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Revisiting compliance negotiations: The EU-Ukraine association relations

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Context of the paper

- Project title: “Lowering the Bar? Compliance Negotiations and the EU-Ukraine Association Agreement”
- Funded by The Research Council of Norway
- July 2021 - June 2024
- Project website: <https://eu-ukraine.uia.no/>
- Challenges:
 - Continuing Russia’s war against Ukraine
 - Shift of Ukraine’s status from associated Neighbour to Candidate country

Theory-related reasons to look at the EU-Ukraine compliance negotiations

- Both EU and IR literature focus on pre-decisional, rather than post-decisional negotiations
- Little cross-fertilization between the literatures on compliance/enforcement and negotiations/bargaining
- IR context: “Getting it done: post-agreement negotiations and international regimes” (Spector and Zartman, 2003) → no focus on compliance negotiations
- Limited contributions on compliance negotiations in the WTO (e.g. Smith, 2006; Jackson, 2012) and the EU (Jönsson and Tallberg, 1998; Tallberg and Jönsson, 2005)

Practical reasons to explore EU-Ukraine compliance negotiations

- Ukraine's likelihood to initiate compliance negotiations with the EU because of
 - Only a remote prospect to join the EU (especially prior to 23 February 2022)
 - High financial and political costs of reforms
 - Insufficient institutional, administrative and technical capacity to implement EU norms
- On the EU side
 - A limbo between political commitments to Ukraine's European integration (especially amid/after the war) and the need to preserve the homogeneity of EU law
 - Geostrategic pressures for enlargement



Ukrinform, 2022

Research goal and contribution

- **Goal:** to revisit the compliance bargaining framework, offered by Tallberg and Jönsson (1998), and illustrated on the case of the Commission's infringement procedure against EU Member State which fails to implement EU law, in the context of the EU association relations.
- **Contribution:** The paper uncovers negotiations in the AA implementation context, which are fundamentally different from EU-MS negotiations:
 - Impact of a **compliance issue at stake** on negotiations' form, structure and effects.
 - Focus on **multistakeholder networks** rather than "monolithic" entities in search for "amicable solutions"
 - Introduction of the concept of "**pre-emptive compliance negotiations**"

Methodology and data

- Legal method
- Evidence from interviews with EU and Ukrainian officials and sector experts, participating in the AA implementation, conducted over the period from February until August 2022
 - Focus on the pre-war and pre-membership perspective for Ukraine status-quo but mentioning changes, brought about by the war and the Candidate status



Foreign Policy

Compliance Negotiations in the EU

- Framework by Tallberg and Jönsson (1998, 2005), seeking to build bridges between the literature on negotiations and bargaining, on the one hand, and compliance and enforcement, on the other hand.
- Components of the framework:
 - Origin of compliance negotiations
 - Forms
 - Structure
 - Bargaining powers
 - Effects

Causes and forms of compliance negotiations in the EU

- **Causes (stemming from compliance theories)**
 - A Party's unwillingness to comply because of high political /financial costs, incl. the opposition by vested interests (external enforcement theory, also concerns attributable to the legitimacy theory)
 - Capacity constraints (management theory)
 - Ambiguity of EU law provisions (management theory)
 - Contingencies (change of circumstances, management theory)
- **Forms**
 - Self-help
 - Third-party (presence of an independent prosecutor/judge)
 - **Prevalence of third-party form in EU compliance negotiations (European Commission as a prosecutor, CJEU as a judge)**

Structure, Parties' bargaining powers and effects

- **Structure**

- Informal – formal
- Bargaining – problem-solving
- Interplay between informal and formalized and between cooperative and conflictual elements over the course of the infringement procedure, with the Parties' sharing the preference for 'amicable solutions'

- **Bargaining powers**

- Structural power
- Behavioural power
- EU's significant bargaining power due to Commission's and CJEU's "monopoly on the interpretation of EU law" vs.
- A Member State's sole decision to (non-)comply and its ability to draw bargaining advantages from Commission's dependence on constructive cooperation with MS

