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# EU – UKRAINE MAKING ASSOCIATION WORK

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## Policy Paper

# E U – U K R A I N E MAKING ASSOCIATION WORK

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# Executive Summary

- The Association Agreement (AA) is a game changer in Ukraine's integration with the EU. The AA provides a comprehensive rulebook to guide Ukraine's efforts in implementing much of the acquis.
- As such, the AA is unprecedented insofar as it provides a template for both integration and modernisation but without offering a membership perspective.
- The five-year period since the start of AA implementation has starkly exposed the challenges of implementation, while Ukraine simultaneously pursues root-and-branch reform of the state.
- This is because the country lacks the strong institutions to implement the complex, wide-ranging and sophisticated corpus of EU rules. Simply put, AA commitments exceed the Ukraine's capacity to implement them (this is also in evidence in Moldova and Georgia).
- In addition, the lack of alignment between AA implementation and the broader reform context which Ukraine has undertaken has produced significantly sub-optimal outcomes across a number of sectors.
- The conclusion is that, as implementation continues, unless these deficiencies are addressed, it is unlikely to generate improved let alone optimal outcomes.
- It is proposed that an amelioration of the implementation process can be achieved by closely linking the AA to Ukraine's reform agenda to modernise the country.

# TABLE OF CONTENTS

5	<b>Introduction</b>
6	<b>State-of-play</b>
6	Legal Approximation
7	Institutional capacity
7	Two-track Approach to Reforms
9	<b>A Strategic Approach to the AA – Mainstreaming and Prioritisation</b>
9	Policy planning, Impact assessment (cost analysis)
11	<b>The Coordination mechanism</b>
11	Coordination at the political level
12	Coordination at the administrative level
13	Planning
14	<b>EU Support</b>
15	<b>Functioning of the Association Bodies</b>
16	<b>Conclusions</b>
17	<b>Bibliography</b>

## Introduction



The AAs have a dual purpose: to enable political association and economic integration with the EU and promote the modernisation of Ukraine. The key instrument to achieve these goals is the ‘export of law’ from the EU to Ukraine. By signing the AAs, Ukraine has made a far-reaching commitment to amend its laws to align with those of the EU. Thus, the EU’s transformative engagement is centred on the export of the *acquis communautaire*. This process of ‘export of law’ is usually referred to as legal approximation.

The AA is often regarded as a ready-made legal template for reforms and the pathway to modernisation. Indeed, the *acquis* itself is seen as a blueprint for both domestic reforms and integration with the EU. Yet this view is misleading. Certainly, the *acquis* is one of the most advanced, efficient and reputable regulatory frameworks in the world. However, for Ukraine, lacking as it does a strong state and economy, the implementation of AA presents significant challenges even at the fundamental level of what, why, when and how to implement.

The issue is compounded by the diverse nature of the AA: while the main body of the agreement contains mainly general, soft-law clauses, the trade, economic and sectoral sections are accompanied by detailed and extensive annexes. Collectively, the AA is a hugely complex document, which exceeds the capacity and capability of Ukraine to implement it.

This paper will elucidate on the challenges the AA presents Ukraine, and will offer some recommendations as to how these challenges may be overcome. It will be seen that at the heart of the solution lies better planning and coordination both across government and between the AA implementation process and the reform process Ukraine has undertaken. It is worth adding that this is more of a planning and coordination issue than a resource issue.

## Legal Approximation

The EU is the most legalised organisation in the world and operates according to a highly specialised and sophisticated body of rules - the *acquis communautaire*. Any country aiming to integrate with the EU has to adopt the *acquis* through the process of legal approximation i.e. importing significant elements of EU law. Precisely, because the AA incorporates so much of the *acquis*, it is itself one of the most complex and ambitious bilateral agreements in the world.

The AA has a number of innovative features<sup>1</sup>, one of which is the highly varied nature and scope of legal approximation (rather than full adoption of the *acquis*); in essence, Ukraine is required to align that legislation which is necessary to successfully implement the DCFTA<sup>2</sup> as well as the 'Economic and Sector Cooperation' part of the agreement (which covers a wide range of sectors, such as transport, science, and the environment). However, the degree of alignment is varied across sectors.<sup>3</sup>

For Ukraine legal approximation is highly problematic due to the complex and diverse content of the AA, the explicit deadlines for implementation<sup>4</sup>, and because the benchmarks for legal commitments differ between different sections ('titles') of the agreement, problems which are exacerbated by the ongoing evolution of the *acquis* and, as a result, updates to some of the AA annexes.<sup>5</sup> There are also challenges at a more prosaic level, namely the need for the AA to be translated, understood and interpreted by the Ukrainian authorities in terms of its implications

and impact on law and regulation. This is not something which can be reasonably expected to be resolved by EU experts alone, without greater support from the EU side (see below). Furthermore, as the legal approximation has progressed, the limits of Ukraine's capacity and capabilities have been laid bare.

