

The EU-Ukraine Association Agreement and DCFTA: Still fit for purpose?

*Ukraine on the way to EU membership
From Association Agreement to candidate status*

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Outline:

1. Background of the EU-Ukraine AA & DCFTA
2. Key features of the DCFTA
3. Implementation of the AA & DCFTA
4. The EU-Ukraine AA after Ukraine's EU Membership application and Russia's invasion: still fit for purpose?

- ENP: first proposals for successor PCA were rather vague
 - “Neighbourhood Agreements”
 - Negotiations launched in March 2007 on a “New Enhanced Agreement”
 - “Association” agreement (2008 Paris EU-Ukraine Summit)
 - Offer extended to other EaP countries in 2009
- Trade-related objectives:
 - 2003: “Stake in the EU Internal Market” and promote free movement of the 4 freedoms
 - 2006: Conclusion of bilateral Deep and Comprehensive Free Trade Areas (in light of the Global Europe Strategy)
 - DCFTA negotiations with Ukraine launched in February 2008 (after WTO accession) (integral part of the AA)
- The DCFTA provisionally entered into force on 1 January 2016, while the full AA entered into force formally on 1 September 2017 (Moldova and Georgia entered into force in 2016)



2. Key features of the EU-Ukraine AA ('political part')

Preamble and objectives of the EU-Ukraine AA

- No explicit EU membership perspective, but preamble states:
 - “acknowledges the European aspirations of Ukraine and welcomes its European choice”
 - Ukraine is a “European country that shares common history and values” with the EU (not new)
 - “this agreement shall not prejudice and leaves open future developments in EU-Ukraine relations”
 - Strengthen relations in “ambitious and innovative way”
 - “This Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations”
 - Georgia is labelled in the AA as an “Eastern European Country”

However, unique “integration objectives” (i.e. integration without membership)

- AA will lead towards “Ukraine gradual integration into EU Internal Market”, by setting up DCFTA (Art. 1)

Objectives (Article 1)

1. An **association** between the Union and its Member States, of the one part, and Ukraine, of the other part, is hereby established.
2. The **aims** of this association are:
 - (a) to promote **gradual rapprochement** between the Parties **based on common values and close and privileged links**, and increasing Ukraine's association with EU policies and participation in programmes and agencies;
 - (b) to provide **an appropriate framework for enhanced political dialogue** in all areas of mutual interest;
 - (c) to promote, preserve and strengthen **peace and stability** in the regional and international dimensions in accordance with the principles of the United Nations Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990;
 - (d) to establish conditions for **enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area** as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, **the progressive approximation of its legislation to that of the Union**;
 - (e) to enhance cooperation in the field **of Justice, Freedom and Security** with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms;
 - (f) to establish conditions for increasingly close **cooperation** in other areas of mutual interest

Outline EU-Ukraine AA

I. General Principles
II. Political Dialogue and reform, Cooperation and convergence in the field of Foreign and Security Policy
III. Justice, Freedom and Security
IV. DCFTA
V. Economic and sector cooperation
VI. Financial cooperation
VII. Institutional, General and Final Provisions
Annexes

3. Key features of the DCFTA

Objective and key principles of the DCFTA(s)

Objective of the DCFTA(s)

(Art: 1(d) EU-Ukraine AA)

- (d) to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union;

- More ambitious than a 'traditional' FTA
- No homogeneity objective as in the EEA (but several EEA provisions copied!)
- *Quid pro quo*: integration – legislative approximation

Comprehensive? (outline DCFTA)

