

# INTEGRATION WITHIN ASSOCIATION: IMPLEMENTATION DYNAMICS OF THE EU-UKRAINE AGREEMENT

Kyiv  
December 2019



INTERNATIONAL  
RENAISSANCE  
FOUNDATION



UKRAINIAN SIDE OF THE  
EU-UKRAINE CIVIL  
SOCIETY PLATFORM

This publication was prepared within the project 'Civic Synergy', implemented by the International Renaissance Foundation with the financial support of the European Union, with involvement of experts of the Ukrainian side of the EU-Ukraine Civil Society Platform and other independent experts.

The sole responsibility for the content of this publication lies with the authors. It does not necessarily reflect the opinion of the European Union and the International Renaissance Foundation.

The publication presents an analysis of the situation as of November 2019.

The International Renaissance Foundation (IRF) was founded by the philanthropist George Soros in 1990. It is one of the largest Ukrainian charitable foundations, and is part of the Open Society Foundations international network. The IRF's mission is to develop an open society in Ukraine on the basis of democratic values. More: [www.irf.ua/en](http://www.irf.ua/en)

The 'Civic Synergy' project aims at strengthening civic participation in implementation of European integration reforms in Ukraine through development of the Ukrainian Side of the EU-Ukraine Civil Society Platform and the Ukrainian National Platform of the Eastern Partnership Civil Society Forum. The project is funded by the European Union, co-funded and implemented by the International Renaissance Foundation. More: [www.civic-synergy.org.ua/en](http://www.civic-synergy.org.ua/en)

The Ukrainian Side of the EU-Ukraine Civil Society Platform is part of the bilateral Civil Society Platform established in accordance with the Articles 469-470 of the EU-Ukraine Association Agreement. It is set to exchange views and make recommendations to the Association Council, Association Committee and Parliamentary Association Committee on how to attain the objectives of this Agreement. More: [www.eu-ua-csp.org.ua/en](http://www.eu-ua-csp.org.ua/en)

# INTEGRATION WITHIN ASSOCIATION: IMPLEMENTATION DYNAMICS OF THE EU-UKRAINE AGREEMENT

POLICY PAPER

## ABOUT THE AUTHORS

---

### POLICY OVERVIEW CHAPTER, EDITOR-IN-CHIEF

**Dmytro SHULGA** - European programme director at the International Renaissance Foundation (the Open Society Foundation in Ukraine). Director of the EU-funded 'Civic Synergy' project. Holds M.A. in International Relations (Kyiv, Ukraine) and LL.M. in European Integration Law (Dresden, Germany).

### SECTORAL CHAPTERS

**Oleksandra BETLIY** - expert in fiscal policy. Leading Research Fellow at the Institute for Economic Research and Policy Consulting since 2002. Participated in international research projects (ETF, UNDP, the World Bank, etc). Advisor to the Minister of Finance of Ukraine since November 2018. Holds M.A. in Economic Theory (EERC master programme at the National University of 'Kyiv-Mohyla Academy').

**Andrii BUTIN** - expert in international trade policy. Senior Research Fellow at the Institute for Economic Research and Policy Consulting. Research focus on trade facilitation and export promotion, deregulation of foreign economic activity and the use of trade defence instruments. Previous 12 years experience in the public and diplomatic service. Holds LL.M. from the National Technical University of Ukraine 'Kyiv Polytechnic Institute'.

**Iryna KOSSE** - expert in transport, post, energy sectors. Senior Research Fellow at the Institute for Economic Research and Policy Consulting. Graduated from the Donetsk State Academy of Management (specialist), National University 'Kyiv-Mohyla Academy' / EERC (MA in Economics), Rutgers State University (NJ, USA) (MA in Economics).

**Vitaliy KRAVCHUK** - expert in monetary policy and financial market development. Senior Research Fellow at the Institute of Economic Research in Kyiv. He has worked at this think tank for over 10 years. Holds M.A. in International Economics from the Institute of International relations of the Taras Shevchenko National University of Kyiv.

**Dmytro LUTSENKO** - lawyer, professional in the area of technical regulations and national quality infrastructure. Expert of the EU projects, the World Bank/IFC in Kazakhstan, Kyrgyzstan, Belarus, Bosnia and Herzegovina and Ghana. In 2000-2001 member of the working group on reforming the system of technical regulation under the Derzhstandart of Ukraine, co-author of all the laws of Ukraine in the area of technical regulation and national quality infrastructure adopted in the course of 2010-2015.

**Volodymyr NOCHVAI** - Senior Researcher of the Institute of Mathematical Machines and Systems Problems of the National Academy of Sciences of Ukraine. Head of technology transfer laboratory at the Kyiv Academic University. Expert in High-Tech Office Ukraine and NGO 'Centre for Innovations Development'. Participated in drafting the Roadmap for Ukraine's integration into the European Research Area. Ph.D. in technical science.

**Lilia OLEKSIUK** - expert in the field of personal data protection and automatic management systems. Head of NGO 'Information Security and Information Technologies'; member of the EU-Ukraine Civil Society Platform. Master of Public Administration, Lawyer with the focus on Economic Law. Senior Lecturer of the All-Ukrainian Centre for the Upgrading of Civil Servants and Local Self-Government Officials since 2017.

**Oksana PRYKHODKO** - expert in telecommunications, Internet governance, human rights in the information society and cyber security. Director of international NGO 'European Media Platform'; initiator of Ukrainian Internet Governance Forum (IGF-UA) and International Forum 'Media for Information Society'. Member of the Coordination Council on implementation of the Open Government Partnership (OGP) Initiative in Ukraine.

**DiXi Group** - Kyiv-based think-tank focused on research and consulting in the field of energy. It is focused on monitoring implementation of Ukraine's commitments in Energy Community and promoting the standards of the Extractive Industries Transparency Initiative (EITI) in Ukraine. It is involved in national policy and legislation development to approximate to the EU acquis in all sub-sectors - gas market, electricity, energy efficiency, independent regulator, and energy statistics.

## CONTENTS

---

Integration dynamics within Association:.....	6
Conclusions and recommendations .....	6
ACAA: Integrating Ukraine into the EU's industrial products market .....	20
Streamlining EU-Ukraine customs procedures.....	28
Integrating Ukraine into the EU's financial services market.....	34
Integrating Ukraine into the EU's Digital Single Market.....	40
Integrating Ukraine into the EU's post services market .....	48
Reciprocal Opening of EU and Ukrainian Public Procurement Markets .....	52
Integrating Ukraine into the EU's gas market.....	60
Integrating Ukraine to the European Common Aviation Area .....	68

# INTEGRATION DYNAMICS WITHIN ASSOCIATION: CONCLUSIONS AND RECOMMENDATIONS

**Dmytro Shulga**

## THE STORY OF THE AGREEMENT

The first framework agreement between the EU (then the European Communities) and Ukraine was the **Partnership and Cooperation Agreement** (hereinafter - PCA), which was signed in 1994, provisionally applied since 1996 and fully entered into force in 1998. The PCA was concluded for an initial period of 10 years (with the possibility of further annual automatic renewal for 1 year unless terminated by the parties).

The PCA provided a framework for political dialogue (it is on this basis that the annual EU-Ukraine summits began to be held in the late 1990s) and the "most favoured nation" trade regime with the prospect of establishing a free trade area, with preconditions of Ukraine's progress on economic reforms and accession to the GATT / WTO. The PCA also determined that another important condition for strengthening economic links between Ukraine and the EU was approximation of legislation<sup>1</sup>. In the 1990s, the EU concluded similar agreements with most other post-Soviet states, including Russia<sup>2</sup>.

In the early 2000s, even before the Eastern Enlargement, discussions began on the future EU policies towards the new neighbours. In 2003, the European Commission proposed the idea of the **European Neighbourhood Policy** (hereinafter - ENP), which was finally shaped and formally approved in 2004. Although the ENP did not provide a membership perspective for new European neighbours, it brought the perspective of moving beyond cooperation to a significant degree of integration, including through a stake in the EU's Internal Market<sup>3</sup>. The essence of the EU proposal to countries such as Ukraine was formulated by Romano Prodi, the President of the European Commission: "everything but institutions", that is, everything but membership<sup>4</sup>.

---

<sup>1</sup> Article 51 (1) PCA: 'Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community'. Further in the text it was mentioned that the approximation of laws shall extend to a number of specific areas: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21998A0219\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:21998A0219(02))

<sup>2</sup> More on PCA see the Commentary on PCA implementation issued by the EU's TACIS programme office: [https://web.archive.org/web/20061120204532/http://www.delukr.ec.europa.eu/en/Data/what\\_is-ukr.pdf](https://web.archive.org/web/20061120204532/http://www.delukr.ec.europa.eu/en/Data/what_is-ukr.pdf)

<sup>3</sup> European Neighbourhood Policy Strategy Paper, COM (2004) 373 final, 12.5.2004, p.8: [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004\\_communication\\_from\\_the\\_commission\\_-\\_european\\_neighbourhood\\_policy\\_-\\_strategy\\_paper.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_-_european_neighbourhood_policy_-_strategy_paper.pdf)

<sup>4</sup> [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_02\\_619](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_619)

The specific content of this proposal, however, needed to be specified. Bilateral Action Plans agreed between the EU and partner countries became the key instruments of the ENP. Negotiations on the EU-Ukraine Action Plan were held during 2004. As a result, the document set out jointly identified priorities for political, economic, and sectoral reforms in Ukraine, that is, mostly her 'homework', without any significant reciprocal commitments from the EU other than technical and financial support. The Action Plan was not a legally binding document: it was endorsed as a recommendation by the joint bodies of the PCA.

However, in response to the democratic peaceful **Orange Revolution** that took place in Kyiv at the end of 2004, in early 2005 the EU, together with the endorsement of the Action Plan, proposed 10 additional points for Ukraine. The key ones were promises to initiate early consultations on an 'enhanced agreement' to replace the PCA and an early start of negotiations on establishing a free trade area once Ukraine has joined the WTO<sup>5</sup>.

Negotiations on a '**new enhanced agreement**' between the EU and Ukraine to replace the PCA began in 2007. In 2008, the parties agreed on the name of the future document: the Association Agreement (hereinafter - AA); and within this framework, the parties began negotiations on establishing a 'deep and comprehensive' free trade area (hereinafter - DCFTA). It was agreed that the AA would be based on the principles of "political association and economic integration".

In 2008, the EU proposed (and in 2009 officially launched) the **Eastern Partnership** initiative (hereinafter - EaP), the Eastern dimension of the ENP aimed at 'creating the conditions for accelerating political association and economic integration'<sup>6</sup>. Thus, within the EaP, the other five post-Soviet countries were offered what was already the subject of bilateral negotiations between Ukraine and the EU - the conclusion of an association agreement, including the DCFTA.

In 2010, Ukraine joined the **Energy Community Treaty**, which unites the EU and its neighbours (initially only the Western Balkan countries - potential EU candidates). The aim of the Energy Community is to create an integrated pan-European energy market by extending EU energy market rules beyond the EU<sup>7</sup>. Thus, Ukraine has for the first time acceded to a legally binding agreement with the EU providing for market integration in a key sector of the economy.

Negotiations on AA between Ukraine and the EU were completed by the end of 2011, and the entire text of the Agreement was initialled in 2012. At the time, however, the EU had doubts about signing the Agreement when President Viktor Yanukovich began an offensive on democratic freedoms and the rule of law. V. Yanukovich, in turn, was undergoing increasing pressure from Russia to refuse the AA with the EU and to agree to join a customs union with Russia.

Finally, in late 2013, Viktor Yanukovich refused to sign the AA with the EU, which sparked internal protests ('**Euromaidan**') in Kyiv. After the attempts to suppress them by force, in early 2014, the protests escalated to the Revolution of Dignity, which overthrew the Yanukovich regime and restored the democratic constitutional order with the cost of a hundred of casualties. Thus, the AA became a symbol of Ukraine's European democratic choice.

<sup>5</sup> Other points included i.a. measures to intensify negotiations regarding visa facilitation, to treat Ukraine as a priority country for the extension of Trans-European Networks etc.: [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_05\\_57](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_05_57)

<sup>6</sup> Joint Declaration of the Prague Eastern Partnership Summit, 7 May 2009: [https://www.consilium.europa.eu/media/31797/2009\\_eap\\_declaration.pdf](https://www.consilium.europa.eu/media/31797/2009_eap_declaration.pdf)

<sup>7</sup> <https://www.energy-community.org/aboutus/whoweare.html>

In 2014, the EU-Ukraine Association Agreement was signed and ratified by the European Parliament and the Verkhovna Rada. Some AA provisions were provisionally applied since 1 November 2014, and DCFTA provisions – since 1 January 2016. Following the completion of the lengthy ratification process by all EU Member States, on 1 September 2017, the AA between the EU and Ukraine fully entered into force (and the PCA finally expired).

## QUID PRO QUO OF THE ASSOCIATION AGREEMENT

The AA is a legally binding bilateral international agreement between the EU and Ukraine. It is a rather large volume: 486 articles, grouped in 7 titles, and 44 annexes and 3 protocols, which form an integral part of the AA. The aims of the AA can be summarised as follows<sup>8</sup>:

- Promoting peace and stability;
- Respect for common values (as they constitute essential elements of the AA)<sup>9</sup>;
- Enhanced cooperation and Ukraine's association with EU policies in various areas<sup>10</sup>;
- Ukraine's gradual integration in the EU Internal Market, by setting up a DCFTA.

In the whole text of the AA, the DCFTA provisions contain the most specific obligations of the Parties. They provide for three major types of arrangements:

- Tariff liberalisation - reciprocal market opening through the progressive removal of customs duties (asymmetric, privileged for Ukraine from the side of the EU)<sup>11</sup>;
- Sectoral integration – abolishing barriers for Ukrainian business operation on the EU market (and vice versa) on the condition of Ukraine's alignment with the EU norms and standards in those sectors/areas;
- Ensuring fair competition between EU and Ukrainian firms on the common market - by gradually bringing Ukraine in line with the EU rules and standards in consumer rights, intellectual property rights, labour rights, environmental protection, state aid and competition<sup>12</sup>.

Thus, the main essence of the deal (*quid pro quo*) in the AA is a unilateral regulatory approximation in exchange for economic integration. **Ukraine is obliged to adopt and implement the *acquis* - EU legislative norms, rules and technical standards. In return for this, Ukraine will gradually become part of the EU Internal Market.** In general, with the exception of the European Economic Area and candidate countries, the EU has never opened up the Internal Market to participation by a 3rd country to such a degree<sup>13</sup>.

<sup>8</sup> Given the complex structure and wording of Article 1 (and of the whole text of the AA), only the key content is presented here, in a somewhat simplified form, without undue details which may be of interest to professional lawyers.

<sup>9</sup> Article 2 defines that respect for democratic principles, human rights and fundamental freedoms, the principles of the rule of law, sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destruction constitute essential elements of this Agreement. According to Article 478, in case of violation by a party of any of the essential elements of this Agreement, the other party may suspend the effect of the AA provisions on DCFTA.

<sup>10</sup> The AA covers a lot of areas and topics, and the political dialogue between the parties on these issues can be very productive. For example, further progress on the visa dialogue and taking gradual steps towards a visa-free regime have been mentioned as commitments of both parties in Article 19 of the AA.

<sup>11</sup> In practice, it took place even before the provisional application of the AA, with unilateral introduction of the EU's autonomous trade preferences for Ukraine in 2014.

<sup>12</sup> «EU-Ukraine Deep and Comprehensive Free Trade Area: Economic benefits and opportunities» - explainer of the European Commission: [http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc\\_154128.pdf](http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154128.pdf)

<sup>13</sup> See the EU's explainer 'The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: What's it all about?': <http://eeas.europa.eu/>

The AA is concluded for an unlimited period<sup>14</sup> but the timeframes envisaged in the AA annexes for removal of the customs duties and for implementation of EU legislative norms in Ukraine are limited to maximum 10 years since the AA's entry into force. According to the AA itself<sup>15</sup>, any reference to the date of entry into force of the AA shall be understood as to the date from which the AA is provisionally applied. As it was already mentioned above, some AA provisions were provisionally applied since 1 November 2014, and of DCFTA provisions – since 1 January 2016. It means that all AA provisions (those ones for which specific implementation deadlines are mentioned in the text) shall be implemented by 31 December 2025.

**The EU's obligations on sectoral integration of Ukraine are presented in Table 1**, which shows specific sectors, forms of the EU's expected decisions to integrate Ukraine, and the timeframes for implementing the respective 'homework'. In total, **these are 14 sectors on which the AA foresaw adoption of 15 decisions by the EU**. Adoption of these decisions will mean that in these sectors, Ukrainian businesses will not require additional permits, certificates or licenses to operate on the EU market.

The AA does not specify the timeframes when the EU should decide on the integration of Ukraine into its domestic market in a given sector but as a rule contains sufficiently clear timeframes by which Ukraine has to fulfil its 'homework' in a sector. It is logical to expect the EU decision to follow soon, i.e. early after confirmation of the sufficient level of homework implementation by Ukraine. As Table 1 shows, Ukraine has to complete the required homework in all 14 sectors by the end of 2023.

The EU decisions taken to integrate Ukraine into different sectors of the EU single market are the best indicators (KPIs) for implementation of the economic part of the AA. This does not deny the value of the homework implementation for the internal development of Ukraine itself. However, from the perspective of the goal of economic integration, such decisions will be the key result.

---

archives/delegations/ukraine/documents/virtual\_library/vademecum\_en.pdf - pp. 8, 11, 13.

<sup>14</sup> Article 481 AA.

<sup>15</sup> Article 486 (5)

**Table 1.**  
**SECTORAL INTEGRATION OF UKRAINE INTO THE EU'S INTERNAL MARKET ACCORDING TO THE PROVISIONS OF THE ASSOCIATION AGREEMENT.**

Area	Market	AA provisions	Method of integration to the EU market as foreseen in the AA	Timeframe for implementing Ukraine's 'homework' as foreseen in the AA, from the date of entry into force/start of provisional application of the AA
Technical barriers to trade	Industrial goods	Article 57 AA, Annex III	Conclusion of the Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA)	2 years* (by 31.12.2017)
Sanitary and phytosanitary measures	Agricultural goods	Articles 64, 66 AA, Annexes IV, V, IX	Recognition of equivalence in various sectors of agricultural commodities**	2021***
Customs procedures	(All) goods	Articles 76,1 (c), 76,4 (b) AA, Annex XV	Ukraine's joining the Convention on the simplification of formalities in trade in goods and the Convention on a Common transit procedure	1 year (by 31.12.2016)
		Articles 76,1 (k), 80 (i) AA	Recognition of authorised economic operators	3 years (by 31.12.2018)
Services				
	Financial	Article 4(3) of the Annex XVII, Appendix XVII-2	Granting internal market treatment	6 years (by 31.12.2021)
	Telecommunications	Article 4(3) of the Annex XVII, Appendix XVII-3	Granting internal market treatment	4 years (by 31.12.2019)
	Post and courier	Article 4(3) of the Annex XVII, Appendix XVII-4	Granting internal market treatment	2 years (by 31.12.2017)
Transport services				
	Road	Article 136 AA, Annex XXXII(1)	Possible conclusion of a special road transport agreement****	7 years (by 30.10.2021)
	Rail	Article 136 AA, Annex XXXII(2)	Possible conclusion of a special rail transport agreement****	8 years (by 30.10.2022)

Area	Market	AA provisions	Method of integration to the EU market as foreseen in the AA	Timeframe for implementing Ukraine's 'homework' as foreseen in the AA, from the date of entry into force/start of provisional application of the AA
	Internal waterways	Article 136 AA, Annex XXXII(5)	Possible conclusion of a special internal waterways transport agreement****	5 years (by 30.10.2019)
	International maritime	Article 4(3) of the Annex XVII, Appendix XVII-5, Annex XXXII(4)	Granting internal market treatment	6 years (by 31.12.2021)
	Air	Article 137 AA	Joint decision adopted by the bodies of the EU-Ukraine Common Aviation Area (CAA) Agreement	Not defined*****
Public procurement	Public procurement market	Article 154 AA, Annex XXI	Granting market access in the scope defined by the AA provisions	Gradually, in five phases, in the period of 6 months - 8 years (by 31.12.2023)
Energy				
	Natural gas market	Annex XXVII	Not clearly defined in the AA*****	by 31.12.2019
	Electric energy market	Annex XXVII	Not clearly defined in the AA*****	2021

\* For fulfilling the "homework" in the scope sufficient for conclusion of the ACAA. For fulfilling it in the scope sufficient for extension of the ACAA coverage to all 27 sectors listed in the AA – 5 years.

\*\* Also, the possibility is foreseen of certification of individual producers for export to the EU without waiting for decisions on the equivalence of the whole relevant sector. In practice, Ukrainian producers are actively using this opportunity.

\*\*\* According to the comprehensive strategy for the implementation of the AA chapter on sanitary and phytosanitary measures (Chapter 4 of the Title IV of the AA), which was approved by the AA joint bodies in the end of 2019 and became the content of Annex V to the AA.

\*\*\*\* The AA text does not put implementation of a regulatory approximation 'homework' as a precondition for the possible conclusion of this agreement.

\*\*\*\*\* The EU-Ukraine Common Aviation Area (CAA) Agreement was initialled at the end of 2013 but has not yet been signed due to a dispute between the UK and Spain about the mention of Gibraltar Airport in the text of this agreement.

\*\*\*\*\* Even the updated Annex XXVII does not contain a clear perspective for gaining internal market treatment. However, its implementation may lead to de facto integration of Ukraine into the EU gas market when transportation of gas from Russia to the EU through the territory of Ukraine is regulated by EU law (and, possibly, with the point of gas delivery shifted to the Eastern border of Ukraine).

\*\*\*\*\* Even the updated Annex XXVII does not contain a clear perspective for gaining internal market treatment. However, its implementation may lead to de facto integration of Ukraine into the EU electric energy market, with Ukraine joining the European ENTSO-E network.

# ACTUAL PROGRESS OF SECTORAL INTEGRATION

As Table 1 shows, by November 2019, Ukraine should have implemented her obligations in at least 5 sectors (out of 14): technical barriers to trade, customs procedures, postal and courier services, inland waterway transport, and partly in public procurement. In addition, deadlines for the homework implementation are approaching (by the end of December 2019) in two other sectors: telecommunications and the natural gas market.

Accordingly, as of November 2019, the conditions should have already been created for the adoption of at least 5 EU decisions on the integration of Ukraine into its internal market: the conclusion of the ACAA; Ukraine's joining the two customs conventions; recognition of authorised economic operators; granting an internal market regime for postal and courier services; partial opening of the public procurement market.

However, as shown in the following chapters, so far Ukraine has fulfilled its 'homework' in only 2 sectors:

- technical barriers to trade;
- (partially) in public procurement.

Accordingly, by now, the EU should already have decided on:

- the conclusion of the Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA);
- (partial) opening of the public procurement market.

However, so far the EU has only made 1 interim decision in the area of public procurement: following the outcome of the November 2019 meeting of the Association Committee in Trade Configuration, the EU has recognised the completion of the first (out of five) phase of the Indicative Schedule in public procurement. However, in this area, a significant mutual opening of the market between the EU and Ukraine has already taken place beyond the AA, in the framework of the WTO (GPA agreement).

However, the EU has not yet decided to conclude the Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA).

## SECTORAL INTEGRATION DYNAMICS IN 2019

In 2019, democratic presidential and parliamentary elections were held in Ukraine, significantly resetting the political system. The new President took office in May, the new Parliament and the Cabinet of Ministers - in late August. The new government's action programme envisages the continuation of the AA implementation in order to bring the country as close as possible to meeting the EU membership economic criteria<sup>16</sup>.

<sup>16</sup> <https://program.kmu.gov.ua/>

As of early 2019, the previous government had negotiated with the EU the update Annex XXVII to the AA (in the field of energy); completed the 'homework' in the area of technical barriers to trade required to conclude the ACAA agreement; started the reform of customs service, with its transformation into a separate public agency; prepared harmonisation plans in the field of telecommunications and other components of the digital market and ensured the adoption of legislation on electronic trust services; has carried out significant public procurement reforms.

In the fall of 2019, during the first few months of the new Parliament, a number of important laws for the implementation of the AA were adopted that were drafted but not (fully) adopted in the previous convocation - in particular, in the areas of customs procedures, technical barriers to trade, public procurement, regulation of the financial services market. In addition, significant institutional changes have taken place: in addition to the already mentioned creation of the State Customs Service, for the first time a Ministry for Digital Transformation was formed in the new Cabinet.

