findings of the article.

2. Direct Application of Law for Integration

The European Union is fundamentally an integrative union, aiming to achieve an “ever closer union among the peoples of Europe”, as stated in the preamble of its founding treaties. Integration theories offer various explanations for the main drivers of EU integration, although this article does not delve into them extensively. Instead, this section focuses on the direct impact of law as one of the effective tools for integration.

2.1. The Importance of Direct Application of Law in the European Union as an Integrative Union

According to established practice of the Court of Justice of the European Union, unlike international treaties, the founding treaties of the European Union have created “their own legal order”, which is directly applicable in the legal systems of member states and thus is mandatory for national courts.⁴ Member states have limited their sovereign rights (even only in certain areas) and transferred these rights to a new legal entity – the European Union. The uniqueness of the European Union as an international organization lies in the combination of several factors: broad law-making competencies; the existence of a single currency and citizenship; the ability to make binding decisions by institutions independent of state governments, as well as decision-making by majority rule; and the direct applicability of EU law within member states and their national courts.⁵ The peculiarity of EU law lies in its predominant force of the domestic law of member states⁶ and its direct effect within national legal systems.

³ For the interpretation of international agreements, the 1969 Vienna Convention on International Law of Treaties (hereinafter: the Vienna Convention) and international customary law are used. Although the Vienna Convention generally applies to agreements between states and neither the EU nor all its member states are members of it, the Court of Justice of the European Union has recognized the binding nature of “a number of its provisions” in the cases: Judgment of 25 February 2010, Brita, C- 386/08, EU:C:2010:91; Judgment of 2 March 1999, C-416/96, El-Yassini, EU:C:1999:107; Judgment of 20 November 2001, C-268/99 Jany and Others, EU:C:2001:616. The Court notes that “a number of provisions” of the Vienna Convention, especially the provisions on the manner of interpretation of international treaties, express norms of customary international law and are binding on the EU.

⁴ Judgement of 15 July 1964, 6/64, Costa/ENEL, EU:C:1964:66.

⁵ European Union Law, *Ed. Bernard C and Peers S.*, Second Edition, Oxford, 2017, 186.

⁶ It entails both primary EU law, such as the EU founding treaties, the European Charter of Human Rights and universal principles, as well as secondary law, which consists of acts adopted by EU bodies: regulations, directives, recommendations and opinions.

EU (primary) law⁷ was granted direct effect in 1963 following the judgment in *Van Gend en Loos* by the European Court of Justice.⁸ With this decision, the Court recognized the right of individuals and legal entities, under specific conditions (precise, clear and unconditional norm), to apply directly to national courts and protect their rights without the need for domestic transposition, relying directly on EU law.

Half of the founding member states argued in their submissions to the Court, that the treaty enforcement mechanism was outlined within the founding treaties themselves. According to these submissions, the European Commission and other member states were obliged to respond to violations of the agreements⁹ (the so-called “public enforcement”). Accordingly, in their opinion, the treaties and their norms did not directly confer rights and obligations to individuals and legal entities. However, the Court did not accept this argument, reasoning that granting individuals the role of “enforcement” would not hinder effective enforcement of treaty provisions but rather facilitate it.

The rationale behind the Court’s decision was based, *inter alia*, on the importance of “vigilance of individuals”. The activism of individuals and their right to appeal to courts created and continue to maintain an effective system of EU law enforcement, which, along with the superior legal force of EU law, forms the basis of the idea of the EU and its integration.

