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Approximation to EU Technical Standards with and without the Promise of Membership: the Cases of Slovakia and Ukraine

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Abstract

This paper aims to identify the extent to which the non-promise of membership of the European Union (EU) precludes the motivation of Ukraine as European Neighbourhood Policy country to adopt EU policies in the field of market access, namely technical standards and regulations. Its approximation approach is compared to the fast-tracked accession of Slovakia, which was driven by a clear-cut membership promise. Furthermore, the paper elaborates whether the conclusion of an Association Agreement between the EU and Ukraine, including a Deep and Comprehensive Free Trade Agreement, provides sufficient incentives for Ukraine to continue reforming its quality infrastructure in order to gain access to the Single European Market. Finally, scenarios of possible developments of EU-Ukraine relations are deliberated in the context of the EU-Ukraine-Russia triangle. The paper argues that market access provides sufficient stimulus for third countries to adhere to EU technical standards – even in the absence of a clear and credible promise of future EU membership. Yet, in the case of Ukraine, the country's relations with Russia appear to compete with its EU approximation process, resulting for the time being in Ukraine attempting to pursue a balanced dual cooperation with both the EU and Russia.

Introduction: does a membership perspective make a difference?

The past years witnessed slow progress in the adoption and implementation of a new Association Agreement between the European Union (EU) and Ukraine. This Association Agreement also encompasses a Deep and Comprehensive Free Trade Agreement (DCFTA). In the light of these developments, the following question arises: to what extent is Ukraine motivated to adopt the EU's rules warranting access to the Single European Market (SEM), in particular those applicable to quality infrastructure, given that the EU has never made an explicit and credible commitment to recognise the Ukrainian membership ambitions?

The paper is structured into three consecutive parts: first, Damro's concept of Market Power Europe (MPE) is employed to provide a theoretical point of departure for analysis of developments in the area of technical harmonisation.¹ Second, the author briefly introduces the Slovak accession process and the milestones in negotiations on the chapter of free movement of goods. The Slovak path of adoption of the EU *acquis* is compared to the process which is currently underway in Ukraine. Furthermore, the current politico-economic situation in Ukraine and the nature of its cooperation with the EU under the framework of the European Neighbourhood Policy (ENP) are scrutinised. Third, the Ukrainian approximation process is analysed. Fourth, the paper outlines lessons learned and possible future scenarios of EU-Ukraine cooperation and their consequences for Ukrainian integration aspirations.

The paper argues that market access provides sufficient stimulus for third countries to adhere to EU technical standards – even in the absence of a clear and credible promise of future EU membership. Hence, the Association Agreement complemented by a DCFTA provides incentives for Ukraine to continue harmonising its technical standards with the EU.

Market Power Europe

Since the inception of the 'European project' in the 1950s, the European Communities and subsequently the EU have come a long way. The EU has, *inter alia*, gradually expanded its policy focus from a purely regional to a more global reach. After the historical accession of the Central and Eastern European Countries (CEECs) in 2004, the EU needed to face internal discussions on how to deal with the new

¹ C. Damro, "Market Power Europe", *Journal of European Public Policy*, vol. 19, no. 5, 2012, pp. 682-699.

neighbours' accession demands. A single umbrella was necessary to cover this cooperation. As a result, the ENP framework has emerged.²

As the EU has gradually established its identity and amplified its position in international relations, the theoretical debate has attempted to capture this evolution. Orbie's Civilian Power Europe (CPE)³ and Manner's Normative Power Europe (NPE)⁴ concepts are claimed to provide less comprehension of external actors' motivation in pursuit of SEM access than Damro's Market Power Europe (MPE).⁵ Thus, due to the limited extent of this paper, the latter is more thoroughly scrutinised here. Damro's concept of MPE departs from the historical perspective of the founding *raison d'être* as well as the evolution to the present state, which describes the EU as predominantly "market integration".⁶ While disregarding traditional conceptualisations of power in terms of security policy, Damro claims that the EU has been highly effective in exerting its influence in other external policy domains, and the SEM in particular. The latter is viewed as an ecosystem where a clash of interests determines the EU's success in the international arena and thus provides a basis for a conceptualisation of the EU as MPE.⁷

Damro has incorporated various theories and empirical evidence into the MPE concept to warrant the claim that the EU is indeed a market power in international relations.⁸ The role of the common market and the common commercial policy is correctly reiterated as crucial in laying the foundations of the EU's identity and integration project.⁹ At the same time, the EU has gradually evolved from a purely economic regional organisation into a global market power with an impact in a wide array of policy domains.¹⁰

Going into more detail, Damro identifies "three interrelated and mutually-reinforcing characteristics: material existence, institutional features and interest contestation".¹¹ First, the material existence corresponds to the SEM, which lies at the

² J. Solana & C. Patten, Letter on 'Wider Europe', 7 August 2002.

³ J. Orbie, *Europe's Global Role: External Policies of the European Union*, Farnham, Ashgate, 2008.

⁴ I. Manners, "Normative power Europe: a contradiction in terms?", *Journal of Common Market Studies*, vol. 40, no. 2, 2002, p. 235.

⁵ Damro, *op. cit.*, pp. 682-699.

⁶ *Ibid.*, p. 683.

⁷ *Ibid.*

⁸ *Ibid.*, pp. 683-684.

⁹ *Ibid.*, p. 685.

¹⁰ *Ibid.*, p. 685.

¹¹ *Ibid.*, p. 686.

core of MPE. Importantly, the EU's power extends beyond its economic influence to impacting other actors' behaviour via an externalisation of the EU's internal policies. For the purpose of the further argumentation, it is indispensable to acknowledge Drezner's recognition of material incentives and actors' perceptions as factors that determine the role of market size in the externalisation of internal rules.¹²

Second, the EU has gradually developed a one-of-its-kind institutional architecture that has facilitated the externalisation of its economic and social regulatory scheme. Due to the latter's complexity, a myriad of stakeholder groups engages in policy-making processes with the aim to steer decision-making in their favour. The need for the EU to counteract these pressures is well captured an emphasis on regulatory expertise, a clear chain of responsibility and an effective oversight.¹³

Third, interest contestation refers to the need to account for different stakeholder interests in the SEM. According to Young, these interests pertain to economic regulation, which institutionalises the rules of the game on the SEM, and social regulation, which covers the outcomes of this game.¹⁴ In turn, the regulatory environment induced by these rules affects the SEM both internally and externally.