By sector, the dynamics for 2019 can be summarised as follows<sup>17</sup>:

**Technical barriers to trade:** In early 2019, Ukraine received additional homework from the EU for the conclusion of the Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA) that it managed to implement in late 2019. It is expected that the EU's first evaluation mission to verify the completion of the 'homework' (harmonisation of legislation, quality infrastructure and market surveillance with EU standards) will visit Ukraine in early 2020.

**Sanitary and phytosanitary measures:** In the autumn of 2019, the EU endorsed the Comprehensive Strategy for the Implementation by Ukraine of the AA chapter on sanitary and phytosanitary measures (Chapter 4 of the Title IV of the AA), which became the content of the Annex V to the AA. Accordingly, the 'homework' to achieve equivalence in various sectors of agricultural commodities must be completed by the end of 2021. In practice, Ukrainian producers are actively using the possibility for individual certification of their exports to the EU.

**Customs:** In 2019, significant progress has been achieved in this area where earlier Ukraine was lagging behind in her homework. In the autumn of 2019, new legislation was finally adopted, which, if successfully implemented, opens the way to mutual recognition of authorised economic operators with the EU, and Ukraine's joining the two European customs conventions - on the simplification of formalities in trade in goods and on a Common transit procedure. The process of establishing the State Customs Service as a separate public agency, launched in late 2018, is still ongoing. The effectiveness of the new Ukrainian customs will depend, among other things, on the effectiveness of cooperation and exchange of information with the customs services of EU member states.

**Financial Services:** Preparation of the Strategy for Developing the Financial Sector of Ukraine until 2025 is currently underway, and its concept provides for the implementation of the EU acquis norms required to obtain internal market treatment. However, this perspective remains uncertain given the changes in EU regulation that have taken place since the conclusion of the AA negotiations. The content of Annex XVII to the AA remains outdated in this part. In addition, in 2019, the issue of ensuring the

---

<sup>17</sup> For more detail on particular sectors, see the relevant thematic chapters of this publication.

sustainability of the recent banking sector reforms, including nationalisation of Privatbank, has acquired political sensitivity in the dialogue between the new government and the EU (and the IMF).

**Telecommunications:** Since summer 2019, a field mission of EU experts has been operating in Ukraine to develop a plan to update and implement the Annex XVII-3 to the AA, including by taking into account the new European Code of Electronic Communications. In the meantime, draft legislation on telecommunications is being actively discussed in Parliament. In addition, in 2019, the EU and Ukraine began a dialogue on the possibility of concluding an agreement on mutual recognition of electronic trust services. The possibility is also discussed of including Ukraine, as the first non-EU country, in the Digital Economy and Society Index (DESI), which measures the progress of EU member states in various dimensions of the European digital single market (not just telecommunications).

**Postal and courier services:** A draft law on postal services to implement the Directive 97/67/EC was prepared back in late 2018, but was never actually submitted to Parliament.

**Public procurement:** In autumn 2019, the new Parliament adopted a new version of the Public Procurement Law, which approximates the national legislation to the EU acquis as required by the second (out of five) phases of the AA Indicative Public Procurement Schedule. Yet, in November 2019, the EU recognised the completion of only the first phase of the Indicative Schedule. However, in this area, a significant mutual opening of the market between the EU and Ukraine has already taken place beyond the AA, in the framework of the WTO (GPA agreement, which Ukraine joined in 2016).

**Energy:** In the first half of 2019, Annex XXVII to the AA was updated, which updated the content of Ukraine's 'homework' and introduced a mechanism for monitoring of its implementation. The trilateral negotiations between the EU, Ukraine and Russia are still ongoing on the future terms for transportation of Russian gas to the EU from the beginning of 2020; however, both Ukraine and the EU appear ready for a crisis scenario of suspension of supply in the absence of an agreement with Russia. Meanwhile, Ukrainian legislation is already largely approximated to the EU acquis on natural gas. In the first half of 2019, the gas market balancing was switched from monthly to daily mode, like in the EU member states. In the autumn of 2019, all necessary decisions have been taken to unbundle the gas transmission system operator, which should become a legal fact from 1 January 2020. The methodology for calculating tariffs for gas storage and transmission was amended to bring it in line with the EU acquis. The liberalisation of retail supply to households still remains an unresolved task. Also, because of the Constitutional Court's decision in mid-2019, another problem was added to legislatively define the independent status of the regulator, which requires changes to the Constitution.

**Transport:** Initiated back in 2013, the Common Aviation Area Agreement has not yet been signed due to a dispute between the UK and Spain about the mention of Gibraltar Airport in the text of this agreement. Nevertheless, Ukraine has already unilaterally begun to implement her 'homework' under this agreement. There have been no significant results in other sectors of transport in 2019: several drafts of the key framework laws (on rail and inland waterways transport) are being now considered by the new Parliament.

# PROSPECTS FOR INTEGRATION IN 2020 AND BEYOND

Though behind schedule, Ukraine is still implementing her 'homework'. Therefore, the EU will increasingly face the question of adopting corresponding reciprocal decisions to integrate Ukraine into the EU internal market in relevant sectors, as provided for by the AA. The ACAA Agreement should be the first such expected decision – out of 15 in total, as shown in Table 1.

Based on the existing progress and provided there is continuing active pace of implementation of the 'homework' by Ukraine and the political will of the EU to reciprocate, ***the following deliverables in the sectoral integration within the AA can be achieved in 2020:***

- Conclusion of the ACAA agreement;
- Recognition of the equivalence of sanitary and phytosanitary measures in key sectors of agricultural commodities;
- Recognition of authorised economic operators;
- Ukraine's joining the EU's Common Transit System (NCTS);
- Update of the Annex XVII-3 and conclusion of an agreement on mutual recognition of electronic trust services between the EU and Ukraine;
- Decisions of the bilateral association bodies to grant mutual access to the public procurement markets at the level of the completed 3rd phase of the Indicative Plan;
- Signing the Common Aviation Area Agreement (after Brexit).

Also, at the end of 2019 - early 2020, conclusion of agreements on interaction of gas transmission systems operators between Ukraine and Russia and on transportation of gas from Russia to the EU is expected<sup>18</sup>, on the basis of EU rules and with EU mediation. Together with the agreements on interaction of gas transmission system operators between Ukraine and neighbouring EU member states already concluded, and with the unbundling of the independent gas transmission system operator of Ukraine, this will de facto mean the integration of Ukraine into the EU gas market.

As mentioned above, in sectoral integration, Ukraine should complete the required 'homework' no later than by the end of 2023, and in general, all AA provisions that have implementation deadlines should be completed by 31 December 2025. In other words, most of the AA provisions have to be implemented by the end of the term in office of President V. Zelensky and the new European Commission (2019-2024).

At the same time, ***it is already possible to amend the provisions of the AA - in practice, only of the Annexes to it***, which does not require ratification by EU member states. Since 2018, there have been 4 cases of amendments to the AA Annexes:

- Clarification of the timeframes applied for customs duties reduction in the Annex I-A (tariff schedule) (2018);
- Changes in the thresholds in the Annex XXI (Public Procurement) (2018);

---

<sup>18</sup> Either a Ukrainian-Russian contract on transportation of the gas to the EU or Ukrainian-European contracts on the same issue with accompanying amendments to the Russian-European contracts to shift the point of gas delivery to the Ukrainian-Russian border.

- Update of commitments and strengthening the monitoring provisions in the Annex XXVII (Energy) (2019);
- Changes in tariff quotas for poultry meat in the Annex I-A (tariff schedule) (2019).

The need to update the Annexes to the AA is objectively evident due to the significant evolution of EU legislation since the conclusion of the EU-Ukraine negotiations on the AA in 2011. Therefore, at the Association Council meeting in December 2018, the Parties agreed to launch work on updating, as required, the annexes of the AA in line with the evolution of EU law<sup>19</sup>. As the first step, the Annex XXVII on energy was updated in 2019. An EU expert mission is currently working on proposals to update the contents of the Annex XVII-3 on telecommunications services. As mentioned above, it is also needed to update the Annex XVII-2 on financial services as well as most other Annexes to the AA.

The recent amendment of the Annex I-A on the tariff quotas for poultry meat, initiated by the EU, deserves special attention. The Ukrainian government will attempt to use this precedent to initiate a comprehensive review (and further liberalisation) of all other existing tariff quotas in the DCFTA. Arguably, significant changes in the economy of Ukraine have taken place since the completion of the negotiations on the AA, so now updating of the AA provisions is required, especially those ones on DCFTA tariffs<sup>20</sup>.

The AA text itself provides for the potential for its updating and upgrading. ***The AA sets forth that within five years of its entry into force, the Parties shall provide for a 'comprehensive review of the achievement of objectives under this Agreement'***<sup>21</sup>. As explained above, any reference to 'the date of entry into force of the AA' shall be understood as to 'the date from which the AA is provisionally applied'. Thus, for many AA provisions (including those ones on energy and transport) 'comprehensive review of the achievement of AA objectives' should be made after 1 November 2019, while for DCFTA provisions – after 1 January 2021. It is logical to expect that following such a review, the Parties would review the AA/DCFTA provisions in order to provide a more effective achievement of its objectives.

Accordingly, the Parties to the AA should consider not only the review (further liberalisation) of the provisions on tariffs, but also the upgrade of mutual obligations on sectoral integration. In particular, the EU should decide on the movement towards conclusion of agreements with Ukraine in the sectors of road, rail and inland waterway transport. The AA provides for the possibility of concluding such special agreements in the future with a view to assuring a coordinated development and progressive liberalisation of transport between the Parties<sup>22</sup>. However, according to the AA text, this is a possibility, not a commitment. For the time being, relevant issues remain the subject of bilateral negotiations between Ukraine and (neighbouring) EU member states.

***Bilateral cooperation between Ukraine and EU member states, especially the neighbouring ones, can significantly contribute to the achievement of the objectives of the AA***<sup>23</sup>. Thus, the development of bilateral cooperation between the customs services of Ukraine and the EU member states, in particular through the conclusion of bilateral agreements on information exchange, can significantly contribute to effective customs reform in Ukraine. Conclusion of agreements between Ukraine and neighbouring EU member states on joint border controls could significantly facilitate the movement of goods and people, provided there is political support for this process from the European Commission, with the flexible use of the Schengen acquis. Agreements on interaction between the gas transmission

<sup>19</sup> <https://bit.ly/2s3mW9l>

<sup>20</sup> <https://biz.liga.net/ekonomika/prodovolstvie/opinion/provatsya-cherez-kvoty-ukrainskaya-kuryatina-probivaet-put-v-es>

<sup>21</sup> According to Article 481 AA.

<sup>22</sup> Article 136 AA.

<sup>23</sup> In this context, it should not be forgotten that the AA is an agreement between Ukraine and not only the EU institutions but also EU member states.

systems operators between Ukraine and neighbouring EU member states, as well as the construction of new interconnectors as projects of common interest of the EU, will ensure the free movement of gas in both directions within the single European market.

## 'POLITICAL ASSOCIATION' – THE NEED FOR SPECIFICATION

As mentioned above, the AA is an agreement on 'political association and economic integration'. While 'economic integration' is a well-established notion, the term '**political association**' is not explained in any way in the text of the AA. It remains unknown to EU law (in which the term 'association' exists, while 'political association' can be found only in the AA and other EU documents with Ukraine, Moldova and Georgia, and in the Eastern Partnership documents) and it has not been interpreted in academic literature.

In practice, one can see in the text of the AA that the provisions on economic integration within the DCFTA are the most specific, while **issues such as combating corruption or the rule of law are mentioned only in general terms**. Paradoxically, these issues remain unspecified in the AA though they are of priority importance in the EU's political dialogue with Ukraine, when the business climate assessment, the prospects for attracting investment and the ultimate success of economic development depend on the progress in those areas.

This can be explained by the fact the EU has virtually no legislation on fighting corruption and on the rule of law of its own to which Ukraine could approximate. Therefore, the relevant articles of the Title II "Political Dialogue and Reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy" and Title III "Justice, Freedom and Security" of the AA contain only general wording<sup>24</sup>. There are no annexes to these Titles of the AA that could contain a list of EU legislation for Ukraine to approximate to.

At the same time, it should be remembered that a number of policy principles are identified in the text of the AA as the 'essential elements' of the agreement, the respect for which is necessary for having the DCFTA in effect:

- respect for democratic principles, human rights and fundamental freedoms;
- respect for the principles of the rule of law;
- respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence;
- countering the proliferation of weapons of mass destruction<sup>25</sup>.

In case of violation by a party of any of the essential elements of this Agreement, the other party may suspend the effect of the AA provisions on DCFTA<sup>26</sup>.

What is more, the language of the 'political' AA provisions resemble the wording of the first - political - Copenhagen criterion for EU membership: 'Stability of institutions guaranteeing democracy, the rule of law,

<sup>24</sup> Article 6 AA 'Dialogue and cooperation on domestic reform':

'The Parties shall cooperate in order to ensure that their internal policies are based on principles common to the Parties, in particular stability and effectiveness of democratic institutions and the rule of law, and on respect for human rights and fundamental freedoms, in particular as referred to in Article 14 of this Agreement.'

Article 14 AA 'The rule of law and respect for human rights and fundamental freedoms':

'In their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security.'

<sup>25</sup> Article 2 AA.

<sup>26</sup> Article 478 AA.

human rights and respect for and protection of minorities.' In other words, implementation of the political part of the AA ('political association') should bring Ukraine closer to meeting the first EU membership criterion that needs to be met before the start of accession negotiations. However, though the new Ukrainian government in its action programme set the aim of Ukraine meeting the EU membership criteria – only meeting of the economic criteria was set as indicator, without mentioning the political criterion<sup>27</sup>.

To address the obvious *need to identify policy priorities and indicators in the areas of the rule of law and fighting corruption in Ukraine*, the EU has used a number of instruments, the key among them in recent years have been: Association Agenda<sup>28</sup>, Visa Liberalisation Action Plan<sup>29</sup>, and financial assistance agreements<sup>30</sup>. In particular, the entire institutional structure of anti-corruption policy in Ukraine was built during 2014-2019 precisely because of the visa-free criteria and the conditions of financial assistance from the EU and the IMF.

For its part, the Ukrainian government in 2018 suggested to the EU to deepen sectoral cooperation on justice, freedom and security by agreeing a new Agenda in this area<sup>31</sup>, and in November 2019 amended this proposal to take form of *a new annex to the Title III 'Justice, Freedom and Security' of the AA*<sup>32</sup>. As of today, the EU-Ukraine AA contains no annexes to this Title<sup>33</sup>, while the AAs of the EU with Moldova and with Georgia contain annexes to the relevant titles<sup>34</sup>.

Specification of political and legal commitments in the form of an annex to the AA seems to be the best method, while implementation plans for these commitments may, if necessary, be formulated as corresponding 'action plans' or 'road maps'. This may be not just one but several annexes to the AA – in case there will be a decision to break the whole theme of justice, freedom and security down into several sectors, or in case that the Parties agree that in addition to an annex to Title III, there will be an annex to Title II of the AA (on political dialogue, domestic reforms and foreign policy cooperation).

The content of such annex (or annexes) can be both issues of cooperation (in particular, between law enforcement agencies - in the areas of fight against crime, integrated border management, cyber-security, enforcement of sanctions regimes etc.), as well as implementation of Ukraine's 'homework'. As for the latter, identification of indicators in line with the EU methodology as well as setting up monitoring and regular evaluation process by the EU is required.

<sup>27</sup> <https://program.kmu.gov.ua/meta/ukraina-vidpovidae-kriteriam-clenstva-v-evropejskomu-souzi>

<sup>28</sup> A bilateral political document setting out the priorities for cooperation (mainly Ukraine's 'homework') on practically the entire spectrum of topics covered by the AA, even before it entered into force. For the first time, the Association Agenda was approved in 2009 when it replaced the EU-Ukraine Action Plan; in 2015, the Agenda was updated. Compared to the AA, political commitments in the text of the Agenda got more place and detail: for example, 5 out of the 10 short-term priorities of the Agenda-2015 were the political ones. To date, this Agenda has become morally obsolete and overall it failed to gain significant political weight, remaining rather a bureaucratic document.

<sup>29</sup> Without being a legally binding document, the Visa Liberalisation Action Plan (VLAP), however, was of great political importance because of the related attractive incentive of a visa-free travel regime. The VLAP requirements included anti-corruption issues, which proved to be one of the most difficult criteria for implementation. The method of monitoring the VLAP implementation was remarkable: it was carried out by regular EU expert missions, which assessed the state of implementation and formulated recommendations for the next steps. Thus, they specified, elaborated and expanded the initial requirements. Following obtaining the visa-free travel regime in 2017, Ukraine remains under the EU post-monitoring to maintain compliance with the visa-free criteria, in particular in the fight against corruption.

<sup>30</sup> The EU macro-financial assistance and budget support agreements (as well as memorandums of cooperation with the IMF) contained several dozen indicators, many of which related to the fight against corruption and the strengthening of the rule of law. The terms of such financial assistance agreements are rather unilateral conditions set forth by the EU as a donor, rather than bilaterally negotiated arrangements. They mainly provide for such indicators as the adoption of legislation or institutional decisions. In particular, it is because of the conditions of EU macro-financial assistance that the Anti-Corruption Court started its work in Ukraine in 2019.

<sup>31</sup> <https://www.ukrinform.ua/rubric-politics/2687558-ukraina-ta-es-sou-novogo-u-sferi-usticii-svobod-i-ta-bezpeki.html>

<sup>32</sup> <https://minjust.gov.ua/news/ministry/ukraina-proponue-es-dopovniti-ugodu-pro-asotsiatsieyu-dodatkom-pro-reformi-yustitsii>

<sup>33</sup> The Title III AA contains 11 Articles: 'The rule of law and respect for human rights and fundamental freedoms' (Article 14); 'Protection of personal data' (Article 15); 'Cooperation on migration, asylum and border management' (Article 16); 'Treatment of workers' (Article 17); 'Mobility of workers' (Article 18); 'Movement of persons' (Article 19); 'Money laundering and terrorism financing' (Article 20); 'Cooperation in the fight against illicit drugs, and on precursors and psychotropic substances' (Article 21); 'Fight against crime and corruption' (Article 22); 'Cooperation in fighting terrorism' (Article 23); 'Legal cooperation' (Article 24).

<sup>34</sup> However, their content is limited merely to personal data protection issues.

On the one hand, as noted above, the EU does not have its own legislation on fighting corruption and on judicial reform, but on the other hand, ***the EU has developed the best tools to measure member states' progress in these areas***. These EU instruments can and should be used to assess Ukraine's progress in implementing these reforms. In particular, a regular assessment of the state of the judiciary in Ukraine would be best done using the EU Justice Scoreboard methodology<sup>35</sup>, and a regular assessment of the state of the fight against corruption in Ukraine - using the EU Anti-Corruption Report methodology<sup>36</sup>, regardless of whether its application will be continued in the EU itself.

From the methodology point of view, these assessment tools are better than those currently used by the EU (AA implementation reports<sup>37</sup> and visa post-monitoring reports<sup>38</sup>, focused on assessing the status of legislation and institutions) as well as those offered by well-known international indices<sup>39</sup>. These progress measurement tools allow for the most comprehensive and objective evaluation of reform effectiveness, for understanding the causes of problems, and for planning further actions. This would allow going beyond both the extremely negative evaluations based on public opinion polls on corruption perception or trust in courts and the very formal reports of progress of the Ukrainian government. For example, according to the latter, by the end of October 2019, the AA had been implemented at 85% on political dialogue, national security and defence, and at 81% on justice, freedom, security, human rights<sup>40</sup>.

The use of the best progress measurement tools available at the EU's disposal makes sense also to help to assess the ultimate effectiveness of EU assistance to reforms in Ukraine as well as to identify priorities and indicators for providing such assistance in the future. After all, a considerable part of the technical assistance and budget support from the EU (and its member states) to Ukraine is provided exactly for reforms aimed at strengthening the rule of law and combating corruption.

The precedent of a similar case for the use of the EU internal methodology for assessing the situation in a particular sector in Ukraine is being created today. As mentioned above, the possibility is being discussed of including Ukraine, as the first non-EU country, in the Digital Economy and Society Index (DESI), which measures progress of EU member states in different dimensions of the European digital single market.

***Thus, both the EU and Ukraine should be interested in specifying the priorities and indicators of cooperation and reform ('homework') in the 'political part' of the AA, in particular, in the areas of justice and the fight against corruption.*** The best way to do it is by adding an Annex (or Annexes) to the AA, using appropriate (already available for member states) EU monitoring tools. For the EU, this is an effective toolkit that does not require a new legal framework or significant funding. For Ukraine, this is an instrument to help to build trust in institutions, which will open up the space for both legal cooperation and the general prospects for deepening integration with the EU.

---

<sup>35</sup> [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en)

<sup>36</sup> [https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report_en)

<sup>37</sup> [https://eeas.europa.eu/headquarters/headquarters-homepage/72011/association-implementation-report-ukraine-2019\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/72011/association-implementation-report-ukraine-2019_en)

<sup>38</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_6819](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6819)

<sup>39</sup> The European Stability Initiative think tank proposed to assess the state of corruption in the Western Balkan countries by using the EU Anti-Corruption Report methodology, arguing that it is better than the one of the Corruption Perception Index - see their article 'Measuring corruption: The case for deep analysis and a simple proposal' (2015): [https://www.esiweb.org/index.php?lang=en&id=156&document\\_ID=162](https://www.esiweb.org/index.php?lang=en&id=156&document_ID=162)

<sup>40</sup> According to the 'Pulse of the Agreement' information system: <https://pulse.eu-ua.org>. As far as one can tell, the section of "Political Dialogue, National Security and Defence" of this system corresponds to the Title II 'Political Dialogue and Reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy' of the AA, and the section 'Justice, Freedom, Security, Human Rights' - Title III 'Justice, Freedom and Security' of the AA.

# ACAA: INTEGRATING UKRAINE INTO THE EU'S INDUSTRIAL PRODUCTS MARKET

**Dmytro Lutsenko**

## THE BENEFITS OF THE ACAA

The Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA) is a way to eliminate technical barriers to trade between Ukraine and the EU<sup>41</sup>.

In the sectors covered by this Agreement, Ukrainian exporters will be entitled to affix CE markings on their products and freely sell them on EU markets without additional certification in the EU itself. The ACAA could potentially cover up to 20% of Ukrainian exports to the EU,<sup>42</sup> predominantly machinery.

Apart from saving exporters the time and costs of undergoing certification, an ACAA with the EU should help promote the image of products made in Ukraine, facilitate access to other global markets for Ukraine, and make Ukraine more attractive as a location for production facilities.



***ACAA will facilitate trade in industrial goods and will help promote the image of products made in Ukraine***

In addition, it will be possible to freely import and sell in Ukraine any products manufactured anywhere that are marked with EU CE conformity marking. This should make life easier for Ukrainian importers and should contribute to a reduction in customs fraud.

The ACAA between the EU and Ukraine has quite a long history. As far back as December 2005, Ukraine and the EU signed an Action Plan to prepare for ACAA accession, long before the start of the negotiations on the Association Agreement. In the text of the latter, the ACAA comes up in Art. 57. According to this article and Annex III to the Association Agreement, the ACAA will cover 27 categories of industrial, non-food products. Initially, the ACAA could cover one or more of those sectors and later be extended to others. Once the ACAA covers all the sectors listed

---

<sup>41</sup> The ACAA is a type of mutual recognition agreement that, unlike other such agreements, requires a partner country to bring its laws, practices and infrastructure into line with EU rules. To date, the EU has only one ACAA agreement with Israel, but has many other similar agreements: the PECA (Protocol to the European Agreement on Conformity Assessment and Acceptance of Industrial Products) with the candidate countries (Western Balkans) - substantively nearly identical to the ACAA (difference is that PECA is only for EU candidates and ACAA is for the others); also, the EU has corresponding agreements within the European Economic Area and the Customs Union with Turkey. In addition, the EU has mutual recognition agreements with third countries that do not provide for unilateral approximation of standards - in particular, with the US, Canada, Japan, South Korea, Australia etc.: [https://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements\\_en](https://ec.europa.eu/growth/single-market/goods/international-aspects/mutual-recognition-agreements_en)

<sup>42</sup> Based on calculations by experts at the Institute for Economic Research and Policy Consulting (IER).

in Annex III, Ukraine and the EU will consider the possibility of extending its scope to cover industrial sectors that were not listed.