Granting direct effect to EU law, thereby ensuring its *effet utile* (maximum efficiency), has become one of the most important prerequisites for effective enforcement, monitoring, legislative harmonization of EU law, its uniform interpretation, and further integration of the EU. Public enforcement alone could not achieve the results possible through private enforcement. Public enforcement has its limits and shortcomings, which are not unique to the enforcement of EU treaties but are common in other international treaties as well. In the case of the European Union, this primarily involves the limited resources of the European Commission: given the scope of the founding treaties, the Commission would not be able to identify every possible violation, process them, and defend its positions in the Court.¹⁰ Additionally, enforcement oversight by other member states would not be effective, as states often refrain from initiating legal proceedings against one another.¹¹

Beyond its role in effective enforcement, the direct effect of EU law also serves legislative and monitoring functions.¹² In several rulings recognizing the direct effect of norms, the Court of the European Union has prompted EU bodies to create a new legal framework. These indications by the Court have spurred legislative activities that promote greater legal harmonization across various areas and thereby enhance internal integration within the European Union.

⁷ On the primary and secondary sources of law, see *Gabrishidze G.*, *Law of the European Union*, New Vision University, Second Edition, 2023, 86-122. (In Georgian)

⁸ Judgment of 5 February 1963, 26-62, *van Gend & Loos*, EU:C:1963:1.

⁹ *Ibid.*

¹⁰ See detailed review *Craig P.P.*, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, in: *Oxford Journal of Legal Studies*, Vol. 12, No. 4, Winter, 1992, 454-458.

¹¹ *Ibid.*

¹² *Ibid.*, 458-479.

Monitoring involves overseeing the implementation of EU acts by member states. Direct effect enables individuals to defend their rights in national courts even when a state fails to enforce or incorrectly enforces an EU regulation or directive.¹³

Moreover, direct effect has promoted uniform interpretation of EU law and, consequently, its consistent application in all member states. Notably, the exercise of the right of appeal by individuals to national courts has raised issues concerning the interpretation of specific provisions of EU law. The Court of the European Union holds exclusive jurisdiction over such interpretations.¹⁴ Consequently, through the preliminary ruling procedure, national courts have received clarifications from the Court on EU law norms, which have formed the basis for uniform application of the law.

In summary, recognition of the direct effect of EU law has contributed to effective enforcement, monitoring of enforcement, uniform application, and legislative harmonisation of EU law. Ultimately, this realization has embodied the European idea expressed in the preamble of the founding treaties: “ever closer union among the peoples of Europe”, as an integrative union.

2.2. The Importance of Direct Effect of the Association Agreement for Georgia’s Effective Integration into the European Union

When discussing the enforcement of an international agreement, the focus primarily revolves around the fulfilment of obligations by the parties involved. The commitments undertaken by Georgia under the Association Agreement are extensive and varied, ranging from the alignment of foreign policy to the adoption of specific technical standards for production. The agreement is conditional in nature, and the obligation such as the gradual opening of the internal market by the EU depend on Georgia’s adherence to relevant EU standards – mainly on the approximation to the relevant *acquis*¹⁵ of the European Union.¹⁶ According to the agreement, both parties are responsible for fulfilling these obligations and achieving the agreed-upon objectives, requiring them to take “any general or specific measures” as necessary.¹⁷ “Supervision and monitoring of the application and implementation” of the agreement is carried out by the Association Council, including periodic reviews and decision-making on disputes related to the agreement.¹⁸ The Agreement on the Deep and Free Trade Area (Title IV)

¹³ According to EU case law, directives that have not been implemented by states have a direct effect, allowing individuals to sue the state in national courts for violations of their rights under the directive. see e.g.: Judgment of 5 April 1979, 148/78, Tullio Ratti, EU:C:1979:110; Judgment of 4 December 1974, 41-74, van Duyn, EU:C:1974:133.

¹⁴ Treaty on the Functioning of the European Union (TFEU), Article 267.

¹⁵ The EU *acquis* is a set of common rights and obligations that constitute EU law and are integrated into the legal systems of EU member states. Glossary of Summaries, [https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html#:~:text=The%20European%20Union%20\(EU\)%20acquis,systems%20of%20EU%20Member%20States](https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html#:~:text=The%20European%20Union%20(EU)%20acquis,systems%20of%20EU%20Member%20States).