As a result, the EU exerts various types of power in its external relations in order to steer other actors' interests and behaviour. This paper focuses on the incentives driving the harmonisation of technical regulation in the cases of Slovakia's accession to the EU and Ukraine's approximation to EU rules. First, harmonisation of technical standards and regulations is an indispensable prerequisite for a proper and efficient functioning of the SEM.¹⁵ Second, Slovakia and Ukraine have been chosen to illustrate the dependency of the harmonisation engagement on an eventual promise of future membership based on the following reasons: first, due to the historical, geographical and cultural affinity of Slovakia and Ukraine; and second, due to the fact that Slovakia after its much contested era in the second half of the 1990s might have been left out of the future enlargement process altogether had it

¹² D. Drezner, *All Politics is Global: Explaining International Regulatory Regimes*, Princeton, Princeton University Press, 2007, pp. 32-33.

¹³ Damro, *op.cit.*, p. 688.

¹⁴ A.R. Young, "The Politics of Regulation and the Internal Market", in K.E. Jørgensen, M.A. Pollack & B. Rosamond (eds.), *Handbook of European Union Politics*, London, Sage, 2006, p. 377.

¹⁵ European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – The Operation of Directive 98/34/EC in 2009 and 2010*, COM(2011) 853 final, Brussels, 7 December 2011, p. 3.

not implemented political changes and much needed economic, financial and other reforms. Thus, the Slovak case serves well as an example for Ukraine in its accession endeavours, in particular considering that the EU had for long not developed a regional policy towards its Eastern neighbours and preferred bilateral relations instead.¹⁶ Moreover, Slovakia as one of the fastest countries to adopt EU rules in the accession process illustrates well the effects of such an unambiguous promise on the national policy-making. Ukraine, on the other hand, serves to analyse the extent to which the non-promise of future membership precludes and/or incentivises adoption of EU technical standards.

To summarise, the concept of MPE provides a good starting point for further analysis of the subject of this paper: to what extent are non-EU countries motivated to adhere to the EU's SEM regulations? Several of the above-mentioned MPE features are instrumental for this deliberation. First, the distinction between material incentives and actors' perceptions will be employed to analyse the prerequisites for a successful realisation of the EU's market power and the approximation of market-based rules such as technical standards. Second, this paper argues that the size of the SEM provides a substantial incentive for Ukraine to adopt the related rules. Third, given that the EU possesses sufficient regulatory expertise, coherence and sanctioning authority, it is able to exert its power towards third actors.

The paper now turns to an empirical scrutiny of the Slovak and Ukrainian approaches to the approximation of technical standards.

Slovakia's accession process

The underlying question of this paper, Slovakia's and Ukraine's motivations to approximate the EU *acquis*, is also pertinent to a broader discourse on incentives inherent to the EU enlargement and ENP-related policies. Prior to the Slovak accession in 2004, the long-awaited and eventually spelled-out promise of future membership was a crucial driving force behind the ambitiously-speedy Slovak adoption of EU *acquis*. More concretely, the forthcoming section focuses on the first chapter of negotiations – the free movement of goods, which handles standardisation, technical regulation, conformity assessment and mutual recognition of industrial products in the SEM, commonly termed as quality infrastructure.

¹⁶ A. Duleba, "Why the EU Needs Only One Eastern Policy: Deficits of the Existing Framework", *International Issues & Slovak Foreign Policy Affairs*, vol. 16, no. 1, 2007, p. 24.

The Slovak road to the EU started in 1993 after the dissolution of Czechoslovakia. The fast signature, ratification and entry into force of the so-called 'Europe Agreement' with the EU effectively enabled Slovakia and the EU to intensify their cooperation.¹⁷ In addition to establishing a mutual contractual relationship, the Agreement recognised the membership aspirations of the CEECs, expressed the EU's intention to help them in their transition and, last but not least, established the legal framework to guide the accession process.¹⁸

The membership aspirations of the CEECs were recognised by the Conclusions of the Copenhagen European Council in June 1993: the member states agreed that the countries "that so desire shall become members of the European Union".¹⁹ These Conclusions also established a set of rules that these countries were expected to fulfil in order to become EU members.

In Schimmelfennig's words, such a commitment effectively meant a 'rhetorical entrapment' of the EU.²⁰ The accession of the CEECs was viewed as a matter of time, subject only to the fulfilment of criteria outlined in the Presidency Conclusions, not a matter of any other political decision. Therefore, although Slovakia submitted its membership application in June 1995, it can be argued that the link between the 1993 'Europe Agreement' and the Conclusions of the Presidency of the Copenhagen European Council in 1993 paved the so-called "from Copenhagen to Copenhagen" irreversible way for future membership of the Slovak Republic.²¹

Despite the promising approach on the EU side, the Slovak progression towards the EU was halted by unfavourable circumstances on the domestic political scene. The submission of the Slovak application for EU membership took place during

¹⁷ "Slovensko a EÚ – vzťahy do členstva (Slovakia and the EU – relations until the membership)", *Európska únia*, 2006.

¹⁸ D. Phinnemore, Visiting Professor at the College of Europe, "Future Enlargement", lecture, College of Europe, Bruges, 17 January 2012.

¹⁹ European Council, "Conclusions of the Presidency", 21-22 June 1993, *op.cit.*, p. 12.

²⁰ F. Schimmelfennig, "The Process of Enlargement: Problems, Interests, and Norms", in Jeremy Richardson (ed.), *European Union: Power and Policy-Making*, London, Routledge, 2006, 3rd edn., pp. 217-218.

²¹ J. Figel & M. Adamiš, *Slovensko na ceste do Európskej únie, Kapitoly a skúsenosti (Slovakia on the road to the European Union, chapters and experience)*, Bratislava, Slovenská spoločnosť pre zahraničnú politiku – Centrum pre európsku politiku (Slovak Foreign Policy Association – Centre for the European policy), 2003, p. 8.

the much-contested era of Vladimír Mečiar in June 1995.²² Despite the Mečiar government's proclamation of pro-EU aspirations as well as an awareness of high non-compliance costs, little was done to substantiate this rhetorical commitment. In other words, the then-government engaged in what Schimmelfennig refers to as 'dualistic policy', that is, divergence of commitments to the EU principles on the domestic level as opposed to the external level.²³ Nonetheless, it can be argued that EU conditionality must have been effective at least to a certain extent, as it had a decisive effect on the outcome of the 1998 parliamentary elections. The definitive loss of Mečiar's political rule radically shifted the dynamics of EU-Slovak relations towards a more favourable development.²⁴

In spite of positive reactions of both the Slovak citizens and the European Commission, this historical overturn in the Slovak political situation did not provide satisfactory grounds for the EU to open accession negotiations already in late 1998. Such a decision came only a year later when the Helsinki European Council decided to open the accession negotiations with six candidate countries, including Slovakia. Following this credible and legitimate commitment of the EU to its enlargement prospects, the Slovak process of *acquis* adoption could officially begin.

