

## **The Dutch Referendum on the EU-Ukraine Association Agreement**

### **Legal options for navigating a tricky and awkward situation**

**Guillaume Van der Loo**

In an advisory referendum held in the Netherlands on April 6<sup>th</sup>, over 61% of the voters rejected the ratification of the Association Agreement (AA) between the EU and Ukraine. If the Dutch government were to act on the outcome of the referendum, which had a low turnout of 32%, an unprecedented situation would emerge in which an EU international agreement cannot enter into force because a member state is not in a position to ratify it. Although the political character of this referendum and the Dutch Advisory Referendum Act (DRA) and the geopolitical implications of the AA itself have already been the subject of heated discussions in the Netherlands and beyond, the legal implications of this referendum remain unclear.

#### **The current legal status of the Association Agreement**

Because the Association Agreement, signed in March and June 2014, includes provisions that fall under the competences of both the EU and its member states, it was concluded as a so-called ‘mixed’ agreement. This implies that it must be ratified both at the EU level by the institutions and by the 28 member states, each according to its own ‘constitutional’ procedures. Usually, this process takes three years to complete, although there have been cases requiring much longer. In order to circumvent a long ratification procedure, a large part of the agreement that falls under the competences of the EU has been provisionally applied (accounting for around 80% of its provisions).<sup>1</sup> The Council Decisions for the signature and provisional application of the Association Agreement<sup>2</sup> applied a large part of the ‘political’ chapters of the agreement since 1 November 2014 (e.g. provisions related to general principles, political dialogue and the institutional framework). In response to political pressures from Russia, the provisional application of the trade part of the agreement (i.e. the Deep and Comprehensive Free Trade Area (DCFTA)) was postponed until 1 January 2016. Only when all the EU member states have ratified it, can the entire agreement enter into force.

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<sup>1</sup> Author’s own calculation. For more details, see G. Van der Loo, “The EU-Ukraine Association Agreement. A New Legal Instrument for EU Integration without Membership?”, Brill/Nijhoff, 2016.

<sup>2</sup> Council Decision 2014/295/EU; Council Decision 2014/668/EU as amended by Council Decision 2014/691/EU.

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Meanwhile, all the EU member states have ratified the Association Agreement. In the Netherlands, the Approval Act for the ratification of the agreement was adopted by the House of Representatives (Second Chamber) on 7 April 2015 and the Senate (First Chamber) on 7 July 2015. However, the entry into force of this Approval Act (and thus the Netherlands' ratification) was suspended due to the start of the referendum procedure under the DRA.

### Exactly what were the Dutch citizens voting for?

It is now claimed that the Dutch voters have rejected the Association Agreement in the referendum, but the reality is more complex. The subject of the referendum was actually not the EU-Ukraine Association Agreement as such, but the Approval Act that ratified the agreement.<sup>3</sup> This law was the legal instrument by which the Kingdom of the Netherlands ratified the member states' elements of the 'mixed' EU-Ukraine Association Agreement. Most likely, few Dutch voters were aware of this subtle technicality when they cast their vote on April 6<sup>th</sup>. In fact, the situation is even more abstract as nowhere in the agreement or in the Council Decisions signing the agreement is it indicated which provisions of the agreement fall under exclusive member state (and thus Dutch) competences. Such a delineation is traditionally avoided to prevent competence conflicts between the European Commission and the European Parliament on the one hand, and the Council and the member states on the other. The scope of the provisional application of the agreement already gives an indication which elements are not considered as member states' competences, as only provisions falling under the EU competences can be provisionally applied. For example, whereas the entire trade part of the AA (i.e. the DCFTA) can be considered as falling under EU competences, other provisions from the political part of the agreement, such as those on judicial cooperation, the fight against corruption and political dialogue, could still fall under the ambit of the EU member states.

### The consequences of the no-vote

According to the DRA, the Dutch government now has to decide whether it will propose a law that repeals the Approval Act, or a law that confirms it.<sup>4</sup> In either scenario, approval by the Parliament is required, but this 'repealing' or 'confirming' law cannot again be the subject of a new referendum.<sup>5</sup> Although the referendum is thus not binding, Prime Minister Rutte has already stated that the ratification "could not go ahead unhindered". The Dutch Prime Minister of the liberal People's Party for Freedom and Democracy (VVD) stated that he now envisaged a three-step approach: i) agree on a strategy with his Social-Democrat coalition partner (the PvdA), ii) discuss the issue with members of the House of Representatives and iii) discuss the issue with "the partners in Brussels", a process that could take several weeks, according to Mark Rutte. The spokesperson of Commission President Juncker declared that it is indeed first "for the government of the Netherlands to analyse the outcome and decide on the course of action", which was also confirmed by Donald Tusk, President of the European Council. In this view, this issue will most likely not be decided at the next Foreign Affairs

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<sup>3</sup> Staatsblad van het Koninkrijk der Nederlanden, Jaargang 2015 (315), 'Wet van 8 juli 2015, houdende goedkeuring van de op 27 juni 2014 te Brussel tot stand gekomen Associatieovereenkomst tussen de Europese Unie en de Europese Gemeenschap voor Atoomenergie en haar lidstaten, enerzijds, en Oekraïne, anderzijds'.

