

Aspects of planning for implementation of the EU-Ukraine New Enhanced Agreement¹

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EU-Ukraine relations are heading to a new stage, marked by the expected finalisation of the New Enhanced Agreement (NEA), which, considering the EU-Ukraine summit conclusions of 2008 may also be called Association Agreement. The new stage of bilateral relations is expected to be characterised by enhanced commitments of Ukraine as to its European integration activities, which is important in view of its long-standing EU membership ambitions.

The new EU-Ukraine treaty, if signed, will not only mark a diplomatic success for Ukraine, but also bring new challenges of which overwhelming majority would lie in domestic rather than in foreign policy area. This should not come as a surprise, however, since the only way to reach the EU destination is via domestic reforms based on standards and principles of the European Community. Even in the absence of clear membership perspective “Europeanised” strategy of domestic reforms can become a realistic way for Ukraine to be able to cope with competitive pressures which should arise after achieving the EU-Ukraine deep free trade area, and eventually, full integration into the EU single market.

The implementation of the commitments embedded in NEA, particularly those pertaining to legal approximation, will require not only political devotion, but also design and use of a well-developed planning and implementation systems for the already undertaken obligations. The planning component will require smooth coordination within the executive branch as well as communication with civil society and business. Implementation will necessitate capable public administration with lucid understanding of *acquis communautaire* and motivation to “Europeanise” the state. The challenge seems to be too complex to be tackled within the current European integration framework in Ukraine. To put it straight, implementation of NEA calls for

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a comprehensive strategic planning (programming) document which would integrate variety of the required implementing activities and which ownership would be shared by the entire public administration.

This short paper aims at offering a number of tactical and strategic suggestions to the planning system for NEA implementation as far as efficient implementation of legal approximation component is concerned. It analyses applicability of the Polish European integration experience in the Ukrainian circumstances. It also analyzes the framework of European integration in Ukraine, but in a rather limited extent as this has already been done at length².

1 The main elements of the current framework of European integration in Ukraine

European integration framework (institutions and procedures) in Ukraine has certain characteristics which make it special when comparing to former and current EU accession aspirants. Particularly this manifests itself via the existence of parallel tracks (processes) of integration represented by the *EU-Ukraine Action Plan*³ (ENP AP) and *National Programme for Legal Approximation*⁴ (NPLA). Activities within NPLA represent a ‘voluntary’ component, while ENP AP is considered to be an obligation of Ukraine, a commitment undertaken by it before the European Union. Legally, activity of harmonisation of the national legislation in Ukraine with that of the EU is framed ‘in a soft way’ by the Art. 51 of EU-Ukraine Partnership and Cooperation Agreement. Its wording says that Ukraine “shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”⁵ (“best efforts” clause).

Empirically, Ukraine does implement its Action Plan obligations however divergent the expert assessments and official positions may be⁶. On the other hand, the NPLA activities show poor

² See, for example, the final report of European Union Co-ordination Project (EUCOP, 2008)

³ See “EU-Ukraine Action Plan” European Neighborhood Policy, adopted in 2005

⁴ This is framed by the Law of Ukraine “On National Programme on Approximation of the Ukrainian Legislation to the Legislation of the European Union” of 18 March 2004, #1629

⁵ See Art. 51 of PCA

⁶ For this consult: Національна безпека і оборона, №6 (100), 2008; EU-Ukraine Action Plan, Joint Evaluation Report, March 2008; ‘Implementation of the European Neighborhood Policy in 2007’, Progress Report Ukraine

track record. According to Mr. Grygoriy Nemyria, Vice Prime Minister of Ukraine, in 2005 – 2007 the implementation rates of NPLA measures were 50, 25 and 10% respectively. Furthermore, if the notion of ‘implementation’ is taken to be beyond adoption of legal acts and also applied to the day-to-day application of EU norms, implementation is lagging behind along both Action Plan and NPLA dimensions. This is often manifesting itself via lack of implementing provisions for fulfilment of the norms of approximated legislation (e.g. implementation of EU technical regulations in Ukraine) and lack of understanding of the essence of new legal norms. For this reason as well as taking into account increasing complexification of commitments in the area of legal approximation within the NEA, a serious overhaul of the whole European integration system in Ukraine would be needed. Ukrainian government has already begun some of the transformations in this direction and it is important not to loose pace in this process.