Since the adoption of the 'Europe Agreement' and its Protocol on Conformity Assessment and Acceptance of Industrial Products in 1993, it governed the adoption of EU standards for industrial products in the pre-accession period along with the Accession Partnership. The follow-up screening process revealed many hindrances that needed to be corrected to ensure Slovakia's preparedness to cope with competition in the SEM. Even though the 1997 Commission 'Avis' and the 1998 Progress Report reiterated significant advancement of the structural reforms, Slovakia was far from reaching the EU market standards. The greatest room for improvement was identified, *inter alia*, in the area of approximation of standardisation and certification.²⁵ "Separation of the legislative, standardisation and accreditation tasks and establishment of market surveillance mechanisms" were seen as key prerequisites for the adoption of the EU's 'New Approach' and 'Global Approach'.²⁶

²² F. Schimmelfennig, S. Engert & H. Knobel, "Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey", *Journal of Common Market Studies*, vol. 41, no. 3, 2003, p. 502.

²³ *Ibid.*, p. 505.

²⁴ *Ibid.*, p. 506.

²⁵ Commission of the European Communities, *Composite Paper – Reports on progress towards accession by each of the candidate countries*, Brussels, 1998, pp. 8-9.

²⁶ *Ibid.*, pp. 13, 15.

This unsatisfactory evaluation motivated Slovakia to speed up the reforms. Thus, EU conditionality proved highly effective in terms of material incentives and actors' perceptions.

The 1999 Progress Report welcomed the new momentum by stating that "problems of reliance on [former Soviet-type] mandatory certification and inadequate preparation of the private sector to undertake voluntary certification"²⁷ had been addressed, and the adoption of the EU harmonised standards (EN)²⁸ began in some areas.²⁹ While the positive assessment in this report served as additional catalyst for reform efforts more emphasis was at the same time to be put not only on legislative approximation but also on the implementation and institutional strengthening.³⁰

In 2001, further progress was recognised in the field of legislative approximation, the transposition of European standards and the membership obligations in the respective EU organisations (ESO).³¹ The positive developments were further acknowledged by the 2002 Progress Report: it welcomed in particular the Slovak extension of *acquis* approximation in the field of technical product requirements, conformity assessment and market surveillance.³² By 2002 most of the 'New Approach' Directives were transposed into the Slovak quality infrastructure system, which was thus well-aligned with EU requirements.³³

Finally, it is noteworthy to consider the Slovak developments in the context of Damro's principles for the successful functioning of MPE vis-à-vis EU's external partners, in this case candidate countries.³⁴ First, the EU clearly possessed and influentially exerted its regulatory expertise to facilitate the alignment of Slovakia's regulatory framework with the then-existent EU *acquis*. Second, owing to horizontal, vertical as well as sectoral coherence at the EU level, Slovakia was effectively bound

²⁷ *Ibid.*, p. 15.

²⁸ EN standard is a publication that provides rules, guidelines or characteristics for activities or their results, for common and repeated use. "European Standards (EN)", *European Committee for Standardisation*, 2012.

²⁹ Commission of the European Communities, *Regular Report from the Commission on Slovakia's progress towards accession*, Brussels, 13 October 1999, p. 32.

³⁰ Commission of the European Communities, *Enlargement Strategy Paper - Report on progress towards accession by each of the candidate countries*, Brussels, 2000, p. 57.

³¹ Commission of the European Communities, *2001 Regular Report on Slovakia's Progress towards accession*, SEC(2001) 1754, Brussels, 13 November 2001, p. 39.

³² *Ibid.*

³³ Commission of the European Communities, *2002 Regular Report on Slovakia's Progress towards accession*, SEC(2002) 1410, Brussels, 9 October 2002, p. 49.

³⁴ Damro, *op.cit.* pp. 688.

to the EU's regulatory framework in the field of quality infrastructure. The third principle pertains to the impact of the EU's sanctioning authority. On the one hand, it can be argued that it did not apply substantively in this case as Slovakia was not yet a full member and the EU's view was that sanctions may hinder the progress. On the other hand, the EU maintained a certain sanctioning conditionality through the potential threat of postponing accession, even though as Haughton argues, conditionality is most valid and efficient before the decision on opening of accession negotiations is taken.³⁵

In order to examine the difference in impact that the EU regulatory expertise, coherence and sanctioning authority had on Slovakia compared to Ukraine's approximation of EU rules, this paper now turns to an analysis of Ukraine's motivation to approximate its technical standards to those of the EU in view of the EU's non-promise of future membership and the historical alignment with Russia.

Ukraine's approximation process with the EU

It has become clear soon after the Soviet Union's collapse that unlike the immediate CEEC neighbours, the EU would adopt a rather reserved strategy towards its more distant ex-Soviet neighbours. The Partnership and Cooperation Agreement with Ukraine (PCA) constitutes an example of how this cooperation was to differ from that preceding Eastern enlargement. As such it was not linked to the promise made at the Copenhagen European Council in 1993.³⁶ The Agreement gave grounds to closer, more functional and sectoral cooperation, yet without explicit promise of future membership. The fundamental reason behind such a divergent approach is believed to rest in the endeavour to strike a balance within the EU-Ukraine-Russia triangle.³⁷

The PCA constituted the first step towards closer EU-Ukraine relations. The first characteristic was that the foreseen approximation to EU rules was to be conducted

³⁵ T. Haughton, "When Does the EU Make a Difference? Conditionality and the Accession Process in Central and Eastern Europe", *Political Studies Review*, vol. 5, 2007, p. 244.

³⁶ The Copenhagen European Council summit affirmed that countries that concluded Association Agreements shall become members of the EU, if they so desire. European Council, "Conclusions of the Presidency", 21-22 June 1993, *op.cit.*, p. 12.