***For conclusion of the ACAA, a positive EU assessment of Ukraine's homework implementation is required.***

Procedurally, the ACAA will be concluded as a Protocol to the Association Agreement, based on a decision by Ukraine-EU Association bodies, such as the Association Committee for Trade and the Association Council. This decision must be preceded by a positive assessment of Ukraine's implementation of its "homework."

## UKRAINE'S HOMEWORK

The Association Agreement requires Ukraine to complete four key steps in order to sign the ACAA:

- bring its legislation, both horizontal (framework) and vertical (sectoral), completely in line with EU law;
- adopt European harmonised standards for related product categories as national standards of Ukraine;
- bring its national quality infrastructure - national standards body, national accreditation body, metrology institutes, and conformity assessment bodies - as well as its market surveillance infrastructure - market surveillance authorities and procedures - in line with EU requirements;
- eliminate all regulatory regimes, most of which exist from the soviet and post-soviet times, that contradict, duplicate or overlap with European requirements for the given product categories. This is especially important for sanitary norms and rules and workplace safety documents that include requirements for product design, manufacture and pre-market control.

## CURRENT PUBLIC POLICY

The fundamental documents that lay down public policy in technical regulation are the Strategy and Action Plan for Reforming the System of Technical Regulation till 2020.<sup>43</sup> These documents require that technical regulations and other legal acts be drafted in full compliance with related EU directives and regulations.

The institutional centre for reforming the system of technical regulation and preparing for ACAA is the Ministry of the Development of Economy, Trade and Agriculture of Ukraine. MEDT is responsible for public policy in this area and for regulatory and coordinatory functions in horizontal (framework) legislation — technical regulations, conformity assessments, standardisation, metrology, and market surveillance. It is also one of the regulators in vertical (sectoral) legislation, and is responsible for developing technical regulations in individual sectors. Other central executive bodies (CEBs) regulate,

<sup>43</sup> Approved by Cabinet Executive Order #844-R dated 19 August 2015.

inspect and oversee individual sectors.

Established in 2002, the National Accreditation Agency of Ukraine (NAAU) is a signatory of the Bilateral Agreement (BLA) with the European Cooperation for Accreditation (EA), which ensures the mutual recognition of accreditation of conformity assessment bodies. NAAU is also a member of the relevant international organizations – International Laboratory Accreditation Cooperation (ILAC) and International Accreditation Forum (IAF).

The Ukrainian Scientific, Research and Training Centre for Standardisation, Certification and Quality, a state-owned enterprise, is Ukraine's national standards body and is a companion body to European standardisation organisations like CEN and CENELEC, as well as a member of the International Organisation for Standardisation (ISO) and the International Electrotechnical Commission (IEC).

On 23 May 2018, the Verkhovna Rada passed the law on Ukraine's accession to the Metre Convention and Ukraine became a full Member State of the International Bureau of Weights and Measures (BIPM) on 7 August 2018, having been an Associate State of the General Conference on Weights and Measures since 2002. This opens the way for full membership in the International Organisation of Legal Metrology (OIML), where Ukraine is currently a corresponding member. These developments provide new opportunities for Ukraine for comparing measurement standards and strengthening its national quality infrastructure, the foundation of which is metrology.

The situation with conformity assessment bodies varies. All bodies that assess conformity to technical regulation requirements are accredited by the NAAU. Some Ukrainian bodies have cooperation or recognition agreements with conformity assessment bodies from other countries, including the EU. But there are still some problems with the practices of issuing of certificates by certain bodies.

## IMPLEMENTATION DYNAMICS

Although the first breakthroughs in legislation happened as far back as in 2010 with the adoption of the laws on market surveillance and on general non-food product safety, the pace of drafting and adopting the necessary legislation has significantly improved since the Revolution of Dignity.

Commitments regarding the adoption of **horizontal (framework) legislation** have been fulfilled by Ukraine in the form of a series of laws and by-laws, adopted over 2010-2016: the Laws "On general non-food product safety" dated 2 December 2010; "On the accreditation of conformity assessment bodies" dated 17 May 2001, amended on 22 December 2011, and 15 January 2015; "On state market surveillance and control of non-food products" dated 2 December 2010; "On technical regulations and conformity assessment" dated 15 January 2015; "On metrology and metrological activity" dated 5 June 2014; and "On liability for damage caused by defects in a product" dated 19 May 2011. In addition, Ukraine passed the Law "On standardisation" on 5 June 2014, in order to align its infrastructure with European requirements.

Because all these legislative acts have been drafted based on related EU legislation, they generally comply with the EU acquis. In some places, Ukrainian lawyers have interfered with the contents

during the drafting process and deviations or discrepancies can be seen. Some amendments of a technical nature also need to be made as a result of the legal application of these acts. Some horizontal legislation has been preliminarily analyzed by European experts. Recently some acts have been amended, while the rest are in the process of being amended.

In particular, the unexpectedly failed in the second reading in February 2019, exactly at the time of negotiations of the Ukrainian government delegation in Brussels about the prospects of conclusion of the ACAA, draft law #6235 was expeditiously replaced with analogous draft law #10183 on amending certain legislative acts of Ukraine with regard to technical regulations and conformity assessment. The latter was adopted in the first reading and on the whole on 6 June 2019.

Draft Law #7123 that aimed at amending a number of Ukraine's laws to bring them in line with the fundamental principle of voluntary application of standards, as laid down by the Law "On standardisation" was re-introduced in the new calling of Parliament as draft law #1068 of 29 August 2019 and adopted on the whole on 20 September 2019.

The legislation on market surveillance still needs to be amended, both with the purpose of fuller alignment with the EU legislation and for solving problems with legal application in Ukraine. To that end, new draft law #2172 of 25 September 2019 was registered in the new calling of the Verkhovna Rada of Ukraine, which envisions amendments to Ukraine's legislation in the area of market surveillance and control of non-food products as well as in the area of general non-food products safety. Essentially, this draft law is draft law #10222 of the previous calling of Parliament, but only in the part of market surveillance and without provisions on consumer rights protection. The absence of the latter, however, is not a problem, since the Ministry of Economy is drafting a new wording of the law on consumer rights protection to implement Ukraine's commitments in this area according to the Association Agreement with the EU.

Yet, it should be pointed out that in the meantime the EU adopted new Regulation (EU) 2019/1020 of 20 June 2019 on market surveillance and compliance of products, which significantly strengthens the powers of market surveillance authorities and enhances market surveillance measures, including in the area of Internet sales. New provisions will come into effect in the EU on 16 July 2021, therefore it is possible to state the fact that in the nearest future Ukraine will face the task of amending its legislation on market surveillance again.

Over 2014-2017, state market surveillance in Ukraine faced a moratorium on inspections. However, starting in 2018, inspections have been actively carried out. Despite the need to introduce certain corrections to legislation and practices, it is possible to assert that, on the whole, the state of national quality infrastructure and market surveillance is acceptable to conclude the ACAA.

***State of horizontal legislation, national quality infrastructure and market surveillance is acceptable to conclude the ACAA***

The four priority sectors for adapting **vertical (sectoral) legislation** were identified back in the 2005 Action Plan: low voltage equipment, electromagnetic compatibility, machinery, and simple pressure

vessels. In 2012, the Cabinet of Ministers adopted technical regulations on low voltage equipment and electromagnetic compatibility. In 2013, the technical regulation on machinery appeared. In 2015, new technical regulations on low voltage equipment and electromagnetic compatibility were developed and adopted that are based on new EU directives from 2014. In July 2018, these three technical regulations were amended based on recommendations from European experts. Thus, the first three sectors where the ACAA can be concluded are low voltage equipment, electromagnetic compatibility and machinery.

***State of vertical legislation is acceptable to conclude the ACAA in three sectors: low voltage equipment, electromagnetic compatibility and machinery.***

As of October 2019, technical regulations based on new EU directives and regulations were adopted in several other sectors: simple pressure vessels, transportable pressure equipment, appliances burning gaseous fuels, lifts, toys, non-automatic weighing instruments, measuring instruments, equipment designed for work in explosive atmospheres, civil explosives, personal protective equipment, cableways, pressure equipment, and requirements for energy efficiency (eco-design) and energy consumption labeling for most types of household appliances and other electric equipment, for which such requirements exist at the EU level. This means that these technical regulations may well be subject to a review of their compliance with EU directives and regulations in the process of preparing those sectors for the ACAA.

In 2016, Ukraine and the EU launched ***a high-level industrial and regulatory dialogue***. Two meetings have taken place so far: in Brussels in March 2017 and in Kyiv in March 2018. At least 5 working groups are actively facilitating this dialogue encompassing the system of technical regulation and national quality infrastructure, with one of them dealing with the issues of technical barriers to trade.

Paradoxically, with the start of the application of the Association Agreement, EU technical assistance for developing legislation and preparing quality infrastructure and market surveillance authorities in Ukraine has decreased.

## UNCERTAIN PERSPECTIVE FOR CONCLUDING THE ACAA

Thus, progress in developing public policy, institutions, quality infrastructure and market surveillance, and the alignment of horizontal (framework) and vertical (sectoral) legislation in several sectors does allow for the process of concluding the ACAA to begin.

However, the EU has not given any signals about actual prospects, such as in its official reports on Ukraine. The first report on the implementation of the Association

***Progress made in Ukraine's homework implementation does allow for concluding the ACAA. However, the EU has not given any signals about actual prospects for it***

Agreement (2016) made no mention of the ACAA.<sup>44</sup> In the first report on the implementation of the DCFTA for 2016, which was published in autumn 2017, the ACAA was designated as a long-term objective, while the Regulatory Dialog on technical barriers to trade that had been launched was designated the appropriate technical cooperation forum for carrying out a detailed assessment of Ukraine's system for the compliance of legislation, enforcement and institutional capacity with EU rules and standards. Only a positive assessment will lead to the start of negotiations on the ACAA.<sup>45</sup> In a further report on the implementation of the Association Agreement (2017), the ACAA was mentioned as an issue of the future, without specifying how distant.<sup>46</sup> In yet another report on the implementation of the DCFTA for 2017, published in autumn 2018, the ACAA was not mentioned at all.<sup>47</sup> In a third report on the implementation of the Association Agreement (2018), the ACAA was mentioned, once again, only as an issue of the future, without specifying how distant.<sup>48</sup>

Nor is the EU position clear as to how the ACAA might be concluded. Will a separate EU evaluation mission be necessary to assess the "homework" done, as the Ukrainian government has requested? Or can this assessment be done by EU experts already involved in the EU-Ukraine industrial and regulatory dialog? Such uncertainty on the

***In the absence of perspective for a quick conclusion of the ACAA, the harmonised procedures and requirements proved too burdensome, especially for importers***

part of the EU offers little assurance that the ACAA will be signed in the foreseeable future, despite Ukraine's progress in doing it "homework." Nor does it increase confidence in the irreversibility of reforms or stimulate the further development of quality infrastructure and market surveillance.

Meanwhile, another issue has arisen: in anticipation of a quick conclusion of the ACAA, Ukraine has implemented the requirements of EU directives and regulations immediately rather than gradually, which has already led to problems in some sectors. For instance, certain conformity assessment procedures and marking requirements have proved too strict or burdensome, especially for importers. Paradoxically enough, there is a likely negative impact on the manufacturers from the EU, who, in order to get access to the Ukrainian market, actually have to repeat in Ukraine the same conformity procedures that they have already undergone in the EU and to additionally affix to their products the Ukrainian conformity mark. All this, in turn, could lead to higher prices for consumers, a smaller range of products on the market, and even the emergence of monopolist importers. Consequently, there has been pressure to simplify procedures or soften requirements<sup>49</sup>.

One of the solutions, which at first glance looks very simple, would be the unilateral recognition by Ukraine of the European CE conformity marking and the conformity assessment, carried out

<sup>44</sup> Association Implementation Report on Ukraine, SWD (2016) 446 final, Brussels, 9 December 2016.

<sup>45</sup> "Having in mind that due to the relevant reforms, the ACAA is a long-term objective, both Parties have launched in July 2016 the TBT Regulatory Dialogue (as provided by Article 55 of AA) as the appropriate technical cooperation forum for carrying out the detailed assessment of the Ukrainian system in order to verify its compliance (in terms of legislation, its enforcement, and institutional capacity) with the EU rules and standards. Only positive results of that assessment will allow for a start of negotiations on the ACAA." Annual report on the implementation of the Deep and Comprehensive Free Trade Area (DCFTA) between the EU and Ukraine, 1 January 2016 – 31 December, 2016, SWD (2017) 364 final, Brussels, 9 November 2017.

<sup>46</sup> Association Implementation Report on Ukraine, SWD (2017) 376 final, Brussels, 14 November 2017.

<sup>47</sup> Annual report on the implementation of the Deep and Comprehensive Free Trade area (DCFTA) between the EU and Ukraine, 1 January 2017 – 31 December 2017, SWD (2018) 454 final, Brussels, 31 October 2018.

<sup>48</sup> Association Implementation Report on Ukraine, SWD (2018) 462 final, Brussels, 7 November 2018.

<sup>49</sup> In particular, to implement the law on timely access of patients to medical devices through public procurements, adopted on 19 March 2019, the Cabinet of Ministers of Ukraine introduced temporary amendments (till 31 March 2020) to the three technical regulations on various medical devices, which had been developed on the basis of relevant EU directives. These amendments simplified conformity assessment procedures, however, only for those medical devices that are procured through specialized organizations at the expense of the state budget.

in the EU. This approach is actively promoted by some importers from the EU. Yet, such unilateral recognition: 1) would put Ukrainian manufacturers into a disadvantageous competitive situation vis-à-vis their European and other competitors, since in order to access the same markets the former would have to have their products certified twice (in Ukraine and in the EU), while for the latter it would be sufficient to do it only once in the EU; 2) would undermine most of Ukraine's quality infrastructure, which would be deprived of the sense for its existence as well as of a significant portion of revenues and, consequently, of opportunities for development; 3) would actually invalidate Ukraine's commitments under the Association Agreement with the EU in the area of technical barriers to trade, since unilateral recognition renders meaningless any reforms in this area – then only European system has to be recognized and there is no need in the national system, therefore there is nothing to reform. This is why the option of unilateral recognition, although it does look attractive to certain stakeholders, cannot be acceptable for Ukraine.

Any simplifications or softening, moreover the lack of meaning for reforms, run contrary to Ukraine's obligations under the Association Agreement, but are an inevitable outcome in the absence of at least approximate timeframes for how long the wait for the ACAA will be.

Recently, it was reported that in the first quarter of 2020, a 'pre-evaluation mission' from the EU could finally arrive in Ukraine, for the purpose to assess the completion of the 'homework' and to offer proposals regarding sending an official evaluation mission to progressively move to conclusion of the ACAA<sup>50</sup>.

## RECOMMENDATIONS

### ***For Ukraine***

- Adopt draft law #2172 on amending the legislation of Ukraine in the area of market surveillance;
- Familiarize with new Regulation (EU) 2019/1020 of 20 June 2019 on market surveillance and compliance of products and start drafting relevant amendments to Ukraine's legislation;
- Concentrate the functions of legal concurrence of draft regulations, including technical ones, aimed at implementing the Association Agreement and preparing for the ACAA in a single institution, staffed with specialised personnel with the proper knowledge of the EU legislation and languages;
- Make the process of accreditation, the supervision of accredited conformity assessment bodies, and the process of designating and monitoring conformity assessment bodies stricter, in order to ensure the proper level of technical competence and to prevent fraudulent and unfair practices;
- Particularly focus on building capacity of market surveillance authorities;
- Raise awareness among economic operators and strengthen the role of business associations in the raising of their awareness.

---

<sup>50</sup> <https://www.eurointegration.com.ua/news/2019/11/20/7103282/>

***For the EU***

- Clarify the process and prospects for concluding the ACAA with Ukraine;
- If the EU is politically ready to move forward with the ACAA, make an official assessment of Ukraine's homework implementation;
- If the prospect of concluding the ACAA is indeed distant, define the stages of this process and agree to temporarily simplifying procedures and requirements that may be too strict or burdensome for economic operators;
- Provide Ukraine with effective technical assistance in drafting legislation and ensuring the proper functioning of quality infrastructure and market surveillance authorities.

# STREAMLINING EU-UKRAINE CUSTOMS PROCEDURES

**Andrii Butin**

## THE BENEFITS OF THE ASSOCIATION AGREEMENT

Implementing the customs-related provisions of the Association Agreement between Ukraine and the European Union (AA) will play a major role in integrating Ukraine economically into the EU's internal market. The result should be considerable streamlining of customs procedures, reduced costs for companies engaged in international trade, and a gradual increase in trade turnover between Ukraine and the EU.

*According to the Agreement, the EU offers Ukraine recognition of authorised economic operators (AEOs) and joining the common transit system (NCTS) that would considerably streamline customs procedures*

Among others, the AA provides for:

- establishing the institution of "authorised economic operators" in Ukraine (AEOs) and their recognition by the EU (Art. 76,1 (k) and Art. 80 (i) AA);
- establishing the single administrative document (SAD) in Ukraine and its recognition by the EU, and Ukraine's joining the EU's common transit system NCTS (Art. 76, 1 (c), Art. 76, 4 (b) and Annex XV to the AA).

**Establishing the AEO** will help reduce the number of customs procedures and the time for going through customs clearance for reliable companies, which will increase the competitiveness of Ukrainian businesses on foreign markets. One of the key advantages will be the recognition by both Ukraine and the EU of companies that have the status of AEOs. For the private sector, this means, first of all, savings in time, money and organisational resources, the transparency and predictability of procedures, and better potential business opportunities.

**Establishing the SAD** means instituting customs declarations in line with EU declarations and can be used for any import or export clearance procedure as well as for the procedure of the common transit for trade in goods between Ukraine and all other signatories of the **Convention on a Common transit**

**procedure**<sup>51</sup> and the **Convention on the simplification of formalities in trade in goods**<sup>52</sup> regardless of the type and source of such goods.

**Ukraine's participation in the EU common transit system (NCTS)** will enable businesses operators to use a single customs declaration and a single guarantee to move goods from the country of departure to the country of destination without delay across the borders of the Contracting Parties to the Convention on a Common transit procedure. It will bring a series of advantages, principal among which will be a significant acceleration and reduction in the cost of the movement of goods for all participants—exporters, transporters and importers, — and the removal of the requirement to declare export goods at the EU border: for exports, this will be done in Ukraine.

The implementation by Ukraine of these and other AA provisions in the area of customs, among other things, includes automation of certain procedures, introduction of post-clearance audit, improvement of risk-oriented control systems, common transit procedure etc. The implementation of all these measures in a complex will allow to make customs procedures more fair and transparent, reduce corruption risks, the volumes of smuggling and 'grey imports'<sup>53</sup>.

*Implementation of AA provisions on customs will enable to reduce corruption risks, the volumes of smuggling and grey imports*

## UKRAINE'S HOMEWORK

AA provisions on customs cooperation in Annex XV commit Ukraine to:

- introduce best practice from EU customs legislation to Ukrainian law, including the EU Customs Code, and establish the prerequisites for mutual recognition of AEOs within three years of the AA coming into effect;
- implement the provisions of the Conventions within a year of the AA coming into effect.

**AEO status**, which is granted to enterprises, offers a specific list of benefits and procedural shortcuts when going through customs clearance. This is the highest level of trust on the part of Customs towards a company. To gain this status, a company needs to meet specific criteria.

Nominally, AEO status was introduced in the Customs Code of Ukraine in 2012. But it doesn't work under the current rules and is significantly out of sync with international practice. Specifically, the criteria for gaining AEO status and the streamlining that comes with the relevant certificate do not match the actual types of certificates; AEO certificates cannot be issued to some businesses, such as brokers, expeditors and freighters; there are no provisions for monitoring AEO activities either, and more. In short, in order for Ukraine to establish the institute of AEOs, it needs to adopt legislation to amend the current Customs Code.

**For Ukraine to join the EU common transit system and institute the SAD**, legislation needs to be passed to establish different types of customs declarations that match those used in the EU for com-

<sup>51</sup> <https://eur-lex.europa.eu/eli/convention/1987/415/2017-12-05>

<sup>52</sup> <https://eur-lex.europa.eu/eli/convention/1987/267/oj>

<sup>53</sup> 'Grey imports' is imports of goods at a deliberately reduced customs value or imports of goods using existing legal grounds for importation into the territory of Ukraine, with subsequent evasion of payment of customs duties and sale of these goods in large volumes.

mon transit procedures. The necessary information and telecommunication system needs to also be developed and launched, based on European technology.

## CURRENT PUBLIC POLICY

Until recently, there has been no coherent customs policy in Ukraine. Despite the large number of international agreements ratified by Ukraine in this area, there was no comprehensive, systematic vision of the priority steps aimed at facilitating trade procedures.

Provisions in the AA and WTO treaty on simplifying trade procedures<sup>54</sup> list fairly clear steps that are needed to improve customs procedures. Unfortunately, however, Ukraine's Government and legislature used to operate in a chaotic and unsystematic fashion. The number of legal documents that were not aligned with each other was considerable and negatively affected how these norms were perceived and understood by those who were supposed to apply them. Draft amendments to current regulatory and normative acts were often not harmonised or duplicated each other. This artificially caused delays in the making of important and much-needed decisions.

Some improvements and a certain systematic approach were introduced by the decree #444 of the Cabinet of Ministers of Ukraine adopted on 19 June 2019, which approved the Plan of measures for the implementation of provisions of the WTO Agreement on Trade Facilitation. This Plan established specific measures, timelines and responsibilities for drafting and initiating legislation, providing appropriate software and computer equipment etc.

Much of this stalling was caused by the lack of a common vision in the Cabinet and the Rada, of what the role and position of a customs service within the system of state agencies should be. The AA itself does not require an independent customs agency in Ukraine, while EU practice varies. This is an example how an institutional issue that is not covered by the AA directly affects how quickly the implementation of its provisions on regulatory harmonisation takes place.

Eventually, in December 2018, the Cabinet of Ministers of Ukraine adopted a decision on the reorganisation of bodies implementing the state tax and customs policies and the creation of the State Tax Service and the State Customs Service as separate executive agencies.<sup>55</sup> In March 2019, the Regulation on the State Customs Service of Ukraine was approved by the Cabinet's Resolution No. 227.

The competition for the position of Head of the Customs Service was blocked for some time by several lawsuits. Eventually, in late June 2019, the winner was announced: Maxim Nefyodov, first deputy minister of economic development and trade of Ukraine (known for his previous successes in reforming public procurement). On 2 October 2019, the Cabinet approved the structure of territorial customs bodies<sup>56</sup>. To date, the process of organisational formation of the new Ukrainian customs service is still ongoing.

***The process of organisational formation of the new Customs Service as a separate public agency is still ongoing. This issue is not covered by the AA, however, directly affects its implementation***

<sup>54</sup> Ukraine joined the treaty in 2015. [http://zakon.rada.gov.ua/laws/show/981\\_053](http://zakon.rada.gov.ua/laws/show/981_053)

<sup>55</sup> Resolution of the Cabinet of Ministers of Ukraine of 18.12.2018 No. 1200 'On the Establishment of the State Tax Service of Ukraine and the State Customs Service of Ukraine': <https://www.kmu.gov.ua/ua/npas/pro-utvorennya-derzhavnoyi-podatkovoyi-sluzhbi-ukrayini-ta-derzhavnoyi-mitnoyi-sluzhbi-ukrayini>

<sup>56</sup> Resolution of the Cabinet of Ministers of Ukraine of 2 October 2019 No. 858 'On Formation of Territorial Bodies of the State Customs Service': <https://www.kmu.gov.ua/ua/npas/pro-utvorennya-teritorialnih-organiv-derzhavnoyi-m858021019mitnoyi-sluzhbi>

# STAKEHOLDER ANALYSIS

Overall, the streamlining of customs procedures will have a positive impact on everyone involved in foreign trade, as bringing down the costs of the process has a knock-on effect on the entire delivery cycle, starting with the seller and ending with the buyer. According to the Ministry of Economic Development and Trade, more than 14,000 companies exported goods to EU markets in 2017.<sup>57</sup> Comparatively more benefits should materialise from the general simplifications and reduction of costs of moving goods across the border, including thanks to the institution of the SAD and joining the EU Common Transit System, for small businesses, as their costs are much higher relative to volumes.