This policy paper suggests an integrated strategic planning approach embedded in a strategic planning document typically called National Programme for Adoption of Acquis (further NPAA). It suggests that all legal approximation measures and the main implementation activities are placed within the single NPAA, which, being a ‘living’ document could flexibly be adjusted by Ukrainian side⁷. For instance, when it comes to the Polish pre-accession track, their NPAA was based on⁸: EU-Poland Europe Agreement, recommendations of bilateral institutions within the Europe Agreement framework, recommendations of EU institutions (e.g. Commission reports) and *unilateral Polish priorities*. Should similar approach be taken by Ukraine, the latter component could flexibly account for any ‘unilaterally established’ legal approximation measures.

2 Options as to the programming for implementation of NEA

It is possible to embark upon implementation of NEA by continuing usage of the existing programming framework of European integration in Ukraine. However, if we assume that the workload of NEA obligations would increase significantly in comparison to the current EU-

⁷ Such adjustment can *inter alia* be in order in case of changes in *acquis communautaire*

⁸ According to the presentation of Cezary Herma, European Union Law Department, Office of the Committee for European Integration, Poland, 2008

Ukraine Partnership and Cooperation Agreement (as operationalised by the EU-Ukraine Action Plan), it is hardly realistic to make rapid progress within the existing planning framework.

Therefore the suggested option would be to develop an NPAA-type programme. It provides several advantages over the keeping *status quo*, namely increased transparency and clarity of the whole process as well as better possibilities for coordination and control. If single approach to financing is chosen (while now there are different financing modalities within legal approximation programme on one side and implementation of EU-Ukraine Action Plan – on the other), this would additionally provide for increased financial transparency of the process and make it easier to plan European integration activities according to the predefined financing priorities. Besides, monitoring and evaluation activities would also be streamlined. For instance, according to the statute of the State Department for Legal Approximation (under the Ministry of Justice), it organises monitoring of implementation of the Ukrainian legal acts which initially were drafted according to *acquis communautaire*⁹. At the same time, monitoring and evaluation of the EU-Ukraine Action Plan (including legal harmonisation within it) is done at the level of the Department on European Integration issues at governmental secretariat¹⁰. Thus having one ‘monitor’ over these processes could be more efficient – at least as far as deadline monitoring of legal harmonisation activities within both processes is concerned.

NPAA-type programme was used in all countries which went through accession process on the way to EU membership. Nevertheless, even if Ukraine has not been given clear EU perspective, provisions of NEA are expected to go quite far in terms of economic integration of Ukraine into a single EU market¹¹. And last, but not least, an NPAA-type programme makes the whole planning (and implementation) system more manageable by a single body, which, according to

⁹ See paragraph 7 of point 3 of the Statute of State Department for Legal Approximation adopted by the Resolution of Cabinet of Ministers from December 24th, 2004, #1742

¹⁰ This is being replaced now by a newly established Bureau for European and Euroatlantic Integration according to the Cabinet of Ministers Resolution on creation of Coordinating Bureau on European and Euroatlantic Integration (#649) adopted on July 16, 2008. The new Bureau will be charged to centralize coordinating activities in the area of European integration

¹¹ Single market is at the core of European project and its legislation represents a significant part of *acquis communautaire*

the governmental programme “Ukrainian breakthrough: for people and not for politicians”¹² should meet the intention of Ukrainian government.

Further analysis is focused on the second option – elaboration of NPAA-type planning document.