³⁷ K. Wolczuk, "Implementation without Coordination: The Impact of EU Conditionality on Ukraine under the European Neighbourhood Policy", *Europe-Asia Studies*, vol. 61, no. 2, March 2009, p. 187.

on a voluntary basis.³⁸ The second difference to the Slovak case was the non-existence of any provisions on future membership and/or pre-accession conditionality in the PCA. Not surprisingly, such an approach did not provide substantial motivation for Ukraine to deliver the PCA-envisioned change, such as the enhancement of mutual political dialogue, consolidation of democratic developments or economic cooperation, including approximation of quality infrastructure.³⁹

Even though the PCA was signed in 1994 and ratified in 1998, it can be argued that the most salient and fruitful cooperation started only after the launch of the ENP in 2004. In the case of Ukraine, the main instrument to facilitate cooperation has been the bilateral 'Action Plan'. It outlines the main areas of cooperation and breaks them down to concrete reforms that need to be implemented to warrant access to the SEM.

Since the drivers behind the approximation of EU rules in the cases of Slovakia and Ukraine are based on qualitatively different conditions, the EU sought to incentivise its conditionality exerted on Ukraine. The level aimed at was to be comparable to incentives offered to CEEC enlargement countries, yet short of a commitment to full membership. This is achieved in a two-fold way. First, the EU promotes its fundamental principles and values as inscribed in its founding treaties by exerting the 'polity conditionality', a term which pertains to "domestic democratic principles, human rights and minority protection", introduced by Sedelmeier.⁴⁰ Second, and more importantly for the field of technical standards and regulations, it exerts its MPE to shape the process of approximation of EU rules and thus facilitates a more functional cooperation. This has been done under the ENP umbrella. As in the CEECs' case, it can be instrumental in enabling the immediate neighbours to cope with reform processes and be better prepared for eventual future membership while simultaneously respecting the EU's absorption capacity.⁴¹

Despite these undoubtedly positive features, the ENP has been under question since its very inception with regard to the incentives offered to the participating countries. As Wolczuk rightly points out, the ENP does not provide sufficiently strong

³⁸ A. Dimitrova & R. Dragneva, "Constraining external governance: interdependence with Russia and the CIS as limits to EU's rule transfer in Ukraine", *Journal of European Public Policy*, vol. 16, no. 6, 2009, p. 855.

³⁹ *Ibid.*, p. 856.

⁴⁰ U. Sedelmeier, "Europeanisation in New Member and Candidate States", *Living Reviews in European Governance*, vol. 1, no. 3, 2006, p. 12.

⁴¹ D. Phinnemore, Visiting Professor at the College of Europe, "Future Enlargement", lecture, the College of Europe, Bruges, 4-5 April 2012.

and unambiguous incentives to be able to achieve its ambition of influencing the domestic reforms.⁴² The ambiguity of the ENP rewards thus poses a potential risk as to the degree of acceptability of the EU's conditionally-imposed reforms in the neighbouring countries. Unlike the EU's Eastern enlargement, the ENP logic does not appear to be bound by any past enlargement commitments. Thus, only when ENP countries aiming at EU membership achieve a desirable level of convergence and preparedness under the ENP to assume their potential future rights and obligations stemming from membership, the question of enlargement may become more prominent.⁴³

SEM motives

As outlined above, the access to the SEM, either partially or fully, is the ENP's main 'carrot' and for the moment also the ultimate goal of non-EU partner countries. The approximation of the quality infrastructure rules was incorporated into the 'EU-Ukraine Action Plan' and the 'EU-Ukraine Association Agenda'. Moreover, already article 4 of the PCA mentioned the possibility of negotiating an EU-Ukraine Free Trade Area (FTA). This was to follow substantial improvements of the Ukrainian market economy as well as accession to the World Trade Organisation (WTO).

The 'European choice' has been proclaimed after the ratification of the PCA, which coincided with the presidential term of Leonid Kuchma. Nonetheless, the notion of closer ties with the EU was effectively centralised around and not extending beyond Kuchma's office.⁴⁴ As argued by Wolczuk, the lack of 'European' ownership among the Ukrainian political elites led to institutional, administrative and legal shortcomings, which ultimately delayed implementation of the reforms foreseen by the PCA.⁴⁵ This view is further supported by Protsyk, who elaborates that the lack of ownership and engagement on the Ukrainian political level was also constituted by inherent historical weaknesses in political partisanship programming.⁴⁶ Last but not least, weak and ineffective coordination is also assigned to the fact that no functional compliance enforcement mechanism was enshrined in the PCA.

⁴² Wolczuk, "Implementation without Coordination", *op.cit.*, p. 190.

⁴³ Phinnemore, *op.cit.*

⁴⁴ Wolczuk, "Implementation without Coordination", *op.cit.*, p. 193.

⁴⁵ *Ibid.*

⁴⁶ O. Protsyk, "Domestic Political Institutions and Their Responses to EU Enlargement in Ukraine and Russia", *Communist and Post-Communist Studies*, vol. 36, no. 4, 2003, p. 438.

EU-Ukrainian cooperation became stronger with the 'Action Plan', which was adopted in the wake of the 'Orange Revolution' and the launch of the ENP. First, the elites of the 'Orange Revolution' committed themselves to adopt so-called 'road maps' to ensure greater alignment with the EU *acquis* in general and with quality infrastructure in particular.⁴⁷ Second, the ENP-proposed 'Action Plan' effectively replaced previously ambiguous proclamations on the future adoption of EU rules. Both events were conducive to more approximation on the Ukrainian side.

One of the strongest driving forces behind the approximation of Ukrainian technical standards to those applied by the EU and the international community was Ukraine's accession to the WTO in 2008.

WTO accession

Three fundamental reasons can be identified as to why and how WTO membership is relevant to Ukraine's negotiations with the EU. First, the historical Soviet-type 'state standards' (GOST) legacy was a key reason behind the limited compatibility of Ukraine's quality infrastructure with that of the EU.⁴⁸ The underlying differences were caused mainly by the following factors: on the one hand, GOST standards were and remain mandatory for producers of all products, not only of industrial products as opposed to the voluntary status of EN standards; and on the other hand, by the fact that the quality infrastructure was centralised under one single authority – the State Committee of Ukraine on Technical Regulation and Consumer Policy (DSSU) – as opposed to a decentralised hierarchy of authorities responsible for individual areas of quality infrastructure under EU rules.⁴⁹ Owing to the substantial differences in the scope of activities covered by the Ukrainian and the EU systems of quality infrastructure, a significant harmonisation was necessary for the sake of their greater compatibility.