¹⁶ Preamble of the Association Agreement, (h) “To achieve Georgia’s gradual integration with the EU internal market..., which will ensure thorough access to the market on the basis of sustainable and comprehensive regulatory approximation...”. Approximation of laws for further liberalization of trade in services, Articles 87, 103, 113, 122, 126, Public Procurement, 147 (In Georgian).

¹⁷ Association Agreement, Article 420 (In Georgian).

¹⁸ Association Agreement, Article 404 (In Georgian).

contains a specific rule on disputes concerning the interpretation and application of this part; consultation, mediation, and arbitration procedures are foreseen for this part.¹⁹

The system established by the Association Agreement falls under public enforcement. However, as discussed above, this system may not be as effective as desired for integrative agreements. Arguments about the limitations of public enforcement, such as incomplete information about agreement violations, imperfect processing of claims, and reluctance of states to challenge each other, hinder effective enforcement of the agreement.²⁰

As mentioned earlier, the direct effect of law serves as a crucial mechanism for effective enforcement within the European Union, contributing significantly to its gradual integration as a converging union. It is worth exploring whether the Association Agreement qualifies as an integrative treaty and whether granting it direct effect in the legal systems of the parties would enhance its effectiveness.

In literature²¹, integration agreements concluded by the European Union are characterized by four main criteria:

- a. Commitment to apply, implement and incorporate predefined EU *acquis*;
- b. Procedure for amending or updating the incorporated *acquis*;
- c. Obligation to interpret the incorporated *acquis* in accordance with decisions of the European Court of Justice;
- d. Legal mechanisms ensuring uniform interpretation and application of the incorporated *acquis*.

Of these criteria, the first (a) is mandatory for the treaty to be considered an integration treaty, while the remaining three conditions (b., c., d.) are optional.²² The Association Agreement fully meets the first two criteria and partially meets the third. Specifically:

- Article 417 requires Georgia to gradually approximate to the predetermined *acquis* listed in the annexes of the Association Agreement. Article 419 establishes mechanisms for monitoring the application and enforcement of the incorporated law.

- Article 418 ensures dynamic approximation, incorporation changes from relevant EU legislation into Georgian law, thus reflecting in full the second criterion.

- As for the relevant interpretation of the EU court rulings of the incorporated legislation, the said obligation is not stipulated either by the association agreement or by Georgian legislation. However, in the process of approximation of legislation, it is necessary to take into account the interpretations received by the Court of the European Union.²³

¹⁹ Association Agreement, Chapter 14, Dispute Resolution, Articles 244-270 (In Georgian).

²⁰ See above.

²¹ For a detailed review of the literature on integration agreement criteria and such agreements, see *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*, in: *Studies in EU External Relations*, Edited by Marc Maresceau, Brill Nijhoff, Leiden, Boston, 2015.

²² *Ibid.*, 49.

²³ Decree of the Government of Georgia #183 on the provision of “Guidelines for the approximation of Georgian legislation to the legislation of the European Union”, January 30, 2020, Annex, 141 et seq.

The integrative nature of the Association Agreement is evident throughout its provisions. The preamble and Article 1 articulate the agreement's objectives, emphasizing its integrative nature. According to the very first paragraph of the preamble, "... the common desire of the parties [is] to further develop, strengthen and extend their relations in an ambitious and innovative way". Political association and economic integration are the leitmotifs of the preamble. Article 1 sets out its goals, emphasizing "Georgia's gradual economic integration into the EU internal market" and "*far-reaching market access*" (Paragraph 2, Sub-Paragraph "h").

Moreover, Articles 80 and 87 allow for revisions to further liberalize trade in services and establishment based on Georgia's successful fulfilment of obligations, primary legislative convergence. The spirit of the preamble, aiming to strengthen and deepen relations "in an ambitious and innovative way", underscores the parties' commitment to Georgia's political and economic integration with the European Union.