The wide-ranging nature of the AAs have resulted almost inevitably for such a huge document – in a vast number of actions in Ukraine's Action Plan for the AA Implementation. Not only has this stretched already scarce human and budgetary resources over a very wide range of issues, but in pursuit of progress has resulted in a proliferation of action plans and reports rather than tangible action. In other words, in many areas apparent progress has been achieved rather than actual progress. Furthermore, this approach, in conjunction with a lack of legal expertise has led to the somewhat mechanical transposition of directives without a thorough analysis of the rationale for drafting of the requisite laws. In other words, the drafting and passing of laws is not underpinned by an overarching vision of the actual purpose of the legal approximation and how it aligns with the Ukrainian context. This is especially the case where vested interests are involved, which further add impediments to the effective implementation of specific sectorial directives/regulations. The net result is that, however well-intended, the legal approximation undertaken by Ukraine, may not yield expected results: laws transposing the *acquis* which are not embedded within the domestic legal framework and not enacted by effective institutions, tend not to be effective.<sup>6</sup> In other words, where these laws

1) Those innovative features are examined more systematically in Petrov, R. and Van Elsuwege, P. (2018) *Post-Soviet Constitutions and Challenges of Regional Integration*, London New York: Routledge.

2) The DCFTA has chapters on: 1/ Technical Barriers to Trade (TBT), 2/ Sanitary and Phyto-Sanitary Measures (SPS), 3/ Establishment and Services, 4/ Public Procurement, and 5/ Competition Customs and Trade Facilitation.

3) The AAs refer to 'alignment with', 'achieving conformity with', 'incorporating into the legislation of' and other legal terms to convey the nature of Ukraine's obligation. For a more extensive analysis see Van der Loo, G. (2014). 'The EU-Ukraine Deep and Comprehensive Free Trade Area: a coherent mechanism for legislative approximation?', in Van Elsuwege, P. and Petrov, P. (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union*. London and New York: Routledge.

4) In public procurement, for example, implementation is usefully prioritised by distinguishing five progressive phases of legislative approximation and implementation. Annex XXI of the EU-Ukraine AA.

5) Ukraine has committed themselves to approximate their law to the *acquis* in force at the time of signing the AAs (the pre-signature *acquis*). But the AA also refers to further legal development of the *acquis* – new and amended future legislation (the post-signature *acquis*). This question is addressed in different ways across different chapters: some chapters add their own enhanced procedure with specific duties to notify new legislation, but, in other chapters, such post-signature approximation commitment is only vaguely formulated. See Wolczuk, K. (2017) 'Demystifying the Association Agreements. Review of the Trilogy of Handbooks: on the EU's Association Agreements and Deep and Comprehensive Free Trade Areas (DCFTAs) with Georgia, Moldova and Ukraine', 3DCFTAs project paper, Centre for European Policy Studies, Brussels.

6) This challenge is only too evident in Moldova, which has engaged in legal approximation for a decade but with relatively little impact on how the country functions.

are not backed up by necessary implementation measures and resources, they are likely to fail to fulfil expectations.<sup>7</sup> Therefore, a more purposeful, strategic approach to AA implementation is needed. Simply put, legal approximation needs to be part of a coherent strategy to address reform priorities in Ukraine and not an end in itself.

### Institutional capacity

Countries that take on a highly elaborate and sophisticated corpus of laws need to be well-functioning states with the necessary capacity and capability to absorb and implement the requirements. The *acquis* is not designed to create this capacity; indeed, there is no *acquis* on how to organise public administration structures.<sup>8</sup> On the contrary, its adoption is based on its presumed existence. In the absence of this capacity, the challenge of implementing the AA, as a transformation and integration mechanism, verges on insurmountable. For example, legal approximation requires profound institutional capacity as it is part of a complex process – passing a law is merely the start of the implementation chain: it needs to be backed by the necessary administrative capacity to implement it (and if the capacity is lacking it needs to be developed), political oversight in order to steer the process and the close monitoring of progress along with the necessary financial resources.<sup>9</sup>

Crucially, the EU was quick to spot the gap between Ukraine's commitment to implement the AA and its capacity to do so, and responded accordingly, with innovative and tailored support for fundamental reforms. Specifically, it has contributed to the rebuilding of the state with strong support for Public Administration Reforms<sup>10</sup> and to capacity building within individual ministries.<sup>11</sup> In Ukraine, the EU's engagement has been conditional yet flexible. The EU provides financial support with and for change, yet is prepared to revise target indicators where it was deemed they did not or would not

achieve the necessary outcomes. These reforms are of fundamental importance if Ukraine to develop the capacity to implement the complex body of EU rules. This is why they are called 'fundamental reforms'.<sup>12</sup>

### Two-track Approach to Reforms

Therefore, **Ukraine has been undertaking two tasks: implementing the AA while creating greater state capacity** – which ultimately supports the implementation of the AA. This two-track reform process, conducted under the banner of European integration, and with support from the EU, is pivotal for Ukraine's European integration.