Second, the binding nature of the WTO membership obligations is probably most important for the deliberation of changes to Ukraine's quality infrastructure. The accession requirements gave ground for subsequent negotiations of a FTA and an Agreement on Conformity Assessment and Acceptance of industrial products

⁴⁷ Wolczuk, "Implementation without Coordination", *op.cit.*, pp. 200-201.

⁴⁸ N. Frota *et al.*, "Assessment of the Ukrainian quality infrastructure: challenges imposed by the WTO and commitments to EU accession", *Key engineering materials*, vol. 437, May 2010, p. 17.

⁴⁹ J. Langbein, "Organizing Regulatory Convergence outside the EU – Setting Policy-Specific Conditionality and Building Domestic Capacities", *KFG Working Paper Series*, no. 33, December 2011, p. 8.

(ACAA) and later also for the approximation of EN standards, which are closely linked to the free movement of goods.

Third, product placement and consumer safety on the SEM is governed by the EN standards which were developed by three EU-recognised European Standardisation Organisations (ESOs). These coexist along the globally-recognised standards developed by the International Standardisation Organisation (ISO). Based on an agreement between the ESOs and the ISO, some 30% of EN standards are identical to ISO standards, thereby dually applicable on the SEM as well as the global market.⁵⁰ Thus, the Ukrainian WTO membership constituted an important step towards gaining a greater stake in the SEM as well as for speeding up the approximation process with the EU.

Although the WTO accession envisaged better alignment of Ukrainian quality infrastructure with the global and European one, several contentious areas still await their full harmonisation. In 2010, Ukraine embarked upon a further decentralisation of its institutional framework for quality infrastructure. However, these legal acts have not produced the desired effects – either because they have not been fully implemented or because they require further action for proper implementation.⁵¹

Despite some progress in the approximation to the EU quality infrastructure, the struggle for the implementation of necessary measures is continuously disrupted by powerful lobbying of large producers in the DSSU and a marginalised capacity of the Ukrainian Parliament.⁵² Currently, the DSSU remains the primary authority in the field of technical standardisation (setting standards) as well as conformity assessment (enforcement of standards).⁵³ Therefore, further legal and implementation alignment with the EU's quality infrastructure is needed to facilitate greater access to the SEM.

New momentum with the Eastern Partnership

The 2009 Prague summit provided a new momentum for enhancement of relations between the EU and its neighbours, most notably by launching the 'Eastern Partnership' (EaP). The envisioned enhancement of this Eastern dimension of the ENP is viewed as a historical commitment of the EU to achieve a more credible and substantial cooperation with its Eastern neighbours. In 2008 the negotiations on the

⁵⁰ *Ibid.*

⁵¹ Langbein, *op.cit.*, p. 9.

⁵² *Ibid.*, pp. 20-21.

⁵³ *Ibid.*, p. 21.

new Association Agreement, inclusive of a DCFTA, began in a follow-up to Ukraine's accession to the WTO. Hence, the new agreements constitute a substantial qualitative step forward in re-building the relationship between the EU and Ukraine under the EaP.

As Wijkman emphasises, the Association Agreement and DCFTA do not constitute a take-it-or-leave-it kind of agreement.⁵⁴ As the EaP countries differ, so do the Association Agreements with DCFTAs. Therefore, several specific characteristics of these negotiations need to be taken into consideration when assessing the process of the agreements' conclusion and implementation. First, one needs to consider the extensive scope of the to-be-transposed *acquis*. In the long run, the agreements aim at a rapid liberalisation of all trade in goods. The ambiguity of the term 'long run' leaves sufficient negotiation leeway both for the EU and the respective country. Second, the flexibility of the *acquis* needs to be considered. It is obvious that it will not be transposed unaltered. However, it has to be implemented in such a fashion that it will not give rise to potential trade diversion. Third, for the sake of a favourable cost-benefit ratio, the sequencing of the transposition shall follow a certain logic in order not to discourage it. Although the approximation of technical standards and regulations may prove costly at the beginning, the expected benefits exceed substantially the initial costs. Fourth, transition periods and asymmetrical concessions constitute another crucial element of the agreements. While the EN standards need to be implemented to ensure SEM access, they do not need to be used on the Ukrainian domestic market.

Even under the recent contentious political developments in Ukraine, EU officials from DG TRADE reiterate that Ukraine is committed to adopting and implementing the legislation, which is necessary to fulfil the criteria discerned in the Association Agreement and DCFTA.⁵⁵ After the latter's ratification, the conclusion and implementation of an ACAA is awaited.⁵⁶ However, several ambiguities on the domestic Ukrainian scene could further impede Ukraine's approximation to EU technical standards as well as overall EU-Ukrainian cooperation. In order to continue further developing EU-Ukrainian relations and Ukraine's political and economic approximation to the EU, the EU called most recently on Ukraine to remedy any

⁵⁴ P.M. Wijkman, "Fostering Deep and Comprehensive Free Trade Agreements for the Eastern Partners", *Eastern Partnership Review*, no. 8, December 2011, p. 7.

⁵⁵ Interview with an official, DG Trade, European Commission, Brussels, 20 April 2012.

⁵⁶ *Ibid.*

shortcomings connected to the October 2012 parliamentary elections (Tymoshenko case), to tackle the issues of selective justice, and to implement reforms defined in the jointly agreed Association Agenda.⁵⁷ If Ukraine fails to achieve substantial progress before the next EaP summit in November 2013, the EU is prepared to further postpone the signing of the Association Agreement inclusive of DCFTA.⁵⁸

Bringing together the external environment and domestic motivations

EU conditionality is deemed to deliver good results when there is a clear domestic political ownership and commitment, termed by Casier as 'self-imposed conditionality'.⁵⁹ As EU-Ukraine cooperation has evolved, so have the perceptions and the engagement of domestic political elites. As deliberated above, in the light of insufficient commitment of the Ukrainian political elites to the approximation process, it is argued that such neglect can be overcome by allowing for more engagement of lower-rank civil servants. The emergence of a 'white-collar class' of committed experts stirred the approximation process further along the lines of closer cooperation with the EU.⁶⁰

Political divide on the domestic political scene is another factor to be considered when deliberating Ukraine's current and future engagement with the EU. The country and its electorate are perpetually antagonised by pro-Western influence in the Western part of Ukraine, while pro-Russian influence prevails in the Eastern part. Since the 'Orange Revolution' in 2004, this dichotomy of political elites has continued being one of the reasons behind constant frictions in Ukrainian politics. Naturally, it also has an indispensable impact on the degree to which rhetorical proclamations of interest to approximate the quality infrastructure are actually turned into real legislative proposals and later implemented.