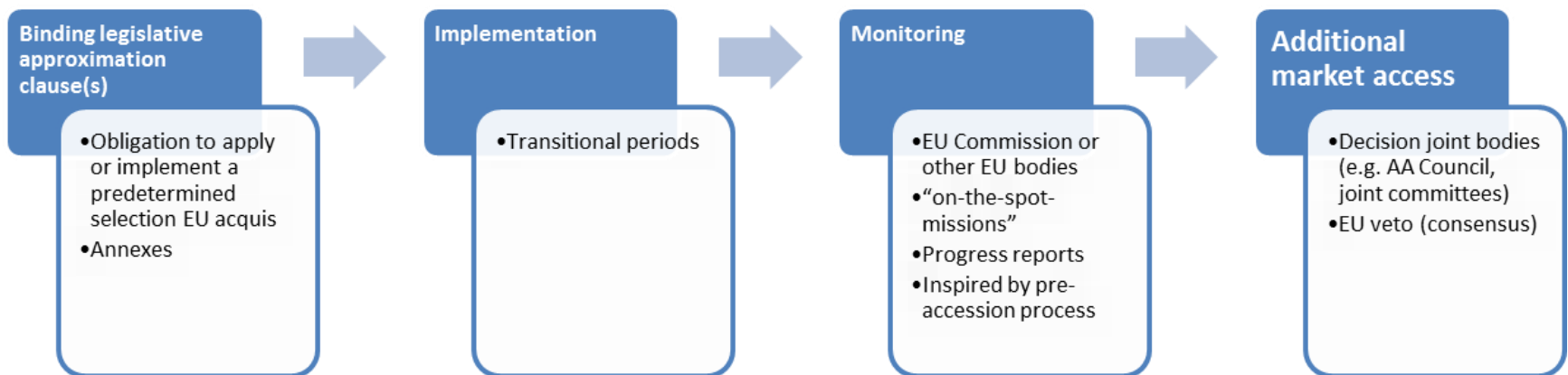
1. National Treatment and Market access for goods	9. Intellectual Property
2. Trade Remedies	10. Competition
3. Technical Barriers to Trade	11. Trade-Related Energy
4. Sanitary and Phytosanitary Measures	12. Transparency
5. Customs and Trade Facilitation	13. Trade and Sustainable Development
6. Establishment, Trade in Services and Electronic Commerce	14. Dispute Settlement
7. Current Payments and Movement of Capital	15. Mediation Mechanism
8. Public Procurement	

“Deep”?

- Integration into the EU Internal Market on the basis of legislative approximation
- **Binding** legislative approximation clauses
 - Level playing field: a common legal space (i.e. the Internal Market)
 - DCFTA offers model for economic reform and modernisation for Ukraine, attract investment
 - Tackle NTB
- Unique (not realistic / feasible with other trade partners)
- far-reaching... (sovereignty)
- Challenging... (e.g. implementation, complexity EU *acquis*)
- Costly?... (e.g. short-term vs. long term)

- **Market access conditionality: quid pro quo**

- In several (not all) DCFTA chapters Ukraine will be granted a specific type of additional market access if it approximates to a predetermined selection of EU acquis
- Differentiation between various DCFTA chapters: complex story...
- Only in several DCFTA chapters (services/establishment, TBT, SPS, public procurement)
- Unprecedented (but inspired by pre-accession and ENP methodology, e.g. monitoring, progress reports, etc.)



Examples of market access conditionality

1. TBT Chapter:

- Conclusion of an ACAA

2. Services and establishment :

- ‘Internal Market Treatment’ (only for several subsections)

“juridical persons of Ukraine will have the same freedom of establishment and will be able to provide services in the EU as juridical persons of EU Member States”

3. Public Procurement

- “EU shall grant access to contract award procedures to Ukrainian companies pursuant to EU public procurement rules under treatment no less favourable than that accorded to EU Party companies , [and vice versa].”
- ‘gradual’ approach on basis ‘Indicative Time Schedule’ (5 phases)

- How to ensure a uniform interpretation of the EU acquis in the EU-Ukraine AA?
- Different procedures in different DCFTA chapters:... complex agreement
 1. DCFTA/AA includes mechanisms to update Annexes with EU acquis to take into account developments EU law (moving target) (e.g. decisions Association Council or other joint bodies – no ‘dynamic’ approximation)
 2. Several DCFTA chapters oblige Ukraine to interpret and apply annexed EU acquis in conformity with case-law ECJ (e.g. services – Annex XVII)
 3. Preliminary ruling procedure before the CJEU for disputes concerning the interpretation of the annexed EU acquis (Art. 322)

Key objective of ‘Integration Into the EU Internal Market’ realised?

- **DCFTAs are far-reaching FTAs...:**
 - Almost full liberalisation of trade in goods (see Regulation 2022/870)
 - Significantly liberalise or facilitate trade in all other trade-related areas
- **However, ...**
 - “integration” into the EU Internal Market is limited
 - And conditional upon legislative approximation implementation (e.g. TBT, services and public procurement)
 - Conditionality approach illustrates that the EU is very cautious to “integrate” in its Internal Market 3th (neighbouring) countries with a less developed economy and administrative capacity than, for example, an EEA country

4. Implementation AA & DCFTA



EUROPEAN
COMMISSION

HIGH REPRESENTATIVE
OF THE UNION FOR
FOREIGN AFFAIRS AND
SECURITY POLICY

Brussels, 22.7.2022
SWD(2022) 202 final

JOINT STAFF WORKING DOCUMENT

Association Implementation Report on Ukraine

Updating the Agreement

Article 463

1. For the purpose of attaining the objectives of this Agreement, the Association Council shall have the power to take decisions within the scope of this Agreement, in the cases provided for therein. Such decisions shall be binding upon the Parties, which shall take appropriate measures, including if necessary action in specific bodies established under this Agreement, to implement the decisions taken. The Association Council may also make recommendations. It shall adopt its decisions and recommendations by agreement between the Parties, following completion of the respective internal procedures.