Yet, at present, the two tracks remain poorly aligned in many sectors. Only in few sectors a degree of alignment has been achieved: energy (both gas and electricity), environment, customs, public procurement and SPS). In the main however, planning for AA implementation is divorced from sectoral reform plans and progress.

As far as processes are concerned, AA implementation is based on the **Action Plan for the Implementation of Association Agreement (Action Plan)** that includes a list of around 2000 measures that ministries undertake to implement the AA. However, the plan is more focused on the process rather than on delivering practical results. Under the previous governments (2014-19), the AA implementation plan was not harmonised with strategic governmental plans such as the Mid-term Plan of Reform Priorities for 2017-2020 nor with any sectoral/ministerial reform plans.<sup>13</sup> The Action Plan stipulates that line ministries prepare periodic monitoring reports yet does require them to focus their efforts on actions related to AA implementation. The monitoring reports are therefore a bureaucratic burden rather than a meaningful exercise which supports reform. As a result, the AA Action Plan exists in a kind of political, administrative and financial vacuum untethered from action.

7) Channell, W. (2006) Lessons Not Learned About Legal Reform, in Carothers T, Promoting the Rule of Law Abroad: In Search of Knowledge, 140.

8) In services, for example, Ukraine committed itself to ensuring effective 'administrative capacity to enforce' this legislation and 'provide a satisfactory track record of sector-specific surveillance and investigation, prosecutions, and administrative and judicial treatment of violations' (according to Appendix XVII-6 of the EU-Ukraine AA).

9) For example, improving environmental standards in the industry require major investments. A majority of industrial plants would not implement them without strong financial support from the state.

10) See Wolczuk, K. (2019). "State building and European integration in Ukraine." Eurasian Geography and Economics, 60(6).

11) The EU supported wide-ranging reforms across a number of sectors, including: public administration reform, economic and fiscal reform, energy, decentralization, health, research and innovations, agriculture and SPS matters, justice and home affairs, education.

12) Mathernova, K. "Ukraine and the European Union" in. Reforms in Ukraine after Revolution of Dignity: what was done, why not more and what to do next. Edited by Miklos, I. and Kukhta, P. 144-165, Kyiv: Strategic Advisory Group for Support of Ukrainian Reforms. (2019).

13) This Mid-term Plan was adopted by the government in parallel with the AA implementation plan in 2017 and outlined the overarching reform priorities for the three-year periods. It provided benchmarks for their achievement and contains specific targets and indicators across many sectors, often referring to 'European standards'.

The quality and value added of the annual AA implementation reports based on the current AA Action Plan is therefore of questionable value. The Action Plan has emerged as ‘PR exercise’ overloaded with descriptions of activities rather than a policy planning tool. In sum, AA planning has become a paper-based exercise for already over-burdened state officials, but which produces few tangible benefits.

As it is the government’s overall reform strategy as well sectoral reform strategies which ultimately shape the pace of implementation, it is self-evident that AA implementation needs to be connected to the reform process and sectoral reform agendas. As has been noted by experts:

*Acquis transposition during a time of crisis is clearly secondary to major work in **strengthening the state, especially institutions and the rule of law**. However, if addressed properly (that is, from a policy planning perspective rather than one of mechanical implementation), transposition issues could create better awareness about the direction of reforms and their fiscal and socio-economic implications in the policy areas covered by EU law, thus raising overall administrative capacity.<sup>14</sup>*

While the above challenges and their implications are not well understood by many in the EU institutions and EU member states, this is not the case with officials and experts involved in the Association bodies and EU assistance projects who have an excellent understanding of the difficulties. This understanding has started to filter through to the EU institutions. For example, the European Parliament has started paying attention to AA implementation and the coordination mechanism.<sup>15</sup> This growing awareness is now increasingly being found amongst Ukrainian officials and experts.<sup>16</sup> Hitherto, this has not resulted in any systematic, or indeed, systemic solution. In the meantime, while the **AA continues to play a symbolic role and is constantly referred to, its practical relevance has been gradually diminishing.**<sup>17</sup> Clearly, this needs to change if AA implementation is not to become irrelevant.