3 Programming element of strategic approach to the European integration: National Programme for Adoption of Acquis (NPAA)

The core of the planning process is a strategic planning document (i.e. NPAA) that was developed by almost all governments of the countries which concluded Association or Stabilisation and Association Agreements with the EU¹³. One can exemplify NPAA structure based on the example of the respective Polish document. Like all the documents of this kind, it is based on the criteria established during Copenhagen European Council¹⁴ which were consequently complemented by Madrid European Council requirement¹⁵. NPAA section ‘Ability to assume the obligations of membership’ contains the *acquis communautaire* and corresponding national transposition and implementation measures that are also relevant to the NEA (deep free trade area) implementation. As this paper focuses on legal approximation, it will further analyze only this section of NPAA.

Polish NPAA can provide for a typical structural component which is used in chapter ‘Ability to assume the obligations of membership’ (underlying of legal approximation). The example below

¹² Програма діяльності Кабінету Міністрів України "Український прорив: для людей, а не політиків" adopted by Governmental Resolution on January 16, 2008 #14, http://www.kmu.gov.ua/control/uk/publish/article?art_id=104231107&cat_id=47292901

¹³ Probably the most comprehensive collection of strategic planning documents can be found at the web-page <http://mis.ueplac.kiev.ua/ua/international/whole>

¹⁴ Membership criteria require that the candidate country must have achieved: (1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; (3) the ability to assume the obligations of membership including adherence to the aims of political, economic and monetary union

¹⁵ It says that the candidate country should adjust its administrative and judicial structures in order to implement the *acquis communautaire* effectively

uses *acquis* section ‘Free Movement of Goods’¹⁶ which is the first priority in the respective chapter.

3.1 Structure of Priority 1 of ‘Free Movement of Goods’ chapter of Polish NPAA (approved by the Council of Ministers of the Republic of Poland on June 12, 2001)

Priority 1. ADJUSTMENT OF POLISH LEGISLATION IN THE AREA OF NEW APPROACH DIRECTIVES

1. Description of the background of the priority and textual presentation of the general actions to be undertaken.
2. Detailed description of methods of implementation according to the table below.

Table 1. Structural elements of Chapter “Free Movement of Goods”

Content	Required details	Example
I. PRIORITY DESCRIPTION		
1. FINAL OBJECTIVE		Full harmonization and implementation of Community legislation in the area of conformity assessment of products and metrological control of measuring devices.
2. INTERMEDIATE OBJECTIVES		Adjustment of the Polish Accreditation Centre, established on 1 January 2001, to European standards concerning accreditation so that Poland becomes a member of the European Co-operation for Accreditation (EA).
3. IMPLEMENTING INSTITUTIONS	<ol style="list-style-type: none"> 1. Leading institution 2. Co-operating institutions 	Leading institution: Ministry of Economy Co-operating institutions: Ministry of Post and Telecommunications, Ministry of Health
II. METHODS OF IMPLEMENTATION		
1. SHORT ASSESSMENT OF EXTENT OF INCOMPATIBILITY OF POLISH LAW WITH ACQUIS COMMUNAUTAIRE		
2. SCHEDULE OF NECESSARY LEGISLATIVE CHANGES (new draft laws and amending drafts, ordinances of Government)	<ol style="list-style-type: none"> 1. Title and number of Community act. 2. Title of drafted Polish act (including responsible drafting institution). 3. Date of submission for interministerial coordination. 4. Date of approval by the Council of Ministers or appropriate minister. 5. Expected date of: 1) adoption by Parliament; 2) entry into force. 	<ol style="list-style-type: none"> 1. Council Directive 8/378/EEC of 3 May 1988 [OJ L 187/88] on the approximation of the laws of the Member States concerning the safety of toys 2. Ordinance of the Council of Ministers to the law on general product safety concerning safety of toys (Office for Competition and Consumer Protection) 3. 19.01.2001 4. II quart. 2001 5. 2) 1 July 2002
3. NECESSARY INSTITUTIONAL CHANGES ¹⁷	<ol style="list-style-type: none"> 1. Contents of changes. 2. Existing or planned legal ground for change. 3. Implementation deadline. 	<ol style="list-style-type: none"> 1. Market surveillance in the field of new approach directives 2. Modification of currently applicable regulations 3. I-II quart. 2002