- **Effects**

- Safeguarding original treaty
- Reconstructing the original treaty
- EU: often safeguarding the Treaty

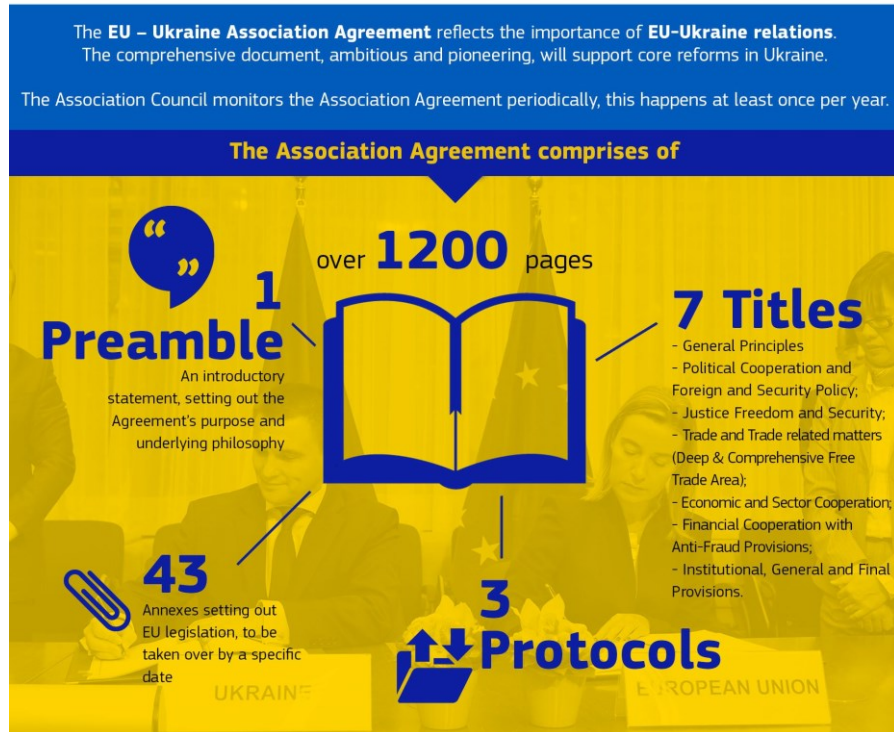
EU-Ukraine AA

EU-Ukraine Association Agreement

The **EU – Ukraine Association Agreement** reflects the importance of **EU-Ukraine relations**. The comprehensive document, ambitious and pioneering, will support core reforms in Ukraine.

The Association Council monitors the Association Agreement periodically, this happens at least once per year.

The Association Agreement comprises of



The infographic features a central blue book icon with the text 'over 1200 pages' above it. To the left, a speech bubble icon is next to '1 Preamble', with a sub-description: 'An introductory statement, setting out the Agreement's purpose and underlying philosophy'. To the right, '7 Titles' are listed: '- General Principles', '- Political Cooperation and Foreign and Security Policy;', '- Justice Freedom and Security;', '- Trade and Trade related matters (Deep & Comprehensive Free Trade Area);', '- Economic and Sector Cooperation;', '- Financial Cooperation with Anti-Fraud Provisions;', and '- Institutional, General and Final Provisions.'. At the bottom left, a paperclip icon is next to '43 Annexes setting out EU legislation, to be taken over by a specific date'. At the bottom center, a double-headed arrow icon is next to '3 Protocols'. The background is yellow with faint images of people and the flags of Ukraine and the European Union.

1 Preamble
An introductory statement, setting out the Agreement's purpose and underlying philosophy

over **1200** pages

7 Titles

- General Principles
- Political Cooperation and Foreign and Security Policy;
- Justice Freedom and Security;
- Trade and Trade related matters (Deep & Comprehensive Free Trade Area);
- Economic and Sector Cooperation;
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- Institutional, General and Final Provisions.

43 Annexes setting out EU legislation, to be taken over by a specific date

3 Protocols

UKRAINE EUROPEAN UNION

- Multiple **institutionalized fora** to address AA implementation and compliance issues:
 - EU-Ukraine Summit
 - Association Council
 - Association Committee (e.g. Trade Committee)
 - Subcommittees
 - Clusters
- Is the picture complete?