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14) Sekarev, A., Antsu, G. and Maniokas, K. (2016) ‘European integration co-ordination arrangements in AA/DCFTA implementing countries: Georgia, Moldova, Ukraine’, Policy brief No.23, Estonian Centre for the Eastern Partnership Tallinn

15) European Parliament. The Development of an Institutional Framework for the Implementation of the Association Agreements in Georgia, Moldova and Ukraine: a comparative perspective. Study prepared by Kataryna Wolczuk, Brussels.

16) This is reflected in the ‘Transition paper’ prepared by the Ukrainian government in 2019 see <https://www.kmu.gov.ua/storage/app/sites/1/17-prezentation-2019/8.2019/transition-book-final-stisnuto.pdf>

17) Matta, A. (2014) ‘Differentiating the methods of acquis export: the case of the Eastern neighbourhood and Russia’, in Van Elsuwege, P. and Petrov, R., (eds.), Legal Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union, London and New York: Routledge.



## A STRATEGIC APPROACH TO THE AA – MAINSTREAMING AND PRIORITISATION

At the time of the negotiations of the AA, the EU and Ukrainian negotiators made certain assumptions as regards the implementation of the agreement.<sup>18</sup> It was, for example, presumed that the AA would stimulate Ukrainian institutions, business and other stakeholders to adopt EU legislation. However, the ambitious, complex commitments of the AA vastly exceeded the capacity of the Ukrainian state institutions to implement them. Therefore, until this capacity has been created the focus has to be on the most urgent elements of the AA. This means focusing on the state institutions and sectors where European Integration brings Ukrainian citizens and businesses tangible benefits.

In the DCFTA - with its focus on agriculture (SPS measures) and technical regulation (TBT) - access to the EU market for export-oriented sectors is a strong incentive to approximate Ukrainian legislation to EU legislation. Other sectors, however, lack such incentives.<sup>19</sup> When it comes to sectors with no external incentive, the AA implementation has to reflect and serve the modernisation goals. Thus AA implementation cannot be divorced from the broader reforms agenda and it needs to be 'mainstreamed' – driven by, and subordinated to, it.

### Policy planning, Impact assessment (cost analysis)

The elements of the DCFTA and sectoral integration vary in complexity, costs and benefits. Therefore, for Ukraine, integration with the EU is a complex exercise in benefit-maximisation and cost-minimisation. **In spite of what is often assumed, there is no one way to integrate with the EU.**

**Thus, it makes sense to introduce the least complex and least costly/high benefit elements first, while leaving the more demanding,**

**higher-investment/low benefit elements until later.** The sequencing principle of starting with the easiest elements avoids the challenges that can derail the whole process. Approximating legislation involving more complex issues (e.g. SPS, TBT, competition policy, state aids and intellectual property rights) can therefore be approached progressively. As these issues - implementing complex legislation, training personnel and building institutions – are time consuming,<sup>20</sup> the sequencing needs to be discussed and agreed with the European Commission.

It is up to the cabinet and ministries to work out what their priorities are. However, this can only be done when they are fully cognizant of the different ways of implementing specific provisions and what the economic, financial, political, legal and social impact is of adopting EU policy and regulation.<sup>21</sup> At present, there is no comprehensive analysis as to how specific Directives should be optimally implemented in the Ukrainian context. The ministries needs start with policy planning and impact assessments, before and EU rules are introduced.<sup>22</sup> (During enlargement, candidate countries assessed the impact of policy and legislative changes on their societies and economies prior to accession, rather than finding out the hard way after accession).<sup>23</sup>

**The aim of impact assessment is to determine which EU regulations are the most beneficial, feasible and cost-effective.** This has already been done in two sectors: energy efficiency and environmental regulation, regarding air quality and urban waste water treatment as a result of which the government have solid basis for estimating the resources needed for the adoption and implementation of EU legislation. However,

18) Wijkman, P. M. (2011) 'Fostering deep and comprehensive free trade agreements for the Eastern partners', Eastern Partnership Review, No. 8, December.

19) Ukraine and the Association Agreement implementation monitoring 2014-2018, 2018, NGO Ukrainian Centre for European Policy.

20) Wijkman, P. M. (2011) Fostering deep and comprehensive free trade agreements for the Eastern partners, Eastern Partnership Review, No. 8, December.

21) Tokarski, S. and Mayhew, A. 'Impact Assessment and European Integration Policy'. Sussex European Institute Working Paper No. 38, Sussex University, UK. (2000)

22) Mayhew, A. The Preparation of Countries in South East Europe for Integration into the European Union., Sussex European Institute, University of Sussex, United Kingdom. December 2005

23) Tokarski, S. and Mayhew, A. 'Impact Assessment and European Integration Policy'. Sussex European Institute Working Paper No. 38, Sussex University, UK (2000)

this has not been done in other sectors meaning that there are no bases on which to prioritise implementation of the AA – a particular issue for those sectors where implementation requires higher levels of investment and which will provide benefits for the economy and society only in the longer-term.<sup>24</sup>

Ukraine is only in the early stages of developing capacity for conducting impact assessment. Therefore, line ministries should be required to identify the most important areas in which impact assessment is needed in order to formulate the implementation plans in a more accurate and realistic way. This would also allow them to prepare for the actual implementation of adopted laws.