<sup>4</sup> Art. 12(3) DRA.

<sup>5</sup> Art. 5(h) DRA.

Council on April 18-19, but more probably at the level of Heads of State or Government at the June 23-24 June European Council. Reaching a political compromise then would push the issue beyond the British 'In/Out' referendum of June 23<sup>rd</sup> and provide for a soft positive note at the end of the Dutch EU Presidency.

In any case, the immediate legal consequences of the no-vote are limited. As long as the Netherlands does not ratify the Association Agreement, it cannot fully enter into force. However, this has no impact on the provisional application of the agreement, which can continue indefinitely. As mentioned above, only a small part of the agreement is not provisionally applied, such as provisions related to defence cooperation, conflict prevention, taxation, public finances, the fight against terrorism, migration and border control. The Dutch Foreign Minister has replied to a Parliamentary question that it would not make sense to continue with the provisional application of the Association Agreement in the event it is not ratified.<sup>6</sup> It would indeed be paradoxical to indefinitely provisionally apply an agreement that it is not ratified. However, the Council Decisions on the signing of the agreement do not specify an expiry date for the provisional application. The article in the Association Agreement on provisional application (Art. 486) states that either Party may terminate the provisional application of the agreement, but on the side of the EU this would require a unanimous Decision of Council.<sup>7</sup> Therefore, no single EU member state can halt the provisional application of the Agreement.

A far-reaching but unlikely interpretation by the Dutch government of the referendum would be that it would decide not only to refuse to ratify the 'member states' parts of the agreement, but also to block the EU ratification of the agreement. Before the agreement can be officially concluded it must be ratified not only by each of the 28 member states, but also by a unanimous Council Decision. It would be perceived as rather undemocratic and politically embarrassing if the rotating EU Council Presidency were to refuse to ratify a landmark international agreement that has been ratified by the other 27 EU member states, by the European and Ukrainian Parliaments and approved by the two Dutch chambers and the Dutch government because less than 20% of eligible voters of one member state, representing 0.6% of the entire EU population, voted against (parts of) the agreement in a consultative referendum.

### Possible solutions

The Dutch government is now in the awkward position that it cannot ignore the outcome of the referendum, which would be a risky domestic move with general elections scheduled for March 2017, but it also would not want to block the conclusion of a landmark agreement while holding the rotating EU Council Presidency. Two options would allow for the completion of the ratification procedure while at the same time taking into account the no-vote.

The first option would be that the EU, the member states and Ukraine would adopt a kind of an 'adjusting protocol', which would delete the Netherlands as one of the contracting Parties to the agreement. Such a strategy was adopted when Switzerland was not in a position to ratify the EEA Agreement in the early 1990s.<sup>8</sup> This would mean that the Netherlands would not adopt the Approval Act (thus following the outcome of the referendum), but would still ratify

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<sup>6</sup> Minister of Foreign Affairs Bert Koenders, "Answers to Members Omtzigt, Verhoeven, Voordewind on the provisional application of the EU-Ukraine Association Agreement", Tweede Kamer der Staten Generaal, 3 February 2016.

<sup>7</sup> Article 218(8) TFEU requires that the Council decides by unanimity for Association Agreements.

<sup>8</sup> On this point, see P. Van Elsuwege, "What will happen if the Dutch vote 'No' in the Referendum on the EU-Ukraine Association Agreement?", Verfassungsblog, 10 February 2016.

the agreement at EU level in the Council. However, such an option could create legal uncertainty because, as mentioned above, it is not entirely clear which elements of the agreement fall under national competences. However, the most important parts of the agreement fall under EU competences (e.g. the DCFTA) and would thus apply in the Netherlands.

A second option would be to adopt a joint declaration or protocol that would address the main concerns of the no-camp. Such a legal instrument can be mainly declaratory (i.e. the soft option), stating for example that the agreement will not lead to Ukraine's EU accession or to increased EU military involvement in the conflict in Eastern Ukraine. Alternatively, it can take the form of a legally binding Dutch 'opt-out' from some parts of the Agreement (e.g. provisions on military cooperation). Obvious parallels can be drawn to the opt-outs of the UK, Ireland and Denmark from the application of the agreement's non-discrimination provision for third-country nationals (Art. 17). Unlike the Netherlands, however, these countries have the competence to do so on the basis of their opt-outs in the EU's Area of Freedom, Security and Justice (Protocols 21 and 22 to the EU Treaties). The tricky element in this scenario would be that not only the EU member states and the European Parliament need to agree on the precise scope of the Dutch 'opt-out', but also that Ukraine would need to give its consent. This could re-open difficult negotiations on sensitive issues, such as on the preclusion of an EU membership perspective for Ukraine. Moreover, if such a deal would be enshrined in a legally binding protocol, then a new ratification round in all the EU member states and Ukraine would be required.