

## ROLE OF “ENTREPRENEURS” IN IMPLEMENTATION OF INTERNATIONAL REGULATION

**Purpose.** The purpose of the study is to show the decisive role of a new group of dynamic actors (social, economic and political “entrepreneurs” according to R. Koppl, S. Kauffman, T. Felin, and G. Longo) in implementation of international treaty obligations in the developing country and describe the algorithm of this process. The study also examines the necessary conditions for the successful implementation of international obligations, in particular, approximation of national legislation with EU legislation.

**Methods.** Qualitative method is used to explore the role of “entrepreneurs” in implementation of international treaty obligations and examine theories of transplant effect and spontaneous legal order in adaptation of international regulation by the developing country. Such scholarly approach as case study is used for exploration of the role of “entrepreneurs” in creation of the “ProZorro” platforms and fulfillment of international obligations in the sphere of public procurement (according to the Association Agreement between Ukraine and the EU). Non-empirical scholarly approach helped to analyze the particularities of the Association Agreement in terms of standards for public procurement and evolution of relevant Ukrainian legislation.

**Results.** Successful implementation of international treaty is impossible without taking into account the following conditions. First, institutional capacity is crucial for implementation of treaty obligations. However, when the capacity is low, it can be built due to creative initiative and professional ability of dynamic actors from business, civil society, international organizations. Second, familiarities of legal systems are also very important. However, the case of public procurement demonstrated that effective transplantation was ensured by “entrepreneurs” through their freedom to chose appropriate version of “legal transplant”. Third, demand for implementation of the obligations in the area of public procurement was created by “entrepreneurs”, who passed the way from the initiative group of volunteer to the public procurement officials. Four, international assistance, both expert and financial, attracted by entrepreneurs was extremely important for elaboration of the legal basis for implementation of the EU regulation.

**Conclusions.** There is no clear algorithm for implementation of regulation. The case of public procurement was characterized by the spontaneity of interactions that were difficult to predict. However, emergence of a new group of dynamic actors in the public administration was decisive for success of the reform. Therefore, to enhance the implementation of regulation of other sectors of the Association Agreement, it is important to create an opportunity for initiative “entrepreneurs” and their cooperation with business, public officials, NGOs, international experts and other stakeholders.

**Key words:** e-government, public procurement, international treaty, public administration, Association Agreement, legal transplants.



**Svitlana Mastruk,**  
*Master of Jurisprudence  
 (MJ) Candidate  
 Program in Rule of  
 Law for Development  
 (PROLAW) Rule of Law for  
 Development Institute,  
 Loyola University  
 Chicago School of Law –  
 John Felice Rome Center  
 orcid.org/0000-0003-4127-2830  
 Sv.mastruk@gmail.com*

## 1. Introduction

Signing Association Agreement (further – AA) with the EU in 2014 (European Commission, 2014), Ukraine took a responsibility to implement a complex of obligations, which aimed at approximation of Ukrainian legislation to the EU *acquis*<sup>1</sup>. However, the greatest difficulty is that this large volume document written on over 2,000 pages (7 titles, 486 articles, 43 annexes, etc.) envisaged much more than changes in legislation – obligations that “regulate not only state conduct but also the activities of individuals and private entities” (McInerney, 2015: 11).

The political part of AA entered into force on November 2014, the Deep and Comprehensive Free Trade Agreement (DCFTA) – since January 2016. The EU did not experience “such a far-reaching contractual relation to a non-candidate state like Ukraine” (Sushko et al., 2012: 2).

The possible failure of the AA implementation was and still is risky for both sides – the EU and Ukraine – from the following reasons. The situation before and after the signing of the AA was extremely complicated because of EuroMaidan revolutionary events, illegal annexation of Crimea, ongoing war in the East of Ukraine. Ukrainians considered the AA as a chance for radical reforms and rapid economic development, the EU – a possibility to have a stable and reliable partner at its eastern borders. However, after 4 years of the AA implementation, Ukraine shows rather disappointing results and a slow pace of implementation of its obligations (European Commission, 2018: 13).