2. In line with the objective of gradual approximation of Ukraine's legislation to that of the Union as laid down in this Agreement, the Association Council will be a forum for exchange of information on European Union and Ukrainian legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures.

3. The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards set out in international instruments deemed relevant by the Parties, without prejudice to any specific provisions included in Title IV (Trade and Trade-related Matters) of this Agreement.

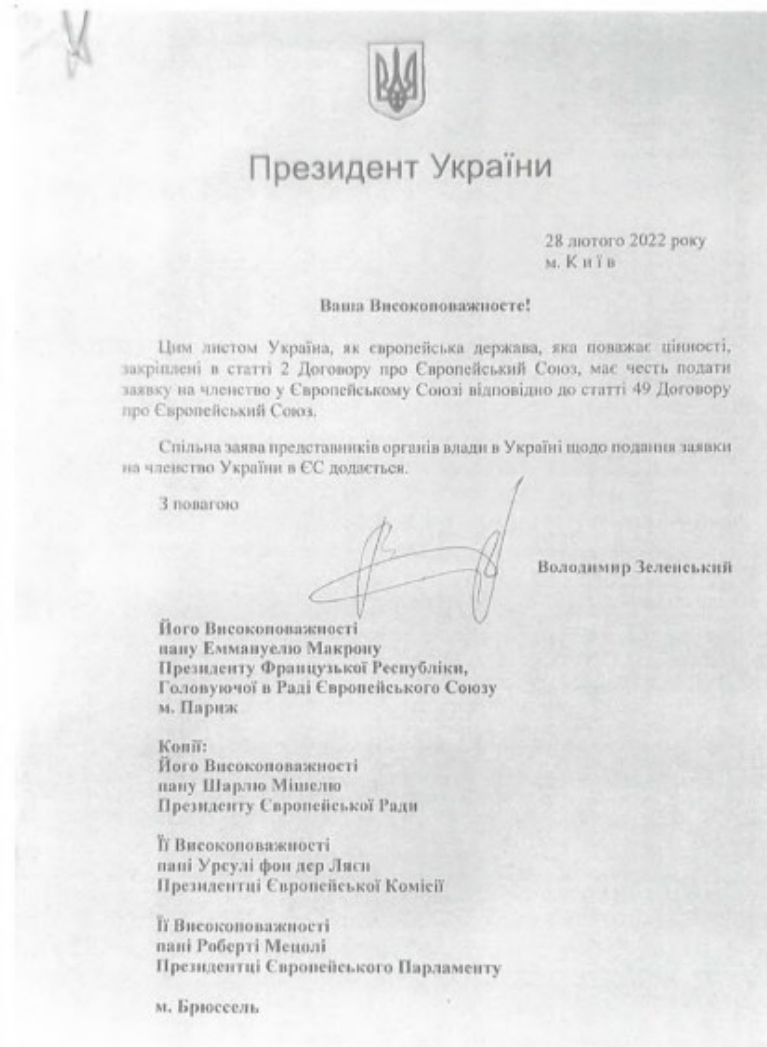
- Dynamic approximation \neq 'automatic' approximation (not even in EEA (e.g. Art. 102 EEA))
- Several DCFTA Chapters have own more ambitious 'dynamic' procedures (e.g. services and public procurement)