¹⁶ This document can be downloaded here:
[http://www.ukie.gov.pl/HLP/files.nsf/0/39AC859BF054B22DC1256E7B0048CBD0/\\$file/nppm2001_01.pdf](http://www.ukie.gov.pl/HLP/files.nsf/0/39AC859BF054B22DC1256E7B0048CBD0/$file/nppm2001_01.pdf)

4. ADDITIONAL ACTIONS NECESSARY FOR ENTRY INTO FORCE OF NEW LEGAL REGULATIONS OR CREATION OF INSTITUTIONS ¹⁸	<ol style="list-style-type: none"> 1. Short description of actions 2. Implementation deadline 	<ol style="list-style-type: none"> 1. Keeping economic operators informed about changes to conformity assessment systems 2. On-going activity
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III. FINANCING: NECESSARY EXPENDITURES AND SOURCES OF FINANCING IN THE YEARS 2001-2002		
Classification ¹⁹	Examples	Breakdown for every line
Cost category/ costs and sources of their financing	<ol style="list-style-type: none"> 1. Investments (infrastructure. Equipment) 2. Employment of new personnel 3. Training 4. Expert opinion/legal opinion. Consultations 5. Translation 6. Other 	<ol style="list-style-type: none"> 1. Years 2. Budget (1000PLN) 3. PHARE (1000EUR) 4. Total PLN

As can be seen from the Table 1, harmonisation of legal framework is not only about adoption of laws by the Parliament. In case of Poland, some directives of *acquis communautaire* were transposed by the means of Governmental ordinances. Generally, implementation would require mobilising the full range of normative tools. At the same time, NPAA *per se* does not normally go deeper than specifying laws/ordinances and particular activities. When the aim of activity/change is established, line executives (ministries) have discretion in the method of implementation as long as they provide for full implementation.

3.2 Preparation and implementation of NPAA – Polish experience

Before drawing lines between Polish experience and its applicability to Ukraine, one should take into account that the Polish NPAA was designed when accession negotiations with the EU²⁰ were underway. This situation is not equivalent to the current stage of EU-Ukraine relations. However it is still relevant for Ukraine. The level of detail of EU-Ukraine Action Plan is already comparable to Accession Partnership provisions (which are based on Europe Agreement²¹). It can further be assumed that NEA provisions would go even deeper and, hence, closer to Accession Partnership dispositions, which were key to Polish accession negotiations.

In Poland the priorities of implementation of *acquis communautaire* were reflexive of the White paper “Preparation of the associated countries of Central and Eastern Europe for integration into

¹⁷ Institutional changes are presented within the breakdown of institutions, i.e. particular institution’s name is followed by the activities to be undertaken within it

¹⁸ “Additional actions ...” part includes, among other things, personnel training activities and other capacity building actions

¹⁹ This breakdown is done separately for every institution, e.g. Ministry of Economy, Polish Accreditation Centre etc.

²⁰ The accession negotiations of Poland started on 31 March 1998

²¹ Polish Europe Agreement was adopted before negotiations on accession and did not include detailed annexes with legal approximation obligations

the internal market of the union” (1995). The Commission created this book with participation of the Member States and this paper was the first road map in the process of integration. It provided for short-, medium- and long-term objectives of the Polish administration.

Preparation of NPAA took place in parts. In this process every ministry elaborated its respective part of the programme, including background information and tables and thereby assuming corresponding commitments. Line ministries prepared parts of the programme according to their policy-making competences. The centre of coordination of this work was in UKIE²². Polish authorities regularly revised NPAA to precise and amend it as necessary. Twice a year Poland was sending information to the European Commission before the Commission issued its reports.

No special EU technical assistance project was involved in elaboration of NPAA in Poland on permanent basis. At the same time a number of EU consultants were always readily available through the European Commission’s Delegation representation in Warsaw. There was no particular horizontal assistance, but rather a lot of capacity building (seminars etc.) activities for line ministries which were preparing drafts of the respective parts of NPAA.