The lack of quick and effective results of structural reforms, which the Ukrainian population associated the AA with, creates a tension in the society and provides the basis for strengthening the populist and pro-Russian forces. In turn, the EU and other international institutions, whose financial assistance helped to balance the economic situation after a sharp decline in 2014–2015, also does not conceal the disappointment concerning slow implementation of the AA, promised by the Government of Ukraine.

In general, expert organizations, which conduct the monitoring of the treaty implementation, point out on the following

<sup>1</sup> Art. 217 of the Treaty on the EU (“The Union may conclude an association agreement with one or more third countries or international organizations in order to establish an association involving reciprocal rights and obligations, common actions and special procedures”) introduces the EU *aquis* for association relationships.

reasons that hinder the successful fulfillment of the AA: 1) poor capacity of the government institutions; 2) low quality of legislative process; 3) conflict of interest of the politicians and stakeholders; 4) lack of the rule of law (NGO “Ukrainian Center for European Policy”, 2018). The following international ratings confirmed this opinion. Thus, according to the Rule of Law Index (WJP, 2018) Ukraine’s rank is 77 out of 113 countries; in the World Bank index of effectiveness of law-making bodies Ukraine’s rank was 120 out of 139 countries (World Bank, 2016); according to Nations in Transit Ratings developed by the Freedom House, Ukraine’s democracy score was 4,6 (maximum – 7) with transition hybrid regime (Freedom House, 2018). These indicators prove the thesis of T.F. McInerney, that “institutional and human capacity are critical determinants of states’ abilities to implement their treaty obligations” (McInerney, 2015: 10).

However, according to the recent Association Implementation Report on Ukraine elaborated by the European Commission, Ukraine demonstrates rather advanced results in some areas of the AA related to trade. In particular, harmonization of legislation in the field of public procurement, technical regulation (market surveillance, standardization etc.), food and safety regulation are even ahead of the deadlines stipulated in the Association Agreement (European Commission, 2018). These are regulatory requirements that go under the Title IV “Trade and Trade-Related Matters” and Title V “Economic and Sector Cooperation” and are important for establishing and functioning of the DCFTA. Given that these parts of the AA are highly complicated and for its implementing “multidimensional and cross-cutting national capacities must be in place”, only public procurement, technical regulation, food and safety area advanced in carrying out of Ukraine’s commitments, providing “complex domestic administrative and enforcement mechanisms” (McInerney, 2015: 11). However, which conditions determined the success of these regulation implementation having the same weak institutional capacity, that hamper the others AA sectors progress?

D. Berkowitz, K. Pistor, and J.-F. Richard describe such necessary conditions for regulations’ “transplanting” efficiency, as existence of demand, adaptation to local particularities, and familiarity with the legal system the country of origin of the law (Berkowitz et al., 2003). However, the role of entrepreneurial effect (political, social, economic) within these elements needs to be explained more (Koppl et al., 2014).

These three spheres of successful implementation of the AA – public procurement, technical regulation, food and safety – are characterized by co-evolutionary process, more spontaneous that predesigned (Devins et al., 2015) with unpredictable coincidences of circumstances, active participation of volunteers, business, international experts, NGOs, and public officials.

The case of Ukraine’s electronic open source government e-procurement system ProZorro regulated by the requirements of the AA regarding public procurement is interesting and quite revealing in this context. Moreover, it affected a wide range of other administrative mechanisms, processes and actors.

In particular, using the case of implementation of public procurement regulation and co-creation of the ProZorro platform (Marin, 2016) (flagship reforms of the Government) we can ask – to which extent it is possible to adhere this algorithm while adapting the other “transplants” of the AA regulation? Can we talk about any algorithm existence in

case of implementation of the public procurement regulation? Or maybe the emergence of this system was more spontaneous, that designed by the AA negotiators and creators? How the institutions and laws can create opportunities for such kinds of non-algorithmic algorithms? Or the lack of the institutional capacity can be an opportunity?