It is important to note that impact assessment is useful for government in general and is not specifically reserved for the European integration process. It should become routine procedure for all the ministries and executive agencies. **Techniques developed during AA implementation are likely to be highly beneficial to policy making and lead to more efficient government** - a worthy

goal given the limited financial resources and extensive developmental needs of Ukraine. Impact assessments are also likely to provide valuable evidence in talks with the EU side to explain delayed implementation, exceptions, customised solutions and requests for additional financial support.

Technical assistance projects have provided some assistance in training in impact assessment as a way to assess the implications of different policy options, including different degrees of alignment with the *acquis* in order to assess the range of investment needed. However, until this is done on a sufficient large scale and in a systematic way it is important to focus on the key selected priorities identified in the sectoral reform plans. Ukraine needs long-term assistance projects relying on EU and Ukrainian experts working in tandem in order to be able to match the AA commitments with ways of addressing the problems Ukraine faces. They need to clearly identify the sector-wide challenges in order to propose solutions fit for purpose.

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24) With hundreds of directives, it is not feasible to conduct impact assessments for all directives. It is notable that, for example the Polish government also did not have capacity to carry impact assessments in all the areas of EU approximation during the accession process. Thus, in Ukraine, there should be a realistic approach to conducting impact assessment.

## THE COORDINATION MECHANISM

### CHAPTER III

Nominally, Ukraine possesses the bodies necessary to implement the AA at the political and administrative levels. Indeed, Ukraine's coordination mechanism – centered on the Deputy Prime Minister for European and Euro-Atlantic Integration of Ukraine (DPM) and the Government office for Coordination on European and Euro-Atlantic integration (GOCEEI) – is closely based on 'best practice' in Central and Eastern Europe.<sup>25</sup>

Ukraine has received ample advice and assistance which provided opportunities to learn from the experience of the accession countries. Indeed, many officials in charge of European integration in Poland, Slovakia and Lithuania have been involved in EU assistance projects disseminating their experience. The results of this are evident in the set up of the Deputy Prime Minister for European and Euro-Atlantic Integration and the GOCEEI.

However, there are limits to such institutional emulation. The effectiveness of the institutional mechanism per se is hampered by the systemic weakness of the government – both at the political and administrative level - in Ukraine. AA implementation is profoundly affected by this broader institutional context meaning that the approach to implementation needs to take into account the institutional landscape.

### Coordination at the political level

**Integration with the EU is both a technical and political process.** Experience shows that without support from the highest authorities in the state, progress on European integration tends to be turgid. Unless implementation is driven from the very highest political level, across all branches of power, it is unlikely to be successful.

In Ukraine, since 2016 responsibility for European integration sits with the Deputy Prime Minister for European and Euro-Atlantic integration. The post was created in order to drive the integration process forward and coordinate the activities of

the various parts of government. This is a position without portfolio (i.e. Ministry) and is supported by the GOCEEI within the Secretariat of the Cabinet of Ministers.

Between 2016-19, the Deputy Prime Minister chaired the Governmental Committee for European and Euro-Atlantic Integration, International Cooperation and Regional Policy,<sup>26</sup> which was the key intra-government platform for dealing with the AA implementation and consists of deputy ministers for European integration, posts which were specially created within each Ministry.<sup>27</sup>

Following the parliamentary elections and the formation of a new government in 2019, the Committee for European integration has not been re-convened. It is important to reinstate it but also remedy its weaknesses. While this Committee was convened within the previous government, it failed to coordinate European integration as it worked on an ad hoc basis with a limited number of issues on its agenda. In fact, most of the issues that were directly connected to AA obligations were covered by the Committee on Economics that was headed by the Minister of Economic Development and Trade.

It is important to take into consideration the experience of former DPM and to engage with the deputy ministers on a regular basis with concrete agenda for each meeting. Therefore, the Committee for European Integration needs to serve as a formal coordination instrument that involves deputy ministers on European integration in order to produce executive decisions on the monitoring and assessment of performance, to identify critical issues and to reach political compromise where necessary. In particular, there is a need to develop inter-ministerial coordination in order to agree a common position on horizontal issues,<sup>28</sup> such as telecommunications, cross-border cooperation, intellectual property rights, the anti-monopoly strategy and so forth.<sup>29</sup> Also, efficient committee

25) For a detailed analysis see European Parliament, 2018.

