

DEEPENING EU-UKRAINIAN RELATIONS

What, why and how?



EDITED BY
MICHAEL EMERSON AND VERONIKA MOVCHAN

A Trilogy of Handbooks: Understanding the EU's Association Agreements and Deep and Comprehensive Free Trade Areas (DCFTAs) with Georgia, Moldova and Ukraine

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ABBREVIATIONS

AA	Association Agreement
ACAA	Agreement on Conformity and Assessment and Acceptance
AMCU	Anti-Monopoly Committee of Ukraine
ATM	Autonomous trade measure
CAA	Civil Aviation Agreement
CBC	Cross-border cooperation
CCC	Community Customs Code
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
CIS	Commonwealth of Independent States
CSP	Civil Society Platform
DCFTA	Deep and Comprehensive Free Trade Area
DSM	dispute settlement mechanism
EaP	Eastern Partnership
EaTCP	Eastern Partnership Territorial Cooperation Programme
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDA	European Defence Agency
EFTA	European Free Trade Association
EIA	Environmental impact assessment
EIB	European Investment Bank
ENI	European Neighbourhood Instrument
ENPI	European Neighbourhood Policy Instrument
ERA-PLANET	European Network for Observing Our Changing Planet
ERC	European Research Council
ESA	European Space Agency
ETS	Emissions Trading System (EU)
ETSI	European Telecommunications Standards Institute
EU	European Union
EUAM	EU Assistance Mission
EUBAM	EU Border Assistance Mission
FATF	Financial Action Task Force
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEOS	Global Earth Observation System of Systems
GI	Geographical indication
GOST	<i>Gosudarstvenny Standard</i> (State Standard)

GSP	Generalised System of Preferences
ICDR	International Commission for the Protection of Danube River
ICT	Information and communications technologies
IDPs	Internally displaced persons
IEC	International Electrotechnical Commission
ILO	International Labour Organization
IMF	International Monetary Fund
INTERREG	Inter-regional cooperation programmes of the EU
IOML	International Organization of Legal Metrology
IPR	Intellectual Property Rights
ISO	International Standardisation Organisation
KhPG	Kharkiv Human Rights Group
MFN	Most favoured nation
MRV	Monitoring, reporting and verification
NABU	National Anti-Corruption Bureau
NAPC	National Agency for Prevention of Corruption
NCP	National Contact Point
NGO	Non-governmental organisation
NCRCI	National Commission for State Regulation of Communications and Information
NEO	National ERASMUS+ office
NIF	Neighbourhood Investment Facility
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the United Nations High Commissioner for Human Rights
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PEM	Pan-Euro-Mediterranean System of Rules of Origin
SBGS	State Border Guard Service (of Ukraine)
SEIS	Shared European Environmental Information System
SIPRU	State Intellectual Property Service of Ukraine
SMEs	Small- and medium-sized enterprises
SPS	Sanitary and phytosanitary (food safety) regulations
SPSA	State Service on Food Safety and Consumer Protection
TBTs	Technical barriers to trade
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TRQ	Tariff-rate quotas
UNHCR	United Nations High Commissioner for Refugees
USTR	United States Trade Representative
VLAP	Visa Liberalisation Action Plan
WEF	World Economic Forum
WTO	World Trade Organization

PREFACE

This Handbook seeks to explain the contents of a long and complex legal treaty – the Association Agreement, which includes a Deep and Comprehensive Free Trade Area (DCFTA) – between Ukraine and the European Union (EU). Like most complex legal texts, it is not intended to be read like a book. Therefore, the purpose here is to make it possible for anyone to understand basically what each chapter of the Agreement means, in terms of both the nature of the commitments that the parties undertake and the prospects for their implementation.

The Handbook has in mind a broad range of readers, including officials, parliamentarians, business leaders, lawyers, business consultants, think tanks, civil society organisations, university teachers, trainers, students and journalists.

The 30 chapters in this Handbook are mainly the same as those in the Agreement, but are not identical. Some chapters of lesser interest in the Agreement are not covered here, and there is some rearrangement of the various chapter headings.

The present volume is one of a trilogy of Handbooks that cover very similar but not identical agreements between the EU, on the one hand, and Georgia, Moldova and Ukraine on the other. All three books are available electronically for free downloading in English and the respective languages of the three countries at www.3dcftas.eu.

There are some references in the Handbook to an Association *Agenda*, which is an annual document drawn up jointly by Ukraine and the EU, reviewing progress in implementing the *Association Agreement* and which usefully provides updating and some greater detail on various topics. The Agreement and Agenda are thus not to be confused. The official texts of both documents are also available in English and Ukrainian at www.3dcftas.eu.

A much shorter version of this book is aimed at a wider readership, including schools. It is also available online for free downloading in English and Ukrainian at www.3dcftas.eu.

The Handbook has been prepared by two teams of researchers from independent think tanks, the Centre for European Policy Studies (CEPS) in Brussels and the Institute for Economic Research and Policy Consulting (IER) in Kyiv. Founded in Brussels in 1983, CEPS is a leading think tank on European affairs, with a strong in-house research capacity and an extensive network of partner institutes throughout the world. Its mission is to produce sound policy research leading to constructive solutions to the challenges facing Europe.

The Institute for Economic Research and Policy Consulting is a leading Ukrainian think tank focusing on economic research and policy advice in such spheres as international trade, fiscal, social and monetary policies, regional development, financial markets, energy and infrastructure. The IER has extensive experience in modelling and analysing the impact of the DCFTA between Ukraine and the EU.

While much of the content of the Handbook is of necessity rather dry, we hope that the reader will appreciate the lighter touch in the artwork of Constantin Sunnerberg.

Finally, the authors are most grateful to the Swedish International Development Agency (Sida) for their support and funding for the project, and in particular to Mirja Peterson and Maria Liungman for their encouragement from the beginning.

The views expressed in this book are entirely those of the authors and should not be attributed to CEPS, IER, Sida or the European Union.

SUMMARY

What?

The Association Agreement (AA) between the European Union (EU) and Ukraine is a comprehensive treaty covering Ukraine's political and economic relationship with the EU. The trade-related content foresees a Deep and Comprehensive Free Trade Area (DCFTA), which is an important part of the overall Agreement.



The Agreement was negotiated during several years of the presidency of Viktor Yanukovich. It was initialled in March 2012, and was due to be signed at the EU's Vilnius summit in November 2013. But at the last minute, President Yanukovich decided not to sign it, thereby triggering the Maidan uprising and ultimately Russia's aggression in annexing Crimea and its hybrid war in the eastern Donbas region. Its signing therefore took place later in two stages, first in relation to its political content in March 2014 by Prime Minister Arseniy Yatsenyuk, and then its economic content in June 2014 by the newly elected President Petro Poroshenko. The Ukrainian *Verkhovna Rada* and the European Parliament ratified the Agreement in September 2014, and the EU member states followed in the course of 2015 and early 2016.¹

The provisional application of the Agreement started in November 2014, except for the DCFTA, which entered into force 'provisionally' in January 2016, after a one-year delay at the request of Russia.

¹ In one EU member state, the Netherlands, the ratification process was interrupted by the negative result of a referendum held on 6 April 2016. However, the provisional application of the Agreement continues unchanged.

Why?

While much of the contents of the Association Agreement and DCFTA are highly technical, its signing in 2014 was an act of strategic, geopolitical significance in the history of Ukraine. It became emblematic of a vital struggle, to both replace the Yanukovich regime at home and resist the attempt by Russia to deny Ukraine its 'European choice' as a democratic, independent state. The costs of this struggle have been tragically high in terms of territory, the economy and above all human life, but these losses must strengthen the country's resolve to succeed.

The political and economic objectives of the Agreement are fundamental for the future of Ukraine as an independent and secure European state, and can be simply defined. The political purpose is to deepen the realisation of Ukraine's 'European choice'. This means making a reality of fundamental European values, namely democracy, the rule of law and respect for human rights and norms of the European security order. Membership of the European Union is not pre-figured in the Agreement, but neither is it excluded in the longer run.

The economic purpose is to help modernise the Ukrainian economy, by boosting trade with the EU and internationally and reforming economic regulations in line with best European practice. Combined with an improving business climate, Ukraine has the potential to become a good location for foreign as well as domestic investment, producing exports for the EU and international markets.

How?

The Agreement amounts to a charter for Ukraine's modernisation through alignment on EU norms, which generally correspond to best international practice. Ukraine does not have to 're-invent the wheel' in many technically complex areas, where the choice of regulations and standards that differ from tested international practice would be highly costly and inefficient. Still, this normative alignment is far more than a technical matter, and it goes to the heart of the urgent task of establishing sound, corruption-free governance.

Since April 2014, the EU has almost completely opened its market for tariff-free imports from Ukraine. This means the opening of new competitive opportunities for Ukraine's economy, especially since the country will remove its tariffs on imports from the EU only gradually over a number of years starting from January 2016. The DCFTA is a roadmap for Ukraine to join the ranks of the several medium-sized to large European economies with highly developed

and diversified industrial structures, like its neighbour Poland as a first point of comparison. Ukraine's trade structure is already substantially diversified in favour of EU markets, offsetting losses in trade with Russia. The technical requirements for access to the EU market are demanding and strict, but they are applied in a professionally fair manner, without (as elsewhere) geopolitical manipulation.

Financial assistance is available to help with technical support and investment where there are heavy adjustment costs, with grants from the EU and loans or investment from European financial institutions.²

The Agreement, with its DCFTA, is no magic wand with which to cure Ukraine's political system and economy of all their problems. However, its provisions do engage with a substantial part of Ukraine's political and economic reform agenda. Since the provisions of the Agreement and DCFTA are many and complex, there will be much 'learning by doing' for both Ukraine and the EU. There is some notable flexibility in fulfilling the commitments, with procedures for extending the timetable and amending the detailed legislative references if both parties agree.

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Part I. Political Principles, the Rule of Law and Foreign Policy

The crucial political objective in the Agreement is for Ukraine's democratic institutions to assure respect for core European values. The Agreements provide for the detailed monitoring of democratic institutions, including the rule of law and human rights. Respect for democratic values is considered in the Agreement to be of such 'essential' importance that in the event of their grave violation the Agreement may be suspended.

After the Maidan uprising in 2013–14, Ukraine returned to the objective of becoming a truly democratic state, which has since been evident in free and fair elections of the parliament and presidency. But there is a pressing need to continue improvements in the functioning of the democratic institutions. The Association Agenda document

² Notably, these include the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD).

particularly urges constitutional reforms to achieve effective checks and balances between the institutions and a strengthening of local and regional government.

Success in anti-corruption policy is a prerequisite for the overall success of the Agreement and Ukraine's economic future. Many chapters of the Agreement will contribute to this, such as transparency in public procurement, but there are still central challenges for Ukraine to address regarding the functioning of the judiciary, the prosecution office and the role of the Anti-Corruption Bureau.

Regarding the objective of visa-free travel to the EU, Ukraine has been implementing a comprehensive Visa Liberalisation Action Plan. In December 2015, the European Commission was able to recommend that the visa-free regime go ahead. At the time of writing, the final decision on this by the Council of the European Union is pending.

Cooperation between Ukraine and the EU in the foreign and security domains has been gradually building up for over a decade. Yet since 2014, with Russia's annexation of Crimea and war in the eastern Donbas region, the question of security cooperation with the EU has moved up to the highest strategic level. Operational collaboration is envisaged in EU security and defence missions, and in some instances is already underway (for example, through the EU Border Assistance Mission on the borders of Moldova and Ukraine with the Transnistrian region), and there are plans to develop cooperation with EU security agencies.

Part II. Deep and Comprehensive Free Trade Area

The elimination of tariffs is the classic basis for a free trade area. The EU largely liberalised access to its market in April 2014 by providing Ukraine with 'autonomous trade measures' and eliminating 94.7% of its tariffs. Under the full provisional application of the DCFTA, which began on 1 January 2016, Ukraine is to eliminate its tariffs on imports from the EU progressively, mostly within seven years.

These measures have so far had only a limited impact on Ukraine's exports to the EU, because of the suspension of production in the occupied territories, logistical problems and the downward price trends on world commodity markets. At the same time, the EU's share of Ukrainian exports and imports has increased, owing to steep declines in trade with Russia. The structure of exports to the EU has shifted towards machinery, fats and oils, prepared foods and animal products. The utilisation of tariff-rate quotas for agricultural products

has been limited, as Ukrainian producers have experienced problems with food safety and weak demand for its products.

The main sectoral safeguard is for Ukraine's car industry, which will continue to be protected against a significant growth of imports from the EU for up to 15 years. This will help Ukrainian producers in the short run, but involves costs for consumers.

There are provisions on anti-dumping measures, subsidies and safeguards to protect the importing economy from serious damage or threats thereof. Anti-dumping duties have been applied in the past quite extensively by the EU against Ukrainian supplies of metallurgical and bulk chemical products, but currently this occurs at a much reduced level, given that Ukrainian industry no longer profits from artificially low input costs for energy.

The DCFTA also includes important measures to ensure fast and efficient customs services. Ukraine is advancing towards fulfilling its legislative commitments, with the new Customs Code broadly aligned with EU legislation. But the main task is for border posts with the EU to function with less delay and without corruption.

The adoption of European technical standards for industrial and agri-food products is vital for the modernisation and competitiveness of the economy. Ukraine has outlined a strategy aimed at eliminating technical barriers to trade with the EU, through harmonising its legislation with key EU directives and adopting the very large number of EU standards. For the agri-food sector, Ukraine is embarking on a comprehensive strategy for applying EU sanitary and phytosanitary regulations. In due course, this will assure high health and safety standards for Ukraine's consumers, as well as position Ukrainian enterprises to export to the EU and other international markets.

A competitive and diversified service sector is of huge importance for the Ukrainian economy. The Agreement is detailed and comprehensive in commitments to liberalisation as well as reservations, but with more liberalisation and fewer reservations on the Ukrainian side than the EU side. The Agreement makes provisions for a few service sectors to attain 'full internal-market treatment' by the EU as a long-term objective.

Work is in progress on the Agreement's requirement for Ukraine to approximate related EU directives in its public procurement legislation. The government is already conducting e-procurement, which is proving effective in enhancing efficiency and reducing corruption. There are some shortcomings in Ukraine's system for intellectual property rights compared to best EU and international

practices, provoking many concerns on the part of the EU and the US. These gaps are expected to be addressed by forthcoming legislation.

Ukraine already has largely aligned its competition policy on EU and international standards, and further legislative and institutional reforms are envisaged.

Part III. Economic Cooperation

As regards the macroeconomic context, in the years since independence Ukraine has made only slow progress in economic policy reforms, with poor results except for periods of very favourable commodity prices. In 2014–15, Ukraine suffered a severe recession and losses of infrastructure as a result of Russian aggression, on top of the effects of the global recession. Nevertheless, the country is now engaged in introducing major reforms to its economic policy (for example in the energy sector) under the combined influence of an IMF support programme and the DCFTA. The EU is supplying significant financial assistance through multiple channels, including macroeconomic loans alongside the IMF, budget grants and investment from the EIB and EBRD. For the period 2014–20, these could total €11 billion.

Ukraine's financial sector has been under extreme pressure to maintain the stability of the banking system and to service external debt. The government and central bank have nonetheless proceeded with a comprehensive, long-term programme for updating regulations, anchored on EU legislation, as an important part of the general process of economic modernisation.

The energy provisions of the Agreement are crucial from both an economic and geopolitical perspective and entail the commitment to approximate many EU laws, although implementation so far through the associated Energy Community Treaty is behind schedule. That notwithstanding, Ukraine's energy policy is now at long last seeing radical and long overdue reforms. Gas supplies are now being diversified away from the former total dependence on Russian supplies, with the aid of reverse-flow pipelines linked with neighbouring EU countries. Energy-saving programmes, in line with EU standards, are vital to ultimately achieving the independence of gas supplies. Yet for the domestic residential market this is going to be a long-term and very costly process, for which the European financial institutions are starting to assist. The major programme of securing the destroyed nuclear reactor site at Chernobyl is proceeding with significant funding from the EU, the EBRD and other international donors.

The effective implementation of the ambitious environment chapter of the Agreement will see a huge upgrade in Ukraine's environmental performance. This can only be achieved in the long run. The EIB and EBRD are among the financial institutions capable of contributing to the necessary investment.

Ukraine has huge capacity and potential in the agri-food sector. Reforms in the post-Soviet period got off to a slow start, but they are now seriously underway. The Agreement contains many references to EU agricultural legislation, but there is flexibility in the extent to which this should be applied, with no binding timetables.

The DCFTA sets out the EU's detailed standards and regulations for road, rail, inland waterways, sea and intermodal transport, which Ukraine will progressively adopt. Ukraine occupies a pivotal place in the pan-European corridors for road and rail connections. The EBRD and EIB are providing investment funding for improvements in these and other major aspects of the transport infrastructure.

The broad digital sector, embracing electronic communications and the entire ICT economy, is an essential part of the economic reform and modernisation process. Ukraine has considerable human capital in this field, which is the basis for rapid development of the sector, including earnings from business outsourcing. The Agreement provides for alignment on EU regulatory practices.

Ukraine started introducing a regime for consumer rights protection upon independence, but so far with questionable success. The Agreement requires the approximation of EU legislation on product safety and official procedures for protecting consumers and enforcing consumer rights.

The Agreement does not impose strict obligations on Ukraine in the area of company law, corporate governance or accounting, but still provides a framework of EU company law that will improve Ukraine's business climate.

Both a new draft Labour Code that is before parliament at the time of writing and a new Law on Employment mostly comply with EU legislation. Attention should be focused not only on legislative work, but also on measures to ensure legal enforcement.

The Agreement sets out basic aims for the reform and modernisation of the education system, especially for higher education in line with the 'Bologna process'. Ukraine's educational standards are ranked in international comparisons as 'high' and comparable with its Central European neighbours in the EU. Over the period 2014–20, more than 4,000 Ukrainians are expected to participate in exchanges with EU

universities under the Erasmus+ programme, and 7,000 in youth exchanges.

There are now opportunities for Ukraine to participate in many of the EU's numerous specialised agencies and initiatives, for example under the research programme 'Horizon 2020', in which Ukraine is now a full participant.

Sharing land borders with four EU member states (Poland, Hungary, Slovakia and Romania) and Moldova, Ukraine has a keen interest in EU-sponsored cross-border cooperation. Several projects are underway, typically on facilitating the cross-border labour market, environmental interests and matters of common historical heritage. Civil society in Ukraine has long been at the forefront of pressure for democratic reforms, good governance and the fight against corruption. The Agreement provides for support and official status for civil society forums.

Part IV. Legal and Institutional Provisions

A comprehensive and joint institutional framework, including an Association Council, will monitor fulfilment of the Agreement and provide a platform for political dialogue. There are well-defined procedures for settling disputes that may arise in implementing the Agreement.

PART I.
POLITICAL PRINCIPLES, THE
RULE OF LAW AND FOREIGN
POLICY

1. POLITICAL PRINCIPLES

Provisions of the Association Agreement

The Association Agreement is premised on a commitment to pursue and respect:

...the common values on which the European Union is built – namely democracy, respect for human rights and fundamental freedoms and the rule of law – [which] are essential elements of this Agreement.



The phrase “essential elements” links to Art. 478 of the Agreement, which provides that in the case of abuse of these principles the Agreement may be suspended.

Art. 6 provides for “dialogue and cooperation on domestic reform”. This political dialogue is conducted through regular meetings at different levels, including at summit, ministerial and senior official levels.

On the substantive implementation of the basic principles, the jointly agreed Association Agenda of 16 March 2015 is more explicit.³ Priority matters for short-term action include constitutional reform, election reform, judicial reform, human rights and public administration reform. These challenges are addressed in considerable detail.

Constitutional reform. The Ukrainian government is urged to embark on a transparent process of constitutional reform that aims to develop effective checks and balances between state institutions. The

³ The “EU-Association Agenda to prepare and facilitate the implementation of the Association Agreement”, as endorsed by the EU-Ukraine Association Council on 16 March 2015.

functioning of local and regional governments should be strengthened, including through decentralisation, in line with the European Charter on Local Self-Government and with the delegation of substantial competences and related financial allocations.

Electoral reform. Electoral legislation should be improved and harmonised, including the laws on referenda, on the Central Electoral Commission and the financing of political parties.

Human rights and fundamental freedoms. Ukraine has committed itself to a swift implementation of the judgments of the European Court of Human Rights. Awareness-raising among the judiciary, prosecution and law enforcement bodies is given special attention. The Association Agenda outlines measures regarding freedom of expression, assembly and association. On freedom of expression, best practices should be developed in public broadcasting and media access for electoral competitors, and freedom for journalists to work without the threat of violence, protected by law enforcement agencies. There is a need for legislation in line with best European practice on the freedom of assembly, and also to strengthen the awareness of law enforcement agencies. Regarding the freedom of association, the Agenda pays particular attention to ensuring the rights of minorities; the equal treatment of men and women; children's rights; and combating torture and inhuman treatment.

The texts of the Agreement and Agenda are silent on the future political status of the occupied eastern Donbas region, although the Minsk II agreement raises the issues of decentralisation and elections.

The issues of judicial reform and corruption are taken up in chapter 2.

Implementation perspectives

The Constitution. According to its Constitution, Ukraine is a democratic state that adheres to the principles of the rule of law, human rights and fundamental freedoms. Ensuring respect for these principles, however, has proved to be problematic. Ukraine has been an unstable democracy so far. After gaining independence in 1991, the country experienced two periods of disguised authoritarianism (1995-2004 and 2010-14), which were ended only by massive public protest. After the last wave of protests, known as *Euromaidan*, Ukraine embarked on a path of democratic development, but the reform process has been slow.

An overview of democratic governance. The most resilient component of the democratic system in Ukraine has been the ballot box. Although many of the elections in the 1990s and 2000s were not considered to be completely free and fair, they were still able to ensure a sizeable representation of the political opposition in the Parliament. They even produced electoral victories for the opposition in 1994, 2005, 2006, 2007 and 2010. After the *Euromaidan* the election process improved substantially. Despite a number of problems, most observers considered the elections in 2014 and 2015 to be generally compliant with international standards. Problems remain with the non-transparent financing of election campaigns, which allows wealthy businessmen and corrupt politicians to improperly influence the results with vote-buying and the abuse of power by officials.

Other components of the democratic system are weaker, however. After gaining independence, there was a power struggle between representatives of the executive and legislative branches of Ukraine's government. The Constitution of 1996 established Ukraine as a semi-presidential republic, with a strong role for the president. But in the Constitution of 2004, adopted after the pro-democratic protests known as the Orange Revolution, the balance of power shifted towards a parliamentary system. Yet the new political system was flawed. A fierce struggle for power between President Viktor Yushchenko and Prime Minister Yulia Tymoshenko in 2007-09 reversed the gains of the Orange Revolution, and caused the country's democracy to backslide in the subsequent years. In 2014, the Constitution of 2004 was reinstated, but once again power imbalances posed risks to democracy.

For most of Ukraine's independence period, the principle of the separation of powers has not been implemented properly. The judiciary and the prosecutor's office were prone to political influence by the executive and the legislative branches of government. The failure of the system was epitomised by the 'general supervision' function of the prosecutor's office, which was allowed to check any individual or entity for compliance with the country's laws. This function was the backbone of corrupt regimes. Recent amendments to the Constitution and plans to overhaul the justice sector are hopeful signs that improving the rule of law and fighting corruption are finally being taken seriously (see chapter 2).

Ukraine's system of government is highly centralised, but with three levels of administrative, territorial entities: *oblasts*, *rayons* and towns/villages, each of which has elected representative bodies (councils). In reality the powers of these bodies are minuscule. *Oblasts* and *rayons* are governed by executives that are directly appointed by

central government. As noted above, this system is currently under review.

Finally, the participation of Ukrainian citizens in politics and civic life is not effective. Although the share of Ukrainians who work in political parties or action groups is higher than in most EU countries, activists have little influence over their parties' decisions. Ukrainian parties typically lack coherent ideologies and are just vehicles for their leaders and financial patrons. Most parties have a short lifespan (four out of the six parties that won the 2014 elections have been around for less than five years), and politicians often change party affiliation. As a result, political parties do not adequately represent large strata of society. Public trust in political parties, which grew in the 1990s and the first half of the 2000s, has fallen to 19% in recent years and has not really improved since the *Euromaidan* (24%).⁴ The share of Ukrainians working in civil society organisations was lower than in EU countries,⁵ although since the *Euromaidan* volunteer activities have accelerated.⁶

Reform of democratic governance. The scope of reforms since *Euromaidan* has been limited, and their pace slow. The reforms focused primarily on the decentralisation and independence of the judiciary, and less on contentious issues such as electoral rules. The problem of power distribution was not even mentioned in key strategic documents such as the parliamentary coalition agreement or the government action plan.

In March 2015, President Poroshenko established a Constitutional Commission with a mandate to draft amendments to the Constitution. The Commission, which was composed of legal experts

⁴ The figures represent the share of Ukrainians believing that at least one party in the country deserves to be entrusted with power, and come from surveys conducted by the Institute of Sociology of the National Academy of Sciences of Ukraine. Source: UA Pershyi TV channel (the First National TV channel), 5 November 2015 (<http://1tv.com.ua/news/73487> - in Ukrainian).

⁵ In 2004-12, the share of Ukrainians who worked in political parties or action groups in the past 12 months varied from 3.6% to 4.1%. The corresponding medians for the EU countries ranged from 3% to 3.8%. However, in that period only 1.4-2.3% of Ukrainians worked in other organisations or associations. The median for the EU countries ranged from 6.6% to 13.9%. Source: own calculations based on the data from the European Social Survey for 2004, 2006, 2008, 2010 and 2012 (www.europeansocialsurvey.org/).

⁶ In 2015, 13% of the population participated in various volunteer activities, according to a survey conducted by Razumkov Centre and Democratic Initiative Fund (www.ufb.org.ua/poslugi/poshyrenya_informacii/vidavnicha-iniciativa.htm?id=4636).

and politicians, decided not to prepare a comprehensive bill to amend the Constitution at once. Instead, it began to draft separate bills aimed at resolving particular issues. In 2015, the Commission prepared three bills. The first one dealt with decentralisation, the second concerned the judiciary and the third revised the chapter of the Constitution on human rights. Another bill – on the procedure to remove parliamentary immunity – had been prepared prior to the creation of the Constitutional Commission, but it ran into problems with the Venice Commission of the Council of Europe.

The bill creating a framework for the decentralisation of power was completed by the Constitutional Commission in June 2015. It made provision for the establishment of local governments (executive committees) subordinated to the councils at the *rayon* and *oblast* levels. The local governments were intended to replace centrally directed local state administrations, which had to be dissolved. The bill provided few details on the powers with which the local governments had to be entrusted. Those details would have to be determined by later laws. The bill also established a framework for the modification of the administrative division of Ukraine, namely for the consolidation of the lowest-level administrative units. It was expected that 1,500-2,000 communities would be created instead of about 11,000 villages, towns, and cities (while higher-level units, *rayons* and *oblasts*, would be preserved). The decentralisation was planned for after the local elections, scheduled for October 2017.

The proposed amendments regarding decentralisation sparked two serious controversies, however. First, the bill determined that local self-government in the occupied areas of Donetsk and Lugansk regions might have special features, which was a requirement of the Minsk II agreement aimed at settling the conflict in the Donbas. A number of MPs and political activists vigorously opposed that provision, fearing that it might undermine Ukraine's sovereignty. They believed that Donbas insurgents were effectively controlled by Russia, and that granting privileges to them would provide Moscow with a long-term lever to destabilise Ukraine and influence its policies. Second, the bill expanded the powers of the president, who would have the right to terminate the powers of locally elected officials and bodies if their decisions posed a threat to the national security or territorial integrity of Ukraine. Certain MPs deemed that this posed a risk of usurpation by the president.

With respect to the reform of electoral legislation, the authorities have so far fallen short of implementing the plans called for in the 2014 coalition agreement. The latter provided for a replacement of mixed

proportional-majoritarian electoral systems with open-list proportional systems, for both parliamentary and local elections. The majoritarian component (single member constituencies) was widely seen as a key weakness of the electoral system, because that component created favourable opportunities for vote-buying and abuse of power by local officials. However, in July 2015, the Parliament introduced a proportional system for local elections that was not an open-list system. The new system preserved a strong degree of party control over candidates and did not resolve campaign financing issues. The question of parliamentary election rules was postponed. Nevertheless, the Parliament took a step to arrange party financing by passing laws that allow for public (budget) financing of parties that win elections.

Human rights. The Constitution of Ukraine proclaims that the main duty of the state is to affirm and ensure human rights and fundamental freedoms. The list of respected civil and political rights mentioned in the Constitution is consistent with international human rights norms. In practice, the majority of those rights and freedoms are generally protected. Notable exceptions concern the right to a fair trial, the right to an effective remedy before a national authority and the prohibition of torture. In the periods of backsliding on democracy, political rights were also significantly curtailed.

The Constitutional Commission has drafted a bill that revised the chapter of the Constitution on human rights. It is intended to align the contents of the chapter with the Charter of Fundamental Rights of the European Union, and to extend the protection of human rights. Specifically, it reduces the term for judicial approval for taking a person into custody from 72 hours to 48 hours. The bill explicitly prohibits the death penalty. The law on local elections that was passed in July 2015 determined that at least 30% of candidates on party lists should be women.

As a member of the Council of Europe alongside all EU member states, Ukraine adheres to the European Convention on Human Rights (ECHR) and Fundamental Freedoms and is bound by the rulings of the European Court of Human Rights (ECtHR).

Open issues regarding Ukraine's record are set out in detail in the Association Agenda document. According to the Agenda, Ukraine had to adopt and implement a National Human Rights Strategy, with a view to improving its record of treating both individual cases pertinent to human rights and issues concerning international law instruments. The latter includes swift implementation of all judgments of the Strasbourg-based Court of Human Rights. To be able to

implement judgments, the Ukrainian government is now analysing the possibility to issue special state government bonds to pay back to Ukrainians who won trials in the European Court of Human Rights.

The National Human Rights Strategy of Ukraine was approved by the president in August 2015.⁷ The document was drawn up by a working group that included civil servants, civil society groups, the Ombudsperson, with the support of international organisations (including the UNDP, the OHCHR and the Council of Europe). The Strategy contains 24 strategic areas that include the entire spectrum of human rights, in particular anti-discrimination and the protection of persons that belong to national minorities.⁸ According to the Ministry of Foreign Affairs of Ukraine, the Strategy is in line with the provisions of the EU Strategy for Human Rights and Democracy.⁹ Some of its provisions, however, are rather declarative. It is too early to evaluate the impact of the Strategy on actual human rights protection as the Action Plan for its implementation, which clarified most provisions of the Strategy, was adopted by the Cabinet of Ministers only on 23 November 2015. This document was also drafted with the participation of civil society groups.¹⁰

As regards anti-discrimination, there have been some noticeable achievements. In November 2015, the *Verkhovna Rada* approved amendments to the Labour Code, which explicitly prohibits discrimination on the basis of sexual orientation,¹¹ which was required in the framework of the implementation by Ukraine of the Visa Liberalisation Action Plan (VLAP). There was progress in delivering training on anti-discrimination for law enforcement officials, prosecutors and judges with a more systematic and permanent approach. The number of staff in the Non-Discrimination Unit of the Ombudsman's Secretariat was increased.

⁷ The Decree of the President of Ukraine No. 501/2015, from 25 August 2015.

⁸ See www.ua.undp.org/content/ukraine/en/home/presscenter/articles/2015/08/31/un-welcomes-adoption-of-the-national-human-rights-strategy.html.

⁹ See <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/39699-komentar-mzs-ukrajini-shhodo-nacionalynoji-strategiji-u-sferi-prav-lyudini>.

¹⁰ The Resolution of the Cabinet of Ministers of Ukraine No. 1393-p, 23 November 2015.

¹¹ The respective provision is still to be incorporated into the new version of the Labour Code, which is now pending in the Parliament.

The Kharkiv Human Rights Protection Group (KhPG) has noted that human rights protection in Ukraine (excluding the occupied territories) improved in 2015, as there was a higher level of political freedom, freedom of speech and freedom of media, assembly and association.¹² The situation with human rights protection in 2015 also appeared to have improved, based on statistics from the European Court of Human Rights. In particular, the number of applications allocated to a judicial formation declined from over 13,000 in each of preceding two years to 6,010.¹³

In particular, Ukraine's political rights rating, conducted annually by Freedom House, rose in 2015 from 4 to 3 and its freedom rating improved from 3.5 to 3.¹⁴ According to the KhPG, the situation about the right to protection from torture and abuse and the right to freedom and personal inviolability has also improved due to enforcement of a new Criminal Procedure Code and the development of a free legal aid system. At the same time, the difficult economic situation and military conflict in the East resulted in increased crime levels.

The percentage of criminal trials that end in convictions is extremely high. In 2005-12, only 0.2-0.3% of the defendants were acquitted by first instance courts. The validity of verdicts was systematically called into question by the ECtHR. In 2000-15, the Strasbourg-based Court rendered 1,052 judgments in cases against Ukraine. In 765 judgments it found violations of the right to a fair trial. The next two most common infractions exposed by the Court were violations of the right to an effective remedy before a national authority (188 judgments), and violation of the prohibition of torture (130 judgments). The latter is linked to harsh conditions in prisons and pre-trial detention facilities, as well as cruel treatment by law enforcement officers. Enterprises also suffer. Since the 1990s, Ukraine's government has been heavily criticised for its poor protection of property rights and its failure to provide equal opportunities to private businesses.

According to the Ukraine 2014 Human Rights Report issued by the Bureau of Democracy, Human Rights and Labour of the US Department of State, the problems with human rights protection decreased in 2014 but remained high (likely the same is true for 2015).¹⁵

¹² See www.khpg.org/en/index.php?id=1455478937.

¹³ See www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf.

¹⁴ See <https://freedomhouse.org/report/freedom-world/2015/ukraine>.

¹⁵ See www.state.gov/documents/organization/236800.pdf.

Excluding the problems related to the annexation of Crimea and the war in the East, systemic problems include:

abuse of persons in custody, in particular beatings and alleged torture of detainees and prisoners; harsh conditions in prisons and detention facilities; a corrupt judicial system; societal violence against women and abuse of children; societal discrimination against and harassment of ethnic minorities; trafficking in persons; discrimination toward persons with HIV/AIDS that endangered their prospects for treatment; limitations on workers' right to strike, and forced labour.¹⁶

Protection of the Roma minority was improved in 2013, with approval of a 'Strategy of integration of Roma minority by 2020'.¹⁷ In 2014, Crimean Tatars were recognised by the Ukrainian Parliament as indigenous people of Crimea/Ukraine.

The situation in Crimea and Donbas. The political and human rights situation is far worse in Crimea, which was annexed by Russia in 2014, and in a part of the Donetsk and Luhansk regions (Donbas), controlled by Russia-backed insurgents. The political regimes in those territories are de facto authoritarian, with limited freedoms and systematic human rights violations. The human rights situation in Donbas is also aggravated by the military conflict that has been there since April 2014. The conflict undermined the most basic rights – to life and security. As of April 2016, a conservative estimate of the number of casualties from the conflict reached 30,729, including 9,333 people killed and 21,396 injured.¹⁸ Evidence has also revealed that Ukrainian civilians and military personnel have been tortured and ill-treated by armed groups controlled by Russia.¹⁹ The rights of some Ukrainians are

¹⁶ See Ukraine 2014 Human Rights Report (www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper).

¹⁷ See <http://zakon4.rada.gov.ua/laws/show/201/2013>.

¹⁸ The figures include casualties among Ukrainian armed forces and police, insurgent groups, and civilians. Source: Associated Press, "9,333 Killed since Ukraine Conflict Began, U.N. Says", *New York Times*, 28 April 2016 (www.nytimes.com/2016/04/29/world/europe/9333-killed-since-ukraine-conflict-began-un-says.html).

¹⁹ According to the mission of the Office of the UN High Commissioner for Human Rights, by the end of October 2015, about 8,000 people were killed and more than 17,000 injured as a result of the armed conflict. The number of people shot without trial or missing is not known; however, according to estimates, it

also violated in the criminal proceedings conducted against them by the Russian authorities (see the cases, for example, of Oleh Sentsov, Nadia Savchenko and Oleksandr Kolchenko). In this context, the European Parliament adopted a resolution requiring Russia to release all illegally detained Ukrainian citizens.²⁰

Masses of people were forced to leave their homes. The number of internally displaced persons (IDPs) who fled to government-controlled areas is estimated at about 1.7 million. In addition, according to the Office of the United Nations High Commissioner for Human Rights (OHCHR), over 1 million Ukrainians sought asylum or protection abroad, primarily in Russia and Belarus.²¹ Individuals registered as IDPs are not eligible for extensive government support.²² Instead, civil society, churches, volunteers and international donors make tremendous efforts to support them. Moreover, during the local elections in 2015, IDPs were not able to vote. The effectiveness of the State Agency on Donbas Recovery, established in autumn 2014, with the aim inter alia to ensure social and professional adaptation of the IDPs, seems to be low. The Office of the United Nations High Commissioner for Human Rights (UNHCR) called on Ukraine's government to establish more effective systems to protect the human rights of IDPs, many of whom left behind all they had.²³ In April 2016, the Ministry of Temporarily Occupied Territories and IDPs was established, replacing state agencies dealing with Donbas and Crimea issues.

The rule of law is virtually absent in the territories controlled by insurgents. Some 2.7 million people living in the area are without access to a fair trial. Numerous allegations of killings, arbitrary detention, torture and ill-treatment are reported. Freedoms of expression, religion, peaceful assembly, and association are substantially limited. Freedom

might reach 750-1,200 individuals. There are also numerous military and civilian prisoners kept in prisons in the occupied territory.

²⁰ See www.europarl.europa.eu/news/en/news-room/20150903IPR91536/Human-rights-Russia-Azerbaijan-and-Angola.

²¹ OHCHR, Report on the human rights situation in Ukraine (16 November 2015 to 15 February 2016) (www.ohchr.org/Documents/Countries/UA/Ukraine_13th_HRMMU_Report_3March2016.pdf).

²² For the description of government policies on IDPs, see H. Brenzel, O. Betliy and R. Kirchner, "Economic issues of internally displaced people in Ukraine", Policy Paper Series, PP/06/2015, GAG/IER, December 2015.

²³ See <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G15/070/53/PDF/G1507053.pdf?OpenElement>.

of movement is also restricted as crossing the contact line between Ukrainian armed forces and insurgent groups is complicated. Human rights are structurally violated in Crimea post-annexation, as there are cases of deprivation of liberty and the alleged ill-treatment of Ukrainians belonging to the Crimean Tatars ethnic group. In particular, in April 2016, the so-called Supreme Court of Crimea banned the activities of the Mejlis, a self-governing body of the Crimean Tatars, thereby violating basic rights of this ethnic group. The local authorities harass and intimidate Crimean Tatars, pro-Ukraine activists and journalists. The administration initiated criminal proceedings against a number of Crimean Tatars on fabricated charges such as terrorism and extremism, carried out intrusive searches at mosques and homes and shut down media outlets. The authorities also failed to properly investigate cases of killings, torture and beatings by para-military groups.²⁴ Ukraine has lodged three inter-state applications against Russia at the European Court of Human Rights.²⁵ Besides, more than 1,400 individual applications related to the events in Crimea or the hostilities in Eastern Ukraine are currently pending before the Court.

Political principles at a glance

After the government changeover that followed the Euromaidan protests, Ukraine embarked on a path of democratic reforms.

The most notable reforms aim to change the Constitution to enhance the rule of law and curb corruption, and to substantially increase the powers of local authorities via decentralisation. Changes to electoral legislation are also expected.

Overall, Ukraine's human rights record is now relatively positive, while still needing improvements.

On the other hand, Crimea and the eastern Donbas, which are not controlled by the government, see a return to authoritarianism and systematic human rights violations.

²⁴ Human Rights Watch, "Ukraine: Fear, Repression in Crimea", 18 March 2016 (www.hrw.org/news/2016/03/18/ukraine-fear-repression-crimea).

²⁵ "European Court of Human Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine", Press release, ECHR 296 (2015), 01.10.2015 (<http://goo.gl/lbd0J9>).

2. RULE OF LAW AND MOVEMENT OF PEOPLE



This chapter deals with a nexus of related issues, notably the fight against organised crime, corruption and terrorism, and policies for border management and the movement of people, including the key issue of visa-free travel between Ukraine and the EU.

The fight against crime, corruption and terrorism

The Association Agreement underlines the paramount case for a sound rule of law, but it does not provide any detailed guidelines. The Association Agenda document of March 2015, however, is far more explicit on the need for judicial reform and improvement in the rule of law more generally.²⁶

The rule of law is the weakest component of democratic governance in Ukraine. One aspect of this is that law enforcement is biased. For instance, groups of top officials and wealthy businessmen seem to enjoy low levels of accountability and high levels of illicit privileges, while others cannot have certain rights protected (see also chapter 1).

Another aspect is the high level of corruption. Over the last 15 years, Transparency International's Corruption Perception Index has ranked Ukraine in the range of 21 to 28 on a scale of 0 (the highest level of corruption) to 100 (an absence of corruption). The judiciary, police

²⁶ See Joint Press Release, "EU-Association Agenda to prepare and facilitate the implementation of the Association Agreement, as endorsed by the EU-Ukraine Association Council on 16 March 2015", 16 March 2015.

and public administration have largely been perceived as the most corrupt institutions in the country. The situation has not yet improved since the revolution of 2013-14.

Still, the authorities have launched a series of reforms aimed at enhancing the rule of law and curbing corruption.

First, parliament passed long-awaited and comprehensive reforms to the judiciary in June 2016, *inter alia*, amending the constitution and the Law on Judicature, and adopting a new law on the enforcement of judgements. According to the new legislation, judges will henceforth be selected on a competitive basis by the High Council of Justice, composed mainly of the judiciary and the association of lawyers. This applies to the selection of judges for local courts, the regional Appeals Courts and a new Supreme Court that should start hearing cases in 2017. Parliament has been stripped of powers to appoint judges, and neither the parliament nor the president will have the right to dismiss judges. The bill also provides for checks on the powers and integrity of incumbent judges, while at the same time dramatically increasing their salaries. Importantly, judges who cannot verify the legality of their assets and those of their family can now be dismissed. The state's monopoly on the enforcement of judgements will be abolished through the introduction of private bailiffs. The changes to the constitution were approved by the Venice Commission, and the launch of the judicial reforms has been positively assessed by EU and US officials. Nevertheless, the risk of reforms stalling remains high, as further legislation and effective implementation efforts are both necessary to ensure that the reforms achieve their aims, namely to establish the rule of law in the country.

Second, reform of the prosecutor's office is underway. In December 2015, a new system of local prosecutors' offices began operating. Local prosecutors are now selected through a competitive process. Amendments to the constitution and relevant laws are intended to increase the independence of prosecutors while narrowing their mandate, notably depriving them of their 'general supervision' function.

Third, the government has embarked on reforms to police administration. In November 2015, the police force, officially called 'militia', was replaced by the National Police of Ukraine. Some of the police officers have been hired on a competitive basis, but most of them will be re-categorised following a competency check, which will involve civil society representatives. The EU Assistance Mission

(EUAM),²⁷ together with the other international donors, recently announced the creation of a new structure designed to assist reform of the country's National Police, which is expected to help bring about crucial changes in four main areas: community policing, criminal investigation, human resources and public order.²⁸ Moreover, EU-compliant criminal analysis and risk analysis systems will be established within the Counter-Trafficking Department of the National Police, with the support of the International Organisation for Migration and funding from the US Department of State.²⁹

Fourth, reforms of Ukraine's civil service have been enacted. The new law on the civil service entered into force in May 2016, with the selection of civil servants subsequently to be based on an open competition. Civil society representatives will be involved in the selection process. In addition, the law seeks to de-politicise the civil service.

Fifth, the authorities have started work on a set of reforms aimed at curbing corruption. These include opening state registers and databases to the public, introducing an electronic public procurement system and establishing anti-corruption bodies (the National Anti-Corruption Bureau, the Special Anti-Corruption Prosecutor's Office and the National Agency for Prevention of Corruption).

The National Anti-Corruption Bureau (NABU) was created on time,³⁰ and its head appointed in April 2015, following an open and competitive selection process. Yet, its full operational start was delayed owing to the late establishment of a specialised anti-corruption prosecution office, the head of which was not appointed until the end

²⁷ The European Union Advisory Mission (EUAM) Ukraine is a non-executive mission of the EU that formally began operations from its headquarters in Kyiv in December 2014, following the Revolution of Dignity (2013–14) and an invitation issued by the Ukrainian government. EUAM Ukraine seeks to assist the Ukrainian authorities to undertake sustainable reforms of civilian security through strategic advice and hands-on support for specific reform measures based on EU standards and international principles of good governance and human rights.

²⁸ See "EUAM Ukraine: New structure to assist national police reform" (www.enpi-info.eu/maineast.php?id_type=1&id=43519&lang_id=450).

²⁹ See "IOM supports Ukrainian national police in developing counter-trafficking criminal analysis and risk analysis systems" (<http://iom.org.ua/en/iom-supports-ukrainian-national-police-developing-counter-trafficking-criminal-analysis-and-risk>).

³⁰ The Bureau was set up in accordance with the timetable in the Visa Liberalisation Action Plan.

of November 2015. Amendments to the Law on Prosecution were passed in February 2016, making this office independent of the general prosecutor.

Also, by the first quarter of 2016, the majority of the members of the National Agency for Prevention of Corruption (NAPC) had been nominated, thus enabling the Agency to be fully operational. Unlike the NABU, which has the power of investigation, the NAPC monitors (the lifestyles of) officials, for instance by way of the electronic system for the declaration of property.

Several other important legislative acts were passed with the aim of reducing corruption. Notable in particular are the laws on asset recovery, on seizure and special confiscation, and on electronic declarations for civil servants.

Furthermore, in February 2015, parliament gave its preliminary approval to the abolition of parliamentary immunity. But that decision drew criticism from the Venice Commission, which spoke in favour of limiting immunity to ensure the protection of MPs against abuse of power by officials.

The pace of reforms, however, is widely considered inadequate by the public, with complaints persisting, for example, about appointment procedures for local prosecutors. Re-establishing people's trust in the justice sector is arguably one of the most daunting challenges to put Ukraine firmly onto the reform track.

Movement of persons and visas

In the Association Agreement, the movement of persons is dealt with only in summary terms, but the Visa Liberalisation Action Plan (VLAP) goes into much more detail.³¹ The Agreement confirms that Ukraine is required to fully implement the visa facilitation and readmission agreements and to take gradual steps on the road to visa liberalisation (i.e. visa-free access). In December 2015, the European Commission formally recommended to the Council of the EU that the EU apply the visa-free regime to Ukrainians for short trips to the EU.³² In April 2016,

³¹ The VLAP is applied in two phases: first through legislation and institutional arrangements, and then implementation. Successful completion of these conditions is now at the top of the political agenda.

³² See the "Sixth Progress Report on the Implementation by Ukraine of the Action Plan on Visa Liberalisation", December 2015 (<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-905-EN-F1-1.PDF>).

the European Commission proposed issuing a visa waiver for Ukrainian citizens with biometric passports.³³ It is now up to the Council of the EU and the European Parliament to give their final backing for visa-free travel. However, the EU continues to pay much attention to the policy agenda in Ukraine, in particular to issues related to fighting corruption.

In its latest report, the Commission concluded that Ukraine has met all the benchmarks set in the four blocks of the VLAP's second phase:

- 1) document security, including biometric passports (see section below);
- 2) integrated border management, migration management and asylum (see section below);
- 3) public order and security (see chapters 1 and 3); and
- 4) external relations and fundamental rights (see chapters 3 and 1, respectively).

Document security, including biometric passports. Significant progress was made in 2015, when Ukraine began issuing biometric passports that comply with the requirements of the International Civil Aviation Organisation. A second line of control was introduced at Kyiv Boryspil airport, which can access information on fingerprints stored in Ukrainian passports. Since January 2016, new biometric ID cards have been issued, but they are currently only available to Ukrainians who apply for a passport for the first time.

Migration and border management. The Agreement sets the stage for comprehensive dialogue and cooperation on legal and illegal migration, trafficking and smuggling of people, border management, asylum, return policies and the movement of persons. Ukrainian policies on migration and border management have been amended during recent years as part of implementing the VLAP.

Of particular importance was the approval by the Ukrainian parliament of the law on external labour migration in November 2015. This law sets the parameters for regulating reintegration, which is essential when taking into account the large number of external labour migrants from Ukraine (1.3–2.5 million people according to different estimates). The Agreement also protects Ukrainian workers legally employed in the EU against discrimination (Art. 17).

³³ See the Commission's proposal of April 2016 (<http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-236-EN-F1-1.PDF>).

As mentioned in chapter 3 (on foreign and security policy), the EU has established special advisory missions to assist the Ukrainian authorities on border management issues. For example, in the context of the EUAM, in May 2015 it set up a Border Management Assistance Group with Ukrainian partners, which is currently confronted with exceptional challenges on its borders with Russia and the separatist regions of eastern Donbas. Another mission, the EU Border Assistance Mission (EUBAM), is part of the EU's combined effort to help Moldova and Ukraine meet the mandatory requirements of Title III of the Agreement (Justice, Freedom, and Security).³⁴ EUBAM provides assistance on harmonising legislation, ensuring skills transfer for border professionals and helping institutions to build the processes, infrastructure and contacts for intra-service, inter-agency and international cooperation. The Ukrainian authorities have ensured access to Interpol databases at border crossing points and have taken further steps to cooperate on border control and border surveillance with neighbouring countries. The government also approved an Integrated Border Management Strategy for the period 2016–20.³⁵ The State Border Guard Service is advancing towards its transition to a modern law-enforcement agency aligned with EU best practices.

Justice, freedom and security at a glance

Success in improving the rule of law and anti-corruption policy is universally considered to be indispensable to the overall success of the Association Agreement and Ukraine's economic future.

Significant reforms were at last underway by mid-June 2016, notably to the judiciary and prosecutor's office.

Border management has become a matter of increasing and indeed strategic significance for Ukraine, for which the EU has introduced specific programmes.

The objective for Ukraine to obtain visa-free access for its citizens to travel to the EU is of the highest political and practical importance, and the official criteria for granting visa-free access have been fulfilled.

³⁴ See EUBAM, "What we do" (<http://eubam.org/what-we-do/#2>).

³⁵ See the CMU Resolution No. 1149-p of October 2015 (<http://zakon4.rada.gov.ua/laws/show/1149-2015-%D1%80>).

3. FOREIGN AND SECURITY POLICY



The Association Agreement aims to facilitate the gradual alignment of Ukraine's foreign, security and defence policies with those of the EU at bilateral, regional and multilateral levels. These include areas covered by the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).

The CFSP encompasses the objectives and issues of strategic interest to the EU, the joint actions and common positions adopted by the Union and the procedures for implementing these actions and positions. In 2014, Ukraine aligned its position to 73% of the CFSP declarations.

The CSDP may undertake a wide range of tasks, including humanitarian, conflict prevention, disarmament and peacekeeping operations; the deployment of combat forces in crisis management; and post-conflict stabilisation.

Provisions of the Agreement

Conflict diplomacy. The parties undertake to work together for the peaceful resolution of regional conflicts and reaffirm their commitment to the international canons of sovereignty, territorial integrity and the inviolability of borders in accordance with the Charter of the United Nations and the Helsinki Final Act of 1975. The Association Agenda goes further by stating that the parties will make use of the bilateral and multilateral fora to achieve a sustainable political solution for the conflicts caused by Russia's "illegal activities" on Ukrainian territory.

Examples include the Geneva Joint Declaration between representatives of the EU, the US, Ukraine and Russia (17 April 2014)

and diplomatic efforts undertaken in the 'Normandy format' (Germany, France, Ukraine and Russia), which led to the adoption of the Berlin Declaration in July 2014, the Minsk Protocol and Memorandum in September 2014, and the Minsk II declaration of February 2015. The EU has supported these efforts and maintained pressure on Russia by applying targeted and sectoral sanctions. It supports the role given to the Organisation for Security and Cooperation in Europe (OSCE) in overseeing the implementation of the Minsk protocols, with the OSCE Special Monitoring Mission and the OSCE Observer Mission tasked with monitoring the borders and ceasefire agreement.

In parallel, a series of trilateral talks were held between the European Commission, Russia and Ukraine in support of the Package of Measures for the Implementation of the Minsk Agreements and with the aim of "finding practical solutions to Russian concerns about the implementation of the DCFTA".³⁶ Russia raised "concerns" about customs cooperation, technical barriers to trade (TBTs) and sanitary and phytosanitary issues (SPS). In response, it was agreed to delay the provisional application of the DCFTA until 1 January 2016 while talks continued. However, Russia made various proposals that would have effectively destroyed the DCFTA, or delayed its implementation further. In a series of trilateral meetings, the European Commission and Ukraine sought clarification on the alleged problems for Russia, and offered various formulae to give reasonable reassurances, but no agreement could be reached. The trilateral negotiations were discontinued at the end of 2015, and the DCFTA entered into provisional force on 1 January 2016.