***SMEs will benefit most from joining the NCTS, and in time will be also able to take advantage of AEO status***

From the institution of AEOs, however, more benefits will be felt by relatively larger, older companies who can meet the criteria for being granted AEO status and gain the advantages that this status brings. In time, of course, SMEs will also be able to take advantage of AEO status once they have a track record of regular, uniform trade operations.

## IMPLEMENTATION DYNAMICS

In order to establish AEOs, in 2016, the Government submitted Draft Law #4777<sup>58</sup> to the Verkhovna Rada. It was prepared with the participation of profile NGOs and experts, and was presented at a broad range of public hearings for public debate. Meanwhile, the Rada soundly criticised it and in March 2018 returned the draft to the authors for further work. Most likely, it was returned because there was controversy around the criteria for granting AEO status that was aggravated by specific players who have been lobbying the interests of those who will potentially be receiving this status.

For Ukraine to join the EU Common Transit System, the Cabinet of Ministers submitted Draft Law #5627<sup>59</sup> to the Verkhovna Rada back at the end of December 2016. After languishing 18 months in the legislature, it failed to get the necessary votes to pass in May 2018, for inexplicable reasons.

Even before Draft Law #4777 was officially returned to the government and Draft Law #5627 voted down, a new Government draft, #7473, was registered in the Rada in December 2017, to amend the Customs Code.<sup>60</sup> This Draft Law was intended to both establish the institute of authorised economic operator (AEO) and streamline transit procedures in Ukraine. In effect, it replaced the ill-fated draft #4777 and some provisions of draft #5627. On 28 February 2019, draft Law #7473 was approved in the first reading.

<sup>57</sup> <https://ukr.segodnya.ua/economics/enews/ukraina-serezno-rasshirila-assortiment-svoih-tovarov-v-es-1117702.html>

<sup>58</sup> Draft Law #4777 "On amending the Customs Code of Ukraine regarding authorised economic operators and streamlining customs formalities," dated June 3, 2016. [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=59320](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59320)

<sup>59</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=60887](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=60887)

<sup>60</sup> Draft Law #7473 "On amending the Customs Code of Ukraine (regarding several issues of excusion in Sec. IV, Ch. 5 of the Association Agreement between Ukraine, on the one side, and the European Union, the European Atomic Energy Community and their member countries, on the other side)", dated 29 December 2017: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=63291](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=63291)

Relative to the previous two draft laws, the content of most of the rules in Draft Law #7473 had changed little. The most visible change is the new terminology introduced for AEO: the Slavic term for “authorised” has been replaced by a Latinised one. This doesn’t change the essence at all. The transitional provisions of the new draft law do shorten the maximum number of AEO certificates that may be issued in the first three years after the law comes into effect — a restriction that was absent in the previous draft. The new draft also proposes that, for these same first three years, applications for a certificate “to streamline customs procedures” only be considered from companies that both manufacture and export/import the goods involved — a restriction that was also absent in the previous draft law. In addition to this, compared to the previous draft, the number of special short-cuts for bearers of certificates on reliability and security was reduced.

After the elections, in the new convocation of the Verkhovna Rada, the draft #7473, revised after the first reading, was re-registered under #1048. On 2 October 2019, the Law “On Amendments to the Customs Code of Ukraine on Certain Issues of Authorised Economic Operators” was finally adopted.

As for Ukraine’s joining the common transit system, given the difficulty with passing the much-needed relevant laws, individual changes to establish SADs in Ukraine were added to a completely different draft law, intended to improve the functioning of the “single-window” mechanism at Customs. The Rada adopted this law on 6 September 2018.<sup>61</sup> These changes<sup>62</sup> make it possible for Ukraine to use customs declarations that are in line with the Convention on the common transit system before the Convention itself comes into effect for Ukraine. At the same time, the necessary information and telecommunication system and the actual use of these kinds of customs declarations remain to be implemented in practice.

On 4 February 2019, the government submitted draft #9532 “On a Common transit regime” to the Verkhovna Rada. The purpose of the draft law explicitly defined the implementation of the provisions of the Convention on a Common transit procedure and the Convention on the simplification of formalities in trade in goods to the national legislation of Ukraine. In fact, the draft proposed to introduce in Ukraine a separate procedure of the common transit, which would operate in parallel with the other customs regime of “transit” as provided for by the Customs Code of Ukraine. On 25 April 2019, this draft was approved in the first reading.

***In 2019, Ukraine finally adopted laws on AEO, EAD and NCTS. Now the new laws need to be implemented in order to open the way to the mutual recognition of AEOs and joining the NCTS***

After the elections and the change of the composition of the Verkhovna Rada, draft #9532, revised after the first reading, was re-registered under #1082. On 12 September 2019, the Parliament finally adopted the Law of Ukraine “On the common transit regime and the introduction of the national electronic transit system”<sup>63</sup>, aimed at implementing the provisions of the Convention on a Common transit procedure and the Convention on the simplification of formalities in trade in goods to the national legislation of Ukraine.

Thus, in 2019, Ukraine finally implemented its obligations to approximate customs legislation by adopting laws on AEO, introducing the EADs and joining NCTS. It is now necessary to create the by-

<sup>61</sup> Law of Ukraine #2530 “On amending the Customs Code of Ukraine and other legislation to institute the mechanism of a “one-stop shop” and streamlining control procedures while moving goods across the customs border of Ukraine, dated 6 September 2018. <http://zakon.rada.gov.ua/laws/show/2530-19>

<sup>62</sup> New Point 73 of the concluding and transitional provisions of the Customs Code of Ukraine, introduced by Point 40 of Law №2530.

<sup>63</sup> <https://zakon.rada.gov.ua/laws/show/78-20>

laws necessary for the full practical implementation of the common transit procedure, the functioning of the AEO and its recognition by the EU member states. It is also necessary to develop and implement an appropriate information and telecommunication system based on European technologies, which will need to be used for at least one year on the territory of Ukraine. Only then will Ukraine be able to receive a formal invitation to join the Convention on a Common transit procedure<sup>64</sup>.

For the reform of Ukrainian customs and effective fighting against smuggling and 'grey imports', it is important to develop cooperation with the custom services of the EU member states on the exchange of information. This exchange takes place on the basis of bilateral agreements between the states, since the NCTS system does not cover the entire volume of trade between the participating states: in parallel, there may be other systems applied of supply (transit) not covered by NCTS; also, shipments from the neighbouring countries will not be covered by NCTS. Currently, Ukraine has only few bilateral agreements on exchange of customs information.

***Efficiency of the new Ukrainian customs service will also depend on the effectiveness of cooperation and exchange of information with the customs services of EU member states***

## RECOMMENDATIONS

### ***For Ukraine***

1. Adopt by-laws to implement the new legislation on the Authorised Economic Operators and on streamlining transit procedures in Ukraine.
2. Invite neighbouring EU member states to conclude bilateral agreements on the exchange of customs information.
3. Systematise efforts aimed at implementing the customs-related provisions of the Association Agreement and simplifying trade procedures. Such efforts, moreover, should be joined with civil society institutions such as business associations that can really assist in making changes happen.
4. Provide for systemic mechanisms for government and public oversight over the activities of the new agency - State Customs Service.

### ***For the EU***

1. Facilitate the setting up the new State Customs Service of Ukraine, in particular through the implementation of technical assistance projects aimed at equipping customs, improving the skills of staff and exercising civic oversight over the customs service' operation.
2. Facilitate the conclusion of bilateral agreements on the exchange of customs information between Ukraine and the neighbouring EU member states.
3. To invite Ukraine to join the EU's common transit system and to recognize Ukrainian Authorised Economic Operators (AEO) in case of proper implementation of the new laws of Ukraine.

<sup>64</sup> The mere legislative transposition of the provisions does not provide for automatic joining to the Convention. Joining to the Convention shall take place only at the invitation of the Joint Committee of the Convention. There is no official list of requirements to be fulfilled by the candidate country to receive the invitation. However, in practice, such an invitation is granted if the country proves to be able to comply with the provisions of the Convention by unilaterally using the common transit procedure within a year. Upon receiving such an invitation, Ukraine shall ratify the Convention by adopting a law. For details, see "Status and Prospects for Ukraine's joining to the Convention on a Common Transit Procedure, as provided for in the commitments within the EU-Ukraine Association Agreement" of the Ukrainian Centre for European Policy and Ernst & Young: <https://bit.ly/36yRgrY>

# INTEGRATING UKRAINE INTO THE EU'S FINANCIAL SERVICES MARKET

**Vitaliy Kravchuk**

## THE BENEFITS OF THE ASSOCIATION AGREEMENT

Annex XVII of the Association Agreement envisages a possibility of full internal market treatment for trade in financial services. This means offering equal conditions for the operation of Ukrainian companies and companies from EU member states on the EU and Ukrainian market, and complete freedom for Ukrainian companies to provide services on the EU market and for EU companies to provide them on the Ukrainian market. For financial institutions, this should mean expanding the "passport" regime, which allows banks, insurance companies and other financial services providers governed by a regulator in one of the EU countries to operate in all EU countries, to include Ukraine. In other words, Ukrainian companies would be able to work in all EU countries and EU companies in Ukraine.

Annex XVII anticipates internal market treatment to be granted after the EU had carried out a comprehensive assessment of regulation in the sector in Ukraine and concluded that the prerequisites established by the AA have been met.

Before internal market treatment is granted, the rules for trading in services between Ukraine and the EU do not significantly differ from the rules governing trade with third countries: trade is free with certain exceptions that are provided for in Annex XVI. These exceptions are not very different from similar exceptions written into the GATT under the WTO.

However, the European Commission's report on the implementation of the DCFTA with Ukraine for 2016<sup>65</sup> notes that Ukraine will not be able to completely institute EU legislation in financial services. The reason why is that the EU itself is gradually moving towards more centralised supervision of banks and other providers of financial services. Newly established EU-level financial services regulators such as the European Banking Authority have no legal authority to operate outside the EU. So, a major shift in the approach to regulating financial services within the EU has made the prospects for granting internal



***The Agreement contains the perspective for full internal market treatment for trade in financial services, but the changes in EU regulations have made this prospect uncertain.***

---

<sup>65</sup>p. 44. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0364>

market treatment to Ukraine written into the AA uncertain. However, the following reports on the implementation of the DCFTA with Ukraine (for 2017 and 2018) recognise the prospect for granting internal market treatment and do not mention regulatory difficulties for it<sup>66</sup>.

## UKRAINE'S HOMEWORK

In order to get internal market treatment, Ukraine's legislation needs to be approximated to EU legislation governing financial services and ensure the necessary level of capacity for oversight bodies and mechanisms to work. The list of EU financial services legal acts that Ukraine has committed to instituting in its own legislation is specified in Annex XVII-2 of the AA. The commitment is considerable: Ukraine must institute the basic EU legislation that regulates the operation of banks, insurance companies and capital markets operators; the circulation of securities, current payment settlements, prevention of money-laundering, and the free movement of capital.

As a result of reforms to the regulation of financial services in the EU, a considerable portion of EU legislation mentioned in the AA has been dropped and replaced by new legislation that in many cases increases the regulatory burden on market players. In this situation, Art. 3 of Annex XVII provides for consultations between the EU and Ukraine about how to update this annex. The EU and Ukraine discuss the possibility to update the Annex XVII, but no official decision has been made yet. At the same time, Ukraine has already added to its AA implementation action plan the new EU legislative acts that replaced outdated legislation.

Both Ukraine and the EU are implementing recommendations from the Basel Committee on Banking Supervision.<sup>67</sup> So far both have introduced the principles of banking supervision and basic capital requirements for banks known as Basel I. However, the EU has already instituted the latest standards for banking regulation, known as Basel III, which were adopted in response to the global financial crisis of 2007-2009, whereas Ukraine is still just in the process of instituting them.

The operation of insurance companies in Ukraine is regulated by the Law on insurance adopted in 2001. At that time, the regulation of the insurance sector in Ukraine was not significantly different from EU rules. However, since 2016, insurance companies in the EU have been working according to new rules, established in Directive 2009/138/EU known as Solvency II. Among others, the list of permissible assets for investment was dropped, new capital requirements were introduced, along with new requirements for the way insurance companies manage risks, and transparency in the supervision of insurance companies was increased. These changes have not yet been reflected in Ukrainian legislation.

***Though the content of Ukraine's obligations under the AA has not been officially updated, Ukrainian implementation plans do include approximation to the new EU legislative acts***

EU legislation governing capital markets corresponds to the more developed capital markets in member-states economies, compared to Ukraine, and has also been substantially updated in recent years.

<sup>66</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2019:370:FIN> ; <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2018:454:FIN>

<sup>67</sup> Includes the central banks and bank regulators of 28 (mostly developed) countries and territories. For more information, see: <https://www.bis.org/bcbs/index.htm?m=3%7C14>

The MiFID II Directive and MiFIR Regulation contained the most substantial changes regarding financial instruments markets. They increased the requirements for the protection of retail customers, expanded transparency requirements among market participants, in particular the disclosure of OTC transactions, and updated requirements for regulated markets.

## CURRENT PUBLIC POLICY

Following the signing of the AA, financial market regulators and the Verkhovna Rada began to implement Ukraine's obligations to approximate domestic legislation to the EU's legislation on financial services. In particular, legislation on banking supervision and consumer protection was approximated to that of the EU as a result of the implementation of the Comprehensive Programme for Developing the Financial Sector until 2020, adopted in 2015. However, these financial sector reform plans proved to be quite ambitious and much of the work still remained to be done.

In September 2019, the Verkhovna Rada adopted the Law on Amendments to Certain Legislative Acts of Ukraine on Improving the Functions of State Regulation of Financial Services Markets<sup>68</sup>. As of 1 July 2020, it lays the responsibilities for regulating financial services on the National Bank of Ukraine (NBU) and the National Commission for Securities and Stock Markets (NCSSM). The National Financial Services Commission<sup>69</sup>, previously responsible for regulating non-banking financial services (excluding capital markets), will cease operations. The consolidation of financial services regulation will simplify the implementation of obligations within the AA.

Preparation of the Strategy for Developing the Financial Sector of Ukraine until 2025 is currently underway, and its adoption is planned by the end of 2019. The concept of the strategy envisages the implementation of the EU acquis norms required to obtain the internal market treatment<sup>70</sup>.

## MARKET ANALYSIS

The role of the financial sector in Ukraine's economy declined during the 2014-2015 crisis when half the country's banks were shut down and the number of financial institutions sharply cut. As a result, the gross value added (GVA) share of financial services shrank from 5.2% in 2013 to 3.3% in 2018, when the GVA of financial services was worth UAH 99 billion or around € 3.1 billion. This is comparable to the GVA of financial services of the three Baltic countries (€2.7 billion). Budget revenues from banks, insurance companies and other financial institutions are relatively small. Financial services generally are not subject to VAT, while revenues from profits are limited by losses that accumulated during the crisis.

Banks and insurance companies are Ukraine's biggest components of the financial sector. In 2017, commercial banks and the NBU formed 52.5% of the sector's added value, insurers formed 28.5%, and other capital market participants only 19%.<sup>71</sup>

***At the moment, state-owned banks dominate Ukraine's banking sector. Among privately-owned banks, the EU banks prevail***

<sup>68</sup> <https://zakon.rada.gov.ua/go/79-20>

<sup>69</sup> Full name: National Commission Regulating Financial Services Markets.

<sup>70</sup> <https://bank.gov.ua/about/refactoring/develop-strategy>

<sup>71</sup> Rounding results in a total of 99%.

At the moment, state-owned banks—Privatbank, OshchadBank, UkrExImBank and Ukrgazbank—dominate Ukraine's banking sector, constituting more than 55% of market value as of August 2019. Among privately-owned banks, the larger share is held by banks from EU member states. Only one privately owned Ukrainian bank is among the Top 10 largest banks by asset value, occupying the 7<sup>th</sup> place. Russian banks are reducing their presence on the Ukrainian market and have announced plans to sell their Ukrainian subsidiaries.

**Privatbank** was the largest privately owned bank in Ukraine until the end of 2016, owned by Ihor Kolomoyskiy and Ghennadiy Boholiubov.<sup>72</sup> According to the NBU, Privatbank was using the money it took from depositors mainly to issue credits to related parties that were part of Kolomoyskiy's Privat Group. These loans were often issued against over-valued, illiquid or even completely non-existent collateral.

When negotiations of NBU and Ministry of Finance with Privatbank's owners about restoring the bank to financial health reached a dead end, the owners appealed to the government to nationalise the bank.<sup>73</sup> The Personal Deposit Guarantee Fund declared Privatbank insolvent on 18 December 2016, and sold the bank to the state on 21 December for a single hryvnia.<sup>74</sup> The former owners promised to restructure the loans the bank had issued by 1 July 2017, but never did.<sup>75</sup> In order to protect the interests of Privatbank's 20 million depositors and maintain overall financial stability, over 2016-2017 the government spent more than UAH 155 billion or about €5 billion, equal to 5% of Ukraine's GDP, to cover the bank's losses.

As of November 2019, the NBU and now state-owned Privatbank have suits pending against the bank's former owners in Ukrainian, Swiss, English and US courts to compensate the losses the government has suffered.<sup>76</sup> At the same time, the former owners of the bank received several rulings by Ukrainian courts that found certain aspects of nationalisation of Privatbank illegal; these rulings were appealed by Privatbank and, accordingly, did not come into force.

Among the biggest insurance companies in Ukraine, there are also several subsidiaries of EU insurers such as UNIQA and PZU, but the share of Ukrainian-owned insurers is higher than in the banking sector. Other financial institutions are also predominantly Ukrainian-owned.

As of today, Annex XVI of the AA allows Ukrainian banks and insurance companies to enter the EU market through subsidiaries and branches, but they may not provide services across borders, with a few exceptions: insuring sea and air transport, and goods in transit. In order to open a subsidiary or a branch, Ukrainian companies must undergo a prudential review of the parent company, just like any other investors. So far, only Ukraine's Privatbank owns a 47% stake in AS Privatbank in Latvia and has a

***Ukrainian banks and insurance companies may already enter the EU market through subsidiaries and branches, but do not do it because of economic considerations. Respectively, the initial effect of the opening of the EU financial services market to Ukraine will be limited***

<sup>72</sup> <https://bank.gov.ua/doccatalog/document?id=62483489>

<sup>73</sup> <https://www.minfin.gov.ua/uploads/redactor/UBOs%20Letter%20UKR.jpg>

<sup>74</sup> <http://www.fg.gov.ua/not-paying/banks-sold-to-state/188-pat-kb-pryvatbank>

<sup>75</sup> <https://www.minfin.gov.ua/news/view/povidomlennia-ministerstva-finansiv-shchodo-statusu-restrukturyzatsii-kredytnoho-portfeliiu-pryvatbanku-kolysh-nimy-vlasnykamy?category=novini-ta-media>

<sup>76</sup> [https://bank.gov.ua/control/uk/publish/article?art\\_id=71475865&cat\\_id=55838](https://bank.gov.ua/control/uk/publish/article?art_id=71475865&cat_id=55838), [https://bank.gov.ua/control/uk/publish/article?art\\_id=60908601&cat\\_id=55838](https://bank.gov.ua/control/uk/publish/article?art_id=60908601&cat_id=55838)

branch in Cyprus. In 2017, plans were announced for the sale of the Latvian subsidiary of Privatbank; however, no one interested to buy it has been found yet. Other Ukrainian banks have no branches or subsidiaries in the EU.

Should Ukraine's access to the EU financial services market be expanded, the initial effect is likely to be limited, given that Ukrainian financial firms are not very actively taking advantage of available options for entering the EU market. Barriers to entry for providers of standard banking and insurance services will also not change much: the EU market is dominated by major players, the cost of real estate and labour is high, and capital is relatively expensive.

Still, in a longer perspective, relatively inexpensive and professional labour force could offer a competitive advantage for start-ups in financial technology on the EU market. Ukrainian banks could put up a good fight to serve the subsidiaries of Ukrainian business groups abroad and Ukrainian migrants.



***EU banks and insurance companies already have a significant presence on the Ukrainian market and were able to enter the market without particular problems***

Expanded access to Ukraine's financial services market could also have a limited impact on EU companies. EU banks and insurance companies already have a significant presence on the Ukrainian market and were able to enter the market without particular problems. Financial sector companies with Ukrainian owners have been competing with foreign market participants for quite some time. However, lowering barriers to entry for new players could increase competition on the market and reduce the shares of the biggest players.

## IMPLEMENTATION DYNAMICS

Among financial services regulators, the NBU has more freedom to act in regulating banks. As a result, the NBU can implement a significant part of EU banking norms without amending the relevant laws. For instance, in 2015, the NBU required banks to establish buffer capital as of 2020,<sup>77</sup> while in 2018 the central bank instituted the liquidity coverage ratio or LCR.<sup>78</sup> The entering into force of the new Law on currency and currency operations in February 2019 allowed the National Bank to implement AA commitments to liberalise the movement of capital. Overall, AA implementation in the banking sector is on schedule.

Establishing EU norms in the insurance market requires that the related law<sup>79</sup> be amended, as the basic requirements for solvency among insurance companies are set at the legislative level. Draft Law #1797-1,<sup>80</sup> which institutes provisions of the Solvency II Directive regarding solvency for insurance carriers, passed first reading in 2016 but the newly elected Verkhovna Rada withdrew it from consideration.

With capital markets, changes<sup>81</sup> were made to the related law on securities and the stock market,<sup>82</sup> and to other laws, to implement some of Ukraine's AA commitments, at the end of 2017. To implement

<sup>77</sup> <http://zakon.rada.gov.ua/go/v0312500-15>

<sup>78</sup> <http://zakon.rada.gov.ua/go/v0013500-18>

<sup>79</sup> Law "On insurance" #85/96-VR dated 7 March 1996. <http://zakon.rada.gov.ua/go/85/96-%D0%B2%D1%80>

<sup>80</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53904](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53904)

<sup>81</sup> Law "On amending certain legislative acts of Ukraine to simplify doing business and attracting investments for issuers of securities" #2210-VIII, dated 16 November 2017. <http://zakon.rada.gov.ua/go/2210-19>

<sup>82</sup> Law #3480-IV dated 23 February 2006. <http://zakon.rada.gov.ua/go/3480-15>

***There has been noticeable progress with the implementation of EU norms in financial services in recent years, although the Parliament is slow in reviewing the necessary draft laws***

of the new convocation,<sup>85</sup> which largely repeats the provisions of the Draft Law #7055 and introduces those same norms of EU legislation.

the revised legislation, the NCSSM amended its regulations in 2018.<sup>83</sup> In July 2018, the Verkhovna Rada rejected Draft Law #7055,<sup>84</sup> which had been submitted in 2017 and proposed adopting a new law on capital markets and organised commodity markets. The draft law contained provisions to introduce the norms of EU legislation, including the profile MiFID II/MiFIR directive/regulation regarding financial instruments markets. In October 2019, Draft Law #2284 was submitted to the Verkhovna Rada

Overall there has been noticeable progress with the implementation of EU norms in financial services in recent years, although it is hampered by the slow work of the Verkhovna Rada in reviewing the necessary draft laws. The Rada has also not managed to decide to either adopt or reject the proposition to redistribute the powers of financial services market regulators – which is not required under the AA, but this has slowed down the development of regulators' institutional capacity to implement the AA.

The prospects for internal market treatment as anticipated in the AA remain unclear, given that current EU legislation does not provide for EU financial services oversight agencies and regulators to operate beyond the borders of the EU.

***The prospects for internal market treatment as anticipated in the AA became uncertain, given that current EU legislation fundamentally changed the regulation of financial services***

## RECOMMENDATION

***The EU and Ukraine need to clarify the prospects for future integration between their financial services markets, in effect choosing one of three possible options:***

- 1. Offer Ukraine the same kind of *mechanism as has been offered to the countries of the European Free Trade Association (EFTA)*<sup>86</sup>, which involves introducing EU legislation within the framework of the European economic space. Formally, the function of European supervisory bodies was delegated to the EFTA supervisory body, while the regulators themselves participate in reviews and draft decisions for the EFTA supervisory body.**
- 2. Look for a compromise** that would expand the integration of financial services markets and reduce the regulatory burden tied to full implementation of EU legislation. For instance, Ukraine could institute all EU norms, except the ones that are the most complicated for market participants to implement, in return for simplified procedures for Ukrainian companies to enter the EU market.
- 3. Reject the goal of having a single financial market.** That would make the establishment of EU rules in this sector non-binding for Ukraine, and so more attention would have to be paid to possibly increasing the regulatory burden on market participants while offering more flexibility in the implementation of EU norms, which will simply become non-binding sources of best regulatory practice.