This general spirit of the Association Agreement is echoed by the decisions of the European Union granting Georgia a European perspective²⁴ and recognizing it as a candidate country for EU membership.²⁵

Recognition of direct effect, particularly concerning regulations on trade in goods, establishments or services under the Association Agreement, could prove pivotal.²⁶ Beneficiaries of these provisions – both legal and natural persons of the parties – are able to engage in economic activities in accordance with the Agreement's provisions. Their direct involvement in enforcing these norms and their "vigilance" to protect these provisions would be crucial for Georgia's economic integration with the European Union.

For Georgia, now a candidate state for EU membership, direct application of the Association Agreement would enhance its effective enforcement. Similar to the examples discussed above, it would foster more effective legislative convergence, strengthen enforcement, monitoring, and ultimately ensure that "all citizens of Georgia" benefit as envisaged in the preamble of the Association Agreement.

3. Application of International Agreements in European Union Law

According to Article 216 (2) of the Treaty on the Functioning of the European Union, international agreements concluded by the European Union are binding on both the Union itself and its member states. However, the founding treaties do not explicitly outline how these international agreements apply within the European Union.

²⁴ European Council Conclusions on Ukraine, Membership Applications of Ukraine, of the Republic of Moldova and Georgia, Western Balkans and External Relations, 23 June 2022, point 10.

²⁵ European Council Conclusions, EUCO 20/23, Brussels, 15 December 2023, point 16.

²⁶ Such general provisions of the Association Agreement as, for example, on the approximation of foreign policy or protection of the rule of law cannot be given direct effect due to their programmatic character or content load. According to the permanent practice of the Court of the European Union, one of the prerequisites for the direct effect of the norm is its accuracy and clarity.

Consistent judicial practice established that once an international agreement enters into force, it becomes a “integral part” of EU law.²⁷ European Union law is generally directly applicable. However, this does not automatically ensure direct applicability of international agreements concluded by the European Union with other states or international organisations, though they form an integral part of EU law. This distinction arises from the unique and special (“sui generis”) legal order of the European Union law.²⁸ This exceptional status does not extend to international agreements that the European Union concludes with third states or international organisations, as the European Union Court has not recognised similar exceptionality for them so far.

International public law norms govern these agreements, similar to other international agreements. Therefore, EU jurisprudence on the applicability of international agreements concluded by the European Union needs separate consideration.

Discussing the applicability of international agreements concluded by the European Union is important to draw parallels with the applicability of the Association Agreement.²⁹

The distinguishing characteristic of EU international agreements from other EU legal norms is their foundation in public international law. While normative acts of the European Union are crafted by its institutions – the Council, the Commission, and the Parliament – international treaties involve sovereign entities of public international law, such as states and international organizations. Therefore, these agreements are assessed within the framework of public international law.

The Court of the European Union consistently emphasizes in its jurisprudence that: “It is true that the effects within the Community [now: the European Union] of provisions of an agreement concluded by the Community with a non-member country may not be determined without taking account of the international origin of the provisions in question.”³⁰ The hallmark of public international law is the primacy of the agreement between the contracting parties. Regarding the direct effect of such international agreements, the Court explains that “In conformity with the public international law Community [now: the European Union] institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisprudence in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.”³¹ It is clear that the Court distinguishes the international treaties concluded by the European Union from EU law, and this distinction lies in their public international law origins. Accordingly, it leaves the scope of action to the competent institutions

²⁷ Judgment of 30 April 1974, 181/73, Haegeman, EU:C:1974:41.

²⁸ See a footnote.

²⁹ The legal bases of the Association Agreement for the European Union are: Article 37 of the Treaty on European Union (which gives the Union the power to conclude international agreements in the field of the common foreign and security policy), Article 217 of the Treaty on the Functioning of the European Union (which gives the Union the power to conclude association agreements that provide mutual rights and obligations, common activities and special procedures will be taken into account.)

³⁰ Judgment of 26 October 1982, C-104/81, Kupferberg, EU:C:1982:362, 17.