CSDP missions in Ukraine. The EU carries out a Border Assistance Mission to Moldova and Ukraine (EUBAM), which aims to strengthen border control facilities, including, notably, at the borders of the Transnistrian region of Moldova. It is a contribution to efforts in the 5+2 framework aimed at the resolution of the Transnistrian conflict. Ukraine and the EU are part of the '5' together with Russia, the US and the OSCE; and the '2' consists of Moldova and Transnistria.

The EU has also deployed an Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM). The role of this 160-person strong mission is to provide strategic advice on the planning and implementation of sustainable reforms to the civilian security-sector bodies responsible for the rule of law and law enforcement. Examples of early action include support for the implementation of a new law on

³⁶ See http://europa.eu/rapid/press-release_STATEMENT-15-5603_en.htm.

the police, and the sharing of French expertise for an electronic case management system with 400 prosecutors of the Odessa region. The EUAM advises on the reform of the judiciary and public prosecution. In terms of regional outreach, EUAM experts work with the police in the Khmelnytsky and Lviv regions, advise on civil security reform and provide strategic communications advice in the Dnipropetrovsk region, support the law enforcement inter-agency cooperation in the Kherson region, and provide free legal aid in Poltava.

Ukraine in CSDP operations elsewhere. The Association Agreement envisages Ukraine and the EU cooperating in conflict prevention and crisis management elsewhere in the world. In 2005, Ukraine and the EU adopted a framework agreement facilitating the participation of Ukraine in EU crisis management operations and an agreement on security procedures for the exchange of classified information. Ukraine contributes to the EU-led Naval Military Operation for combating piracy off the east coast of Africa (EUNAVFOR Atalanta). After the annexation of Crimea, Ukraine kept its forces at EUNAVFOR Atalanta's headquarters but pulled out its frigate 'Hetman Sahaydachny.'

The Association Agenda calls for consultations with a view to increasing the inter-operability of peacekeeping forces through advancing military and technical cooperation. Ukraine is able to collaborate with CSDP agencies and bodies, including the European Defence Agency, the European Union Satellite Centre and the European Security and Defence College.

Weapons of mass destruction and disarmament. Ukraine and the EU have also agreed to advance the non-proliferation of weapons of mass destruction, combat terrorism and the illegal arms trade, and cooperate on arms controls, arms export control and arms trafficking, including small arms.

International Criminal Court. The Association Agreement focuses on the ratification and implementation of the 1998 Rome Statute of the International Criminal Court, which Ukraine has signed.

Implementation perspective

The basic framework for the alignment of Ukraine's foreign and security policy with that of the EU began to be developed in 2000.³⁷

³⁷ See address by the President of Ukraine to the *Verkhovna Rada* of 6 March 2001, "On the internal and external situation of Ukraine in 2000" (<http://zakon5.rada.gov.ua/laws/show/n0002100-01> (in Ukrainian)).

Since then, the EU and Ukraine have signed several bilateral agreements aimed at strengthening their cooperation. Specifically, they agreed on the Mechanisms for consultations on crisis management (2002), concluded the Agreement on the security procedures for the exchange of classified information (2005) and the Agreement establishing a framework for the participation of Ukraine in the EU-led crisis management operations (2005).³⁸ Those steps reflected Ukraine's intention to expand cooperation with the European Union, even if the intensity of coordination efforts was uneven due to a variation in positions of subsequent Ukrainian governments.

Russia's annexation of Crimea and its 'hybrid' war in Donbas in 2014 dramatically changed the focus for joint cooperation efforts in the foreign and security policy domains. As Russia officially denied its involvement in the military conflict in Donbas, Ukraine was not able to achieve any de-escalation through bilateral negotiations. The 'Minsk' peace process was launched with the support of the EU. Active diplomatic efforts by the EU and its member states, combined with sanctions imposed on Russian individuals and entities, contributed significantly to the reduction of hostilities, which in principle should lead towards a peaceful resolution of the conflict.

Ukraine supports the EU's sanctions imposed on Russian targets and considers them as a tool to curb the aggression. It joined in certain EU decisions by imposing several sets of sanctions, which included travel bans and asset freezes on individuals and entities responsible for action against Ukraine's territorial integrity. Ukraine has also imposed an embargo on the import and export of certain goods from/to Russia, including arms and related materials, and it has banned flights of Russian airlines to the country. Ukraine also advocates a tightening of international sanctions against Russia. In December 2015, the Parliament of Ukraine called on the Parliaments of other countries to extend and strengthen sanctions against Russia for organising terrorist acts in Ukraine.³⁹

³⁸ MFA of Ukraine. Foreign and security policy, see <http://ukraine-eu.mfa.gov.ua/en/ukraine-eu/dialogue/foreign-policy>.

³⁹ Decree of the *Verkhovna Rada* of Ukraine No. 892-VIII of 11 December 2015, "On appeal of the *Verkhovna Rada* of Ukraine to the Parliaments of foreign states, the European Parliament and the parliamentary assemblies of international organizations to continue and strengthen sanctions against the Russian Federation for organizing terrorist acts in Ukraine" (<http://zakon2.rada.gov.ua/laws/show/892-viii> (in Ukrainian)).

Building on the Association Agreement, Ukraine intends to enhance the convergence of its foreign policy with the CFSP/CDSP.⁴⁰ This does not mean that Ukraine is willing to embrace EU positions unconditionally, however. Some approaches proposed by the EU might not be acceptable for Ukraine, for example, over constitutional amendments providing for special rules for local self-government in Donbas, which have been virtually blocked in the Parliament for fear of undermining Ukraine's sovereignty.

According to the AA implementation plan, Ukraine intends to advance proposals for joint EU-Ukraine positions based on a monitoring of the security situation in Eastern Europe. Ideas for such proposals have been outlined by Ukraine's Minister of Foreign Affairs Pavlo Klimkin. In November 2015, he expressed the view that giving a membership perspective to the Eastern Partnership countries would strengthen strategic security in Europe.⁴¹

EUBAM and EUAM. Ukraine generally views cooperation with the EUBAM Mission to Moldova and Ukraine as fruitful and valuable, for many reasons. First, it has helped the State Border Guard Service of Ukraine (SBGS) to draft strategic documents, including the Development Strategy of the SBGS and the Integrated Border Management Concept. Second, it provided technical assistance in improving the low level of border and customs standards with procedures to harmonise them with those in EU member states. Third, it has contributed to the development of border infrastructure (border crossing points). Fourth, joint border control operations, carried out at the Transnistrian segment of the Moldova-Ukraine border, were instrumental in fighting cross-border crime. Fifth, a monitoring presence of the EUBAM and its confidence-building measures contributes to ensuring security in that region. Sixth, the EUBAM facilitated development of the cooperation between Ukraine and

⁴⁰ See Cabinet Order No. 847-r, 17 September 2014, "On the implementation of the Association Agreement between the European Union and the European atomic energy community and their member states, of the one part, and Ukraine, of the other part" (<http://zakon1.rada.gov.ua/laws/show/847-2014-%D1%80> (in Ukrainian)).

⁴¹ MFA, Pavlo Klimkin's speech at the Warsaw Security Forum, 5 November 2015 (<http://mfa.gov.ua/ua/press-center/news/41662-pavlo-klimkin-dlya-stabilnosti-v-jevropi-vazhlivoju-je-rishuchisty-u-nadanni-jevropejskoji-perspektivi-krajinam-skhidnogo-partnerstva> (in Ukrainian)).

Moldova, as well as between Ukrainian and EU law enforcement bodies.⁴²

Views on the EUAM, which started working in December 2014, are more mixed.⁴³ On the one hand, the mission's work is considered as beneficial by its Ukrainian counterparts. EUAM assists in developing strategic documents and bills for a number of government bodies, including the Ministry of the Interior, the SBGS and the National Security and Defence Council. The mission also provides technical assistance and facilitates communication between Ukrainian officials and their counterparts in Brussels. On the other hand, EUAM's mandate and operational capacity are considered to be insufficient. In certain cases, EUAM has declined to provide assistance, arguing that its mandate is advisory, not operational. Ukrainian bodies would also like the mission staff to include more experts from Eastern Europe with experience in dealing with post-Soviet law enforcement problems (e.g. the nexus of organised crime and law enforcement bodies).

EU-led crisis management operations. Ukraine is willing to take measures to enhance military and technological cooperation with the EU. Ukraine is participating in an EU Battle Group in 2016,⁴⁴ and is ready to participate in more developed European military formations, if established.⁴⁵ Ukraine plans to develop cooperation with the EU Institute for Security Studies, the EU Satellite Centre and the European Security and Defence College. Negotiations were launched in June 2015 for an agreement between Ukraine's Ministry of Defence and the European Defence Agency, with a view to boosting military and technical cooperation. Furthermore, in September 2015, the National Security and Defence Council adopted a new Military Doctrine of Ukraine reflecting the country's objective of integration into the EU.

⁴² EUBAM, "Annual Report 1 December 2014-30 November 2015", 2015 (http://eubam.org/wp-content/uploads/2015/12/Report_2015_ENGL.pdf).

⁴³ Kateryna Zarembo, "EUAM's First Year: Ambitions versus Reality", Policy Brief, Institute of World Policy, 2015 (www.dropbox.com/s/8085urds2mxogtz/policy_brif_EUAM_all_2.pdf?dl=0).

⁴⁴ According to MFA of Ukraine, Foreign and security policy (<http://ukraine-eu.mfa.gov.ua/en/ukraine-eu/dialogue/foreign-policy>).

⁴⁵ Interview with Minister of Foreign Affairs of Ukraine Pavlo Klimkin in *Evropeiska Pravda*, 3 March 2015 (www.eurointegration.com.ua/news/2015/03/11/7031701/ (in Ukrainian)).

Foreign and security policy at a glance

Cooperation between Ukraine and the EU in the foreign and security domains has been building up for over a decade.

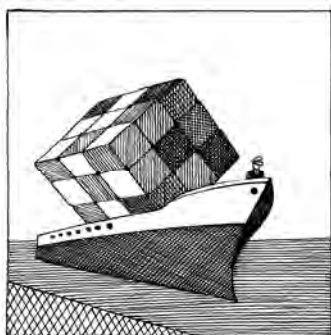
However, since 2014, with Russia's annexation of Crimea and its 'hybrid' war in Donbas, the question of security cooperation with the EU has been raised to the highest strategic level.

Increased alignment with EU foreign and security policies will reframe Ukraine's relations with Russia and the rest of the world.

Operational collaboration takes places in two missions (EUBAM and EUAM), and there are plans to develop cooperation with EU security agencies.

PART II.
DEEP AND COMPREHENSIVE
FREE TRADE AREA

4. MARKET ACCESS FOR GOODS



Tariff liberalisation is the basic starting point for a free trade area. The DCFTA almost completely liberalises trade in goods between the EU and Ukraine, but with a significant asymmetry in that the EU liberalises totally and immediately for most products, whereas Ukraine liberalises for many products, over three to seven years. This means exceptional opportunities for Ukrainian producers to boost their exports to the EU market

before facing full competition on the home market.

Provisions of the Agreement

The DCFTA establishes a free trade area for trade in goods over a transitional period of a maximum of 10 years. Quantitative restrictions on imports and exports are also prohibited, unless allowed by the relevant WTO rules (i.e. Art. XI GATT).

The DCFTA tariff liberalisation is asymmetrical; the EU needs to abolish its customs duties faster than Ukraine. This should give Ukrainian exporters the time to prepare for competition from the EU and support the Ukrainian market. This asymmetrical pace of liberalisation started with the EU's 'autonomous trade measures' (ATM) towards Ukraine, which entered into force on 23 April 2014,⁴⁶ and unilaterally reduced the EU's tariffs on Ukrainian goods in line with the EU's DCFTA commitments. These autonomous trade measures expired on 1 January 2016, when the DCFTA as a whole entered provisionally into force, after a delay under a trilateral agreement between Ukraine, the EU and Russia on 12 September 2015.

⁴⁶ Regulation 374/2014.

Five years after the AA's entry into force, the parties may consider broadening the scope of tariff liberalisation by a decision of the Trade Committee.

According to the European Commission, Ukraine and the EU will eliminate 99.1% and 98.1%, respectively, of their duties in trade volume. Ukrainian exporters will save €487 million annually due to reduced EU import duties, whereas Ukraine will remove around €391 million in duties on imports from the EU.⁴⁷

Industrial products and raw materials. Existing EU tariffs for industrial goods exported from Ukraine will be removed immediately for 94.7% of the tariff lines. For the remaining handful of products, the tariffs will be eliminated after a transitional period.⁴⁸ For example, a transitional period is envisaged for a limited number of minerals (three years), chemicals (up to five years), fertilisers (up to seven years), wood products (up to five years), footwear (up to five years) and several copper articles (five years) and aluminium articles (seven years). Significantly, cars and most of the motor vehicles for the transport of goods will only be liberalised after seven years.

Ukraine, on the other hand, will grant immediate preferential treatment to only 49.2% of EU exports of industrial products. After a transitional period of seven years, the share of EU exports liberalised by Ukraine will increase to 96%. For example, Ukraine will apply a gradual liberalisation on several minerals (up to seven years), organic chemicals (up to three years); fertilisers (three years), rubber tyres (up to five years), leather articles (up to five years) and textiles such as headgear (three years).

The DCFTA includes specific rules for Ukraine's car sector, which has already had to digest Ukraine's WTO accession that reduced import tariffs from 25% to 10%.⁴⁹ Ukraine's motor vehicles sector (both for passenger and goods transport) will enjoy a particularly long transitional period of 10 years. Moreover, Ukrainian negotiators

⁴⁷ European Commission, "The EU-Ukraine Deep and Comprehensive Free Trade Area", 2013 (http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf).

⁴⁸ European Commission, "European Commission proposes temporary tariff cuts for Ukrainian exports to the EU", press release, 11 March 2014 (http://europa.eu/rapid/press-release_IP-14-250_en.htm).

⁴⁹ WTO, "Report of the Working Party on the Accession of Ukraine to the WTO", WT/ACC/UKR/152, 25 January 2008.

managed to include specific safeguard measures on passenger cars (see below) in the agreement.

Agricultural products. Ukraine has committed to fully eliminate tariffs for 88.5% of the tariff lines on agricultural products. Around half of its agricultural products will be liberalised immediately. For the other products, a transitional period of up to seven years is envisaged. However, not all the import duties will be reduced to zero; 8.7% of agro-food tariffs will be subject to limited linear reductions by 20-60% over 5-10 years (for example dairy, eggs, sugar, animal oils and fats). After this transitional period a residual tariff will remain. Moreover, for 2.8% of the agro-food tariff lines (e.g. types of meat and sugar groups), tariff-rate-quotas will be applied.

The EU liberalisation process for Ukrainian agricultural products is rather different. Where the EU commits to reducing agro-food tariffs, in almost all cases it will fully abolish them. Moreover, the EU uses shorter transitional periods than Ukraine: 82.2% of the relevant tariffs will be nullified immediately and only 1.2% will be reduced to zero in a transitional period of up to seven years.

However, the EU will apply more tariff quotas than Ukraine, especially on specific types of cereals, pork, beef, poultry and sugar. The quantities shall enter on a first-come, first-served basis. This reduces the scope of the liberalisation process. Nevertheless, in total, regarding agro-food products, the simple average EU tariff will drop from 9.8% to 0.4% by the end of the tenth year, whereas for Ukraine this will be from 8% to 0.9%. According to the European Commission, the DCFTA will lead to a tariff reduction of €330 million for Ukrainian agricultural products and €53 million for processed agricultural products.

Export duties. Ukraine applies export duties on a number of products, such as types of livestock and hide raw materials, sunflower seeds and types of metal. The EU has been contesting these export duties as it claims that they are used as an indirect subsidy to Ukraine's domestic industry. The DCFTA now prohibits export duties in principle. However, existing export duties applied by Ukraine on products such as livestock and raw hide materials, seeds of some types of oil-yielding crops and types of scrap metal, will be phased out over a transitional period of 10 years in accordance with a schedule included in Annex I-C. Moreover, a specific safeguard measure mechanism is provided for Ukraine's export duties during a period of 15 years following the entry into force of the agreement. This mechanism allows Ukraine to impose a surcharge on the export duty on several goods

such as raw hide materials, sunflower seeds and types of metal, steel and copper, if during a yearly period the cumulative volume of exports from Ukraine to the EU exceeds a trigger level (set out in Annex I-D).

A standstill clause states that neither party may increase any existing customs duty or adopt any new customs duty on goods originating from the territory of the other party. This was effectively broken by Ukraine in February 2015, when it imposed a surcharge of 5% on imports of industrial goods and 10% on imports of agricultural goods as a crisis measure to tackle its significant reduction of monetary reserves and to restore its balance of payments. Although the DCFTA was not – provisionally – in force at the time of the adoption of this measure, this import surcharge violated the spirit of the DCFTA. Moreover, the EU's current autonomous trade measures regarding Ukraine are conditional on abstention by Ukraine from introducing new duties or increasing existing levels of duties on EU products.⁵⁰ Nevertheless, considering Ukraine's economic crisis, the EU did not object to this measure. Also at the level of the WTO, most members considered this measure to be in line with the WTO rules concerning balance of payments (Art. XII GATT). However, they encouraged Ukraine to terminate this import surcharge by the end of 2016,⁵¹ and Ukraine cancelled this surcharge on 1 January 2016.

Rules of origin. These are laid down in Protocol I of the Association Agreement. Rules of origin confirm when a product is wholly obtained from the territory of one of the parties, or when products have undergone “sufficient working or processing” in order to obtain a movement certificate ‘EUR.1’ or an invoice declaration. An annex to the Protocol defines four different criteria for “sufficient processing” for each product (i.e. tariff heading): i) a change of tariff heading (e.g. a screw will originate from Ukraine if it is made from imported materials of any other heading); ii) a minimum value added (e.g. for passenger cars, the value of all the non-originating materials used to manufacture the car may not exceed 40% of the total value of

⁵⁰ Art. 2(d) Regulation (EU) No 374/2014 of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine.

⁵¹ WTO, “Members adopt report on Ukraine's import surcharge imposed for balance-of-payments reasons”, press release, 19 June 2015 (www.wto.org/english/news_e/news15_e/bop_19jun15_e.htm). The report was considered at the WTO General Council Meeting held on 27-28 July 2015; however as one member (Russia) was not in agreement, it was decided to conclude the consultations. Download report at https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/132826/q/WT/BOP/R110.pdf.

the product); iii) specific processing or working requirements or iv) a combination of the first three requirements. The DCFTA also allows bilateral cumulation, meaning that producers in the EU and Ukraine can use materials and components originating in each other's country as if they originated in their own country when seeking to qualify for preferential treatment. For example, when a Ukrainian car producer imports intermediate parts from the EU to manufacture a car, those intermediate parts will be considered as Ukrainian and will not have to be taken into account in the calculation of the maximum threshold of the non-originating materials (i.e. 40%, as explained above).

Implementation perspectives

The provisional application of DCFTA started on 1 January 2016. However, even before this, in April 2014, the EU provided Ukraine with the autonomous trade measures (ATMs) to support its economy in times of crisis. Application of ATMs meant that the EU lowered its import tariff protection to the level of the first year of DCFTA implementation and provided Ukrainian exporters with certain tariff quotas.

Since the DCFTA provisionally entered into force, Ukraine also started the tariff-reduction process on EU goods and introduced certain tariff quotas. In addition to the DCFTA trade regime, Ukrainian exporters will be able to sell goods to the EU under the Generalised System of Preferences (GSP) for two more years. According to the Ministry of Economy of Ukraine, the GSP would provide more liberalised access for 547 Ukrainian goods in 2016 and 424 goods in 2017.

In 2014, at the height of the economic and political crisis in Ukraine, exports to the EU increased by 1.5%, despite an overall contraction of exports by 14.9%. In 2015, despite the suspension of production in the occupied territory and defective logistics, Ukraine's exports to the EU increased by 2% in volume terms;⁵² but the downward price trend in world commodity markets resulted in a fall of 23.4% in nominal terms in US dollars (see Table 4.1). Despite a contraction of nominal trade with the EU, the share of the EU in total

⁵² Mykola Ryzhenkov, Veronika Movchan and Ricardo Giucci, "Trade liberalisation with the EU and its impact on Ukrainian exports in 2015", German Advisory Group in cooperation with the IER Kyiv, Policy Briefing Series [PB/10/2016], Berlin/Kyiv, April 2016 (www.beratergruppe-ukraine.de/wordpress/wp-content/uploads/2016/05/PB_10_2016_en.pdf).

Ukrainian exports of goods increased from 26.5% in 2013 to 34.1% in 2015, as nominal exports to the EU contracted at a slower pace than overall exports of Ukraine (see Table 4.3).

The huge depreciation of the hryvnia (32.8% in 2014 and 45.6% in 2015) and contraction of both consumer and investment demand resulted in lower imports of goods from the EU. Imports from the EU fell by 22.1% in 2014 and by 27.2% in 2015 (see Table 4.1). As imports to the EU decreased at a slower pace than overall imports, the share of the EU in Ukraine's imports increased from 35.1% in 2013 to 40.9% in 2015 (see Table 4.2).

The commodity trade structure also changed during 2013-15. Exports shifted mainly from mineral products and base metals to machinery, animal or vegetable fats and oils, prepared foodstuffs and animal products. Imports from the EU have shifted to minerals in favour of vehicles and machinery and equipment (see Table 4.3).

Table 4.1 Trade turnover between Ukraine and the EU, 2008-15 (\$ mn)

Period	2008	2009	2010	2011	2012	2013	2014	2015
Total turnover	152,489	85,138	112,170	151,002	153,467	140,276	108,330	75,637
Turnover w. EU	46,997	24,892	32,153	43,722	43,237	43,805	38,072	28,361
Growth %	30.1	-47.0	29.2	36.0	-1.1	1.3	-13.1	-25.5
Share %	30.8	29.2	28.7	29.0	28.2	31.2	35.1	37.5
Total exports	66,954	39,702	51,430	68,394	68,809	63,312	53,901	38,134
Exports to EU	18,129	9,499	13,051	17,970	17,081	16,758	17,002	13,017
Growth %	30.3	-47.6	37.4	37.4	-4.9	-1.9	1.5	-23.4
Share %	27.1	23.9	25.4	26.3	24.8	26.5	31.5	34.1
Total imports	85,535	45,435	60,740	82,608	84,658	76,964	54,428	37,502
Imports from EU	28,868	15,392	19,101	25,752	26,156	27,046	21,069	15,343
Growth %	29	-46.7	24.1	34.8	1.6	3.4	-22.1	-27.2
Share %	33.	33.9	31.4	31.2	30.9	35.1	38.7	40.9
Balance with EU	-10,738	-5,893	-6,049	-7,782	-9,075	-10,287	-4,066	-2,326

Source: State Statistics Service of Ukraine.

Table 4.2 Ukraine's trade structure by country or region, 2013 and 2015

	2013				2015			
	Exports (\$ mn)	Exports (%)	Imports (\$ mn)	Imports (%)	Exports (\$ mn)	Exports (%)	Imports (\$ mn)	Imports (%)
EU	16,758	26.5	27,046	35.1	13,017	34.1	15,343	40.9
Russia	15,065	23.8	23,234	30.2	4,829	12.7	7,485	20.0
Other CIS	6,998	11.1	4,697	6.1	2,978	7.8	2,988	8.0
Other Europe	467	0.7	1,582	2.1	294	0.8	1,342	3.6
US	888	1.4	2,759	3.6	481	1.3	1,480	3.9
China	2,726	4.3	7,900	10.3	2,399	6.3	3,770	10.1
Rest of world	20,407	32.2	9,743	12.7	14,133	37.1	5,092	13.6
Total	63,312	100.0	76,964	100.0	38,134	100.0	37,502	100.0

Source: State Statistics Service of Ukraine.

Table 4.3 Commodity structure of Ukraine's trade with the EU, 2015

	2015			
	Exports (\$ mn)	Exports (%)	Imports (\$ mn)	Imports (%)
Total	13,017	100.0	15,343	100.0
Animal products	164	1.3	272	1.8
Vegetable products	2,444	18.8	405	2.6
Fats and oils	678	5.2	47	0.3
Prepared foodstuffs	762	5.9	777	5.1
Mineral products	1,477	11.3	3,492	22.8
Chemical products	416	3.2	2,641	17.2
Plastics, rubber	94	0.7	1,283	8.4
Leathers, skins	106	0.8	91	0.6
Wood	713	5.5	102	0.7
Pulp, paper	61	0.5	571	3.7
Textile	508	3.9	529	3.4
Footwear, headgear	118	0.9	40	0.3
Articles of stone	106	0.8	191	1.2
Precious stones and metals	14	0.1	40	0.3
Base metals	3,066	23.6	777	5.1
Machinery and equipment	1,797	13.8	2,664	17.4

	2015			
	Exports (\$ mn)	Exports (%)	Imports (\$ mn)	Imports (%)
Vehicles, aircraft	158	1.2	871	5.7
Instruments and apparatus	57	0.4	206	1.3
Misc. manufactured articles	259	2.0	214	1.4
Other goods	10	0.1	124	0.8

Source: State Statistics Service of Ukraine.

Tariff-rate quotas (TRQs). Ukrainian exporters were able, under the ATM regime, to export to the EU under TRQs for almost two years before the provisional application of the DCFTA started.

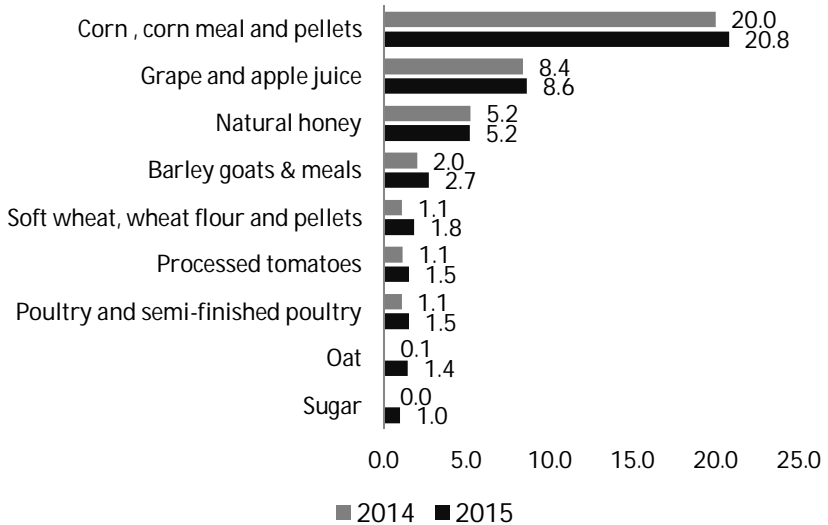
Ukraine's experience of TRQs utilisation during 2014-15 shows that Ukraine was not able to fully use their potential. In 2014 Ukraine fully utilised only six out of 36 TRQs (natural honey, cereals, processed tomatoes, grape and apple juice, wheat, maize), whereas 12 more TRQs were only partially utilised. In 2015 the situation improved slightly as the number of fully utilised TRQs increased to 9 out of 36 (oats, sugar and poultry in addition to quotas fully utilised in 2014). As a result, almost half of the tariff-rate quotas remained unused. Movchan, Kosse and Giucci (2015)⁵³ identify a number of factors limiting the use of TRQs, including non-compliance with EU food safety and SPS standards, insufficient domestic production, orientation towards other export partners, low demand in the EU, and lack of trading partners in the EU.

Another important issue is whether the TRQs are binding, i.e. whether import tariffs outside the quotas are so high that it is too costly to ship goods to the EU above TRQs volumes. Comparison of actual exports to the EU and fully utilised TRQs shows that many quotas are not binding as exports significantly exceed TRQs volume (Figure 4.1). The only clear exception is sugar, where exports in 2015 were equal to the quota amount and the import tariff above quota can reach €507 per tonne for selected product categories. Also, there is a group of products (wheat, processed tomatoes, poultry and oats) where the exports only moderately exceed the TRQs volumes and given data deficiencies, exports still could be bound by the TRQs volumes. Geographical

⁵³ Veronika Movchan, Iryna Kosse, and Ricardo Giucci, "EU Tariff Rate Quotas on Imports from Ukraine", German Advisory Group in cooperation with the IER Kyiv, Policy Briefing Series [PB/06/2015], Berlin/Kyiv, June 2015 (www.beratergruppe-ukraine.de/wordpress/wp-content/uploads/2014/06/PB_06_2015_en.pdf).

diversification helps make the EU's TRQs less onerous. For example, wheat and maize are actively exported to Asia and Africa.

Figure 4.1 Ratio of Ukraine's actual exports to the EU vs. amount of fully utilised TRQs, 2014 and 2015



Since 1 January 2016, when the provisional application of the DCFTA began, both the EU and Ukraine actively used TRQs. As of 11 May 2016, Ukraine has already fully utilised six 'first come, first served' TRQs. Both TRQs for honey and juice were utilised on 4 January 2016. In February Ukraine utilised quotas for sugars (17 February) and barley groats (29 February). The quota for processed tomatoes was closed on 16 March, whereas the TRQ for oats was exhausted on 11 April 2014. Another eight TRQs are partially utilised at the moment. As of 11 May 2016, EU exporters have already fully utilised Ukrainian tariff-rate quota for poultry and semi-finished poultry and partially used the quotas for sugar and pork.

Safeguards. As mentioned above, the car industry received special treatment under the DCFTA. At the start Ukraine's import tariffs are brought down mostly into the 9-10% range, with further gradual elimination during the period from 7 to 10 years. The EU car market also remains relatively closed with the most import tariffs at 10%, which will be gradually eliminated during the seven-year period. However, Ukraine can also apply a special safeguard measure on passenger cars. Starting from the second year of the DCFTA's

implementation, Ukraine can hold its import tariff at the level of 10% for up to 15 years if during the previous year: i) imports from the EU exceeded 45,000 cars or ii) imports from the EU amounted to 25% newly registered cars.

During non-crisis years the imports of passenger cars exceeded 45,000 cars and account for more than 25% of new cars in the domestic market; for this reason, the Ukrainian market is likely to remain protected for EU passenger cars for an additional 15 years. On the one hand, this will create favourable conditions for Ukrainian car producers, but there is only one Ukrainian passenger car producer, ZAZ, which has a full production cycle. The remaining producers, including Bogdan, Eurocar, KrASZ and Vipos, assemble passenger cars under the trademarks of foreign companies. Foreign producers can therefore choose to produce cars in Ukraine in order to avoid the high protection against imports. On the other hand, expensive imports will negatively affect both Ukrainian consumers and the prospects for Ukrainian producers to become integrated with competitive European supply chains.

Ukraine also has other safeguard mechanisms provided by the DCFTA, such as an entry price for worn clothes. Measures for export duties are mentioned above.

Rules of origin. The general rules have been outlined above. In order to be eligible for exporting to the EU, Ukrainian goods should be issued with the certificate of origin 'EUR.1'. However, for the first years of the DCFTA's application, Ukrainian producers can obtain Certificate of Origin Form A, and export goods under the GSP trade regime, as for some goods GSP is more beneficial than DCFTA. Initially, when under the ATM system, the EUR.1 certificates were issued by Chambers of Commerce and Industry. The State Fiscal Service of Ukraine started to issue EUR.1 certificates in 2016 in accordance with the Agreement.

The medium-term priority of Ukraine in the framework of DCFTA is also to join the Regional Convention on Pan-Euro-Mediterranean preferential rules of origin (PEM). As the Convention is based on a network of FTAs with identical origin protocols, joining it allows parties to apply a principle of diagonal cumulation when determining the country of origin of goods. Currently, the parties of the Convention include 42 countries: the EU, EFTA states, Faroe Islands, the Republic of Moldova, participants in the Barcelona Process (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, Tunisia and Turkey), and participants in the EU's Stabilisation and Association Process (Albania, Bosnia and Herzegovina, the former

Yugoslav Republic of Macedonia, Montenegro, Serbia and Kosovo). According to the Final Provisions of Protocol I, the Customs Sub-Committee may decide to replace the rules of origin set out in the DCFTA by the preferential rules of the PEM when Ukraine joins the Convention.

Market access for goods at a glance

Due to political pressure by Russia, the EU and Ukraine postponed the provisional application of the DCFTA to 1 January 2016. However, the EU liberalised access to its market in April 2014 by providing Ukraine with Autonomous Trade Measures (ATMs).

These measures have so far only had a limited impact on Ukraine's exports to the EU due to the suspension of production in the occupied territories, logistical problems and downward price trends for world commodity markets.

However, the EU's share in Ukrainian exports and imports has increased because of a sizeable fall in trade with Russia. The structure of exports to the EU has shifted towards machinery, fats and oils, prepared foods and animal products.

The utilisation of tariff-rate quotas for agricultural products was limited because Ukrainian producers experienced problems with food security and weak demand for its production.

Safeguards for Ukraine's car industry constitute a major source of protection, which will help Ukrainian producers in the short run, but at the expense of their integration into competitive European supply chains, and with costs for consumers.

Joining the Pan Euro-Mediterranean system for rules of origin is an important issue for Ukraine as it will allow the country to apply diagonal cumulation among its members. Ukraine intends to join this system, but so far made no significant progress.

5. TRADE REMEDIES



This DCFTA chapter includes rules on 'trade defence' measures that the EU and Ukraine can take against imports from the other party that cause or threaten to cause injury to the domestic industry, notably anti-dumping, anti-subsidy and safeguard measures. These DCFTA provisions essentially incorporate the relevant WTO rules.

Anti-dumping and countervailing measures.

The anti-dumping provisions that are most actively used rely on Art. VI of GATT (1994), the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures (SCM). If a company exports a product at a price lower than the price it normally charges on its own home market, it is considered to be 'dumping' the product. The WTO agreement allows governments to act against dumping where there is a 'material' injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price) and demonstrate that the dumping is causing injury or threatening to do so. The importing country may then impose an anti-dumping duty to correct any damage to its industry.

The DCFTA adds specific features of the EU's trade defence practice that go beyond the WTO Agreements, such as the 'public interest' and the 'lesser duty' rules. The former implies that a party may decide not to impose anti-dumping or countervailing measures if it is not in the public interest to do so, for example if the interests of consumers or the employment situation were negatively affected. The lesser duty rule implies that the amount of a (provisional) anti-

dumping duty shall not be higher than adequate to remove the injury in the domestic industry. This rule stresses the remedial rather than punitive character of the EU's approach to trade defence.

Until 2005, several Ukrainian exports to the EU were subject to anti-dumping measures, mainly metallurgical and chemical products, in which Ukraine has large production capacities that until recently have benefited from artificially low energy input costs.⁵⁴ The large number of these anti-dumping measures against Ukrainian products is also a reflection of the fact that Ukraine had not yet obtained Market Economy Status (MES) recognition by the EU. This meant that the EU was entitled to use a rather flexible procedure (the analogue country procedure) to determine the dumping margins. After Ukraine obtained the MES in 2005, the calculation of dumping margins had to be done strictly on the basis of costs and prices observed with the Ukrainian producers or the Ukrainian market. More recently the energy costs for its industry have also been aligned to international market prices. As a result the number of EU anti-dumping cases against Ukraine has decreased. Currently, the EU is imposing anti-dumping measures on certain Ukrainian steel pipes, tubes, ropes and cables.⁵⁵

Safeguard measures. This is a separate instrument, reliant on Art. XIX of GATT (1994) and the WTO Agreement on Safeguards. These rules regulate when and how WTO members may take a safeguard action (e.g. quantitative restrictions or duty increases higher than bound tariffs) to protect a specific domestic industry from an increase in imports of any product that is causing, or threatening to cause, serious injury to the industry. The key difference here, compared to the anti-dumping provisions, is that it does not require an 'unfair' practice to be found by particular supplying enterprises or countries. Correspondingly, the safeguard action has to be applied to all WTO member states, and the country imposing these measures may have to pay compensation to other members whose trade is affected. This largely explains why anti-dumping measures are much more used than safeguard measures.

The DCFTA contains one specific safeguard measure protecting that Ukrainian automobile industry. The agricultural sector is also covered by other specific provisions (see chapter 4 for both cases).

⁵⁴ For an overview of all the EU's anti-dumping measures against Ukrainian products, see <http://trade.ec.europa.eu/t di/completed.cfm>

⁵⁵ For an overview of ongoing EU trade-defence investigations against Ukrainian products, see <http://trade.ec.europa.eu/t di/completed.cfm>

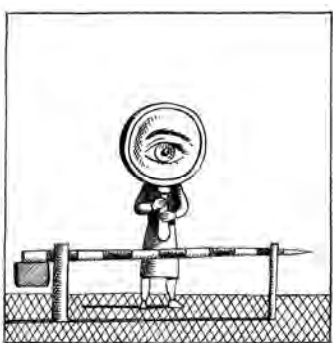
The EU and Ukraine will establish an expert-level 'Dialogue on Trade Remedies' which will serve as a forum for cooperation on these questions. However, the DCFTA provisions on safeguard, anti-dumping and countervailing measures cannot be challenged under the DCFTA's Dispute Settlement Mechanism.

Trade remedies at a glance

There are provisions for anti-dumping, anti-subsidy and safeguard measures to protect the importing economy from serious damage, or threats thereof.

Anti-dumping duties have been applied quite extensively in the past by the EU against Ukrainian supplies of metallurgical and bulk chemical products, but this now occurs less frequently, as Ukrainian industry no longer profits from artificially low energy input costs.

6. CUSTOMS SERVICES



For the DCFTA to work well there have to be a high quality customs services at the frontiers with efficient and speedy facilitation of traffic, avoiding delays and corruption with long queues of heavy trucks. This chapter of the DCFTA seeks to fix key principles for customs legislation and procedures and to enhance operational cooperation between the customs services of the EU and Ukraine.

Provisions of the Agreement

Key principles for customs legislation and procedures. At a general level, the EU and Ukraine commit to ensure that their customs legislation and procedures will be stable and comprehensive, proportionate, transparent, predictable, non-discriminatory, impartial and applied uniformly and effectively, and will prevent fraud. They also aim at reducing and simplifying the data and documentation required by customs agencies.

At the legal and operational levels, the parties undertake the following commitments:

- Adopt the EU's customs code, establish modern transit conditions and cooperation between customs services (see details below).
- Apply relevant international instruments, including those developed by the World Customs Organization and the revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures.

- Apply a single administrative document for customs declarations.
- Provide for advance binding rulings on tariff classification and rules of origin.
- Adopt rules that ensure that any penalties imposed for the breach of customs regulation or procedural requirements are proportionate and non-discriminatory.
- Provide effective and transparent procedures guaranteeing the right of appeal against the administrative actions, rulings and decisions of customs and other agencies.
- With regard to fees and charges imposed by customs authorities, Ukraine must prohibit administrative fees having the equivalent effect of import or export duties. Moreover, fees and charges have to be transparent and made publically available and may not exceed the cost of the service provided by the customs authority.

Customs code. Ukraine will approximate the Modernised Community Customs Code (CCC), laid down in Regulation 450/2008/EC, which sets out the general rules and procedures applicable to goods brought into or out of the customs territory of the EU. The CCC was mainly drafted to implement IT solutions for a simple and paperless environment for customs and trade. It introduces electronic data-processing techniques for all required exchanges of data, accompanying documents and notification between customs authorities and between economic operators and customs authorities. Ukraine is not obliged to implement the entire CCC, however, as Annex XV identifies provisions that are excluded from approximation or where approximation is based only on the 'best endeavours' principle.

The CCC provisions that Ukraine is obliged to implement relate mainly to data protection obligations, information requirements in customs procedures, transparency rules (including procedures to appeal), customs controls, methods of customs valuation, customs declaration, the release of goods, storage of goods, free zones and temporary admission of goods. The CCC was replaced in October 2013 by the Union Customs Code (in Regulation 952/2013/EU).⁵⁶ The new

⁵⁶ See Regulation 952/2013/EU laying down the Union Customs Code. The Regulation entered into force on 30 November 2013 and repealed Regulation 450/2008/EC. In 2015, the European Commission adopted the Delegated Act

Code will complete the progression to a paperless and electronic customs environment and introduces several new procedures. The new procedures will need to be transposed in the DCFTA by the Customs Sub-Committee.

Within three years, Ukraine also has to implement the EU rules on the relief of customs duties as set out in Regulation 1186/2009/EC⁵⁷ and on actions against goods suspected of, or actually infringing, certain intellectual property rights in Regulation 1383/2003/EC.⁵⁸

Transit traffic. The EU and Ukraine are to ensure progressive interconnectivity of their respective customs transit systems, with a view to Ukraine acceding to the Convention of 20 May 1987 on a common transit procedure. This procedure is used for the movement of goods between the 28 EU member states, the EFTA countries, Turkey and Macedonia. Ukraine already has observer status in relation to the Convention and has to fully implement it within a year after the Agreement enters into force.

An action plan for Ukraine's accession to the EU's Common Transit Convention was approved in May 2015.⁵⁹ A crucial step in this regard will be Ukraine's adoption of the New Computerised Transit System, which enables an economic operator to submit common transit declarations electronically.⁶⁰ In addition, Ukraine will have to apply the relevant WTO provisions, such as Art. V of GATT, and adopt any future WTO measures for improving trade facilitation.

and Implementing Act allowing the Union Customs Code to enter into force on 1 May 2016.

⁵⁷ See Regulation 1186/2009/EC of 16 November 2009 setting-up a Community system of reliefs from customs duty.

⁵⁸ See Regulation 1383/2003/EC concerning customs actions against goods suspected of infringing certain intellectual property rights, and the measure to be taken against them. This regulation was repealed in 2013 by Regulation 608/2013/EU concerning customs enforcement of intellectual property rights.

⁵⁹ See Government of Ukraine, "Ukraine begins the process of integration into the EU common transit system", 26 May 2015 (www.kmu.gov.ua/control/en/publish/article?art_id=248186862).

⁶⁰ On the accession procedure of EU neighbouring countries to the Convention on a common transit procedure, see European Commission, "Strategy to prepare certain neighbouring countries for accession to the 1987 EC-EFTA Conventions on a common transit procedure and the simplification of formalities in trade in goods", COM(2010) 0668.

Customs cooperation. The EU and Ukraine are also to strengthen their customs cooperation. The EU and Ukraine have to exchange information concerning customs legislation and procedures, cooperate on the automation of customs procedures, exchange relevant information, best practices and data, cooperate in the planning and delivery of technical assistance, etc. In particular, the DCFTA outlines a procedure for “Mutual Administrative Assistance in Customs Matters”, foreseeing information exchange in cases of suspected or actual fraud under customs legislation.

The DCFTA has also established a Customs Sub-Committee to monitor the implementation and administration of this customs and trade facilitation chapter.

In addition to the DCFTA, the EU and Ukraine have developed other instruments for customs cooperation, notably in the context of the Eastern Partnership. For example, in May 2012 the EU and Ukraine adopted a “Strategic Framework for customs cooperation”.⁶¹ This initiative identified various priority areas, most of which have been taken over by the DCFTA. One particular point of interest relates to *safe and fluid trade lanes* to achieve maximum trade facilitation and enable reliable business, with customs acting as a link in the supply chain. For example, the EU and Ukraine intend to create fast lanes to move pre-approved eligible goods across the border quickly. Recognition of authorised economic operators (AEOs) could be part of this process. In the EU, economic operators can apply for AEO status to benefit from reduced controls and simplified customs procedures. The AEO status is granted to reliable operators that comply with security and safety standards.

Another important instrument in EU–Ukraine customs cooperation is the EU Border Mission (EUBAM), launched in 2005 (see chapter 2).⁶² As an advisory, technical body mandated to enhance the border-management capacities of Moldova and Ukraine, EUBAM plays an important role in strengthening the customs procedures and institutions of these two countries. For instance, EUBAM monitors customs clearance and border guard checks, provides assistance in

⁶¹ See the Strategic Framework for customs cooperation (http://ec.europa.eu/taxation_customs/resources/documents/customs/policy_issues/international_customs_agreements/geomoldukr/strategic_framework_ukraine.pdf).

⁶² This mission is based on a Memorandum of Understanding between the European Commission and the Government of Ukraine and Moldova (http://eubam.org/wp-content/uploads/2015/11/memorandum_of_understanding_en.pdf).

preventing the smuggling of goods and persons, examines border control documents and makes unannounced visits to any locations on the Moldovan–Ukrainian border, including border units, customs posts and revenue accounting offices.

EUBAM's mandate has already been extended four times, with the current mandate expiring on 30 November 2017. The new EUBAM phase will see a strong focus on assisting with the implementation of the DCFTA customs and trade facilitation rules. Much of this work is accomplished using the Mission's Trade Facilitation Working Group set up in 2015 as a platform for communication and cooperation between the relevant national agencies, business and international development partners, such as USAID, the American Chamber of Commerce in Ukraine and the European Business Association. In collaboration with, among others, the EU Directorate-General for Taxation and Customs Union, EUBAM helped to promote reforms related to the AEO (see above).⁶³

Finally, in 2013 the European Anti-Fraud Office and Ukraine signed an Administrative Cooperation Agreement. It sets out a framework for practical cooperation between the EU and the Ukrainian authorities on measures to prevent and detect cigarette smuggling, which include information exchange and joint investigations.⁶⁴

Implementation perspectives

Moving products across the border of Ukraine remains a cumbersome and costly process compared with neighbouring countries. Frequently, vehicles are forced to queue at border crossings for hours, or even days for commercial trucks, waiting for customs clearance and other controls.

According to the World Bank Group's report, "Doing Business 2016", Ukraine is ranked 109 out of 189 countries in the category "Trading across borders", mostly due to the lengthy and costly process of documentary compliance. Problems with documentary compliance were similarly reported by exporters and importers surveyed by the

⁶³ See the 2015 EUBAM report (http://eubam.org/wp-content/uploads/2015/12/Report_2015_ENGL.pdf).

⁶⁴ http://ec.europa.eu/anti_fraud/documents/international-cooperation/list_signed_acas_en.pdf

IER in mid-2015.⁶⁵ While the State Fiscal Services (SFS) of Ukraine claims that 96% of customs declarations were submitted electronically in 2015,⁶⁶ business respondents reported that they occasionally provide both electronic and paper copies of declarations. Moreover, most of the other necessary documents are submitted in paper form, which largely undermines the positive impact of introducing electronic declarations.

Customs valuation remains a problematic issue. Business complains that the customs authorities are still reluctant to use Method 1 of valuation, based on the actual paid price, and tend to apply other methods resulting in artificial changes in customs value. According to the SFS, the transaction cost method was used in 82% of cases in 2015,⁶⁷ while in the EU this method is applied to over 90% of imports. Importers of agro-food products and textiles suffer the most as Method 1 was applied only in 62% and 70% of cases.

Inefficient and corrupt customs are reported to be among the most significant trade barriers by both international observers and Ukrainian business. Customs inefficiency is partly explained by poor equipment and an insufficient number of customs officers working on the border. For instance, in the Lviv oblast, where joint customs controls take place at three out of six vehicle customs checkpoints at the Ukraine–Poland border, there are 20% fewer Ukrainian customs officers than Polish officers. The low wages of customs officers are an additional factor discouraging efficient work and create incentives for corruption.

Corruption scandals have recently stimulated the government to advance reforms to the customs service. In August 2016, ‘single customs windows’ are due to be launched, the duration of controls reduced and additional monitoring equipment introduced to ensure transparency and accountability.⁶⁸ Also, 20 mobile groups composed of representatives of the National Anti-Corruption Bureau, the National

⁶⁵ The survey was conducted as part of the project “Trade Facilitation Dialogue”, funded by the EU (<http://tfd.ier.com.ua/wordpress/en/home/>).

⁶⁶ See the “Report on the implementation of the plan by the State Fiscal Service” (<http://sfs.gov.ua/data/files/131201.pdf>).

⁶⁷ Ibid.

⁶⁸ See the website of the Cabinet of Ministers on the introduction of single customs windows (www.kmu.gov.ua/control/uk/publish/article?art_id=249056564&cat_id=244274130).

Police and the SFS are to be introduced to fight smuggling schemes on the border.

Ukraine has gradually moved forward in fulfilling its DCFTA customs and trade facilitation commitments. Since 2013, the SFS has published binding advance rulings on tariff classification,⁶⁹ although with some delays. Since 2016, the SFS has been responsible for issuing EUR1 certificates for rules of origin, using a procedure equivalent to that of the EU. A status of approved exporter, further simplifying the procedures for complying with the rules of origin, was introduced in 2015, and the Odesa Sparkling Wine Company was the first exporter that obtained this status in February 2016.⁷⁰

In December 2015, a pilot of online administrative services for exporters and importers was launched.⁷¹ It is expected to substantially reduce costs and time spent on documentary compliance in cross-border trade.

The draft law on AEOs was agreed by the government in spring 2016, but still needs to pass through parliament. The AEOs were envisaged in the Customs Code passed in 2012, but the institutional setup was insufficient to make them operational.

The new Customs Code was passed 2012 to bring the Ukrainian legislation closer to international and in particular EU norms. Still, it was amended several times and further changes are in the pipeline to harmonise requirements for AEOs in the EU and Ukraine, further simplify customs clearance and increase the IPR protection in line with EU norms.⁷²

⁶⁹ See the SFS “Registry [of] previous decisions on the classification and coding of goods in the Nomenclature” (<http://sfs.gov.ua/baneryi/mitne-oformlennya/subektam-zed/klasifikatsiya-tovariv/62835.html>); see also the SFS “list of products on which classification decisions [have been] taken” (<http://sfs.gov.ua/baneryi/mitne-oformlennya/subektam-zed/klasifikatsiya-tovariv/62834.html>).

⁷⁰ See “First authorized exporter to Odesa customs” (<http://customs.odessa.gov.ua/otrymaty-status-upovnovazhenogo-eksportera-na-odeskij-mytnytsi-ne-skladno/>).

⁷¹ See “Foreign Trade”, Unified State portal administrative services (<https://posluga.gov.ua/info/services/byservicescope/82>)

⁷² See the “Report on Implementation of the Association Agenda and the Association Agreement between the European Union and Ukraine” (2015) (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248115804&cat_id=247749488).

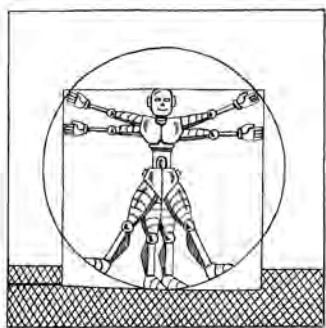
Customs and trade facilitation at a glance

The DCFTA includes key measures to ensure fast and efficient customs services.

Ukraine is progressing towards fulfilling its legislative commitments, with the new Customs Code (2012) being broadly aligned with EU legalisation, although several amendments are still required.

The main task for Ukraine is to ensure efficient implementation of existing legislation. Both public authorities and businesses have responsibilities in this regard. There remain serious problems of long queues and delays at crossing points with EU member states.

7. TECHNICAL STANDARDS FOR INDUSTRIAL GOODS



Customs tariffs between the EU and Ukraine are set to disappear almost completely, so non-tariff barriers such as technical standards will become the main obstacle to trade. In order to tackle these barriers, Ukraine will adopt the relevant EU legislation, standards and procedures. This will be a long and complex process, but one that is fundamental to modernising and making Ukraine's industry internationally competitive.

Provisions of the Agreement

Basic features of the European system. While the system for setting technical standards is highly complex and has been changing over time, its basic, two-level system can be summarised as follows:

- First level: EU harmonisation laws, of which a few 'horizontal' regulations or decisions cover the general methodology and institutional framework, and around 30 directives cover broad 'sectoral' product groups such as 'machinery'. For the product groups the directives outline the 'essential' health and safety requirements they have to meet before they can be placed on the EU market.

- Second level: around 5,000⁷³ product-specific 'harmonised standards' that provide the technical means to comply with the essential health and safety requirements defined in the sectoral product directives. These standards are produced at the request of the European Commission by one of the three technical organisations (CENELEC for electrical products, ETSI for telecommunications equipment and CEN for the largest number of other products).⁷⁴ When the Commission is satisfied with the proposed standards it publishes them in the *Official Journal of the European Union*, so they then have official status as 'harmonised', which are presumed to meet the 'essential requirements' of the applicable directive.

An overview of the harmonised standards, grouped by the existing sectoral product directives, can be found on the European Commission's website.⁷⁵ For example, for the very important category of 'machinery', there is the applicable directive that defines the health and safety requirements, followed by several hundred harmonised standards for specific products or components.