The nature of the EU's conditionality vis-à-vis Ukraine can be further scrutinised by employing Damro's MPE approach. First, the EU clearly adopted an approach of exerting its regulatory expertise in approximation of Ukraine's quality infrastructure. Second, coherence of the EU's approach towards Ukraine has been present on both technical and political levels. And third, Damro's conceptualisation of MPE is useful in

⁵⁷ European Union, "Joint Statement on the situation in Ukraine", A 576/12, Strasbourg, 12 December 2012, p. 1.

⁵⁸ *Ibid.*, p. 3.

⁵⁹ T. Casier, "The EU's two-track approach to democracy promotion: the case of Ukraine", *Democratization*, vol. 18, no. 4, 2011, p. 971.

⁶⁰ Wolczuk, "Implementation without Coordination", *op.cit.*, p. 207.

emphasising the role of the EU's sanctioning authority. Although it has not been applicable as such, sufficient sanctions follow from the fact that without adequate compliance, the SEM access for Ukrainian products would remain rather limited. Irrespective of the powerful nature of the EU's conditionality, the question of Ukrainian motivations to approximate the EU-based rules is and will remain a subject of both policy and theoretical scrutiny. In this regard, Wolczuk argues that the lack of a membership perspective along with the ill-defined goal of the ENP has limited its impact in Ukraine.⁶¹ Therefore, the question arises whether the overarching motivation of Ukraine is solely bound to future EU membership, even though no such promise has been made. Do we see a gradual implementation of pre-accession conditionality for the sake of achieving sufficient preparedness for potential membership? Or does the EU simply wish to promote more approximation in order to foster inter- and intra-regional cooperation?

It is necessary to understand the EU's and the Ukrainian motives in a wider geopolitical, rather than technical context. Having Russia at the doorstep plays a crucial role. Hence, the following section considers the Ukrainian motivations and ambiguities in approximation with the EU technical standards vis-à-vis its most important geopolitical partner Russia.

Ukraine and Russia

An initial objective of the ENP was to also foster the EU's cooperation with Russia by including it in the group of neighbouring countries and in particular providing it with a stake in the SEM.⁶² However, Russia rejected this form of cooperation. It views itself as a more prominent – strategic – partner of the EU and thus opted out of the common ENP framework.⁶³ However, due to historically-engrained geopolitical interests of Russia in Eastern Europe, the analysis of the potential impact of the ENP and the EaP on Ukraine's motivation to reform its quality infrastructure cannot neglect the most salient aspects of Ukraine-Russia relations. Ukraine is a founding member of the Commonwealth of Independent States (CIS), a regional organisation that committed former Soviet republics to a new form of

⁶¹ *Ibid.*, p. 208.

⁶² Commission of the European Communities, *Communication from the Commission: Wider Europe-Neighbours: A new Framework for relations with our Eastern and Southern Neighbours*, COM(2003) 104 final, Brussels, 11 March 2003, p. 4.

⁶³ T. de Wilde & G. Pellon, "The implications of the European Neighbourhood Policy (ENP) on the EU-Russian 'Strategic Partnership'", *Helsinki Monitor*, no. 2, 2006, p. 126.

cooperation with Russia.⁶⁴ The interaction of Ukraine and Russia within the CIS is particularly determined by their strategic economic, energy and security interdependence.⁶⁵

As argued elsewhere, the selective sectoral cooperation with the EU and Russia may explain why Ukraine positioned itself into a role of a self-imposed 'buffer zone' between the EU and Russia.⁶⁶ For instance, the high energy interdependence of Ukraine and Russia must be considered separately from the increasing economic cooperation between the EU and Ukraine. It can be argued that Ukraine intentionally intensifies its functional and sectoral cooperation with both the EU and Russia. A targeted pursuit of its interests is possible through the participation in the EU's SEM as well as the Single Economic Space (SES) which was proposed by Russia under the umbrella of the CIS.⁶⁷ The functional cooperation within the EU-Ukraine-Russia triangle or – the SEM-Ukraine-SES triangle – is by definition competitive. It is probably inevitable that the gradually increasing rivalry of these economic integration areas will ultimately translate into barriers to mutual cooperation.⁶⁸ In such a case, Ukraine's quality infrastructure in certain sectors may have to diverge from the one required by the SEM.

On the other hand, it could be hypothesised that the WTO membership of Ukraine and Russia may constitute a factor that stimulates future convergence of their quality infrastructure systems. However, empirical evidence from some CIS member states demonstrates that even the approximation with ISO standards required by WTO accession does not provide for permanent approximation.⁶⁹ When deliberating the impact of economic integration projects on national standardisation models, it is also purposeful to consider the calls for a Eurasian Union in 2011⁷⁰ as a continuation of the Customs Union between Russia, Belarus and Kazakhstan launched in 2010.⁷¹ These three current members have already started to establish EU-like institutions, aiming to gradually include all CIS countries. For Ukraine this would imply the introduction of a common external tariff for third countries, thus rendering

⁶⁴ *Ibid.*, p. 128.

⁶⁵ *Ibid.*

⁶⁶ M. Minarik, "Ukraine: A self-imposed 'buffer zone' between the EU and Russia?", paper for the course 'Future Enlargement', Bruges, College of Europe, 2 April 2012, pp. 6-8.

⁶⁷ Dimitrova & Dragneva, *op.cit.*, p. 861.

⁶⁸ Interview with Kvetoslava Steinlova, Director of the Department of European Affairs of the Slovak Office of Standards, Metrology and Testing, Bratislava, 22 December 2011.

⁶⁹ *Ibid.*

⁷⁰ "Putin calls for Eurasian Union", B92, 2011.