³¹ Ibid.

(European Council, European Commission) to agree with the contracting parties on the application of such agreements, and only if this is not the case, the Court interprets, as in the case of other EU norms, the application of such agreement within EU.

In the same vein, the Court offers a significant clarification regarding unilateral determination of enforcement instruments of an international agreement by a party. It states that “According to the general rules of international law there must be *bona fides* [good faith] performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken, it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means.”³² Based on the content of the said provision, the Court acknowledges the limited authority of parties to unilaterally determine the applicability and operational means of the agreement. The parties can unilaterally determine the legal means of fulfilling the obligations under the agreement, i.e., the operation of this agreement only if (a) it is not agreed in this agreement or (b) the necessity of its direct application does not stem from the interpretation of its purpose and content.

Granting direct effect to an international agreement by the court of one party, when the other party does not reciprocate, does not contravene the principle of reciprocity in the agreement implementation.³³

In summary, the parties to an international agreement, as subjects of public international law, may, in accordance with recognized rules by public international law:

- a. Agree and take into account the issue of direct effect of the international agreement;
- b. If no agreement exists on the applicability issue, the Court interprets and determines the applicability of the agreement based on its purpose and content.

These principles will be discussed further in the context of the Association Agreement.

4. Application of the Association Agreement

The wording of the document itself plays a crucial role in elucidating the agreements between the parties regarding the applicability of the Association Agreement. Agreement means both the text of the main agreement and its annexes and protocols.³⁴

The *main text* of the Association Agreement (excluding annexes and protocols) does not explicitly address the applicability of the agreement. Only Article 414 addresses the prohibition of discrimination in the exercise of the right to appeal to courts.

Annexes to the Association Agreement concerning establishment and provision of services explicitly exclude the direct effect of these regulations.

In addition to the provisions agreed upon by the parties, *a decision of the European Council* (relevant for the EU and its member states) completely excludes the direct application of the agreement.

Each provision will be discussed in subsequent sections to clarify its legal implications.

³² Ibid., 18.

³³ Ibid.

³⁴ As per Article 426 of the Association Agreement: “Annexes to this agreement are an integral part of it.”

4.1. Article 414 of the Association Agreement

Article 414 of the Association Agreement prohibits discrimination against nationals of the other party to the agreement in their access to courts and administrative bodies within the framework of the agreement. It does not establish the direct right for individuals to invoke treaty provisions but rather ensures non-discriminatory treatment by each party towards the other's citizens seeking judicial remedies. In other words, if a party grants its own citizens (through direct action or an implementing act) the right to apply to the courts within the framework of the agreement, it is obliged to consider the same rights for the citizens of the other party. Thus, the issue of whether the treaty provisions have direct effect in domestic law remains open, without mutual agreement between the parties.

As mentioned above, the unilateral granting of direct effect by one party does not obligate the other party to reciprocate. Accordingly, Article 414 conditions that if Georgia gives direct effect to certain provisions of the agreement for its citizens, it must equally consider such rights for EU citizens, though the EU is not bound by reciprocity.

Under Article 6, Clause 3 of the Law of Georgia on International Agreements, provisions of international agreement that establish specific rights and obligations without requiring implementing measures are self-enforcing and have direct effect. This means that generally EU citizens can invoke their rights in Georgian courts if they are derived from the self-enforcing provisions of the Association Agreement. However, there are some exceptions where direct effect is excluded, such are provisions related to establishment and services (discussed below).

4.2. Exclusion of Direct Application in the Establishment and Service Sector

Provisions excluding direct application of some norms are found in the annexes to the Association Agreement, specifically addressing the establishment and provision of services under Chapter 6.³⁵ These annexes specify that “rights and obligations arising from the list below shall have no self-executing effect and thus confer no rights directly on natural or juridical persons”.

Annexes are an integral part of the international agreement and hold equal legal weight as the main text.³⁶ Accordingly, the Annexes and their provisions as a whole constitute the agreement between the parties.