[@EUDelegationUA](https://twitter.com/EUDelegationUA)

Origin of the EU-Ukraine compliance negotiations

Reasons	Type of compliance negotiations	Background
Anticipated non-compliance	Pre-emptive compliance negotiations	<ul style="list-style-type: none">• Cost-benefit considerations of the Ukrainian government, incl. high political costs of compliance• Salience of capacity issues (i.e. the 'commitment-capacity gap' (Wolczuk, 2017))
Existing violation of the AA or EU law	Rectifying compliance negotiations (AA or EU law violation)	
Broad formulations of the AA, e.g. under the auspices of political association	Negotiations as to AA interpretation	Intentionally or unintentionally broad and vague treaty commitments

Objects and forms of compliance negotiations

- Pre-emptive negotiations vs rectifying negotiations (AA/EU law violations)
- Objects according to the substance of respective commitments:

Category	Characteristics	Forms of negotiations
Political commitments under Titles I-II of the AA, such as democracy, rule of law, human rights, market economy and sustainable development	Vague commitments, which offer the parties broad room to negotiate what constitutes compliance through political dialogue	'Self-help' at various levels, mainly political dialogue
Trade-related matters under Title IV, which do not envisage market access conditionality	Specific commitments, which can take either the form of standards, included into the AA, or Ukraine's regulatory approximation obligations	'Self-help' at various levels 'Third party' (arbitration) after obligatory consultations ('self-help')
Trade-related matters under Title IV, which envisage market access conditionality	Specific commitments, which can take either the form of standards, included into the AA, or Ukraine's regulatory approximation obligations	'Self-help' at various levels The European Commission acting as a third party in case of assessing Ukraine's regulatory approximation progress with respect to (non)-granting market access 'Third party' (arbitration) after obligatory consultations ('self-help'), also in case of Ukraine's violations of EU law after market access was granted
Sectoral cooperation matters, which do not belong to either of the above categories	General commitments to cooperation	Only 'self-help' at various levels

Structure of negotiations

- **Informal vs formal components**

- Saliency of **informal sector- or even issue-specific networks**, comprised of the Commission's civil servants, Support Group for Ukraine members, EU Delegation and technical assistance projects' representatives and Ukrainian officials and civil society members.
 - **Institutionalized (formalized) negotiations**, ranging from rather technical discussions in clusters to politicized ones at the EU-Ukraine Summit (in rare cases, if the matter concerns trade- and trade-related issues).
 - **Formalized and legalized third-party arbitration procedure, which can also involve the CJEU** (yet offering the Parties room for negotiations at all further stages)
- Problem-solving approach, bargaining and arguing in terms of the legal case (arbitration procedure)

Parties' bargaining powers and effects of negotiations

- **EU:**

- Monopoly over the interpretation of EU law
- European integration as a single regional economic integration alternative for Ukraine / EU membership perspective
- Ukraine's dependence on EU macro-financial and technical assistance, especially amid the war
- EU's market power, especially when it comes to market opening issues

- **Ukraine:**

- No opportunity for the EU Party to enforce compliance (it is the Ukrainian Government, which has the final say)
- Politicization of Ukraine's European integration and moral pressure on the EU
- Geostrategic pressures for enlargement, experienced by the EU
- Ukraine's ability to closer engage with specific Member States, more supportive of Ukraine's European integration for (geo)political reasons

Effects

- Safeguarding the AA
- Reconstruction of the original agreement, *inter alia*, through Ukrainian legislation with longer transition periods or the recognition of Ukraine's legal acts as those, which do not comply with EU law

Conclusion

- Relevance of compliance negotiations in the EU-Ukraine AA implementation context amid the politicization of Ukraine's European integration and war issues
- Much room for 'self-help', combined with the EU's strong leverage over trade-related matters, especially in cases, when market access is concerned
- Importance of informal multi-actor networks in achieving amicable solutions
- Importance of pre-emptive compliance negotiations