26) Governmental committees are the main structure inside the Cabinet of Ministers for Inter-Ministerial Coordination. They can also adopt direct instructions to Ministries and bodies, which are reflected in minutes of meetings

27) Decision of the Cabinet of Ministers of Ukraine, No.330, 11 May 2016 available at <https://www.kmu.gov.ua/ua/npas/249029454> (in Ukrainian).

28) 'Introducing the New Structures in Ministries – Initial Comments (from the Perspective of Weaknesses of the AA/DFCTA Implementation-Coordination)', a [comment](#) written by project experts funded within the 'Association4U' project in Ukraine.

29) For example, several Ministries and agencies have not cooperated effectively on the construction of new border crossings, despite EU support.

proceedings require permanent, operational support at an administrative level – by default at the GOCEEI – delivered by committed and professional civil servants, who are well networked within the governmental administration. Without this type of political coordination, the process of AA implementation is carried out in an unsustainable and ad-hoc manner.

The overarching problem of coordination at the political level is that it is based on the soft power of instructions (*doruchennia*) of the DPM. As a result, in the absence of any instructions, the Ministries organise their activities for AA implementation without the involvement of the DPM and GOCEEI. Political and administrative control over the process of AA implementation is weak. AA implementation monitoring based on the AA Action Plan has become been a low-level administrative process in which politicians are involved only sporadically.

**This informal approach needs to be replaced by a legally binding process that will ensure inter-institutional coordination between the DPM, Deputy Ministers for European Integration and Directorates in the Ministries.** Only such coordination will ensure that the DPM and GOCEEI are informed and involved in the implementation processes that are developed by the Ministries.

Better intra-government steering will also help to curb the circumvention of governmental structures, as is the case when Members of Parliament register AA-related draft laws independently of any state input. This practice means that the draft laws are not subjected to any form of scrutiny in terms of impact assessment, budgeting/financing, conflict solving, prioritisation, strategic planning, integrating of laws into ‘fundamental reforms’, etc. It is important to note, though, that this practice is sometimes supported by the GOCEEI/DPM and EU assistance projects as a more expedient route, particularly when the vested interests in some ministries block certain bills.

## **Coordination at the administrative level**

The GOCEEI is the body, which coordinates the European Integration process while actual implementation is undertaken by line ministries and agencies. **The Office has extensive competences but has not been able to fulfill them for a variety of reasons.** The main role of the Office ought to be to advise ministries on

some issues, coordinate cross-sector activities and assist in problem-solving. Therefore, at the administrative level, the Office should in theory coordinate AA implementation, resolve conflicts, facilitate networking and engagement with the representatives of the Directorates on Strategic Planning and European Integration and/or other departments at the line Ministries. However, the role of GOCEEI remains unclear. It ought to drive change, but in practice it plans and tracks the implementation in a very labor-intensive way, without tangible results.

There are two main problems that hamper the Office’s functioning. First, while the GOCEEI has extensive functions and responsibilities, it lacks the capacity to fulfil them. At present, the Office has around 37 staff members and few have sufficient experience in policy planning, legal analysis and/or sectoral expertise, covering Euro-Atlantic integration. To be effective, the body should be enlarged to at a minimum of 80-100 staff with relevant experience and expertise.

Second, the GOCEEI is relatively isolated within the government and is not involved with line ministries beyond formal planning and reporting. There is a lack of coordination of European integration issues on an administrative level as coordination between GOCEEI and Directorates is not based on any legal framework or established practice and meetings are organised only sporadically. Given the challenges that the GOCEEI already faces, it would be unwise to overburden it with excessive expectations. The main implementation takes place in line ministries, where capacity-building efforts need to be focused (as has been the case with PAR). However, the Office can take the important initiative of organising meetings of the sectoral working groups, which ought to focus on the quality of actions undertaken.

At the same time, if the Governmental Committee for European Integration acquired real decision-making power, the GOCEEI could become its operational hand, preparing the decisions and monitoring their implementation/enforcement.

The last challenge is connected with the implementation of PAR reform in general. **There is no substitute for building capacity within individual ministries.** Directorates on Strategic Planning and European Integration have been created as part of this reform, but they are still not strategic centers that can drive the implementation of the AA in specific sectors. The main problem is that the newly created Directorates function within the otherwise unreformed eco-systems of individual ministries. Directorates have significant

financial support (provided by the EU) which other unreformed departments in the ministries lack. In such circumstances the Directorates struggle to be effective since they need to cooperate with the all relevant structures and departments within specific ministries. Moreover, Directorates can be only effective if/when ministers provide political leadership and oversight. Overall, capacity building in individual ministries is the number one priority for European integration.