The qualitative difference between directives and standards is that while directives are binding laws, the harmonised standards, while having official recognition, are voluntary for manufacturers who may choose to use them or to apply their own specifications. However, in the latter case the manufacturer still has to prove 'conformity' with the directive, which will usually be a more costly procedure than adopting the harmonised European standards that give automatic conformity with the relevant directive.

When placing a product on the EU market covered by the EU's harmonisation legislation, the manufacturer has to draw up and sign an 'EU Declaration of Conformity' in which he ensures and declares that the products concerned satisfy the 'essential requirements' of the relevant product directive and that the relevant conformity assessment

⁷³ Author's own calculation on the basis of data in the 2014 annual report of the three European standardisation organisations (www.cenelec.eu/Pages/default.aspx and www.etsi.org/)

⁷⁴ CEN: European Committee for Standardisation; CENELEC: European Committee for Electrotechnical Standardisation; ETSI: European Telecommunications Standards Institute.

⁷⁵ European Commission, *Harmonised Standards Index* (http://ec.europa.eu/growth/single-market/european-standards/harmonised-standards/index_en.htm).

procedures have been fulfilled. By signing the EU Declaration of Conformity, manufacturers assume responsibility for the compliance of the product. Only then can a manufacturer affix the 'CE' marking to the product. Products bearing the CE marking are presumed to comply with the applicable EU legislation and benefit from free circulation in the European Market.

Horizontal methodological directives. Important horizontal EU legislation to which Ukraine must approximate are two legal acts of 2008 known as the New Legislative Framework, namely a Decision on a common framework for the marketing of products⁷⁶ and a Regulation on the requirements for accreditation and market surveillance.⁷⁷ The former sets out a common framework of general principles and reference provisions for the marketing of products. It establishes criteria for EU sectoral legislation by providing the definitions of fundamental concepts (e.g. what is "placing on the market" and what are "harmonised standards"?). It also defines the obligations for manufacturers, importers and distributors and defines several modules of conformity assessment procedures, explained below, together with the accreditation requirements. This decision is to be approximated by Ukraine within one year.

In addition, Ukraine has to approximate to a Directive on general product safety,⁷⁸ which imposes general safety requirements on any product placed on the market and defines criteria for when a product is considered safe. Ukraine has to ensure that producers comply with these rules and monitor product compliance with the applicable EU requirements. It will have to identify products that pose a serious risk to health and safety and prohibit such products from being marketed. It also has to put in place a system of liability for defective products, in line with the relevant EU rules.

Sectoral directives. According to Annex III of the Agreement, Ukraine has to approximate to 27 sectoral directives covering a wide range of products such as machinery, lifts, safety of toys, medical devices and simple pressure vessels (see Box 7.1). This task is complicated by the fact that these directives are currently being updated in light of the New Legislative Framework, in particular of the EU's Decision of 2008 on a common framework for the marketing of

⁷⁶ Decision 768/2008/EC.

⁷⁷ Regulation 765/2008/EC.

⁷⁸ Directive 2001/95/EEC.

products, which aims to improve market surveillance and boost the quality of conformity assessments (see further below on conformity rules and procedures).⁷⁹ The 27 directives define 'essential' health and safety requirements for each product group and the specific conformity assessment procedures to be followed (explained further below). Most of the directives have to be approximated within two to three years, although some have four to five years. Annex III lists the 27 sectors but does not indicate the legal references of the directives in question. This is presumably because of the changes under way.

⁷⁹ In order to bring product harmonisation legislation into line with the provisions of Decision 768/2008/EC on common framework for the marketing of products, the EU adopted on 26 February 2014 – thus after the AA was negotiated – an 'Alignment Package' consisting of eight directives beginning to revise those listed in Box 7.1, namely:

- Low Voltage Directive 2014/35/EU
- Electromagnetic Compatibility Directive 2014/30/EU
- ATEX Directive 2014/34/EU
- Lifts Directive 2014/33/EU
- Simple Pressure Vessels Directive 2014/29/EU
- Measuring Instruments Directive 2014/32/EU
- Non-Automatic Weighing Instruments Directive 2014/31/EU
- Civil Explosives Directive 2014/28/EU

In addition, legislation aligned on Decision 768/2008/EC has also been adopted for:

- pyrotechnic articles (Directive 2013/29/EU)
- toy safety (Directive 2009/48/EU)
- restriction of hazardous substances in electrical and electronic equipment (Directive 2011/65/EU)
- recreational craft (Directive 2013/53/EU)
- radio equipment (Directive 2014/53/EU)
- pressure equipment (Directive 2014/68/EU)

Further aligning proposals are pending on:

- medical devices
- gas appliances
- cableways
- personal protective equipment

Box 7.1 Sectoral product legislation for approximation by Ukraine

Cableways	Marine equipment
Construction products	Measuring equipment
Diagnostic medical devices	Medical devices
Electrical equipment	Packaging
Electromagnetic compatibility	Personal protective equipment
Equipment for explosive atmospheres.	Pressure equipment
Explosives for civil use	Radio & telecomm terminals
Gaseous fuels	Recreational crafts
High-speed railways	Refrigerators, freezers
Hot-water boilers	Simple pressure vessels
Implantable medical devices	Toys
Labelling of energy consumption	Transportable pressure equipment
Lifts	weighing machines
Machinery	

European standards. The Agreement requires Ukraine to adopt the ‘corpus’ of European standards, which includes, in addition to the 5,000 harmonised standards, around 24,000 European standards (i.e. standards developed by CEN, CELELEC or ETSI). Clearly, this will be a huge challenge for Ukraine. Because the Agreement does not provide for a transposition timetable, it will have to prioritise its efforts. Ukraine must also repeal any conflicting national standards, such as the GOST standards developed before 1992.

Ukraine has to ensure that its relevant national bodies participate fully in the European and international organisations for standardisation and conformity assessment, including accreditation. Ukraine is also obliged to progressively fulfil the membership conditions for the European standardisation organisations (CEN, CENELEC and ETSI).

Conformity and surveillance procedures. The Agreement envisages wide-ranging cooperation between the two parties in the fields of market surveillance and conformity assessment procedures. Moreover, the parties have to promote cooperation between their respective public or private organisations responsible for these matters.

As noted above, Ukraine has to approximate to the Decision of 2008 on a common framework for the marketing of products.⁸⁰ This Decision establishes a highly complex set of differentiated models (called ‘modules’ in the text) for conformity assessment procedures. The sectoral directives covering the different product groups identify

⁸⁰ Decision 768/2008/EC.

which module of conformity assessment is required. For certain groups of products that could pose a risk to the public (e.g. pressure vessels, lifts and certain machine tools), a conformity assessment by a third party is required before placing the product on the market. These third parties are laboratories, inspection and certification bodies, which are known generally as 'conformity assessment bodies', or more formally as 'notified bodies'. When implementing this decision, Ukraine will have to guarantee that its notified bodies offer all guarantees of independence, objectivity, impartiality, confidentiality and professional integrity. For various low-risk products, manufacturers can make the 'declaration of conformity' themselves.

Ukraine also has to approximate to the EU's 2008 Regulation⁸¹ that lays down rules on the requirements for accreditation of conformity assessment bodies and for market surveillance of products to ensure that products placed on the EU market fulfil the specific health and safety requirements defined in the sectoral EU legislation. This regulation includes detailed rules on how a national accreditation body (i.e. the body that evaluates whether a conformity assessment body meets the specific requirements) should be organised. There has to be a single national accreditation body, operating with impartiality and objectivity, and on a non-profit basis.

Ukraine will have to establish and maintain surveillance authorities that monitor and control whether products placed on its market meet EU health and safety requirements. These market authorities must perform checks on the characteristics of products through documentary, physical and laboratory checks. The surveillance authorities must have the competence to withdraw products from the market that pose a serious risk. However, a decision to withdraw products from the market has to be proportionate, communicated to the relevant economic operators and must state the exact grounds on which it based. Moreover, Ukraine would have to notify the Commission of such a decision and notify it to Rapid Alert System for dangerous non-food products (RAPEX).

The Agreement also aims to conclude an Agreement on Conformity and Assessment and Acceptance of Industrial Products (ACAA). ACAAs are a type of mutual recognition agreement envisaged by the EU for any country of the eastern or southern parts of the European Neighbourhood Policy and the Western Balkan countries. By concluding an ACAA, the parties agree that industrial products listed in the annexes of an ACAA and fulfilling the

⁸¹ Regulation 765/2008/EC.

requirements for being lawfully placed on the market of one party may be placed on the market of the other party, without additional testing and conformity assessment procedures. However, before concluding an ACAA, Ukraine would first have to fully implement its obligations related to EU directives, including the harmonised standards, and accreditation and conformity assessment institutions, described above. These reforms will be closely monitored by the EU institutions. An ACAA would consist of a framework agreement, providing for the recognition of equivalence of the conformity assessment, verification and accreditation procedures, and one or more annexes setting out the products covered. The sectors to be covered by the first ACAA between the EU and Ukraine are simple pressure vessels, low voltage equipment, electromagnetic compatibility and machinery. More sectors can be added later.

Relations with third countries. Ukrainian producers are entirely free to manufacture for export to third-country markets, such as Russia, according to those countries' own technical standards. On the import side, the question is more sensitive, as exemplified by the difficult 'trilateral' dialogue between Ukraine, the EU and Russia on the implications of the DCFTA for Russia. Once the sectoral EU directives are implemented, imports, including those from Russia, will have to meet the essential health and safety requirements of those directives before they can be placed on the Ukrainian market. These products do not have to be produced according to the EU's harmonised standards per se as they are voluntary. However, only products from third countries that follow the EU's harmonised standards will have the 'presumption of conformity' to be placed on the Ukrainian – and EU – market.

Implementation perspectives

Recently, Ukraine has progressed significantly with harmonisation with relevant EU legislation, the transposition of EU standards, the elimination of outdated Soviet norms and the development of the relevant structures. In August 2015, the Cabinet of Ministers adopted a Strategy for the Development of the Technical Regulation System until 2020 (the TBT Strategy),⁸² aimed at the elimination of technical barriers in trade with the EU, thereby stimulating the modernisation of Ukraine's economy. The Strategy envisages the harmonisation of technical regulations with EU law (the list of EU norms appears in the

⁸² See <http://zakon5.rada.gov.ua/laws/show/844-2015-%D1%80>.

Action Plan accompanying the TBT Strategy), a development of institutions and infrastructure and a preparation for signing the ACAA. The export of Ukrainian products to the EU market without additional testing and conformity assessment procedures is one of the expected results following implementation of the Strategy.

Horizontal legislation. By now, Ukraine's national legislation has largely aligned with the relevant EU horizontal legislation, explained above, but is still awaiting the official evaluation by the European Commission. There are six key laws in the sphere:

- Law No. 2735-VI on State Market Surveillance and Control over Non-food Products⁸³ (2010, last amended 2015)
- Law No. 2736-VI on General Safety of Non-food Products⁸⁴ (2010, last amended 2015)
- Law No. 3390-VI on Liability for Damage Caused by Defected Product⁸⁵ (2011)
- Law 1315-VII on Standardisation⁸⁶ (2014, last amended 2015)
- Law No. 1314-VII on Metrology and Metrological Activity⁸⁷ (2014, last amended 2015)
- Law No. 124-VIII on Technical Regulations and Conformity Assessment⁸⁸ (2015)

The Strategy foresees the development of a secondary legislation for laws on metrology and metrological activity and on technical regulations and conformity assessment to ensure that the horizontal laws are properly implemented. In addition, the laws on technical regulations and conformity assessment and on market surveillance require further modification, in particular to remove a duplication of functions of various public bodies, simplify procedures and increase responsibility of involved parties.

Sectoral legislation. Ukraine has intensified reforms in the sphere of technical regulations since the country joined the WTO in 2008; over 40 technical regulations have been passed, using the EU directives as a basis. By the end of 2014, technical regulation for 24 out

⁸³ See <http://zakon3.rada.gov.ua/laws/show/2735-17>.

⁸⁴ See <http://zakon3.rada.gov.ua/laws/show/2736-17>.

⁸⁵ See <http://zakon5.rada.gov.ua/laws/show/3390-17>.

⁸⁶ See <http://zakon3.rada.gov.ua/laws/show/1315-18>.

⁸⁷ See <http://zakon3.rada.gov.ua/laws/show/1314-18>.

⁸⁸ See <http://zakon3.rada.gov.ua/laws/show/124-19>.

of 27 sectors envisaged in the DCFTA were adopted, and 17 implemented.⁸⁹

These technical regulations were not identical to the EU directives, however, which is a precondition for the conclusion of an ACAA. The government of Ukraine is therefore currently working on the completion of sectoral legislation alignment with the support of the EU technical assistance projects. By the end of 2015, eight technical regulations had been closely aligned with the corresponding EU directives,⁹⁰ including most of the sectors earmarked for the first round of the ACAA like electromagnetic compatibility, electrical equipment and machinery. Alongside the alignment of sectoral legislation with the EU directives, the government has to cancel other legal norms like sanitary and labour safety norms that contain additional mandatory requirements regarding product characteristics, production methods and processes, and hence duplicate technical regulations. In January 2016, the government made an important step forward in this sphere by cancelling numerous sanitary, epidemiologic and hygienic norms adopted before 1991. This decision will enter into force on 1 January 2017.⁹¹

Ukraine's plan for harmonisation of technical regulations with the EU norms does not focus exclusively on the 27 sectors foreseen in the DCFTA. Technical regulations in other sectors are also set for alignment with the EU legislation, e.g. with REACH.

Adoption of standards. As of 1 January 2016, there were 17,889 national standards in Ukraine, including 10,964 aligned with the international and European standards.⁹² Compared to previous years, two major changes occurred. First, the total number of standards was reduced by 40% from 29.6 thousand documents in 2014. Second, the

⁸⁹ "Report on Implementation of the Association Agreement between the European Union and Ukraine (September 2014 – January 2015)" (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248115804&cat_id=247749488).

⁹⁰ "Report on Implementation of the Association Agenda and the Association Agreement between the European Union and Ukraine (2015)" (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248115804&cat_id=247749488).

⁹¹ See www.kmu.gov.ua/control/uk/cardnpd?docid=248850007.

⁹² "Report on the Implementation of the Association Agenda and the Association Agreement between the European Union and Ukraine (2015)" (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248115804&cat_id=247749488).

number of national standards harmonised with international ones increased by 24% compared to 2013 a year before and their share doubled from 30% to 60% in total.

The changes were mostly due to the abolition of obsolete GOST standards from before 1992, as required by the DCFTA (see above). In 2015, the Ministry of Economic Development and Trade annulled 14.1 thousand GOSTs, a great acceleration compared to 122 standards withdrawn in 2014 and 3.8 thousand in 2006-13.

In parallel, Ukraine intensified alignment with international and European standards: 4,792 standards, almost half of all international standards adopted over the years of independence, were adopted in 2014-15.

Importantly, access to national standards has improved significantly. Most standards can be bought and downloaded online at <http://shop.ukrndnc.org.ua/ua/about>, supported by the national standardisation authority.

Standardisation: institutional setup. In accordance with the new law on standardisation enacted in 2015, standardisation was passed from the public body to an independent non-governmental national standardisation authority, namely to the state-owned enterprise 'Ukrainian Scientific Research and Training Centre for Standardisation, Certification and Quality' (UkrNDNC). This institution has become responsible for the organisation and coordination of standardisation activities, including setting up technical committees for the standardisation, adoption and abolishment of standards, and to represent Ukraine in international bodies.

Over 170 technical standardisation committees embracing representatives of all stakeholders, have been registered under the auspices of the UkrNDNC, and to ensure a proper balance of interests among stakeholders, the Management Board, as an advisory and supervisory body of the national authority on standardisation, and the Appeals Commission were established.

The UkrNDNC has already received confirmation of its membership in the International Standardization Organization (ISO) and the International Electrotechnical Commission (IEC), an international counterpart of the CENELEC.

Ukraine's State Service of Technical Regulation, a predecessor of the UkrNDNC, had been an affiliate member of the CEN⁹³ and the CENELEC.⁹⁴

Metrology. The law on metrology adopted in 2014 completely changed the principles and institutional structure of metrological activity in the country and aligned it with European and international norms. The new national metrology system has been developed based on norms and practices of the International Organization of Legal Metrology (OIML),⁹⁵ in particular the OIML international document "Elements for a Law on Metrology,"⁹⁶ the EU, the WTO and other international organisations.

Accreditation. The National Accreditation Agency of Ukraine (NAAU), an independent authority in the sphere of accreditation, was established in 2002 by the Ministry for Economic Development and Trade. Together with the NAAU, the Accreditation Council, the Technical Committee on Accreditation and the Appeals Commission were set up. To ensure a balance of interests, the Accreditation Council consists of representatives of three groups of stakeholders, namely central public authorities, accredited conformity assessment bodies and other stakeholders (i.e. representatives of business, expert community, academia and civil society organisations). The impartiality of NAAU is guaranteed by law.

The NAAU is an associate member of the European Cooperation for Accreditation (EA) and signed several bilateral agreements with the EA, which recognises and accepts the equivalence of the operated accreditation systems,⁹⁷ as well as the reliability of the conformity-assessment results provided by conformity assessment bodies.⁹⁸

⁹³ See <https://standards.cen.eu/dyn/www/?p=CENWEB:9:::NO:::>

⁹⁴ See www.cenelec.eu/dyn/www/?p=web:9.

⁹⁵ Ukraine is a member of the International Organization of Legal Metrology (OIML), www.oiml.org/en/structure/members/contactmember_view?IDCountry=222&CountryName=UKRAINE&iso=UA&M=2.

⁹⁶ See www.fundmetrology.ru/depository/04_IntDoc_all/D_E_1.pdf.

⁹⁷ See www.european-accreditation.org/the-mla.

⁹⁸ "Report on Implementation of the Association Agenda and the Association Agreement between the European Union and Ukraine (2015)" (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248115804&cat_id=247749488).

In addition, the NAAU is a full member of the International Laboratory Accreditation Cooperation (ILAC). In 2014, it signed several Mutual Recognition Agreements with the ILAC regarding assessment and accreditation of conformity assessment bodies according to two international standards: ISO/IEC 17025 and ISO/IEC 17020. The accreditation bodies that signed the ILAC MRA were peer-evaluated in line with ISO/IEC 17011 requirements to prove their competence.⁹⁹

Conformity assessment and market surveillance. The new law on technical regulations and conformity assessment adopted in 2015 established unified principles of conformity assessment in line with the EU and WTO norms and practices and stipulates that the mandatory certification of products, an archaic element of the Soviet system, will no longer be in force by 2018.¹⁰⁰ The register of the conformity assessment bodies for specific technical regulations has been available online at the Ministry of Economic Development and Trade website.¹⁰¹

The market surveillance and control over non-food products is regulated by the law passed in 2010 and developed according to EU norms and practices. However, further changes in market surveillance legislation are expected to increase the efficiency of the system.

Currently, the State Service on Food Safety and Consumer Protection (SPSA) is the key responsible authority in the sphere of non-food products market surveillance. Formally established in 2015, this Service was launched only in 2016. It will require some time to develop its institutional and technical capacity and thus ensure efficient market surveillance.

To sum up, Ukraine made significant progress in its approximation to EU legislation in the sphere of technical regulations. Now, major efforts are required to ensure the proper implementation of these changes, including capacity development of the institutions involved in standardisation, conformity assessment and market surveillance, and the creation of adequate infrastructure. EU technical assistance is expected to play a key role in this process.

⁹⁹ See <http://ilac.org/ilac-mra-and-signatories/>.

¹⁰⁰ Compared to 2009, the list of products subject to mandatory certification reduced by 70%.

¹⁰¹ See <http://me.gov.ua/Documents/List?lang=uk-UA&tag=Otsinka-pidverdzhenniaVidpovidnosti>.

Technical standards for industrial goods at a glance

The adoption of European technical standards for industrial products is vital for the modernisation and competitiveness of the Ukrainian industry.

Ukraine has adopted a Strategy for Development of Technical Regulation System until 2020 to eliminate technical barriers in trade with the EU.

Ukraine is making good progress in first approximating the limited EU relevant directives, and second in adopting the huge number of European standards.

Ukraine's national accreditation system achieved recognition from the European Cooperation for Accreditation and the International Laboratory Accreditation Cooperation.

Progress in establishing proper market surveillance system is proving more difficult.

8. FOOD SAFETY REGULATIONS



The chapter officially entitled “Sanitary and PhytoSanitary Measures” (SPS) concerns the food safety standards required to facilitate trade in agricultural and food commodities and plants covered by SPS regulations, and to safeguard human, animal and plant life or health (Art. 59). The key mechanism is for the law of Ukraine to approximate its SPS law to that of the EU, with procedures to establish their effective

equivalence. The Agreement also aims to reach a ‘common understanding’ on animal welfare standards.

Provisions of the Agreement

Approximation. The Agreement did not itself define the list of laws to be approximated, but instead required Ukraine to submit a Comprehensive Strategy for the implementation of EU SPS standards within three months of its entry into force. In February 2016 agreement was reached between Ukraine and the European Commission on the contents of the Comprehensive Strategy, which is a list of roughly 255 EU regulations and directives. This sets out the implementation schedule for each regulation or directive (see below and Figure 8.1 in particular).

Equivalence. Rules are established for recognising the equivalence of measures taken by Ukraine with those of the EU, or for groups of measures, for sectors or sub-sectors, and commodities or groups of commodities (Art. 66). The process should be launched by the exporting party based on the “objective demonstration of equivalence” and the “objective assessment of this demonstration” by

the importing party. This should be an interactive process. It is then for the importing party to determine equivalence or not, or to withdraw or suspend equivalence, based on internationally recognised standards or proper scientific evidence. Verifications may be made by the importing party, for which there are detailed rules. Where equivalence is recognised there will be a reduction of physical checks at frontiers and simplified procedures.

Audits are conducted by the EU to verify that SPS conditions are being met. For example an audit conducted in 2015 on cereal seeds was positive: “Overall, the national authorities responsible for implementation of seed certification in Ukraine are competent and operate appropriately. Once the abovementioned minor shortcomings have been addressed, seed produced in Ukraine can be considered equivalent to seed produced in the EU”.¹⁰²

Trade conditions. When the approximation has been fully undertaken the import conditions for the products or sectors in question shall apply to the whole territory of Ukraine as exporting country (Art. 69). However, this still requires that enterprises wishing to export to the EU obtain certification from the ‘competent authority’ of Ukraine, which has to guarantee that the establishment meets the relevant health requirements of the EU and has the power to suspend the establishment’s listing in the case of non-compliance (Art. 4 of Annex VIII).

Pests, animal and plant diseases. There are detailed provisions for handling problems of animal or plant diseases and of pests. The diseases and pests in question are listed (Annex VI). Procedures are established to recognise the pest-free status of given regions for the purpose of trade and for the notification of risks to public, animal or plant health through diseases.

Safeguard measures. Where the importing country needs to take measures to control a serious health hazard or risk it may take provisional restrictive measures affecting imports, but these have to be suitable or proportional in order to minimise the disruption to trade.

SPS Sub-Committee of the Association Council. This sub-committee has the task of reviewing the implementation of the SPS chapter and may *inter alia* decide upon modifications to the annexes. Decisions shall be taken on the basis of consensus of the parties.

¹⁰² Ukraine, audit number 2015-7641, “Cereal seed and their equivalence with EU requirements” (http://ec.europa.eu/food/fvo/audit_reports/details.cfm?rep_id=3499).

Pre-existing import arrangements. The EU maintains a comprehensive system for the regulation of imports of agri-food products from third countries world-wide to assure their compliance with its SPS requirements, notably under Regulation 854/2004/EC on rules for the organisation of controls of products of animal origin.

This Regulation first of all sets the rules for the approval within the EU itself of 'establishments' (i.e. slaughterhouses, or food processing factories) and requires that officially designated 'competent authorities' carry out or organise controls to verify compliance with SPS requirements. However, this Regulation goes on to establish comparable rules for approving establishments in third countries for the purpose of exporting to the EU market. These arrangements are currently being used by Ukraine and will remain in force while the provisions of the Agreement are implemented. The most active categories of recognised establishments and the number of enterprises recognised are as follows:

- Meat from poultry, rabbits - 4
- Fishery products - 16
- Dairy plants - 34
- Facilities handling animal by-products - 34
- Processing plants - 22
- Pet food plants - 23
- Fertiliser and soil improvers - 7

These lists show that a considerable number of Ukrainian agri-food enterprises producing commodities of animal origin are already recognised for exporting to the EU in compliance with its SPS requirements.

This mechanism can effectively continue to be used and expanded alongside entry into force of the Agreement, since its requirements are the same as those in Art. 69.2-5, described above. The enterprises in question have to comply with the same relevant SPS regulations as set out in the SPS strategy. Others may lag behind, but this does not hold back the more progressive export-oriented enterprises.

In conclusion, total SPS compliance for the whole of the territory of Ukraine is an ambitious long-term objective, and the system will take a number of years to become effectively applied throughout the agri-food sector. In the meantime, procedures exist for those enterprises willing and able to comply with export certification for the EU. This is an important element of effective flexibility in the Agreement and can help avoid excessive costs of compliance.

In addition, there are provisions within the EU to exempt small-scale production from various SPS requirements (Regulation 853/2004/EC on hygiene rules). For example, hygiene rules do not apply to production for private domestic consumption, or small quantities supplied to local retail establishments and markets. Ukraine remains free to apply similar exemptions for local markets.

Implementation perspectives

Early legislation. Development of the national SPS system in Ukraine started in 1991, when the first legislation was passed. Since then, Ukraine developed relevant legislation and infrastructure aimed at the protection of human health and safety of plant and animal products.

WTO accession. Reforming the SPS system was an integral part of Ukraine's accession to the WTO. As a result, all SPS regulations in Ukraine are already consistent with the provisions of WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Harmonisation occurred without transition periods.

Ukraine is also a member of Codex Alimentarius, the Office International des Epizooties (OIE) and the International Plant Protection Convention (IPPC).

Types of control. According to the Customs Code of Ukraine, the current SPS system requires three types of border control: sanitary and epidemiological, veterinary and sanitary, and phytosanitary control.

Sanitary and epidemiological control aims to protect the territory of Ukraine from the spread of infectious diseases and to test the compliance of goods with the sanitary standards. This type of control is obligatory, mainly for imported food products, some consumer products and for the export of sunflower oils. Transit of farm produce, however, is not subject to sanitary and epidemiological control.

Veterinary and sanitary control aims to prevent the spread of animal diseases. It is applied for exports, imports and transit of animals, animal products (including meat products, eggs, milk, fish and honey), reproductive material, biological products, pathological material, veterinary preparations, animal-care products, feed additives, premixes and feeds.

The purpose of phytosanitary control is to prevent the spread of pests and supervise quarantine regimes. This type of control is applied for exports, imports and the transit of plants and plant products (including food products), packaging, means of transportation, soil and other products that spread regulated pests.

Institutional infrastructure. Development and implementation of policies on SPS is directed and coordinated by the Cabinet of Ministers of Ukraine through the Ministry of Agriculture and Food of Ukraine, the Ministry of Economic Development and Trade and the Ministry of Healthcare of Ukraine. Before 2016, the main operational authorities were the State Sanitary and Phytosanitary Service of Ukraine, the State Inspection for Consumer Protection of Ukraine and the State Sanitary and Epidemiological Service of Ukraine.

The State Sanitary and Phytosanitary Service of Ukraine¹⁰³ conducted veterinary and sanitary control, supervised animal health, the safety and quality of all food products and feeds, and protected Ukraine from pathogens of dangerous diseases. The State Sanitary and Epidemiological Service of Ukraine,¹⁰⁴ among other functions, performed sanitary measures to protect the country against the entry and spread of dangerous (including quarantine) infectious diseases, conducted sanitary and epidemiological supervision and control at checkpoints across the state border, and supervised compliance with sanitary standards. The State Inspection for Consumer Protection of Ukraine¹⁰⁵ was an authorised consumer rights protection body. It conducted state control for compliance with the legislation on consumer protection and carried out market surveillance for compliance with technical regulations.

As part of the administrative reform, the system of main operational bodies in the SPS sphere was revised. The single State Service on Food Safety and Consumer Protection of Ukraine (SPSA)¹⁰⁶ was established by reorganising the State Sanitary and Phytosanitary Service and merging it with the State Inspection for Consumer Protection and the State Sanitary and Epidemiological Service. The new State Service was launched in spring 2016.

Legislation. In order to implement its SPS-related obligations under the Association Agreement, in February 2016 Ukraine adopted a Comprehensive Strategy for Sanitary and Phytosanitary Measures. This entails adopting 255 EU directives and regulations. Most of the legislation should be passed in 2015-19 with major implementation to occur in 2016-20 (see Figure 8.1), aimed at closing the gap between Ukrainian and EU SPS-related legislation and infrastructure.

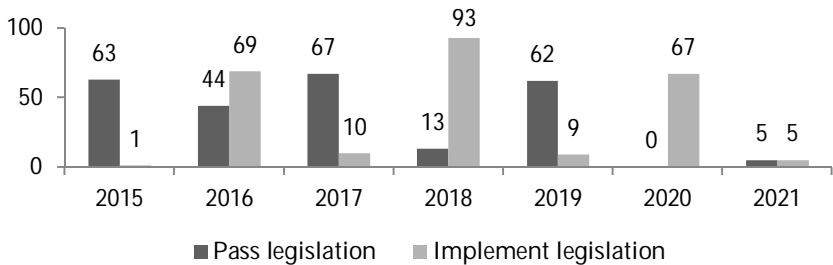
¹⁰³ See www.vet.gov.ua/.

¹⁰⁴ See www.dsesu.gov.ua/ua/.

¹⁰⁵ See www.dsiu.gov.ua/.

¹⁰⁶ Decree of the Cabinet of Ministers No. 442 of 10 September 2014.

Figure 8.1 Schedule for approximating SPS legislation of the EU



These legislative changes will cover the following ground:

- *Principles and requirements for food and feeds safety* - on official controls, rapid alert system, traceability and veterinary checks.
- *Labelling and information on foodstuff* – on health and nutrition claims for foods, vitamins and minerals.
- *Hygiene rules* – approximation of hygiene rules for food of animal products, temperatures in transport and storage, etc.
- *Food additives* – regulations on additives, enzymes and flavourings.
- *Packaging materials* – best EU practices on manufacturing of materials and articles intended to come into contact with food.
- *Animal health* – on health protection of bovine and porcine animals, poultry, live fish, crustaceans, molluscs, bees and other mammals, etc.
- *Animal diseases* – legislation on swine vesicular disease, African horse sickness, bluetongue, infectious salmon anaemia (ISA), etc.
- *Identification and registration of animals* – of equidae, bovines, ovine and caprine animals as well as swine.
- *Animal welfare standards* – EU standards of stunning and slaughter of animals, as well as farming animals should be implemented.
- *Plant health* – on plant health checks, standardisation of plant passports, control of certain plant diseases, phytosanitary certificates, etc.
- *Protection of plant variety* – Ukraine should apply the EU approach to plant protection rights.
- *Registration of plant protection products* – labelling requirements, maximum residue levels of pesticides, etc.
- *Fertilisers* – a number of regulations and directives should be adopted.

- *Seeds* – regulations on marketing of different seeds, minimum conditions for seeds and related field inspections.
- *Regionalisation/zoning and compartmentalisation* – requirements for regions, buffer and quarantine zones.
- *Genetically modified organisms (GMO)* – traceability of the products containing GMO, labelling requirements and provisions on inspections.

Box 8.1 Technical assistance projects

The EU implements significant technical assistance projects to support the work of the State Veterinary and Phytosanitary Service of Ukraine to get in line with European standards. One important project, costing €3.9 million, aims to improve the food safety control system 'from farm to fork'. Another project costing €2.6 million will supply laboratory equipment and software to increase the range of tests undertaken by state food laboratories and strengthen database collection and processing.

Likely impact of SPS reforms. Proper implementation of Ukraine's SPS-related obligations under DCFTA will contribute dramatically to the development of its agriculture and food industry, improvement of consumer protection rights and protection of human, animal and plant health. Given the huge potential of Ukraine's agriculture to export to European and world markets the task of getting Ukrainian SPS standards fully in line with best EU and international practice is of the highest importance. The most promising markets for export expansion may well be in Asia rather than Europe, but approximation of EU standards becomes a brand asset and a sufficient technical qualification for accessing many world markets.

Continuing improvement of food safety will allow Ukrainian companies to gain greater access to the EU market. For example, in 2014 a number of meat and egg producers were recognised for exporting to the EU, and in 2015 some dairy enterprises and producers of fertilisers were recognised similarly.

After approximation of Ukrainian legislation to EU standards, animal and plant products will face lower non-tariff barriers to enter the EU market. In addition, obtaining access to the EU market will have a positive externality in facilitating access to the markets of the third countries. Costs will be lowered through easier trade procedures, including fewer import permits and inspections. With the introduction

of risk management by the state authorities, less suspicious products will be subject to less onerous physical inspections.

Consumers will benefit from better quality of products and better protection of consumer rights. Yet Ukrainian producers will face higher costs in order to comply with higher quality standards. Producers of high-quality goods will benefit from higher legislative pressure on low-quality producers.

Some small producers will be hit by higher costs, but under EU regulations the authorities retain considerable flexibility in defining how local markets and traditional regional specialities may be exempted from full compliance with SPS standards. Moreover, in the next few years before the new SPS regime is fully established in Ukraine, there remains the possibility for individual export-oriented enterprises to be recognised by the EU as SPS-compliant. Ukraine's 2020 agriculture strategy prioritises the expansion of the number of enterprises individually recognised in this way.

Government policy on SPS is expected to be more transparent. Also, Ukraine will be able to apply best European experience in the application of early warning systems on SPS-related emergencies. The system of government bodies will be better structured and coordinated.

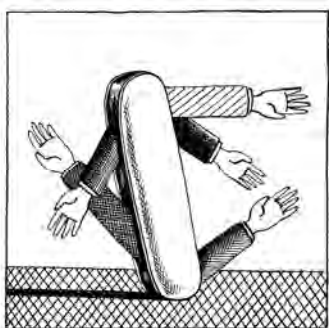
Food safety regulations at a glance

Ukraine adopts a comprehensive strategy for applying EU SPS regulations in its agri-food sectors, which is programmed to take approximately 6 years to implement.

This will assure high health and safety standards for Ukraine consumers, as well as position Ukrainian enterprises to export in EU and other international markets.

For the time being individual enterprises can still be certified by the Ukrainian authorities for exporting to the EU, ahead of the SPS standards being applied across the entire territory of Ukraine.

9. SERVICES



Development of a dynamic and competitive service sector is of huge importance for the modernisation of the Ukrainian economy. In this regard the DCFTA provides for a comprehensive and extremely detailed liberalisation of establishment and trade in services, subject still to reservations - more by the EU than Ukraine. For several services sectors, the agreement envisages the integration of Ukraine into the EU

Internal Market. However, this far-reaching integration is conditional upon Ukraine's approximation to the relevant EU legislation.

Provisions of the Agreement

The provisions of the agreement are organised under three headings i) establishment, ii) cross-border supply of services and iii) temporary presence of natural persons for business purposes.

Establishment. This entails the right of either enterprises ('legal persons'), or individuals ('natural persons') to pursue business in the country of the other party. Enterprises may create or acquire branches or representative offices. Individuals may pursue their business as self-employed persons or set up undertakings that they control.

The Agreement provides for national treatment and MFN treatment for establishment. This means that the EU and Ukraine must grant the 'established' enterprises treatment no less favourable than that accorded to its own enterprises, or those of any third-country, whichever is better.

However, for several service sectors both the EU and Ukraine have reservations that restrict this national treatment or MFN

treatment. These reservations are laid down in the annexes to the agreement (Annex XVI-A and D) and essentially replicate the parties' reservations under the WTO's General Agreement on Trade in Services (GATS), which entered into force in 1995.¹⁰⁷ Ukraine has fewer reservations than the EU and its member states (see Table 9.1). Ukraine's liberal approach mainly reflects the fact that it has only a few reservations at the level of the WTO (i.e. in its Schedule of Specific Commitments on Trade in Services).¹⁰⁸ It is important to note that these reservations in the DCFTA are listed in a *negative list*. This means that the EU and Ukraine will, by default, open up all services sectors, except those sectors listed in which reservations apply (as detailed in the annexes). This approach guarantees automatic coverage for new services not listed as exceptions.

Ukraine has for example some important reservations with regard to land ownership (i.e. foreign citizens and persons without citizenship have no right to the acquisition of agricultural land). In several other areas, Ukraine requires that the service provider must have Ukrainian nationality (e.g. notary services, ownership of forests or directing educational institutions), or must obtain a licence (e.g. several postal activities), or must meet professional qualification requirements according with Ukrainian legislation (e.g. medical and dental services; health-related and social services). Ukraine has also no national treatment or MFN obligations for air transport services and national cabotage transport.

The list of EU reservations is complicated by a distinction between horizontal and sectoral reservations and includes both EU-wide and member state-specific reservations. With regard to horizontal reservations (i.e. reservations applying to all sectors or sub-sectors), important EU-wide reservations concern, for example, economic activities that are considered as public utilities or may be subject to public monopolies. Several member state-specific reservations exist, for example, for real estate purchase. Numerous EU-wide or member state-specific reservations remain in the area of agriculture and

¹⁰⁷ For an overview of the parties' reservations under the GATS, see <http://i-tip.wto.org/services/Search.aspx>.

¹⁰⁸ [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(\(%20@Symbol=%20wt/acc/ukr/*%20or%20wt/I/718%20or%20wt/I/718/*%200\)%20or%20\(%20@Symbol=%20wt/min*%20and%20@Title=%20\(accession%20and%20working%20and%20party%20and%20ukraine\)\)\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((%20@Symbol=%20wt/acc/ukr/*%20or%20wt/I/718%20or%20wt/I/718/*%200)%20or%20(%20@Symbol=%20wt/min*%20and%20@Title=%20(accession%20and%20working%20and%20party%20and%20ukraine)))&Language=ENGLISH&Context=FomerScriptedSearch&languageUICChanged=true#)

hunting, fishing, energy mining, professional services, financial services, transport services, etc.

The agreement also includes a standstill clause that forbids, subject to the reservations in the Annex, the EU and Ukraine to adopt new discriminatory regulations as regards the establishment of legal persons of the other Party by comparison with their own legal persons. A soft commitment is included to further negotiate investment protection provisions and an investor-state dispute settlement mechanism.

Table 9.1 National treatment or MFN reservations to establishment

	EU party reservations		Ukraine reservations
	<i>EU-wide reservations</i>	<i>Member state-specific reservations*</i>	
Horizontal reservations	3	22	0
Sectoral reservations	21	59	21
Total	105		21

* The number of member state-specific reservations stands for the number of reservations that are being applied by different EU member states.

Cross-border supply of services. The DCFTA section on cross-border supply of services covers both:

Cross-border supply, from the territory of a party into the territory of the other party without the supplier's presence in the importing country (GATS Mode 1), and

Consumption abroad, where a service consumer (e.g. a tourist or patient) moves to another country's territory to obtain a service (GATS Mode 2).

However, it does not apply to audio-visual services, national maritime cabotage and domestic and international air transport services.¹⁰⁹ The EU and Ukraine have to accord services and service suppliers of the other Party market access and national treatment. However, contrary the section on establishment, the section on cross-border supply of services works with a positive list. This means that the EU and Ukraine only make market access and national treatment commitments in those service sectors listed in the annex.

¹⁰⁹ The conditions of mutual market access in air transport are covered by the bilateral Common Aviation Area Agreement (explained in the transport chapter).

In the sectors where market access commitments are undertaken, the EU and Ukraine may not limit:

- (i) the number of service suppliers (e.g. by quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test);
- (ii) the total value of service transactions or assets in the form of quotas or the requirement of an economic needs test; or
- (iii) the total number of service operations, the total quantity of service output by quota or the requirement for an economic needs test.

The sectors or subsectors liberalised, including the applicable market access and national treatment reservations, are listed in great detail in Annex XVI-B (EU and its member states) and XVI-E (Ukraine). However, the liberalisation is – similar to establishment – rather asymmetrical: whereas Ukraine only has a limited number of reservations or unbound service sectors in its list, the EU has numerous reservations (Table 9.2). Again, this is mainly due to Ukraine’s liberal approach in the GATS.

Table 9.2 Market access and national treatment reservations for cross-border services

	EU		Ukraine	
	<i>Mode 1</i>	<i>Mode 2</i>	<i>Mode 1</i>	<i>Mode 2</i>
Business services	79	23	4	0
Communication services	2	2	1	1
Construction and related engineering	0	0	0	0
Distribution services	13	4	0	0
Educational services	11	8	0	0
Environmental services	1	0	0	0
Financial services	33	13	5	0
Health services and social services	3	1	2	0
Tourism and travel related services	4	0	0	0
Recreational, cultural, sporting services	5	7	4	0
Transport services	25	11	8	0
Other services	2	2	3	0
Energy services	12	1	0	0
Total	190	72	27	1

Notes: EU reservations above are both EU-wide and individual member state reservations. EU-wide and member state-specific reservations are grouped together. The number of member state-specific reservations stands for the number of reservations that are being applied by different EU member states.

Temporary presence of natural persons for business purposes.

This section covers measures of the parties concerning the entry into and temporary stay in their territory of categories of natural persons providing services such as “key personnel” (i.e. senior personnel responsible for the setting-up or operation of an establishment), or as an “independent professional” (i.e. persons engaged in the supply of a service and established as self-employed for such purposes).

With regard to key personnel, a legal person of the EU party or of Ukraine is entitled to employ employees who are nationals of the other party respectively. The residence and work permits of such employees only cover the period of such employment and the entry and temporary stay of such employees shall be for a period of up to three years. The entry and temporary presence of business visitors will be for a period up to 90 days in any 12-month period.

Legal persons of the EU or Ukraine are also entitled to employ graduate trainees who are nationals of the other party for a period of up to one year. The EU and Ukraine will also allow the temporary entry and stay of sellers of business services for a period of up to 90 days in any 12-month period.

The DCFTA also partly liberalises services provided by contractual services suppliers in 18 sectors. However, this liberalisation is subject to several conditions and reservations. Important conditions are, for example, that the natural persons must be engaged in the supply of a service on a temporary basis as employees of a juridical person, which has obtained a service contract not exceeding twelve months. Moreover, they must possess at least three years professional experience in the relevant sector and must have a university degree or a qualification demonstrating knowledge of an equivalent level and relevant professional qualifications. The reservations are listed in two Annexes (EU reservations in Annex XVI-C and Ukraine’s reservation in Annex XVI-F). The EU party has again more reservations than Ukraine.¹¹⁰ Whereas Ukraine only imposes limited reservations in the area of research and development services and entertainment services, several or most of the EU member states have specific reservations in each of the 18 listed sectors, such as the requirement of an economic needs tests (i.e. a test that conditions market access upon the fulfilment

¹¹⁰ Whereas the EU party has in total 82 reservations (member state reservations or EU-wide reservations), Ukraine has only 2 reservations (the number of member state-specific reservations stands for the number of reservations that are being applied by different EU member states).

of certain economic criteria). Similar or identical conditions and reservations also apply for the six sectors for which the parties liberalise the supply of services by independent professionals.¹¹¹

Regulatory framework and Internal Market treatment. The EU and Ukraine also aim to tackle regulatory barriers to trade in those services sections where they have made specific commitments. For example, the DCFTA defines some basic rules for licensing (i.e. the process through which a service supplier or investor is required to obtain a license from a competent authority before being allowed to supply a service). The DCFTA requires that licensing and licensing procedures proceed in clear, transparent and pre-established manner, and that it is proportionate to a legitimate public policy objective and made public. The agreement also envisages the mutual recognition of necessary qualifications and/or professional experience that natural persons must possess to provide a specific service. The EU and Ukraine shall encourage their relevant professional bodies to make recommendations to the Trade Committee on mutual recognition of requirements, qualifications, licenses and other regulations.

In four services sectors, i.e. i) postal and courier services, ii) electronic communications, iii) financial services and iv) international maritime transport, the DCFTA includes specific rules and procedures on regulatory cooperation and even envisages a far-reaching integration into the EU internal market on the basis of legislative approximation. Ukraine has committed itself to approximate to the EU's key legislation in these four services sections (included in Annex XVII). After the EU has determined, after a strict monitoring procedure, that Ukraine has effectively implemented these EU rules, the Trade Committee may grant reciprocal "internal market treatment" with respect to the services concerned. This internal market treatment means that there shall be no restrictions on the freedom of establishment of juridical persons of the EU or Ukraine in the territory of either of them and that juridical persons of one Party shall be treated in the same way as juridical persons of the other Party. This shall also apply to the freedom to provide services in the territory of the other Party.¹¹² In practice, this means that for these four specific sections, the reservations of the EU and Ukraine to market access and national treatment, listed

¹¹¹ These six sectors are i) legal services, ii) architectural services, iii) engineering services, iv) computer services, v) management consulting services and vi) translation services.

¹¹² Art. 4 Annex XVII.

in the corresponding annexes, will be lifted.¹¹³ The Agreement defines detailed rules on how Ukraine has to implement and enforce this legislation in its domestic legal order and how the EU shall monitor this implementation.¹¹⁴

These sectors are discussed in further detail in the chapters concerned.

Box 9.1 Summary of commitments and reservations of the EU and Ukraine for service sectors

EU

Reservations on establishment: *substantial horizontal and sectoral national treatment reservations*

Commitments on liberalisation of cross-border supply of services: *large liberalisation, but with extensive reservations*

Commitments on contractual services and independent professionals: *extensive reservations*

Ukraine

Reservations on establishment: *substantial national treatment reservations*

Commitments on liberalisation of cross-border supply of services: *large liberalisation with few reservations*

Commitments on contractual services and independent professionals: *almost no reservations*

Ukrainian perspectives

Ukraine's service industry is one of the most important sectors of Ukrainian economy. It employs around 63% of the country's workforce and is the major contributor to its GDP (66%).¹¹⁵ 65% of Ukrainian enterprises (state and private) and 91% of private entrepreneurs work in services. The sector was steadily growing by 10-12% per year until

¹¹³ Annex XVI-A, point 1(3) and Annex XVI-B point 7.

¹¹⁴ Annex XVII.

¹¹⁵ Services include trade, repair and maintenance, transportation, postal and courier services, accommodation and food services, information and telecommunications, finance and insurance, real estate, professional, scientific and technical services, administration, state governance and defence, education, healthcare, culture, sports and recreation, and other services.

2014 when its volumes dropped by 2% due to the unstable political and economic situation in Ukraine. In 2015, the service industry volumes increased by 38% to UAH 1301 bn.

The biggest number of companies and entrepreneurs works in trade and automobile maintenance (60%), professional, scientific and technical activities (7%) and information and telecommunications (7%). At the same time, the biggest employers are trade and automobile maintenance (35%), education (14%) and healthcare (10%) sectors. This shows, first, that trade attracts most entrepreneurs and, second, that there is a vast public sector in education and healthcare.

One of the fastest growing service sectors is the **IT service and software R&D** sector. Ukrainian developers often work on mobile, software, enterprise and web projects solving complex engineering tasks. Ukraine also has the largest and fastest-growing number of IT professionals in Europe (90,000 of IT professionals in 2015, the highest number in Europe). The main destination of Ukrainian IT firms is the US market (around 80% of exported IT services). The export volume of Ukraine's software development industry reached around \$2.5 billion in 2015 (third largest export sector), showing double digit growth year after year.¹¹⁶ Moreover, Ukraine is home to over 100 R&D subsidiaries of global companies from a variety of industries, including telecoms, software, gaming and e-commerce.

The Association Agreement will impact the IT sphere mainly via legislative regulation of the rights of both suppliers and consumers of IT services. The key issue here is protection of intellectual property rights according to the EU's E-commerce Directive 2000/31/EC, whose key provisions are enshrined in the DCFTA IPR Chapter (see chapter 11 of this handbook). Stronger intellectual property rights legislation in Ukraine will mean for the business higher protection of investments into new technologies and innovations thus increasing investment attractiveness of the country.

The Ukrainian **financial sector** was hard hit by the events of the beginning of 2014 and its banking system has structural weaknesses: "high rates of related-party lending, the short open currency position of many banks, the high ratio of non-performing loans to total banks

¹¹⁶ Ukraine Digital News (<http://itonews.eu/report-ukraine-powerhouse/>).

assets"¹¹⁷ in addition to hryvnia depreciation. To stabilise the system, the National Bank of Ukraine closed around a third of all banks in Ukraine (54 out of 180) and stress-tested 35.¹¹⁸ During 2013 – first half of 2015, credit volumes decreased by 15% year over year, lending to enterprises decreased by 9% while lending to households fell by 57%. Ukraine experienced also a significant outflow of foreign capital from the system: the share of foreign investment decreased from 34% on January 1, 2014 to 24.8% on June 1, 2015. The DCFTA requirements related to the **banking industry** mean the introduction of new macro-prudential supervision tools aimed at strengthening financial stability, implementation of Basel II principles, progressive introduction of free movement of capital, improvement of monetary and financial statistics.

The **insurance sector** of Ukraine despite being treated with caution due to low consumer confidence and thus low demand for insurance products, nevertheless, holds "definite long-term potential".¹¹⁹ Many segments, in particular life and health insurance, are underdeveloped with low penetration rate. The DCFTA requires measures of prudential supervision on the insurance market to protect investors, policyholders and beneficiaries.

The **healthcare system** in Ukraine is highly inefficient with oversized and fragmented infrastructure. The government health expenditures account for about 4.2% of GDP, the rest in patients' out-of-pocket expenditures. Ukraine has 2,400 hospitals and 300,000 beds which is twice the number of Spain, a country with a similar population. Yet crude adult death rates in Ukraine are higher than in its neighbours, Moldova and Belarus, and for its men among one of the highest in the world. For the healthcare, the DCFTA is important mainly in the light of the intellectual property rights protection which includes medicinal products and protection of exclusive data of medicinal testing.¹²⁰ In the sphere of protection of biotechnological inventions Ukraine protects the inventions according to its national

¹¹⁷ World Bank Group, "Ukraine Partnership: Country Program Snapshot", April 2015 (www.worldbank.org/content/dam/Worldbank/document/Ukraine-Snapshot.pdf).

¹¹⁸ Ukraine: banking sector overview ([www.ey.com/Publication/vwLUAssets/ey-ukraine-banking-sector-overview/\\$FILE/ey-ukraine-banking-sector-overview.pdf](http://www.ey.com/Publication/vwLUAssets/ey-ukraine-banking-sector-overview/$FILE/ey-ukraine-banking-sector-overview.pdf)).

¹¹⁹ BMI, "Ukraine Insurance Report", 1 January 2016.

¹²⁰ Arts 219-223.

patent laws. Ukraine also has to harmonise its technical regulations for medicinal products with that of the EU.¹²¹

For the **labour market**, the mutual opening of markets for natural persons for business purposes (e.g. independent professionals and key personnel) can lead to increased competition on the Ukrainian market and, accordingly, to higher qualification levels in certain spheres. Moreover, Ukrainian contractual service suppliers and independent professionals will have access to the EU market. For example, the employer will obtain rights for the computer programs created by a hired professional under the labour contract (now both the employer and the employee have the rights). This will induce the employers looking for IT professionals in Ukraine to formalise their relations via labour contracts and thus 'de-shadow' the IT market in Ukraine. However, as illustrated above, the EU has imposed numerous reservations in this area. The Agreement doesn't make it easier for Ukrainian professionals to find job in the EU. On the contrary, it stimulates EU employers to establish companies in Ukraine and Ukrainian companies to provide services to the Europeans.¹²²

In **telecommunications**, the Agreement envisages new rules for setting tariffs, mutual access to networks, new regulation methods, market liberalisation, strengthening the regulator. "All in all, the level of trade liberalisation and the parties' concessions in trade in telecommunications services do not go far beyond the commitments under the GATS. The value-added of this agreement seems to lie elsewhere, namely in its detailed provisions on domestic regulation."¹²³ Thus, as before, EU companies cannot provide telecom services directly to customers in Ukraine on a cross-border basis since, according to Ukrainian laws, only a locally incorporated company may provide these services in Ukraine. A foreign company also cannot apply for any telecom or frequency license. It can operate in Ukraine only through a local subsidiary (whether wholly or partially owned).

¹²¹ Annex III to the TBT Chapter states that Ukraine will approximate to the EU sectoral (New Approach) Directives in the area of medical devices, active implantable medical devices and in vitro diagnostic medical devices.

¹²² See <http://europa-torgivlia.org.ua/it-business/>.

¹²³ Olga Batura and Olga Kretova, "Opportunities of Trade in Services between the EU and Ukraine: the Case of Telecommunications Services under the GATS and the Association Agreement", ZERP-Working Paper No. 1/2015.