<sup>83</sup> <https://www.nssmc.gov.ua/2018/02/20/zakon-v2210-viii-regulyuvannya-otsnyuvatchv/>

<sup>84</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=62443](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62443)

<sup>85</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67117](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67117)

<sup>86</sup> <http://www.efta.int/EEA/news/EEA-adaptations-EU-financial-supervisory-system-128596>

# INTEGRATING UKRAINE INTO THE EU'S DIGITAL SINGLE MARKET

**Volodymyr Nochvai, Lilia Oleksiuk, Oksana Prykhodko**

## DIGITAL SINGLE MARKET AND THE ASSOCIATION AGREEMENT

Given that the digital revolution is evolving at a much faster pace than the industrial revolution once did, digitalizing the economy will determine a country's competitive positions for the upcoming years. Understanding this, the EU began to carry out its Digital Single Market (DSM) Strategy in 2015.<sup>87</sup>

In a Joint Declaration at the Eastern Partnership Summit in November 2017, the participants agreed to cooperate in harmonizing digital markets to extend the benefits of the EU DSM to the partner countries.<sup>88</sup> The related deliverable, #7, was listed among the 20 deliverables of the EaP by 2020.<sup>89</sup>

The structure of the Association Agreement covers the subject of a digital market in a number of places:

- Title IV, Chapter 6, Section 5, Sub-section 3: liberalizing commerce in computer services;
- Title IV, Chapter 6, Section 5, Sub-section 5 and Annex XVII: integrating Ukraine into the EU's internal market of telecommunications services;
- Title IV, Chapter 6, Section 6: cooperation in developing e-commerce;
- Title V, Chapter 14: cooperation in the information society and access to information and communication technologies (ICT);
- Title V, Chapter 15 and Annex XXXVII: approximating policy in the audio-visual sector.

In the telecommunications services sector, the AA offers the prospect of a mutual internal market treatment. According to Art. 4 (3) of Annex XVII of the Agreement, this kind of treatment means that there should be no restrictions on the freedom of a Ukrainian legal entity to provide services on the territory of the EU and vice-versa. This will be possible provided that the EU evaluates Ukraine's fulfilment of its "homework" with regard to approximating Ukrainian legislation and regulations to EU law.

---

<sup>87</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0192>

<sup>88</sup> <https://www.consilium.europa.eu/media/31758/final-statement-st14821en17.pdf>

<sup>89</sup> [https://cdn3-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/dLJ9RdBalFgQqx34lgPlwagsNlujB6cjzDeeiRR0RdQ/mtime:1497363650/sites/eeas/files/swd\\_2017\\_300\\_f1\\_joint\\_staff\\_working\\_paper\\_en\\_v5\\_p1\\_940530.pdf](https://cdn3-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/dLJ9RdBalFgQqx34lgPlwagsNlujB6cjzDeeiRR0RdQ/mtime:1497363650/sites/eeas/files/swd_2017_300_f1_joint_staff_working_paper_en_v5_p1_940530.pdf)

In this way, Ukraine's integration into the EU's DSM is a logical objective that flows out of AA provisions and EaP priorities. For Ukraine, the DSM will effectively mean access to the online markets and e-services of EU countries, simplified legal and administrative barriers, enjoying common rules for free cross-border dissemination of online services and content, online payments, simplified procedures for digital contracts, licensing, taxation and copyright registration. As a consequence of integrating into the DSM, investments should grow, together with commerce and employment.

***Integrating Ukraine into the DSM is in line with AA provisions and EaP priorities. The AA also offers prospects for internal market treatment in the telecoms services sector***

## UKRAINE'S DIGITAL MARKET

In 2018, Ukraine's telecommunications market grew by 10% up to UAH 66.5 billion or over € 2 billion, meaning less than 1% of the EU market. The most important market players in telecom are the operators of mobile, satellite and cable networks, and internet service providers. Ukraine's biggest of these segments in terms of revenues is the mobile telecoms market. The 'Big Four' Ukrainian large-scale mobile and fixed-line operators (Kyivstar, Vodafone Ukraine, Lifecell, and Ukrtelecom) favourably assess potential outcomes of DSM integration and mutual internal market treatment in the telecommunications services sector.<sup>90</sup> Nevertheless, smaller players – a great number of small-scale providers – oppose to increasing market regulation by the state.<sup>91</sup>

According to the Ecommerce Foundation<sup>92</sup>, Ukraine's e-commerce market in 2018 grew by 22% as against 2017 and reached UAH 70 billion. It remains Europe's second market in terms of the growth rate. According to various sources, about 25-33% of Ukrainians regularly buy online and pay for their orders with bank cards directly on the site. Both international and Ukrainian e-platforms such as eBay, Taobao, Amazon, Rozetka etc. have grown in popularity. This has also raised a slew of problematic issues that need to be legislated properly, especially when it comes to consumer protection and personal data security in the face of illegal use for the purposes of advertising, and marketing and selling data.

***The large mobile operators are positive about integration into the DSM while the smaller internet providers oppose to increasing the market regulation by the state***

Today, Ukraine's IT sector produces about 4.5% of GDP. This and the industry's export volume place it in third place after agriculture and metallurgy.<sup>93</sup> The domestic IT sector is largely oriented towards export markets: 80-90% of IT services are provided to foreign markets. The sector's main customers for computer and information services are traditionally in the US and the EU.<sup>94</sup>

<sup>90</sup> Stakeholder survey conducted in April 2019 by iNGO 'European Media Platform' (<http://www.eump.org>)

<sup>91</sup> Open Appeal of the Ukrainian Internet Association to the Ukrainian Government on the Threat of Destroying the Internet Access Services Market, 4 Nov. 2019: <https://inau.ua/document/vidkryte-zvernennya-vid-04112019-do-ukrayinskoyi-vlady-shchodo-zagrozy-znyshchennya-rynku>

<sup>92</sup> <https://www.ecommercefoundation.org/free-reports>

<sup>93</sup> <https://www.kmu.gov.ua/ua/news/sekto-it-mozhe-stati-dodatkovim-lokomotivom-ekonomichnogo-zrostannya-glava-uryadu>, <https://economics.unian.ua/finance/2349038-eksport-it-poslug-z-ukrajini-za-rik-zris-do-36-milyarda-infografika.html>

<sup>94</sup> <https://eba.com.ua/industriya-narostyla-eksport-poslug-na-17-5/>

# UKRAINE'S HOMEWORK

In signing the AA, Ukraine committed itself to gradually bringing its existing and future legislation governing the telecommunications sector in line with the EU acquis, commitments that are spelt out in Annex XVII. However, since the AA was concluded, the EU has begun to radically revise its legislation in this sphere as part of setting up the DSM.

The DSM Strategy for Europe requires:<sup>95</sup>

- Removing barriers to cross-border trade in goods and services through the internet by simplifying contractual obligations, e-commerce, reforming copyright rules, avoiding unwarranted geoblocking, protecting consumer rights, unifying taxation, reviewing the rules for providing cable and satellite communications and courier services;
- Harmonizing with the regulations governing digital networks and services in EU countries by revising legislation governing the dissemination of content, telecommunications, audio-visual services, the protection of personal data, the development of public-private partnerships in cyber security, ensuring that information and communication technologies are broadly accessible;
- Taking maximum advantage of potential growth in the EU digital economy by investing in infrastructure and technologies such as cloud computing and big data, and in research and innovations aimed at increasing industrial competitiveness, improving public services, and developing digital skills among ordinary citizens.

As of September 2018, the European Commission had presented 30 legislative propositions related to DSM as part of the implementation of the Strategy, 19 of which were passed by the Council of the EU and the European Parliament.<sup>96</sup>

***Substantive changes to EU legislation mean that AA provisions defining Ukraine's DSM 'homework' need to be updated***

Common tasks for Ukraine and the EU include achieving 20 EaP deliverables till 2020. The EaP deliverable #7 targets on harmonisation of digital markets somewhat duplicate, supplement, elaborate on or are additional to the AA provisions. Most of the defined targets relate to Title V Chapter 14 (Information society), and also to some other AA articles regarding telecommunications services, database protection, cross-border digital communications services, and regulations governing e-commerce.<sup>97</sup>

## CURRENT PUBLIC POLICY

In early 2018, the Cabinet adopted the Concept of the development of the digital economy and society of Ukraine for 2018-2020<sup>98</sup> and approved an Action Plan for implementing it. Prior to concluding this document, the Ministry of Economic Development and Trade (MEDT) spent considerable efforts

<sup>95</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0192>

<sup>96</sup> <https://ec.europa.eu/digital-single-market/en/news/creating-digital-single-market-european-commission-actions-2015>

<sup>97</sup> [https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/Web\\_ua\\_AAEap-deliverables\\_civic\\_synergy\\_ua\\_2018.pdf](https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/Web_ua_AAEap-deliverables_civic_synergy_ua_2018.pdf) pp 6, 13-14.

<sup>98</sup> <https://www.kmu.gov.ua/ua/news/uryad-shvaliv-koncepciyu-rozvitku-cifrovoyi-ekonomiki-ta-suspilstva-ukrayini-na-2018-2020>

drafting the foundation document – 'The Digital Agenda for Ukraine - 2020'<sup>99</sup> – together with leading IT experts and civil society. The Concept establishes the key policies, priority areas, initiatives and projects for the digitalisation of Ukraine until 2020. On 30 January 2019, the Cabinet issued Decree No. 56 'On certain digital development issues'<sup>100</sup> to implement a 'digital by default' state policy principle, that is, digitise those analogue systems of which development and maintenance are obviously neither efficient nor effective.

However, no financial and organisational resources of the state were allocated for implementing the Concept's Action Plan in 2018-2019. Similarly, no funds were allocated for this purpose in the approved State Budget for 2020.<sup>101</sup>

Moreover, until recently, Ukraine did not have a separate central executive body to deal with the development of a digital economy and society. Earlier, the issues of the digital economy development were assigned to the MEDT, even though it had no department in place for this task within its structure. Public policy for the development of information society was partly handled by the State Agency for E-Governance of Ukraine.

A good deal of the election programme of the new President of Ukraine, Volodymyr Zelensky,<sup>102</sup> was dedicated to building an 'e-country.' In particular, it deals with the high-speed internet access, digital literacy development, start-ups support, e-services, e-elections, and e-participation of citizens in decision-making. 'A State in a Smartphone' project was presented in the Presidential Office.<sup>103</sup>

***For the first time, a Ministry for Digital Transformation was set up in Ukraine. However, the state budget does not provide funding for the digital development***

An essential step forward of the new Government was the upgrade of the State Agency for E-Governance to a Ministry for Digital Transformation (MinDigit) and setting up a Parliamentary Committee on Digital Transformation. The MinDigit's main tasks are to develop and implement public policy on digitisation, digital development, digital economy, digital innovation, e-governance and e-democracy, as well as information society development. In particular, the ministry's terms of reference also include the issues of access to internet and telecommunications, electronic commerce and business, and electronic identification and trust services. The MinDigit is the very authority that is vested with the coordination and organisation of activities of executive agencies related to integration into the Digital Single Market. It should be mentioned, however, that the MinDigit structure and functions do not cover the whole range of the digital development's areas as outlined in the Concept of the development of the digital economy and society and the DSM Strategy.

On 4 October 2019, the Ukrainian Parliament approved the Action Programme of the new Cabinet of Ministers of Ukraine, which includes joining the EU's digital space as one of its goals. Total digitisation

<sup>99</sup> <https://goo.gl/BUui46>

<sup>100</sup> <https://www.kmu.gov.ua/ua/npas/deyaki-pitannya-cifrovogo-rozvitku>

<sup>101</sup> The State Budget for 2020 does not provide for funding digital transformation programmes and projects, either new ones, such as the 'State in a Smartphone,' or those to implement the Concept of the development of the digital economy and society of Ukraine that was adopted by the previous Government. Only UAH 30.8 million is earmarked to maintain the current e-governance systems and UAH 73.6 million for the National Informatisation Programme: [www.dw.com/uk/на-проект-держава-в-смартфоні-кошти-в-держбюджет-2020-не-закладені-міністр/a-51125869](http://www.dw.com/uk/на-проект-держава-в-смартфоні-кошти-в-держбюджет-2020-не-закладені-міністр/a-51125869), <https://ua.interfax.com.ua/news/econom-ic/622907.html>

<sup>102</sup> <https://www.cvk.gov.ua/pls/vp2019/wp005pt021f01=233pt001f01=720.html>

<sup>103</sup> <https://www.president.gov.ua/en/news/radnik-prezidenta-ukrayini-mihajlo-fedorov-obgovoriv-iz-pred-55621>

of processes and information is planned at the level of the government machinery. The Programme lays down that improving the access of citizens to high-speed internet, the quantity and quality of online services, and the digital skills of citizens that will use these services will be priorities in the Ministry of Digital Transformation's activities. The Government is planning to optimise registers (the draft law 'On public electronic registers' passed in the first reading<sup>104</sup>), create a single portal for services, and develop state-of-the-art electronic identification techniques for individuals (like Smart-ID). The systemic development of the internet is considered an important step toward the harmonisation with European legislation on digitisation.

***The national regulator is not an independent agency and cannot carry out its proper functions***

The national regulator for electronic communications in Ukraine is the National Commission for the State Regulation of Communications and Informatisation (NCCIR). The State Service of Special Communication and Information Protection regulates special communications and the protection of state information and telecommunications systems and resources. At present, this service is supposed to be turned over to the new ministry (although it

is still not decided which of the functions that do not come within the MinDigit competence will be turned over to other agencies). In addition, the NCCIR is not an independent authority de jure since it is subordinated to the President of Ukraine; whereas de facto, according to stakeholders, it has not sufficient powers and capacities to exercise properly the functions of an independent regulator up to EU standards.<sup>105</sup>

## IMPLEMENTATION DYNAMICS

In the last few years, Ukraine managed to take a series of steps to approximate legislation and regulation. In November 2018, the law on electronic trust services came into effect, which updated legislation governing electronic identification such as digital signatures in line with the eIDAS Regulation 910/2014.<sup>106</sup> Today, negotiations are underway on drafting an agreement on mutual recognition of electronic trust services between Ukraine and the EU to ensure mutual recognition by both parties of e-identification of their individuals and legal entities.

In December 2018, the head of the State Agency for E-Governance signed administrative arrangements with the EU on cooperation in the e-governance development. In particular, Ukraine obtained access to the EU's ISA<sup>2</sup> programme, which is in charge of the development of unified standards for the provision of e-services.<sup>107</sup>

***In recent years, Ukraine took steps to approximate its legislation and regulations, but it is not keeping up with the pace of updates to EU legislation***

<sup>104</sup> <https://thedigital.gov.ua/news/zakonoproekt-pro-publichni-elektronni-reiestri-priynyato-v-pershomu-chitanni>

<sup>105</sup> <https://www.civic-synergy.org.ua/en/analytics/from-objectives-to-results-the-implementation-of-the-eu-ukraine-association-agreement-as-seen-by-stakeholders/>, pp. 38-46.

<sup>106</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC, which is mentioned in Annex XVII-3 to the Association Agreement.

<sup>107</sup> <https://www.ukrinform.ua/rubric-politics/2600622-ukraina-i-evrosouz-pidpisali-ugodu-sodo-elektronnogo-uraduvanna.html>

At the same time, Ukraine still lacks a strategy to ensure access to high-speed internet (broadband access). In 2015, a law on e-commerce was adopted, which nevertheless left unregulated a variety of issues related to the harmonisation with EU law.<sup>108</sup>

No progress has been made in passing new legislation on electronic communications and radio spectrum. Draft Law No. 1083 on e-communications, introduced at the beginning of the new Parliament's term, raised a lot of criticism for its provisions that allowed excessive intervention in private life and was revoked. Presently, there are three legislative drafts on the matter that are discussed by a working group within the Parliamentary Committee on Digital Transformation, namely on the infrastructure development for digital transformation of the economy and society (No. 2320 of 28 Oct. 2019), on e-communications (No. 2264 of 15 Oct. 2019), and on radio spectrum (No. 1086 of 29 Aug. 2019). It is possible that a new draft law on e-communications will be developed based on the three.<sup>109</sup> A key question here is whether it will contain clauses on the independence and powers of the Regulator for e-communications in line with EU law.

In early 2016, a Cyber Security Strategy was approved and in May 2018 the law on the basic principles of ensuring the cyber security of Ukraine came into effect. A legislative proposal on critical information infrastructure is in the process of being drafted. However, both the legislation and the Cyber Security Strategy action plan need to be amended to meet the requirements of NIS Directive on network and information system security<sup>110</sup> and the new EU Cyber security Act, which came into effect on 28 June 2019 and, in particular, is introducing a new approach to cyber security certification.<sup>111</sup>

Meanwhile, Ukraine has not completely ratified the Council of Europe's Convention on Cybercrime, having not yet agreed to apply the section of the Convention on digital evidence.<sup>112</sup> Because of this, law enforcement agencies often seize computers as material evidence (e.g. in investigations of piracy), claiming that existing legislation does not provide for the use of copies. This worsens conditions for IT business. In spring 2017, the law on government support for cinematography was adopted, instituting new mechanisms for protecting copyright and other rights on the internet. However, this did not resolve the problem with the dissemination of illegal content on pirate sites that are generally not hosted in Ukraine. The National Office of Intellectual Property and the MEDT have drafted a National Intellectual Property Strategy for 2020-2030, which covers the copyright and digital economy issues among other things.

## UPDATING THE COMMITMENTS

Taking into account the considerable changes in EU legislation on DSM since the conclusion of the AA, there is a need to identify the exact extent of Ukraine's 'homework', and in particular, update Annexes XVII and XXXVII.<sup>113</sup>

<sup>108</sup> For more details on problems of Ukraine's public policy on e-commerce see: <https://www.civic-synergy.org.ua/en/analytics/how-the-government-of-ukraine-can-develop-a-state-policy-on-e-commerce/>

<sup>109</sup> <http://www.dsnews.ua/economics/uregulirovat-svyaz-pochemu-prezhde-chem-stroit-gosudarstvo-06112019220000>. A draft Code of Electronic Communications should be also mentioned, which was presented by the Better Regulation Delivery Office (BRDO) in the summer of 2019 but has never made it to Parliament.

<sup>110</sup> <https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive>

<sup>111</sup> [http://europa.eu/rapid/press-release\\_IP-18-6759\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6759_en.htm)

<sup>112</sup> <http://zakon.rada.gov.ua/laws/show/2824-15>, <https://inau.ua/news/inau-proponuye-implementuvaty-yevropeysku-konvenciyu-pro-kiberzlochynnist-na-osnovi-napracyuvan>

<sup>113</sup> Annex XXXVII deals with approximating Ukraine's legislation to that of the EU in audiovisual matters and envisages the introduction of provisions from the Audiovisual Media Services Directive #2010/13/EU. However, while Ukraine was still debating the need to amend the law on radio and television broadcasting (<https://detector.media/rinok/article/132891/2017-12-14-syumar-zareestruvala-zakonoproekt-pro-audiovizualni-poslugi>), the EU passed a revised Audiovisual

In the summer of 2018, the Government drafted a Strategy (Roadmap) of Ukraine's Integration into the EU Digital Single Market and an action plan for implementing it over 2018-2023 that took into account new EU legislation. The EU agreed to assess this Roadmap for updating Annex XVII-3 to the AA (on telecommunications). In the summer of 2019, the first phase of the assessment was completed: European Commission's experts identified the Roadmap contents that fell within and outside the scope of Annex XVII-3. After that, the second phase began with the deployment of a DG CONNECT field mission in Kyiv to assess how Ukraine had implemented her commitments in this area, including current legislation and the existing administrative capacity. It is expected that this phase will be finalised before the year 2020, in which the third assessment phase will be carried out to develop a plan to update and implement the Annex XVII-3 to the AA, including priorities, deadlines, and indicators of the implementation.

It should be noted that the above concerns just the update of Annex XVII-3 (on telecommunication services), which provides for legislative approximation in e-communications, e-commerce, radio spectrum, e-identification, and the institutional capacity of the Regulator for telecommunications. In fact, the Government of Ukraine proposed a broader roadmap for integration into the EU's DSM, which included many other legislative acts of the EU. Although these acts fall outside the scope of the Annex XVII-3, nothing prevents Ukraine from bringing its legislation in line with, e.g., EU law on cyber security and personal data protection.

***Besides updating the Annex XVII-3 on telecommunications, where the EU is not willing to envisage a reduction of roaming tariffs, it remains open how to fix other aspects of Ukraine's integration into the DSM***

It is still an open question of whether updated Annex XVII-3 will include the EU regulation on roaming. The Government of Ukraine has included it into its draft roadmap. However, despite the recommendations of the European Parliament,<sup>114</sup> the EC holds firm to its position promoting an agreement on roaming between all the six Eastern Partnership countries first (and later, maybe, between them all and the EU) rather than between individual partner countries and the EU.

Moreover, for the time being, a bilateral discussion started on the possibility of including Ukraine, as the first non-EU country, into the Digital Economy and Society Index (DESI), which measures the digital performance of the EU member states in a variety of DSM dimensions.<sup>115</sup>

## RECOMMENDATIONS

### ***For Ukraine***

- Draft and adopt a law on electronic communications that reflects the new EU Electronic Communications Code;
- Reinforce the independence and regulatory capacities of the national communications regulator (NCCIR) and reform the administration and functions of the State Service of Special Communication and Information Protection with respect to information protection and cyber security;

---

Media Services Directive, #2018/1808 (<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>). This new directive reflects changes in the market itself, where the consumers more and more choose content for themselves and get it online rather than through radio or television broadcasts.

<sup>114</sup> [https://www.europarl.europa.eu/doceo/document/TA-8-2017-0440\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2017-0440_EN.html)

<sup>115</sup> [https://www.facebook.com/permalink.php?story\\_fbid=971359376549044&id=100010249710888](https://www.facebook.com/permalink.php?story_fbid=971359376549044&id=100010249710888)

- Ratify the Council of Europe's Convention on Cybercrime in its entirety. Amend domestic legislation and the cyber security strategy action plan in line with the NIS Directive and other new EU legislation;
- Consider the concept of reforming the personal data protection system in Ukraine and draft a new law that will take account of the changes in European legislation (GDPR, the Free Flow of Non-Personal Data Regulation, the Council of Europe's modernised Convention No.108+ for the Protection of Individuals with regard to Automatic Processing of Personal Data);
- Amend the Law "On e-commerce" to harmonise it with EU legislation;
- Develop and approve (by a resolution of the Cabinet) a national plan for the broadband communications development;
- Include expenditures in the State Budget to carry out the action plan of the Concept for developing a digital economy and society in Ukraine in 2020 and have the Government decide to launch a Digital Transformation Fund;
- Accelerate the formation of a coordination and management system for the digital development, specifically mechanisms of effective interaction of the MinDigit with other ministries, parliamentary committees, regional authorities, and non-governmental expert community.

### ***For the EU***

- Publicise the findings of the EU expert mission in Ukraine and hold consultations with non-governmental expert community, in particular, with the Ukrainian Side of the EU-Ukraine Civil Society Platform (under the Association Agreement) and the Ukrainian National Platform of the Eastern Partnership Civil Society Forum, on the complex assessment of the market, infrastructure, condition of legislation and needs to update it, and regulatory capacities for Ukraine's integration into the EU's Digital Single Market;
- Launch a process of concluding an agreement on mutual recognition of electronic trust services between the EU and Ukraine;
- Include Ukraine into the Digital Economy and Society Index (DESI);
- Provide expert and financial support for developing new legislation on personal data protection;
- Provide funding for priority projects implementing the Concept of the development of the digital economy and society in Ukraine in 2020.

# INTEGRATING UKRAINE INTO THE EU'S POST SERVICES MARKET

**Iryna Kosse**

## BENEFITS OF THE ASSOCIATION AGREEMENT IMPLEMENTATION

The Association Agreement envisages integration of Ukraine's sector of postal and courier services into the EU internal market, conditional on regulatory approximation. According to Annex XVII, the Association Committee meeting in trade configuration (Trade Committee) may decide that the Parties grant each other 'internal market treatment' with respect to their postal services sectors - after the EU determines, on the basis of an assessment, that Ukraine has implemented applicable provisions of EU law.