Similar to the current setting in Ukraine in which Action Plan measures are agreed on the level of EU-Ukraine Cooperation Committee's subcommittees, the parts of Polish NPAA were consulted with the European partners during such subcommittee meetings.

Poland adopted two types of structures to make European integration work. On the one side, there were departments of European affairs in every ministry charged with coordination of European integration activities within their organisations. On the other, interministerial task forces were formed due to multidisciplinary nature of many issues which required not only internal but sometimes external expertise in different fields. Thus in the period of implementation of NPAA many task forces were created to work on specific sectoral and intersectoral issues. They consisted of the representatives of the relevant state bodies and external experts. The task forces were responsible for drafting (sets of) legal acts. UKIE as a coordinating body was agreeing the working timetable with both line ministries and all task forces. The approach was to analyse particular piece of *acquis*, define to which fields it belongs and then compose a task force (intra- or interministerial) which would include the people with

²² Office of the Committee for European Integration (Polish: *Urząd Komitetu Integracji Europejskiej*)

the required competences or the people who could quickly learn and solve a particular problem. Whenever experts participated in drafting of task forces, they had only a consultative status and could not write norms themselves.

UKIE representatives (including the Secretary of the UKIE) had frequent meetings with line ministers and line ministries (officers) regarding implementation. One line of communication and assessment took place in writing: what was agreed, what has been done, are there any lags in implementation, and why was it so. Apart from that, the UKIE Secretary also met with line ministers and people from the line ministries personally. While the UKIE Secretary could meet with ministers individually, ministerial representatives were communicating with him in group meetings. These meetings were business-like. When ministries did not comply with the deadlines (to which they initially agreed), they were held responsible for the problem (via prime-ministerial channel if necessary). This system worked quite efficiently.

A powerful tool which was used in the process of *acquis* implementation was a requirement for line ministries to prepare drafts of all the necessary secondary acts as a package to be used for implementation of a draft law. This idea was not and is not popular among Polish public servants first of all for its heavy supplementary drafting needs. However, in certain cases usage of this requirement can be justified. Nowadays, the Polish government is trying to reintroduce it. *Ceteris paribus* this system works better in case of a strong parliamentary coalition which supports governmental legal initiatives; although even in this case there is no absolute guarantee that Parliament would not change governmental draft.

During EU accession Poland made use of a system of compatibility check of national legislation to *acquis communautaire*. It was similar to the current Ukrainian system in which a designated body (in Ukrainian case this is State Department for Legal Approximation at the Ministry of Justice, in Polish case this was UKIE secretariat) provides expert opinion on drafts' compliance. However, in Ukraine this function is much weaker than it was in pre-accession Poland. Polish non-compliance was considered a block on the way to accession while in the case of Ukraine this does not pose as big threat for obvious reasons. Hence, despite similar legal force in both cases, political effect of negative decisions in terms of drafts' compliance to *acquis communautaire* in Poland was much stronger.

4 Recommendations as to organisation of planning and implementation processes in Ukraine

4.1 NPAA-type programme

In order to successfully implement NEA provisions, Ukrainian government shall develop an NPAA-type programme taking into account the following:

- NPAA-type programme should become the programme of domestic reforms, a reference point for any (successive) government (governmental programme). NPAA should provide for a very clear road map and for a possibility to adjust it according to the dynamics of EU-Ukraine relations, decisions of EU-Ukraine bilateral bodies and the individual priorities of Ukraine.
- NPAA-type document requires financial estimations, at least on the level of forecasts. Rough estimates as to the resource needs of different reforms and measures can be taken from NPAA documents of other countries (e.g. Poland, Turkey²³).
- It is necessary to link NPAA tasks with all the available opportunities to engage technical assistance resources from the EU, MSs and other national and international donors.
- Currently 80 to 90% of all the new laws regulating economic activity in Poland relate to the *acquis communautaire*. While in case of Ukraine and its 'less binding' obligations this ratio may be smaller, *acquis communautaire* should become an important point of reference in Ukraine during any drafting process in economic domain.