³⁵ Annexes: XIV- A List of Reservations on Establishment (Union), point 3; XIV – B, List of Commitments on Cross-Border Supply of Services (Union), point 6, XIV – C, List of Reservations on Key Personnel, Graduate Trainees and Business Sellers (Union), point 9; XIV – D, List of Reservations on Contractual Services Suppliers and Independent Professionals (Union), point 10; XIV – E, List of Reservations on Establishments (Georgia), p. 3; XIV -F, List of Commitments on Cross-Border Supply of Services (Georgia), p. 6; XIV – G, List of Reservations on Key Personnel, Graduate Trainees and Business Sellers (Georgia), p. 9; XIV – H, List of Reservations on Contractual Services Suppliers and Independent Professionals (Georgia), p. 10. All mentioned annexes provide: “The rights and obligation from the list below shall have no self-executing effect and thus confer no rights directly on natural or juridical persons.”/ <<https://matsne.gov.ge/ka/document/view/2496959?publication=0>> [23.05.2024].

³⁶ Association Agreement, Article 426.

These specific annexes detail the establishment and service sectors liberalized under the provisions of the Association Agreement. More specifically, Chapter 6 of the Association Agreement – Establishment, Trade in Services and Electronic Commerce, sets out the conditions under which legal and natural persons of the Parties are allowed (a) to initiate and carry out activities in the other Party through the establishment, or (b) to provide services to customers in the territory of the other party without establishment or provide such services to customers of the other party in their own territory.

Annexes, in turn, list the sectors of economic activity (and prerequisites) to which citizens and legal entities of the other party are entitled to have access. The direct application of these provisions and thus rights derived from the liberalized sectors are not directly invocable. In the establishment and service sectors, the exclusion of direct effect means that affected parties cannot directly enforce their rights through national courts in case of violations. For example, a Georgian legal entity seeking to establish a branch in Italy is required by the Italian authorities to have a minimum capital that is twice the minimum amount of capital that is required by residents of other EU member states. According to paragraph 2 of Article 79 of the Association Agreement, Georgian legal entities enjoy the same treatment as legal entities of the European Union in accordance with the terms of Annex XIV-A. According to Annex XIV-A, Italy has only one reservation, which presumes the existence of a residence permit. Such permission has been obtained by the legal entity. However, the existence of additional double capital, which the Italian legislation provides for in this case, is not established as a reservation in the annex. Based on Article 79 of the Association Agreement and Annex XIV-A, the Georgian legal entity cannot challenge the compatibility of the Italian regulation with this agreement, as far as paragraph 3 of Annex XIV-A states that “the rights and obligations arising from the annex below shall not have the effect of self-execution and therefore, directly shall not confer rights on natural and legal persons”, implying that the possession of a residence permit does not in itself establish the right of these persons to appeal directly to the courts of EU Member States for the restoration of the violated right. Similarly, the provision of services under Article 85 of the Association Agreement is subject to the terms and conditions outlined in Annex XIV-B. According to subparagraph ‘a’ of point F of the Annex, there is no restriction on the provision of advertising services from Georgia on the part of the European Union and its member states. If a Georgian legal entity is subject to a restriction, which is not provided for EU legal entities, when providing such services, it will not be able to file a dispute in court to restore the right arising from the Association Agreement and specifically from this annex, as the annex excludes the direct effect of the rights stemming from it.

Disputes in such cases, obviously, are handled through the agreement’s formal dispute settlement mechanisms outlined in Chapter 14, involving consultations, mediation and arbitration between the parties of the agreement. A natural or legal person is forced to contact his own state authorities and provide information about the obstacle that has arisen. The latter, in turn (within discretion), decides whether to raise this issue with the other party and to go through the formal procedures provided for in the agreement. For a private person while applying to the state authorities may pose challenges, such as the absence of an appropriate mechanism or competent institution,

procedural delays, unpredictability of the results, and ambiguity of compensation issues for private individuals.