	Ukraine	Moldova	Georgia
Trade in Goods		Decision No 1/2020 of the EU-Republic of Moldova Association Committee in Trade Configuration of 23 January 2020 concerning the update of Annex XV (Elimination of customs duties)	
TBT		Decision No 1/2016 of the Association Committee meeting in Trade Configuration of 19 October 2016 updating Annex XVI	Decision 1/2019 of 18 October 2019 of the Association Committee meeting in Trade Configuration
SPS	Decision No 1/2019 of the EU-Ukraine Sanitary and Phytosanitary Management Sub-committee of 18 November 2019	Decision No 1/2016 of the EU-Republic of Moldova Sanitary and Phytosanitary Sub-Committee of 1 June 2016 modifying Annex XXIV-B	Decision No 1/2017 of the EU-Georgia Sanitary and Phytosanitary Sub-Committee of 7 March 2017 modifying Annex XI-B
Services and establishment	Decision No 1/2021 of the EU- Ukraine Association Committee in Trade Configuration of 22 November 2021 amending Appendix XVII-3 (Rules applicable to telecommunication services), Appendix XVII-4 (Rules applicable to postal and courier services) and Appendix XVII-5 (Rules applicable to international maritime transport)	Decision No 1/2019 of meeting in Trade Configuration of 4 October 2019 concerning the update of Annex XXVIII-B (Rules applicable to telecommunication services) Decision No 2/2019 of the EU-Republic of Moldova Association Committee Meeting in Trade Configuration of 4 October 2019 concerning the updating Annex XXVIII-D (Rules applicable to international maritime transport)	
IPR			Decisions No 1/2020 and 1/2016 of the Geographical Indications Sub-Committee
Public Procurement	Decision 1/2018 updating Annex XXI - and giving a favourable opinion regarding the comprehensive roadmap on public procurement	Decision No 2/2016 of the Association Committee meeting in Trade Configuration of 19 October 2016 updating Annex XXIX	Decision No 2/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex XVI to
Customs	Decision No 1/2018 of the EU-Ukraine Customs Sub-Committee of 21 November 2018 replacing Protocol I to the EU-Ukraine Association Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation	Decision No 1/2016 of the Customs Sub-Committee of 6 October 2016 replacing Protocol II; Decision No 1/2018 of the Association Council of 3 May 2018as regards the amendment of Annex XXVI Decision 1/2021 OF THE EU-REPUBLIC OF MOLDOVA CUSTOMS SUB-COMMITTEE of 16 November 2021 replacing Protocol II	Decision No 1/2018 of the Customs Sub-Committee of 20 March 2018 replacing Protocol; Decision No 1/2021 of the EU-Georgia Association Committee in Trade Configuration of 17 June 2021 updating Annex XIII (Approximation of customs legislation)
Energy	Decision No 1/2019 of the EU-Ukraine Association Council of 8 July 2019 as regards the amendment of Annex XXVII		

Quid 'Internal Market Integration'?

- Trade in goods/TBT :
 - ACAA: further progress is needed with regard to approximation to sectoral and horizontal legislation, institutions and standards (priority areas already identified)
- Public Procurement: Phase 1 almost finalised
- Services (4 subareas): Internal Market Treatment: not yet considered

5. The EU-Ukraine AA: still fit for purpose?





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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL**

Commission Opinion on Ukraine's application for membership of the European Union

Ukraine has demonstrated the resilience of its institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities.

The Commission, therefore, recommends that Ukraine be granted **candidate status**, on the understanding that the following steps are taken:

- enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations;
- finalise the integrity vetting of the candidates for the High Council of Justice members by the Ethics Council and the selection of candidate to establish the High Qualification Commission of Judges of Ukraine;
- further strengthen the fight against corruption, in particular at high level, through proactive and efficient investigations, and a credible track record of prosecutions and convictions; complete the appointment of a new head of the Specialised Anti-Corruption Prosecutor's Office through certifying the identified winner of the competition and launch and complete

III. MEMBERSHIP APPLICATIONS OF UKRAINE, THE REPUBLIC OF MOLDOVA AND GEORGIA

10. The European Council recognises the European perspective of Ukraine, the Republic of Moldova and Georgia. The future of these countries and their citizens lies within the European Union.
11. The European Council has decided to grant the status of candidate country to Ukraine and to the Republic of Moldova.
12. The Commission is invited to report to the Council on the fulfilment of the conditions specified in the Commission's opinions on the respective membership applications as part of its regular enlargement package. The Council will decide on further steps once all these conditions are fully met.
13. The European Council is ready to grant the status of candidate country to Georgia once the priorities specified in the Commission's opinion on Georgia's membership application have been addressed.

Conclusions – 20 and 21 October 2022

10. The European Council calls for the timely provision of the remaining EUR 3 billion in macro-financial assistance for Ukraine. It invites the Commission to present, and the Council to work on, a more structural solution for providing assistance to Ukraine. The full potential of the Association Agreement and the Deep and Comprehensive Free Trade Agreement with Ukraine should be used to ease its access to the Single Market.

Association Agreement still fit for purpose?

- ‘Dynamic nature’ of the AA:
 - recalibrate some DCFTA requirements
 - AA and DCFTA can remain an up-to-date and realistic instrument promoting economic reforms in Ukraine
- Reorientation towards pre-accession agreement?
- Gradual integration into EU (Internal Market) (staged approach)
- Further integration into EU sectoral policies and instruments
- Association Trio (see e.g. [Eastern Partnership Summit – Joint Declaration](#); December 2021)
- Envisaged sectoral integration: the twin green and digital transitions, connectivity, energy security, justice and home affairs, strategic communication, healthcare, and participation in several EU agencies and programmes.



Q&A