***Internal market treatment, as envisaged in the AA, would mean cancelling licensing in this sector except for the universal service provision***

The internal market treatment means that there are no restrictions on the freedom of establishing juridical persons of the EU and Ukraine in the territory of each other. Juridical persons of either Party should be treated in the same way as juridical persons of the other Party. That is, companies of one Party will, as a matter of fact, be granted the right to provide services in the territory of the other Party.<sup>116</sup> This means in practice that licensing will be cancelled in the postal sector except for the universal service provision.<sup>117</sup>

## MARKET OF POSTAL AND COURIER SERVICES

The postal services market is very important for Ukraine, whose advantageous geographic location has prospects of making it a postal logistics transit country for the EU member states.

The volume of postal and courier activities in Ukraine in 2018 equalled UAH 6,059.1 million or 0.17% of its GDP, which was by 9.7% more than in the previous year. In 2018, the postal and courier services

---

<sup>116</sup> Article 4 of the Annex XVII.

<sup>117</sup> Annex XVI-A, 1(3) and Annex XVI-B, 7. Universal postal service is a service whose quality standard and price are regulated by the state.

sector officially employed 74,600 persons.<sup>118</sup> As of 1 October 2019, 51 postal service operators were registered in Ukraine.<sup>119</sup> The governmental Roadmap for the implementation of provisions of EU directives in the postal and courier services sector mentions, citing expert estimates, that there are over 300 nongovernmental postal operators and enterprises that provide services of commercial mail delivery.<sup>120</sup> In total, they have about 15,000 offices throughout the country.

Ukraine's largest postal operator is Ukrposhta. Other large-scale operators include Nova Poshta and Meest Express. Ukrposhta is the letter service leader (90.6% of the market),<sup>121</sup> and Nova Poshta leads in the delivery of parcels (60% to 70% of the market).<sup>122</sup>

**Market leaders in Ukraine are state-owned Ukrposhta, which provides universal postal services, and private Nova Poshta and Meest Express**

Recent years have marked a stable decrease in the volumes of written correspondence on the market and growth of electronic commerce, financial services, and international logistics. The market of international mailings in 2016 equalled UAH 1.2 billion or 42 million mailed items, of which import accounted for 89%.<sup>123</sup> These items mainly represent commodities ordered by Ukrainians on Chinese, US, and European sites. Ukrposhta is the leader on Ukraine's international mailing market (74.4%) followed by Meest Express (10.7%) and EMS (4.1%). In 2018, Ukrposhta processed 34.4 million of international inbound and outbound mailed items or by 45% more than in 2017.<sup>124</sup>

In 2017, Ukrposhta ranked 33rd of 173 countries in the Universal Postal Union's Integrated Index for Postal Development, seven positions up from 2016.<sup>125</sup>

**Postal enterprises of Ukraine and the EU operate on one another's market not directly but by concluding cooperation agreements**

In the EU, there are 34 enterprises defined as universal postal service providers and 21,680 other companies that provide postal services (as of 2017).<sup>126</sup> According to the European Commission, the EU postal services market employs 1.8 million people.<sup>127</sup> The postal market of the EU, the European Economic Area, and Switzerland equals €90

billion or 0.52% of their aggregate GDP.<sup>128</sup> Delivery of letters accounts for a good deal of this market (42%). The largest companies are Deutsche Post (Germany), Royal Mail (UK), La Poste (France), and DHL (Germany).

So far, Ukrainian postal enterprises have not been operating on the European market directly. They sign agreements on cooperation with European operators, under which each of the parties provides postal services in the territory of its country. Thus, in 2017, Nova Poshta entered into an agreement with DPDgroup on parcels delivery to Europe.<sup>129</sup>

<sup>118</sup> Transport and Communications of Ukraine. 2018. State Statistics Service of Ukraine.

<sup>119</sup> Unified State Registry of Postal Service Operators <https://nkrzi.gov.ua/index.php?r=site/index&pg=60&language=uk>.

<sup>120</sup> <https://zakon.rada.gov.ua/laws/show/104-2018-%D1%80>

<sup>121</sup> A Study of the Postal Logistics Market in 2016. Ukrainian Direct Marketing Association. <https://bit.ly/30GFadZ>

<sup>122</sup> <https://biz.nv.ua/ukr/markets/yak-nova-poshta-ukrposhta-ta-inshi-poshtovi-operatori-mozhut-priskoriti-dostavku-posilok-ukrajincyam-50028195.html>

<sup>123</sup> A Study of the Postal Logistics Market in 2016.

<sup>124</sup> <https://biz.nv.ua/ukr/markets/yak-nova-poshta-ukrposhta-ta-inshi-poshtovi-operatori-mozhut-priskoriti-dostavku-posilok-ukrajincyam-50028195.html>

<sup>125</sup> <https://nachasi.com/2018/05/31/ukrposhta-pidnyalasya/>

<sup>126</sup> [https://webgate.ec.europa.eu/grow/redisstat/databrowser/view/POST\\_CUBE1\\_X\\$NUM701/default/table?category=GROW\\_CURRENT](https://webgate.ec.europa.eu/grow/redisstat/databrowser/view/POST_CUBE1_X$NUM701/default/table?category=GROW_CURRENT)

<sup>127</sup> [https://ec.europa.eu/growth/sectors/postal-services\\_en](https://ec.europa.eu/growth/sectors/postal-services_en)

<sup>128</sup> Main developments in the postal sector (2013-2016) <https://publications.europa.eu/en/publication-detail/-/publication/d22799b5-bbb7-11e8-99ee-01aa75e-d71a1/language-en>

<sup>129</sup> <https://novaposhta.ua/ru/news/rubric/2/id/4266>

It should be understood that integration with the European market of postal services means not only the access of Ukrainian companies to the EU market but also the easier access of European companies to the internal market of Ukraine and hence increased competition on the domestic market for Ukrainian companies.

## PUBLIC POLICY

The public policy in the postal services sector is developed and implemented by the Ministry of Infrastructure. The National Commission for the State Regulation of Communications and Informatisation (NCCIR) is the regulatory body in the sector. It is the state licensing, supervisory, permit-issuing, and regulatory authority. The NCCIR is subordinated to the President of Ukraine and accountable to the Verkhovna Rada of Ukraine. The NCCIR maintains the unified state registry of postal service operators, develops the pricing policy, and regulates tariffs for universal postal services. The ministry of Infrastructure in consultation with the Ministry of Economic Development and Trade sets tariffs for periodicals subscription and delivery.

Postal services in Ukraine are provided in accordance with national legislation, taking into account provisions of the acts adopted by the Universal Postal Union and ratified by the Verkhovna Rada. Relations in the postal services sector are governed by the Law 'On Postal Service' and the Rules for Provision of Postal Services.<sup>130</sup>

The national operator charged with the functions of providing universal postal services is the Ukrainian State Enterprise of Posts "Ukrposhta", which is directed by the Ministry of Infrastructure. Ukrposhta also provides services of subscription-based periodicals distribution as well as payment and delivery of pensions and allowances. Special-purpose postal services are provided by the State Courier Service and the State Enterprise for Special Communications. The latter is also the designated operator for the international Express Mail Service (EMS).

## UKRAINE'S HOMEWORK

According to the Association Agreement, Ukraine shall transpose provisions of Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service<sup>131</sup> into its legislation. This Directive establishes rules for the conditions governing the provision of postal services; the provision of universal postal services; their financing on the conditions that allow the permanent service provision; tariff principles and transparency of accounts for universal service provision; the setting-up of quality standards for universal service provision and a system to ensure compliance with those standards; the harmonisation of technical standards; and an independent national regulatory authority.

Directive 97/67/EC prescribes that a universal postal service must include the minimum set of facilities for processing up to two kilograms of postal items and up to 10 kilograms of postal packages as well as services for registered items and insured items (Article 3).<sup>132</sup> Such a service must be available at all points in the territory of a country at affordable prices for all users. If the universal service provision represents an unfair financial burden for the designated operator, the state may establish a compensation fund for the financing of the service.

<sup>130</sup> Decree of the Cabinet of Ministers of Ukraine No. 270 dated 5 March 2009.

<sup>131</sup> As amended by Directives 2002/6/EC and 2008/6/EC.

<sup>132</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A31997L0067>

# IMPLEMENTATION DYNAMICS

Although it was expected that provisions of Directive 97/67/EC would be implemented in Ukraine from the beginning of 2019 (two years had been allowed for that), it has never happened. In 2015, the Ministry of Infrastructure began drafting a new law on postal service that would implement Directive 97/67/EC. The discussions on the draft went to another level when in late 2018 the Ministry of Infrastructure presented it on its website<sup>133</sup> and noted: "Of course, such innovations are not convenient for some postal operators and we recognize the right to freely outline its own position on the draft Law, even if such position does not reflect the essence of the draft Law"<sup>134</sup>.

The main amendment proposed by the draft law was to separate the services of postal communication and related services (e.g. transportation of goods). As a result, the companies engaging in the delivery of large household appliances would not be considered postal operators. The draft law also defined services that belong to the category of universal. It classified as universal services the mailing of items up to two kilograms, packages up to 10 kilograms, and cecograms<sup>135</sup> up to seven kilograms, as well as registered and insured postal items.<sup>136</sup> The Ministry of Infrastructure believes that companies that provide universal services should keep records of their incomes and expenditures separately for each universal postal service and separately for other activities. This will allow regulating postal operators' liability for a failure to fulfil or improper fulfilment of their duties. According to Volodymyr Dovhan, former Deputy Minister of Infrastructure for European integration, 'the operators presently are not liable for the quality of their services and compliance with legislation.'<sup>137</sup>

However, the draft law encountered criticism from postal operators. They said that the new version of the law would restore the licensing of postal operators and establish regular reporting. They were also afraid that the regulator (NCCIR) would receive access to information about their beneficiaries, owners, and managing officers, and that it would be just the NCCIR who decides on what is a quality postal service. Moreover, the postal operators and the Ministry of Infrastructure are at odds at interpreting the provision of the draft law on whether an operator providing universal services will have the exclusive right to provide such services and whether it will be the monopolist on the market.

***Ukraine has not begun implementing its homework: the Parliament has not yet considered amendments to the Law on Postal Service***

The draft law passed several rounds of discussions with market players, and proposals made by postal operators have been largely taken into account. However, the elaborated draft has never been submitted to the Parliament for consideration. Thus, Ukraine still has not amended its Law 'On Postal Service' as required by the Association Agreement.

## RECOMMENDATIONS

### **For Ukraine**

- Adopt a new version of the Law 'On Postal Service' that would implement provisions of Directive 97/67/EC;
- After the adoption of the new version of the Law 'On Postal Service', develop regulatory acts necessary for its implementation.

<sup>133</sup> <https://mtu.gov.ua/projects/view.php?P=192>

<sup>134</sup> <https://mtu.gov.ua/news/30336.html>

<sup>135</sup> Printed publications for visually impaired persons.

<sup>136</sup> According to current legislation, the universal postal service covers postcards, letters, parcels, and items for the blind, including non-registered, registered, and insured items, at a weight of up to 10 kilograms.

<sup>137</sup> <https://biz.nv.ua/ukr/experts/navishcho-potribno-reformuvati-poshtovij-zvjazok-2504256.html>

# RECIPROCAL OPENING OF EU AND UKRAINIAN PUBLIC PROCUREMENT MARKETS

**Oleksandra Betliy**

## BENEFITS OF THE ASSOCIATION AGREEMENT IMPLEMENTATION

Under its Title IV, Chapter 8, the EU-Ukraine Association Agreement (AA) envisages 'mutual access to public procurement markets on the basis of the principle of national treatment at national, regional and local level for public contracts and concessions in the traditional sector as well as in the utilities sector.'

This implies benefits for Ukrainian companies, which gain access to the public procurement market of the EU equal to about 14% of GDP, or over EUR 1.9 trillion.<sup>138</sup> On the other hand, the increased competition on the public procurement market in Ukraine resulting from the participation of EU companies will make public spending more efficient and urge Ukrainian companies to become more competitive.

Unlike the commodity markets, for which the AA envisages the asymmetric opening by the EU, in the case of public procurement, the agreement provides for symmetric reciprocal access to the markets of both parties after Ukraine completes its 'homework' on bringing its legislation in line with EU norms.

Annex XXI to the AA provides an Indicative Time Schedule for Institutional Reform, Legislative Approximation and Market Access, which sets up five phases of legislative amendments and the reciprocal opening of market access from 1 Jan. 2016 to the year 2024. The implementation of each phase is subject to evaluation by an Association Committee meeting in Trade configuration (Trade Committee). A positive assessment by the Trade Committee will mean the opening of a certain public procurement segment in the EU and Ukraine for contracts that exceed the value thresholds set out in that Annex.



***The AA envisages mutual access to public procurement markets, provided that Ukraine fulfils its 'homework', in five phases***

---

<sup>138</sup> These figures do not include procurements by public utility companies. If the latter are included, the aggregate public procurements in the EU can be estimated at 19% of the GDP or €2.3 trillion. For details see European Semester Thematic Factsheet: Public Procurement <https://goo.gl/DfQsvP>

According to Article 154(4) of the AA, after all the phases of the Indicative Time Schedule are implemented, Ukraine and the EU will examine the possibility to mutually grant even deeper market access to their procurement markets.

## UKRAINE'S HOMEWORK

The Association Agreement explicitly ties up access to the EU public procurement market with Ukraine's successes in approximating its legislation to public procurement rules of the EU.

Particularly, Ukraine has to designate a central executive body that will be responsible for its public procurement policy as well as a separate, impartial and independent, body of appeal for reviewing decisions taken by contracting authorities or entities in the procurement process. It has to ensure that the principles of non-discrimination, equal treatment, transparency, and proportionality are observed in the award of contracts. Ukraine also has to approximate its legislation to the EU Directives that regulate public procurement, although it is not required to implement these Directives fully or instantly. Annexes XXI-B to XXI-N break down these Directives into elements of several types: 'basic', 'mandatory', 'non-mandatory' (i.e., provisions that are not mandatory but recommended for the approximation), and 'outside the scope of the process of legislative approximation.'

In May 2018, the Trade Committee updated Annex XXI<sup>139</sup> to take into account the new EU Directives on public procurement that had been adopted in 2014.<sup>140</sup> They also somewhat increased the value thresholds for the application of public procurement rules (Table 1).

**Table 1**

### VALUE THRESHOLDS FOR THE APPLICATION OF PUBLIC PROCUREMENT RULES<sup>141</sup>

<b>Contract types</b>	<b>Value threshold</b>	<b>Updated value threshold</b>
Public supply and service contracts awarded by central government authorities and design contests awarded by such authorities	EUR 133 000	EUR 135 000
Public supply and public service contracts not covered by the point above	EUR 206 000	EUR 209 000
Public works contracts and concessions	EUR 5 150 000	EUR 5 225 000
Works contracts in the utilities sector	EUR 5 150 000	EUR 5 225 000
Supply and service contracts in the utilities sector	EUR 412 000	EUR 418 000
Public service contracts for social and other specific services	-	EUR 750 000
Service contracts for social and other specific services in the utilities sector	-	EUR 1 000 000

<sup>139</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22018D0972&rid=9>

<sup>140</sup> Directive 2014/23/EU on the award of concession contracts; Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC; and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

<sup>141</sup> The current updated thresholds are set out in accordance with the Association Committee in Trade Configuration (Trade Committee) decision of 14 May 2018. They would have to be in line with the effective provisions of the corresponding EU Directives. However, since January 2018, the thresholds in the EU Directives have already become somewhat higher for their harmonisation with the WTO Government Procurement Agreement (GPA). However, no further adjustment in the thresholds of the AA's Annex XXI has been made – see: [https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds\\_en](https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32017R2365>

## CURRENT PUBLIC POLICY

The government launched the public procurement reform to overcome corruption in this area, as well as within the framework of fiscal consolidation, yet before the entry into force of AA Chapter 8. Moreover, before the signing of the AA, Ukrainian legislation did not limit the participation of foreign companies in public procurement, and the announcements of large-scale tenders were accompanied by the translation of their documentation into English. In April 2014, Parliament passed a new Law 'On Government Procurement',<sup>142</sup> the main provisions of which were harmonised with EU norms. Still, the higher transparency and broader competition opportunities resulting from the implementation of the new Law were not sufficient to overcome corruption anyway.

Therefore, in 2015, an e-procurement pilot project was launched and a new Law 'On Public Procurement'<sup>143</sup> was adopted. As soon as in 2016, the Public Procurement Law was fully implemented. Accordingly, all publicly owned and publicly funded companies began procuring based on the ProZorro electronic system for contracts above a certain amount (UAH 200,000 for procurement of goods and services and UAH 1.5 million for procurement of works).

***In 2016 the new law on public procurement was fully implemented, and all public procurements started to be conducted via the ProZorro electronic system***

The Law designated the Ministry of Economic Development, Trade and Agriculture as the responsible body in the area of public procurement and the Antimonopoly Committee of Ukraine (AMCU) as the body of appeal for reviewing complaints against violations of public procurement legislation.

## MARKET ANALYSIS

The adoption of the new public procurement legislation helped to increase competition and transparency and reduce fraud and corruption. In particular, according to the data of the Centre of Excellence in Procurement (Kyiv School of Economics), the number of single-supplier procurements has dropped, whereas the number of suppliers has grown.<sup>144</sup> What is important, access of small to medium enterprises to the public procurement market was simplified, and as a result, their participation in procurement increased. In 2018, according to the data of the electronic procurement system, about 35,000 contracting entities announced 2,7 million procurement procedures at an expected value of more than UAH 1.6 trillion<sup>145</sup> (In 2017, there were about 27,000 contracting entities with about one million procurement procedures at an expected val-

***Companies from the EU member states already have full access to the Ukrainian public procurement market***

terprises to the public procurement market was simplified, and as a result, their participation in procurement increased. In 2018, according to the data of the electronic procurement system, about 35,000 contracting entities announced 2,7 million procurement procedures at an expected value of more than UAH 1.6 trillion<sup>145</sup> (In 2017, there were about 27,000 contracting entities with about one million procurement procedures at an expected val-

<sup>142</sup> Law No. 1197-VII of 10 Apr. 2014, <http://zakon.rada.gov.ua/laws/show/1197-18>

<sup>143</sup> Law No. 922-VIII of 25 Dec. 2015, <http://zakon.rada.gov.ua/laws/show/922-19>

<sup>144</sup> [http://cep.kse.org.ua/assets/img/articles/Prozorro\\_report\\_ua.pdf](http://cep.kse.org.ua/assets/img/articles/Prozorro_report_ua.pdf)

<sup>145</sup> Report of the Ministry of Economy on public procurements in 2018: <https://bit.ly/329nd6P>

ue of more than UAH 777.7 billion)<sup>146</sup>. The number of active bidders in 2018 went up 148,000 which is by 16% higher than in 2017.

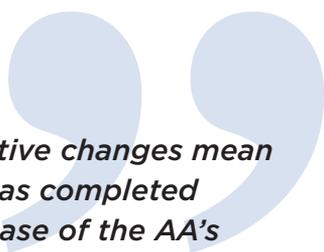
Ukraine does not limit access to its public procurement market for companies from the EU since it provides non-discriminatory access to all companies. The translation of documentation into English is required for all tenders at a value above €133,000 for goods and services and above €5.15 million for works. At the same time, only about 0.4% of all completed procurements were held in the open tender with publication in English.

In 2018, the share of international companies, including those from the EU, remained low: 0.1% of all electronic procurements and 9.0% of the total value of contracts concluded. This may be due to various technical difficulties of providing documents for entering into agreement with a Ukrainian party. Therefore, smaller European companies still incline to participate in public procurement in Ukraine through their Ukrainian subsidiaries or partners.

## IMPLEMENTATION DYNAMICS

Most of the provisions of the Public Procurement Law are in line with relevant EU Directives. To adapt other provisions, in 2016, the Cabinet of Ministers approved a Public Procurement Reform Strategy,<sup>147</sup> which is the 'Roadmap' for implementing changes in public procurement.<sup>148</sup> The provisions of the Law and the Roadmap approval were sufficient for Ukraine to pass the first phase of the Indicative Time Schedule for Institutional Reform. According to the governmental Report on the Implementation of the EU-Ukraine Association Agreement in 2017,<sup>149</sup> the first phase was already complete in 2016.

Meanwhile, the European Commission's report on the implementation of DCFTA with Ukraine in 2016,<sup>150</sup> published in November 2017, pointed out that Ukraine was lagging behind with the first phase completion. It was only in May 2018 that the Trade Committee issued its positive opinion<sup>151</sup> of the roadmap approved in 2016. However, the Committee's decision does not mention the passage of the first phase by Ukraine and the corresponding reciprocal opening of markets.



***Recent legislative changes mean that Ukraine has completed the second phase of the AA's Indicative Schedule in Public Procurement***

The Roadmap identified the expected further changes in the public procurement regulation, in particular, amendments to the legislation to bring it into line with the updated EU Directives, to

<sup>146</sup> <https://www.kmu.gov.ua/ua/news/minekonomrozvitku-zvituye-pro-publichni-zakupivli-u-2017-roci>

<sup>147</sup> Ordinance of the Cabinet of Ministers of Ukraine No. 175-r of 24 Feb. 2016 'Public Procurement Reform Strategy (Roadmap)'; <http://zakon.rada.gov.ua/laws/show/175-2016-%D1%80#n11>

<sup>148</sup> A comprehensive roadmap for public procurement reform is required by Article 152 of the AA.

<sup>149</sup> Report on the Implementation of the EU-Ukraine Association Agreement in 2017, <https://www.kmu.gov.ua/storage/app/media/uploaded-files/pro-vikonannya-ugodi-pro-asotsiatsiyu-mizh-ukrainoyu-ta-evropeyskim-soyuzom-za-2017-rik.pdf>

<sup>150</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0364>, p. 44.

<sup>151</sup> <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:22018D0972>

improve the area of regulation and to eliminate the inconsistency between legislation and the technical work of Prozorro. However, on the 'budgetary night' of 23 November 2018 (when the Verkhovna Rada was approving the State Budget for 2019), Draft Law No. 8265 of 13 April 2018 on Amending the Law of Ukraine 'On Public Procurement' did not receive enough votes of MPs and thus was rejected. Now, a similar draft will be probably introduced again. Following the 2019 parliamentary elections, the revised draft law was registered in the Verkhovna Rada on the first day of its work under No. 1076. It was already adopted on 19 September as the Law No. 114-IX, and will enter into force on 19 April 2020.

In fact, Ukraine has received a new version of the Public Procurement Law, replacing the previous one. It approximated legislation to the EU directives and addressed the problematic issues faced by both contractors and bidders (in particular, fighting against fraudulent suppliers of poor quality goods / services; preventing artificial delay or disrupt of procurements; lifting restrictions on the use of non-price criteria, which is widely used in EU countries, etc.). Below-threshold procurement from 50 thousand UAH were now called 'simplified procurement' and were now regulated by law (they are dealt with separately in Article 14). Therefore, such procurement will need to be made through Prozorro<sup>152</sup>. The amendments also improve the mechanisms of appeal: they simplify the bureaucratic procedures of the AMCU, prevent artificial appeals, and increase the liability for significant violations. In general, the adoption of this law means that Ukraine implemented the requirements of the second phase of the Indicative Schedule.

A different approach was applied to regulate public procurement of medicines that had traditionally been exposed to high levels of corruption. In 2015, a law was adopted that transferred centralised procurement of the medicines to international organisations<sup>153</sup> (in September 2019, MPs decided to continue this approach until 2022). Currently, the United Nations Development Program (UNDP), the The United Nations Children's Fund (UNICEF) and the British procurement agency Crown Agents make procurements more efficiently than the Ministry of Health did before<sup>154</sup>. At the same time, in 2019, a new state-owned enterprise 'Medical Procurement of Ukraine' started to operate in pilot mode. It is responsible for the procurement of medicines against AIDS, tuberculosis and malaria. It is planned that this state-owned enterprise will be identified as a centralised procurement organisation to carry out medical procurement from 2020.

In addition, the risk of protectionist measures on the public procurement market was avoided. On 29 October 2019, the Parliament withdrew from consideration the 'Buy Ukrainian' draft law, which was approved in the first reading in December 2017 by the previous convocation. It sought to introduce amendments to the Public Procurement Law to grant preferences to goods produced in Ukraine.<sup>155</sup> This is a very important step in implementing Ukraine's international obligations, as this draft contradicted both the AA and the WTO Government Procurement Agreement (GPA).

---

<sup>152</sup> According to the Ministry of Economy's estimates, this will help to additionally annually save UAH 9 billion in total.