It's important to note that the exclusion of direct effect applies bilaterally, affecting both the European Union and its member states, as well as Georgia.

It should also be noted that the provisions on the exclusion of direct effect are only found in the annexes on establishment and services. Accordingly, it is presumed that these provisions do not apply to other provisions of the agreement and do not exclude their direct effect in this way.

Significantly, the placement of provisions excluding direct effect in the annexes rather than the main text underscores their strategic inclusion in the context of market integration and liberalization objectives of the Association Agreement. According to paragraph 3 of Article 406 of the Association Agreement, the Association Council, as a body created for the implementation of the Agreement, has the authority to "update or amend the Annexes to the Agreement..." depending on the objectives of the Association Agreement. The mentioned regulation gives the possibility to assume that the provisions excluding direct effect were not accidentally included in the annexes and that as a result of integration and market liberalization, the possibility is left to give direct effect to the provisions for the sake of further market integration.

4.3. European Council Decision

In 2014, the European Council adopted a decision³⁷ concerning the signing and provisional application of the Association Agreement. According to the 7th paragraph of its preamble, "The agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or member State court and tribunals." This decision explicitly excludes the direct effect of any provision of the Association Agreement at the intra-European level.

As mentioned above, under international and EU jurisprudence, the application of a treaty is established through mutual agreement of the parties. If there is no such agreement, then the court bears the responsibility to define its applicability by interpreting the purpose and content of the agreement. Therefore, an act adopted unilaterally by one party, such as the European Council's decision, cannot alone constitute an agreement between the parties.

Firstly, it should be noted that the decisions of the European Council constitute secondary sources of EU law. Decisions of general application have binding force across the entire European Union and its member states (Article 288 of the Treaty on the Functioning of the European Union). From the perspective of public international law, the decision of the European Council, as an act internal to the European Union, does not directly affect third states like Georgia. Therefore, this decision, standing alone, does not constitute an agreement between the parties. However, to fully

³⁷ Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU), preamble 7: 'The Agreement should not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals', <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014D0494&qid=1706105985064>> [23.05.2024].

understand its significance this decision may have for the interpretation of the application of the Association Agreement, it is necessary to refer to the rules of treaty interpretation, which are determined by customary law and outlined in the Vienna Convention.

Article 31 of the Vienna Convention entails the rules of interpretation of international agreements, including the definition of their applicability.³⁸ According to paragraph 2 of the mentioned article, for the purposes of interpreting an agreement “b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty” shall suffice. This provision is characterized by two cumulative elements: a. The document is drawn up by the party related to the treaty and b. The other party accepts it as a document related to the treaty. In the presence of these two prerequisites, it is possible that even a document accepted by one party can be used to determine the purpose and content of an international agreement.

The decision of 2014 of the European Council was prepared in connection with the conclusion of the Association Agreement and pertains to issues such as the provisional application and signing of the agreement.

The 2014 decision of the European Council seems to have been communicated to and accepted by Georgia. This stems from the information on the Legislative Herald,³⁹ according to which the Georgian side received a notification from the General Secretariat of the Council of the European Union about the date of the start of the provisional application of the relevant parts of the agreement. The same is confirmed by another source,⁴⁰ which repeats a similar text and refers to the mentioned decision of the European Council. It suggests Georgia’s acceptance of the decision of the European Council.

Therefore, since both conditions of Article 31 of the Vienna Convention appear to be met, the 2014 decision of the European Council can serve as a document related to the Association Agreement, clarifying aspects of its application. Consequently, the decision excludes the direct effect of the Association Agreement within the European Union.

³⁸ See Footnote 3 on the opinion of the Court of the European Union regarding the binding nature of the court of Vienna Convention. Vienna Convention: “Article 31. The general rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

³⁹ Association Agreement, third paragraph of the preamble, <<https://matsne.gov.ge/ka/document/view/2496959?publication=0>> [23.05.2024].