## **2. Evolution of public procurement regulation**

R. Koppl, S. Kauffman, T. Felin, and G. Longo in their study “Economics for a creative world” pointed out that “institutions are generated from the “entrepreneurial” innovations of many dispersed actors, which contribute to the evolution of institutions beyond their original design in order to adapt to shifting environments” (Devins et al., 2015: 624).

This idea worth to be considered as an important assumption of the public procurement regulation success in Ukraine.

The ProZorro platform (electronic public procurement system) was set up and launched on a pro bono basis by a group of different stakeholders “co-creators” – volunteers, anti-corruption activists, business, public officials (a number of volunteers came from the private sector and started to occupy government posts right after the Euro-Maidan revolution) in assistance with the consortium of international organizations leading by Transparency International in 2014 and 2015 (Marín, 2016).

The urgent need to eliminate corruption and ensure the best value for money arose after the sharp economic downturn (GDP fell by 7% in 2014 and 10% in 2015), which stimulated reduction of public expenditures and accordingly introduction of measures for combatting corruption and use public expenditures as much effective, as possible. Thus, according to the Ministry of Economic Development and Trade, Ukraine was losing 2 billion of USD (2,2% of GDP per year) due to different corruption schemes and inefficiency in the public procurement sphere (Dmytryshyn et al., 2018). Also, in 2015 Ukraine occupied 130 position among 168 countries in the rating Corruption Perception Index, elaborated by Transparency International (Transparency International, 2015). But the Government did not consider the reform of public procurement as the first priority.

Therefore, a spontaneous coincidence of threatening circumstances played a decisive role in creating incentives for combatting corruption by emerged political, social and economic “entrepreneurs”. Having no trust in the authorities, citizens and non-governmental organizations – together with international observers and international financial institutions – pushed politicians to reform the system (Marín, 2016: 7).

By that time, Ukraine had ineffective and overwhelmed legislation in the field of public procurement. Its evolution started from the first Government regulation in 1997 in order to meet the World Trade Organization requirements. Despite the fact that the first procurement law (adopted in 2000) included best international practices and EU procedures, it had a number of shortcomings. Also, there was a tentative to implement EU Directive 2004/17/EC on the procurement procedures, however, the “transplant” did not work properly and caused significant corruption. During the next years the Government and the Parliament of Ukraine continued attempts to review the legal framework of public procurement, but the success was miserable. A number of changes to the public procurement legislation have created confusing and complicated procedures, which

were paper-based, not transparent, and ineffective. Such environment was perfect for excessive corruption and discouraging for business. “Top-down” approach in creating regulations for public procurement has failed.

This co-evolutionary process between law and society cannot be controlled, predicted, or even fully understood. The spontaneous order of law emerges from the innumerable interactions of judges, lawyers, policymakers, regulated entities and the society at large (Devins et al., 2015: 624). However, how did these entrepreneurs interact during that spontaneous coincidence of circumstances?

In 2014 a group of volunteers at the request of that time Minister of Economic Development and Trade of Ukraine started to work on public procurement as one of the area for reforming under the mandate of the Ministry. They engaged through open discussions all those interesting in the reform, but who was not related to the previous system – “these people became the core of the future ProZorro team” (Marín, 2016: 11).

Having a great credit of trust this group of people managed to involve in the fruitful discussion the representatives of the Parliament, the Government, business, NGO and international organizations.

Without support of the head of the Department of Public Procurement, volunteers got in touch with the experts of the EU technical support project for the public procurement reform in Georgia. Thus, volunteers organized the working group within the Ministry of Economic Development and Trade using the Georgian model for elaboration of public procurement regulation. Also, the volunteers received support from the Open Contracting Partnership in terms of application of the Open Contracting Data Standard.

At the same time, with the involvement of government officials, volunteers have negotiated with the business on providing the market place, and IT developers for the design and creation of the architecture of a new electronic system for public procurement.