⁷¹ "Customs Union of Russia, Belarus and Kazakhstan", *Ria Novosti*, 2012.

the EU-Ukraine FTA effectively dysfunctional.⁷² Therefore, staying out of this Customs Union and Eurasian Union can be seen in line with the balanced approach to economic approximation that Ukraine strives to strike vis-à-vis the EU and Russia.⁷³

Given the relatively short existence and the high ambitions of this Customs Union and Eurasian Union, the EU should carefully balance out this integration project's attractiveness, as it already constitutes a substantial basis for the EaP countries' approximation with Russia. On the other hand, I have argued that the DCFTA and the ACAA constitute a favourable offer to Ukraine and have proven as sufficiently incentivising an approximation to the EU quality infrastructure in Ukraine.

Lessons learned and future scenarios

This paper has attempted to show that conditionality linked to economic approximation in the field of technical standards and regulations provides substantive incentives for ENP countries such as Ukraine. This is so despite the fact that the EU does not provide the ENP, and the EaP countries in particular, with a promise of future enlargement.

Although Ukraine's adoption and implementation of an EU-like quality infrastructure may depend on future progress, the initialling of the Association Agreement shows a promising development in EU-Ukrainian relations. Thus, it can be inferred that the EU has succeeded in exerting its influence vis-à-vis Ukraine even without a clear, credible and committed promise of membership.⁷⁴ Langbein and Wolczuk concede, however, that Ukraine may face difficulties in terms of the size of its industrial base, the power of its interest groups as well as the domestic political division, which simultaneously favours both the EU and Russia.⁷⁵ The domestic perceptions and the commitment of the political elites to the approximation and reform processes are, "and will remain, at the pinnacle of the convergence process".⁷⁶ Thus, it has been argued that Ukraine intentionally balances its economic

⁷² L. Delcour, "What influence does the European Union have in its Eastern Neighbourhood? Assessment and Prospects for the Eastern Partnership", *Études européennes. La revue perm@nente des professionnels de l'Europe*, 16 February 2012, p. 10.

⁷³ Interview with Kvetoslava Steinlova, Director of the Department of European Affairs of the Slovak Office of Standards, Metrology and Testing, Bratislava, 22 December 2011.

⁷⁴ Langbein, *op.cit.*, p. 11.

⁷⁵ J. Langbein & K. Wolczuk, "Convergence without membership? The impact of the European Union in the neighbourhood: evidence from Ukraine", *Journal of European Public Policy*, vol. 19, no. 6, 2011, p. 16.

⁷⁶ K. Wolczuk, "Perceptions of, and Attitudes towards, the Eastern Partnership amongst the Partner Countries' Political Elites", *Eastern Partnership Review*, no. 5, December 2011, p. 11.

position between the EU and Russia in order to maximise the benefits stemming from this dual cooperation. Nonetheless, Ukraine is expected to eventually face a need to clearly choose between the EU and Russia to enhance its cooperation with one of them, as the cooperation schemes proposed by the EU (FTA) and Russia (customs union) are incompatible.⁷⁷

Finally, three points can be mentioned to synthesise the above-outlined reflections. First, offers of cooperation under the ENP framework do not measure up to the promise of future membership. From Ukraine's perspective, cooperation with the EU established through the Association Agreement and DCFTA significantly enhances mutual integration on the SEM. Yet, it fails to provide access to a full range of rights and obligations granted to EU members.

Second, the non-existence of a clear and distinct strategy of the EU towards Ukraine does not reduce the attractiveness of access to the SEM. The size of the SEM remains appealing particularly in the long run, which is why Ukraine has committed itself to approximate the EU-type quality infrastructure. In spite of certain current developments (see above), the Association Agreement and the DCFTA show that both the EU and Ukraine remain committed to their cooperation.⁷⁸

Last but not least, it is noteworthy to emphasise the power of the EU's regulatory expertise, coherence and sanctioning authority to incentivise reform measures undertaken by Ukraine. The EU has exerted its MPE within boundaries provided by the fact that no promise of future membership was granted to Ukraine, while the latter has repeatedly declared EU membership as its ultimate foreign policy goal. The Association Agreement, the DCFTA and the potential ACAA will enable at least the free movement of Ukrainian industrial products. Empirical evidence shows that the EU's regulatory expertise, coupled with the size of the SEM is viewed as a source of potentially large benefits for Ukraine, thus making it committed to the process of approximation.⁷⁹

Nevertheless, Ukraine's approximation of EU technical standards is no straightforward agenda without any obstacles and as such is more of a long-term

⁷⁷ Interview with Kvetoslava Steinlova, Director of the Department of European Affairs of the Slovak Office of Standards, Metrology and Testing, Bratislava, 22 December 2011.

⁷⁸ Langbein & Wolczuk, *op.cit.*, p. 16.

⁷⁹ Interview with an official, DG Trade, European Commission, Brussels, 20 April 2012.

engagement.⁸⁰ Thus, the next section attempts to outline four possibly feasible scenarios of further cooperation between the EU and Ukraine.

The first option is that Ukraine will continue cultivating its cooperation and economic approximation with both the EU and Russia. Several experts suggest, however, that this model may not be viable on a long-term basis.⁸¹ The integration projects launched by the EU and Russia are by definition incompatible and require Ukraine to make a clear choice. If Ukraine accepted the Russian proposal to join a customs union-based SES, it would need to adopt a Common External Tariff and thus place economic cooperation with the EU at risk.

Second, another group of scholars asserts that Ukraine may not be necessarily forced to make an unambiguous choice between the EU and Russia.⁸² The key condition here is the evolution of the ENP in the direction of at least minimal institutionalisation. Pardo proposes the concept of an Advanced Partnership, which builds on the concept of the ENP and allows for sufficient flexibility of individual countries to follow the cooperation according to their political situation, ambitions and developments.⁸³ The unique feature of this model is its ambition to integrate the ENP countries more closely with the EU but keep them below the status of full-fledged members. Hence, employing Pardo's proposal would enable both the EU and Ukraine to develop their relations under more flexible terms than a proper membership would require, thereby allowing Ukraine to pursue its current cooperation with Russia.

Third, Ukraine may continue considering approximation and deeper economic integration with the EU in the context of its repeatedly reaffirmed membership aspirations. Under this scenario it is essential that the EU-Ukraine relations are further addressed in the context of the EU-Ukraine-Russia triangle. This option thus presumes that the EU would play a more active role in the dialogue with Ukraine and Russia, in order to provide for a more favourable recognition of all actors and their

⁸⁰ Interview with a Senior Official, Eastern Europe, South Caucasus and Central Asia Department, Ministry of Foreign Affairs of the Slovak Republic, via email, 4 May 2012.