⁴⁰ <https://www.asocireba.ge/show_article.php?id=30&id=30#ganmarteba> [23.05.2024].

It remains uncertain how the Court of Justice of the European Union will consider this argumentation and whether it will uphold the provisions set out in the 2014 decision of the European Council. Traditionally, the Court has recognized direct effect of provisions in association, partnership and cooperation Agreements.⁴¹ However, in the presence of such an exceptional decision by the European Council in this case – unprecedented in relation to previous association and partnership agreements – leaves room for potential deviation from established judicial practices. Especially, considering the fact that the decision on the application of the international agreement is the discretion of the parties (the relevant institutions represented by the European Union: the European Council, the European Commission), it would not be unexpected from the Court to abandon its established practice. Such a departure would significantly impact the purpose and importance of the Association Agreement and Georgia's integration into the internal market.

5. Summary

Granting direct effect to EU law has been pivotal in driving internal integration processes within the EU. This principle ensures that EU law can be invoked directly by individuals and entities before the courts, thereby fostering uniformity and coherence in the application of EU rules.

Giving direct effect to the Association Agreement, as an integration agreement, is also essential for its effective implementation. EU case law has established that the parties to an international treaty, including integration agreements like the Association Agreement, can agree on its application. This agreement is provided for in the annexes related to the establishment and provision of services, where the parties have explicitly excluded direct effect.

Aside from the provisions in the annexes related to establishment and services, the Association Agreement does not explicitly address the direct effect of its other parts. The only specific provision regarding the exclusion of direct effect is found in the 2014 decision of the European Council, which applies within European Union. This decision can be considered a treaty document under the Vienne Convention, potentially influencing the interpretation of the Association Agreement's application.

On the other hand, in Georgia, the self-enforcing norms of the Association Agreement (except for the establishment and service provisions) apply directly. This means that Georgian citizens and entities can rely on these provisions in their national courts without the need for further

⁴¹ See the cases within the framework of association agreements concluded with Eastern European countries (so-called European agreements): Judgment of 27 September 2001, C-63/99, *GŁoszczuk*, EU:C:2001:488; Judgment of 27 September 2011, C-235/99, *Kondova*, EU:C:2001:489; Judgment of 27 September 2001, C-257/99, *Barkoci and Malik*, EU:C:2001:491; Judgment of 20 November 2001, C-268/99, *Jany*, EU:C:2001:616; Judgment 29 January 2002, C-162/00, *Land Nordrhein-Westfalen v Pokrzeptowicz-Meyer*, EU:C:2002:57. Also, cases: Judgment of 31 January 1991, C-18/90, *Onem v Kziber*, EU:C:1991:36; Judgment of 11 November 1999, C-179/98, *Belgium c Mesbah*, EU:C:1999:549 (Cooperation Agreement with Morocco) Judgment of 5 April 1995, C-103/94, *Krid v WAVTS*, EU:C:1995:97; Judgment of 15 January 1998, C-113/97, *Babahenini v Belgium*, EU:C:1998:13 (Cooperation Agreement with Algeria); Judgment of 11 May 2000, C-37/98 *Savas*, EU:C:2000:224 (EU – Turkey Association Agreement) Judgment of 24 September 2013, C-221/11, *Demirkan*, 62011CA0221; Judgment of 11 September 2014, C-91/13, *Essent Energie*, 62013CA0091.

implementation measures. The same applies to European citizens, in accordance with the principle of non-discrimination.

In summary, the question of whether the Association Agreement directly applies (other than establishment and services) in the territory of the EU can only be determined by the Court of Justice of the EU. The judicial practice to date regarding association and partnership agreements concluded by the European Union recognises the direct effect of such agreements, considering their objectives and content. The extent to which the Court of Justice of the European Union will adhere to this precedent in recognizing the direct effect of the Association Agreement will depend on its interpretation of the Agreement, considering both EU law and international norms under the Vienna Convention.

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