**Capacity building will clearly take time – hence the need to focus on fewer, more important actions in the short- to medium-term.** Given the ongoing PAR and the scale of the challenges, it is important to ensure that the ministries decide on their priorities and how the AA helps them solve the problems of their particular sectors rather than approach AA implementation as a parallel process.

At present, it is clear that while ministries usually know what to do, they still lack the expertise, budget and political backing from the highest political levels, namely the Cabinet of Ministers and the Presidential Office.

## Planning

Currently, planning is almost exclusively focused on EU requirements in relation to AA implementation and does not take into account needs and priorities.

The Action Plan for the implementation of the AA for 2017-20 was adopted in October 2017, by a governmental resolution, meaning that formally it is binding on the ministries and other executive agencies.<sup>30</sup> The plan is an improvement on its predecessor, primarily due to its comprehensiveness, as it includes many measures beyond 2020. It lists both broader reform measures such as public administration reforms and specific actions needed to implement the AA. In other words, while there is no alignment between the two, there was at least some initial recognition that the two processes work in conjunction.

However, it still has many limitations, as it focuses mostly on legal approximation and the passing of laws, whereas other implementation actions are underspecified, especially with regard to institutional reform (such as the creation of institutions responsible for implementing SPS standards, especially at the regional level). The Plan also does not specify sources of funding for

the implementation. Most importantly the Plan is a process-oriented document as it contains more than 2000 measures, organised according to sections of the AA rather than discrete policy areas – an inherently illogical approach for the Ukrainian context. Furthermore the AA comprises a series of tasks, which collectively do not amount to a coherent and explicit reform agenda for the ministries and executive agencies. As a result, strategic issues, priority activities and sectors, key challenges and so forth are not only not articulated, but are actually disaggregated amongst the many measures to the extent that they cannot be discerned.

The preparation of the Plan was a protracted process. It was the longest document ever adopted by the government and also one of the most controversial – it was extensively commented on by ministries as a result of which it was published well after adoption. Nevertheless, some Ministries still believe their comments were not taken fully into account.

Therefore, **our recommendation is to move away from the mechanical listing of AA-related tasks and transform the Plan into result-oriented document.** The Action Plan should be reviewed so that the plan 1) includes fewer but more important actions 2) considers which actions can best answer particular concerns 3) incorporates intermediate steps/deadlines and 4) identifies budgetary resources 5) adopts a structure according to sector/policy areas 6) consists of actions that reflect closer alignment of AA implementation and sector reform 6) focuses on outcomes as well as outputs (i.e. what the action is designed to achieve in terms of desired change) 7) would consist only of items, each of which contributes to the achievement of the strategic vision driving the implementation of the AA.

The renewed Plan would list concrete priorities that are needed for AA implementation for each Ministry/executive body and it would be developed in close consultations with the ministries.

30) [Decision](#) of the Cabinet of Ministers, 25 October 2017.

In Ukraine, the EU has responded to the challenges of weak state institutions with customised and innovative support. Owing to the combined capacity and expertise of the Support Group for Ukraine (SGUA) and the operational staff of the EU Delegation in Kyiv, comprehensive support was provided for systemic reforms, in areas such as public administration, public finance management, the judiciary, energy efficiency, decentralization, governance and anti-corruption. The SGUA is staffed by a combination of seconded officials from the Commission's sectoral Directorates General and expert staff.

The importance of this innovation – nothing similar has ever been created for a 'third' country i.e. non-EU member – cannot be overstated. The SGUA's internal expert capacity is, as a result, greater than for other countries in the European neighborhood or elsewhere. This internal capacity has in turn allowed the SGUA to test and experiment with new approaches in supporting reforms in Ukraine. It has also allowed its staff to spend a far greater amount of time and energy corralling other donors (bilateral and international) and ensuring that their work is aligned with that of the EU.

The SGUA's reach, however, only extends to AA implementation if and when this assists fundamental reforms. The energy sector is a good example: the *acquis* is used to address Ukraine's problems on a needs-driven basis and Ukraine has managed to approximate its legislation to EU norms in gas and electricity sectors, as well as energy efficiency.

The SGUA focusses on fundamental reforms as it has limited capacity and functions according to strategic priorities. However, the EU does not offer guidance on AA implementation. This means that there is no oversight of the profound challenges presented by AA implementation.

There is also a dearth of staff who can support Ukrainian officials to devise a suitable sequence of implementation measures for each sector. Currently, there is a special cross-sectoral Task force on AA in the EU Delegation that consists of four people (Trade, Political, SGUA and Operation sections). Their task is to ensure internal coordination for AA monitoring and implementation, to provide advocacy, and to cooperate with relevant Ukrainian authorities. They also coordinate sectoral assistance projects that are designed to assist the GOCEEI and Committee for European Integration in the Verkhovna Rada.