⁸¹ Interview with Kvetoslava Steinlova, Director of the Department of European Affairs of the Slovak Office of Standards, Metrology and Testing, Bratislava, 22 December 2011.

⁸² S. Pardo, "The Advanced Partnership: A New Model for Relations between the EU and its Neighbourhood Partner States", draft presentation, 50th ISA 2009 Annual Convention, 15-18 February 2009, New York, pp. 24-25.

⁸³ *Ibid.*, pp. 25-26.

interests in play, paying special attention to EU-Russian relations and Ukrainian-Russian interdependence.⁸⁴

Finally, Ukraine may truly embark on its EU path by intensifying the cooperation and approximation with the *acquis* as foreseen under the ENP and the EaP. Consequently, Ukraine might lose in certain areas of traditional cooperation with Russia, such as energy procurement and distribution. This scenario may have two possible vectors. First, Ukraine's obligation to make a definitive foreign policy choice may actually magnify its leverage towards the EU. Second, if the EU refrained from providing a credible membership promise, it may in turn promote enhancement of the ENP and the EaP by striving for more intra- and inter-regional cooperation. Thus, under this scenario, Ukraine's economy is predicted to benefit from making a pro-EU choice even if the EU will not reciprocate with a membership promise.

These scenarios are considered as more or less plausible and likely to emerge in future discussions on Ukraine's approximation to the EU's standards and regulations. Even though the EU-Ukrainian relations were deliberated also in the context of the EU-Ukrainian-Russian triangle, the scenario of Ukraine opting for deeper cooperation with Russia may not be viable and is not discussed in more detailed due to the following reasons. First, the main deliberation concentrated on the framework of the ENP, EaP and the EU-Ukrainian relations. Second, Ukraine has intentionally opted out and/or followed merely various forms of sectoral cooperation under the CIS cooperation frameworks proposed by Russia, due to its balanced approach between the West and the East. Third, based on the historically-inherent political, economic, social and demographical conditions in Ukraine, a clear-cut pro-Russian choice does not seem viable due to domestic contentions. And finally, in the short and medium term Ukraine is unlikely to substantially change its approach.

Thus, I conclude that the proposed options provide a valid assessment of the future EU-Ukrainian relations. Continued approximation of technical standards under the third scenario is viewed as substantially beneficial for Ukraine as it would align its quality infrastructure with that of the EU without impeding the EU's absorption capacity. However, certain practitioners reiterate that this process would take a substantial amount of time on the Ukrainian side, yet they also concede that

⁸⁴ S. Gänzle, "EU Governance and the European Neighbourhood Policy: A Framework for Analysis", *Europe-Asia Studies*, vol. 61, no. 10, December 2009, p. 1730.

Ukrainian membership aspirations may not be unattainable in the long run.⁸⁵ The remaining three scenarios may not be acceptable to Ukraine on a long-term basis as they do not fit with Ukraine's energy interdependence on Russia nor with Ukraine's EU membership aspirations, albeit rhetorical ones.

Conclusion: Ukraine between the EU and Russia

Drawing on an intense discourse on the power of the 'European dream' to drive reforms in European non-member states, this paper attempted to deliberate the extent to which the non-promise of future membership precludes or incentivises third countries' endeavour to adopt EU rules pertaining to SEM access. More concretely, the approximation of quality infrastructure was analysed as an illustrative and important example of such reforms. Given the historical, geographical and cultural affinity of Slovakia and Ukraine, these countries were selected as representative cases of reform processes conducted by accession countries as opposed to those without the 'golden carrot' membership promise. Some features, such as the driving forces behind political and economic reforms, the motivation to harmonise EU rules and the cooperation process may be applicable to other candidate countries and ENP/EaP countries respectively. However the reasons behind their endeavours may deviate to a varying extent. Thus, it may prove difficult to generalise also due to the fact that even the main instruments of the enhanced cooperation under the ENP – Association Agreement and DCFTA – are prone to individual conditions of various EU counterparts.

Damro's concept of MPE provided a stepping stone for the empirical scrutiny of the two cases. On the one hand, the Slovak case was an exemplar accession process, which was driven mainly by a clear membership promise. On the other hand, the Ukrainian approximation as an example of ENP cooperation was scrutinised to identify the Ukrainian motivations for enhanced cooperation with the EU in the field of quality infrastructure as part of the broader relational triangle EU-Ukraine-Russia. Bringing together the theoretical umbrella and empirical evidence, the paper identified lessons learned from the past reforms of quality infrastructures. Four scenarios of possible future developments were projected to outline alternative paths in which EU-Ukraine relations may evolve.

⁸⁵ Interview with a Senior Official, Eastern Europe, South Caucasus and Central Asia Department, Ministry of Foreign Affairs of the Slovak Republic, via email, 4 May 2012.

It has been argued that economic motivation in terms of access to the SEM provides sufficient stimuli for Ukraine as an ENP country to approximate to EU rules. This was clear from Ukraine's acceptance of 'self-imposed' conditionality as some kind of 'pre-accession' lenses. Furthermore, continuous deepening of EU-Ukrainian relations (through the Association Agreement, the DCFTA and potentially the ACAA) proves Ukraine's motivation to approximate to EU rules even if unaccompanied by a clear membership promise.

Despite the benefits that the EU-Ukraine cooperation brings about for Ukraine's economy, the approximation process is by no means anything close to resembling a straightforward commitment. Attention needs to be paid to Ukraine's contentious relations with Russia, which have a pronounced impact on developments within the EU-Ukraine-Russia triangle. Overall, the findings of this paper support the idea that for the time being, it is beneficial for Ukraine to intentionally continue pursuing a balanced dual cooperation with both the EU and Russia. In view of future developments, there remain several issues to be closely scrutinised, such as the developments on the Ukrainian domestic scene, the determination of the EU elites to extend incentives stemming from ENP engagement, the EU's willingness to address its relations with Ukraine and Russia in a triad as well as Russia's preparedness to shift the nature of its relations with Ukraine. More research and empirical analysis is needed to determine whether the scenario of a continuous dual cooperation with both the EU and Russia is feasible in the long run.

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