Remarkably, that the “novelty intermediation” (Koppl et al., 2014: 14) of volunteers helped not only to use the latest technologies in the construction of a digital platform for public procurement, but create a holistic hybrid system (called “ProZorro”) with the innovation in its heart. The Ukrainian version of e-platform located on the private marketplaces is similar to the examples from the countries of the EU with innovative approaches to e-procurement system (Sweden, UK, Denmark) (Marín, 2016: 19). The developers of the Ukrainian ProZorro platform used Ukraine’s advantage in the field of IT. Paradoxically, but unlike the low positions in almost all world ratings, Ukraine is among 50 the most innovative countries (ranking 43 in the Global Innovation Index) (Global Innovation Index Report, 2018). The case of ProZorro is characterized by assertion of R. Koppl, S. Kauffman, T. Felin, and G. Longo: “Novelty intermediation is not about the diffusion of innovations. It is about finding the innovation in the first place” (Koppl et al., 2014: 16).

Therefore, the traits of regulation derived from the architecture of the ProZorro platform. In 2014 the working group developed a concept for reform. In February 2015 a pilot version of the ProZorro platform was launched. Remarkably, that it became an interesting example of the private-public partnership, as the business provided free market place entering the market of public procurements, and the e-procurement system received financing from these market places without any financial support from

the state. Also, the team of the ProZorro platform received financing from international organizations.

However, the pilot version of the ProZorro platform functioned without legal approval. A number of government bodies have begun to use the system for their purchases on a voluntary basis. In order to provide an effective functioning of the system and elaborate new legal framework for public procurement, the Minister of Economy and Trade decided to institutionalize the group of volunteers in the Department of Public Procurement. Such an important step toward the strengthening of the institutional capacity of the Ministry of Economic Development and Trade helped to ensure further harmonization of Ukrainian legislation in the field of public procurement with EU legislation, in accordance with the deadlines provided for in the AA.

Hence, the new legal framework regulated the functioning of a unique electronic platform, fully implementing Ukraine's commitments to the EU not simply by transplanting, but by abandoning EU regulation to the organic network a spontaneously created legal order. Thus, after the necessary changes to the new law on public procurement and secondary legislation in 2015, it was declared that all public procurements should be conducted through the ProZorro platform from August 1, 2016.

The same group of "entrepreneurs" develop comprehensive Strategy of reforming the system of public procurement, marking the step-by-step implementation of all obligations under the AA in these spheres, its measures and deadlines, as well as the responsible bodies (Cabinet of Ministers of Ukraine, 2016). The Government adopted the Strategy in 2016. Such a nonlinear path was overcome to create an institutional capacity for implementation of the transplanted EU regulation, which began to significantly affect all actors in the process and also became an example for "entrepreneurs" from other areas of implementation of the AA.

In parallel, cooperation between "entrepreneurs" continues regarding enhancing users' capacity on the procedures and opportunities of the e-platform "ProZorro". Also, a team of former volunteers – new civil servants began to develop a monitoring and analytical tool together with their partners.

That was an example, how "laws are set in motion and catapulted into an ever-evolving dance between the legal system and the entities it regulates" (Devins et al., 2015: 624) plus "entrepreneurship" of volunteers becoming "intermediaries". They find an opportunity "to discover the novel possibilities of the adjacent possible, including novel combinations of elements, some of which may be old and others, perhaps, new" (Koppl et al., 2014: 26).

### 3. Algorithm of implementation of the treaty commitments

***Institutional capacity.*** Institutional and human capacity are critical determinants of states' abilities to implement their treaty obligations (McInerney, 2015: 10). However, the capacity of the state in implementation of regulation in the field of public procurement was extremely low at the early stage of the reform. Before the EuroMaidan revolutionary events numerous state bodies, involved in the public procurement process, resisted to effective changes, trying only to repaint the facade of the relevant legislation in order "to block innovations that threaten their economic position, their rents" (Koppl et al., 2014: 26).

The fateful coincidence of circumstances gave way to creative innovators who took advantage of the institutional weakness and offered an effective agenda to the stakeholders, who had real demand for public procurement reform. Only after success story with the launch of the ProZorro platform, the Minister of Economy and Trade introduced the group of volunteers to the managing positions of the Department of Public Procurement with the opportunity to begin work on drafting legislation. As a result, the “cross-cutting” capacity development in “legislative drafting, policy-making, planning, organization, administration, enforcement, technology, budgeting, knowledge and information, institutional partnership and monitoring” successfully began (McInerney, 2015: 10).