For **audio-visual services**, Ukrainian legislation has to follow major European principles in this sphere: ¹²⁴ everyone (not just institutions licensed under the laws of Ukraine) has the right to freedom of expression and freedom to receive and impart information without interference by public authorities. According to the audio-visual media services Directive, which Ukraine should implement within two years of the entry into force of the DCFTA (Annex XXXVII), “governments may not restrict which broadcasts people can receive or what programmes foreign broadcasters can retransmit in their country” if the broadcasts comply with the Directive.¹²⁵ European standards do not require legislative authorities of Ukraine to encourage full public disclosure of information on ownership and control in the media sector (although Ukraine has every right to go beyond the requirements of European standards, introducing stricter requirements for media). However, audio-visual services are exempted from the DCFTA both for establishment and cross-border supply.

Reforms in services sector are under way. As a step to implement international monitoring standards in financial services, the National Bank of Ukraine approved the “Methodology of comprehensive assessment of systemically important payment systems” that complies with the key principles of oversight standards: management of the payment organisation; risk management; finality of settlements in the payment system; requirements on access, participation and participation structure in the payment system; efficiency and effectiveness of the system; information disclosure. The Ministry of Finance is currently working on “Risk criteria for legalisation (money laundering) of crime proceeds, terrorist financing and financing of weapons of mass destruction” which sets the requirement for mandatory risk assessment for all clients receiving financial or other services.

In the IT and electronic commerce sector, the Parliament adopted a Law on electronic commerce which harmonises Ukrainian legislation to that of the EU in the sphere of innovative technologies and electronic trade. The Government also prepared a draft Law on electronic trust services, which develops a unified system of electronic trust services and introduces mutual recognition of Ukrainian and foreign public key certificates and electronic signatures and seals.

¹²⁴ According to European Convention on Transfrontier Television of 1989.

¹²⁵ See <https://ec.europa.eu/digital-single-market/en/general-principles>.

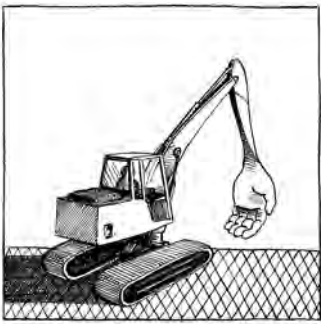
Services sector at a glance

A competitive and diversified services sector is of huge importance for the Ukrainian economy.

The Agreement is detailed and comprehensive in both commitments to liberalisation and reservations. The text is asymmetric, with more liberalisation and fewer reservations on the Ukrainian side, which however is consistent with the urgent need for the Ukrainian economy to be modernised.

The Agreement makes provisions for a few services sectors to attain 'full internal market treatment' by the EU as a long-term objective.

10. PUBLIC PROCUREMENT



Public procurement is of great economic importance to both the EU and Ukraine; it accounts for around 18% of GDP in the EU and offers enormous potential market for Ukrainian companies. The DCFTA provides for the gradual and reciprocal liberalisation of the parties' public procurement markets under the strict condition that Ukraine implements the EU's key public procurement rules.

Ukraine has to ensure that the public purchase of goods, works and services are transparent and fair, guarantee sound competition, tackle corruption and get the best value for taxpayers' money.

Provisions of the Agreement

In the DCFTA chapter on public procurement the EU and Ukraine envisage mutual access to their respective public procurement markets, based on the principle of national treatment at national, regional and local level for public contracts and concessions in traditional sectors and for utilities. It covers any state, regional or local authority, including public undertakings in the field of utilities, such as state-owned enterprises and private undertakings operating on the basis of special and exclusive rights. Defence procurement is not covered.

The DCFTA procurement rules only apply to contracts above certain value thresholds listed in Annex XXI-P (Table 10.1). The agreement states that these thresholds should be adapted at the

moment of entry into force of this agreement to reflect the thresholds in place under the EU directives.¹²⁶

Table 10.1 Thresholds for application of public procurement rules

	Threshold
a. Public supply and service contracts awarded by central government authorities	€133,000
b. Public supply and public service contracts not covered by point a.	€206,000
c. Public works contracts and concessions	€5,150,000
d. Works contracts in the utilities sector	€5,150,000
e. Supply and service contracts in the utilities sector	€412,000

The DCFTA includes provisions relating to i) institutional reforms and the award of procurement contracts, ii) Ukraine's approximation to the EU's public procurement laws and iii) market access.

Institutional reforms. Ukraine has to establish and maintain an appropriate institutional framework for the proper functioning of its public procurement system. In particular, Ukraine has to designate a central executive body that guarantees coherent economic policy in all areas related to public procurement, which will also be responsible for the implementation of this chapter. Ukraine also has to establish a separate, impartial and independent body that will review decisions taken by contracting authorities or entities during the award of contracts.

Award of contracts. The DCFTA also defines "basic standards regulating the award of contracts", which are derived directly from EU public procurement law and include the principles of non-discrimination, equal treatment, transparency and proportionality. Ukraine has to comply with these basic standards no later than six months after the entry into force of the Agreement. Ukraine has to ensure that all its intended procurements are properly published to enable the market to be opened up to competition and to allow any interested economic operator to have access to information regarding the intended procurement prior to the award of the contract.

¹²⁶ Commission Regulation (EU) No 1336/2013 of 13 December 2013 amending Directives 2004/17/EC, 2004/18/EC and 2009/81/EC of the European Parliament and of the Council in respect of the application thresholds for the procedures for the awards of contract.

Concerning the award of contracts, these basic standards state that all contracts have to be awarded through transparent and impartial award procedures that prevent corrupt practices. This impartiality has to be ensured, especially through a non-discriminatory description of the subject matter of the contract, equal access for all economic operators and appropriate time limits. Contracting entities may not impose conditions that directly or indirectly discriminate against the economic operators of the other party, such as the requirement that economic operators interested in the contract must be established in the same country, region or territory as the contracting entity. The final decisions are to be communicated to all applicants, and upon the request of an unsuccessful applicant, reasons must be given in sufficient detail to allow a review of the decision.

Legislative approximation. This DCFTA chapter includes detailed rules on Ukraine's approximation to the EU public procurement law. Ukraine is obliged to approximate to Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, and Directive 2004/17 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (i.e. utilities). However, these two Directives do not have to be implemented in their entirety and at once. Annex XXI divides these two Directives into mandatory elements and elements that fall outside the scope of legislative approximation.

Directive 2004/18 covers most public contracts other than for utilities, telecommunications and service concessions. It obliges the contracting authorities to treat economic operators equally, non-discriminatorily and in a transparent way. It provides for four types of contract procedures: i) open (i.e. any party may submit a bid), ii) restricted (i.e. any party may ask to participate and the contracting authority decides which parties to invite to submit a bid), iii) negotiated (i.e. the contracting authorities negotiate directly the terms of a contract) and iv) competitive dialogue (i.e. for very complex contracts the contracting authority may discuss requirements and solutions with candidates admitted to a procedure, before the candidates submit their final tender). With regard to transparency, this directive requires the publication of all public contract notices in the EU's *Official Journal* and in the TED database, which is the public procurement database of the EU.¹²⁷ All publications must contain identical information, such as the deadlines for the bids, language(s), award criteria and their relative

¹²⁷ See <http://ted.europa.eu/TED/main/HomePage.do>.

weighting so as not to favour any bidder. Most of this Directive's provisions are labelled in Annex XXI as 'mandatory' and therefore need to be implemented by Ukraine.

Directive 2004/17 applies to supply, works and services contracts in the energy, water, transport and postal services sectors. Like Directive 2004/18, this one provides rules, most of which are mandatory, on the procedures for the awarding of public procurement contracts (i.e. an open, restricted and negotiated procedure), rules on publication and transparency, contract award criteria and conditions for participation. Finally, Ukraine also has to approximate to the EU's remedies Directives (covering the utilities and public sector), which require that decisions taken by contracting authorities or contracting entities may be reviewed effectively and as quickly as possible where such decisions have infringed EU public procurement law.¹²⁸

Market access. This DCFTA chapter clearly links market access to Ukraine's progress in approximating to the annexed EU public procurement rules and institutional reforms. Annex XXI includes an "indicative time schedule for institutional reform, legislative approximation and market access" (hereinafter "the indicative time schedule"). This time schedule sets out five phases indicating the provisions of the EU public procurement Directives that Ukraine has to implement and the specific market access that Ukraine and the EU will grant to each other (Table 10.2). The market access granted in each phase implies that the EU shall grant access to contract award procedures to Ukrainian companies – whether established or not in the EU – that is no less favourable than that accorded to EU companies and vice versa. This schedule also indicates that the EU and Ukraine will open their respective procurement markets gradually and simultaneously. Unlike other DCFTA chapters such as trade in goods, the EU will not grant access to a section of its procurement market until Ukraine offers the same market access to the EU. Moreover, each phase shall be evaluated by the Trade Committee and the reciprocal granting of market access will only take place following positive assessment by this Committee, which will take into account the quality of Ukraine's legislation, as well as its practical implementation. The Trade Committee shall only proceed to the evaluation of the next phase once the measures to implement the previous phase have been carried out and approved.

¹²⁸ Directive 89/665/EEC and Directive 92/13/EEC as amended by Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

Table 10.2 Indicative time schedule for approximation of public procurement rules

Phase	Action	Indicative time schedule (period after the entry into force of the DCFTA)	Market access granted to EU by Ukraine	Market access granted to Ukraine by EU
1	Implementation of the basic standards, the institutional reforms and the public procurement roadmap	6 months	Supplies for central government authorities	Supplies for central government authorities
2	Implementation of the basic elements of Directive 2004/18 EC and of Directive 89/665/EEC	3 years	Supplies for state, regional & local authorities & bodies governed by public law	Supplies for state, regional and local authorities & bodies governed by public law
3	Implementation of basic elements of Directive 2004/17 EC and of Directive 92/13/EEC	4 years	Supplies for all contracting entities in the utilities sector	Supplies for all contracting entities
4	Implementation of other elements of Directive 2004/18 EC	6 years	Service & works contracts & concessions for all contracting authorities	Service & works contracts & concessions for all contracting authorities
5	Implementation of "other elements" of Directive 2004/17/EC	8 years	Service & works contracts for all contracting entities in the utilities sector	Service & works contracts for all contracting entities in the utilities sector

Prior to the beginning of legislative approximation, Ukraine has to submit a comprehensive roadmap to the Trade Committee for the implementation of this procurement chapter (hereinafter: the public procurement roadmap), covering all reforms in terms of legislative approximation and institutional capacity building. This roadmap has to comply with the five phases of the indicative schedule of Annex XXI (Table 10.2). Following a favourable opinion by the Trade Committee, this roadmap will be considered as the reference document for the implementation of this chapter.

It is important to note that the EU public procurement Directives included in the DCFTA have since been replaced by a new legislative package. In 2011 the Commission proposed the revision of Directives 2004/17 and 18 and the adoption of a Directive on concession contracts. This legislative package was adopted in February 2014 and member states have until April 2016 to transpose the new rules into their national law.¹²⁹ These new public procurement rules aim to simplify the EU procurement regime, introduce more flexibility, establish better access to EU procurement markets for SMEs and ensure that greater consideration is given to social and environmental criteria. Once the DCFTA enters into force, it will be crucial that Annex XXI be updated to take into account these new EU procurement Directives. Moreover, these new public procurement rules should also be covered in Ukraine's public procurement roadmap. While these new directives did not change the basic framework of the EU's public procurement system, which is mainly covered in phase 1 of the DCFTA's indicative time schedule, the numerous novelties need to be transposed in the DCFTA. At a technical level the Commission and the Ukrainian authorities already agreed on the elements of the new directives to be transposed to the agreement. The public procurement roadmap, drafted by the Ministry of Economic Development and Trade, already takes account of these new directives (see below).

Implementation perspectives

Public procurement policy reform has been a government priority for several years and remains so, given the general government deficit and

¹²⁹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC; Directive 2014/23/EU on the award of concession contracts.

the need for fiscal consolidation and greater efficiency in public spending.

Ukraine started legislating on public procurement when negotiating membership of the WTO. The basis for this was the WTO Government Procurement Agreement (signed by WTO members in 1994). The Cabinet of Ministers approved several resolutions in 1997-98¹³⁰ with a view to introducing WTO principles on procurement. In particular, it approved the principles for procurements by central and local government entities, enterprises and organisations, if they are subject to budget financing or credits guaranteed by the government. These provisions were defined for the procurement of works, services and goods above UAH 10, 000. Special procurement procedures were allowed for construction works. Overall, these regulations were evaluated to be in compliance with international practice and WTO provisions, and in 2000 they were consolidated into the single law.¹³¹ While a welcome step, the law had several drawbacks: it set low thresholds for the purchase of services and goods (UAH 20, 000 and UAH 50, 000, respectively); it also made the Tender Chamber of Ukraine (a non-government entity) a platform for state procurement, which became known for corruption, non-transparent procedures and expensive services. SMEs were de facto excluded from participating in public procurements. There were many delays in organising and conducting tenders – all factors that led to the abolition of this law in 2008.¹³²

A long-debated public procurement reform finally occurred in 2010, when the state procurement Law became effective.¹³³ The law was positively evaluated by the expert community in Ukraine and international organisations, including the European Commission. The law envisaged more transparent rules for state procurements, even though it did not fully comply with the EU law. However, almost immediately the Parliament amended it and extended the number of exceptions for which procurements should be conducted according to special procedures (e.g. the purchase of energy, housing and utility services were taken out of the scope of the Law). As a result, the

¹³⁰ No. 694 from 28 June, 1997; No.1058 from 24 September, 1997; No.1369 from 1 September, 1998.

¹³¹ Law No. 1490-III from 22 February, 2000.

¹³² This Law was abolished according to the Law No.150-VI from 20 March, 2008.

¹³³ The Law No. 2289-VI from 1 June, 2010 (became effective on July 30, 2010).

European Commission suspended its budget support programmes in Ukraine and only resumed them after the amendments to the Law on public procurement were introduced in order to make the procedures more transparent. In July 2011, the President signed the amendments to the state procurement Law,¹³⁴ the key novelties of which included changes to the rules of state procurement with a single bid procedure and a reduction in the number of goods and services whose purchase had been excluded from the Law. The inclusion of procurement of housing and utility services under the Law can be considered as a positive step. However, state and municipal enterprises, which did not receive budget support and perform procurement on account of their own working capital, were removed from the scope of the Law. The decision whether to conduct a tender or not was to be made at the discretion of such enterprises. Besides, it was claimed that a lack of control over the procurement procedures involving a single participant led to more corruption, as the Ministry of Economic Development and Trade was not responsible for authorising such a procurement procedure. Overall, in four years the State Procurement Law of 2010 was amended more than 20 times, mainly to increase the list of exemptions, which did not bring it closer to EU standards.

In April 2014, the Parliament approved a new State Procurement Law,¹³⁵ whose key provisions were harmonised with EU rules.¹³⁶ The law was drawn up by the Ministry of Economic Development and Trade with the aim to increase transparency and openness in the area of procurements, to simplify procedures, reduce corruption and approximate legislation to the EU norms. The law extended the list of procuring entities to be covered, reduced the list of exemptions and narrowed the grounds for non-competitive procedures. Changes were introduced for conducting procurements in utilities (e.g. notion of "special or exclusive rights" was introduced in compliance with EU norms). The openness of state procurements was ensured by publication of information on all tenders on the special web-portal (www.tender.me.gov.ua).

¹³⁴ The Law No. 3681-17 from 8 July 2011.

¹³⁵ The Law No. 1197-VII from 10 April 2014.

¹³⁶ For detailed analysis of the compliance of the Law with the EU rules, see S. Yaremenko and O. Shatkovskiy, "Commentary on Ukrainian Public Procurement Legislation", Harmonisation of Public Procurement System in Ukraine with EU Standards, 5 November 2014 (<http://eupublicprocurement.org.ua/wp-content/uploads/2014/12/Commentary-to-Ukrainian-PP-legislation-ENG-031220141.pdf>).

The Ministry was defined as the authorised government entity in public procurements, while the Antimonopoly Committee was an appeal entity. Such institutional arrangements complied with the EU Directive 2004/18. The only provision of this Directive that was not in the law, but should have been implemented within six months of the Association Agreement becoming effective, related to the provision that entitled the entity that did not win the tender to receive clear explanations for rejection. Overall, according to the plan approved by the Ministry, the harmonisation of Ukrainian legislation with the EU directives was to be implemented according to the 'roadmap' for public procurement reform.¹³⁷

Still, according to estimates of the Ministry, losses from corruption and low competitiveness in public procurements accounted for nearly 20% of procurement spending in 2014.¹³⁸ As procurements were paper-based, they often resulted in the non-transparent selection of the winner, with possible changes of documents and difficulties of control by stakeholders. To increase the efficiency of budget spending and reduce corruption the government promised to introduce e-procurement in compliance with EU standards, which is envisaged in the DCFTA. As a result, the Ministry has initiated a pilot scheme for e-procurements through a system called ProZorro.¹³⁹ On 12 February 2015, the Ministry of Justice, the Ministry of Defence, the State Management of Affairs and the state-owned company Energoatom conducted pilot e-procurements¹⁴⁰ through ProZorro, which became possible thanks to amendments to the State Procurement Law in January. Six e-trading markets were connected to ProZorro (Prom.ua, SmartTender.biz, E-tender.biz, NEWTEND, NEtCast and PublicBid). Other central executive bodies joined e-procurement in 2015.

The system allows for small-scale e-procurements of goods and services up to UAH 200, 000 and up to UAH 1.5 million, respectively, (before October 1, it was UAH 100, 000 and up to UAH 1 million, respectively), which are not subject to the general Law on Public

¹³⁷ The Plan of Implementation of the Directive 2004/18/EC, approved by the Ministry of Economic Development and Trade, 15 November, 2015 (<http://new.me.gov.ua/news/7460.html>).

¹³⁸ See http://reforms.in.ua/sites/default/files/upload/docs/7.1_20150514_nrc_public_procurement_presentation_v9_a4_dr_0.pdf.

¹³⁹ See <http://prozorro.org/>. Currently the system belongs to the Transparency International. After the completion of pilot stage of its work the System will be provided to the Government. The pilot was prolonged to the end of 2015.

¹⁴⁰ See www.president.gov.ua/news/32246.html.

Procurement. During the pilot phase, the ProZorro was administered by Transparency International, and its creation and operation was financed by international donors and user fees. Overall, during the first year of work 73.5 thousand tenders were conducted through ProZorro at a total amount of UAH 15.3 billion. The savings are officially estimated to be 14% of allocated financing.

At the end of December 2015, the Parliament approved the Public Procurement Law drawn up by the government. The law mostly complies with the norms of the Directives 2014/24/EC and 2014/25/EC. The exception relates to the compulsory e-auctions regulation envisaged in the Law (according to the EU directives such auctions are not compulsory). In Ukraine the requirement of compulsory e-auctions is officially explained by traditionally high corruption in public procurements. Still, according to the Ministry of Economic Development and Trade this provision was already agreed with the European Commission. All central executive bodies and state-owned natural monopolies have had to conduct procurement through ProZorro since 1 April 2016, and other public entities will have to switch to ProZorro starting 1 August 2016. In particular, ProZorro should be used for purchases of goods and services above UAH 200,000 and for works above UAH 1.5 million (these thresholds are raised for procurement of natural monopolies to UAH 1.0 million and UAH 5.0 million, respectively). The system is also used for procurement for much smaller purchases to ensure a better price. Besides, the law stipulates that the entity that conducts procurement should make the contract public if the tender is not conducted through ProZorro but its amount is between UAH 50,000 and the threshold defined for the full tender. The law envisages the electronic appeal procedure and introduces centralised procurement organisations. In addition, it provides for procedures of auction at a minimum price, auctions with the MEAT criteria,¹⁴¹ competitive dialogue and negotiations. E-tenders through the ProZorro have built-in mechanisms to reduce corruption. Moreover, to increase the transparency and public control over procurement, the business intelligence module of the platform is public (bi.prozorro.org).

¹⁴¹ The MEAT criterion means that contracting authorities must base the award of public contracts on the Most Economically Advantageous Tender, which aims to ensure the best value for money (rather than the lowest price). The quality as well as the price or life-cycle costs of the work, good or service in questions have to be taken into account.

The ProZorro platform was transferred to the state company Zovnishtorgvydav in the beginning of April 2016. Eight e-trading markets received accreditation. The participation in e-procurement is on a cost recovery basis (it also helps to filter spurious bids). This is expected to allow ProZorro to be self-financing, ensure higher competition between e-trading markets for new suppliers and increase quality of services provided by e-trading markets.¹⁴² In May 2016, the Ukrainian e-procurement system ProZorro became the winner in the category of Public sector award in the World Procurement Awards 2016.¹⁴³

The Ministry of Economic Development and Trade is generally responsible for the implementation of public procurement reform and the implementation of DCFTA provisions. The Ministry elaborated the public procurement roadmap, which was approved by the Cabinet of Ministers in February 2016.¹⁴⁴ The roadmap complies with the different phases of the indicative time schedule of the DCFTA's public procurement chapter, explained above (Table 10.2). It already takes into account new EU Directives (i.e. 2014/25/EC and 2014/24/EC). The Ministry further plans to harmonise rules of concluding agreements, usage of framework of agreements, etc.

Moreover, in November 2015, the WTO's Committee on Government Procurement took a decision to invite Ukraine to join the WTO Government Procurement Agreement (GPA).¹⁴⁵ In March 2016, the *Verkhovna Rada* ratified the WTO GPA, which means that Ukrainian companies had an opportunity to access public procurement in 48 countries (estimated at total amount of USD 1,700 billion). This is a step forward in public procurement reform, which became possible thanks to the changes in the state procurement legislation aimed at deregulation and reduction of corruption.¹⁴⁶

Overall, the Ministry of Economic Development and Trade is very active in implementing public procurement reform according to the indicative time schedule on public procurement. The full-scale

¹⁴² In April and May 2016, more than 25,000 tenders were announced in the ProZorro. The savings were estimated at 15.8%. Overall, since the introduction of the ProZorro in 2015, the number of tenders announced in the ProZorro by 5,000 entities exceeded already 100,000.

¹⁴³ See www.procurementleaders.com/world-procurement-awards/winners.

¹⁴⁴ See <http://zakon4.rada.gov.ua/laws/show/175-2016-%D1%80>.

¹⁴⁵ See www.wto.org/english/news_e/news15_e/gpro_11nov15_e.htm.

¹⁴⁶ Law No. 679-VIII from 15 September 2015.

implementation of new Public Procurement Law is expected to result in lower corruption in public procurements, greater efficiency in government consumption, greater transparency and openness of procurement and higher competition.

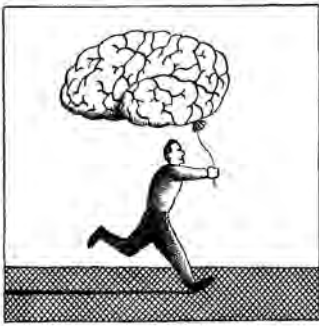
Public procurement at a glance

The Association Agreement calls for Ukraine to approximate its public procurement legislation to the respective EU directives to increase transparency and competition.

The government moved towards the introduction of compulsory e-procurement in the public sector on the basis of the ProZorro system, which proves to be effective in enhancing efficiency and reducing corruption.

Overall, current government policies comply with the schedule of public procurement reform envisaged in the Association Agreement. A new Law on public procurement was approved in 2015 and the roadmap for reform was adopted by the Cabinet of Ministers in February 2016.

11. INTELLECTUAL PROPERTY RIGHTS



In our knowledge-based economies, the protection of intellectual property is important, not only for promoting innovation and creativity, but also for developing employment and improving competitiveness. The DCFTA requires Ukraine to modernise its IPR (Intellectual Property Rights) system. These reforms will contribute to a stable legal environment in Ukraine for the protection of IPR, which is crucial for attracting foreign investment.

Provisions of the Agreement

The DCFTA chapter on IPRs aims to facilitate the production and commercialisation of innovative products while guaranteeing an adequate level of protection and enforcement of intellectual property rights. It complements and further defines Ukraine's obligations under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This WTO agreement establishes minimum levels of protection that each government has to provide to the intellectual property of fellow WTO members. The DCFTA confirms these WTO rules and even goes beyond them in several areas. This has important implications for Ukraine as in principle it has to extend these 'TRIPS-plus provisions' to all WTO members in line with TRIPS' MFN clause (Art. 4 TRIPS). In addition to the TRIPS Agreement and the DCFTA, Ukraine is also under pressure from the USA to reform its IPR system. Ukraine is on the '301 Priority Watch List' due to widespread (and admitted) use of illegal software by Ukrainian government

agencies and its failure to effectively combat the widespread online infringement of copyrights (see below).

Unlike other DCFTA chapters, the IPR section does not oblige Ukraine to approximate to a selection of the EU's IPR legislation annexed to the agreement. However, the main text of the DCFTA is very detailed, and its provisions reflect – or sometimes even copy – several principles and procedures of the EU's IPR legislation. The DCFTA lays down rules on copyright, trademark, geographical indications (GIs) and designs, including detailed enforcement provisions.

Copyright. The parties must comply with several international conventions and agreements (e.g. the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the Berne Convention for the Protection of Literary and Artistic Works and the World Intellectual Property Organisation Copyright Treaty). With regard to the duration of authors' rights, the DCFTA states that the rights of an author of a literary or artistic work have to be protected for 70 years after his/her death and critical and scientific publications may be protected for a maximum of 30 years after publication. The agreement also covers broadcasting and communication to the public; protection of technological measures; computer programs; rights of management information and release rights. The provision on cooperation on collective management of rights, which goes beyond the TRIPS agreement, envisages that the parties' collecting societies¹⁴⁷ conclude agreements with each other in order to ensure easier mutual access to and delivery of content between the EU and Ukraine, as well as to ensure the mutual transfer of royalties for the use of parties' works.

Trademarks. Ukraine must establish a fair and transparent system for the registration of trademarks in which any refusal by the relevant trademark administration is duly reasoned, including the possibility to appeal a final refusal before judicial authorities. Ukraine has to provide a publicly available electronic database of trademark applications and registrations. A trademark may be revoked if, within a period of five years, it has not been put to genuine use in the relevant territory in connection with the goods or services in respect of which it is registered.

¹⁴⁷ For example, authorities established under national IPR law that represent the holders of a certain IPR and who have the responsibility to administer the IPR rights of its members, such as collecting societies responsible for collection of copyrights royalties for musicians.

Geographical Indications (GIs). The text of the Agreement recognises that Ukraine's IPR legislation (e.g. the Law of Ukraine on the Protection of Rights to Indications of Origin of Goods of 16 June 1999 and its implementing rules) already meets the required conditions with regard to registration and control of GIs (Annex XXII), and therefore it does not require further legislative approximation to EU law. The annexes contain an elaborate list of geographical indications of agricultural products, foodstuffs and types of wines and spirits of both parties, which will be protected against commercial use or misuse of a protected name for comparable products, going beyond the TRIPS requirements. This list can be expanded after an objection procedure. Because numerous Ukrainian producers of foodstuffs and types of spirit drinks are still using protected EU GIs, the agreement provides for several transition procedures. Products that were produced and labelled before the DCFTA entered into force, but which do not comply with its GI requirements, may continue to be sold until stocks run out. Moreover, a transitional period of seven or ten years is provided during which Ukrainian producers may still use a selection of EU GIs for their comparable products, such as Champagne, Cognac, Porto, Calvados, Parmigiano Reggiano and Feta. A specific sub-committee on GIs shall monitor the implementation of these provisions and report to the Trade Committee. Moreover, this Committee is responsible for amending the annexes to this chapter, including the list of protected GIs.

Designs and patents. Ukraine also has to protect independently created designs that are new and have individual character. The protection shall be provided by registration and shall confer exclusive rights upon the holder to at least have the exclusive right to use the design and to prevent third parties from using it without consent, in particular to make, offer, put on the market, import or export it. The duration of protection following registration shall amount to at least five years, but the holder may have the term of protection renewed for one or more periods of five years each, up to a total term of 25 years from the date of filing. Specific rules are provided for patents for medicinal and plant products. For example, the provisions on pharmaceutical data protection, which go beyond the TRIPS agreement, require that Ukraine shall implement a comprehensive system to guarantee the confidentiality, non-disclosure and non-reliance of data submitted for the purpose of obtaining an authorisation to put a medicinal product on the market.

Enforcement of IPRs. The Agreement has a strong section on the enforcement of IPRs. These commitments go beyond the TRIPS Agreement. However, the complementary measures and remedies in

the DCFTA have to be fair and equitable and may not result in additional barriers to trade. The section on civil measures and procedures, which is largely based on the EU's IPR enforcement Directive,¹⁴⁸ includes detailed procedural provisions on the judicial enforcement of IPR (e.g. on transparency, procedural fairness, right to information, measures for preserving evidence and publication of judicial decisions). Judicial authorities must have the competence to recall products from the market that are found to infringe an intellectual property right or to order the destruction of those goods. Moreover, judicial authorities must be able to issue an injunction and penalty payments or pecuniary compensation payments against the infringer with the aim to prohibit the continuation of the infringement. In addition, provisions on the liability of intermediary service providers (e.g. online service providers) are foreseen. These are copied from the EU's E-commerce Directive¹⁴⁹ and provide for a 'safe haven' regime, under which three types of intermediary service providers are exempted from liability for IPR infringements, under certain conditions. Ukraine only has to comply with these obligations within 18 months of the entry into force of this agreement.

Implementation perspectives

Overview of intellectual property system. The development of the national system of intellectual property in Ukraine started in 1992 with the creation of the State Patent Office of the Committee for Scientific and Technological Progress under the Cabinet of Ministers of Ukraine. It was reorganised several times: in 1999 the State Committee of Science and Intellectual Property was established, which was replaced in 2000 by the State Department of Intellectual Property and in 2011 by the State Intellectual Property Service of Ukraine (SIPRU). In 2013 the SIPRU changed subordination from the Ministry of Education and Science to the Ministry of Economic Development and Trade. Currently, the SIPSU is a central government body, which implements policy on intellectual property and develops proposals for the MEDT on the further development of this policy.¹⁵⁰ The SIPSU also supervises

¹⁴⁸ Directive 2004/48 EC on the enforcement of intellectual property rights.

¹⁴⁹ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

¹⁵⁰ See <http://sips.gov.ua/ua/polozhennia>.

a number of special bodies dealing with the evaluation of applications for industrial property (Ukrainian Institute of Industrial Property), the management of copyright (Ukrainian Agency of Copyright and Related Rights) and issuing checkmarks (*Intelzakhyst*).

In December 1993, the *Verkhovna Rada* passed the first set of laws on IPRs: the Laws on the Protection of Rights to Inventions and Utility Models;¹⁵¹ Protection of Rights to Industrial Designs;¹⁵² Protection of Rights to Marks for Goods and Services;¹⁵³ and Copyrights and Related Rights.¹⁵⁴ The standards system in the field of industrial property in Ukraine entered into force in 1998.¹⁵⁵

In 1998-2000 another four laws were passed, including the Laws on the Protection of Rights to Topographies of Integrated Circuits¹⁵⁶ (1998); on the Protection of Rights to Indication of Origin of Goods (1999);¹⁵⁷ on the Distribution of Audio-visual Works, Phonograms, Computer Programs, Databases (2000);¹⁵⁸ and on state regulation of business entities associated with the Production, Export and Import of Disks for Laser-reading Systems (2000).¹⁵⁹ In 2007 the Ukrainian

¹⁵¹ See <http://zakon5.rada.gov.ua/laws/show/3687-12/print1445587447179522>.

¹⁵² See <http://zakon5.rada.gov.ua/laws/show/3688-12/print1445587447179522>.

¹⁵³ See <http://zakon5.rada.gov.ua/laws/show/3689-12/print1445587447179522>.

¹⁵⁴ See <http://zakon5.rada.gov.ua/laws/show/3792-12/print1445587447179522>.

¹⁵⁵ These standards include the "Patent Card, Basic Provisions, Drawing up and Execution Procedure" and "Patent Research, Basic Provisions and Conducting Procedure".

¹⁵⁶ See <http://zakon5.rada.gov.ua/laws/show/621/97-%D0%B2%D1%80/print1445587447179522>

¹⁵⁷ See <http://zakon5.rada.gov.ua/laws/show/752-14/print1445587447179522>.

¹⁵⁸ See <http://zakon5.rada.gov.ua/laws/show/1587-14/print1445587447179522>.

¹⁵⁹ See <http://zakon5.rada.gov.ua/laws/show/2953-14/print1445587447179522>.

parliament passed the Law on Basic Principles of State Supervision (Control) in Economic Activity.¹⁶⁰

Another important development in intellectual property rights protection was Ukraine's accession to the WTO in 2008, when it also joined the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

State of intellectual rights protection. Despite this substantial legislation and infrastructure, IPR protection in Ukraine is quite poor, as shown in the evaluations by the US and the EU.

Ukraine has been included in the 'Special 301 Report' of the United States Trade Representative since 1998., but its status has not been constant (see Table 11.1). Starting with the most moderate status in the Watch List in 1998, Ukraine was then downgraded by 2001 as a 'Priority Foreign Country', which means the worst protection of IPR. In 2008-11 Ukraine's status was again updated to the Watch List, and later in 2013-14 the situation worsened again. As of 2016, Ukraine remained on the Priority Watch List.¹⁶¹ Ukraine did not solve the problems but some efforts to improve the situation were noted.

Table 11.1 Evolution of Ukraine's status under Report 301

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Watch List	x										x	x	X	x					
Priority Watch List		x	x						X	x					x			x	x
Priority Foreign Country				x	x	x	x	x								x	x		

Source: International Intellectual Property Alliance, Office of the United States Trade Representative, Washington, D.C.

¹⁶⁰ See <http://zakon2.rada.gov.ua/laws/show/877-16/print1444899710805737>.

¹⁶¹ US Trade Representative, 301 Report 2015 (<https://ustr.gov/sites/default/files/2015-Special-301-Report-FINAL.pdf>).

According to the Office of the United States Trade Representative (USTR), the three major IPR problems in Ukraine are:

- unfair and non-transparent administration of the system for collecting societies;
- widespread use of illegal software by the government agencies;
- failure to combat the widespread online infringement of copyright and related.¹⁶²

Legislative reform regarding collective societies has not proceeded and not all collecting societies actually represent rights holders. In 2015 one collecting society was de-credited, two more were under investigation, and 15 continue to operate without paying royalties to the rights owners. No institutionalised mechanism of transition to the use of authorised software was established; there were only occasional transitions. As a result, the piracy rate in the government remains high, at 60-80%. Regarding online infringement, Ukrainian officials were involved in some training and enforcement activities, and drafted relevant legislation. The process has stalled, however.

In its recent report on the protection and enforcement of intellectual property rights in third countries the European Commission also states that, despite some minor improvements, the situation regarding the protection of IPR in Ukraine has not changed significantly and remains unsatisfactory.¹⁶³ Ukraine is included on the Priority 3 list of countries (Priority 1 is defined as the most detrimental for the EU).

Among the major IPR-related problems, the European Commission's list reiterated massive infringements (both online and in physical markets), non-payment of royalties by state broadcasters and a general lack of clear rules in the area of collective management organisations. IPR laws are not relevant for enforcement in the digital environment, as criminal sanctions do not represent sufficient deterrence, legal proceedings are lengthy, and the number of IPR-trained judges is insufficient. According to the European Commission, the main reasons for this situation are weak institutions, corruption,

¹⁶² See <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>.

¹⁶³ See <https://oami.europa.eu/ohimportal/documents/11370/0/Report+on+the+protection+and+enforcement+of+intellectual+property+rights+in+third+countries>.

poor capacity and lack of resources on the part of the enforcement authorities.

The gap between the DCFTA and reality and reforms underway.

The provisions of Ukraine's legislation on intellectual property rights are mainly in compliance with the relevant EU legislation.

However, some gaps remain. According to Ukraine's Plan of Implementation of the Association Agreement in the sphere of intellectual property,¹⁶⁴ it intends to adopt 19 EU legislative acts (12 directives and 7 regulations) in 2015-17. The major improvements will focus on mechanisms for strengthening the protection and enforcement of industrial property rights; institutional and organisational changes for protecting Geographic Indications; mechanisms to increase the protection of rights and interests of copyright holders; a unified procedure of property rights realisation by copyrights by means of collective management organisation; and civil and administrative enforcement procedures and additional measures.¹⁶⁵ The drafts of these laws had to be submitted by July 2015. The drafts were submitted in time but this process has also stalled: three draft laws were withdrawn for the Parliament, while two drafts are still under public consultation. These draft laws would bring the following amendments to the current legislation on IPR:

Ukraine's *copyright system* mainly complies with the DCFTA provisions. The amendments proposed include regulations on resale rights for the benefit of the author of an original artwork, the legal protection of computer programmes and databases, lease, loan and related rights in the field of intellectual property, and the harmonisation of issues regarding satellite broadcasting and cable retransmission. New legislation should also eliminate conflict between the provisions of legislation regarding property rights on office computer programs; provide for exemptions from copyrights (freedom of panorama); introduce the concept of public licence agreement in order to legalise end-user licence agreements, free software and free content.

¹⁶⁴ Cabinet of Ministers Resolution №164, 4 March 2015. This implementation plan was prepared by the State Intellectual Property Service of Ukraine (SIPSU) with the assistance of an EU Twinning project "Strengthening the protection and enforcement of intellectual property rights in Ukraine," http://sips.gov.ua/en/twinning_eng.

¹⁶⁵ See <http://new.me.gov.ua/en/content/plani-implementacii-aktiv-zakonodavstva-es-shvaleni-rozporyadzhennyam-kabinetu-ministriv-ukraini-vid-4-berezhnya-2015-roku--164.html?PrintVersion>.

Ukraine should develop separate legislation on *collecting societies* in order to implement the relevant provisions of EU legislation. The proposed amendments include detailed provisions on the collection and distribution of royalties, including those obtained from home use and cable retransmission.

Ukraine should improve the system of electronic application for the protection of trademarks, industrial designs, geographical indications, regulation of appeals regarding industrial rights and the renewal of industrial property rights. Immediate online access to this information should be granted.

Opportunities and challenges for implementation. Proper implementation of the DCFTA provisions would bring Ukrainian legislation on intellectual property rights close to the best EU practices. This would contribute significantly to Ukraine's economic development and international economic relations and would resolve most of the current concerns of the EU and US.

The implementation of the DCFTA provisions on GIs will be challenging as numerous Ukrainian producers of foodstuffs and types of spirit drinks are still using protected EU GIs. Both the Ukrainian government and businesses should take a number of steps to fulfil Ukrainian obligations regarding the protection of the EU GI's. The government should assure the protection of GI's at its borders and maintain a database of GI's. Businesses producing goods affected by these changes would face some losses. The DCFTA gives these producers a long transition period to adjust (up to 10 years for some products), however. As Ukraine is mainly an importer of intellectual property, stricter regulations could also impose additional costs on Ukrainian consumers.

Another important change would be the improvement of legislation on the collective management of copyright and related rights, which is one of the major IPR-related problems in Ukraine. The proposed amendments would increase the transparency of collecting societies and improve the system of collecting and distribution of royalties.

Online access to the information on trademarks will improve the protection of IPRs for both domestic and foreign producers. This would allow producers to monitor applications for trademark registration and make appeals in case their intellectual property rights are violated.

Better regulation of IPR protection on the internet would significantly contribute to the overall better protection of IPR in

Ukraine, as well as eliminate Ukraine from the list of the major 'pirate' countries, which is one of the main concerns regarding IPR in Ukraine.

An EU-funded twinning project, "Strengthening the protection and enforcement of intellectual property rights in Ukraine", will support legislative changes, and organise training courses and study tours for relevant officials and judges working in the field of intellectual property.¹⁶⁶

Since Ukraine started its implementation of DCFTA a number of positive changes have occurred. For example, the State Intellectual Property Rights Service of Ukraine launched online access to data on applications for the registration of trademarks on August 21, 2015, and updates it daily.

During the first nine months of 2015, the State Fiscal Service of Ukraine reported 2,210 cases of customs clearance suspensions due to suspected violation of intellectual property rights. The customs services also initiated 19 investigations into instances of imported goods violating IPRs.

Intellection property rights at a glance

Ukraine's IPR system has some gaps in relation to the best European and international practices, which raises many concerns for the US and the EU. These gaps will be addressed by forthcoming legislation.

Ukraine is a member of the main IPR- related international organisations (WIPO) and international treaties (TRIPS).

The main problems are: non-transparent work of collecting societies; use of illegal software by public authorities; and online and offline infringement of copyright.

Major changes will deal with copyright and related rights, trademarks, patents and designs, geographical indications and enforcement.

¹⁶⁶ See http://sips.gov.ua/en/twinning_eng.

12. COMPETITION POLICY



An effective competition policy that controls monopolistic behaviour by companies and trade-distorting subsidies by the government is essential for the sound functioning of a modern economy. It assures a level playing field for economic operators, lower prices for consumers with better quality and wider choice, and reduces the scope for corruption. However, the starting point for today's Ukraine shows there is much to be done.

Provisions of the Agreement

Antitrust and mergers. The DCFTA prohibits and sanctions anti-competitive practices and transactions, with the following practices deemed illegal:

- (a) agreements, concerted practices and decisions by associations of undertakings, which have the object or effect of impeding, restricting, distorting or substantially lessening competition in the territory of either party;
- (b) the abuse by one or more undertakings of a dominant position in the territory of either party; or;
- (c) concentration between undertakings, which results in monopolisation or a substantial restriction of competition in the market in the territory of either party.

These principles are clearly derived from EU competition law (i.e. Arts 101 and 102 TFEU). The above practices are only prohibited “insofar as they may affect trade between the Parties”. However, the

Commission interprets very widely what may affect trade between EU countries, and sets the bar quite low for what is not considered to affect such trade, notably if (a) the aggregate market share of the parties on any relevant market does not exceed 5% and, (b) the aggregate annual turnover of the undertakings does not exceed €40 million. Implicitly, a similar interpretation may apply to the DCFTA.

The DCFTA gives Ukraine considerable discretion in how to implement and enforce these antitrust and mergers principles. The agreement only requires that Ukraine maintains i) competition laws that effectively address these anti-competitive practices, and ii) authorities responsible for the effective enforcement of these competition laws. These competition laws and enforcement authorities have to be transparent and non-discriminatory, respecting the principles of procedural fairness and rights of defence. While Ukraine is not obliged to approximate to the entire body of EU antitrust and merger law, it has to implement specific provisions of important EU competition regulations within three years of the entry into force of the DCFTA. For example, Ukraine has to approximate to the concentration thresholds of the EU merger Regulation (No 139/2004), which define when a merger has an 'EU dimension' and therefore needs to be notified to the Commission and subjected to the publication requirements of Directive 1/2003. The latter implies that the Ukrainian competition authority has to properly publish its decisions while taking into account the legitimate interest of undertakings in the protection of their business secrets.

State aids. The provisions here apply to all goods and services, except agriculture and fisheries. Again, the DCFTA provisions are largely inspired by the key principles of EU competition law. Reflecting Art. 107(1) TFEU, the DCFTA states that:

any aid granted by Ukraine or the [EU member states] through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of this Agreement insofar as it may affect trade between the Parties.

Here too, the DCFTA only prohibits state aid when trade between Ukraine and the EU "may be affected". In the EU, state aid granted by a member state to a single undertaking that does not exceed €200,000 over a period of three fiscal years falls outside the scope of EU state aid control. The agreement also takes over from the Treaty (TFEU) the types of state aid that "shall" or "may be considered to be" compatible with the agreement: for example, various social aids and disaster relief

“shall” be considered compatible, and various regional economic development aids “may” be compatible, including state aid to achieve the objectives allowed under the EU horizontal block exemption regulations (e.g. aid for environmental protection and for research and development). Ukraine and the EU will notify each other of the total amount annually, types and sectoral distribution of state aids that may affect trade between them, although any aid below €200,000 does not need to be notified.

Institutional aspects. The Agreement is largely silent on how Ukraine’s competition policy should be administered. Only in the area of state aid does the DCFTA explicitly oblige Ukraine to establish an independent authority with powers to authorise state aid schemes, as well as to order the recovery of state aid that has been unlawfully granted. There is a crucial political issue here that goes beyond the question of formal institutional organisation; namely, how the system works in practice.

The EU’s own experience in this regard has some strong messages. To take just three examples from EU member states, Belgium, France and Germany, the general rules are that the government and/or parliament make the top-level appointments for fixed terms for medium-term periods (five or six years), but the appointees cannot be dismissed at the discretion of the government or parliament. Most important, individual case decisions of these competition policy bodies are sovereign, and not subject to approval by the government. These member state examples are perhaps more relevant than the EU’s own institutional structure, where the competition authority (Directorate-General) works as part of the European Commission. However, even in this case, there is a strongly established convention that competition policy decisions are taken according to a strict interpretation of EU law and minimum politicisation. For example, at the present time when the Commissioner is handling cases concerning companies of global significance, such as Google and Gazprom, the Commissioner declares that strict respect for the law is the only safeguard against politicisation of such cases. Such considerations are of high importance in Ukraine, given the endemic corruption and the political leverage of leading entrepreneurs (‘oligarchs’).

The overall conclusions for Ukraine are that top-level appointments to the Anti-Monopoly Committee should be for fixed periods of several years and should be protected from politically motivated dismissal by transparent and strict procedures that guarantee the right of defence, and that the case decisions of the Anti-

Monopoly Commission should be made independently of the government or parliament.

Implementation perspectives

Competition policy and institutions in Ukraine. The first set of competition-related laws were adopted in 1992-96, in the initial period of state formation. The *Law on Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities*, dated February 1992, focused on abuses of dominance, anti-competitive concerted actions and discrimination of enterprise by public authorities, and on unfair competition among business entities.¹⁶⁷ This law also established the Anti-Monopoly Committee of Ukraine (AMCU) as the public authority responsible for protection of businesses against unfair competition and monopoly power abuses and for state control over the implementation of the anti-monopoly legislation. In July 2000, important changes were introduced to the organisational structure of the AMCU,¹⁶⁸ reducing its independence. Since then, the Chairman of the AMCU has been appointed and dismissed by the President of Ukraine after the Rada's consent. Similarly, the Commissioners have been appointed and dismissed the President based on submissions of the Prime Minister following the proposals of the Chairman of the AMCU. The AMCU Law¹⁶⁹ stipulates several clear reasons for the AMCU Chairman and Commissioners' dismissal, namely health, their personal decision, a crime and a major violation of duties (for Commissioners), thereby shielding the Commissioners from politically motivated dismissals.

A new *Law on Protection of Economic Competition*,¹⁷⁰ passed in January 2001, followed the patterns of EU competition rules, bringing Ukrainian legislation closer to international standards.¹⁷¹ It provided a clearer definition of monopolistic activity, especially the description of

¹⁶⁷ See <http://zakon4.rada.gov.ua/laws/show/2132-12/ed19920218>.

¹⁶⁸ See <http://zakon4.rada.gov.ua/laws/show/1907-14/ed20000901>.

¹⁶⁹ See <http://zakon4.rada.gov.ua/laws/show/3659-12/print1447338779961228>.

¹⁷⁰ See <http://zakon4.rada.gov.ua/laws/show/2210-14/ed20010111>.

¹⁷¹ M. Jakubiak (2005), "Analysis of factors contributing to the adoption of competition law in Ukraine. Implications for other developing countries", Project on Competition Policy Foundations for Trade Reform, Regulatory Reform and Sustainable Development (www.iwh-halle.de/projects/competition_policy/Ukraine_Country_Study.pdf).

a dominant position on the market and concerted practices and also expanded the role of the AMCU. Since 2010, the AMCU's responsibilities have been further widened as it became an appeals body for public procurement and a monitoring and control authority for state aid.

Until recently, there had been no unified rules on oversight of the state aids, which were regulated by the Commercial, Budget and Tax Codes, the Law on Protection of Economic Competition, the Law on Stimulating Regional Development and numerous sectoral development programmes.¹⁷² However, in 2014, the framework Law on State Aid to Commercial Entities¹⁷³ was passed, bringing the system of state aid provision in line with European norms. The law designated the AMCU as a public authority responsible for monitoring and authorising state aids, and assessing their impact on competition and thus their legality, and also empowered the AMCU to recover the unlawfully granted state aid. This was, as explained above, a key DCFTA requirement. Although selected provisions of the law have become effective since 2014, its key provisions will only be implemented in 2017.

A peer review of Ukraine's competition law and policy conducted by UNCTAD (United Nations Conference on Trade and Development) in 2012 concluded that Ukraine has developed a rather comprehensive body of competition law largely aligned with international best practices, and thus did not require drastic changes.¹⁷⁴ At the same time, the UNCTAD experts advised that more effort was needed on law enforcement, and to strengthen the AMCU as the independent and powerful competition authority.

While Ukraine's anti-monopoly legislation is relatively well developed, enforcement has remained very poor. Also, sectoral legislation has occasionally restricted competition. For instance, in October 2014, new rules regarding airline route allocation were passed, envisaging inter alia that only airlines operating regular domestic

¹⁷² O. Betliy and V. Kravchuk (2012), "Reforming state aid in Ukraine," Policy Paper for the Project on Economic aspects of Ukraine's European integration in the light of Association Agenda priorities: Expert analysis, recommendations and public discussion.

¹⁷³ See <http://zakon4.rada.gov.ua/laws/show/1555-18/paran205#n205>.

¹⁷⁴ UNCTAD, "Voluntary Peer Review of Competition Law and Policy: Ukraine", 2013.

flights for at least a year are entitled to serve international routes.¹⁷⁵ This legislation effectively ruled out international competitors. In May 2016, the new version of the rules was passed removing this dubious standard, although the implementation of the rules may be delayed by litigation initiated by the main Ukrainian airline.

Poor competition law enforcement resulted in the growing monopolisation of Ukraine's economy. According to AMCU assessments, from the beginning of 2015, only 43% of markets were competitive, while in 2005 their share was 60%.¹⁷⁶ The share of oligopolistic markets grew from 12% to 17% over last decade, the share of markets dominated by one company – from 24% to 31%, and the share of monopolies – from 7% to 10%. The highest level of market concentration is registered in utility services, energy, and transport.

According to the Global Competitiveness Report 2014-2015,¹⁷⁷ Ukraine's "intensity of local competition" is ranked 101 out of the 144 states surveyed, the "extent of market dominance" is ranked 129 and the "effectiveness of anti-monopoly policy" has the disconcertingly low ranking of 136.

Reforms in legislative and institutional set-up. Reforms for the protection of competition and antitrust laws have been identified among 62 key reforms of the Presidential Strategy 2020, although it was not placed among the top eight reform priorities. At the same time, reforms of the juridical and law enforcement system are among the country's priorities, and their successful accomplishment would be beneficial, also for the competition policy enforcement.

In September 2014, the government approved the Action Plan for the Association Agreement, including the competition chapter.¹⁷⁸ Several important steps have been already taken.

As required by the DCFTA, in September 2015, the AMCU issued an official clarification on the methods of setting penalties for anti-

¹⁷⁵ See <http://zakon3.rada.gov.ua/laws/show/z1440-14/ed20141024>.

¹⁷⁶ See www.amcu.gov.ua/amku/doccatalog/document?id=122547&schema=main.

¹⁷⁷ See www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf.

¹⁷⁸ See www.kmu.gov.ua/kmu/control/en/publish/article?art_id=248402403&cat_id=248402399.

competitive practices,¹⁷⁹ based on the European Commission guidelines.¹⁸⁰ Experts assessed these clarifications as a positive step, although they might require further improvement after its implementation starts.¹⁸¹

Since July 2015, the AMCU has started publishing its decisions. In November 2015, Law No. 782-VIII was also passed, improving the transparency of the AMCU by requiring timely and full publication of all Committee's decisions on the official website. The law was reviewed and generally supported by the European Commission.¹⁸²

Law No. 935-VIII aiming to increase efficiency of control over economic concentration envisaging simplification of concentration practices and their harmonisation with the EU norms was passed in January 2016.¹⁸³ The main novelties include higher thresholds for controlled concentrations, removal of the 30% market-share criterion for notification of concentration, improvement of the procedure for considering the application and introduction of simplified procedure for certain types of concentrations.

The draft Law No. 2431 amending the Law on the Protection of Economic Competition regarding penalties imposed by the AMCU for anti-competitive practices awaits its second reading.¹⁸⁴ Its adoption has been delayed by debates on the role of courts in appeal procedures regarding penalties imposed by the AMCU.

A new Chairman and set of Commissioners of the AMCU were appointed in 2015. The appointment ended a period of weak operational capacity of the AMCU, as in 2014 the institution lacked a Chairman and four out of nine Commissioners, causing delays in its work and making the process more burdensome for all participants. According to the AMCU report, in 2015 the authority considered 5,000 complaints regarding competition violations, 12% more than the year before, while penalties increased by 3.4 times to UAH 339 million.¹⁸⁵

¹⁷⁹ AMCU, Clarifications No. 16-pp, 15 September 2015 (http://search.ligazakon.ua/l_doc2.nsf/link1/FN013589.html).