<sup>153</sup> Law 'On Amendments to Certain Laws of Ukraine on Ensuring Timely Access of Patients to Necessary Medicines and Medical Devices through Public Procurement by Specialised Procurement Organisations' No. 269-VIII of 19 March 2015: <http://zakon.rada.gov.ua/go/269-19>

<sup>154</sup> Report of the Accounting Chamber of Ukraine: <https://goo.gl/2MKB64>

<sup>155</sup> Draft Law No. 7206 of 17 Oct. 2017: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=62736](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=62736)

# MUTUAL MARKET ACCESS UNDER THE GPA AGREEMENT

It looks like Ukraine did not initiate the EU's formal evaluation of the first phase implementation. A possible reason could be the intention to obtain a positive assessment on passing several phases of the Indicative Time Schedule at once. However, most likely, the main reason was that Ukraine had already gained access to the EU public procurement markets under the WTO Government Procurement Agreement (GPA).

***Ukraine has already gained access to the EU public procurement markets under the GPA agreement. The GPA does not require Ukraine to fulfil 'homework'***

On 18 May 2016, Ukraine acquired the status of a full-fledged party to the GPA.<sup>156</sup> Within the framework of this agreement, the EU defined for access to its market the same thresholds for application of public procurement rules<sup>157</sup> as those currently in effect according to the updated Annex XXI to the AA. The data of the 'GPA in Ukraine'<sup>158</sup> project shows that Ukrainian companies have already begun entering the public procurement markets in the EU.

Mutual access to procurement markets under the GPA does not require any additional changes in procurement rules on either side. This is what makes the GPA essentially different from the AA, which requires that Ukraine would gradually be doing its homework on the harmonisation of its public procurement legislation and foresees phased granting of procurement market access to Ukraine only after a favourable assessment issued of the homework completion.

It is worth mentioning, however, that the EU does not grant access to all types of public procurement under the GPA – in contrast to what the AA provides for after going through all phases of the Indicative Time Schedule. In particular, the matter is procurement in the public utility sector, procurement of certain types of goods and services, and concessions.

Thus, as a matter of fact, both parties have already implemented most public procurement provisions of the AA. In view of access to the EU market gained within the GPA framework, Ukraine has not that many external stimuli to fully carry out its legislation harmonisation commitments under the AA as it was expected at the moment of the AA signing. Nevertheless, Ukraine has gone to the even deeper, asymmetric opening of its market to the EU. According to its national legislation, companies from the EU member states have already got full access to the Ukrainian public procurement market (although its practical use involves various technical complications, because of which businesses

***As a matter of fact, both parties have already implemented most public procurement provisions of the AA***

<sup>156</sup> Parties' commitments are available at <https://e-gpa.wto.org/en/Agreement/Latest>

<sup>157</sup> The thresholds are primarily set in a special drawing rights (SDR) equivalent but the WTO site also provides these values in Euros and other currencies: <https://e-gpa.wto.org/en/ThresholdNotification?PartyId=557>

<sup>158</sup> <https://www.facebook.com/gpainua/>

from the EU might still find it more convenient to participate in procurement through their Ukrainian subsidiaries).

## RECOMMENDATIONS

### ***For Ukraine and the EU***

- Find a technical solution to ensure interconnection between the Ukrainian e-procurement system, ProZorro, and the European information system for public procurement, TED.

### ***For Ukraine***

- Continue the implementation of the 'Public Procurement Reform Strategy (Roadmap)' to eliminate those practical barriers that still exist on the procurement market to companies from the EU member states;
- Initiate decision of the Association Committee in Trade Configuration (Trade Committee) on Ukraine's passing the second phase of the Indicative Schedule.

### ***For the EU***

- Carry out a formal evaluation of Ukraine's progress in the implementation of its commitments under Title IV, Chapter 8, of the Association Agreement;
- In accordance with AA Art. 154(4), determine prospects for granting procurement market access below the thresholds set out in the GPA – similarly to the single procurement market within the framework of the European Economic Area (EEA).

# ANNEX XXI-A TO CHAPTER 8 ON PUBLIC PROCUREMENT<sup>159</sup>

## INDICATIVE TIME SCHEDULE FOR INSTITUTIONAL REFORM, LEGISLATIVE APPROXIMATION AND MARKET ACCESS

Phase	Indicative time schedule	Market access granted to the EU by Ukraine	Market access granted to Ukraine by the EU	
1. Implementation of Articles 150(2) and 151 of this Agreement  Agreement of the Reform Strategy set out in Article 152 of this Agreement	6 months after the entry into force of this Agreement	Supplies for central government authorities	Supplies for central government authorities	
2. Approximation and implementation of basic elements of Directive 2014/24/EU and of Directive 89/665/EEC	3 years after the entry into force of this Agreement	Supplies for state, regional and local authorities and bodies governed by public law	Supplies for state, regional and local authorities and bodies governed by public law	Annexes XXI-B and XXI-C
3. Approximation and implementation of basic elements of Directive 2014/25/EU and of Directive 92/13/EEC	4 years after the entry into force of this Agreement	Supplies for all contracting entities in the utilities sector	Supplies for all contracting entities	Annexes XXI-D and XXI-E
4. Approximation and implementation of other elements of Directive 2014/24/EU. Approximation and implementation of Directive 2014/23/EU	6 years after the entry into force of this Agreement	Service and works contracts and concessions for all contracting authorities	Service and works contracts and concessions for all contracting authorities	Annexes XXI-F, XXI-G, and XXI-H
5. Approximation and implementation of other elements of Directive 2014/25/EU	8 years after the entry into force of this Agreement	Service and works contracts for all contracting entities in the utilities sector	Service and works contracts for all contracting entities in the utilities sector	Annexes XXI-I and XXI-J

<sup>159</sup> As updated by Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration of 14 May 2018: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:22018D0972>

# INTEGRATING UKRAINE INTO THE EU'S GAS MARKET

**DiXi Group**

## THE BENEFITS OF THE ASSOCIATION AGREEMENT IMPLEMENTATION

Ukraine already took its first steps towards integrating into the EU energy market before the Association Agreement was signed, having become a member of the Energy Community back in 2011. This international organisation brings together the EU and neighbouring countries for the purpose of establishing an integrated pan-European energy market by expanding EU energy legislation beyond EU borders.<sup>160</sup>

In joining the Energy Community, Ukraine committed itself to implement the provisions of the EU's Third Energy Package<sup>161</sup> and a number of network codes. According to Article 278 of the AA, the provisions of the Treaty Establishing the Energy Community take precedence over the provisions of the AA. Updated Annex XXVII to the AA separately lists the legislative acts that Ukraine has to implement based on the Treaty, and separately other acts of EU energy sector acquis.

***The result of the implementation of the updated Annex XXVII should be de facto application of internal market treatment in the energy sector***

However, even if Ukraine completely harmonises its energy legislation with EU laws, it still has no set prospects for gaining internal market treatment in the energy sector from the EU even if it completes this 'homework' assignment. The necessary provision is missing in Annex XXVII even in its updated version<sup>162</sup>, in contrast to Annex XVII, which clearly provides such a prospect for certain service markets. However, according to the updated Annex XXVII to the AA, the European network codes 'shall be made

part of the internal legal order of Ukraine without changes to the structure and text'. This, and also the strengthened mechanisms of consultations, monitoring, and reporting may lead to de facto internal market treatment of Ukraine by the EU in its energy sector.

---

<sup>160</sup> <https://www.energy-community.org/aboutus/whoweare.html>

<sup>161</sup> As well as a number of others, such as for security of supply, projects of common interest, and rules of competition on the EU's internal market. The list of legislation is contained in the Annexes of the Treaty Establishing the Energy Community. This list may periodically be updated by decision of the Ministerial Council of the Energy Community to reflect changes in EU energy legislation.

<sup>162</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=65942](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65942)

Today, the most important part of the Ukrainian market that needs to move to EU rules is the transportation of gas from Russia to EU countries. The current contract between Ukraine's Naftogaz and Russia's Gazprom expires at the end of 2019; even more: the Stockholm Arbitral Tribunal has ruled that its provisions conflict with EU and Ukrainian law<sup>163</sup>. In 2018, the EU, Ukraine and Russia began negotiating the terms for transportation of Russian gas to Europe starting in 2020. Ukraine and the EU share their position regarding the extension of EU rules to the delivery of Russian gas to the EU via Ukraine.<sup>164</sup> Besides booking capacity of Ukraine's gas transmission system (GTS) per se, this also includes the need to sign an agreement on the interaction between grid operators based on standard European terms and conditions.<sup>165</sup>

***Gas is transported from Russia to the EU via Ukraine under a contract between Naftogaz and Gazprom that expires in the end of 2019 and which provisions contradict the EU law***

Kyiv knows from experience that special political deals with Moscow are dangerous.<sup>166</sup> The only path to protecting itself against any unpredictable aggressive behaviour on the part of Gazprom is to force the Russian state giant to work in line with EU rules. This will be possible to properly ensure if EU norms fully apply to the points of entry into the Ukrainian GTS at the border with Russia. This will mean de facto applying internal market treatment to Ukraine, which will have the same rights and obligations on the gas market as the EU member states. In fact, EU legislative acts in the gas market referring to 'EU member states' will read as 'EU member states and Ukraine'. This will mean that European institutions like the European Commission and the Court of Justice of the EU will have additional powers in Ukraine, but Ukraine will also have additional rights in relation to these institutions and to EU member states.

***The internal market treatment offers more powers to EU institutions, better guarantees to investors, and streamlining to EU companies***

This kind of integration establishes a stable legal framework and offers investors additional guarantees. It also significantly simplifies the operations of EU companies on the Ukrainian market, which will have positive consequences in the form of increased supplies for delivery, rising FDI, and growing domestic production. It will also open prospects for Ukrainian companies to enter various segments of the EU market.

In terms of the transportation of Russian gas, this will mean that the common EU-Ukraine market will begin at the Ukrainian-Russian border. Rules governing the cross-border gas transmission as designated in harmonised European network codes will directly apply in Ukraine. Based on this, European companies will be able to buy gas from Gazprom at the Ukrainian-Russian border. The shipment of this gas through Ukraine will be subject to contracts between such European companies and the Ukrainian transmission system operator (TSO) on booking transmission capacity. An EU operator may well be the managing partner of the TSO. In this way, the potential for disputes related to direct Ukrainian-Russian contracts can be avoided, which will preserve the stable supply of Russian

<sup>163</sup> [http://www.naftogaz.com/files/media/Transit%20Award\\_Redacted.pdf](http://www.naftogaz.com/files/media/Transit%20Award_Redacted.pdf)

<sup>164</sup> <https://www.eurointegration.com.ua/articles/2018/07/18/7084538/,C2258389007235D5>

<http://www.naftogaz.com/www/3/nakweben.nsf/0/48F5648BC10B833C->

<sup>165</sup> [http://dixigroup.org/eng/news/tranzit-gazu-rozhasnyuyucha-infografi-ka-vid-dixi-group](http://www.naftogaz.com/www/3/nakweb.nsf/0/23D87157863A8E35C225849B002C5DEC?OpenDocument&year=2019&month=10&nt=Новини& - I.e., based on Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules. Operators of Ukraine's and Russia's gas transmission systems should be the parties to this agreement. Such agreements have been already concluded with the operators of Poland, Slovakia, Hungary, and Romania for most interconnection points. See: <a href=)

<sup>166</sup> <http://dixigroup.org/eng/publications/russian-fairy-tales/>

gas to EU countries through Ukraine. A close example: in July 2019, the Polish GTS operator, GAZ-SYSTEM, applying the European rules and not planning any special negotiations on a transit contract, auctioned Yamal–Europe gas pipeline capacity since its long-term transit contract with Gazprom is expiring in May 2020<sup>167</sup>.

Another option applicable on the European markets is to conclude a gas swap contract rather than a transit agreement. In this case, Gazprom will deliver a certain volume of gas on the eastern border of Ukraine and the Ukrainian GTS operator will give over the same volume on the border with EU countries<sup>168</sup>.

If Ukraine has its 'homework' done properly, it should request the EU to meet the Third Energy Package requirements either. In particular, the matter here is to unblock the 'great reverse' of gas between Slovakia's and Ukraine's GTS. Slovakia's operator Eustream refuses to enter into an agreement with Ukrtransgaz on the grounds of its legacy contract with Gazprom, which has booked the entire available capacity and acts as the de facto operator of this interconnector<sup>169</sup>. Such a practice is incompatible with the requirements of EU energy law on unrestricted and non-discriminatory third party access and so should be brought into line with these requirements.

***European companies will be able to buy gas from Gazprom at the Ukrainian-Russian border, avoiding potential disputes over Ukrainian-Russian contracts***

## UKRAINE'S HOMEWORK

In the context of the AA and Energy Community, Ukraine has committed itself to implementing all the key requirements of EU legislation governing the gas market, including:

- opening its market to competition and offering all consumers the right to choose their supplier;
- separating the functions of transportation, storing and distributing gas, which means unbundling the transmission and storage systems operators, as well as the distribution systems operators;
- providing unrestricted and non-discriminatory third party access to networks;
- pursuing a balanced tariff policy for gas transmission as well as transparent and non-discriminatory principles of capacity distribution and overload management in gas transmission systems;
- instituting a security of supply policy with regular monitoring;
- monitoring the activities of gas market players for upholding quality standards and a competitive environment;
- offering targeted social protection to vulnerable consumers;
- issuing permits for hydrocarbon exploration and extraction in a transparent, non-discriminatory manner;
- establishing an independent national regulator.

## CURRENT PUBLIC POLICY

In recent years, public policy regarding the gas market has been adjusted in line with Ukraine's international commitments. And so instituting the principles of the Third Energy Package now underpins

<sup>167</sup> <https://www.icis.com/explore/resources/news/2019/06/04/10374390/polish-tso-to-auction-yamal-pipe-capacity-as-transit-deal-ends>

<sup>168</sup> <https://www.radiosvoboda.org/a/news-vitrenko-naftogaz-svop/30006050.html>

<sup>169</sup> For more details, see 'DIXI Group Alert: EU Antitrust Settlement with Gazprom. Opportunities for Ukraine': [http://dixigroup.org/storage/files/2018-06-02/alert\\_eu\\_gazprom\\_case.pdf](http://dixigroup.org/storage/files/2018-06-02/alert_eu_gazprom_case.pdf)

an entire series of public policy documents.<sup>170</sup> Approved in 2017, Ukraine's Energy Strategy foresees a build-up of the gas market on these principles by 2020 by properly implementing EU legislative acts governing energy, reforming vertically-integrated companies, and establishing the necessary conditions for Ukraine to integrate into the EU energy system.

***Following the Constitutional Court's decision, legislative definition of the independent status of the regulator requires changes to the Constitution***

The main institutions governing this sphere are the Government of Ukraine and, directly, the Ministry of Energy and Environmental Protection, the National Energy and Utilities Regulatory Commission (NEURC) as the independent regulator and the Anti-Monopoly Committee (AMC) as the agency that ensures that competition is maintained, including on the energy market.

The law on NEURC passed in 2016 contains provisions ensuring the Commission's independence. Although its activities were quite problematic<sup>171</sup> for a long while, they did finally improve in June 2018 with the replacement of some members of the Commission. Restoring trust in the regulator among market participants appears to be a long process. However, the Constitutional Court of Ukraine's ruling that recognised certain provisions in the law on NEURC unconstitutional,<sup>172</sup> in particular, the independent status of the regulator, can suspend this process until the moment of having the place of NEURC within Ukraine's system of authorities settled through amendments to the Constitution and the law.

## MARKET ANALYSIS

The gas market is strategically important for both Ukraine's economy and its security. In 2017, the Naftogaz Group<sup>173</sup> accounted for 14% of Ukraine's state budget revenues and 4% of GDP.<sup>174</sup> In 2018, Naftogaz remained Ukraine's greatest taxpayer: UAH 110 billion or 15% of budget revenues<sup>175</sup>. Gas transit secured 28% of Naftogaz earnings in 2018,<sup>176</sup> and the company estimates that absence of these revenues will result in a reduction in Ukraine's GDP by about 4%, taking into account the multiplier effect.<sup>177</sup>

The transit of gas through Ukraine is also strategically important for the EU's energy security. In 2017, nearly 93.5 bcm of the 192.2 bcm of Russian gas exported to the EU by Gazprom transited through Ukraine.<sup>178</sup> In 2018, transit volumes decreased by 7.2% to 86.8 bcm.<sup>179</sup>

<sup>170</sup> Ukraine's Energy Strategy till 2035, the Medium-Term Priority Action Plan of the Government till 2020, the Government's Priority Action Plan for the current year, the separate Action Plan for implementing the Association Agreement, and the Roadmap of priority draft laws to legislatively underpin the implementation of the AA, which was jointly developed by the Verkhovna Rada and the Cabinet of Ministers.

<sup>171</sup> According to a study of NEURC operations and independence, undertaken by the Energy Community Secretariat and published in March 2018, there are significant problems with ensuring the genuine independence of the regulator and maintaining the trust of market participants. The National Energy Regulatory Authority of Ukraine Governance and Independence, Energy Community Secretariat Review, March 2018, pp 33-36. [https://www.energy-community.org/dam/jcr:6eb10b22-ca6a-4c43-8c9f-f3614dab3c91/ECS\\_NEURC\\_reg\\_report\\_032018.pdf](https://www.energy-community.org/dam/jcr:6eb10b22-ca6a-4c43-8c9f-f3614dab3c91/ECS_NEURC_reg_report_032018.pdf)

<sup>172</sup> <http://www.ccu.gov.ua/sites/default/files/docs/5p.pdf>

<sup>173</sup> Including subsidiaries, such as the largest extracting company, Ukrgezvydobuvannia and the TSO, Ukrtransgas.

<sup>174</sup> Presentation 'Naftogaz of Ukraine: What Has Changed over Four Years?' <http://www.naftogaz.com/files/Zvity/Four-years-changes-ukr.pdf>, p. 8

<sup>175</sup> <http://www.naftogaz.com/www/3/nakweb.nsf/0/ECC39CFC1973DF90C22584260047169C?OpenDocument&year=2019&month=06&nt=%D0%9D%D0%BE%D0%B2%D0%B8%D0%BD%D0%B8&>

<sup>176</sup> Report on Naftogaz Group management for 2018, p. 5: <http://www.naftogaz.com/files/Zvity/Zvit-pro-upravlinnya-2018.pdf>

<sup>177</sup> Naftogaz 2018 annual report, p. 13: <http://www.naftogaz.com/files/Zvity/Annual-Report-2018-ukr.pdf>

<sup>178</sup> According to the Naftogaz Group at <http://www.naftogaz.com/www/3/nakweb.nsf/0/9C51660E41BAB696C225822C00262C70?OpenDocument&year=2%2018&month=02&nt=News&> and Gazprom Export statistics at <http://www.gazpromexport.ru/en/statistics/>.

<sup>179</sup> According to Ukrtransgaz (<http://utg.ua/utg/media/news/2019/01/gts-results-for-2018.html>)

Over 2013-2018, Ukraine's domestic consumption of gas shrank significantly, from 50.4 bcm to 32.3 bcm.<sup>180</sup> In the import segment, the number of private players grew from 5 in 2014 to 65 in 2018, while Naftogaz' share remains high, 66%.<sup>181</sup> In recent years, natural gas was imported to Ukraine exclusively from European markets.

**Naftogaz generates 15% of the state budget revenues. Most of Naftogaz' revenues come from the transit of gas**

Meanwhile, domestic production grew to nearly 21 bcm in 2018,<sup>182</sup> making the prospect of Ukraine completely providing for domestic needs in the near future a realistic scenario — given the right investment policy. For now, most of the production is being carried out by Ukgazvydobuvannia, which is part of the Naftogaz Group.

State-owned Ukrtransgaz, also part of the Naftogaz Group, operates the transmission<sup>183</sup> and storage systems, whereas gas distribution companies include private ones.<sup>184</sup>

**European companies are already using Ukraine's gas storage facilities located closely to the EU**

The retail gas market has two segments: the supply of industrial consumers, with competition among private players where Naftogaz controls only 5% (in 2018), and the supply of residential and heating sector, where the lion's share is in the hands of the Regional Gas Company group (RGC), which represents private utilities that were unbundled from the regional distribution system

operators (DSOs or 'Oblgaz' in Ukrainian) in 2015, in line with the Gas Market Law, and Naftogaz. This unbundling of supply companies was largely a formality, however, and these companies remain legally part of the DSOs (Oblgazes) that are mostly managed by RGC - and RGC itself is part of Firtash's Group DF.<sup>185</sup> Because of the way this market segment is regulated, household users do really not have the option of choosing a supplier, while oligarchic interests continue to carry a lot of weight.

The rapid development of gas hubs<sup>186</sup> in the EU offers additional opportunities for Ukrainian companies to establish a presence. Its strong infrastructure, including gas storage facilities near the EU border, allows Ukraine to consider setting up its own hub to serve European customers, among others.<sup>187</sup> The more so that a growing number of European suppliers have been booking Ukrainian gas storage facilities<sup>188</sup> with the introduction of customs warehousing.<sup>189</sup>

<sup>180</sup> Data for 2013 from the 2014 Naftogaz Group annual report p. 72: <http://www.naftogaz.com/files/Zvity/Naftogaz%20Annual%20Report%202014.pdf> Data for 2018 at: <http://www.naftogaz.com/www/3/nakweb.nsf/0/00B62B682AA8CA37C22583900050DAF0?OpenDocument&year=2019&month=01&nt=%D0%9D%D0%BE%D0%B2%D0%B8%D0%BD%D0%B8&>

<sup>181</sup> Annual Report on NEURC Performance, March 2018, p. 113: [http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi\\_zvit\\_NKREKP\\_2018.pdf](http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2018.pdf)

<sup>182</sup> The Ministry of Energy and Coal, Information Note on Basic Performance Indicators of Ukraine's Fuel & Energy Complex Sectors in December and during 2018 (according to actual data), <http://mpe.kmu.gov.ua/minugol/doccatalog/document?id=245343568>

<sup>183</sup> On 1 July 2019, the operation of the gas transmission system was transferred to Operator GTS Ukraine, a limited liability company that is an Ukrtransgaz subsidiary.

<sup>184</sup> Annual Report on NEURC Performance, March 2018, p. 96, [http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi\\_zvit\\_NKREKP\\_2018.pdf](http://www.nerc.gov.ua/data/filearch/Catalog3/Richnyi_zvit_NKREKP_2018.pdf)

<sup>185</sup> Although the Single State Register of Legal Entities, Physical Entities-Entrepreneurs, and Community Organisations lacks direct information about beneficiaries, control over the companies was established by Dmytro Firtash's Group DF back in 2012, when most Oblenergos were privatised. <https://www.epravda.com.ua/publications/2012/05/4/322738/>

<sup>186</sup> A gas hub is where sales of gas take place, both physical and virtual, based on the intersection of a significant number of gas pipelines.

<sup>187</sup> DiXi Group, Policy Paper, Ukrainian Gas Hub – A Chance for Europe, 2016. [http://dixigroup.org/storage/files/2016-12-19/web\\_en\\_ukrainian\\_gas\\_hub\\_2016\\_en.pdf](http://dixigroup.org/storage/files/2016-12-19/web_en_ukrainian_gas_hub_2016_en.pdf)

<sup>188</sup> In October 2019, 2.32 bcm of gas was stored in the customs warehousing mode: <https://www.facebook.com/mcfire76/posts/10157090705054081>

<sup>189</sup> The option for TSO customers to store gas for up to three years without paying taxes or customs duties, for further sale to EU markets or in Ukraine. In the second case, all necessary taxes and duties have to be paid first.

# IMPLEMENTATION DYNAMICS

The adoption of the Gas Market Law in 2015 and related bylaws, such as Cabinet and NEURC resolutions effected the transposition of the requirements of Directive 2009/73/EC, Regulation (EC) 715/2009, and Directive 2004/67/EC. In addition, over 2017-2019, a number of amendments were made to the GTS Code, the Gas Distribution Systems Code, the Gas Storage Code, the Security of Supply Rules, and the National Action Plan for Responding to Gas Supply Crises. These amendments aimed, in particular, at preventing discrimination in network access, introducing daily balancing on the market, settling the issues of capacity distribution, and preventing supply crises. In early October 2019, the methodology for calculating tariffs for gas storage and transmission was amended to bring it in line with the EU acquis.<sup>190</sup>

On 1 March 2019, the gas market balancing was switched from a monthly to a daily mode – a long-awaited move.<sup>191</sup> In the latter mode, Ukrtransgaz daily balances the demand and supply on the gas market in Ukraine. This step means approximating the Ukrainian market to the way the EU market operates, which is more comfortable for European companies and much more transparent.