Remarkably, the institutional capacity was built (even not enhanced) after the signing the AA and heated by the revolutionary events due to creative initiative and professional ability of the volunteers and other “entrepreneurs” from the business, civil society, international organizations.

**Familiarities of legal systems and adaptation.** Experts, who conduct monitoring of the AA implementation, stressed that one of the factors characterizing successful fulfillment of commitments was a long process of harmonization, which started before the AA signing (Berkowitz et al., 2003). However, the case of public procurement demonstrated that the reason for effective transplantation was not an experience (path dependency made effective changed even more doubtful). The way on how the volunteers decided to use already adapted by Georgia transplanted EU regulation, was decisive. Therefore, “entrepreneurial” freedom from the ineffectual history of successors and their flexibility regarding finding the appropriate version of “legal transplant”.

**Demand.** Since neither the Government, not the Parliament made an inquiry to start implementation of AA from the area of public procurement, the society created the demand through its “entrepreneurs”, whose cooperation evolved from the initiative volunteer group to the leading potions responsible for public procurement in the Government (Berkowitz et al., 2003). Therefore, the demand was not “top-down”, but “bottom-up”. These volunteers were able to try different approaches, not being constrained by the need to win the next set of elections (Marín, 2016: 11).

**International assistance.** We can not underestimate the expert support from the EU and Georgia, which Ukraine has received for the reform of public procurement. Despite the tendency to criticize European technical projects, the Ukrainian case confirms the importance of expert assistance during the process of elaboration of the legal basis for implementation of the EU regulation. The Harmonization of the Public Procurement System of Ukraine with EU Standards project and Georgian procurement experts brought an extremely valuable experience in terms of successful legal approximation and creation of the e-procurement system (the group of volunteers used the Georgian model as a basis, that in the future evolved significantly) (Marín, 2016: 11).

#### 4. Conclusions

Summarizing the particularities of the process of the AA regulation implementation in the area of public procurement the following treats were reviled. Nevertheless, it is difficult to talk about clear algorithm, as the sequence of actions is characterized by the spontaneity of interactions that were difficult to predict.

However, one factor was decisive for the success of the reform – the emergence of an absolute new group of dynamic actors in the public administration, which independently undertook the initiative to conduct reform in a critical case scenario – the annexation of the Crimea, the war on the Donbass, the decline of the economy, the inability of state institutions to meet the demands of society. This was a group of volunteers who were able to break away from the past negative experience with incentives based on enthusiasm and motivation to make the public procurement work.

For the first time in Ukrainian history “entrepreneurs” become drivers of the state development and implementation of its treaty obligations due to innovations and creation of effective cooperation with business, NGOs and international organizations. The “entrepreneurs” creatively used the weakness of institutions as an opportunity to set their own agenda and after the successful start of the reform replaced the Department of Public Procurement in the Ministry.

As R. Koppl, S. Kauffman, T. Felin, and G. Longo mentioned, that “central task in entrepreneurial economics is to ask what institutions and laws (conceived, perhaps, as webs of enabling constraints that create adjacent possible opportunities) promote favorable entrepreneurial opportunities” (Koppl et al., 2014: 25). It is equally important to create favorable conditions for entrepreneurs in the context of the implementation of international treaties regulations, especially in those areas where there is a lack of institutional capacity. For this, no algorithms exist, besides emergence of necessary actors and some common traits, which may vary significantly in different spheres. For instance, to enhance the implementation of regulation of other sectors of DCFTA between Ukraine and the EU, it is important to create an opportunity for initiative “entrepreneurs” in cooperation with business, public officials, NGOs, international experts and other stakeholders; rebuild capacity of responsible institutions; use experience of successful adaptation of “transplanted” regulation by other country with the familiar legal system and history; involve expert assistance from the NGOs and international organizations; and meet the demand of society, not the interest of a narrow circle of oligarchic groups. This mean that developing countries like Ukraine have to elaborate more comprehensive to implementation of international regulation.