¹⁸⁰ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006XC0901%2801%29>.

¹⁸¹ See www.epravda.com.ua/columns/2015/09/22/560649/.

¹⁸² See <http://zakon5.rada.gov.ua/laws/show/782-viii/>.

¹⁸³ See <http://zakon5.rada.gov.ua/laws/show/935-viii/>.

¹⁸⁴ See http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54479/.

¹⁸⁵ See

www.amc.gov.ua/amku/doccatalog/document?id=122547&schema=main.

Competition policy at a glance

The provisions in the DCFTA for competition policy are substantial and strong in terms of legal commitments, requiring Ukraine to reform control of monopolistic behaviour and state subsidies in line with established EU practices.

Ukraine has already largely aligned its competition legislation on EU and international standards and further legislative and institutional reforms are envisaged. The adoption of the Law on State Aid marks an important achievement in the implementation of the DCFTA competition chapter.

However, the effective implementation and enforcement of these and other envisaged competition laws will be the key challenge for Ukraine. This requires a competent and independent AMCU, which is still too dependent on the executive branch.

13. STATISTICS



A modern and internationally comparable statistical system is indispensable for informed policy-making and for the work of the business sector and civil society. All the post-Soviet states have had to face the same challenges of radical reform to their statistical systems, notably the move from systems that essentially served the needs of the state to systems that serve the private sector and society as a whole

and, more technically, to a greater use of sampling methods rather than exhaustive data collection.

Provisions of the Agreement

The EU has engaged all six Eastern Partnership states and the Central Asian states in extensive cooperation programmes to assist this long and complex process. Many of the projects listed below are 'group activities' for the whole Eastern Partnership and, in some cases, also with the Central Asian states.

For Ukraine, Moldova and Georgia this is enhanced by collaboration and by the explicit commitments made in the Association Agreements to align their statistical systems to that of the EU: Eurostat, which sets out a huge number of legal regulations in the Statistical Requirements Compendium. This is a highly ambitious programme. The time horizon for compliance with EU regulations is not specified, however, but experience from the accession of the new member states of the EU would indicate that this is a long-term process. For a realistic perspective, it took around 15 years for other new EU members to

complete the transition, with much more support from the EU than Ukraine, Moldova or Georgia will be receiving.

Cooperation between Eurostat and the partner states is structured as follows:

- Seminars on statistical strategies, once a year for three days
- Training courses on current issues and recent developments in statistical systems, about five to six times over a two-year cycle
- Collection of selected data series, about 300 in number (i.e. a selection of key series, but less than what the EU member states comply with), in which the partner states submit data in accordance with Eurostat questionnaires, allowing Eurostat to publish comparable data series
- In-depth assessment of the statistical systems of Ukraine, Moldova and Georgia (called Global Assessments), on which see further below
- Activity of the Eastern Partnership multilateral platform and panel on statistical systems. This consists of conferences held in EaP capitals at a rate of about two per year, each taking up a particular theme in depth (such as labour market, migration, etc.).

Developments in Ukraine's statistical services

Ukraine has a relatively well-developed statistical agency, Ukrstat. During the 2000s, Ukrstat received a lot of help from international donors to upgrade data collection processes, data quality and methodology, including a major \$45 million loan from the World Bank.¹⁸⁶ An ongoing twinning project with the Danish statistical agency also seems to be moving at a good pace.¹⁸⁷

In part thanks to international funding, Ukrstat introduced a number of new statistical products and revamped existing ones. For example, the consumer prices index was reformed in 2007-08. National accounts are now produced based on standardised models (SNA-2008 and NACE 2.0). The methodology for the industrial output index was revised several times in recent years. Most publications by Ukrstat are now published online and generally on time. The output compares

¹⁸⁶ See www.worldbank.org/projects/P076338/development-state-statistics-system-monitoring-social-economic-transformation-project?lang=en.

¹⁸⁷ See www.dst.dk/en/consulting/projects/ukraine.

favourably with most post-Soviet states, and with Eurostat on some points.¹⁸⁸

However, the many revisions in methodology have caused breaks in data series, including four such breaks for the industrial output index. Back-cast data were provided with a significant delay. Ukrstat is currently adjusting for important discontinuities resulting from the loss of Crimea and the conflict over the eastern Donbas (see Box 13.1).

Box 13.1 Impact of Crimea and eastern Donbas on Ukrainian statistics

The loss of control over Crimea in March 2014, led to relatively straightforward consequences for Ukrainian statistics. Most statistics are aggregated from data gathered by regional/oblast statistical offices. After reports from Crimea and Sevastopol stopped, Ukrstat started to provide data aggregated from reports by the 25 remaining regional offices, and Ukrstat is now providing adjusted retrospective data in most cases from 2010. The loss of Crimea causes a break in most data series, but adjustments are relatively small as Crimea and Sevastopol accounted for less than 4% of GDP in Ukraine.

In the case of eastern Donbas, the situation is more complex. Some economic establishments were destroyed and others continued to operate but ceased reporting. Others nevertheless continued to report to Ukrstat, despite operating on uncontrolled territory. Ukrstat stated that 2015 statistics and some of 2014 statistics excludes “part of the zone of the antiterrorist operation” but did not provide guidance on what this means. In practice part of oblast-level statistics and thus national aggregates clearly include reported economic activity in the eastern Donbas.¹⁸⁹ This may result in an overstating of the reported reduction in economic activity in 2014 and 2015. The IER has estimated that GDP in Ukraine, excluding eastern Donbas (and Crimea), fell by less than 10% in the first half of 2015, compared to the 16% drop reported by Ukrstat. In 2016, reports from companies in eastern Donbas continued to be included at minimum levels of industrial output, and construction and services activity. Survey-based statistics have by necessity been calculated without the eastern Donbas.

¹⁸⁸ According to personal experience with cross-country data.

¹⁸⁹ For example in first quarter of 2016, Donetsk city accounted for 25% of reported construction work in the Donetsk oblast and steel production in the Lugansk oblast (with no large mills in controlled part of oblast) contributed 29% of sales by industrial companies in the oblast.

However, it is not completely clear how the displaced population, estimated at over 1 million,¹⁹⁰ was accounted for in recent household surveys.¹⁹¹

The main challenges on data gathering are the coverage of individual entrepreneurs and households, and delays in censuses of households and agricultural undertakings. Individual entrepreneurs are not subject to mandatory statistical reporting, although they account for large market shares in a number of service sectors, including hotels and restaurants, IT services, real estate services, professional and business services, etc. So far Ukrstat has resorted to extrapolation, based on data reported to tax authorities, but did not make much progress in voluntary surveys.

The household survey has a relatively high response rate (77%) but the response rate for urban households was lower, at 70% for large cities and only 49% for Kyiv. This probably means that a large share of middle-income households and most high-income households are excluded from the sample. This is reflected in an improbably low Gini index of 0.246¹⁹² for distribution of income by Ukrainian households, which is the lowest recorded by the World Bank.¹⁹³

A census of households was initially planned for 2011, i.e. ten years after the previous census in 2001. But this has been pushed back repeatedly, most recently to 2016, because of the budget crisis. This means that the Ukrstat's population estimates are based on 2001 data, adjusted for administratively registered births, deaths and migration. For example, Ukrstat's 2016 population estimate for Kyiv city is 2.9 million, while the unregistered population is estimated at 0.4 million.¹⁹⁴ A delayed agricultural census is also critical for accurate agricultural

¹⁹⁰ About 1.6 million were registered as displaced by social services (required for regular welfare payments), and 1 million received assistance from the emergency services.

¹⁹¹ In 2015, the reported number of households in 23 regions not affected by conflict increased by 0.3 million from the 2013 level, despite mortality exceeding the birthrate. It is difficult to judge whether this reflects displaced persons and whether they were represented in the survey sample.

¹⁹² See www.ukrstat.gov.ua/druk/publicat/kat_u/2016/bl/05/bl_vrdu15_pdf.zip, p. 144.

¹⁹³ See http://data.worldbank.org/indicator/SI.POV.GINI?order=wbapi_data_value_2011+wbapi_data_value+wbapi_data_value-first&sort=asc.

¹⁹⁴ See www.ukrstat.gov.ua/operativ/operativ2016/ds/kn/kn_u/kn0316_u.html.

statistics, since 45% of agricultural production is estimated to be produced by households.

Current progress and plans for the implementation of EU standards cover an extensive range of statistical series, including business sentiment, structural statistics, a labour force survey, household survey, education statistics, gas and electricity prices, agricultural holdings, fisheries, livestock and meat statistics, and pesticide statistics. For these series implementation is at various stages of completion. Overall Ukrstat is likely to be able to implement EU rules on statistics as scheduled, as no major increase in scale or complexity of data gathering is required.

There remain several serious technical challenges:

- The website of Ukrstat is antiquated and navigation can be difficult for new users.
- Ukrstat.gov.ua is not searchable, either internally or through search engines (except through unofficial sources).
- There is no interface to download data series.

Ukrainian statistics at a glance

Ukraine has a relatively well-developed statistical agency, although its website is still rather antiquated.

Programmes for harmonisation with European methodologies are extensive and broadly proceed as planned.

However, shortage of resources hold back some important census and survey operations.

PART III.
ECONOMIC COOPERATION

14. MACROECONOMIC CONTEXT AND FINANCIAL ASSISTANCE

The macroeconomic context

In the first decade of the post-Soviet period, Ukraine suffered a more dramatic recession than many of the other transition economies. Real GDP decreased by 59% between 1990 and 1999, and labour market adjustment mainly took the form of a drastic fall in real wages. Despite progress in privatisation and price liberalisation, many structural reforms were postponed.

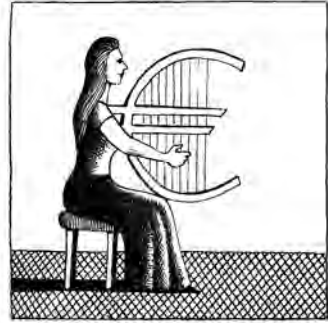
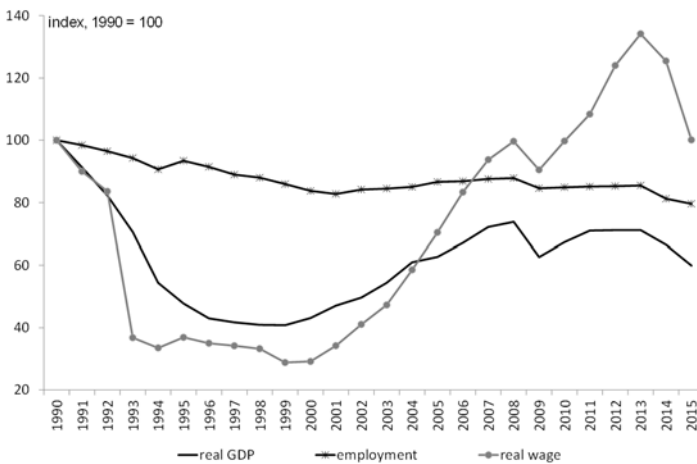


Figure 14.1 Economic trends in Ukraine since independence



Note: Since 2010, data do not include AR Crimea and Sevastopol; the 2015 data also do not include the occupied territory in eastern Ukraine.

Source: Ukrstat.

Economic recovery started in 2000, led by a global commodity price boom and later by increased domestic demand. Real GDP grew by 6.9% on average between 2000 and 2008.

The Ukrainian authorities did not use these years of easy growth to implement reforms, however. Tax and regulatory burdens remained high and pension, social welfare, health care and education reforms were incomplete. Substantial universal energy subsidies were provided in the form of discounted gas, heating and electricity tariffs. The government did succeed in a degree of international trade liberalisation, which allowed the country to become a member of the WTO in May 2008.

Ukraine's economy entered into recession in 2008 as the world financial crisis aggravated its inherent weaknesses. The hryvnia depreciated sharply, resulting in high inflation. In 2008 and 2009, the economy's external payments were supported by an IMF loan programme, but the drop in external and domestic demand caused a severe contraction of real GDP in 2009 by 15.2%.

Table 14.1 Ukraine: Main economic indicators

	2009	2010	2011	2012	2013	2014*	2015**
GDP growth (%)	-15.2	7.5*	5.5*	0.2*	0.0*	-6.6*	-9.9**
CPI (% aop)	15.9	9.4	8.0	0.6	-0.3	12.1	48.7
Budget balance (% GDP)***	-6.3	-5.8	-2.8	-4.5	-4.8	-4.9	-2.3
External debt (% GDP)	88.3	83.1	74.6	73.7	75.4	93.9	131.3
Current account (% GDP)	-1.7	-2.1	-6.1	-7.8	-8.7	-3.4	-0.2

*Without Crimea. **Without Crimea and part of eastern Donbas. ***IMF methodology, excluding Naftogaz.

Source: Ukrstat, NBU, Ministry of Finance.

The economy began to bounce back in 2010. Nevertheless, serious budgetary problems obliged the government to ask for another IMF programme, which was approved after the Ukrainian authorities accepted budgetary conditions, raised gas tariffs for the population and increased the independence of the central bank. The tax code and a new version of the budget code were approved, although high tax levels and unfair tax administration remained in place. Fiscal decentralisation was not introduced.

In 2011, Ukraine's economy continued its recovery, but then the external environment for Ukraine took a turn for the worse in both the EU (with recession and then stagnation in 2012-13) and Russia (with decelerating growth in 2012, leading to recession in 2014), and with metal commodity prices falling continuously from 2011 onwards. External demand for Ukrainian products remained weak and unstable. In 2012, real GDP growth almost stopped, and in 2013 a new phase of recession started. The budget deficit increased sharply, with acute pressure also on the foreign exchange market. The economic situation again signalled the need for long-delayed structural reforms.

But in 2014 and 2015, Ukraine faced tougher challenges still, with the annexation of Crimea by Russia, military conflict in the Eastern Donbas and an extreme financial and economic crisis. Real GDP dropped by 6.6% in 2014 and by 9.9% in 2015. Industrial output plummeted, partly due to the destruction and closure of some companies in the occupied territory, broken supply links and trade tensions with Russia. The decline in exports and higher demand for foreign currency led to a sharp depreciation of the hryvnia. Average consumer price inflation reached 48.7% in 2015. A fragile macroeconomic stabilisation was reached towards the end of 2015.

Nonetheless, during 2014 and 2015, there was intense cooperation with the IMF, with a two-year Stand-By Agreement for a \$17 billion package agreed in April 2014, which was replaced in March 2015 by a four-year Extended Fund Facility for the same amount, to which the EU added complementary funds (see below). The Ukrainian authorities intensified reforms efforts only in 2015. Deregulation and public procurement reform were among the largest successes. The central bank moved to a more flexible exchange-rate policy. The banking sector became sounder, as problem banks were taken out of the market. The fiscal situation improved as high inflation and somewhat better tax administration resulted in additional revenues, while energy subsidies were reduced after the hikes in gas tariffs. In autumn 2015, the Ministry of Finance agreed on sovereign debt restructuring with debt holders, which reduced financing needs for the next three years by \$15.2 billion.¹⁹⁵ However, implementation of anti-corruption measures was slow and ineffective. Comprehensive tax reform and pension, healthcare and social welfare reforms were not

¹⁹⁵ At the same time, the government imposed the moratorium on the repayment of \$3 billion Eurobond held by Russia (maturing on 31 December 2015), which is expected to lead to a legal challenge by Russia against Ukraine in a British court.

implemented. Judicial reform was delayed hampering further investment climate. Slow reforms, delays in approval of the State Budget for 2016, as well as the political crisis in the beginning of 2016 resulted in the suspension of disbursements under the IMF programme. Now that the newly appointed government confirmed its intention to continue the promised reforms, cooperation with the IMF is likely to resume in the second half of 2016.

Real GDP is expected to grow by 1.6% in 2016. However, economic development is subject to many risks, including a possible escalation of war and higher political uncertainty.

Provisions of the Agreement and financial assistance from the EU

The text of the Association Agreement on macroeconomic cooperation (chapter 2) is short and simple. It foresees regular dialogue on macroeconomic policy and forecasts. Ukraine shall aim at “gradual approximation of its policies to those of the EU”, but there is no legally precise backing to this aspiration in the Agreement.

The actual macroeconomic cooperation and financial assistance to Ukraine is substantial, however, with the EU normally topping up aid from the IMF, largely subject to the same conditions. For the period 2014-20, the EU announced a package of possible financial measures totalling €11 billion, including grants from the EU budget and investments by the European Investment Bank (EIB) and the European Bank for Reconstruction and Development (EBRD), as detailed in Table 14.2.

After signature of the Association Agreement in June 2014 the EU extended fresh macroeconomic loans to Ukraine, alongside the main macroeconomic assistance programme led by the IMF with its \$17 billion stand-by arrangement agreed in April 2014. In January 2015, the EU Commission proposed €1.8 billion of loan operation, which was agreed by the EU authorities in April 2015, following €1.6 billion of loans in the preceding years. The new loan operation is subject to a memorandum of understanding rapidly agreed with the Ukraine authorities in May, outlining the policy programme attached to the loans. The programme largely builds on the reform agenda pursued by the Ukrainian authorities and covers a broad range of areas, including public finance management, governance and transparency, the energy sector, social safety nets, the business environment and financial sector. A first tranche of €600 million was disbursed in July 2015. These loans will carry a low interest rate with a maturity of 15 years.

Table 14.2 EU support for Ukraine, indicative package for 2014-20

Source	Indicative amounts/ ranges (€ mn)
1. European Commission	3,175
1.1 Development assistance (grants)	1,565
- Annual Action Plan for 2014	140-200
- Annual Action Plans for 2015-20	780
- Umbrella Programme 'more for more', 2015-20	240-300
- Neighbourhood Investment Facility	200-250
- Instrument contributing to Stability and Peace (IcSP)	20
- Common Foreign and Security Policy	15
1.2 Macro financial assistance (loans)	1,610
2. European Financial Institutions	up to 8,000
2.1 European Investment bank	Up to 3,000
2.2 European Bank for Reconstruction and Development	5,000
Grand total	Up to 11,175

Source: European Commission.

The EU is executing a number of grant programmes provided for in the indicative package for 2014 to 2020. This includes €355 million of grants for a State-Building Contract and a share for Ukraine (with Georgia and Moldova also profiting) of a €200 million programme for supporting small- and medium-sized enterprises to be executed over the next 10 years. This programme is expected to leverage total investment of up to €2 billion. Further initiatives to support decentralisation and local government reform with over €100 million was announced in December 2015.

Humanitarian aid from the EU and its member states was supplied in 2014 and 2015 to support the basic needs of the population hit by the conflict in eastern Ukraine: €28 million from the EU and €47 million bilaterally from member states in 2014, with the Commission pledging €15 million for 2015.

Ukraine is also a leading recipient of grants from the Neighbourhood Investment Facility (NIF), which supplies grant funding in support of investment operations led by European financial institutions, notably the EIB and the EBRD, and the national investment institutions of Germany, France, Italy, Spain and Austria. From its inception in 2008 to 2014, the NIF supplied €1 billion of grants alongside €12 billion of investments by the financial institutions, with a leveraging of total investments of €25 billion. For the period after the

signing of the Association Agreement, Ukraine is expected to receive an increased level of NIF funding, with €200-250 million up to 2020.

The EIB expects to increase its investments in Ukraine in the period until 2020 to €3 billion, up from the €2.4 billion invested between 2010 and 2014. New commitments made in 2015 amounted to €857 million, devoted to the energy, transport and environmental sectors.

The EBRD is also stepping up its activity in Ukraine, planning up to €5 billion of investments up to 2020. It will concentrate on energy efficiency and energy security, industry, quality infrastructure and the financial sector. The EBRD has already invested €5 billion on projects in Ukraine. Projects approved in 2015 include several in agri-business and municipal environment and infrastructure.

Macroeconomics and funding for the EU at a glance

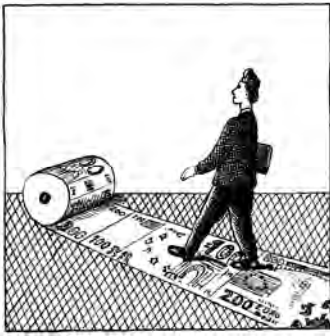
In the years since independence, Ukraine made slow progress in economic policy reforms and consequentially saw a slow recovery of output, except for a period of very favourable commodity prices.

In 2014-15, Ukraine suffered a very severe recession and losses of infrastructure as a result of the war with Russia over the eastern Donbas, on top of the effects of the global recession.

The EU is supplying significant financial assistance to help economic recovery through multiple channels, including macroeconomic loans alongside the IMF, budget grants and investments from the EIB and EBRD.

These financial instruments are supporting concrete operations under the sectoral policy chapters of the Association Agreement, notably in the energy, environmental, agri-business, SME and financial sectors.

15. FINANCIAL SERVICES



The Agreement envisages the comprehensive adoption by Ukraine of the European system for regulating banks, insurance and securities markets with adoption, at least in the end, of the entire EU legislative complex of laws. After a series of major financial crises, the priority now is for the financial markets to be safe and efficient for consumers, systemically sound for the economy and for industry to have open

access to European markets and to secure its competitiveness and modernisation.

Provisions of the Agreement

General provisions. The Agreement commits Ukraine to reform its financial market regulations to ensure that they are “gradually made compatible” with those of the EU for banking, insurance, securities and asset management. A large number of EU laws, 51 in total (listed in Annex XVII-2), will be approximated with implementation delays of mostly four years. In addition, however, there is a smaller number of core regulations of systemic importance and many other technical implementing provisions for the core regulations.

While the ‘gradual’ language in the main text of the Agreement (Art. 133) appears to be quite soft, the Annexes list the legal acts to be transposed into Ukrainian legislation with their timetables (Annex XVII on Regulatory Approximation in general, and particular Annex XVII-2 on approximation for financial services). Art. 2 of Annex XVII states that compliance with the laws listed within the stipulated time delays “shall be binding”, although Ukraine may request delays in the event of difficulties.

National treatment. In general, the Agreement provides for national treatment for establishment and the cross-border supply of services, meaning that each party shall grant to the other party's operators treatment no less favourable than for its own. This is in line with standard WTO/GATS principles, where however national treatment only applies once a service provider has legally entered the market (i.e. this national treatment does not in itself grant market access, which is a separate matter – see further below). In addition, there are detailed provisions facilitating the “temporary presence” of key personnel and suppliers of services (i.e. implicitly assuring the granting of visas). However, there are still numerous specific reservations by individual EU member states (listed in Annex XVI-B), many of which may be of small significance, but nonetheless complicate and limit the openness of the market. In the case of Ukraine, its commitments replicate its very liberal GATS schedule.

Market access. Annex XVII goes on in Art. 3 to specify the specific conditions for “*full internal market treatment*” to be granted. Full internal market treatment is defined as meaning:

- No restrictions on the freedom of establishment, including agencies, branches or subsidiaries, where the two parties treat each other's juridical persons in the same way as their own; and
- No restrictions similarly on freedom to provide services.

For this purpose, Ukraine “shall transpose and continuously implement the existing EU legislation”. This covers “all new or amended” legislation, so this part of the Agreement is to be automatically updated. Actually, the legislation listed (in Annex XVII-2) predates major revisions to EU law and international norms that had already been undertaken in the wake of the financial crisis that began in 2008-09. For full internal market treatment to be granted, the EU must carry out an assessment that the conditions are fulfilled and then the Trade Committee of the two parties may decide on the granting of full internal market treatment. The updating of the list of EU laws for approximation is thus to be a normal process for the two parties to arrange together, with periodic formal announcements on which items of law are to be added and/or repealed in relation to those in the Annex.

It will surely take a considerable number of years before Ukraine achieves full internal market access. In the meantime, conditions close to GATS commitments prevail. Under the Association Agreement, however, GATS provisions will be subject to accelerated dispute settlement. The EU and Ukraine may agree in principle to reduce trade

barriers under Annex XVI independently of the full internal market treatment process.

International standards. At the same time, the Agreement calls in Art. 127 for Ukraine “to make its best endeavours” to apply internationally agreed standards, inter alia:

- Core Principle for Banking Supervision under the Basel rules
- Insurance Core Principles of the International Association of Insurance Supervisor (IAIS)
- Objectives and Principles of Securities Regulation of the International Organisation of Securities Commissions (IOSC)
- OECD’s Agreement on exchange of information on tax matters
- G20 Statement on transparency and exchange of information for tax purposes
- Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing, issued by the Financial Action Task Force (FATF)

Ukraine has included the implementation of international best practices for financial-sector supervision in its action plan to implement the Association Agreement as well as its 2020 Financial Development Programme. In practice, Ukraine has been making efforts to implement Basel principles since the 2000s, and its IMF programme should also lead to better compliance. FATF rules have been implemented as part of Ukraine’s compliance efforts after the country was called out by FATF. Ukraine’s regulators are also members of IOSCO and IAIS. While some provisions in these documents are included in EU legislation, others are best practices, which are implemented on an operational level.

Banks

Capital requirements. The global financial crisis of 2008-09, with the collapse or near-collapse of major banks of systemic importance, has led to a radical strengthening of the capital reserve requirements of banking systems. When the Association Agreement was negotiated, Ukraine was adhering to core Basel I rules.¹⁹⁶ Meanwhile the EU was

¹⁹⁶ Basel I was the first internationally agreed set of banking regulations negotiated and produced by the Committee on Banking Supervision at the Bank for International Settlements (located in Basel), while Basel III is the most recent version that takes into account of the need for changes in light of the 2009

implementing the newer Basel II capital adequacy requirements, and the Association Agreement binds Ukraine to harmonise with these rules. Since then, however, the EU has moved on to the latest international standard, i.e. the Basel III rules, and repealed older legal instruments. Accordingly, among the key EU laws to be implemented are the following:

- The 2006 Directive on capital adequacy of investment firms and credit institutions (2006/49/EC), replaced in 2013 by a Regulation on prudential requirements for credit institutions and investment firms (575/2013/EU – CRR)
- Another related Directive of 2006 on the business of credit institutions (2006/48/EC), replaced now by a Directive of 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (2013/36/EU - CRD IV)

These key prudential requirements are now set in the above EU regulations, which are directly applicable to banks.¹⁹⁷ While the basic minimum capital requirement of 8% of equity capital is unchanged (as in Basel I and the Basel II), the definition of capital is tightened and additional categories of reserve requirements are introduced, giving essentially the following regime (under Basel III and the new 2013 laws):

- Minimum capital reserve requirement of 8%, plus...
- Capital conservation buffer of 2.5%
- Countercyclical capital buffer of 0 to 2.5%
- Capital buffer of 0 to 3.5% for systemically important institutions
- Systemic risk buffer of 0 to 3 to 5% (usually not cumulative with systemic institution buffer)

As a result, capital adequacy requirements can range from 10.5% to 16.5% of risk-adjusted assets (exposure), depending on the systemic status of banks (based on size or specialisation). Small- to medium-sized banks can be largely exempt from the additional requirements. These capital reserve requirements are subject to extremely complex methodologies of definition and calculation, which take up the bulk of the texts in question. There are also new requirements with respect to

financial crisis. While these norms are international, the EU legislates to make them strictly operational and binding.

¹⁹⁷ For a detailed analysis of the new laws, see Karel Lannoo (ed.), *The Great Financial Plumbing: From Northern Rock to Banking Union*, Brussels and London: CEPS and Rowman and Littlefield, 2015.

liquidity to cover stress conditions. The timeline for implementation of the new rules will be decided in accordance with the procedure in Art. 3 in Annex XVII. The Trade Committee will have to add new EU legislation to Annex XVII-2 and agree on 'indicative deadlines'.

Accounting rules. Five accounting directives, cited in Annex XVII-2, set requirements for annual accounts by banks and other financial institutions.

Insurance. The key law for regulating the insurance industry is a Directive on the taking-up and pursuit of the business of insurance and reinsurance also known as Solvency II (2009/138/EC), which is a fundamental text detailing the rules for the conduct of the industry, its supervision and solvency. Ukraine should comply within four years. It is understood that implementation of Solvency II will pose a big challenge for Ukraine and will take considerable time to be realised. Ukraine also promised to implement EU rules on insurance intermediaries (2002/92/EC – IMD II) and the motor insurance Directive (2009/103/EC). So far, the Ukrainian insurance regulator has focused its efforts on implementing the last two directives referred to above.

Securities (MiFID). The EU has established a comprehensive regulatory regime for investor transactions by stock markets, other trading systems and investment firms, with a single authorisation for investment firms to do business anywhere in the EU. The key law is the 2004 Directive for markets in financial instruments (2004/39/EC – MiFID), supplemented by an implementing Directive in 2006 (2006/73/EC). Two other key Directives concern rules for the prospectus for issuance of securities (2003/71/EC) and for controlling insider dealing (2003/6/EC). The remaining directives presented in this section are mostly intended to provide detailed amendments or implementing details of the three main directives cited above.

Investment funds (UCITS). The basic law of the EU for investment funds was revised in 2009 in the wake of the Madoff scandal of 2008, and this text on the Regulation of collective investment in transferable securities (2009/65/EC – UCITS) is cited in Annex XVII-2. The market in question has grown to a substantial size of over €5 billion in the EU. Moreover, this text has undergone a further important revision in 2014 (2014/91/EU). There was also in 2011 a significant addition to this domain of regulation with a Directive to govern alternative investment fund managers (2011/61/EU – AIFMD), aimed at hedge funds and other highly leveraged institutions, but it is not listed in Annex XVII-B.

Financial derivatives. The EU has introduced complex rules to regulate financial derivatives in a Regulation on over-the-counter (OTC) derivatives, central Counterparties and trade repositories, also called EMIR (648/2012/EU). This was a major development, enabling the European Union to deliver the G20 commitments on OTC derivatives agreed at the Pittsburgh summit in September 2009. The Regulation ensures that information on all European derivative transactions will be reported to trade repositories and made accessible to supervisory authorities.

Implementation perspectives

Present structure and state of Ukrainian financial markets. Ukrainian financial markets have developed practically from zero since independence in 1990. The banking and insurance sector started with Ukrainian branches of Soviet state banks and insurance companies, while securities markets, investment funds and others started literally from scratch. The development of the financial sector has not been a smooth process, however, having witnessed no less than three financial and economic crises (1998-99, 2008-09 and 2014-15).

The decade between first two crises, i.e. from late 1999 to September 2008, was marked by rapid expansion of all segments of financial markets from the banking sector to credit unions, insurance companies and stock markets. Between 2003 and 2008, bank loans outstanding increased from 20% of GDP to 59% of GDP and bank deposits from 18% of GDP to 33% of GDP. This reflected a lending boom in 2006-08, when loan stock grew at over 100% year on year. Before 2008, the financial sector also attracted large amounts of foreign investment. By 2008, FDI in the financial services sector reached about \$12.7 billion or about 30% of the total FDI stock, with about half of the assets of the banking system being held by foreign owned banks.

Structurally the Ukrainian banking sector was diffused. On the eve of the 2008 crisis, over 180 banks operated in Ukraine. The top 10 banks held only 49% of total assets of the banking sector with 113 small banks contributing 8.4% to the total. Quite a few small and medium banks operated as 'pocket' banks, performing treasury, funding and tax-optimising functions for the owners.

In late 2008 and in 2009, the financial services sector went through a 'perfect storm'. Spillovers from the global economic and financial crisis were compounded by domestic structural problems, high dollarisation and overheating from the lending boom. Depreciation of the hryvnia from 5 to 8 per USD instantly reduced the

quality of loan portfolios. The crash of the real estate market reduced the value of collateral assets. Most market participants were able to pull through the crisis due to regulatory forbearance and generous stabilisation loans from the National Bank. Parent companies of foreign-owned banks injected additional funds to help keep their recently acquired subsidiaries afloat. In all, less than 20 banks failed in 2009 and 2010, and eight new banks were created. By 2013, number of active banks was back to 180.

Nevertheless, the 2008 crisis inflicted lasting damage on the banking sector despite (or because of) the few bankruptcies. The banks that survived were left holding large portfolios of problem loans that were not adequately provided for. The capitalisation of banks appeared sound on paper, with average ratios of capital to risk-weighted assets of over 20% in 2010, but this reflected under-provisioning, opportunistic risk-weighting of assets and over-capitalisation of state-owned banks. In reality, many banks were weakened by the 2008 crisis and were still struggling by the time the next crisis started.

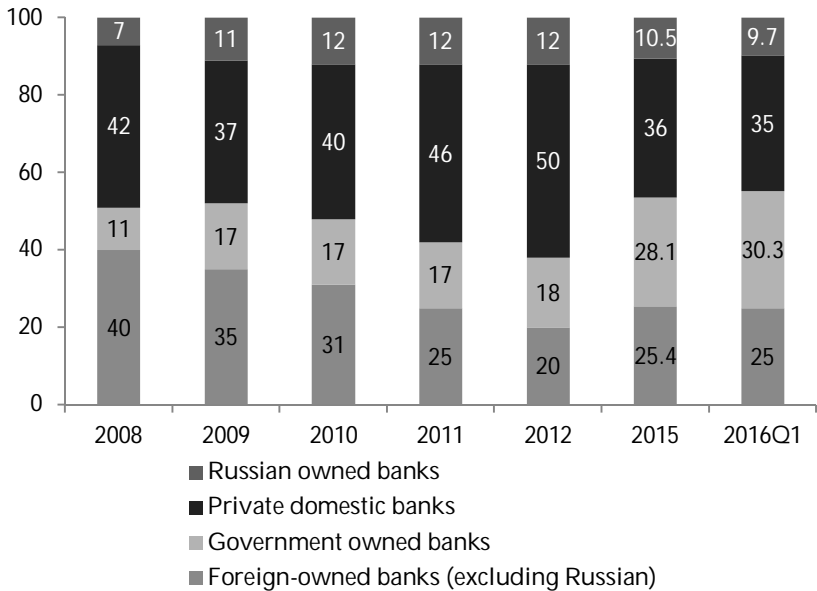
The 2014-15 crisis presented a mix of new and old challenges to the banks. A sharp depreciation of the hryvnia, lower cash flows of borrowers due to the economic downturn and difficulties in selling collateral in a buyer's market were present in 2009. But, in addition, the armed conflict in the Donbas region and the annexation of Crimea presented new problems to deal with. Donetsk and Lugansk oblasts in 2013 produced 31% of output of extractive industries and over 23% of manufacturing output, and were thus major borrowers. Banks with larger exposure to Donbas and Crimea were disproportionately affected, and several regional banks simply ceased to function, as their offices and documentation were located outside the effective control of the Ukrainian authorities.

The result of these accumulated challenges was a large number of bank failures. In 2014 and 2015, 66 banks failed and over five months of 2016 another nine banks withdrew from the market. Together they represented over 28% of banking sector assets, including three out of top 15 banks and 13 out of next 20 banks. So far, no banks have been bailed out by the government, and the National Bank of Ukraine has been more selective in granting emergency loans.

As foreign owners were more conservative in granting loans and had less difficulty in recapitalising banks, the ownership structure of the banking system changed significantly (see Figure 15.1). Between 2009 and 2012, some foreign owners sold their Ukrainian banks to

Ukrainian owners and expanded their assets at a slower pace than Ukrainian-owned banks.

Figure 15.1 Ownership structure of Ukrainian banks (by assets*)



* Not adjusted for minority stakes.

Source: Own calculations and Raiffeisen Bank Aval based on NBU data. The figure extends the data found in “The economic implications of the Eurozone crisis on Ukraine” Policy Brief 03/2013 by German Advisory Group and Institute for Economic Research and Policy Consulting.

During the crisis, most of the private banks that failed had Ukrainian owners. By March 2016, the asset share of private domestic-owned banks decreased to 35%, including 21.6% attributed to Privatbank, the largest bank in the country. The share of state-owned banks in total bank assets swelled to 30.3%, as they picked up business from failed banks and continued lending to public-sector entities. The share of foreign-owned banks increased slightly to 34.7%, including a 9.7% share by Russian-owned banks.¹⁹⁸

¹⁹⁸ Russian-owned banks exclude Alfabank, which is majority-owned by Russian emigres (with UK and Israeli citizenship).

Present state of regulatory system before the Agreement

The requirements of Basel I were broadly in force in Ukraine since at least 1995,¹⁹⁹ with the National Bank of Ukraine (NBU) applying the minimum ratio required by Basel I, i.e. 8% for the overall capital adequacy ratio (CAR) and 4% for Tier 1 CAR. In 2004, the CAR was raised to 8%, and in the middle of 2008, the Tier 1 ratio was replaced by a leverage ratio defined as the regulatory capital to total assets (gross assets net of provisions). It was set at 9%. In 2014, the NBU added a modified leverage ratio defined as the ratio of regulatory capital to liabilities set at 10%.

After Basel II was approved, there were plans to transition to new rules²⁰⁰ at the NBU, but they were delayed during the lending boom and abandoned during the 2008 crisis.

While key ratios did not change much over the last 20 years, the NBU made numerous revisions to what could be included in regulatory capital, risk-weighting, deductions and exceptions. It also introduced changes to rules about other regulatory ratios, such as minimum capital, liquidity and limits on the open foreign currency position. The NBU's Instructions on bank regulation of 2001²⁰¹ was amended 60 times over the next 15 years. Besides, the NBU made several cycles of revisions to accounting standards by banks to align them to IFRS/IAS standards. In 2010, in principle, banks were required to provide annual financial reports in accordance with IFRS, and in 2016 quarterly reports will also be subject to IFRS. This corresponds to reporting requirements adopted by the EU for listed companies.²⁰²

After the 2009 crisis, the banking authorities learned some lessons. For example, to limit dollarisation, the NBU implemented tougher requirements for foreign currency loans, and new consumer foreign exchange loans were prohibited altogether. Reserve requirements on foreign currency deposits were increased. In an effort

¹⁹⁹ Rulemaking by the NBU in the beginning of the 1990s was informal. Thus, it is difficult to establish when CARs were established. In any case, hyperinflation made CARs meaningless before 1995.

²⁰⁰ See <http://zakon5.rada.gov.ua/laws/show/v3749500-04>.

²⁰¹ See <http://zakon5.rada.gov.ua/laws/show/z0841-01>.

²⁰² Ukrainian law requires all banks to be incorporated as public joint-stock companies and to apply the same IAS/IFRS accounting standards that are mandatory for listed companies in the EU. At the same time the form of presentation of annual/quarterly accounts does not correspond fully to that in Council Directive 86/335/EEC on annual accounts of financial institutions.

to make provisioning for non-performing loans more effective, new rules for loan loss provisions were implemented. Problems with loan fraud and loan enforcement prompted the Parliament to make significant changes in the laws on contracts, mortgage, enforcement of court orders and bankruptcy. At the same time, consumer-protection provisions for lending to individuals were strengthened. Some loopholes remained, however, allowing some borrowers to invalidate loan agreement/sureties. Institutional weaknesses of the court system also remained, allowing some corporate borrowers to prolong litigation excessively and to syphon assets from the debtor entity and move them to other companies. Enforcement of court orders remained long and often unfruitful.

In 2015, the NBU took a first step towards implementing Basel III by inserting some elements, e.g. concerning core capital ratio and capital buffers, for their gradual introduction between 2019 and 2023 (i.e. after an IMF loan programme is scheduled to end). For example, the Tier 1 capital ratio at 7% will become effective in 2019 and the capital conservation buffer will be phased in during 2020-30, increasing each year to 2.5% in 2023. The NBU will also be able to apply a countercyclical buffer of up to 2.5% of risk-weighted assets in case of debt overheating. Systemic banks will be subject to a systemic bank buffer of 1-2%. However, this is only a framework decision. In the next three to four years, the NBU will have to implement detailed rules on capital buffers to be effective.

Reform and approximation prospects and priorities. From the above, it is evident that there will be many issues of timing of approximation and implementation of individual EU laws and on how and when to update the list of laws for approximation in the financial area. The government of Ukraine has drawn up a very detailed action plan, its Comprehensive Programme of Financial Market Development of Ukraine until 2020,²⁰³ which integrates commitments under the Agreement with the EU with those made with other international partners and of course the domestic context. The 2015 EU-Ukraine Association agenda recommends implementation of EU legislation on financial services based on an updating of the list in Annex XVI-2.²⁰⁴ The programme seems to follow this approach as it contains an

²⁰³ For the programme approved by NBU resolution 315 from 18.06.2015, see <http://zakon5.rada.gov.ua/laws/show/v0391500-15>.

²⁰⁴ Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement as endorsed by EU-Ukraine Association Council on 16 March 2015 (http://eas.europa.eu/ukraine/docs/st06978_15_en.pdf).

implementation schedule for both EU legislation in financial services listed in Annex XVI-2 to the agreement as well as new legislation such as Directive 2013/36/EU. All key new directives are mentioned there. More burdensome large-scale directives that will require market participants to significantly change their business practices are planned for implementation in 2018. A significant number of directives are planned for earlier implementation, including those related to deposit guarantees, e-money, payment services, etc. A more detailed listing of the deadlines is given below in Table 15.1.

Table 15.1 Deadlines for implementation of EU legislation in the 2020 Programme

2015-16	2018
2009/110/EC (new E-money Directive)	2005/60/EC (3 rd AML Directive, 2017)
2014/49/EC (DGS Directive)	2013/36/EC (CRD IV)
2014/59/EU (BRRD)	2007/44/EC (acquisitions Directive)
2001/24/EC (bank resolution Directive)	2014/65/EU (MiFID 2)
2007/64/EC (payment services Directive)	575/2013 (CRR IV)
1781/2006 (wire transfer Regulation)	2002/87/EC (FICOD)
2004/39/EC as amended by 2006/31/EC (MiFID)	86/635/EEC (bank reporting Directive)
2006/73/EC (MiFID implementing Directive)	2001/65/EC (fair value Directive)
97/9/EC (investor compensation Directive)	2013/34/EU (EU accounting Directive)
2014/57/EU (market abuse Directive)	2006/43/EC (statutory audits Directive)
596/2014 (market abuse Regulation)	2003/51/EC (accounts modernisation)
2004/72/EC, 2003/124/EC, 2003/125/EC, 2273/2003 (implementing Directives/Regulations)	537/2014 (statutory audit Regulation)
1060/2009 (CRA Regulation)	2006/46/EC (company reporting Direct.)
2002/47/EC (collateral Directive)	2014/56/EU (amending audit Directive)
2008/48/EC (consumer credit Directive)	98/26/EC (settlement finality Directive)
2007/14/EC (transparency Directive)	2007/60/EC (PEP Directive)
	1287/2006 (MiFID implementation Regulation)
	2009/65/EC (UCITS IV)

2001/34/EC (prospectus and listing)	2007/16/EC (eligible assets Directive)
2003/71/EC (prospectus Directive)	1606/2002 (IAS Regulation)
2008/10/EC, 809/2004, 1787/2006, 1289/2008 (prospectus Regulations)	2009/138/EC (Solvency II)
2004/109/EC (listed companies Directive)	2009/103/EC (motor insurance Directive)
2010/43/EC, 583/2010, 584/2010 (UCITS implementing legislation)	91/674/EEC (insurance accounts Directive)
	2002/92/EC (IMD II)
	2003/41/EC (IORP Directive)
	1569/2007/EC (accounting standards)

Overall, it seems that the NBU plans to prepare all the legislative changes necessary for internal market treatment by the end of 2018. However, the legislation may be implemented with transition periods, as in the case of Basel III. Besides, other regulators may be slower in implementing EU legislation. For example, it is planned to divide the Financial Services Commission between the NBU and the Securities Commission in the course of 2016. This may reduce incentives to be proactive in implementing EU legislation and means that it may be difficult to keep to the deadlines. Still, eventual access to the EU market is likely to be beneficial by increasing competition in the Ukrainian market and easing access to the EU financial market for Ukrainian corporates.

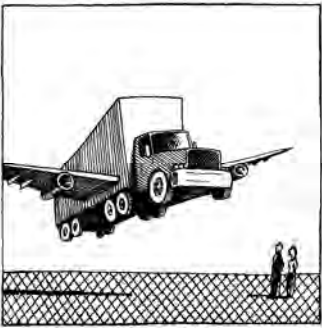
Financial markets at a glance

At the starting point of the Agreement, Ukraine's financial sector was in the midst of extreme tensions regarding the stability of the banking system and the servicing of external debt, following a major financial crisis.

Nevertheless, the government is proceeding with a comprehensive, long-term programme for regulatory modernisation, anchoring on EU legislation, which is a crucial part of the general economic modernisation process.

A large portion of EU legislation is complex and will demand a long and sustained effort to implement, but there are sound reasons to embark upon adopting this international best practice immediately.

16. TRANSPORT



Transport has been a key sector for the EU's internal market since the early days of the European integration process. As a result, the EU has a well-established body of law and policies on transport. The DCFTA aims to expand and strengthen Ukraine's cooperation with the EU in the field of transport and thereby to promote efficient, safe and secure systems with greater interoperability. This will be fundamental to integrating Ukraine's industries into the European supply chain and to boosting contact between people, especially when visa-free travel becomes possible.

Provisions of the Agreement

Overall, the DCFTA provides for a progressive liberalisation of transport in road, rail and inland waterways, with approximation to many EU standards and, in some instances, conclusion of further special agreements. Before the conclusion of such agreements, the EU and Ukraine may not restrict the conditions of mutual market access. Mutual market access for shipping services will only materialise when Ukraine transposes and implements a designated list of EU regulatory measures. Air transport is mentioned but does not fall under the Association Agreement. The conditions of mutual market access in this sector are dealt with in a bilateral Common Aviation Agreement, which waits full ratification.

Road transport. At the present time road freight services operated between the EU and Ukraine are regulated by bilateral intergovernmental agreements between EU member states and Ukraine. These agreements impose quota and licence arrangements on

hauliers from both sides.²⁰⁵ A recent study has shown that abolition of these restrictions would give a significant boost to trade, output and employment for both parties.²⁰⁶ However, because EU member states fear that their markets could be overrun by lower-paid Ukrainian truckers they have not so far been willing to adopt a mandate for the Commission to negotiate an EU-Ukraine road transport agreement. While the DCFTA does not allow foreign investors to provide road passenger transport services within a member state (cabotage), it does offer an exception for the rental of non-scheduled services of buses with operators (Annex XVI-A).

Under the terms of the DCFTA, goods and passenger road transport companies, operators and drivers from Ukraine have to fully comply with the EU regulatory standards within three to five years of the entry into force of the Agreement.²⁰⁷ This puts the onus on Ukraine's legislature to approximate domestic rules and standards to those of the EU and to introduce the necessary monitoring, inspection and enforcement mechanisms to assure the proper implementation of the EU directives and regulations. In view of the need to create more transparency in the licensing system and to level the playing field for road transport operators, priority should be given to the approximation of legislation on a single state electronic register for road transport operators²⁰⁸ and the confirmation of the professional qualifications of drivers.²⁰⁹

²⁰⁵ According to the case law of the European Court of Justice, these bilateral agreements have to conform to existing EU transport law. See Judgments in Cases C-466-9/98, C-471-2/98, C-475-6/98, *Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany*, 5 November 2002.

²⁰⁶ See "Study on the economic impact of an agreement between the EU and Ukraine", 14 October 2014 (http://ec.europa.eu/transport/modes/road/studies/doc/2015-07-24-icf-eu_ukraine-roadfl-finalreport.pdf), which concludes that an EU agreement that abolished these requirements "would deliver a modest but positive boost to trade, output and employment for both parties. The largest gains come from removal of bilateral permitting arrangements; removal of transit permits has a smaller effect. Full liberalisation could boost total trade by more than €0.5 billion per year. Liberalisation increases the EU's road-freighted exports to Ukraine more than it does imports from Ukraine under all scenarios."

²⁰⁷ See Annex XXXII.

²⁰⁸ Regulation (EC) No. 1071/2009.

²⁰⁹ Directive 2003/59/EC.

Air transport. The DCFTA refers to the Common Aviation Area Agreement (CAA) between Ukraine and the EU, which was negotiated separately and initialled in 2013. When the CAA enters into force,²¹⁰ Ukraine will be committed to approximate its legislation to more than 60 legal acts of the EU (Annex I of the CAA) concerning flight safety and certification regulations; the strengthening of the administrative capacity of the aviation authorities to implement EU aviation standards; and further cooperation with the European Aviation Safety Agency (EASA), including convergence of the airworthiness certification system with that of the EU.

The transition of Ukraine towards the full implementation of the CAA will happen in stages, as it is subject to assessments and standardisation inspections by the European Commission and the EASA, as well as a decision of the Joint Committee. The CAA does not immediately confer complete internal market access to Ukrainian carriers: at first they only obtain the right to fly between Ukraine and an EU destination, either directly or via an intermediate point in the neighbourhood, in the European Common Aviation Area or in Iceland, Liechtenstein or Switzerland (Art. 16 and Annex II). That precludes Ukrainian carriers from operating flights within EU member states (cabotage) and flights between two EU member states unconnected to a flight to or from Ukraine. Such rights would come at a second stage (cf. Art. 33 and Annex III).

The legal regime applicable to air transport services is convoluted. In general terms, the DCFTA defers to the CAA, once it enters into force. In the meantime, the DCFTA excludes national and MFN treatment for domestic and international air transport services, whether scheduled or non-scheduled, and services directly related to the exercise of traffic rights. There are, however, exceptions to this rule, with respect to: i) aircraft repair and maintenance services during which an aircraft is withdrawn from service; ii) the selling and marketing of air transport services; iii) computer reservation system (CRS) services; iv) ground-handling services; v) airport operation services" (Arts 87-88 of the DCFTA). However, the reservations mentioned in the DCFTA have to be regularly reviewed by the Association Council's sub-committee dealing with transport in order to

²¹⁰ The CAA was initialled on 28 November 2013 in Vilnius but its signature has been postponed by the EU because Spain and the UK have not yet agreed to the Agreement's territorial application to Gibraltar.

progressively liberalise the establishment conditions and resolve the legal inconsistencies between the CAA and the DCFTA.²¹¹

Railway transport. The DCFTA aims to reform the rail transport sector in Ukraine and gradually liberalise the freight and passenger rail market over a period of 8 years. As with other modes of transport, this requires equal access to infrastructures and improvement of technical and technological quality standards.

One of the difficulties of achieving interoperability with the rail networks in the EU is that the three Eastern Partnership countries still operate on the Russian gauge, which at 1,520 mm is wider than the European standard of 1,435 mm. Finland is currently offering technical expertise to the Support Group on Ukraine to help organise rail connections in a cost-efficient way, in particular through the use of equipment to change the undercarriages at border crossings.

Inland waterway transport. The Agreement does not foresee any national and MFN treatment obligations with respect to national *cabotage* (either in the EU or Ukraine), but respects the traffic rights reserved under existing or future agreements (e.g. following the Rhine-Main-Danube link). Still, Ukraine is expected to gradually approximate its legislation (within 5 years of entry into force of the Agreement) concerning the conditions for access to the domestic market, i.e. qualifications for operators, a central register, harmonised information services, safety standards for vessels and the establishment of a network of logistics centres.

International maritime transport. The Agreement grants “unrestricted access to the international maritime markets and trades on a commercial and non-discriminatory basis” and MFN treatment to

²¹¹ This should forego any problems of hierarchy of legal regimes when the CAA enters into force. In the same vein, Arts 87-88 relate to the freedom of establishment and not to the cross-border provision of services. As these services are typically provided through establishment, one could argue that the DCFTA regime will prevail in practice. In some cases, however, services are provided without establishment (e.g. self-handling), which will mean that the applicable rules will have to be derived from the CAA. Similarly, the DCFTA lists two EU-wide reservations on establishment in the area of air transport services, one relating to the rental of aircraft with crew, the other with respect to CRS (Annex XVI-A). The relevant provision on CRS in the CAA (Art. 13) refers to access to the market, without detailing whether this is through or without establishment; this may indeed create a conflict, in which case one could either argue that the specialised (i.e. the CAA) or the later agreement (DCFTA) takes precedence.

vessels with regard to, inter alia, access to ports, the use of infrastructure and services of ports, and the use of maritime auxiliary services, as well as related fees and charges, customs facilities and facilities for loading and unloading (cf. Art. 135, paras. 4 and 5).²¹² Yet, EU-wide and member state-specific reservations on national treatment and MFN limit that access until Ukraine has approximated its legislation to 19 measures relating to the qualification of seafarers, safety standards for passenger and cargo ships, the liability of carriers of passengers by sea in the event of accidents, port state control, etc. (cf. Annex XVII) within prescribed timetables of 3-7 years of the entry into force of the Agreement.²¹³

In other areas of international maritime transport, a formal procedure (also regulated in Annex XVII) prescribes that it is for the European Commission to formally assess if revised/new Ukrainian legislation conforms to the EU's *acquis*, and, if so, for the Association Committee (in trade configuration) to decide whether Ukraine has indeed fulfilled its commitments and that markets can be opened. In practice, it will take years before internal market treatment is extended to Ukraine. Ukraine has developed a roadmap for the approximation of Ukrainian legislation to EU norms in the international maritime transport and passed it to the EU for comments.