Other steps were taken to streamline the approval process for exploration, development and processing of hydrocarbons in line with the Directive 94/22/EC by amending the Subsoil Code and other legislation and regulations.<sup>192</sup> In autumn 2018, the Law 'On Ensuring Transparency in Extractive Industries' was adopted.

***Ukraine's laws are already approximated to the gas acquis: transposition of the main provisions of the EU's Third Energy Package has already taken place***

In this way, despite delays in the transposition of individual legal acts, such as of Regulation (EC) 347/2013, which covers projects of common interest, as well as of certain network codes, Ukraine's laws no longer have any serious differences with the EU gas acquis. The transposition of the main provisions of the EU's Third Energy Package to the national legislation has already taken place – both the Energy Community Secretariat<sup>193</sup>, and representatives of Ukraine's expert community<sup>194</sup> agree on such an assessment.

Among key implementation issues, the following remain to be resolved: the finalisation of the unbundling and the liberalisation of the retail supply to households and district heating companies, which is about 60% of the market.

In the summer of 2016, the Government approved a plan to restructure Naftogaz based on the Ownership Unbundling (OU) model.<sup>195</sup> However, the key element of this plan, transferring the assets to the new TSO, Mahistralni Gazoprovody Ukrainy (MGU) kept being delayed in anticipation of the results of the Stockholm arbitration of a dispute between Naftogaz and Gazprom. After a positive decision was handed down in early 2018, Naftogaz' position is that, as long as the transit gas contract between the company and Gazprom is in effect, i.e. until the end of 2019, the right to execute the contract cannot be transferred to a third party (like the new, independent TSO) without Gazprom's

<sup>190</sup> NEURC's new tariff methodology is based on the basic capacity-weighted distance methodology in Commission Regulation (EU) 2017/460 of 16 March 2017 for the transmission cost at each of clustered entry/exit points of a GTS. See: <http://www.nerc.gov.ua/?id=45133>

<sup>191</sup> <http://utg.ua/utg/media/news/2019/03/ukraine-gas-market-switched-to-daily-balancing.html>

<sup>192</sup> Law of Ukraine #2314-VIII 'On amending certain legislation of Ukraine regarding the deregulation of the oil and gas sector' dated 1 March 2018, and others.

<sup>193</sup> Annual Implementation Report, Energy Community Secretariat, 1 September 2018, p. 182: [https://www.energy-community.org/dam/jcr:05c644e0-3909-4c26-84f5-e1cdb63e1af4/ECS\\_IR2018.pdf](https://www.energy-community.org/dam/jcr:05c644e0-3909-4c26-84f5-e1cdb63e1af4/ECS_IR2018.pdf)

<sup>194</sup> Energy Reforms: Monitoring report on Ukraine's progress with implementing the Association Agreement with the EU in the energy and environment, June 2018. Gas Benchmarks, p.12, 58: [http://enref.org/wp-content/uploads/2018/09/Monthly-June-2018\\_rs.pdf](http://enref.org/wp-content/uploads/2018/09/Monthly-June-2018_rs.pdf)

<sup>195</sup> <http://zakon.rada.gov.ua/laws/show/496-2016-%D0%BF>

approval.<sup>196</sup> Moreover, because Ukraine's interests need to be secured in new arbitration vs. Gazprom on the transit tariff,<sup>197</sup> the Naftogaz management has come out with a proposal to carry out the unbundling based on the Independent Transmission Operator (ISO) model,<sup>198</sup> where the gas transmission assets remain within the Naftogaz structure.

Eventually, on 18 September 2019, the Government approved an updated unbundling plan based on the ISO model.<sup>199</sup> In October 2019, the Law on unbundling was adopted<sup>200</sup> to allow transferring the GTS property rights and its management by an independent operator. The GTS operator will be legally separated from Naftogaz on 1 January 2020.<sup>201</sup> Its certification will be finalised after the operator confirms meeting the conditions set by the regulator and after a positive conclusion by the Energy Community Secretariat.

It is important that a joint working group has been formed to support the unbundling, including representatives of the five European TSOs (from France, the Netherlands, Italy, Slovakia, and Belgium)<sup>202</sup> that are interested in their further participation in the management of the Ukrainian GTS.

The main obstacle to liberalising the retail supply for households and ensuring the choice of supplier is the excessive regulatory imposition of public service obligation (PSO) on participants in the gas market in order to cover social needs.<sup>203</sup> Under European legislation, the PSO scheme can be generally applied to protect vulnerable consumers, but it should not get in the way of competition. In its current form, the PSO scheme both restricts the rights of consumers to choose a supplier and quality services, and the rights of market participants through the discriminatory way that the duty to supply is imposed on specific companies, mainly those connected to RGC for households, and Naftogaz for district heating companies.

***The liberalisation of the retail supply to households remain to be implemented***

These problems led the Energy Community Secretariat to open an infringement case against Ukraine.<sup>204</sup> Despite long discussions on this very issue, the Government of Ukraine did not manage to resolve them and was unable to meet the requirements of the Energy Community when updating its resolution on PSO in November 2018 and September 2019, as well as when approving addenda to it in April through June 2019<sup>205</sup>.

On the other hand, the market trends in the spring and summer of 2019, in fact, equalized the wholesale gas prices for both the regulated and the free market segments, and Naftogaz together with PSO-suppliers launched a product called 'Gas Stock,' which allows Ukrainian households to prepay

<sup>196</sup> Gotev G., EU and Ukraine in tug-of-war over Naftogaz unbundling, EURACTIV.com, July 19, 2018. <https://www.euractiv.com/section/energy/news/eu-and-ukraine-in-tug-of-war-over-naftogaz-unbundling/>

<sup>197</sup> <http://www.naftogaz.com/www/3/nakweb.nsf/0/713B012BCE83C6A9C22582C20050AF41>, <https://ua.interfax.com.ua/news/economic/596374.html>

<sup>198</sup> Андрій Коболєв: Анбандлінг Нафтогазу. Коли та як? <http://www.naftogaz.com/www/3/nakweb.nsf/0/A0DFE24C8ED6AC24C22583850034772F7?OpenDocument>

<sup>199</sup> <https://www.kmu.gov.ua/ua/npas/pro-vidokremlennya-diyalnosti-z-tran-180919-840>

<sup>200</sup> <https://portal.rada.gov.ua/news/Novyny/183737.html>

<sup>201</sup> <http://utg.ua/utg/about-company/unbundling-project/>

<sup>202</sup> <http://www.naftogaz.com/www/3/nakweb.nsf/0/60014DB06114C8D0C22583D1002509F4>

<sup>203</sup> <https://zakon.rada.gov.ua/laws/show/867-2018-%D0%BF>

<sup>204</sup> Energy Community, Case ECS 02/17: Ukraine/Gas: <https://energy-community.org/legal/cases/2017/case0217UE.html>

<sup>205</sup> <https://zakon.rada.gov.ua/laws/show/867-2018-n>, <https://zakon.rada.gov.ua/laws/show/293-2019-%D0%BF>

gas at its summer price and use it during the heating season.<sup>206</sup> These developments give rise to optimism with respect to price liberalisation and discontinuation of the current conditions of PSO from 1 May 2020.

## RECOMMENDATIONS

### ***For Ukraine***

- Accelerate the work on implementing legislative acts of the EU in line with updated Annex XXVII to AA, in particular, the EU network codes on interoperability and data exchange rules (Commission Regulation (EU) 2015/703), capacity allocation mechanisms (Commission Regulation (EU) 2017/459), and gas balancing (Commission Regulation (EU) No 312/2014);
- Ensure holding consultations with the European Commission on the compatibility of any legislative proposals with EU acquis, as well as respective reporting;
- Timely and fully implement the plan on the unbundling of the independent TSO, in particular, ensure the transfer of assets to the new operator and its certification, engaging operators from EU countries as potential partners in GTS management;
- Revise the public service obligation (PSO) scheme on Ukraine's gas market in order to make it compliant with the requirements of the Energy Community and EU standards;
- Update tariff rates for gas transmission based on the new methodology adopted in October 2019 that takes into account Commission Regulation (EU) 2017/460 as well as based on the long-term planning of the GTS development, including projected transit volumes;
- Make amendments to the Constitution of Ukraine and the law on NEURC that will guarantee the legal, functional, and financial independence of the regulator in line with EU acquis provisions.

### ***For the EU***

- Ensure proper monitoring of how Ukraine implements its 'homework' as foreseen by the updated Annex XXVII to AA, and in the case of successful performance, apply EU internal market treatment to Ukraine, with shifting the gas delivery point for European customers of Gazprom to the eastern border of Ukraine;
- Uphold a common position with Ukraine during negotiations with Russia regarding the transit of gas after 2019 based on EU rules and ensure the effective extension of these requirements to all other routes of Russian gas supply to the EU through the proper implementation of updated Directive 2009/73/EC by the member states;
- Support the establishment of an open, competitive gas market infrastructure in Ukraine, including by introducing daily balancing, developing gas trading on the spot market, forming a hub, and unblocking all cross-border interconnections between Ukraine and EU countries for the free flow of gas in both directions.

---

<sup>206</sup> <http://www.naftogaz.com/www/3/nakweben.nsf/0/07DC488E669CDA6FC225845F00316A0D>

# INTEGRATING UKRAINE TO THE EUROPEAN COMMON AVIATION AREA

**Iryna Kosse**

## COMMON AVIATION AREA AGREEMENT

The European Common Aviation Area is a single market in aviation services formed by the EU countries to liberalise the market based on common safety standards. Besides the EU member states, third countries may join the single market through the signing of bilateral agreements with the EU. Such Common Aviation Area (CAA) Agreements have been already signed with Moldova and Georgia, and negotiations with Azerbaijan and Armenia are underway. Similar agreements (the Euro-Mediterranean Aviation Agreements) were signed with Morocco, Jordan, and Israel.

The CAA Agreement with Ukraine was initialled on 28 November 2013 but remains unsigned because of the dispute between Spain and the UK over the mentioning of the Gibraltar airport.

According to the Agreement, Ukraine has to incorporate in its legislation the EU requirements and standards in civil aviation related to market access, air traffic organisation, flight safety, environment, and other issues. This approximation should be implemented in two phases, so the Agreement singles out two transition periods.

The first transition period will begin after the signing of the CAA Agreement.<sup>207</sup> It will allow Ukrainian and EU air carriers to fly between any point in the EU and any point in Ukraine. Ukraine will be engaged as an observer in activities of the committee responsible for slot allocation in EU airports. Simultaneously, Ukraine will be harmonising its legislation and implementing the EU requirements and standards: successful completion of these tasks will allow it to move to the second transition period.

During the second transition period, the EU will recognise aircrew certificates issued by Ukraine; ground handling service providers will be able to operate in the territory of the other party; and Ukraine will be engaged in activities of the committee that defines which of air carriers are prohibited from flying within the EU.



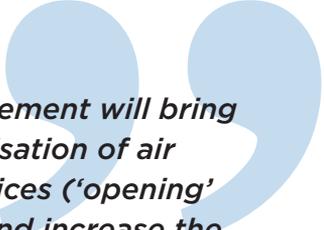
***The CAA Agreement between the EU and Ukraine was initialed back in 2013, but remains unsigned because of a dispute between UK and Spain about the mentioning of Gibraltar airport in the text***

---

<sup>207</sup> And after its registration with the International Civil Aviation Organization (ICAO) and the UN Secretariat.

After Ukraine organises her airspace in line with the EU requirements, the Agreement will become fully effective. EU airlines will be able to fly between Ukrainian cities; and Ukrainian airlines will be able to fly between EU cities provided the flight is a part of carriage serving a point in Ukraine (that is, the Agreement is asymmetric). The EU will begin recognising certificates issued by Ukraine for air traffic organisation and air navigation services.

According to the Agreement, a Joint Committee should be set up in order to interpret EU civil aviation legislation, oversee air traffic organisation, monitor the Agreement implementation, and make amendments to the Agreement. The Joint Committee will be responsible for the application of this Agreement and will have to ensure its proper implementation. The CAA Agreement does not contain any implementation timetables. Movement to the next implementation period follows a decision of the Joint Committee, which evaluates the implementation. The Joint Committee will consist of representatives of the EU and Ukraine. Its decisions will be binding. Although the Joint Committee will have a high degree of discretion, the Agreement provide neither a mechanism for its establishment nor the number of its members.



***The CAA Agreement will bring mutual liberalisation of air transport services ('opening' of the skies) and increase the number of flights between the EU and Ukraine, to the benefit of passengers and airports***

In addition, Ukraine will participate in a few more institutions as an observer: the European Union Aviation Safety Agency (EASA)<sup>208</sup> and the Single Sky Committee (SSC). Ukraine will be accountable to the EASA for aircraft certification.

Thus, the most powerful and tangible effect of the CAA Agreement signing will be the mutual opening of the sky for Ukrainian and European carriers. Passengers and airports will benefit from the increased number of flights between cities in Ukraine and the EU as well as from the stronger competition among airlines. Politically, Ukraine will strengthen its positions as a European actor by gaining access (at least, as an observer) to the decision-making process at the governing bodies of European aviation.

## AVIATION MARKETS OF UKRAINE AND EU

According to the European Commission, the EU air carriage sector accounts for 2.1% of the EU's GDP and provides jobs to nearly five million people. The internal European market comprises over 100 regular air carriers, 400 airports, and 60 providers of ground handling services.<sup>209</sup> In 2017, one billion passengers used air transport in the EU.<sup>210</sup>

The air carriage services in Ukraine are estimated as about one per cent of its GDP, and the sector employs 8,200 persons (2017). The air transport exported \$1.1 billion worth of services in 2017 and imported half of that, about \$0.5 billion.

Twenty-one Ukrainian passenger airlines operate on the market,<sup>211</sup> the leader is 'Ukrainian Interna-

<sup>208</sup> Presently, Ukraine has the status of an EASA Pan-European Partner Country.

<sup>209</sup> [https://ec.europa.eu/transport/modes/air/internal-market\\_en](https://ec.europa.eu/transport/modes/air/internal-market_en).

<sup>210</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php/Air\\_transport\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Air_transport_statistics).

<sup>211</sup> <https://avia.gov.ua/pro-nas/statistika/periodychna-informatsiya/>.

***Ryanair in Ukraine proves that Ukrainian market is attractive for low cost airlines***

tional Airlines'. 22 Ukrainian companies carry mail and other cargo, the leader is state-owned 'Antonov'.<sup>212</sup> In 2018, 20 Ukrainian airports served 20.5 million passengers (by 25% more than in 2017), including 15.8 million on regular flights. In addition, there are 78 commercial service entities and airport services in Ukraine as well as 42 design and 26 manufacturing entities for aviation equipment, and 252 organisations have certificates to provide agency services in selling air passenger carriage, and 48, in selling air cargo carriage.

By now, Ukraine has entered into 26 inter-government agreements on regular air service with EU countries. These agreements define the number and frequency of flights on routes between the countries, destinations, and the number of carriers that may serve these routes. Hence, the bilateral agreements can restrain the air service between Ukraine and EU countries and 'hold' low-cost airlines off popular routes. For example, Ryanair has no flights from Ukraine to France, Spain, and Italy. For Ukraine, the appearance of Ryanair meant the attractiveness of the Ukrainian market for low cost airlines and the possibility of cheap travel to Europe. In October 2018, the company started with 15 destinations from Kiev and Lviv, and now it is flying from five Ukrainian cities and plans to bring the number of destinations from Ukraine to 43 in the summer of 2020.

During 2018, 38 foreign airlines from 37 countries flew to Ukraine, having carried 6.9 million passengers (by 38% more than in 2017).<sup>213</sup> According to data of UkrAeroRukh (Ukrainian State Air Traffic Services Enterprise), the number of international flights by foreign airlines in the Ukrainian air space in 2018 grew by 25%. Unfortunately, the State Aviation Administration of Ukraine does not provide statistics on individual countries that have flights to Ukraine, although it reports on certain aspects of air carriage liberalisation. Thus, in 2018, the frequency of regular flights to Hungary, Germany, and France increased, and the limits on the frequency of flights to Austria were cancelled altogether.

But of course, the greatest market opening will happen in the case of signing the CAA Agreement with Ukraine. There will be no more need to conclude bilateral agreements, define the number of possible flights per week, define air carriers, etc. European air carriers will be able to unrestrictedly fly to Ukrainian cities as well as use Ukrainian airports for transit to Asia or Australia. However, there are essential risks too for Ukrainian air carriers: due to the lack of unoccupied slots in European airports, they will find it difficult to open new routes to the EU, and also more powerful European airlines may squeeze them out of carriage between Europe and Ukraine.

The development of air cargo carriage will depend on not only the Agreement provisions implementation but also investment in new cargo facilities. The cargo terminals of Ukraine's largest airport, Boryspil, are overloaded, and there is no cargo terminal in the Lviv airport at all. Therefore, an increase in cargo traffic can give an additional impetus to the development of airports near major cities, e.g., the aerodrome in Bila Tserkva. This will require installing navigation equipment for landing planes in the night-time and bad weather conditions as well as setting up an international checkpoint for foreign cargo.

<sup>212</sup> Some of the companies perform all types of carriage.

<sup>213</sup> Report by the head of the State Aviation Administration of Ukraine for 2018.

# STATE POLICY

The Ukrainian air market development is defined by the state policy on air carriage. The Air Code of Ukraine is the basic instrument that regulates the use of the Ukrainian air space as well as the use of main air carriage directions.<sup>214</sup> Certain aspects of the state policy are also regulated by orders of the Ministry of Infrastructure, the Defence Ministry (regarding issues of defence), and the State Aviation Administration.

The strategy of the aviation sector development in Ukraine is defined in the Strategic Plan for the Development of Air Transport until 2020. It envisages the signing of the CAA Agreement; consultations with EU countries on amendments to the current bilateral agreements in order to lift the existing restrictions; support of Ukraine's participation in the EASA as an observer; adoption of a State Flight Safety Program meeting ICAO standards; execution of the Common European Single Sky Implementation Plan following EUROCONTROL recommendations; and harmonisation of Ukrainian legislation with that of the EU. Some of the aviation strategy's aspects are detailed in the State Programme for the Development of Ukrainian Airports until 2023, the Strategy for the Development of the Air Navigation System of Ukraine in 2016-2025, etc.

The main supervisory authority for the development and implementation of the state air carriage policy is the Ministry of Infrastructure. It defines the main areas of activities for the State Aviation Administration, which implements the state policy in the use of the Ukrainian air space. These institutions are relatively effective, although there are some concerns about the effectiveness of state aviation surveillance. For example, in March-May 2019, the National Agency for the Prevention of Corruption (NACC) conducted a scheduled check of the State Aviation Service and found signs of corruption offenses by the head of the State Aviation Service and state inspectors of the service. The State Aviation Service challenged the results of the check in court, but the court did not satisfy this claim<sup>215</sup>. It should be noted that lack of safety oversight by civil aviation authorities could lead to the inclusion of the country and its airlines in the so-called 'EU Aviation Safety List' and to the ban on flying to the European Union, as happened with Moldova in April 2019<sup>216</sup>.

## CAA AGREEMENT IMPLEMENTATION DYNAMICS

Ukraine has already begun implementing the EU norms and standards in its legislation, that is, unilaterally and voluntarily started the CAA Agreement implementation even before its signing.

The CAA Agreement requirements with respect to passenger rights; classification of aviation as state, civil and general ('small') aviation; aviation safety measures; and environmental protection – were already taken into account in the Air Code as long ago as its 2011 version.

The arrangements signed in 2017 between the State Aviation Administration of Ukraine and the European Commission on convergence of certification systems<sup>217</sup> provided that, in the following five

<sup>214</sup> <https://zakon.rada.gov.ua/laws/show/3393-17>.

<sup>215</sup> <https://www.ukrinform.ua/rubric-society/2404779-derzaviasluzba-vs-nazk-sud-viznav-zakonnou-perevirku-antikorupcijnikiv.html>

<sup>216</sup> <https://glavcom.ua/news/moldova-opinilasya-u-chornomu-spisku-aviabezpeki-jes-586694.html>

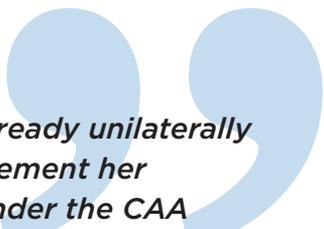
<sup>217</sup> <https://avia.gov.ua/oleksandr-bilchuk-pidpisav-domovlenist-pro-zbizhnist-sistem-sertifikatsiyi-z-yevrokomisijeyu/>.

years, the parties would be jointly working on reaching convergence of the certification systems for the primary fitness for flight, maintenance of the fitness for flight, and maintenance of aircraft and its components. As a result, some of the Aviation Rules of Ukraine have been developed<sup>218</sup> in line with EU regulations, and the personnel trained accordingly. In 2017, the State Civil Aviation Safety Program was adopted, and a number of licensing conditions and rules approved.<sup>219</sup>

One of the main innovations in the CAA Agreement is that Ukraine will be accountable to the EASA with respect to aircraft certification. Ukraine has to provide for EASA technical inspection and audit mechanisms regarding standardisation. However, Ukrainian national authorities will be issuing the certificates, licenses, and other technical documentation. In 2018, UkrAeroRukh passed the EASA audit and received a certificate required for plane approach manoeuvring at the Uzhhorod airport, but no mechanism for regular EASA check-ups has been developed as yet.

The issue of opening the ground handling market still remains unsolved. Developed in February 2017 and amended in November 2018, the draft Aviation Rules on 'The Access to the Market of Ground Handling Services at Airports' has not been considered by the Verkhovna Rada. Meantime, this market remains monopolised by certain companies. For example, in November 2018, the Antimonopoly Committee of Ukraine found a breach of antimonopoly legislation on the part of the Kyiv airport (Zhuliany) and the 'Master-Avia' limited company that entered into a general agreement on ground handling services and squeezed out other companies from this market.<sup>220</sup> In 2017, the Boryspil airport was fined UAH 13 million for abuse of monopoly on the specialised airport services market with respect to ground handling services.<sup>221</sup>

Thus, the work on harmonisation of Ukrainian and EU legislation in the air carriage sector is going on. However, it is difficult to evaluate the extent of harmonisation because there is no monitoring of this work. Even in the Government Priority Action Plan for 2019, bringing Ukrainian aviation legislation in line with European standards is expected within a year after the Agreement comes into force.



***Ukraine has already unilaterally begun to implement her 'homework' under the CAA Agreement even before its signing***

## RECOMMENDATIONS

### ***For the EU***

- Sign the CAA Agreement with Ukraine, having defined the wording of how it applies to the Gibraltar airport (either through a protocol between the UK and Spain or, in the case of a 'hard' Brexit without an agreement, by amending the CAA Agreement text without an additional protocol with the UK).

### ***For Ukrainian state authorities:***

- Provide for legal regulation of the question of EASA technical inspections and audits regarding standardisation;

<sup>218</sup> On certification of aircraft and organisations of designer and manufacturer as well as procedures for aerodrome certification.

<sup>219</sup> On passenger carriage, insurance, flight rules, meteorological service, requirements for aircrews and certification of aerodromes, certification of sale agents for air carriage, flight operation, use of airspace, and certification of air traffic controllers.

<sup>220</sup> <http://www.amc.gov.ua/amku/doccatalog/document?id=145732&schema=main>. In April 2019, the Kyiv Economic Court cancelled the decision of the Antimonopoly Committee, pointing out that it did not find any casual connection between the general agreement conclusion and the potential competition restraint.

<sup>221</sup> <https://vezha.net.ua/economy/aeroport-boryspil-oshtrafuvali-na-miljoni-cherez-zlovzhivannya-monopolnim-stanovishhem-na-rinku/>.

- Ensure unrestricted access to the ground handling market in full compliance with Directive 96/77/EC;
- Continue actively working on the incorporation of EU aviation regulations and directives into national legislation;
- Continue actively working to strengthen state oversight of flight safety.

***For Ukrainian market players:***

- For Ukrainian airlines – enhance competitiveness in order to be ready for the arrival of European air carriers on the Ukrainian market;
- For Ukrainian providers of ground handling services at airports – take an active stance and defend own rights, also at the Antimonopoly Committee;
- For Ukrainian airports - develop cargo and mail carriage.