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## РОЛЬ «ПІДПРИЄМЦІВ» В ІМПЛЕМЕНТАЦІЇ МІЖНАРОДНОГО РЕГУЛЮВАННЯ

**Світлана Майструк,**

здобувач ступеня магістра права (MJ) в Інституті верховенства права для розвитку,  
Школа права Університету Лойоли Чикаго – Римський центр Джона Феліче

orcid.org/0000-0003-4127-2830

Sv.maistruk@gmail.com

**Метою** статті є дослідження ролі нової групи динамічних акторів (соціальних, економічних і політичних «підприємців», згідно з Р. Коплом, С. Кауффманом, Т. Феліном та Дж. Лонго) у процесі імплементації міжнародних зобов'язань Україною, а також висвітлення алгоритму цього процесу. У статті також аналізуються умови, необхідні для успішного виконання Україною міжнародних договірних зобов'язань, зокрема, наближення національного законодавства до законодавства Європейського Союзу.

**Методи.** У статті використовується якісний метод наукового дослідження, який застосовується автором для аналізу ролі «підприємців» у процесі реалізації Україною міжнародних договірних зобов'язань, а також під час дослідження значення теорій «ефекту трансплантації» та спонтанного правового порядку в ході адаптації європейських стандартів в окремих сферах публічного адміністрування. Такий науковий підхід, як «case study», використовується для дослідження ролі «підприємців» у створенні платформи «ProZorro» та виконання міжнародних зобов'язань у сфері державних закупівель (відповідно до Угоди про асоціацію між Україною та Європейським Союзом). Неемпіричний науковий підхід дав змогу проаналізувати особливості Угоди про асоціацію в частині вимог до державних закупівель та еволюції відповідного законодавства України.

**Результати.** Успішне виконання міжнародних договорів та адаптація міжнародного законодавства до законодавства України неможливі без урахування певних умов. По-перше, інституційна спроможність держави має вирішальне значення для виконання договірних зобов'язань перед Європейським Союзом. Однак коли інституційний потенціал держави є низьким, то він може бути розвинений за рахунок творчої ініціативи та професійних здібностей динамічних акторів із бізнесу, громадянського суспільства, міжнародних організацій. По-друге, дуже важлива схожість правових систем, від якої залежить успіх подальшої конвергенції. Проте у випадку імплементації Україною стандартів Європейського Союзу у сфері державних закупівель було продемонстровано, що ефективна трансплантація забезпечена шляхом надання новим динамічним акторам свободи в реалізації найбільш оптимальних та успішних підходів до регулювання в цій сфері. По-третє, суспільний запит на виконання Україною договірних зобов'язань у сфері державних закупівель був реалізований «підприємцями», які пройшли шлях від ініціативної групи волонтерів до посадових осіб сектора державних закупівель. По-четверте, міжнародна допомога, залучена «підприємцями» (як експертна, так і фінансова), була надзвичайно важливою для розроблення правової основи майбутніх змін.

**Висновки.** Немає чіткого алгоритму імплементації міжнародних стандартів регулювання певних суспільних відносин. Процес імплементації в Україні стандартів Європейського Союзу у сфері державних закупівель характеризувався спонтанністю,

*яку було важко спрогнозувати й передбачити. Однак поява нової групи динамічних акторів у публічному адмініструванні була вирішальним фактором успіху цієї реформи. Тому для активізації впровадження в національну правову систему регулювання інших секторів Угоди про асоціацію між Україною та Європейським Союзом важливо створити умови, які дадуть змогу ініціативним «підприємцям» реалізовувати відповідні реформи в співпраці з бізнесом, державними посадовими особами, громадськими організаціями, міжнародними експертами та іншими зацікавленими сторонами.*

**Ключові слова:** електронне урядування, державні закупівлі, міжнародні договори, публічне адміністрування, Угода про асоціацію, правові трансплантації.