Implementation perspectives

The transport sector accounts for 7% of Ukraine's GDP and 6% of total employment. The government's reform priorities in this area are: to conform to European standards, to reduce the state's role in the activities of monopolies, to decentralise the functions of the Ministry of Infrastructure and to privatise revenue-generating operating units of state enterprises.

To harmonise Ukrainian transport legislation with that of the EU, the Ministry of Infrastructure has introduced changes to the rules of transportation of dangerous goods and standards for licence plates, and has simplified the business environment in seaports. Currently, the main goal is to sign the Common Aviation Area Agreement with the EU.

²¹² The Agreement does not apply to domestic maritime transport, with the exception of the movement of equipment (e.g. empty containers not being carried as cargo against payment between ports).

²¹³ See Art. 3 of Annex XVI-A and Art. 4(3) of Annex XVII.

Road transport. This transport mode is the economically most vibrant in EU-Ukraine relations and is growing rapidly for both international road haulage and passenger traffic. Around 80% of EU exports to Ukraine and 30% of imports, in value terms, travel by road. Eurostat data suggest that 5.3 million tonnes of EU exports and 3.5 million tonnes of EU imports are carried by road to/from Ukraine each year. The development of public roads in Ukraine is currently lagging behind the pace of motorisation in the country and the operational condition of roads is very poor. The average speed on roads in Ukraine is 2-3 times lower than in Western countries and there are barely 200 km of highways. One of the biggest challenges facing Ukraine is the high death toll from road accidents.

At the time of writing, hardly any legal acts of this kind have been brought before the *Verkhovna Rada*. However, in December 2015 the Cabinet of Ministers approved the draft law “On bringing legislation of Ukraine on automobile transportation in accordance with the EU regulations”, which was submitted to the *Verkhovna Rada* on 23 December 2015.²¹⁴ Further approximation initiatives concern market access, working hours, speed limit devices, tachographs and technical inspections.²¹⁵

Air transport. Ukraine’s aviation sector has developed very quickly in recent years. This is partly thanks to the visa-free regime for EU nationals to travel to Ukraine, visa facilitation for Ukrainian citizens to travel to Europe and major investments in infrastructure for the Euro 2012 football tournament. This rapid growth is expected to continue and to be boosted when the CAA enters into force.

In 2015, 29 Ukrainian air companies were operating on the domestic market. International flights are offered by 9 Ukrainian and 35 foreign air companies. The biggest passenger-carrying companies in 2015 were Ukrainian International Airlines, UTair Ukraine, Windrose and Dniproavia. Eighteen companies offer cargo services, of which the biggest are; Antonov, Maximum Airlines, Ukrainian International Airlines, ZetAvia and Urga. Among the 20 active airports in Ukraine

²¹⁴ See http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57545.

²¹⁵ To liberalise the road transport market, Ukraine suggested at the Association Committee meeting of 13-15 July 2015 to sign a new bilateral agreement with the EU. At the request of the European Commission, on 15 August 2015, Ukraine submitted a completed questionnaire on the analysis of the Ukrainian market of road transportation. See [www.kmu.gov.ua/document/248531076/Non%20paper_Cluster%203_final_en_FOR%20WEB%20\(1\).pdf](http://www.kmu.gov.ua/document/248531076/Non%20paper_Cluster%203_final_en_FOR%20WEB%20(1).pdf).

the biggest are Boryspil (near Kyiv), Kyiv (Zhulyany), Odesa, Lviv, Kharkiv and Dnipro.

In 2015, the volume of passenger air transportation by Ukrainian air carriers decreased by 2.7% to 6.3 million passengers. International passenger air transportation decreased by 2.6% to 5.7 million passengers. Passenger turnover via Ukrainian airports decreased by 1.9% to 10.7 million. This fall in demand for air travel continues from 2014, mainly due to the unstable political and economic situation in the country.

Ukraine would also like to bring its Antonov aircraft production into compliance with EU *acquis* and would like UA certification to be regarded as equivalent to EU standards. Ukraine retained the right to certify the older versions of Antonov airplanes but for the new models it needs to obtain EASA certificates in order to fly within the EU.

Railway transport. The Ukrainian railway network ranks as the third-longest in Europe (ca. 22,000 km, half of which is electrified), but due to the break-of-gauge to the west and south (Hungary, Poland, Romania, Slovakia), international rail transport is mainly directed towards former Soviet states. While investments were made to improve rail links between Euro 2012 cities, the economic weight of today's passenger and freight transport via rail cannot be compared with that of road and air. Nevertheless, the Ministry has prepared a new draft law on rail transport.²¹⁶

Inland waterway transport. Ukraine has limited access to European inland waterways via the Danube and the Black Sea. Its internal navigable waterway system is limited to 2,240 km, 40% of which consists of the Dnieper. Whereas the Ukrainian government is developing plans to increase transportation of corn via Kyiv to Odesa, the volume is still marginal in economic terms. The Ministry has prepared a draft law on inland water transport.

International maritime transport. The ports of Odesa and Mykolayiv are the major outlets for maritime transport. In 2015, 34% of all cargo was handled by the Yuzhny seaport near Odesa (48.6 million tons), 18% by Odesa seaport (25.6 million tons) and 15% by Mykolayiv seaport (22.2 million tons). The five Crimean ports (in Yevpatoriya, Kerch, Sevastopol, Feodosiya and Yalta) accounted only for 8% of all cargo handling in 2013.

²¹⁶ Ukraine sent the draft law to the EU in July 2015 and expects to receive comments from DG MOVE regarding compliance of the law with the European railway legislation.

Pan-European Corridors. Ukraine occupies a pivotal position in the network of Pan-European Corridors, defined in 1994 as a long-term strategic plan for Europe's multi-modal network of continental road, rail and waterway connections. This planning framework provides the reference for prioritising major infrastructural investments, which can be funded on the European side by investment from the EIB and EBRD, with the addition of some grant funding from the European Commission. These investments naturally complement regulatory transport policy measures, including the approximation agenda of the Association Agreement.

Four of the ten Pan-European Corridors involve Ukraine, as follows:

- Corridor IV consists of road and rail connections from Brussels to Kyiv, via Dresden, Krakow and Lviv.
- Corridor V starts in Venice and goes through Slovenia and Hungary before entering Ukraine and Uzhgorod, and thence on to Lviv and Kyiv.
- Corridor VIII is the Danube waterway, which at its mouth in the Black Sea gives access to Ukraine.
- Corridor IX contains the major north-south connections, starting in Helsinki and St Petersburg, with one branch transiting Belarus and another passing through Moscow, both reaching Kyiv.

All these corridors converge on Kyiv as a central crossroad point. The context for these corridors is now taking on the intercontinental dimensions of China's 'New Silk Road' programme. This programme is likely to increase European-Chinese cooperation, which will be of interest to Ukraine in view of various Eurasian corridors that may pass through its territory.

Transport at a glance

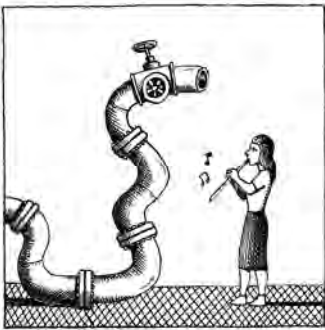
The DCFTA sets out the EU's detailed standards and regulations for road, rail, inland waterways, sea and intermodal transport, which Ukraine will progressively adopt. These concern the qualifications of transport operators, the technical safety of vehicles and vessels, and the activities of inspection bodies

Air transport is referred to in the DCFTA but regulated in a separate EU-Ukraine Civil Aviation Area Agreement, which is pending full ratification and will in due course open the air transport market to low cost competition.

In the case of road haulage transport access to the EU's market is currently subject to quota provisions at the level of the member states.

Ukraine occupies a pivotal place in the Pan-European Corridors for road and rail connections. The EBRD and EIB are supplying investment funding for improvements in these and other major transport infrastructures.

17. ENERGY



The reform and modernisation of Ukraine's energy sector is a challenge of the utmost priority, for both economic and geopolitical reasons. Ukraine is currently the most wasteful energy user in the industrialised world. If it approached average European energy efficiency standards it would no longer need to import gas. The provisions of the Agreement are highly relevant for the necessary policy reforms in the energy sector.

Provisions of the Agreement

The Agreement contains two separate chapters on energy: under the DCFTA heading one chapter concerns trade-related issues, and the second concerns broader energy policy cooperation. Both chapters include references to the Energy Community Treaty, to which Ukraine acceded as a full member in 2011, following Moldova in 2010. We first set out the content of this Treaty.

Energy Community Treaty. The contents of this Treaty pre-date the Agreement, but are carried over into it. The purpose of the Treaty is to provide for the application of much of the EU's energy and environmental law in neighbouring non-member states. Since the intentions and content of the Treaty are entirely consistent and overlap with the Agreement, the latter includes references to the Treaty and, in particular, it states in Art. 278 that in the event of conflict between the two texts, the Treaty shall have legal precedence. The content of the two texts can thus be taken as parts of the same political project, even if there are legal distinctions between the two.

The blocks of EU law that feature in the Treaty cover:

- Electricity and gas: rules for internal markets, access to networks, cross-border exchanges and security measures
- Renewable energy promotion
- Energy efficiency measures
- Oil: provision for maintaining minimum stocks
- Environment (see also chapter 18)

Among these provisions, of particular importance for Ukraine are the rules for electricity and gas networks in the so-called unbundling Directives²¹⁷ of the Third Energy Package. These require that transmission operators such as electricity transmission line and gas pipeline companies are separated from producers or suppliers of energy, and assure freedom of access to these transmission infrastructures for all suppliers or producers of energy. These unbundling provisions are significant for both the de-monopolisation of Ukrainian energy markets (see below) and for limiting monopolistic behaviour in the EU's own markets.

Trade-related requirements of the DCFTA. The DCFTA chapter on 'trade-related' energy applies basic free trade provisions to the electricity, crude oil and natural gas sectors. Customs duties and quantitative restrictions on the import and export of energy goods are generally prohibited. Energy prices for the supply of gas and electricity to industrial consumers shall be determined solely by market prices. Related to this is the prohibition of dual pricing, where the Commission has imposed several anti-dumping duties on numerous energy intensive products from Ukraine to offset the trade-distortive effects of energy dual pricing.²¹⁸ Over the years these measures have mainly concerned fertilisers and steel products, and the anti-dumping duties have been based on adjustments to the exporters' gas and electricity

²¹⁷ Directive 2009/72/EC for common rules for the internal market for electricity, replacing Directive 2003/54/EC; and Directive 2009/73/EC concerning common rules for the internal Market in natural gas, repealing Directive 2003/55/EC. The Agreement in its Annex XXVII actually refers to the two repealed directives, while (paradoxically) the Energy Community Treaty is more up-to-date, and in any case its provisions have legal precedence.

²¹⁸ Energy dual pricing is a two-tier pricing policy when domestic prices for energy are kept low compared to export or world prices.

costs using the so-called market price observed in a range of surrogate countries, including the EU.²¹⁹

This chapter also includes provisions on cooperation with regard to infrastructure, the establishment of an independent regulatory authority and the exploration for and production of hydrocarbons.

Regarding the transit of energy goods, the DCFTA incorporates elements of Art. V GATT 1994 and of Art. 7 of the 1994 Energy Charter Treaty,²²⁰ both of which assure freedom of transit. Furthermore, under Art. 276 of the Agreement the EU and Ukraine shall ensure that transmission system operators minimise the risk of accidental interruption or stoppage of transit and transport. But a party shall not be held responsible for an interruption of supply over which it has no control (e.g. Ukraine shall not be held liable for an interruption caused by Russian actions).

For the transport of electricity and gas, and in particular third-party access to fixed infrastructure, Ukraine must approximate its legislation to the EU law referred to in Annex XXVII of the Agreement and in the 2005 Energy Community Treaty.

Broader energy cooperation provisions. This Agreement envisages cooperation in general terms over virtually the whole landscape of energy policy issues, including policy strategies, crisis mechanisms, infrastructure modernisation, enhancement of energy security, energy efficiency and savings and support for renewable energies. Annex XXVII of the Agreement lists numerous EU laws and the timetables for Ukraine's 'gradual approximation'. These include the main provisions of the Energy Community Treaty, for which the implementation delay is zero. For other laws the implementation periods range from two to eight years.

²¹⁹ Vitaliy Pogoretsky, "The System of Energy Dual Pricing in Russia and Ukraine: The Consistency of the Energy Dual Pricing System with the WTO Agreement on Anti-Dumping", *Global Trade and Customs Journal*, Vol. 4, No. 10, p. 313, 2009 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2035581).

²²⁰ The Energy *Charter* Treaty of 1994 is not to be confused with the Energy *Community* Treaty of 2005. The Energy Charter was an early attempt to establish a wider international energy legal order for the post-Soviet era, including the EU, Russia and all other former Soviet Union states, and a number of non-European states. However Russia never ratified this Treaty, and the enterprise has had only a limited effect, although its transit provisions are legally and operationally significant.

Of strategic importance for the EU's own long-term energy saving and climate policy goals are Directives for energy efficiency, notably that covering the energy performance of buildings²²¹ and energy end-use efficiency.²²² The implementation periods in the EU itself are quite long, in some cases extending to 2020. Both Directives have proved difficult to implement in many EU member states and have recently been replaced by updated Directives.²²³ This is one of many instances where the provisions of the Agreement already need to be updated with revisions of EU laws. The new Directives introduce the concept of 'nearly zero-energy buildings' – to become mandatory for new buildings or major renovations by 2020, albeit with a number of provisions allowing for flexibility.

Box 17.1 Main provisions of EU energy efficiency Directives

Directive on energy performance of buildings

- Methodology for calculating energy performance of buildings
- Minimum standards for energy performance of new buildings or major renovations
- Energy performance certificates upon sale or rental of buildings
- 'Nearly zero-energy' standard for new buildings by 2020
- Retro-fits to cover 2-3% per year of existing building stock

Directive on energy efficiency

- Long-term strategy required for overview of housing stock, policies for cost-effective renovation and expected energy savings
- Central government to refurbish 3% of buildings per year
- Energy-saving schemes to achieve reductions of consumption of 1.5% per year
- Smart meters to aid better management of energy consumption

²²¹ Directive on the energy performance of buildings, 2002/91/EC, subsequently replaced by Directive 2010/31/EU.

²²² Directive on energy end use efficiency, 2006/32/EC, subsequently replaced by Directive 2012/27/EU.

²²³ For an analysis of the implementation issues posed by these directives for the EU itself, see Tania Zgajewski, "The Energy Performance of Buildings: Promises Still Unfulfilled", Egmont Paper No. 78, Academia Press, Egmont, Brussels, May 2015.

A central indicator is that buildings should emit no more than 3 kg of CO₂ emissions per square meter per year.²²⁴ This principle is important because if the EU itself is to achieve its own objective of reducing greenhouse gas emissions by 80% by 2050 compared to 1990 levels, this would require a 90% reduction of the buildings stock. However, the EU itself will need to invest around €62 billion per year, which indicates the scale of the implementation challenge for Ukraine.

Technical requirements for energy-using products. The Agreement also sets out two framework Directives for energy-using products in Annex XXVII. The first defines eco-design requirements of energy-using products such as household electrical appliances to be implemented within three years of the entry into force of the Agreement.²²⁵ The second concerns the labelling of similar household appliances regarding their energy consumption, to be implemented in two years.²²⁶ These regulations specify the technical conditions for the CE conformity mark that allows the products to be sold on the EU market. These Directives have been included in the Ukrainian government's implementation plan.²²⁷ After the full implementation of the Directives, all household appliances produced in Ukraine will bear the CE conformity mark and can be sold on the European market.

Nuclear issues. Cooperation over nuclear safety is provided for in general terms, with reference to EU (Euratom) policies and standards of the International Atomic Energy Agency (IAEA). This concerns such issues as nuclear fuel management and radioactive waste management. The most important operational programme concerns the site of the Chernobyl disaster (see chapter 18).

²²⁴ For a detailed study of NZEB, see "Principles for Nearly Zero-Energy Buildings – paving the way for effective implementation of policy requirements", Building Performance Institute Europe (BPIE), 2011.

²²⁵ Directive 2005/32/EC in the Agreement, but updated in Regulation 278/2009/EC.

²²⁶ Directive 92/75/EEC in the Agreement, but updated Directive 2010/30/EU.

²²⁷ See <http://zakon2.rada.gov.ua/laws/show/475-2015-%D1%80> and <http://zakon4.rada.gov.ua/laws/show/499-2015-%D1%80>.

Implementation perspectives

The energy-saving landscape in Ukraine. This has recently been surveyed thoroughly by the Energy Charter secretariat,²²⁸ and by the International Energy Agency²²⁹ and the UN.²³⁰ The Ukrainian economy's energy intensity (of 0.4 kg of oil equivalent per \$ of GDP) is comparable to that of Russia, but without, of course, the latter's natural resource endowment. Ukraine's energy intensity is twice that of the United States (also an energy-rich economy) and three times that of Germany and Japan. This gives a long-term perspective of the potential for energy-saving. The energy-intensity ratio may in reality be more favourable if the value of the shadow economy is taken into account (the Ministry of Economy has estimated the value creation not represented in official data at 34% of Ukraine's GDP in 2012.)²³¹

The draft Energy Strategy of Ukraine²³² explains the high energy intensity of the country's economy by the high share of energy-intensive industries in GDP, the low energy efficiency of sectors that transform energy (i.e. thermal energy production, energy transportation and distribution) and the high energy consumption by households for heating and hot water. The average annual energy consumption in the residential sector is 250-270 KWh/m², which is almost twice as high as in European countries with similar climatic conditions.

According to the Energy Strategy, in order to decrease energy intensity by 20% Ukraine will have to decrease total primary energy supply by 10% by 2020 (assuming that GDP growth resumes from 2017). That would mainly be achieved by decreasing gas consumption by 22%. By 2035, the share of renewables in the total primary energy supply is expected to reach 20% due to the substitution of coal and

²²⁸ Energy Charter Secretariat, "In-Depth Review of Energy Efficiency Policy of Ukraine", 2013.

²²⁹ International Energy Agency, "Ukraine 2012", Energy policies beyond IEA countries, series, 2012.

²³⁰ United Nations, "Financing Energy Efficiency and Climate Change Mitigation: A Guide for investment in Belarus, Bulgaria, Kazakhstan, Russia and Ukraine", 2005.

²³¹ Interfax Ukraine, "Economy Ministry: Level of Shadow Economy in Ukraine Grows by 0.4% in the first quarter of 2012", 21 August 2012.

²³² See

<http://mpe.kmu.gov.ua/minugol/doccatalog/document?id=245032412>.

natural gas with biomass and bioenergy. The energy intensity ratio of GDP is expected to fall to 0.12 kg of oil equivalent per \$ of GDP.

Energy reform policies of Ukraine. In 2014-15, Ukraine engaged in radical reform measures in the energy sector, driven by a combination of conditions set by the IMF for macroeconomic financial aid and the legal obligations of the Agreement with the EU and Energy Community Treaty.

In its February 2015 Letter of Intent to the IMF the government of Ukraine pledged to raise household gas prices to parity with import costs, which was part of the IMF's conditions to grant an Extended Fund Facility Arrangement.²³³ Actual prices were increased by 285% in early 2015 and were supposed to reach 75% of import cost levels by April 2016, before reaching 100% parity by April 2017. However, prices reached 100% parity in May 2016, ahead of schedule when the government unified gas prices in Ukraine to a single market price for both retail and industrial users. The new price-setting mechanism for gas prices is based on the forecast gas price at Germany's gas hub (Net Connect Germany – NCG) and takes into account transportation, distribution, supply and other costs. This will permit the progressive elimination of state budget subsidies to the Naftogaz, whose deficit in 2014 amounted to 5.7% of GDP, decreased to 0.9% of GDP in 2015,²³⁴ and is expected to further decline to zero in 2017. At the same time, these huge budget savings will permit an expansion of social assistance to the poorest households that would be unable to afford the price rises. Such benefits rose from 0.4% of GDP in 2013 to 1.3% in 2014 and 2015, and will further increase alongside the price rises in 2016-17. However, these increased expenditures will be far less than the savings to the budget from eliminating subsidies to the Naftogaz.

In addition, the structure of the Naftogaz and the gas sector is being radically changed in line with the norms of the 'unbundling' Directives. The general framework was set up by the Law of Ukraine 'On the natural gas market', which came into force on 1 October 2015. The law separates the functions of the market operator from those of producers and suppliers, and it tries to minimise the influence of gas producers and suppliers on the operators of the gas transportation,

²³³ IMF, "Letter of Intent (by the government of Ukraine), Memorandum on Economic and Financial Policies & Technical Memorandum of Understanding", 27 March 2015; Conference Call on Extended Fund Facility Arrangement with Ukraine, 12 March 2015.

²³⁴ See <http://pubdocs.worldbank.org/pubdocs/publicdoc/2016/4/88201459504749749/Ukraine-Macroeconomic-Update-April-2016-ENG.pdf>

storage and distribution systems. The gas transportation business of the Naftogaz therefore has to be separated out into a new independent operator.

The law envisages the development of free and fair competition in the natural gas commodity market. To that end the law cancels the licences of wholesale gas traders and establishes free pricing on the wholesale and retail markets for natural gas, as well as the free choice of gas suppliers.

Implementation of the Energy Community Treaty provisions.

The annual implementation report of the Energy Community Secretariat offers a detailed account of how Ukraine is proceeding.²³⁵ Ukraine's progress and problems in implementing the Energy Community Treaty provisions have also been analysed by the Energy Reforms Coalition (a Ukrainian NGO),²³⁶ with continuous monitoring reported in DixiGroup's monthly updates.²³⁷ Their analysis shows that progress is underway at the level of legislation, but the problems of concrete implementation remain formidable.

The findings of these reports may be summarised as follows:

Electricity: while the present state of affairs does not comply with Treaty commitments, a new Electricity Market Law will greatly improve this situation, but it only enters into force in 2017, which is considered too late. Work on developing secondary legislation has to be intensified. Ukraine made no real steps towards the effective integration of Ukrainian and European electricity systems. Other priorities are the unbundling of transmission and distribution networks, deregulation of the prices for generation and supply and alleviation of cross-subsidies.

Gas: The most progress was made in the security of gas supplies by opening new gas routes. The law "On the natural gas market" has laid the grounds for further reforms and needs secondary legislation. Despite the improved financial transparency of the Naftogaz, the holding company still has no reform programme. Ukraine adopted the requirement to separate the functions of natural gas distribution and supply at the regional level. However, it was not able to introduce the entry/exit tariff system in the gas transportation system as this requires

²³⁵ Energy Community Secretariat, "Annual Implementation Report 2014-2015", 1 September 2015.

²³⁶ Energy Reforms Coalition, "Ukraine and Energy Community: On the Road of Reforms", Kyiv, 2015.

²³⁷ See, for example <http://ua-energy.org/post/56538>.

switching to a new payment model. Nevertheless, Ukraine made substantial progress and the Energy Community Secretariat notes that commitment so far suggests an irreversible path of reforms.

Oil: Ukraine is required to adopt a system of minimum stocks for crude oil/petroleum products, including a progressive stock build-up schedule and its financing programme.

Renewable energy: Ukraine has a comprehensive framework for the promotion of renewable energy, but this is not yet wholly compliant with Treaty obligations. The government eliminated the 'local content' discrimination barrier, corrected the legal definition of 'biomass' and introduced a number of incentives to develop alternative heat supply and bioenergy in the country. At the same time, the regulator reduced 'green' tariffs, which led to a number of lawsuits from investors.

Energy efficiency: Ukraine has made some progress in adopting technical regulations and supporting laws. Although a significant number of important legislative acts were prepared, they have not yet been adopted. Priorities for Ukraine are the adoption of the energy efficiency Law, the Law on energy performance of buildings, and the 2020 Energy Efficiency Action Plan.

The shortcomings in Ukraine's performance in relation to its Treaty obligations have led to a number of legal infringement proceedings being launched by the Energy Community Secretariat. These concern capacity allocation for electricity connectors, non-compliance with the Directive on sulphur in fuels, the lack of an action plan for renewable energies and the lack of legislation on state aids in the energy sector. One of the cases was closed by the Secretariat after the National Renewables Action Plan was submitted. The other two cases on failing to prohibit state aid and on Ukrainian capacity allocation rules remain open.

Energy saving in households. The reform of gas prices for households currently underway is indispensable for getting Ukraine onto a serious energy saving and efficiency track, accompanied by subsidies for the poorest households. However, in itself this does not address the problem of funding energy saving investments in low-income households. This requires specific financing schemes with grant and loan funding, principally by the EU and the EBRD.

There is already a valuable initiative in operation, administered by the EBRD, called the East European Energy Efficiency and Environment Partnership (E5P), supported by a coalition of donors led financially by grants from the EU and Sweden, with the EBRD also contributing loan funds. Until 2013, E5P had received €93 million of

grant pledges and had launched nine projects, mostly for the modernisation of the district-heating system. While this improves the delivery systems up to housing blocks, it does not solve the problem of energy waste within the buildings and individual apartments. As a result, a new initiative of the EBRD aims at energy saving investments in apartment blocks and individual households, which would mobilise €100 million of loan funds, with the objective of adding another 20-30% in grant funding from the EU and other bilateral donors. However, assuming an average of €5,000 of expenditure per apartment, the €100 million would only reach 20,000 apartments.²³⁸ But if successful, it could lead to far bigger programmes that are necessary for a transformative strategy. Supposing an expansion of operations to increase the scale and notably the grant component, one might hypothesise a programme funded to the level of €500 million for both grants and loans, which could upgrade 200,000 apartments, thereby becoming more than a pilot operation.

A necessary complement for such programmes is the improvement of the governance of the standard apartment block. Comprehensive energy-saving investment in apartment blocks requires collective decision-making. There is a form of legal entity established in Ukrainian law since 2001, namely the Law of Ukraine on Associations of Co-owners of Multifamily Buildings. Only about 17,000 of the 75,000 apartment blocks have adopted this practice,²³⁹ however, and the numbers are not growing fast. This is at least in part because of the large number of poor people who could not afford to share in investment expenditures, and more well-off people not wanting to run the risk of having to bear financial responsibility for defaulting neighbours. A new Law on Specifics of the Right of Ownership in Multi-Family Apartment Buildings, adopted in 2015, is intended to facilitate decision-making and management in multi-family apartment blocks.²⁴⁰ This law would facilitate major investment decisions such as for energy efficiency by allowing them to be adopted by a 75% majority rather than 100% as in the past, with lesser decisions to be adopted by a simple 50% majority.

²³⁸ For detailed cost estimates see M. Emerson and V. Shimkin, "A Household Energy-Saving Initiative for Ukraine", CEPS Working Document No. 408, CEPS, Brussels, May 2015.

²³⁹ See www.minregion.gov.ua/osbb/dinamika-utvorennya-osbb-v-ukraini/udoskonalennya-sistemi-upravlinnya--v-zhitlovomu-gospodarstvi-228731/.

²⁴⁰ See <http://zakon0.rada.gov.ua/laws/show/417-19>.

Strategic diversification of gas supplies. Given the last decade's tensions with Russia over gas supplies and now open conflict with Russia, Ukraine is developing gas pipeline connections with neighbouring EU states. The technique is not to build new pipeline connections, which have large capacities, but to make necessary engineering investments to enable gas to flow in 'reverse' direction compared to the original uses. These 'reverse flow' connections are via Slovakia and Hungary. Ukraine has built a small 400-meter pipeline connecting the Voyany-Uzhgorod and Soyuz pipelines, which allows direct gas flows from Slovakia.²⁴¹ The Slovakian Eustream enterprise is reported to invest around €20 million to prepare Voyany for reverse-flow mode,²⁴² with a gas metering station and a pipeline to the Ukrainian border.²⁴³

Energy policy at a glance

The energy provisions of the Agreement are of exceptional economic and geopolitical importance, with a commitment to approximate much of the technical content of EU laws.

Ukraine's energy policy is now finally undergoing radical and long overdue reforms, centred upon the alignment of energy prices with import costs and the unbundling of gas distribution structures in line with IMF and EU requirements.

However, the implementation of provisions of the Agreement through the linked Energy Community Treaty is still behind schedule.

Gas supplies are now being diversified away from the former total dependence on Russian supplies, with the aid of reverse-flow pipelines linking to neighbouring EU states.

Energy-savings programmes, in line with EU standards, are of vital importance to the independence of gas supplies.

The major programme of building a sarcophagus to secure the destroyed nuclear reactor site in Chernobyl is proceeding, with major funding from the EU, the EBRD and other international donors.

²⁴¹ See www.naftogaz.com/www/3/nakweb.nsf/0/D8BA54BC1CAB9979C2257D33002E92.

²⁴² See www.bloomberg.com/news/articles/2014-07-07/ukraine-europe-gas-link-set-to-run-at-full-capacity-this-winter.

²⁴³ See <http://ukranews.com/ru/interview/2014/08/13/517>.

18. ENVIRONMENT



The environment chapter of the Agreement is a very ambitious one and commits Ukraine to cooperation across the whole landscape of environmental policy issues. Implementation will be a long and difficult process, given Ukraine's starting point, but it will ultimately mean a radical transformation of environmental quality and the modernisation of key heavy industries in the country.

Provisions of the Agreement

Ukraine agrees to undertake a gradual approximation of its legislation to that of the EU within two to ten years in accordance with Annex XXIX of the AA, which lists 35 EU directives. This represents the main body of EU environmental law and policy, including environmental governance methods, air and water quality, waste management, industrial pollution and hazards, nature protection, the use of GMOs (genetically modified organisms) in agriculture and climate change.

Environmental governance. The centrepiece is the environmental impact assessment Directive, introduced in 1985 and amended several times (in 1997, 2003, 2011 and 2014 – the key text is Directive 2011/92/EC). This requires that a long list of major projects types (such as refineries, metallurgical smelters, major transport infrastructures, dams, etc.) should not receive the go-ahead before a published assessment of their impact on humans, fauna and flora, soil, water, air, climate and the landscape.

Major pollutants and dangerous substances. The centrepiece here is the industrial emissions Directive (2010/75/EU), which revises

and modernises seven previous directives, simplifying existing legislation and cutting unnecessary administrative costs. The Directive covers all industries liable to produce harmful emissions: energy, metals, minerals, chemicals, pulp and paper, large-scale pork and poultry production, waste-management industries, etc. It sets out the main principles for the licensing and control of such installations, specifying limit values for noxious substances. It requires the application of best available techniques (BAT).

To counter air pollution, the ambient air quality framework Directive (2008/50/EC) and four 'daughter' Directives lay down limits for specific pollutants.²⁴⁴ The parties are obliged to enforce standards of air quality within the prescribed limits. Where ambient air exceeds any limit or target value in a given zone or agglomeration, the authorities shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the relevant limit value. Procedures exist for exemptions or the postponement of deadlines where limit values cannot be respected because of site-specific dispersion characteristics, adverse climatic conditions or transboundary factors.

The large combustion plant Directive (2001/80/EC) applies to combustion installations, such as thermal power stations, with a rated thermal input equal to or greater than 50 MW. Its purpose is to limit the amount of sulphur dioxide, nitrogen oxides and dust emitted from large combustion plants. It encourages the combined production of heat and electricity (cogeneration). The limit values and timetables to be respected are graduated according to the age of installations, starting with 'existing plants' authorised before 1987, and on to later installations. The governments must prepare national emission reduction plans for existing plants by a specified date. The Directive allows existing plants to be exempted from compliance with the emission limits on condition that the operator undertakes not to operate the plant for more than 20,000 hours between 1 January 2008 and 31 December 2015. The Energy Community Treaty requires that Ukraine comply by 2018.

A further key law is the water framework Directive of (2000/60/EC, subject to several subsequent amendments), which has established a framework for the protection of inland surface waters, ground waters and coastal waters. Its objective for the EU itself has been to achieve a good status of all waters by 2015. The approach is

²⁴⁴ Notably 1) sulphur dioxide, nitrogen dioxide and oxides of nitrogen, and lead, 2) carbon monoxide and benzene, 3) ozone and 4) polyaromatic hydrocarbons, arsenic, nickel, cadmium and mercury.

based heavily on river basins, for which member states must prepare management plans and detailed management programmes. The parties should ensure that the pricing of water encourages consumers to use resources efficiently.

Legislation by the EU for the prevention and control of *catastrophic industrial accidents* was triggered by the major accident at a chemicals factory in the Italian town of Seveso in 1976. The resulting Seveso Directive (96/82/EC) was later amended in view of the lessons learned from later accidents such as at Bhopal, Toulouse and Enschede (2012/18/EU). The Directive now applies to more than 10,000 industrial establishments in the EU where dangerous substances are used or stored in large quantities, mainly in the chemical, petrochemical, logistics and metal refining sectors. The Directive has contributed to reducing the number of major accidents and is widely considered as a benchmark for industrial accidents policy and a role model for legislation in many countries worldwide.

According to the hierarchy of waste management techniques, landfilling is the least preferable option and should be limited to the necessary minimum, in accordance with the landfill Directive (1999/31/EC). Where waste needs to be landfilled, it must be sent to landfills that comply with the requirements of the Directive. The objective is to prevent or reduce, as far as possible, negative effects on the environment, in particular on surface water, groundwater, soil, air and human health from the landfilling of waste, by introducing stringent technical requirements for waste and landfills. The Directive sets up a system of operating permits for landfill sites. Existing landfill sites may not continue to operate unless they are brought into compliance with the provisions of the Directive. Ukraine has a six-year time limit for implementation.

Natural habitat. Nature protection is subject to two Directives for natural habitats and sanctuaries for wild birds (92/43/EC and 2009/147/EC). These Directives establish principles and procedures for the designation of special protection zones and would be helpful references for the work of Ukrainian NGOs in this domain.

Climate change. The central element of EU climate change policy is the emissions trading system (ETS) Directive (2003/87/EC, updated in 2009/29/EC); Ukraine is due to establish a compatible system within 2 years. This requires establishing a system for registering relevant installations, a national development plan for the distribution of allowances and a system for these to be traded domestically. Ukraine further undertakes to fully implement the Kyoto Protocol and develop

a long-term action plan for the mitigation and reduction of greenhouse gas emissions.

Implementation perspectives

The environmental status quo in Ukraine. In 2014, the environmental performance of Ukraine was ranked 95th out of 178 countries,²⁴⁵ while the majority of the EU member states are in the top 30. This gives a good indication of the scale of the challenges for Ukraine to approach European standards. According to the State Statistics Service of Ukraine,²⁴⁶ in 2013 on a per capita basis 148 kg of pollutants were emitted into the air, 38 m³ of polluted wastewaters discarded and 9.9 tons of wastes discarded (including 20 kg of I-III hazard classes).

In 2013, about 6.7 million tons of polluting substances were released into the air from stationary (64%) and mobile (36%) sources of pollution. The energy sector was the main polluter, accounting for 43% of emissions while manufacturing and extractive industries contributed to 29% and 21% of noxious emissions, respectively. The transport sector was responsible for 2.4 million tons of emissions, the majority of which came from private cars (70.1%)

The State Emergency Service of Ukraine reports that water bodies are contaminated with mainly heavy metal compounds, nitrates, oil products, phenols and sulphates. In 2013, 1.7 billion m³ of polluted wastewaters were discarded; 85% of return waters (1.5 billion m³) were not sufficiently treated while 0.3 billion m³ were not treated at all, despite available water treatment capacities.

In 2013, 448 million tons of waste were generated, including 439 million tons from economic activities of enterprises and 9 million tons generated by households. Unfortunately, landfilling remains the main method of waste management, the share of waste disposed of or incinerated (without energy production) is 64.3%. As of January, 2014, 15.2 billion tonnes of waste are accumulated at landfills.

Implementation progress and plans. In 2015, the Cabinet of Ministers²⁴⁷ approved 21 Implementation Plans for the transposition of 26 EU environmental directives and regulations, defining the activities of ministries and agencies required for the timely implementation of

²⁴⁵ See <http://epi.yale.edu/epi/country-profile/ukraine>.

²⁴⁶ See www.ukrstat.gov.ua/operativ/operativ2012/ns_rik/analit/arhiv.htm.

²⁴⁷ Orders No. 371 as of 15 April 2015 and No. 475 as of 14 May 2015 (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=248102785&cat_id=247984327).

environmental EU legislation. The plans are also important to ensure transparency and enable effective monitoring of implementation by civil society and business representatives. Administrative planning is thus quite well advanced as a first step in what will be a long process.

Environmental Impact Assessment Directive. In the last few years, several draft laws were registered in the Parliament aiming to implement this directive,²⁴⁸ but none of them was approved, for a number of reasons – mainly the resistance of the business lobby and government officials interested in the status quo.

According to the Implementation Plan for the Directive on Environmental Impact Assessment (2011/92/EC) approved by the Cabinet of Ministers in 2015, all activities required for the transposition of this directive should be undertaken during 2015-16. In 2015, the Ministry of Ecology and Natural Resources of Ukraine established an interdepartmental working group on implementation of the directive,²⁴⁹ which prepared a draft law of Ukraine on Environmental Impact Assessment. The draft law (no. 2009a) has gone through public consultations and was submitted for the approval of executive bodies concerned.²⁵⁰ It was considered by parliamentarians on 26 November 2015, and returned for revision to the main responsible Committee on Environmental Policy.

Large combustion plants Directive (LCPD). According to its commitments under the Energy Community Treaty, Ukraine is expected to implement the large combustion plants Directive (2001/80/EC) by 1 January 2018. Similar requirements were established in 2008 by the Ministry of Environmental Protection.²⁵¹ However, the required modernisation has not been carried out due to financial constraints and limited possibilities to pass on costs to end-users through increased electricity and heat tariffs.²⁵² Clearly, it is not

²⁴⁸ Protocol Concerning the Accession of Ukraine to the Treaty Establishing Energy Community ratified by the Law No. 2787-VI (2787-17) as of 15.12.2010 (http://zakon2.rada.gov.ua/laws/show/994_a27).

²⁴⁹ Order Ministry of Ecology and Natural Resources of Ukraine No. 25-ag as of 30.01.2015.

²⁵⁰ See http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55438.

²⁵¹ Order No. 541 “On the approval of technological standards of allowable emissions of thermal power plants with nominal thermal capacity exceeding 50 MW” as of 22.10.2008 (<http://zakon3.rada.gov.ua/laws/show/z1110-08>).

²⁵² Electricity and heat tariffs are regulated by the National Commission for State Regulation of Energy and Public Utilities (NCSREPU) and the investment component in the price structure is very restricted.

feasible to ensure compliance of over 140 installations with the LCPD Directive within the two remaining years.

Box 18.1 Costs of environmental upgrading of large combustion plants

It was estimated by the study commissioned by the Energy Community in 2013 that Ukraine would need between €3.8 and €5.1 billion, depending on the scenario for meeting the requirements of large combustion plants Directive and €6 billion to upgrade power plants for compliance with industrial emissions Directive (IED).

Estimates prepared for NERP delivered different results. The total funds required for installation of modern flue gas cleaning equipment (to comply with IED) is €2.6 billion. Assuming capital investment costs at €1800/kWh, €16.4 billion is needed for the construction of new capacities of coal-based thermal power plants (TPPs). Construction of new coal-based combined heat and power plants (CHPPs) will require investment of €4.60 billion. Thus, the total costs of modernisation of thermal power sector are over €23.5 billion. The Cabinet of Ministers and relevant executive bodies are responsible for determining and approving financial mechanisms for the enforcement of such massive modernisation.

Several installations subject to the Large Combustion Plants are located at the territories, which are currently not controlled by the Ukrainian government (parts of Donetsk and Luhansk regions and Crimea), but these are still included in the NERP under the assumption that Ukraine will regain control over its temporarily lost territories. According to the NERP, emission reduction measures are planned at Zujivska, Muronivska and Starobeshivska TPPs, while the CHPPs of the Alchevsky Steel Plant, the Central Electric Blower Plant of Makiivsky Steel Plant as well as four Crimean CHP plants (Simferopolska, Sevastopolska, Sakska and Kamysh-Burunska) will be decommissioned.

As a result, Ukraine has chosen the alternative pathway for meeting the requirements of the Directive (2001/80/EC), as envisioned by the Ministerial Council of the Energy Community.²⁵³ In particular, parties are allowed to use national emission reduction plans up to 31 December 2027, which impose national emission caps for certain pollutants (SO₂, NO_x, dust) for all power plants taken together, rather than imposing emission limit values on each large combustion plant.

²⁵³ Decision D/2013/05/MC-EnC approved in 2013.

Ukraine submitted its National Emissions Reduction Plan (NERP)²⁵⁴ by the deadline of 31 December 2015.²⁵⁵ Implementation of the NERP is planned from 1 January 2018, to 31 December 2028 for SO₂ and dust, and to 31 December 2033 for NO_x. This long implementation period (contrary to the Ministerial Council of the Energy Community decision mentioned above) is due to the schedule of the energy sector reconstruction, as envisioned in the current Energy Strategy.²⁵⁶ To avoid interruptions in power supply, no more than five installations (out of 90 TPP units) can be stopped at any given time for reconstruction or replacement.

Industrial emissions Directive. Although the national legislation of Ukraine partly meets the requirements of this Directive (2010/75/EC), much work needs to be done to develop the required by-laws and regulations, which will be partially covered by technical assistance projects. According to the implementation plan approved by the Cabinet of Ministers in 2015, most of these activities should be undertaken during 2016-17.

Estimates indicate that the administrative and operational costs at the stage of legislation approximation will be relatively modest.²⁵⁷ As regards implementation costs, estimates are only available for a number of the largest sectors as there are more than 30 industrial sectors and sub-sectors concerned. In addition to the large combustion plants described above, the modernisation of the metallurgy sector is expected to cost between €1.6 and €1.9 billion; €1.8 billion for the coking industry; and for glass factories between €260 and €300 million. These data are for 2013 and include major industrial plants in the East Donbas regions, which are not currently controlled by Kyiv.

Seveso Directive on dangerous substances. Ukraine's national legislation is now partially compliant with the provisions of the Seveso-III Directive (2012/18/EU).²⁵⁸ However, certain provisions in the

²⁵⁴ See

<http://mpe.kmu.gov.ua/minugol/doccatalog/document?id=244996563>.

²⁵⁵ According to a press release of the Energy Community of 7 January 2016.

²⁵⁶ See <http://zakon3.rada.gov.ua/laws/show/n0002120-13/paran3#n3>.

²⁵⁷ See www.sbs-envir.org/images/documents/Indicative_cost_assessment_draft_Feb_2015.pdf.

²⁵⁸ Through the Law No. 2245-III "On high-risk objects" of 18.01.2001, Resolution of the Cabinet of Ministers No. 956 "On the identification and

current legislation still need to be improved, in particular procedures for informing the population in the case of an accident at high-risk projects such as chemical plants, and for the interaction between operators of high-risk projects and state bodies.²⁵⁹ Ukraine has registered more than 9,000 high-risk projects. According to the Action Plan for the implementation of this Directive,²⁶⁰ required draft laws and regulations should be developed and submitted for consideration by the Cabinet of Ministers by December 2017.

Landfill Directive. Ukraine's waste management system differs significantly in its definitions from that of the EU. Landfills are often overfilled and a long way from complying with EU standards. A working group on resource and waste management was established by the Cabinet of Ministers in 2014.²⁶¹ Legislative approximation should be completed within two years, but practical implementation measures are planned for 2018-20.

The landfill Directive (1999/31/EC) is likely to be one of the most challenging and costly, both in terms of administrative costs for the development of the required regulations and for their technical implementation. Estimates of the administrative and operational costs at the stage of legislative approximation indicate that they are likely to be relatively modest. However, funds needed for the development of a large-scale waste management infrastructure, the rehabilitation or decommissioning of existing landfills, introduction of recycling, etc. are likely to be much higher (in the range of €3 to €5 billion) and will have to be mostly funded from state and municipal budgets,²⁶² with possible contributions from the EIB and EBRD.

Ambient air quality framework Directive. Current legislation is considered to be partially compliant with the provisions of the air quality Directive (2008/50/EC).²⁶³ However, the air quality monitoring

declaration of high-risk objects" of 11.07.2002, and Resolution No. 847-p as of 17 September 2014.

²⁵⁹ See <http://zakon3.rada.gov.ua/laws/show/847-2014-%D1%80#n12>.

²⁶⁰ Resolution of the Cabinet of Ministers No. 132 as of 25 February 2015 (www.kmu.gov.ua/kmu/control/uk/publish/article?art_id=247983863&cat_id=247984327).

²⁶¹ Order of the Cabinet of Ministers No. 385 as of 1.12.2014.

²⁶² See www.sbs-envir.org/images/documents/Indicative_cost_assessment_draft_Feb_2015.pdf.

²⁶³ See www.menr.gov.ua/docs/activity/adaptation/Table%20of%20Concordance_Dir_2008_50_ambient_03.11.11.pdf.

system requires certain improvements as it dates back more than 20 years. Key legislative and institutional measures defined in the Implementation Plan should be completed by 2017. However, the technical re-equipment of existing air quality monitoring stations and the development of air quality improvement plans is scheduled for 2016 to 2019, with the aid of technical assistance projects.

Water framework Directive. According to the Implementation Plan, the transposition of the water framework Directive (2000/60/EC) into national legislation of Ukraine should be completed by 2017. Important steps have already been taken with the establishment of an interdepartmental working group by the State Water Resources Agency in 2015.²⁶⁴ A draft law²⁶⁵ amending current texts on integrated approaches to water basin management was registered by the parliament on 9 December 2015, and it was approved in the first hearing on 19 May 2016.

Natural Habitats. Ukrainian legislation on the conservation of natural habitats and of wild fauna and flora is partly compliant with the habitats and birds Directives (92/43/EC and 2009/147/EC). Both directives should be transposed into national legislation by the end of 2017, with certain organisational and coordination measures to be performed by 2018. Ukraine is party to a number of international conventions in this area, and its national legislation largely meets the requirements of the birds Directive, but certain aspects should be clarified or complemented. A working group on environmental protection was established by the Ministry of Ecology and Natural Resources in 2014,²⁶⁶ which in September 2015 discussed a draft law on amending the current Laws on the animal world, the protection of animals from cruelty, among others.

Emissions trading system (ETS). While emissions trading is theoretically the most economically efficient environmental policy instrument for emissions reduction because it allows polluters to optimise their abatement costs, it is also one of the most complicated. A sophisticated legislative basis has to be developed and tested to ensure the proper monitoring, reporting and verification (MRV) of emissions reductions for an ETS to achieve real environmental improvements.

²⁶⁴ Order of the State Water Resources Agency No. 26 as of 06.03.2015.

²⁶⁵ See http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57335.

²⁶⁶ Order of the Ministry of Ecology and Natural Resources No. 321 as of 16.10.2014.

The AA requires Ukraine (in Annex XXX) to approximate to the EU ETS (Directive 2003/87/EC) within two years.

In addition, linking Ukraine's ETS to that of the EU would bring benefits for both parties. Considering that the EU industries are in many cases more technologically advanced than Ukrainian ones, the former will usually face higher abatement costs than the latter. Thus, EU companies will be able to buy cheaper allowances on the Ukrainian market, while Ukrainian companies will be able to raise the funds required for modernisation. However, this will only be possible when the Ukrainian ETS passes through its pilot phase and the MRV system becomes fully compliant with the latest EU standards.

Ukraine does not have previous experience of operating any similar policy mechanism. A huge amount of work is therefore required to establish an effective ETS. The Ministry of Ecology and Natural Resources²⁶⁷ established a working group, and certain draft laws are being developed. However, it is unlikely that the ETS Directive will be fully transposed by August 2016, as required by the Action Plan for the implementation of the Association Agreement.²⁶⁸ A possible prolongation of the approximation period, by several years, is currently being discussed.

Chernobyl. In 1986, the world's most catastrophic nuclear accident took place at the Chernobyl nuclear power plant in northern Ukraine near the Belarus border. The EU has subsequently played a leading role in funding work to repair the site and contain contamination, including a huge 'shelter' or 'sarcophagus' to cover the failed reactor. The EU has so far committed €600 million out of a total of €2.1 billion to the Chernobyl Shelter Fund, which is managed by the EBRD. The AA makes only a passing reference to Chernobyl, but the operations for securing the site are ongoing, with new commitments of €70 million made by the EU in 2015.

Donetsk and Lugansk separatist regions. A substantial part of Ukraine's heavy industry lies in the separatist regions, which are currently out of the control of the Ukrainian government. Information about accidents at energy infrastructure and high-risk industrial objects

²⁶⁷ Order of the Ministry of Ecology and natural Resources No. 286 as of 30.07.2015.

²⁶⁸ Resolution of the Cabinet of Ministers No. 847-p as of 17 September 2014 (<http://zakon3.rada.gov.ua/laws/show/847-2014-%D1%80#n12>).

appear in the media from time to time but the Ukrainian government does not have access to the site to organise repair, or collect reliable information about the level of environmental contamination. One study based on satellite images and the on-site sampling of water and soil at the territories, released by the Ukrainian army, presents evidence of the devastating environmental consequences of military operations in 2013 and 2014.²⁶⁹ As a result of intensive shelling at certain sites, concentrations of noxious substances in the air and water increased to several times above the limit values, soil was heavily contaminated by heavy metals and protected natural areas trapped in the area of military operations were heavily damaged by machinery and fire. For the time being there is no possibility for Kyiv to implement environmental standards in the separatist regions where, theoretically, many of the environmental reconstruction and modernisation costs arise.

Environment at a glance

The effective implementation of the ambitious environment chapter of the Agreement would upgrade Ukraine to the level of the top 30 countries globally in terms of environmental performance indicators.

This huge improvement of environmental standards is only likely to be observed in the long run because just the legal transposition of the EU directives will take several years, while their technical implementation will take up to 18 years in certain cases.

Some directives are straightforward acts of policy modernisation and will help establish effective environmental quality and resource management systems. Others are very challenging in terms of economic costs (for example, the large combustion plants and industrial emissions Directives).

The EIB and EBRD are among the major financial institutions capable of making substantial contributions to the funding of necessary investments, leveraging in other public and private sources. These investments in environmental quality will generate payback in terms of improved production efficiency and health benefits for both present and future generations.

If the timetables for implementation of specific EU directives prove to be too fast it is possible for them to be extended, if agreed by the two parties in the Association Council.

²⁶⁹ See http://epl.org.ua/attachments/article/1713/1817_WEB_EPL_Posibnuk_ATO_Cover_Ukrainian.pdf.

19. THE DIGITAL SECTOR



This chapter deals with the ‘digital’ family of chapters and sub-chapters of the Agreement on electronic communications and postal services, the information society and audio-visual policy. Ukraine is already showing encouragingly positive trends in this broad sector of strategic importance for an internationally competitive economy.

Provisions of the Agreement

Electronic communications. The provisions on electronic communications fall under the special category of service sectors that are treated within the DCFTA as having a specific roadmap for securing ‘full internal market treatment’. As described in chapter 9 on services, there is an explicit procedure, set out in Annex XVII, for checking whether Ukraine complies with its commitments to approximate to EU legislation.

For electronic communications there are complex provisions in Arts 115 to 124, laying the ground rules for a competitive and well-governed sector. These concern the regulatory authority, principles for the authorisation of licences to service providers, the rights of access to interconnections with other service providers and principles for governing the allocation of scarce resources, such as radio frequencies. Existing EU legislation with which Ukraine should comply within 4 years is specified in Annex XVII-3, which includes a set of key Directives adopted in 2002 and amended in 2009:

- Framework Directive 2002/21/EC (as amended in Directive 2009/140/EC) on electronic communications networks, which defines the products covered and the need for an independent administrative capacity of the national regulator.
- Directive 2002/20/EC (also as amended by Directive 2009/140/EC) on the authorisation of licences for operators in the sector.
- Directive 2002/19/EC (also as amended by Directive 2009/140/EC) on the requirements that operators with significant market power assure open access to network facilities and control for non-discriminating interconnection charges.
- Universal service Directive 2002/22/EC (as amended by Directive 2009/136/EC), which requires respect for the interests and rights of users, such as 'number portability' between operators.

Postal and courier services. Regulatory rules aim to prevent anti-competitive practices in this sector, license provisions for universal service providers and maintain the independence of the regulatory body. Several directives are specified in Annex XVII of the internal market regulation for postal services. Courier services in the EU are increasingly subject to criticism for their high costs, and action on this account is planned.

Information Society. The objective here is to ensure the widespread availability of information and communication technologies (ICT) with quality services at affordable prices. In particular, there should be broadband access for citizens, business and public administration through services of e-business, e-health, e-government and e-learning. Joint research projects are envisaged under the Horizon 2020 programme. Specific EU legislation for approximation by Ukraine within three years includes the E-commerce Directive (2000/31/EC) and a framework law on electronic signatures (Directive 1999/93/EC).