Overall, this team is mostly focused on technical issues, especially tracking legal approximation, rather than strategic issues. Thus, there is a **need to significantly enlarge the size and therefore the capacity of this AA Team** to enable its staff to engage at both a technical and strategic level. This is especially important because sectoral DGs in the Commission have limited capacity to engage in the process of adjusting the strategy for AA implementation after taking into account Ukraine's specific circumstances which are in a state of constant change. Overall, from the EU side there has been an insufficient reflection on, and as a result a poor response to the challenges of AA implementation.

## FUNCTIONING OF THE ASSOCIATION BODIES

Bilateral institutions that are formed in the framework of the AA are decision-making bodies, such as the Association Council and the Association Committee (along with several subcommittees and clusters). These institutions can adopt decisions that are needed for the implementation of the AA and are agreed at the highest political level. This platform can be used for the initiation and fostering of dialogue on important issues.<sup>31</sup> However, the Association Committee and sub-committees are not working at their full potential.

Usually decisions taken within these bodies are concerned with the adoption of changes to the Annexes, updating the provisions of the Agreement, assessing the progress of AA implementation in concrete sectors and agreeing follow up steps. The AA is a live document and bilateral institutions can help with prioritisation within AA Annexes, which can be changed relatively easily. Over the last five years several important decisions were adopted.<sup>32</sup> One of the most important among these documents is the amended Annex XXVII on Energy cooperation that allows for Ukraine's full integration into the EU energy market. A Comprehensive Strategy for implementing sanitary and phytosanitary measures and Road map for Public Procurement has been also adopted.

However, these bilateral institutions suffer from notable weaknesses. First, the process of decision-making is quite time-consuming – from six months to one year.<sup>33</sup> While this is inevitable, there are relatively few opportunities for more informal discussions and consultations.<sup>34</sup> Second, there is insufficient synergy between different administrative and political levels. Political decisions adopted at the level of the Association Council have a declarative and general nature – as indeed can be expected at this level – which need to be followed up by concrete actions. However, this is not done either by the Ukrainian or the EU side. In such cases the GOCEEI should perform its coordinating role and trigger bilateral negotiations with the EU as soon as decisions have been prepared. Alas, so far the GOCEEI has not been doing this. Overall, bilateral association bodies can be made more effective with a few simple steps.

31) Interview with Mykola Kuzio, former Deputy Minister of Ecology and Natural Resources on European Integration, November 2019

32) Such as changes to the Annex I (Tariff schedules of Ukraine), Annex I-C (Schedules of export duty elimination), Annex I-D (Safeguard measures for export duties), Annex IV (Comprehensive Strategy for the implementation of Chapter IV – Sanitary and phytosanitary (SPS) measures), Annex XXI (Road map for Public Procurement) and Annex XXVII (Energy cooperation, including nuclear issues. Interview with GOCEEI experts, November 2019

33) Ukrainian government adopted a first draft of the Comprehensive Strategy for SPS measures in February 24, 2016. But it was finally adopted by European and Ukrainian sides only on November 18, 2019, in the sub-committee that is responsible for sanitary and phytosanitary measures.

34) It is worth noting that in the candidate state, bilateral bodies were quite formal. However, the countries had opportunities for intensive interactions during accession negotiations, involving screening and negotiations on individual chapters. Ukraine's relations with the EU lack such opportunities, placing higher expectations on the bilateral association bodies.

## CONCLUSIONS



The conclusion of the AAs represents a profound shift in the EU's relations with Ukraine (alongside Moldova and Georgia).

The agreement offers advanced market access while promoting their long-term modernisation and development.

However, this two-track is unprecedented: no country has ever undertaken the task of importing a body of detailed and complex legislation in the midst of political, administrative and economic reforms at the same time as undergoing painful socio-economic modernisation while in a military confrontation with Russia.

In this context, the ambition, scope and complexity of the Agreements posed a challenge of an entirely new order for policy makers and experts within the EU institutions let alone Ukraine.

And yet, so far there has been at times a limited appreciation of the challenges of implementing the AA within Ukraine as well as the EU, particularly at the strategic level.<sup>35</sup>

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35) On the part of the EU, many individual DGs, the EU Delegations and EEAS lack the resources to provide both strategic and tactical support. Within the Commission, DG NEAR, TRADE proved to be most engaged (2014-19), in addition to some effective innovations such as the SGUA and the AA team in EU Delegation in Ukraine as well as the work of many individual EU officials and experts, for example, in DG ENV in interacting with Ukraine officials.



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# NOTES



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