Audio-visual services. Ground rules for the regulation of television broadcasting are laid down in the audio-visual media services Directive (2007/65/EC, 2010/13/EU). Ukraine will implement these provisions within two years.

Digital Single market. This broad 'digital' domain, including electronic communications, information society and audio-visual markets are together witnessing the fastest rate of technological change and development of any sector in the economy. This means that the stock of EU laws and regulations in this field, as represented in Annex

XVII-3 of the Agreement, is also subject to rapid change. The European Commission has set out directions for the next developments in its comprehensive 2015 policy paper “A Digital Single Market for Europe”.²⁷⁰ This addresses the agenda for action under three broad headings: i) better online access for consumers and businesses, ii) creation of the right regulatory conditions for advanced digital networks and iii) building the digital economy through investment, interoperability and standardisation. Sixteen specific action points are highlighted, several of which will see amendment to the laws cited in the Agreement for approximation, including reform of the Directives on electronic communications, copyright regimes, consumer protection, courier services, audio-visual services and a Priority ICT Standards Plan.

Implementation perspectives

Ukraine’s growing IT sector. The share of IT industry in Ukraine’s economy is estimated at 3% GDP in 2015.²⁷¹ Ukrainian IT industry employs 74,000–100,000 people (software developers, engineers, architects, QA engineers and testers, business analysts, project managers, etc.) with the majority of specialists working in IT outsourcing. In 2014, ICT entrepreneurs earned about UAH 18 billion (\$851 million) – an average monthly gross salary of \$2000. The average monthly software engineering salary was \$1,600 in 2015.²⁷² In 2014, ICT services accounted for 31% of the total service exports.²⁷³

In 2013, there were 3,292 institutions in Ukraine providing IT services.²⁷⁴ The ICT sector has 2,114 certified ICT operators, 1,482 legal entities that provide access to the internet. Overall 44% of Ukrainian citizens had access to the internet, 148 universities trained ICT specialists, and there was almost complete coverage of the territory of

²⁷⁰ Communication COM(2015)192 final, of 6 May 2015.

²⁷¹ “Ukrainian IT in figures” (<http://dou.ua/lenta/columns/it-in-figures/>) (DOU is an online community of Ukrainian ICT professionals).

²⁷² IT Ukraine, 2016 edition (www.uadn.net/files/ua_hightech.pdf).

²⁷³ World Development Indicators (databank.worldbank.org).

²⁷⁴ Ukraine, “ICT environment, innovation policies & international cooperation” (http://eeca-ict.eu/images/uploads/pdf/EECA_counires_reports_NEW/ICT-Env_Inno-policies_and_Inter-coop_report_UKRAINE.pdf).

Ukraine by mobile networks. Every year Ukrainian universities graduate about 15,000 IT specialists.²⁷⁵

According to some estimates, Ukraine's IT industry is valued at over \$5 billion;²⁷⁶ it also has over 2,000 start-ups. Ukraine is a popular destination for IT outsourcing due to a large number of skilled developers and moderate costs compared to the US or Western Europe.²⁷⁷ According to a survey of small and medium IT companies carried out in August 2015, 77% of CEOs responded that during the previous two years, their companies grew and only 8% said that their volumes decreased.²⁷⁸

To develop the industry, Ukrainian IT companies are creating IT clusters in major Ukrainian cities (Lviv, Kharkiv, Lutsk, Dnipro and Odesa) with the support of the Ukrainian government. These clusters aim to increase the quality of IT education in local universities, offering programming courses and conducting advocacy and popularisation campaigns.

In April 2015, the Cabinet of Ministers approved the 2015 Action Plan on supporting the national IT industry.²⁷⁹ The government needs to draft laws to correct various deficiencies: to introduce definitions of software, supply of software and online service in Ukraine's Tax Code; to simplify the regulatory procedures for the provision of IT services to non-residents; and to improve provisions for the allocation of intellectual property rights in computer programmes and databases created by Ukrainian employees and contractors. At the time of writing, no information on the completion of these obligations was available.

Overall, Ukraine's digital sector is developing fast and showing encouraging signs of becoming a successful and dynamic branch of the economy, with good export prospects via outsourcing business.

Approximation process. Ukrainian laws on telecommunications and radio frequency resources already partly comply with EU legislation, but lack compliance in the distribution of responsibilities on policy development, regulation, licensing, market analysis, technical neutrality, and the provision of universal services. To rectify this the

²⁷⁵ IT Ukraine, 2016 edition (www.uadn.net/files/ua_hightech.pdf).

²⁷⁶ See <http://igniteoutsourcing.com/publications/best-ukrainian-it-startups/>.

²⁷⁷ See <http://igniteoutsourcing.com/publications/ukraine-top-outsourcing-destinations/>.

²⁷⁸ See <https://hh.ua/article/17518>.

²⁷⁹ See <http://zakon2.rada.gov.ua/laws/show/338-2015-%D1%80>.

State Service of Special Communication and Information Protection, together with the National Commission for State Regulation of Communications and Information (NCRCI) need to develop a roadmap for changes to Ukrainian legislation, introduce European terminology and definitions for electronic communications, and increase the independence of the national regulator. Furthermore, these two administrative bodies have to develop legislation to support the infrastructure for information society (high-speed broadband access and information protection).

The NCRCI developed and submitted to Parliament the draft law on electronic communications and amendments to some of Ukraine's laws in order to increase the independence and administrative capacity of the national regulator in the communications sphere.

A draft law on postal services that would implement the EU Directive on universal services is also being developed, and for postal and courier services, the Ministry of Infrastructure developed a roadmap on the harmonisation of Ukrainian legislation to that of the EU as well as an action plan on the implementation of Directive 97/67/EC on common rules for the postal services market.

Within the information society, Ukraine adopted a law on e-commerce in September 2015 that complies with Directive 2000/31/EC and designed a draft law on electronic trust services that complies with Regulation 910/2014 on electronic identification and trust services for electronic transactions. The draft law has been submitted to the Parliament.

The State Committee for Television and Radio Broadcasting developed a new draft law on television and radio broadcasting that would incorporate the norms of the European Convention on Transfrontier Television and EU Directive 2007/65/EC on audio-visual media services and presented it for public discussion.

The digital sector at a glance

This broad sector, embracing electronic communications and the entire ICT economy, is a vital, strategic part of the economic reform and modernisation process in Ukraine.

Ukraine has quite advanced human capital skills in this field, which is the basis for rapid development of the sector, including earnings from outsourcing business.

The Agreement provides for comprehensive alignment on EU regulatory practices, mostly within four years. The approximation programme is progressing well.

This fast-changing technological environment will mean comparable dynamics for regulatory systems in both the EU and Ukraine.

20. CONSUMER PROTECTION

Provisions of the Agreement

EU legislation is intended to ensure a high and consistent level of protection for the health and safety of consumers by means of strict common safety rules and standards for products and services circulating within the internal market (see. Arts 203-204 on geographical indications). Many EU policies directly affect consumers. This is especially the case in such areas as telecommunications, digital, energy, transport and food. The EU has also adopted measures to increase the transparency and access to retail financial services and to facilitate the switching of bank accounts. This trend of mainstreaming consumer protection is reflected in the Association Agreement, which integrates the interests of consumers into its policies.



Chapter 20, on consumer protection, nevertheless lays down a number of general commitments. The most fundamental of these is that the parties to the Agreement “shall cooperate in order to ensure a high level of consumer protection and to achieve compatibility between their systems of consumer protection” (Art. 415). This requires, among others, the exchange of information on consumer protection systems; providing expertise on legislative and technical capacity to enforce legislation and market surveillance systems; improving information provided to consumers; and encouraging the development of independent consumer associations (Arts 416 and 418).

Crucially, it also requires Ukraine to approximate its legislation to the EU *acquis*, as set out in Annex XXXIX to the Agreement, while avoiding barriers to trade. Generally speaking, Ukraine has committed

to stricter implementation timeframes than Georgia (three instead of five years).

Product safety is an important achievement of consumer policy. Within three years of the entry into force of the Agreement, Ukraine is expected to have transposed into its legal order the provisions of the main acts in this field, i.e. the general product safety Directive 2001/95/EC and Directive 87/357/EEC concerning products which, appearing to be other than they are, endanger the health or safety of consumers. Certain products whose composition, manufacture or use may pose a risk to consumers are subject to more specific provisions.

It is worth noting that in 2013, the European Commission adopted a Product Safety and Market Surveillance Package that aims to improve further product safety, in particular through enhanced product identification and traceability. At the same time, the Commission has adopted measures to reinforce safety in the food chain. Regarding the safety of cosmetic products, new rules entered into force in mid-2013.

Ukraine must also transpose the unfair commercial practices Directive 2005/29/EC and Directive 98/6/EC on the indication of the prices of products offered to consumers.

To protect consumers from unfair contract terms, the general Directive 93/13/EEC has to be incorporated, as well as, *inter alia*, Directive 97/7/EC on the protection of consumers in respect of distance contracts.

Other EU legal acts to be approximated concern doorstep selling, package holidays and consumer credit.

Finally, in terms of the enforcement of consumer rules, the provisions of Directive 98/27/EC on injunctions for the protection of consumers' interests have to be transposed into Ukrainian legislation within three years of the entry into force of the Agreement, whereas the provisions of Regulation (EC) No 2006/2004 on Cooperation between national authorities responsible for the enforcement of consumer protection laws have to be implemented within five years.

Ukrainian legislators should be aware that thanks to Directive 2013/11/EU on alternative dispute resolution and Regulation (EU) 524/2013 on online dispute resolution simple, fast and low-cost, out-of-court procedures for consumers to seek redress will also soon become available throughout the EU.

Implementation perspectives

Although a system for the protection of consumer rights in Ukraine was first set up more than 25 years ago, further efforts are necessary to ensure that the system is effective, efficient and aligned with EU regulations.

For Ukraine, the key task is to find a proper balance among consumer rights protection, a reduction in the administrative burden on businesses and the elimination of corruption incentives associated with state control functions. For instance, in 2016, a moratorium on state inspections of entrepreneurs with a turnover below UAH 20 million was introduced. This decision was welcomed by businesses while being lambasted by representatives of consumer rights protection organisations who claimed that it undermined consumer safety.

Recently, several public inspections and services were reorganised into a single State Service on Food Safety and Consumer Protection (SPSA) to streamline the control functions of the state and reduce the control burden on businesses. The SPSA was officially launched in 2016 as a key public body responsible for implementing consumer rights protection policy. It is subordinated to the Ministry of Agrarian Policy and Food, which raised doubts about the competence of the supervisory authority to implement consumer rights protection over non-food products.

There is no specific agency responsible for consumer rights protection in the field of finance, which, given the very low level of financial literacy of the population is a highly sensitive issue. Several draft laws to improve the system of consumer rights protection in financial services and enhance the role of the central bank in minimum requirements regarding financial information disclosure are currently considered by the Parliament.²⁸⁰

Apart from the SPSA, several other public authorities are responsible for consumer rights protection in specific areas, for example:

- National Commission for the State Regulation of Communications and Information²⁸¹ – communication services;

²⁸⁰ See www.bank.gov.ua/control/uk/publish/printable_article?art_id=27325737&showTitle=true.

²⁸¹ See <http://nkrzi.gov.ua/index.php?r=site/index&pg=77&language=uk>.

- State Labour Services²⁸² – social services;
- State Administration on Medical Products²⁸³ – pharmaceutical products;
- State Inspection on Architecture and Construction²⁸⁴ – construction norms; and
- State Inspection on Maritime and River Transport Safety – maritime and river transportation.

The law 'On Consumer Rights Protection' (1991; last amended in 2015)²⁸⁵ remains a key legal act regulating the mutual rights and obligations of consumers and providers of goods and services, as well as consumer protection mechanisms.

However, recent reforms in the areas of technical standards for industrial and food products (TBT and SPS) bring Ukraine's legislation much closer to the EU legislation. In 2015, a new edition of the Law on General Product Safety²⁸⁶ was passed in Ukraine, aligned with the respective EU directive. There are several other important laws enhancing consumer protection, including:

- Law on State Market Surveillance and Control over Non-Food Products (2010, last amended 2015),²⁸⁷
- Law on Key Principles and Requirements regarding Food Safety and Quality (1997, last amended 2015),²⁸⁸
- Law on Liability for Damage Caused by a Defect in the Product (2011).²⁸⁹

Ukraine has also made significant progress in the adoption of technical regulations and standards harmonised with the EU norms.

Although more efforts are necessary to harmonise legislation, an urgent task is to ensure adequate state control over the implementation of consumer protection norms executed by the SPSA and other

²⁸² See <http://dsp.gov.ua/>.

²⁸³ See www.diklz.gov.ua/control/main/uk/index.

²⁸⁴ See <http://dabi.gov.ua/>.

²⁸⁵ See <http://zakon5.rada.gov.ua/laws/show/1023-12>.

²⁸⁶ See <http://zakon3.rada.gov.ua/laws/show/2736-17>.

²⁸⁷ See <http://zakon3.rada.gov.ua/laws/show/2735-17>.

²⁸⁸ See <http://zakon3.rada.gov.ua/laws/show/771/97-%D0%B2%D1%80>.

²⁸⁹ See <http://zakon5.rada.gov.ua/laws/show/3390-17>.

involved authorities. These efforts also require the establishment of an adequate quality infrastructure.

The involvement of civil society activists in consumer rights protection is an important complement to the public authorities. There are multiple NGOs involved in consumer rights protection, including the All-Ukrainian Federation of Consumers 'Puls'; the All-Ukrainian Association in Consumer Rights Protection Issues; the Civic Control of Consumer Rights Protection; the Institute for Consumer Expertise; and the All-Ukrainian Union of Consumers of Ukraine etc. Most of these NGOs have a network of regional representative offices.

There is also the *Spojivach.info* newspaper, disseminated both in paper and electronic versions,²⁹⁰ which discusses issues related to consumer rights protection and the efforts of producers to improve product safety and quality.

One of the most well-known consumer rights public campaigns is the Youth for Consumer Rights movement organised by students of Kyiv National University of Trade and Economics.²⁹¹ The representatives of this movement conducted comparative testing of products, wide awareness-raising campaigns, consultations on consumer rights protection and organised several 'Consumer Fests'.

Consumer Protection at a glance

Ukraine started building a system of consumer rights protection since independence, but with questionable success. A key task is to find a proper balance among consumers rights protection, a reduced administrative burden on businesses and the elimination of corruption.

AA requires approximation to relevant EU acquis in the consumer protection field within 3 years of the entry into force of the Agreement.

Ukraine's obligations in the area of consumer protection under the AA can be divided into several categories. First: general commitments related to information exchange and improvement of information provided to consumers, etc. Second: obligations related to an approximation of legislation concerning product safety, but also institutional and administrative procedures of protection of consumers and the enforcement of consumer rights.

²⁹⁰ See <http://spojivach.info/>.

²⁹¹ See <http://consumer.at.ua/>.

21. COMPANY LAW



To further support Ukraine's transition to a fully functioning market economy and to create a stable environment for investment, the Association Agreement includes a brief chapter on company law, corporate governance, accounting and auditing.²⁹² This chapter entails a relatively soft provision on Ukrainian cooperation with the EU in these areas.

Company law. In the area of company law, to improve the protection of shareholders, creditors and other stakeholders, Ukraine “undertakes” to approximate a list of EU company law directives, included in Annex XXXIV. In particular, Directive 2009/101/EC²⁹³ requires companies with limited liability to disclose basic information and documents relating to, for example, their instruments of constitution and statutes, annual accounts and other rules for the management of the company. This information has to be recorded in a file opened in a central register, commercial register or company register, made available in electronic format and published in a national gazette or by other means.

Ukrainian legislation in 2016 complies with most if not all the rules of this Directive. In 2014 and 2015, parliament revised the law on company registration.²⁹⁴ As a result, the registration of companies became easier, with the goal of completing formalities in 24 hours. It

²⁹² See Title V Chapter 13.

²⁹³ Directive 2009/101/EC replaced Directive 68/151/EEC.

²⁹⁴ In November 2015, parliament recast the business registration law in a new edition. See Law 835-VIII from 26 November 2015 (<http://zakon.rada.gov.ua/go/835-19/>).

also added annual accounts and foundation documents to the business registries. Access to business registry information was extended and includes the disclosures required by Directive 2009/101/EC. Ukrainian corporate law also seems to comply with the rules on formation and nullity of companies.

Another important area of company law, covered by Directive 2012/30/EU,²⁹⁵ aims at protecting shareholders and creditors of public limited liability companies (PLCs) by fixing rules for creating and running companies and for increasing or reducing their capital. It requires that the company statutes include certain information, such as the objectives of the company, the details of its share capital and various rules for managing the company. The Directive sets the minimum capital requirement for an EU PLC at €25,000. It also regulates the distribution of dividends as well as the issue and acquisition of shares.

Ukrainian corporate law²⁹⁶ largely complies with the key provisions of Directive 2012/30/EU and also Directive 2004/25/EC on takeover bids. There are some provisions that are not completely harmonised. For example, there are no rules in Ukrainian corporate law on indirect ownership of own shares by a company. Also, the list of issues that have to be decided at a shareholders' meeting is rather vague. The National Securities and Stock Market Commission (NSSMC) prepared a draft law that is supposed to implement the EU rules on corporate governance and shareholders' rights, including Directive Nos. 2012/30/EU and 2007/36/EC, as well as Commission Recommendations 2004/913/EC and 2005/162/EC²⁹⁷ (explained below) and published it for comments. As of May 2016, this draft law has not progressed through parliament.

Ukrainian law also has basic provisions regarding single-member companies, notably on those that are single-member limited liability companies, but there are gaps regarding single-shareholder stock companies. A draft law integrating Directive 2009/102/EC, which clarifies the status of these companies and actions by a sole shareholder, was circulated for comments by the Ministry of Economic

²⁹⁵ Directive 2012/30/EU replaced Directive 77/91/EEC.

²⁹⁶ In addition to the Business Registration Law (see above), other important corporate laws are the Company Law (Law 1576-XII of 19 September 1991, <http://zakon.rada.gov.ua/go/1576-12>), Stock Company Law (Law 514-VI of 17 September 2015) and the Commercial Code (<http://zakon.rada.gov.ua/go/436-15>).

²⁹⁷ See the website of the NSSMC (<http://nssmc.gov.ua/law/19903>).

Development and Trade in July 2015.²⁹⁸ So far, no further action on this draft law has been reported.

In addition, Annex XXXIV includes several other EU directives in the area of company law that Ukraine has to put into effect within two to four years after the Agreement enters into force (Table 21.1).

Table 21.1 EU Directives on company law in the EU-Ukraine Agreement

Directive	Substance
Council Directive 78/855/EEC concerning mergers of PLCs (<i>replaced by Directive 2011/35/EU</i>)	Deals with mergers between PLCs in a single EU country.
Council Directive 82/891/EEC concerning the division of PLCs (<i>as amended by Directive No. 2007/63/EC</i>)	Deals with the division of PLCs in a single EU country.
Council Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a member state by certain types of companies governed by the law of another state	Introduces disclosure requirements for foreign branches of companies.
Directive 89/667/EEC on single-member private limited liability companies (<i>repealed by Directive 2009/102/EC</i>)	Provides a framework for setting up a single-member company (in which all shares are held by a single shareholder).
Directive 2004/25/EC on takeover bids	Establishes minimum guidelines for the conduct of takeover bids involving the securities of companies, where all or some of those securities are admitted to trading on a regulated market.

²⁹⁸ See the website of the Ministry for Economic Development and Trade (www.me.gov.ua/Documents/Detail?lang=uk-UA&id=d90c5b29-d47e-41ec-bc50-b2612c6438df&title=ProektZakonuUkrainiproVnesenniaZminDoDeiakikhZakonodavchikhAktivUkrainiSchodoTovaristv-YakiSkladaiutsiaZOdnogoUchasnika).

Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (<i>amended by Directive 2013/50/EU</i>)	Seeks to improve information supplied to investors about issuers of securities admitted to trading on a regulated market. This transparency Directive was amended in 2013 by Directive 2013/50/EU, which aims at reducing the administrative burden for SMEs.
Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies	Establishes rules to help exercise shareholders' rights at general meetings of companies that have their registered office in an EU country and are listed on an official stock exchange.

Source: Annex XXXIV of the EU-Ukraine Agreement.

Accounting and auditing. Here Ukraine is to harmonise its legislation with Council Directive 78/660/EEC on the annual accounts of certain types of companies and Council Directive 83/349/EEC on consolidated accounts. These two directives have since been replaced by Directive 2013/34/EU, which simplifies and reduces the administrative burdens for firms. It is intended to facilitate greater EU cross-border comparability of accounts. It also introduces mandatory requirements for disclosing payments by companies in the extractive and logging of primary forest industries to government agencies.

Ukraine will also need to approximate Regulation 1606/2002/EC on the application of international accounting standards. This regulation requires EU companies to prepare their accounts in accordance with international accounting standards (IAS) and international financial reporting standards (IFRS). These standards are issued by the International Accounting Standards Board. Ukrainian law already requires reporting based on IAS and IFRS for public companies, including all banks. The government introduced draft Law 4646 to parliament, which covers those provisions of Directive 2013/34/EU that have not yet been incorporated into Ukrainian legislation, including IFRS reporting requirements for companies in extractive industries, simplified reporting for microenterprises as defined by EU rules and a reduction of the required primary documents. As of May 2016, this draft law had not progressed through parliament.

Corporate governance. The EU and Ukraine agreed to cooperate on the further development of corporate governance policy in line with international standards (i.e. the OECD Principles on Corporate Governance), as well as gradual approximation to the EU legislation listed in Annex XXXVI. This includes Commission Recommendation 2004/913/EC on fostering an appropriate regime for the remuneration of directors of listed companies and Recommendation 2005/162/EC on the role of non-executive or supervisory directors of listed companies and the committees of the supervisory board. After the financial crisis, these two recommendations were completed by Recommendation 2009/385/EC. With regard to the structure of the policy on directors' remuneration, these recommendations require a balance between fixed and variable remuneration, with the allocation of the variable component conditioned on performance criteria. Termination payments ('golden parachutes') should also be subject to various limitations. Each listed company should publish a statement on these aspects of its remuneration policy.

In 2014, the Ukrainian securities regulator (NSSMC) approved a new version of the Corporate Governance guidelines,²⁹⁹ which seems to be based on the OECD's Principles of Corporate Governance. The rules on the remuneration of directors and independent board members are yet to be implemented in Ukraine, but they are partially addressed in the 2015 revision of stock company law that took effect in May 2016. Corporate law now allows independent directors to be appointed to a supervisory board of a company. Independent directors are optional for private sector corporations, but state-controlled ones are required to appoint at least two independent directors. Independent directors have to chair and constitute a majority of members in the audit and remuneration committees of supervisory boards for state-controlled companies.

²⁹⁹ See the NSSMC Decision 755 of 25 July 2014 and <http://nssmc.gov.ua/law/18922>.

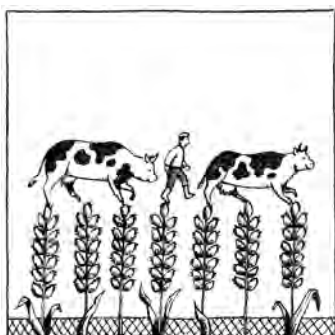
Company law at a glance

The Association Agreement does not impose strict obligations on Ukraine in the area of company law, corporate governance or accounting. Instead, it provides a framework of EU company law for Ukraine to implement.

Ukraine has moved to transpose EU rules relatively quickly. Some provisions have already been incorporated and draft changes to legislation have been prepared for some of the remaining key provisions.

Alignment with these provisions of EU company law will improve Ukraine's business climate and help to create a transparent environment for companies, including an appropriate level of protection for company shareholders and creditors.

22. AGRICULTURE



Sometimes referred to as ‘the bread basket of Europe’, Ukraine’s expanses of rich black earth endow it with both a huge capacity and potential in the agricultural and food sectors. Necessary reforms to the farm sector were slow to get under way in the post-Soviet period, but are now progressing well.

Provisions of the Agreement

The text states that: “the Parties shall cooperate to promote agricultural and rural policies, in particular through progressive convergence of policies and legislation”. It goes on to list general objectives, such as improving competitiveness, exchanging best practices and promoting modern and sustainable agricultural production (Arts 403-404).

Art. 405 says that “the parties will support gradual approximation to relevant EU law and standards”, in particular those listed in Annex XXXVIII, which contains 58 EU laws that constitute the essence of the EU’s agricultural policy (see Box 22.1). These include the mechanisms of market organisation and support measures for specific commodities and rules for direct income support payments for farmers.

There are no timeframes stipulated for approximation, however, and the texts are careful to say that the listed regulations “constitute the legislative references when gradual approximation of legislation in a specific sector or product is considered by the Ukrainian side” (introductory phrase in Annex XXXVIII).

Box 22.1 Summary of EU agricultural policy laws referred to in the Agreement

Quality policy, 7 regulations. These set the rules for the protection of geographic indications and traditional specialities.

Organic farming, 3 regulations that set rules for organic production and the labelling of organic products.

Genetically modified crops, 1 recommendation offering guidelines for the coexistence of genetically modified crops and conventional and organic farming.

Biodiversity, 1 regulation that establishes a programme in the EU for conservation of genetic resources in agriculture.

Marketing standards for plants and derived products, fruit and vegetables, 33 regulations and directives. These mostly set technical standards for the marketing of specific commodities, as well as basic regulations on the organisation of markets and direct support schemes.

Marketing standards for live animals and animal products, 14 regulations and directives that mostly set technical standards for the marketing of specific commodities, as well as for the common organisation of markets.

The subsequently agreed Association Agenda document of 16 March 2015 defines the approach as follows: “The Parties cooperate to support Ukraine ... to prepare for implementation of EU acquis mentioned in relevant annexes of the Association Agreement, in particular through enhanced activities of the established agricultural dialogue”.

While the texts might suggest different legal interpretations of precisely what commitments Ukraine is undertaking, the overall message is that Ukraine retains much flexibility over how far or how fast to replicate elements of EU farm policy.

The policy dialogue, which takes place in a Sub-Committee of the Association Council, is supported by technical assistance projects. One of these supports the improvement of the land market in line with best EU practices, concerning land law, the land cadastre and related administrative structures (€1.8 million). Another aims to strengthen the capacity of the Ministry of Agrarian Policy to implement its 2015-20 strategy (€3 million).

The EU can also help with funding and investment; for example in October 2015 the European Investment Bank (EIB) agreed to provide €400 million of loan funding for projects to modernise Ukraine's

agricultural infrastructure and to develop aquaculture. Key investment gaps to be addressed include agricultural field machinery; drying, storage, processing and logistics capacity; and investments in aquaculture. The loan will also be available for investment in public sector infrastructure, such as testing laboratories, research and vocational training facilities and fish-stock monitoring capacity that supports the sustainable flow of produce from producer to consumer along these value chains.

Developments in Ukraine's agriculture sector and policy

Ukraine's natural resources are well suited for agricultural production, with 69% of its territory allocated to agriculture, much of which is the especially fertile *chornozem* soil (black earth). Another important advantage is the year-round access to deep port capacities on the Black Sea coast, which are crucial for grain exports. A well-developed crop production sector provides cheap feed and raw materials for animal farming and the food industry. Ukraine is already the world's largest sunflower oil exporter and a leading wheat and poultry exporter.

On the other hand, a continuing lack of financial resources at the enterprise level, an underdeveloped infrastructure and arbitrary state regulations hold back productivity growth. Average yields of wheat, corn, rape seed and sunflower seed are all lower than in neighbouring Poland, despite better natural conditions. Changes in agricultural policy could remove the factors hampering the huge potential of Ukraine's agricultural production.

The most crucial agricultural reform in the history of independent Ukraine took place in the 1990s, when the land of former collective farms was distributed among workers and rural employees. The distribution of formerly collectively owned land continued until 2001, and in 2002 the government imposed a moratorium on the sale of agricultural land, which is still in force at the time of writing. As of 2016 there are 13 million landowners, with farms averaging 2.5 hectares in size. The majority of these landowners are of retirement age and only have limited access to credit resources because of high interest rates, the underdeveloped system of agricultural credits and lack of collateral security. As a result, the majority of owners do not cultivate the land themselves, but rent it to enterprises.

Another important element of agricultural policy is financial support for producers. Due to the constant shortage of budgetary resources, Ukraine built a support system that relies not on direct

payments but on tax privileges and exemptions. Specifically, the Parliament established a fixed agricultural tax in 1999, which allowed producers to reduce their tax payments. Further, in 2009 Parliament adopted a special VAT regime for farmers, allowing them to keep the VAT collected on their sales, instead of passing it to the state. Together, according to OECD estimates, the fixed agricultural tax and special VAT regime constituted 93% of all support to agriculture in 2014. Expert opinions differ about the effectiveness of this system. According to one expert,³⁰⁰ this support is adequate and at EU level, if account is also taken of the very low rent prices for agricultural land in Ukraine. Another expert³⁰¹ finds that since 2011 support is insignificant, given the absence of VAT refunds for grain exporters. Overall, Ukrainian agricultural policy in 1991-2013 lacked consistency and transparency. It only partly managed to reform the system left by Soviet-era agricultural regulation.

However, in 2014-15, several important reforms were undertaken. They were guided by the Coalition Agreement and by the “Strategy for Sustainable Development: Ukraine-2020” document, drawn up in compliance with a memorandum of understanding with the IMF. Also, in 2015 the Ministry of Agrarian Policy and Food, with the support of Ukrainian and EU experts, developed a strategy and action plan for 2015-20 to guide agricultural reforms over the next five years.³⁰²

Decentralisation measures dominated the agricultural reforms of 2014-15, cancelling much unnecessary legislation with immediate effect and mostly without creating new regulations. Overall, 56 agricultural permits and procedures were cancelled, creating estimated savings of 12 billion UAH for Ukraine’s economy. In particular, Parliament cancelled grain quality certificates, the mandatory certification of warehouses on compliance of services for grain and the licensing of import of plant protection products. The issuing of the phytosanitary certificates was accelerated and the registration of nitrogenous fertilisers simplified. Various other permits regarding transportation of

³⁰⁰ See <http://agroportal.ua/views/blogs/ekonomika-agrarnoi-gospodderzhki-es-i-ukrainy/>.

³⁰¹ See <http://voxukraine.org/2015/02/23/is-ukrainian-agriculture-subsidized/>.

³⁰² Ministry of Agrarian Policy and Food of Ukraine, “Single and Comprehensive Strategy and Action Plan for Agriculture and Rural Development in Ukraine for 2015-2020”, October 2015.

plant products, the import of agrichemicals, livestock certification, food safety, fisheries etc. were also cancelled.

Much work was undertaken to harmonise Ukraine's agri-food legislation with that of the EU. Parliament adopted laws on food safety, feed quality control, identification and registration of animals and animal by-products. As a result, Ukrainian dairy produce and egg exporters gained access to the EU market in 2015. This harmonisation also facilitated successful negotiations regarding the export of dairy products from Ukraine to China. Also, in February 2016 companies already exporting poultry to EU received the permission to export their products to the United Arab Emirates. In future, the harmonisation of Ukrainian laws with those of the EU will open the EU market for the export of Ukrainian pork and beef products and grain seeds.

Other agricultural reforms include expanding the access to financial support for small and medium producers (the refund of building costs related to animal farming); creating a single institution responsible for consumer protection, sanitary and epidemiological service, veterinary and phytosanitary service; and preparing 86 state-owned agricultural companies for privatisation. These reforms will improve enterprises' access to financial resources, decrease administrative burdens on producers and lead to better management of land resources.

On the other hand, some aspects of agricultural policy in 2015 were controversial. One of the most notable was the prolongation of the moratorium on land sales until 2017. As a result, farmers are still unable to use their land as collateral security for loan finance and therefore have restricted access to financing. According to the 2020 strategy documents, there should be a land market pilot project in 2016. Its implementation remains to be seen.

Another issue generating heated debate was the reform of the agricultural tax system. Specifically, Parliament decided to cancel the special VAT tax regime for agricultural producers from 2017, and from 2016 reduce the amount of VAT that producers are allowed to keep for themselves (by 85% for producers of grains and technical cultures, by 20% for animal producers and by 50% for producers of other agricultural products). At the same time, Parliament approved the restoration of VAT refunds to grain exporters. These changes to the tax system, which were demanded by the IMF, will contribute to the creation of a more transparent tax system. On the other hand, the special VAT regime was the most crucial part of the state support for

agriculture. Its cancellation needs to be matched by the increased efficiency of direct state support to the sector.

According to the Strategy Action Plan, the main topics of agricultural policy in 2016 will be: reform of various governmental structures; continuation of deregulation and harmonisation with EU laws; preparation for launching the land market; privatisation of state enterprises; the abolition of food price regulations and the implementation instead of a direct support system.

In the first half of 2016 agricultural reforms lost momentum due to increased political uncertainty and the dismissal of the government. Consequently, there have been no significant legislative changes, only the implementation of reforms that started in 2015. However, in April 2016 the new government was elected, with a new minister for agriculture. There is hope that agricultural reforms will restart from June 2016.

Agricultural policy at a glance

Ukraine has a huge capacity and potential in the agri-food sector.

Reforms in the post-Soviet period got off to a slow, but are now seriously under way.

The contribution of the Agreement is essentially through policy dialogue, supported by technical assistance and investment finance.

The Agreement contains many references to EU agricultural legislation, but there is flexibility in the extent to which this should be applied, with no binding timetables.

23. EMPLOYMENT AND SOCIAL POLICY



This chapter of the Association Agreement seeks to promote cooperation over a large part of EU labour law and related conditions of work, much of which is closely related to the content of International Labour Organisation (ILO) conventions. A major reform of the Ukrainian Labour Code is currently before the parliament and is long overdue, modernising the Code inherited from the Soviet period.

Provisions of the Agreement

The Agreement sets out (in Annex XXIX) a comprehensive agenda for gradual approximation under three basic headings: labour law, anti-discrimination and gender equality and health and safety at work. The first two headings cover basic principles of the labour code, which leave a wide margin of flexibility as to how onerous the implementing provisions may be. For example, one can compare the broad range of actual policies followed by different EU member states, all of which are in conformity with EU law. This is important when considering how to ensure that approximation of the EU legislation does not impose excessive costs in Ukraine.

There is a close relationship between the content of many EU directives and ILO conventions, as explained in Box 23.1.

Box 23.1 Relationships between EU employment and social directives and ILO conventions

Quotation from an official EU document:

“There is an interplay between EU labour law, the European Social Charter and ILO Conventions: EU law, in particular the Charter of Fundamental Rights, takes into account the European Social Charter and ILO Conventions and in turn influences the evolving content and monitoring of the latter instruments.

All EU member states are also members of the ILO. The EU is committed to promoting the ILO’s Decent Work agenda to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen social dialogue on work-related issues.

All EU countries have ratified the core labour standards – that is, the fundamental ILO Conventions on freedom of association, collective bargaining, forced and child labour, equal remuneration and the elimination of discrimination. EU countries have also ratified the ILO Governance Conventions on labour inspection, employment policy and tripartite consultations, as well as a considerable number of other ILO Conventions.

While ILO standards cover a wider range of areas than those in which the EU is competent to legislate and EU law often goes beyond the minimum provisions of ILO Conventions, the principles that underlie the action of both organisations are similar. There is much common ground in the content of EU Directives and ILO Conventions, with EU law reinforcing ILO standards. Directives on issues such as working time and young workers (see Chapter 3) explicitly seek to take into account relevant ILO standards.

The protection, realisation and enforcement of core labour standards as well as the promotion of the ratification and effective application of other up-to-date ILO Conventions underpinning the Decent Work Agenda, are part of a growing number of bilateral agreements between EU and third countries, such as the new generation of EU free trade agreements. The follow-up mechanisms of these agreements include monitoring mechanisms involving social partners.”

Source: Extracted from: “Labour law and working conditions”, Social Europe Guide, Vol. 6, European Commission, Directorate-General for Employment, Social Affairs and Inclusion, February 2014. For a detailed analysis, see “Analysis – in the light of the European Union acquis – of ILO up to date Conventions”, European Commission Directorate-General for Employment, Social Affairs and Inclusion, June 2013.

Labour law. The *individual employment conditions Directive* (991/533/EEC) establishes the employer's obligation to inform employees in writing of the conditions applicable to the contract or employment relationship. The aim of the Directive is to provide employees with improved protection, to avoid uncertainty and insecurity about the terms of the employment relationship and to create greater transparency on the labour market.

The *fixed-term contract Directive* (1999/70/EC) aims to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination and to prevent abuses arising from the use of successive fixed-term employment contracts. The *part-time contract Directive* (97/81/EC) sets out to eliminate unjustified discrimination against part-time workers and improve the quality of part-time work. It also aims to facilitate the development of part-time work on a voluntary basis and contribute to the flexible organisation of working time in a way that takes account of employers' and workers' needs.

The *Directive on collective redundancies* (98/59/EC) sets out requirements for the information to be given to workers on the reasons, the numbers and categories of workers concerned, and of redundancy compensations payments. The public authorities have to be notified, and the redundancies cannot be effective within 30 days of this notification.

These directives require approximation within three to four years.

Anti-discrimination and gender equality. This section includes four directives aiming at anti-discrimination and gender equality in general terms, with two more specific directives concerning parental leave and conditions for pregnant workers.

The *employment equality framework Directive* (2000/78/EC) is a key part of EU labour law, which aims to combat discrimination in conditions of work or contract on grounds of disability, sexual orientation, religion or belief and age in the workplace. This framework directive accompanies the equal treatment Directive on gender (2004/113/EC) and the racial equality Directive (2000/43/EC).

The *equal treatment Directive on gender* prohibits any less favourable treatment of men or women by reason of gender, or of women due to pregnancy or maternity. It also prohibits sexual

harassment. A detailed analysis of this directive has been published by the European Commission.³⁰³

The *racial equality Directive* implements the principle of equal treatment between people, irrespective of racial or ethnic origin. It gives protection against discrimination in employment and training, education, social protection and gives victims of discrimination a right to make a complaint through a judicial or administrative procedure. It further provides for the establishment of organisations to promote equal treatment and assistance to victims of racial discrimination.

The *Directives on parental leave* (96/34/EC) provides for three months of leave; the *Directive on pregnant workers* (92/85/EEC) prohibits work that risk engendering health and safety and also for leave before and/or after confinement of 14 weeks.

Health and safety at work. The centrepiece is the *Framework Directive for health and safety at work* (89 /391/EEC). The scope of the directive is expansive, applying to all sectors including industry, agriculture, commerce and services. The Directive describes employer obligations, which include providing workers with information and safety training, taking necessary measures for first aid and fire-fighting. This Directive is limited to setting out general principles. It is to be approximated by Ukraine in a relatively short period of three years, but its concrete implementation will depend more on a family of 27 implementing directives, specifying which the safety requirements for particularly dangerous products, such as carcinogens or explosives, or the working environment in specific industries such as construction sites or underground mineral extraction.

Some examples illustrate the substance of the specific directives. The *Directive for protection against asbestos* (83/18/EEC) reduces the limit value for occupational exposure of workers to asbestos at 0.1 fibres per cm³, while the *Directive for safety against noise* (2003/10/EC) sets the exposure limit value at 87 decibels. An example of particular significance for the coal mining industry in Ukraine, which suffers a high incidence of tragic mining accidents, is a *Directive on the minimum requirements for improving the safety in surface and underground mineral-extracting industries* (92/104/EEC), which sets out a comprehensive set of minimum standards.

³⁰³ Susanne Burri and Sacha Prechal, "EU Gender Equality Law - Update 2013", European Network of Legal Experts in Gender Law, European Commission, Directorate-General for Justice Unit JUST/D/1 , Theme - Equal Treatment Legislation.

Implementation perspectives

According to the Association Agreement Ukraine should ensure “gradual approximation” of its labour regulation to the EU law, as well as ratify ILO conventions. The parties agreed to “strengthen their dialogue and cooperation on promoting the decent work agenda, employment policy, health and safety at work, social dialogue, social protection, social inclusion, gender equality and non-discrimination” (Art. 419). Important legislative reforms are currently under way in Ukraine, which will be largely consistent with the provisions of the Agreement.

Ukraine has already ratified all fundamental ILO conventions and core standards, which are mostly taken into account in the effective legislation.

The main legislative act regulating the labour market in Ukraine is the Labour Code, inherited from the former Soviet Union.³⁰⁴ It was amended many times since Ukraine became independent. However, it remained very rigid, providing *de jure* little flexibility on the labour market. It focuses on rights and guarantees for employees, while paying little attention to employers (dismissal of employees is very difficult). The Code does not have specific provisions on mass redundancies. Actual rigidities are lower in practice as law enforcement is poor, which leaves employees without adequate protection and puts employers at risk of penalties if a violation is identified.³⁰⁵

Heated debates on the approval of new Labour Code have been ongoing for many years, but a new law taking account of the new realities of the market economy and modern labour market requirements has not yet been approved. A new Draft Code was submitted to Parliament at the end of 2014 (draft law No. 1658), and approved in its first reading on 5 November, 2015. The new law envisages more flexibility in labour relations and more rights provided to employers. According to the Ministry of Social Policy, the provisions of the draft Labour Code comply with EU legislation. At the same time, Ukrainian trade unions announced their plans to refer it to the European Commission to analyse its compliance with the Association

³⁰⁴ The current Labour Code was approved in 1971 (the Law No. 322-VIII, from 10 December 1971).

³⁰⁵ O. Betliy and L. Feiler (2011), “Flexicurity and the Role of Lifelong Learning in Ukraine”, European Training Foundation.

Agreement.³⁰⁶ Taking into account the lack of consensus between major stakeholders (government, trade unions and representatives of employers), on 12 November 2015 the text of the draft Labour Code was sent to the ILO with the request to analyse its compliance with international standards and ILO Conventions. The ILO position on the draft is expected by July 2016, hopefully unblocking the process for adopting the new Labour Code adoption.

The major differences with the current version of the Labour Code include:

- Written contract become compulsory.
- Employers will have a right to dismiss employee for skills mismatch, publication of official secrets and violation of labour safety rules.
- The working week is to be limited to 40 hours, but could be increased to 44 hours upon the agreement of both sides.
- There will be regulation of flexible work schedule and work from home.
- There is a provision against gender discrimination.
- The list of reasons for fixed-term contracts is to be extended.
- The redundancy payment is to be increased.

Overall, these changes seem to be mostly in compliance with the Association Agreement. However, the Rada failed to include an article on the prohibition of discrimination based on person's sexual orientation at the labour market. Instead, on November 12, 2015 members of the Rada introduced this provision into the current version of the Labour Code in order to fulfil obligations taken in the Visa Liberalisation Action Plan. It was promised that the provision on the prohibition of discrimination based on a person's sexual orientation would be included in the new Labour Code before it is put to vote in the second reading.

Another essential regulation of labour relations is the Law on Employment of the Population, which was finally approved in 2012 after long discussions,³⁰⁷ replacing the law of 1991.³⁰⁸ This law regulates

³⁰⁶ Trade unions claim that protection of employees' rights decline in the draft Labour Code as compared to the effective Labour Code. In particular, they refer also to poor law enforcement and possible abuse by new provisions on the side of employers, which might result in worse protection of employee's rights.

³⁰⁷ The Law No. 5067-VI from 5 July 2012, became effective in 2013.

³⁰⁸ Law on employment of the population, No. 03-XII from 1 March 1991.

many labour market issues, such as rights of employees, guarantees in case of job loss, condition for unemployment benefits and various active labour market. The law also contains provisions on collective redundancies, which comply with the respective EU directive.³⁰⁹

Health and safety at work. The Constitution of Ukraine states that every person has a right to safe and healthy work conditions (Art. 43). Major legislative acts that regulate safety at work include the Law on Labour Protection, the Law on Compulsory State Insurance in Case of Working Accidents and Occupational Diseases, and a number of normative acts.

The Law on Labour Protection was approved in 1992, revised in 2002 and later amended several times.³¹⁰ According to the law employers should inform an employee of the working conditions, and the presence at the workplace of hazardous and harmful factors. There are provisions for special clothing, footwear and other personal protective equipment for those working in dangerous environments. The employer is also responsible for financing regular medical checks and work safety measures. Such provisions mostly comply with the EU Framework Directive for health and safety³¹¹ (including Directive 92/104/EEC for mineral-extracting industries), although the Directive has a larger list of employers' responsibilities than Ukrainian legislation. However, law enforcement remains low, especially in the coal mining sector, which sees many deaths due to violation of work safety requirements.³¹² There is no real procedure to prosecute people guilty of causing accidents at work. Moreover, the system of work accident insurance is inefficient.³¹³ Firms have no incentive to invest in work safety as their insurance premium remains unchanged.

The Cabinet of Ministers has approved a list of measures required for the implementation of the EU directives that should be

³⁰⁹ This Law defines the definition of the collective (mass) redundancies and broadly defines policies related to these issues. In turn, current Draft Labour Code envisages measures that could be taken by employers to reduce the risk of collective redundancies.

³¹⁰ Law on labour protection, No. 2694-XII from 14 October 1992.

³¹¹ Directive 89/391/EEC from 12 June 1989.

³¹² E.g. not all miners carry gas meters with them and cannot check whether the gas level exceeds safety norms.

³¹³ "Reforming the work accident insurance in Ukraine: Introducing economic incentives and private sector competition", Policy Paper V20, GAG/IER.

incorporated into national legislation by August 2017.³¹⁴ The Ministry of Social Policy has already approved the implementation plans of these directives.³¹⁵ National legislation is already mostly compliant with EU norms (see Table 23.1). Moreover, the State Labour Service has already approved the implementation plan of several individual directives³¹⁶ related to the Framework Directive for health and safety (89/391/EEC),³¹⁷ including those concerning display screen equipment (90/270/EEC), temporary or mobile construction sites (92/57/EEC), mineral-extracting industries (92/104/EEC and 92/91/EEC) and use of work equipment (2009/104/EEC).

Table 23.1 Implementation plans of EU directives on labour issues

Directive	Status of compliance of national legislation with the provisions of directives	Deadline for implementation
Directive 2001/23/EC: <i>safeguarding of employees' rights in the event of transfers of undertakings</i>	Partial compliance	2016
Directive 2002/14/EC: <i>informing and consulting employees</i>	Mostly in compliance*	December 2016
Directive 97/81/EU: <i>part-time work</i>	Mostly in compliance*	Additional analysis might be conducted in 2016
Directive 91/383/EEC: <i>fixed-duration or temporary employment relationship</i>	Mostly in compliance	2015

³¹⁴ The CMU Resolution No. 847-p, 17 September 2014 (<http://zakon0.rada.gov.ua/laws/show/847-2014-%D1%80>).

³¹⁵ See www.mlsp.gov.ua/labour/control/uk/publish/article?art_id=171876&cat_id=168553.

³¹⁶ Namely, Directive 90/270/EEC from 29 May 1990, Directive 92/57/EEC from 24 June 1992, Directive 92/104/EEC from 3 December 1992, Directive 92/91/EEC from 3 November 1992 and Directive 2009/104/EEC from 16 September 2009.

³¹⁷ The CMU Resolution No. 745-p from 17 July 2015 (<http://zakon3.rada.gov.ua/laws/show/745-2015-%D1%80>).

Directive 91/533/EEC: <i>obligation to inform employees</i>	Partial compliance	2016
Directive 1999/70/EC: <i>fixed-term employment</i>	In compliance	Additional analysis might be conducted in 2016
Directive 98/59/EC: <i>collective redundancies</i>	Mostly in compliance*	2015
Directive 2004/113/EC: <i>equal treatment between men and women</i>	Mostly in compliance	2016
Directive 2010/18/EC: <i>parental leave</i>	Mostly in compliance	2017
Directive 92/85/EEC: <i>pregnant workers</i> (10 th individual Directive within the meaning of Art. 16 (1) of Directive 89/391/EEC)	Mostly in compliance	2015-16
Directive 79/7/EEC: <i>social security</i>	Mostly in compliance	2015
Directive 2000/43/EC: <i>racial equality</i>	Mostly in compliance	2016
Directive 2000/78/EC: <i>employment equality framework</i>	Mostly in compliance	2016
Directive 2003/41/EC: <i>institutions for occupational retirement provision</i>	Mostly in compliance	2016

* Some of the provisions of these directives are already included in the draft Labour Code.
Source: Ministry of Social Policy of Ukraine.

Overall, the evidence shows that the biggest problem in Ukraine relates to law enforcement more than the incorporation of required provisions into legislation.

Employment and social policy at a glance

The Association Agreement calls for Ukraine to ratify ILO conventions and approximate EU directives. Ukraine has already ratified all major ILO conventions.

A new draft Labour Code is currently (May 2016) before Parliament and a new law on Employment mostly complies with the EU regulation.

Overall, the implementation of the Association Agreement is likely to help move Ukrainian labour regulation towards best international practice.

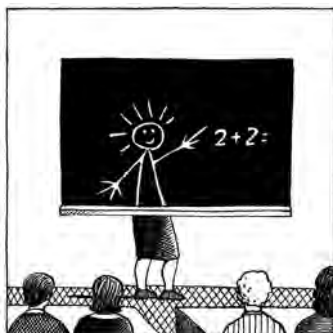
Still, anti-discrimination on the basis of sexual orientation remains the issue as it is still to be incorporated into the draft Labour Code before the second reading.

Attention should be focused not only on legislative work, but also on measures that would ensure law enforcement.

24. EDUCATION, TRAINING AND CULTURE

Education and training

The Association Agreement sets out basic aims for the education system, notably its reform, modernisation and convergence in the field of higher education on the Bologna Process and the enhancement of the quality and relevance of higher education. While the Agreement is largely silent on the instruments for doing this, the Association Agenda document is more substantial.



Several indices on Ukraine's educational standards and human capital endowment show its current rankings to be "very high". The human capital index calculated by the World Economic Forum (WEF) is the most favourable, placing Ukraine at 31 out of 124 countries in 2015, alongside its immediate neighbours Poland, Hungary and Slovakia, and ahead of most of the EU's southern member states (such as Portugal, Spain, Italy and Romania). The UNDP's education index ranks Ukraine 36 out of 188 countries, alongside Austria and slightly behind other East European countries. The UNDP's education index for Ukraine has been improving steadily since 1980, similar to developments observed in its immediate neighbours. Thus, unlike Ukraine's economic performance, its relative performance in education and human capital endowment is comparable to its EU neighbours, such as Poland and Hungary. This suggests a human capital basis for a major recovery in economic performance.

The EU supports the implementation of the new 2014 Ukrainian Law on Higher Education, with a view to further integration into the

European Higher Education Area in line with the Bologna Process. The main objective of the Bologna Process since its inception in 1999 has been to ensure more comparable, compatible and coherent systems of higher education in Europe. Ukraine joined the Bologna Process in May 2005, leading to the adoption of the three-cycle higher education system (bachelor, masters and doctorate). The new law will bring Ukrainian universities into compliance with the Bologna Agreement, recognise foreign degrees and introduce several other reforms (decentralise administration and simplify bureaucracy, give more control to universities, expand student self-governance and promote transparency). The full implementation of the Bologna model, however, remains challenging. Numerous regulations have to be adopted, and avoiding contradictions and erroneous interpretations of these regulations is a major task. Important reforms are also necessary in quality assurance through introducing the National Qualification Framework, in alignment with the European Qualifications Framework, as well as in making use of the European Credit System for Vocational Education and Training. The Association Agenda also promotes the introduction of international assessment criteria and the professionalisation of higher education management.

The EU's largest direct contribution is through the Erasmus+ programme for educational exchanges, training, youth and sport. For the period 2014-20, there is a total budget for the EU itself plus third countries of €14.7 billion. In the field of higher education, Erasmus+ supports the following main actions:

- International credit mobility of individuals, with the Erasmus Mundus Joint Master Degrees promoting the mobility of students and staff from and to partner countries;
- Capacity-building projects in higher education to modernise and internationalise higher education institutions and systems in partner countries, with a special focus on those neighbouring the EU;
- Support to policy dialogue through the network of Higher Education Reform Experts in partner countries neighbouring the EU, an international alumni association and promotion events;
- Jean Monnet activities to stimulate teaching and research in the field of European Union studies worldwide.³¹⁸

³¹⁸ See http://ec.europa.eu/programmes/erasmus-plus/documents/erasmus-plus-programme-guide_en.pdf.

Institutional arrangements to support the implementation of the ERASMUS+ Programme include the National ERASMUS+ office (NEO), which was officially registered in the Ministry of Economic Development and Trade in March 2015. The NEO's responsibility covers all issues dedicated to supporting, promoting, monitoring and disseminating activities related to the Erasmus+ activities in higher education open to cooperation with partner countries.³¹⁹

During the 2014-20 period, more than 4,000 young Ukrainians are expected to benefit from university exchanges, and 7000 Ukrainians will have the opportunity to take part in youth exchanges under the European Voluntary Service programme.

The AA encourages the development of vocational education and training as well as professional life-long learning (in line with Recommendation 2008/C111/01), taking into account the European Quality Assurance Reference framework for Vocational Education and Training.

Culture

The cultural cooperation between Ukraine and the EU is based on the promotion of exchanges and the mobility of arts and artists. Ukraine participates fully in the EU's Creative Europe programme for cultural and creative sectors, signing an agreement to this effect with the Commission in November 2015.³²⁰ Participation in this programme will help Ukrainian cultural and creative organisations to collaborate with partners from all over Europe and access funding for cultural cooperation projects, literary translation schemes, cultural networks and platforms. For the Ukrainian audio-visual sector it will be also opportunity to obtain funding for training, festivals, audience development and market access activities.³²¹

The parties also pledge to cooperate in the framework of UNESCO and the Council of Europe, in order to sustain cultural diversity and preserve and valorise cultural and historical heritage. Concrete projects of cultural cooperation are being implemented with the EU's Eastern neighbours under the Culture Programme II, launched in September 2015. The programme has a budget of €4.95

³¹⁹ See www.erasmusplus.org.ua/en/.

³²⁰ The *Verkhovna Rada* ratified the agreement in February 2016.

³²¹ See http://ec.europa.eu/programmes/creative-europe/news/2015/1119-ukraine-joins-creative-europe_en.htm

million and has two components: i) EU support for capacity building and the inclusion of culture on the political agenda; and ii) Joint EU and Council of Europe support for 6-12 historical towns for the development of urban strategies with the rehabilitation of heritage.³²²

Education, training and culture at a glance

Ukraine's human capital endowment is rated as 'high' in international comparisons, comparable to its immediate European neighbours, but with worrying evidence of relative decline in recent decades.

Basic education reforms are supported in the Association Agreement, notably for Higher Education through the Bologna Process and European Higher Education Area and with concrete programmes such as Erasmus+ benefiting large numbers of Ukrainian students.

Ukraine has now joined the EU's culture programme with a new agreement signed in November 2015.

³²² See http://eeas.europa.eu/delegations/georgia/documents/news/2015/20150918_01_en.pdf

25. SCIENCE, TECHNOLOGY AND SPACE



Science and technology: The Agreement sets out wide-ranging objectives for cooperation in the area of science and technology, aiming to strengthen research capacities, human potential and the sharing of scientific knowledge. It intends to facilitate the involvement of Ukraine in the European Research Area. While the terms of the Agreement are mostly quite general, it has already been followed up by an important operational agreement signed in March 2015 for Ukraine's full participation as 'associated country' in the Horizon 2020 – the EU Framework Programme for Research and Innovation for the period 2014-20, which was ratified by the Ukrainian Parliament in July 2015.

The Horizon 2020 programme is the centrepiece of the EU's scientific research activity, endowed with very substantial funds (€80 billion) for the period 2014-2020. The areas eligible for project funding by Horizon 2020 cover both the natural and social sciences, under three main thematic pillars (see Table 25.1 below):³²³

Ukraine's associate membership of Horizon 2020 allows it to participate as if an EU member state, including participation in the Horizon 2020 Programme Committees. It also allows Ukrainian teams to take the role of leading partner within consortia. Membership comes with an obligation to make financial contributions, but half of this can

³²³ See <https://ec.europa.eu/programmes/horizon2020/h2020-sections> and http://ec.europa.eu/research/horizon2020/pdf/proposals/horizon_2020_impact_assessment_report_executive_summary.pdf#view=fit&pagemode=none.

be covered by using the European Neighbourhood Instrument (ENI) funds earmarked for Ukraine.

Table 25.1 Main thematic priorities of Horizon 2020

Excellent science	Industrial leadership	Societal challenges
European Research Council (ERC) Future and Emerging Technologies Marie Skłodowska-Curie actions career development Research infrastructures (including e-infrastructure)	Leadership in enabling and industrial technologies (LEITs): nanotechnologies, materials, biotechnology, manufacturing, ICT, space Access to risk finance Innovation in SMEs	Health, demographic change Food security, sustainable agriculture, marine research Energy, transport, climate action Europe in a changing world; protecting freedom and security

In the preceding Framework Programme (FP7) Ukraine was one of the top ten most performing third countries, with a total number of 274 successful participations in several priority areas (environment, climate change, transport, aeronautics, nanotechnologies, materials technologies, biotechnologies, food and agriculture and space). Its enhanced status now in Horizon 2020 should open the way for an even stronger performance.

During 2014-15, Ukrainian teams submitted 394 applications, while 42 were successful (10.7%), winning funding of €7.1 million. To support participation in the Horizon 2020 a network of Ukrainian National Contact Points (NCPs) was established, comprising universities and institutions of National Academy of Sciences of Ukraine. As of May 2016, there are 40 NCPs and 12 Regional CPs.³²⁴

The Agreement encourages the EU and Ukraine to organise joint measures and events dedicated to scientific and technological advancement. The EU-Ukraine Association Agenda specifically refers to the need to facilitate partnerships between research and industry, and to work towards the marketability of research products.

³²⁴ See <http://mon.gov.ua/activity/mizhnarodni-zvyazki/uchast-u-programax-es-erazmus-ta-gorizont-2020/gorizont-2020.html>.

Box 25.1 Examples of collaborative EU-Ukraine research projects

ERA-PLANET³²⁵ (European Network for Observing Our Changing Planet) aims to strengthen European leadership within the Global Earth Observation System of Systems (GEOSS). ERA-PLANET will provide advanced decision support tools and technologies to better monitor our global environment in different domains of Earth Observation. The project budget is €11 million for the period 2016-20 for the consortium, which includes about 40 institutions. Ukrainian teams: the Space Research Institute of National Academy of Sciences of Ukraine and the State Space Agency of Ukraine.

AMMODIT³²⁶ (“Approximation Methods for Molecular Modelling and Diagnosis Tools”) project in the area of applied mathematics with emphasis on medical and life science applications. Budget: €823,500. Ukrainian teams: Institute of Mathematics, NAS of Ukraine, Institute of Hydromechanics, NAS of Ukraine, Taras Shevchenko National University of Kyiv, National Technical University of Ukraine, Kyiv Polytechnic Institute.

UKRAINE³²⁷ (“UKRAINE Replication, Awareness and INnovation based on EGNSS”). The UKRAINE project was established in January 2015, following the EU-Ukraine Cooperation Agreement in the field of Global Navigation Satellite Systems (GNSS). Key components of the project will see development of solutions for multimodal transport logistics, with opportunities for commercial relationships between EU and Ukrainian enterprises. Budget: €1,429,252. Ukrainian teams: National Aviation University, National Technical University of Ukraine, Kyiv Polytechnic Institute, State Space Agency of Ukraine.

The BLACK SEA HORIZON³²⁸ (BSH) project aims to support the EU’s external relations with the target region by contributing to ongoing bi-regional and regional science, technology and innovation (STI) policy dialogues. Budget: €1,499,503. Ukrainian team: Institute for Economics and Forecasting of the National Academy of Science of Ukraine.

Space: The EU’s most important tool for space exploration is the European Space Agency (ESA), of which Ukraine is not a member, but with which it has had a cooperation agreement since 2008. In early 2014 this agreement was extended until 2019. The ESA focuses on cooperation in satellite systems; earth observation and global

³²⁵ See www.era-learn.eu/network-information/networks/era-planet.

³²⁶ See http://cordis.europa.eu/project/rcn/194356_en.html.

³²⁷ See www.project-ukraine.eu/.

³²⁸ See <https://blacksea-horizon.eu/project>.

monitoring; space science and applied space technologies. In July 2015, the Ukrainian State Space Agency and ESA started consultations on cooperation between Ukrainian rocket-and-space industry enterprises and European companies within ESA projects. Major possible directions of bilateral cooperation under consideration include Earth Remote Sensing (ERS) and rocket carriers. Concretely, the ESA's new Vega-class rocket carrier, which launches low-earth orbit cargo weighing from 300 to 1500 pounds, uses the RD-843 engine for the upper stage of this rocket, developed by the Yuzhnoye State Design Office and the Yuzhmash enterprise.³²⁹ Currently Ukraine takes further steps towards becoming a full member of the ESA.

Ukraine may benefit from Horizon 2020 projects that support space research based on the principles set out in the Commission's Communication on "EU Space Industrial Policy: Releasing the Potential for Growth in the Space Sector".³³⁰ The EU prioritises, among other things, the European Global Navigation Satellite System (EGNSS), the setting up of a Space Surveillance and Tracking system (SST) and general support for space science and exploration as well as industry's competitiveness.

Science, technology & space at a glance

In accordance with the Association Agreement, in 2015 Ukraine became a full participant in the EU's main research funding instrument Horizon 2020.

Ukraine has considerable traditional strengths in some important scientific domains, including medicine, physics, astronomy, biology, chemistry, material sciences, space and earth sciences.

Participation in Horizon 2020 should enable stronger performance in these areas.

³²⁹ See <http://open4business.com.ua/ukrainian-government-esa-preparing-agreement-formalizing-kyivs-space-integration-plans/>.

³³⁰ COM/2013/0108, final, 28 February 2013.

26. EU AGENCIES AND PROGRAMMES



The EU operates 46 agencies, which are semi-autonomous and specialised bodies funded and controlled by the EU, with the objective of supporting the functioning of EU policies. There are also around 45 programmes, most of which (but not all) are funded and administered by the European Commission. Of these a considerable number are open to participation by Ukraine as partner under the

Association Agreement, notably the 20 agencies and 19 programmes listed in Tables 26.1 and 26.2. The agencies and programmes with which Ukraine already has ongoing cooperation at different levels (projects, seminars, study visits, etc.) appear in bold in these tables.

*Table 26.1 EU agencies open to Ukraine, Moldova and Georgia**

European Fisheries Control Agency (EFCA)	European Aviation Safety Agency (EASA)	European Maritime Safety Agency (EMSA)
European Agency for Safety and Health at Work (EU-OSHA)	European Defence Agency (EDA)	European Food Safety Authority (EFSA)
European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)	European Police College (CEPOL)	European Institute for Gender Equality (EIGE)
European Union Institute for Security Studies (EUISS)	European Union's Judicial Cooperation Unit (EUROJUST)	European Police Office (EUROPOL)

European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)	European Centre for Disease Prevention and Control (ECDC)	European GNSS Agency (GSA)
European Chemicals Agency (ECHA)	European Environment Agency (EEA)	European Network and Information Security Agency (ENISA)
European Foundation for the Improvement of Living and Working Conditions (EUROFOUND)	European Asylum Support Office (EASO)	

* Bold text denotes EU agencies open to Ukraine.

Table 26.2 EU programmes open to Ukraine, Moldova and Georgia

Asylum, Migration and Integration Fund	Copernicus, European Earth Observation Programme	Competitiveness of Enterprises and SMEs (COSME)
Creative Europe, Programme for the cultural and creative sectors	Customs 2020	Erasmus+
European Maritime and Fisheries Fund	European Statistical Programme	European Territorial Cooperation
Fiscalis 2020 (tax administration support)	Galileo and EGNOS Programmes, Global satellite navigation system	Health for Growth
Hercule III Anti-fraud Programme	Horizon 2020	Internal Security Fund
Life Programme, Environment and climate change	Pericles 2020, Programme for the protection of the euro against counterfeiting	SESAR JU, Air Traffic Management modernisation
European Union Civil Protection Mechanism		

* Bold text denotes EU programmes open to Ukraine.

Such participation offers a useful means of in-depth integration of professional experts and administrative organisations with EU counterparts and aids reform processes.

Membership of an agency requires negotiation of a specific international agreement and a decision on the financial contribution of the partner. Cooperation with a programme is carried out on the basis of a protocol or specific Memorandum of Understanding stating the details of participation for each programme. The participation of Ukraine in these EU agencies and programmes is subject to regular dialogue and review.

Membership of the agencies and inclusion in programmes gives full access to the infrastructure and governing bodies, but also involves costs. To ease the financial burdens on Ukraine, the EU can negotiate temporary rebates. Ukraine is also able to pay up to 50% of membership fees from EU aid funds. The process of participating in some programmes, such as for research projects under Horizon 2020, is extremely competitive, but here Ukrainian institutes will normally be joining consortia and counterparts in EU member states in these initiatives.

The agencies of most interest to Ukraine include the following:

European Aviation Safety Agency (EASA). The State Aviation Service of Ukraine (SAS) is one of EASA's Pan-European Partners (PANEP) since 2009. The Working Arrangements cover all aspects of the regulation of civil aviation safety and environmental protection of products, organisations and personnel. Ukraine's participation in EASA was a key precondition for proceeding with the Common Aviation Area Agreement (CAA Agreement) between Ukraine and the European Union.

European Maritime Safety Agency (EMSA). Ukraine is in the process of developing its cooperation between the European Maritime Safety Agency (EMSA) and the state maritime and river transport safety inspection (Ukrmorrichinspektsiya). Two main vectors of such cooperation have been determined: maritime safety and the prevention of marine pollution, with the aim of implementing international conventions and improving the quality and coordination of maritime administrations in the Black Sea and Caspian Sea partner countries.

European Agency for Safety and Health at Work (EU-OSHA). In 2014 Ukraine became one of the partners of EU-OSHA's project for neighbouring countries. In 2014-16 there has been an opportunity to participate in the work of Agency with establishment of a country contact point and platform for sharing information and future cooperation.³³¹

³³¹ See osha.europa.eu/en/blog/enp-summary/.

European Defence Agency (EDA). Cooperation between Ukraine and EDA is foreseen in the EU-Ukraine Association Agreement, and the negotiations for signing the administrative agreement between the Ministry of Defence of Ukraine and the European Defence Agency (EDA) have been launched. This will cover the main principles, activities and mechanisms of the EU-Ukraine cooperation related to improving defence capabilities and strengthening military cooperation,³³² including cooperation between defence firms.

European Police College (CEPOL). There are ongoing negotiations on signing formal agreements on cooperation between European Police College (CEPOL) and the Ministry of Internal Affairs of Ukraine. All EU member states expressed support for Ukraine's accession to CEPOL. It will open training and learning opportunities for law enforcement officers of Ukraine. Training covers topics ranging from law enforcement techniques to economic crime.

European Union's Judicial Cooperation Unit (EUROJUST). In February 2015, the final version of the Agreement on cooperation between Ukraine and the EU Judicial Cooperation Unit (Eurojust) was concluded. The College (Board) of Eurojust approved the Agreement in March 2015. On 28 June 2016, the Agreement was officially signed.³³³

European Police Office (EUROPOL). The agreement on cooperation between Europol and Ukraine was signed back in 2009. The document sets out to coordination efforts of the member states and Ukraine in preventing and combating all forms of international crime, terrorist threats, human trafficking, drugs and illegal migration. An important step was signing of a Memorandum of Understanding with Europol in April 2015, setting up a special secured communication channel called SIENA for the exchange of information.

European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX). Cooperation between the State Border Guard Service of Ukraine and Frontex was initiated in 2007, and has been working under a cooperation plan for 2013-15. Key activities involve the exchange of information, risk analysis, joint operations and personnel training. Training projects are mostly focused on the detection of stolen vehicles and falsified documents, the training of dog handlers, learning English, the

³³² According to the Ministry of Defence of Ukraine.

³³³ See www.eurojust.europa.eu/press/PressReleases/Pages/2016/2016-06-28.aspx

implementation of a common core curriculum for border guards and preparation of a common web platform for border guards training.

European Environment Agency (EEA). Cooperation with Ukraine started in 2009, but the main focus now is to implement the relevant provisions of the Association Agreement, raising cooperation to a new qualitative level, including harmonisation of Ukrainian legislation with EU laws. A key objective is to develop the infrastructure in Ukraine in the framework of the Shared European Environmental Information System (SEIS) and identification priorities in relation to the Strategy of the State Environmental Policy of Ukraine up to 2020.

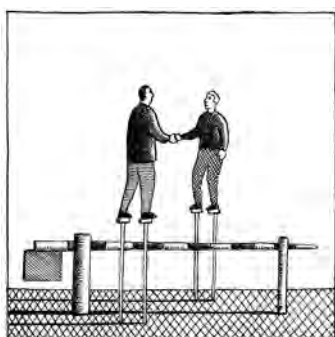
The EU agencies and programmes at a glance

There are extensive possibilities for inclusion in EU agencies and programmes, with the potential to develop institutional capabilities and advance policy reforms.

Ukraine is taking up a considerable number of these possibilities, for example for health and safety standards, policing and justice, research, education and culture.

EU offers financial assistance to contribute to the costs of participation.

27. CROSS-BORDER COOPERATION



Ukraine shares 1,152 km of land borders with EU members Poland, Slovakia, Hungary and Romania, and about 1,000 km of border with EU associate Moldova, which offers extensive opportunities for enhanced cooperation at the cross-border regional level. The AA calls for cross-border cooperation (CBC) in general terms and in specific sectors such as transport, energy, education, tourism and health and the

modernisation of cross-border emergency services.

In most cases Ukrainian border regions have common history, traditions and strong personal and business ties to their EU counterparts. To maintain these ties Ukraine has signed agreements with them that establish special provisions for small/local cross-border traffic based on the EU's Regulation (1931/2006/EC) on local border traffic at the external land borders of EU member states. Hungary was the first country to sign such an agreement in 2007 which, after entering into force in January 2008, gave advantages to Ukrainian citizens residing in settlements and towns to visit the border areas in Hungary identified in the Agreement. Ukraine and Slovakia signed a similar agreement in 2008. The agreement with Poland, signed the same year, was modified in 2014-15, and now allows visits to border areas up to 30 km from the frontier, for up to 90 days. Since May 2015, the agreement between Ukraine and Romania entered in force, easing border crossings for up to 90 days for about 2 million people residing along the Ukrainian-Romanian border.

In the period 2007-13, the EU spent €950 million on 13 cross-border cooperation programmes along its eastern and southern neighbourhood under the European Neighbourhood and Partnership

Instrument (ENPI).³³⁴ For the period 2014-20, the number of programmes was increased to 17, 12 of which are for land borders, one for a sea crossing and four for sea basin programmes.³³⁵ Three of the land border programmes are of particular importance for Ukraine, namely cross-border cooperation between a) Poland, Belarus and Ukraine; b) Hungary, Slovakia, Romania and Ukraine; and c) Romania and Ukraine. Ukraine is also involved in the Black Sea Basin programme.

In December 2016, the European Commission adopted a Joint Operational Programme for Poland-Belarus-Ukraine for the years 2014-20,³³⁶ following a previous programme for 2007-13. The new programme contributes to four thematic objectives of the CBC, namely:

- (i) promotion of local culture and preservation of historical heritage,
- (ii) improvement of accessibility to the regions, development of sustainable and climate-proof transport and communication networks and systems,
- (iii) common challenges in the field of safety and security and
- (iv) promotion of border management and border security, mobility and migration management.

The programme's budget is €201 million, the largest part of which (€183 million) comes from the EU.

Box 27.1 Regional beneficiaries of cross-border cooperation in Ukraine, Poland and Belarus

Ukraine	Poland	Belarus
<i>Core areas:</i> Lvivska, Volynska and Zakarpatska oblasts	<i>Core areas:</i> Krośnieński and Przemyski (in Podkarpackie voivodeship), Białostocki, Łomżyński and Suwalski (in Podlaskie voivodeship), Białski and	<i>Core areas:</i> Grodno and Brest oblasts
<i>Adjoining regions:</i> Rivnenska, Ternopiłska and Ivano-Frankivska oblasts	Chelmskozamowski (in Lubelskie voivodeship) and Ostrołęcko-siedlecki (in Mazowieckie voivodeship) <i>Adjoining regions:</i> Rzeszowski and Tarnobrzeczski (in Podkarpackie voivodeship); Puławski and Lubelski (in Lubelskie voivodeship)	<i>Adjoining regions:</i> Minsk Oblast (including the city of Minsk) and Gomel Oblast

³³⁴ See ec.europa.eu/enlargement/neighbourhood/pdf/20141217-enpi-results-2017-2013.pdf

³³⁵ See eeas.europa.eu/enp/pdf/financing-the-enp/cbc_2014-2020_programming_document_en.pdf.

³³⁶ See www.pl-by-ua.eu/upload/pl/JOP_PL-BY-UA_2014-2020_FINAL_ENG.pdf.

The projects supported by this programme in 2007-13 were mainly in the priority areas of: increasing competitiveness, improving quality of life and people-to-people cooperation. Some projects aimed to improve environmental protection in the infrastructure of Poraż and Zagórz in Poland and Horodok in Ukraine. In another, the experience of Lublin was used in a project to set up a municipal system for processing household electronic and electrical equipment waste in Lviv. The development of IT infrastructure for Ukrainian customs and border guard services is implemented jointly by Podkarpackie Voivodeship Office, Lublin Voivodeship Office (Poland) and the Administration of State Border Guard Service of Ukraine. A Museums without Barriers project brought together a coalition of Polish and Ukrainian museums for adapting them to become accessible to disabled visitors.

Box 27.2 Joint Operational Programme Poland-Belarus-Ukraine, 2007-13

In the framework of Poland-Belarus-Ukraine programme for 2007-13, six umbrella projects were implemented.* Beneficiaries of these projects coordinated 56 different micro projects. Representatives of local governments, the tourism sector, NGOs, cultural and educational institutions and sports organisations were partners of these micro projects. Poland was represented by 60 partners, Ukraine by 45 partners and Belarus by 10 partners. The total project financing was €2.9 million.

One umbrella project is dedicated to a cross-border labour market support centre and aimed to provide professional support to existing and potential cross-border labour market participants in their professional development. This project embraces 5 micro-projects with the following objectives:

- increase the competences of teachers, counsellors, psychologists, educators and secondary school class teachers from PL and UA in job counselling;
- improve the qualifications of young people from rural areas, to improve career planning and personal development support methods and to help them find their way in the labour market;
- increase the chances of young people preparing to enter the labour market and to establish cross-border cooperation between schools in PL and UA;
- foster cross-border cooperation on research into the needs and improvement of educational and labour market opportunities for young people from BY and UA from border areas planning to study or work in PL; and
- increase the employment opportunities of students from Poland and Ukraine.

Nine large-scale projects were related to the development and construction of infrastructure of Ukrainian customs and border guards' services.

* For more information, see www.pl-by-ua.eu/.

The Hungary-Slovakia-Romania-Ukraine 2014-20 programme³³⁷ was also adopted by the European Commission in December 2015. This focuses on the promotion of local culture and the preservation of historical heritage, environmental protection, climate change adaptation and disaster management. The programme budget is €81 million.

A further programme, for Romania-Ukraine 2014-20 was adopted to facilitate economic development and improve quality of life, with joint investments in education, economic development, culture, infrastructure and health.³³⁸ The programme has a budget of €60 million.

All Joint Operational Programmes were developed with the broad involvement of stakeholders from participating countries.

Ukraine is also part of the Black Sea Basin Programme for 2014-20, which aims to support sustainable growth and improve joint environmental protection in the Black Sea region (e.g. through the joint reduction of marine litter).

As part of the Eastern Partnership Territorial Cooperation Programmes (EaPTC),³³⁹ a Moldova-Ukraine Joint Operational Programme was approved in October 2014, with a budget of €3.3 million, aiming to promote cooperation between border regions and social and economic development.

Three Danube sub-basins, partly located in Ukraine (the Tisza, Prut and Siret Basins) pose specific challenges and opportunities in terms of cross-border flood prevention, the environment, energy, the economy, social and security-related issues. In February 2016, the International Commission for the Protection of Danube River (ICDR) adopted two plans for water management priorities for the Danube River Basin until 2021.³⁴⁰ The Danube River Basin Management Plan aims to further protect and enhance the state of waters, to prevent their deterioration and to ensure the sustainable, long-term use of water resources. The Danube Flood Risk Management Plan addresses aspects of flood risk management, focusing on prevention, protection and preparedness. As an official contracting partner of ICDR, Ukraine may participate in the implementation of the projects under these plans.

³³⁷ See www.huskroua-cbc.net/.

³³⁸ See www.ro-ua.ro-ua-md.net/en/.

³³⁹ See www.eaptc.eu/struct_file.php?id_pr=72/.

³⁴⁰ See www.icpdr.org/.

The EU also funds the EU Border Assistance Mission to Moldova and Ukraine (EUBAM) aiming to improve border management (see chapter 2).

During 2007-13, Ukraine participated in two programmes to encourage interregional cooperation between European cities and regions and enhance their competitiveness and attractiveness, namely INTERREG IVC³⁴¹ and the Central Europe Programme.³⁴²

*Box 27.3 Examples of projects in the framework of INTERREG IVC and the Central Europe Programme with Ukrainian participation**

- Sustainable flood management strategies for cross-border river basins
- 'Via Regia plus' - Sustainable Mobility and Regional Cooperation along the Pan-European Transport Corridor III
- Improvement of regions' accessibility through air transport interconnectivity
- Capitalising on cultural heritage for sustainable development and competitiveness of cities and regions

* For more information, see www.interreg4c.eu/projects/project-details/?project=77-sustainable-flood-management-strategies-for-cross-border-river-basins& and [www.central2013.eu/nc/projects-2007-2013/approved-projects/?L=se%251%20or%201%3D%25&tx_fundedprojects_pi1\[display\]=all](http://www.central2013.eu/nc/projects-2007-2013/approved-projects/?L=se%251%20or%201%3D%25&tx_fundedprojects_pi1[display]=all)

The EU also cooperates with Ukraine through its eastern regional dimension, the Eastern Partnership,³⁴³ which has given rise to new platforms for dialogue at the government and expert level (thematic platforms), as well as in the fields of parliamentary and participatory democracy.

³⁴¹ See www.interreg4c.eu/.

³⁴² See www.central2013.eu/.

³⁴³ See http://eeas.europa.eu/eastern/index_en.htm.

Cross-border cooperation at a glance

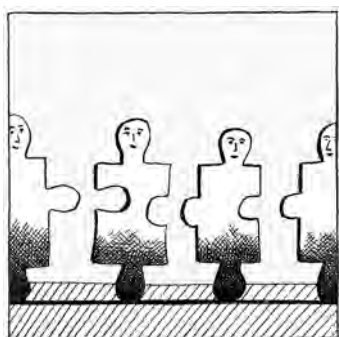
Ukraine's border with Poland, Hungary, Slovakia and Romania in the EU, as well as with Moldova and Belarus, offers extensive opportunities for business, social and cultural cross-border exchanges.

The EU cooperates with Ukraine in the framework of the European Neighbourhood Policy and its eastern regional dimension, the Eastern Partnership.

Joint Operational Programmes are the main tools of cross-border cooperation between EU and Ukraine.

Ukraine also participates in specific programmes to maintain the Danube sub-basin.

28. CIVIL SOCIETY



Civil society in Ukraine has long been at the forefront of change, from the Orange Revolution (2004) to the Maidan uprising (2013-14). Ukrainian civil society has consistently shown a great sense of unity and determination in its quest for democracy. The State Registry Service of Ukraine revealed that there were more than 50,850 civil society organisations registered in July 2013, and 61,090 by the end of 2014. These organisations focus on a wide range of issues such as human rights, culture, minorities, women's rights and sport.

The EU has long supported Ukrainian civil society. The NGOs have functioned both as a watchdog to provide input to the EU on the progress of reform in Ukraine and as a pressure group vis-à-vis the government, thus acting as a driver of change. According to the EU-Ukraine Association Agenda, the EU provided €10 million support to civil society in 2014. The formal framework of cooperation between civil society in Ukraine and the EU consists of three somewhat overlapping platforms that work in parallel. These are on the one hand the *multilateral* Civil Society Forum for all six Eastern Partnership countries together, and on the other hand the *bilateral* Civil Society Platform and the DCFTA Advisory Group both established under the Association Agreement.

Multilateral Civil Society Forum. One of the major avenues for the EU to engage Ukrainian civil society has been the multilateral Civil Society Forum of the Eastern Partnership, established prior to the signature of the Association Agreement in 2009. The Forum brings together the members of civil society from all six countries of the Eastern Partnership with individual country platforms. In 2015, the

Ukraine National Platform consisted of 215 registered organisations and actively participates in all the working groups and sub-groups of the Civil Society Forum.

In November 2013, Platform members expressed their strong disagreement with the decision of former President Viktor Yanukovich not to sign the Association Agreement at the Eastern Partnership Vilnius Summit. His renegeing on the Association Agreement triggered the Maidan. Many of the civil society organisations included in the Platform were active in the process.

Bilateral Civil Society Platform. This platform was created as part of Association Agreement (Arts 443 to 445) and continues the EU's approach of including civil society in the process of reforms in Ukraine. This has also created some overlap with the (above) Ukrainian national platform within the multilateral Civil Society Forum.

The Agreement is both general and specific in its provisions related to the bilateral Civil Society Platform. It offers a long list of general goals, from fostering civil society cooperation as a tool to familiarise the societies of the EU and Ukraine with each other, through to the involvement of the NGOs in the implementation of the Agreement. To this end, the members of the EU-Ukraine Civil Society Platform (CSP) have decided to meet in plenary session twice a year, with meetings of experts in between. Confirming the official status of the Platform, the Agreement pledges regular contacts between it and the intergovernmental Association Committee and Parliamentary Association Committee "in order to obtain [its] views on how to attain the objectives of [the Association] Agreement".³⁴⁴

The CSP was officially launched on 16 April 2015 with an inaugural meeting,³⁴⁵ with a second meeting on 11 February 2016. The members of the CSP discussed the state of the implementation of the Association Agreement, held a debate and adopted reports on the rule of law, with a focus on anticorruption and energy policy. They also discussed the future work of the Platform.³⁴⁶ The joint declaration of the CSP contains calls for immediate ratification by Ukraine of the Rome Statute of the International Criminal Court and urges the Association Committee and the Association Council to give priority in 2016 to the implementation of EU standards and legislation on

³⁴⁴ EU-Ukraine Civil Society Platform. Rules of Procedure.

³⁴⁵ See www.kmu.gov.ua/document/248107495/CSP%20statement%202016%2004_EU_UA_official_EN.pdf.

³⁴⁶ See www.eesc.europa.eu/resources/docs/joint_declaration.pdf.

employment and labour, workplace safety, collective bargaining in the European multinational companies operating in Ukraine and social dialogue.

In the energy sphere, the CSP members invited the EU to assess critically the compliance of the Nord Stream II project with EU law and to prioritise cooperation with Ukraine on the implementation of the Southern Gas Corridor project.

However, the Agreement is considered by many NGOs to be too rigid when it comes to the composition of the Civil Society Platform. The agreement states that the Platform “shall consist of members of the European Economic and Social Committee (EESC) on the one hand, and representatives of civil society on the side of Ukraine, on the other, as a forum to them to meet and exchange views” (Art. 469 (2)). The CSP is made up of 30 members, 15 from each side, representing the EESC and Ukrainian civil society and three sectors - trade unions, employers and other civil society organisations. The civil society organisations of Ukraine claim that the EESC imposes its tripartite structure on the Platform. The civil society organisations working especially on the human rights and democracy issues argue the need to go well beyond the EESC’s conception of social dialogue. Trade unions, on the other hand, welcome recognition of their role as communicators between society and the government. Criticism of the civil society organisations did not produce any substantial change, however.

Advisory Group of the DCFTA. Ukrainian civil society should also participate in monitoring the DCFTA through a so-called Advisory Group. The Commission’s DG Trade has made it general practice to consult civil society organisations over its free trade agreements. The Advisory Group should include NGOs and representatives of employers and workers’ organisations. They are expected to meet once a year at an open Civil Society Forum (not to be confused with the Civil Society Forum of Eastern Partnership mentioned above) to discuss issues related to sustainable development. The mechanism of cooperation and distribution of roles between the Civil Society Platform and the Civil Society Forum (of the Association Agreement) is not specified and creates ambiguity. This was the main reason why neither the Advisory Group nor the Civil Society Forum has been formed yet.

Current status of Ukrainian civil society organisations. Ukrainian civil society experienced rapid growth after the Maidan (or Revolution of Dignity) of 2013-14. An example of a civil initiative arising during the Maidan was the Reanimation Package of Reforms

(RPR),³⁴⁷ which unites different NGOs with the aim of monitoring and stimulating reforms in the country. It serves as a coordination centre between the civil society and the government drafting laws and lobbying reforms in the Parliament. In early 2016 there were 48 NGOs registered as RPR members, who work in 26 expert groups in specific areas. However, the most active are expert groups where the NGOs already had expertise in areas such as anti-corruption, judicial and media reform. In other sectors, like health care reform, culture or education, the NGO network is either absent or underdeveloped and currently seeks to organise teams of experts.

In November 2015, a survey of the participants of the Civil Society Development Forum in Kyiv assessed the efficiency of NGO influence on solving the problems in the country as being mostly effective (43.7%).³⁴⁸ The Top-3 tasks of the NGOs in Ukraine were named control over the government, civic education, support and stimulation of reforms.³⁴⁹

To influence European policy-makers, in March 2014 Ukrainian think tanks organised the Ukrainian Think Tanks Liaison Office in Brussels.³⁵⁰ The Office helps think tanks to organise conferences and expert discussions on topical Ukrainian issues in Brussels and in EU member states, to present and promote its members' research and establish communication channels between members and EU institutions. Currently there are 21 members of the Liaison Office.

Think tanks are important for promoting reforms in Ukraine. They are more flexible than the state research centres and more trusted by society, and they generate new ideas. However, their development is hampered by the unwillingness of the state institutions to cooperate with think tanks.³⁵¹ The 2015 "Global Go to Think Tanks Index Report"³⁵² listed 47 think tanks in Ukraine.

³⁴⁷ See <http://rpr.org.ua/en/>.

³⁴⁸ See <http://cd-platform.org/forum/cdforum2015/1647-opytuvannia-uchasnykiv-forumu-rezultaty>.

³⁴⁹ See <http://ednannia.ua/177-vektor/11791-trendy-rozvytku-hromadianskoho-suspilstva-na-2016-rik>.

³⁵⁰ See <http://ukraine-office.eu/>.

³⁵¹ See <http://iac.org.ua/analitichna-revoljutsiya-chi-analitichna-evolyutsiya-kontekst-progresivnogo-rozvitku-ukrayini/>.

³⁵² See http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=think_tanks.

Civil society at a glance

Civil society in Ukraine has been active in advocating for democracy and human rights since the country's independence.

Ukrainian NGOs seek to influence the Ukrainian reform agenda through drafting laws and lobbying reforms in the Parliament.

The EU has supported Ukrainian civil society organisations, considering them both a driver for democratic change in Ukraine and a watchdog of government activities.

The EU's structured cooperation with the Ukrainian civil society has several somewhat overlapping and conflicting platforms, causing some frustration among Ukrainian NGOs.

PART IV.
LEGAL AND INSTITUTIONAL
PROVISIONS

29. DISPUTE SETTLEMENT



The Agreement has two different dispute settlement mechanisms (DSM); one that covers disputes related to the agreement in general but excluding the DCFTA; and another more detailed one that covers the DCFTA itself.

The general dispute settlement mechanism

This mechanism is defined in quite simple terms in Arts 476 to 478 of the Agreement. It concerns disputes over the interpretation, application or implementation of the non-DCFTA parts of the Agreement. It is based on a traditional ‘diplomatic’ approach, under which the Association Council has the key role.

A party can initiate this DSM by sending a formal request to the other party and the Association Council. The parties shall then try to resolve the dispute by entering into good- faith consultation within the Association Council or other relevant bodies (i.e. the Association Committee, or a specific sub-committee). The Association Council can eventually settle the dispute, after a consultation period, by way of a binding decision. Because the Association Council takes decisions “by agreement”,³⁵³ both the EU and Ukraine would need to approve the decision to resolve the dispute.

As long as the dispute is not resolved, it shall be discussed at every meeting of the Association Council. If an agreement cannot be reached in the Association Council after three months, the complaining party is allowed to take “appropriate measures” such as the suspension of parts of the agreement, but not of the DCFTA part (except in the

³⁵³ Art. 465(3) EU-Ukraine Association Agreement.

special case of violations of the ‘essential elements’ of the Agreement – see further below). In the selection of appropriate measures, priority shall be given to those which least disturb the functioning of the Agreement.³⁵⁴

The ‘essential elements’ clause. As in other Association Agreements concluded by the EU, the EU-Ukraine Agreement includes a suspension clause (in Art. 478(3)) relating to ‘essential elements’ of the Agreement (defined in Art. 2). This refers to “Respect for democratic principles, human rights and fundamental freedoms”, as defined in several international agreements and conventions, and “respect for the principle of the rule of law, the principles of sovereignty and territorial integrity, inviolability of borders and independence and countering the proliferation of weapons of mass destruction...”

In the event of violation of these fundamental principles the complaining party can immediately suspend the agreement, including rights and obligations under the DCFTA.³⁵⁵

In practice the EU very rarely uses these suspension clauses. If an EU reaction is required to address a specific human rights situation in the territory of the partner country, it prefers to act through diplomatic means (e.g. in the Association Council or annual summit meetings), or by using limited restrictive measures such as arms embargoes, asset freezes or visa bans. Total suspension or termination of an Agreement is viewed as the ‘nuclear’ option – best not used.

Recent EU-Ukraine relations actually clearly saw violations of many of the ‘essential elements’ by the administration of former President Yanukovich. The predecessor of the Association Agreement, namely the Partnership and Cooperation Agreement (PCA), already included an ‘essential elements’ and suspension clause. In 2013, the Yanukovich administration was heavily criticised for ‘selective justice’ over the imprisonment of former Prime Minister Yulia Tymoshenko. Instead of suspending the PCA, however, which would have had little impact, the Union threatened to postpone the signature of the Association Agreement unless the Tymoshenko and other cases of ‘selective justice’ were corrected. In a second phase, the Yanukovich administration’s use of force against the Maidan demonstrators in 2013-

³⁵⁴ The requirement of a 3-month consultation period and the condition that the measures may not include the suspension of any DCFTA rights or obligations do not apply in the case of violation of the essential elements, referred to in Art. 2 of the AA (and further explained below).

³⁵⁵ Art. 478(3) EU-Ukraine Association Agreement.

14 escalated with Russia's violation of Ukraine's sovereignty and territorial integrity. In this fast-moving situation, the EU adopted sanctions against Russia and Ukrainian persons involved and also suspended negotiations with Russia on a 'New Agreement'. Overall, these episodes illustrate the kind of circumstances under which the 'essential elements' suspension provisions might be activated, even if the very specific conditions of these recent developments made its use inappropriate.

The DCFTA dispute settlement mechanism

Arbitration. For disputes concerning the interpretation and application of DCFTA provisions, a separate and more sophisticated DSM is laid down in a long and detailed chapter (Arts 303-323) of the DCFTA. The mechanism is largely inspired by the WTO Dispute Settlement Understanding (DSU). If there is a dispute regarding the interpretation and application of DCFTA provisions, the parties shall first seek to come to an agreement through consultations.

If these consultations fail, the complaining party may request the establishment of an arbitration panel to rule on the dispute. The panel shall be composed of three arbitrators chosen by the parties. The arbitrators must be independent, serve in their individual capacity, not take instructions from any government and comply with a Code of Conduct annexed to the Agreement. One party cannot block the establishment of an arbitration panel, because if the parties cannot agree on the composition of the panel, the panellists will be drawn by lot from a permanent list of arbitrators.³⁵⁶

Rulings of the arbitration panel shall be binding and each party must take the necessary measures to comply with them. If the party to whom the complaint was addressed fails to comply without offering at least temporary compensation, the other party is entitled to suspend obligations arising from the DCFTA at a level equivalent to the violation (e.g. by imposing again the MFN tariff on specific products). Again, in practice the EU very rarely relies on the DSM in its FTAs to resolve a trade dispute. It prefers to use diplomatic means (e.g. by discussing this in bilateral meetings such as the Association Council or

³⁵⁶ The Trade Committee has to establish a list of 15 experts who are willing and able to serve as arbitrators. Each of the parties has to propose five individuals and the two parties shall also select five individuals that are not nationals of either party and who shall act as a chairperson to the arbitration panel.

in unilateral statements) or, in some cases, the WTO DSU. For example, in April 2016 the EU Delegation in Kyiv issued a statement criticising Ukraine's proposal to increase its export duties on metal scrap, as it considers that this would be in breach of Ukraine's DCFTA commitments (see chapter 4). The use of the DSM was not triggered.³⁵⁷

This DCFTA DSM is without prejudice to possible dispute settlement under the WTO. However, the parties are not allowed to pursue dispute settlement under both systems at the same time.

The DCFTA DSM includes several specific features. First, several elements of the DCFTA are excluded from this DCFTA DSM, such as parts of the chapter on Trade Remedies,³⁵⁸ and chapters on Trade and Sustainable Development³⁵⁹ and Antitrust and Mergers.³⁶⁰ Secondly, as regards energy disputes, the DCFTA DSM foresees quicker procedures if one party considers that dispute settlement is urgent because of an interruption of the transport of gas, oil or electricity, or a threat of interruption. This procedure, obviously tailored to the challenges of the EU-Ukraine-Russia triangular energy relationship, should allow the parties to react in a swift manner to any future energy disputes. Third, there is a procedure that obliges the arbitration panel to ask the Court of Justice of the European Union (CJEU) for a binding preliminary ruling when there is a dispute concerning the interpretation and application of EU law (i.e. EU legislation annexed to the Agreement).³⁶¹ This procedure aims to ensure a uniform interpretation and application of the Agreement's annexed EU legislation without jeopardising the exclusive jurisdiction of the CJEU to interpret EU law.

Mediation. A separate, lighter mechanism is included (in Arts 327 to 333) for 'mediation' rather than 'arbitration', which the parties can use to tackle market access problems, including non-tariff measures. This mechanism functions through the appointment of a single mediator who can advise and propose a non-binding solution within 60 days. The aim of the mediation is not to review the legality of a measure, but to find a quick and effective solution to market access problems without recourse to litigation. If the solution is agreed by the two parties it will be adopted as a decision of the Trade Committee.

³⁵⁷ EU Delegation to Ukraine, "EU Delegation in Kyiv criticises Ukraine proposal to raise export duties on metal scrap", 29 April 2016.

³⁵⁸ Art. 52 EU-Ukraine Association Agreement.

³⁵⁹ Art. 300(7) EU-Ukraine Association Agreement.

³⁶⁰ Art. 261 EU-Ukraine Association Agreement.

³⁶¹ Art. 322 EU-Ukraine Association Agreement.

This mediation mechanism does not exclude the possibility, if a solution is not agreed, to have recourse to the dispute settlement mechanism with arbitration.

Transparency. In addition, the DCFTA includes detailed rules on transparency (in Arts 281 to 288). Ukraine has to establish “an effective and predictable regulatory environment for economic operators doing business in its territory, due account being taken of the requirements of legal certainty”. For example, laws, regulations, judicial decisions and administrative rulings that have an impact on the AA (i.e. measures of general application) must be properly and timely published and communicated. A contact point has to be established that responds to enquiries from interested persons regarding such measures of general application (proposed or in force). This chapter also includes rules on administrative and ‘review and appeal’ procedures. According to the latter, each party shall establish or maintain impartial and independent courts, or other independent tribunals or procedures, for the purpose of the prompt review and, where warranted, correction of administrative actions in areas covered by the DCFTA.

Dispute settlement at a glance

There are two basic dispute settlement mechanisms: a ‘general’ one applicable to all parts of the Agreement except the DCFTA and a second one applicable to the DCFTA itself.

The ‘general’ mechanism relies on the two parties finding a mutually agreed solution in the Association Council, failing which the aggrieved party may take ‘appropriate measures’.

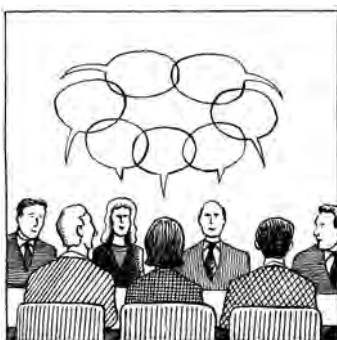
For DCFTA-related disputes there is a more elaborate system that provides two alternative tracks: either binding arbitration, or softer mediation for consensual solutions.

There is also provision for the special case of violation of the ‘essential elements’ of the Agreement (i.e. basic political principles), which can lead to suspension of the entire Agreement.

In practice these procedures are rarely used as the EU prefers the ‘diplomatic approach’.

The DCFTA rules on transparency oblige Ukraine to establish and maintain a transparent and predictable legal environment to do business.

30. INSTITUTIONAL PROVISIONS



The institutional arrangements for reviewing and controlling the implementation of the Agreement are well developed. Only the final step in the ratification of the Agreement has still to be completed, although almost all of the elements of the Agreement are provisionally in force.

Ratification and provisional application. Several procedural steps had – or still have – to be taken before

the Agreement enters fully into force, but the Agreement’s ‘political’ chapters were signed on 21 March 2014, and the remaining chapters, including the one on the DCFTA, on 27 June 2014. The European Parliament had to give its consent, which it did on 16 September 2014, simultaneously with the *Verkhovna Rada*’s ratification. Moreover, because the Agreement is a ‘mixed agreement’ (i.e. it includes provisions falling under the competences of EU member states), all EU member states also have to ratify it according to their national laws and procedures.

In order to avoid ratification delays, the EU and Ukraine agreed to apply large parts of the agreement ‘provisionally’, namely most provisions that fall within the Union’s competences. The scope of this provisional application is exceptionally broad and covers almost the entire DCFTA and many chapters on general principles, political dialogue, the rule of law and numerous items of sectoral cooperation. The provisional application started on 1 November 2014, with the exception of the DCFTA part, which only started on 1 January 2016. The delay for the DCFTA was the result of a trilateral meeting between the EU, Ukraine and Russia on 12 September 2014, when it was decided – under Russian pressure – to delay its provisional application. However,

the EU's autonomous trade preferences (i.e. the unilateral implementation of the DCFTA tariff section) were applied in the intervening period, so, overall, little was lost in these delays.

For the provisional application, any reference to "the date of entry into force of the agreement" in the text of the Agreement, including the Annexes on legislative approximation, are replaced by 1 November 2014 for its non-DCFTA part, and by 1 January 2016 for its DCFTA part. Therefore, the respective transitional periods foreseen on the agreement, for example for legislative approximation, started already on these dates.

All member states have since ratified the Association Agreement, with the notable exception of the Netherlands. In an advisory referendum held in the Netherlands on 6 April 2016, over 61% of voters rejected the ratification of the Association Agreement. The Dutch government now has to decide how it will act on the outcome of the referendum, which had a low turnout of 32% because as long as it does not ratify the Association Agreement, it cannot fully enter into force.³⁶² In the meantime, however, the provisional application of the agreement will continue to apply with no time limit.

Institutional framework. The Agreement establishes a comprehensive institutional framework, which will play a crucial role in the monitoring and implementation process. The annual EU-Ukraine summits are given a clear legal basis, which was not the case in the previous Partnership and Cooperation Agreement. The highest level of political dialogue is in evidence at these summits; they provide overall guidance for the implementation of the Agreement and an opportunity to discuss any bilateral or international issues of mutual interest.

Below the summit level the key institution is the Association Council, composed of members of the EU Council and Commission on the one hand and members of the government of Ukraine, on the other. The Association Council meets at least once a year at ministerial level and is the core institution to monitor the application and implementation of the Agreement. Furthermore, it examines any other

³⁶² For a commentary on this Dutch referendum, see G. Van der Loo, "The Dutch Referendum on the EU-Ukraine Association Agreement: Legal options for navigating a tricky and awkward situation", CEPS Commentary, 8 April 2016 (www.ceps.eu/publications/dutch-referendum-eu-ukraine-association-agreement-legal-options-navigating-tricky-and).

major issues in the relationship between the two parties. The last meeting was held in December 2015.³⁶³

The Association Council can take ‘binding’ decisions where provided for by the Agreement. This means that the EU (and its member states) and Ukraine are obliged to implement these decisions. It can also adopt non-binding recommendations, such as the ‘Association Agenda’ document, which goes through the implementation process in detail.³⁶⁴ Both decisions and recommendations are taken by consensus between the parties. The scope of decision-making powers is rather strict as this joint institution can only take decisions where its competence is provided for in the Agreement.

The Association Council is assisted by an Association Committee, composed of representatives of the parties at senior official level, which in turn is assisted by specific sub-committees. At its first meeting on 15 December 2014, the Association Council adopted rules of procedure for itself, the Association Committee and sub-committees.³⁶⁵ It also established sub-committees on Freedom, Security and Justice and on Economic and Sector Cooperation.³⁶⁶ The Agreement already established a Trade Committee to address all issues related to the DCFTA,³⁶⁷ complemented by several sub-committees (e.g. SPS, Customs and Trade and Sustainable Development).³⁶⁸

³⁶³ The latest Association Council took place on 7 December 2015 in Brussels. The Association Council “took stock of developments in EU-Ukraine relations since the first Association Council held in December 2014 and welcomed the significant progress realised since”.

³⁶⁴ EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement as endorsed by the EU-Ukraine Association Council on 16 March 2015 (http://eeas.europa.eu/ukraine/docs/st06978_15_en.pdf).

³⁶⁵ Decision 1/2014 of the Association Council adopting its Rules of Procedure and those of the Association Committee and of Sub-Committees.

³⁶⁶ Decision 2/2014 of the Association Council adopting on the establishment of two sub-committees.

³⁶⁷ Art. 465(4) EU-Ukraine Association Agreement.

³⁶⁸ See, respectively, Arts 74, 83 and 300 of the EU-Ukraine Association Agreement.

Finally, the Agreement established a Parliamentary Association Committee, consisting of Members of the European Parliament, the *Verkhovna Rada* and a Civil Society Platform (see chapter 28).

Dynamic approximation. These joint institutions also play a crucial role in the process of Ukraine's (dynamic) approximation to EU legislation (i.e. the continuous updating of the list of EU directives or regulations in the many annexes to the Agreement, in light of the relevant legislative developments in the EU itself). As indicated in earlier chapters, numerous EU acts listed in the annexes of the Agreement have already been replaced or amended in the EU. Therefore, the agreement includes a general provision attributing to the Association Council the competence to update or amend the annexes "taking into account the evolution of EU law".³⁶⁹ However, this provision does not give the Association Council a 'carte blanche' to modify other annexes not related to legislative approximation. Moreover, as the Association Council decides by consensus, both the EU and Ukraine need to agree on the updating of the annexes. Several chapters of the DCFTA include specific provisions to update the annexed EU legislation (e.g. SPS, Services and Public Procurement).³⁷⁰ In December 2014 the Association Council delegated to the Trade Committee the competence to amend or update the DCFTA annexes related to export duties, safeguard measures on passenger cars, TBT, Customs and Trade Facilitation, Services and Public Procurement.³⁷¹

While the Association Council has broad powers to amend the annexes, it cannot change the main body of the Agreement since, being a Treaty, this would require opening up once again the complex procedures of ratification according to the internal procedures of the EU and Ukraine.

³⁶⁹ Art. 463(2)/(3) EU-Ukraine Association Agreement.

³⁷⁰ See, respectively, Art. 74(2), Annex XVII and Art. 153(2) EU-Ukraine Association Agreement.

³⁷¹ Decision 3/2014 of the Association Council on the delegation of certain powers by the Association Council to the Association Committee in Trade configuration.

Institutional and final provisions at a glance

The Association Agreement is largely provisionally applied, partly since 1 November 2014 and, for the DCFTA, since 1 January 2016. All member states have ratified it, with the notable exception of the Netherlands.

A comprehensive joint institutional framework will monitor the implementation of the agreement and provides a platform for political dialogue.

The Association Council has a broad competence to amend the annexes of the Agreement, but not the main body of the Agreement.

The signing of the Association Agreement and DCFTA between Ukraine and the European Union in 2014 was an act of strategic, geopolitical significance in the history of Ukraine. Emblematic of a struggle to replace the Yanukovich regime at home and to resist attempts by Russia to deny Ukraine its 'European choice', the Association Agreement is a defiant statement of the country's determination to become a democratic, independent state.

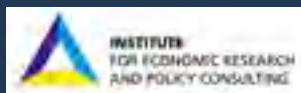
The purpose of this Handbook is to make the legal content of the Association Agreement clearly comprehensible. It covers all the significant political and economic chapters of the Agreement, and in each case explains the meaning of the commitments made by Ukraine and the challenges posed by their implementation.

A unique reference source for this historic act, this Handbook is intended for professional readers, namely officials, parliamentarians, diplomats, business leaders, lawyers, consultants, think tanks, civil society organisations, university teachers, trainers, students and journalists.

The work has been carried out by two teams of researchers from leading independent think tanks, CEPS in Brussels and the Institute for Economic Research and Policy Consulting (IER) in Kyiv, with the support of the Swedish International Development Agency (Sida). It is one of a trilogy of Handbooks, with the other two volumes examining similar Association Agreements made by the EU with Georgia and Moldova.

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