4.2 Administrative structures for *acquis* implementation

It is important to ensure understanding of programming process for NEA implementation by public servants. This may be facilitated via available supplementary materials of the European Commission. For instance, there exists a reference (catalogue) on 'typical' administrative structures required for implementation of *acquis communautaire*. This document was compiled on the eve of EU enlargement of 2004 and should serve a very good point of reference²⁴. There is a chance that a fresher version of this document is featuring in EU-Croatia negotiations.

²³ http://mis.ueplac.kiev.ua/files/int_exp_doc_273.pdf

²⁴ MAIN ADMINISTRATIVE STRUCTURES REQUIRED FOR IMPLEMENTING THE ACQUIS, OVERVIEW

4.3 Programming (planning)

Implementation of NEA is a costly activity. It imposes expenses on the Ukrainian government, on certain categories of market participants, on low-income consumers. At the same time, wise sequencing and planning, usage of transitional periods, efficient use of the EU technical assistance and funding possibilities²⁵ allow decreasing such costs. Therefore one should not approach the programming in a technical way only. Rational approach would dictate looking at the respective parts of the *acquis* offered for implementation and investigating both impacts and interrelations between the proposed *acquis* norms. Afterwards it is necessary to develop a scenario of implementation²⁶. That is sequencing analysis is very important to avoid (minimise) negative effects. In this respect usage of regulatory impact assessment is an essential tool.

In the past Ukraine has already experimented with a strategic programming document in European integration area. Back in 2000 president Leonid Kuchma adopted a Decree #1072 “On the Programme of Integration of Ukraine into the European Union” which enacted Ukrainian programme of European integration designed by the Cabinet of Ministers. Today this document may serve a good starting point for elaboration of a strategic planning document (NPAA) in the context of NEA implementation. Yet the new NPAA should be ‘of direct relevance’, meaning that its implementation should not require separate action plans, but serve this purpose directly thereby providing for clearly defined deadlines, necessary financial forecasts, staff needs and précising responsible executive bodies.

It is dangerous to proceed with strategic planning without sufficient participation of the executive bodies which will later implement the planned. The line ministries’ ownership of the NEA is crucial, which requires their involvement on all stages: negotiations, programming for implementation and implementation itself.

It is recommended to converge NPLA and Action Plan types of programmes in the framework of NPAA. As has already been explained in Chapter 3, this would provide for increased financial

(last update: 30 April 2003), informal working document for information purposes only (please contact the author for getting this document)

²⁵ Apart from the already existing instruments, it is expected that Eastern Partnership will provide new flexible tools for this kind of assistance

²⁶ For instance, this is the case while implementing New Approach directives. First, horizontal components of technical regulation system are to be implemented and only then one can implement sectoral directives.

transparency of the European integration process, enhanced monitoring and evaluation possibilities.

4.4 Implementation of NEA

Enormous investment needs spawned by implementation of the EU norms can be significantly reduced in case of a well-thought-out involvement of business via provision of corresponding investment opportunities – this concerns first of all infrastructural projects, like building of roads. In this sense an improved version of the law on Public Private Partnerships is crucial. To that, general improvement of investment climate in Ukraine, protection of the investors' rights is complementary policies to be pursued.

Introduction of the mandatory requirement to draft full package of secondary legislation together with draft laws (as exemplified in Polish experience) is a strong impulse for raising quality of planning and implementation. However, this might impose unbearable burden on bureaucracy. Therefore Ukrainian government should consider selective application of this requirement - for the areas of *acquis communautaire* which exhibit the biggest lack of implementation. For instance, these can be the most corruption-ridden domains.

An additional way to 'rationalise' implementation of NEA is to achieve the best synergy possible between WTO compliance activities and EU norms' implementation. While conducting planning for NEA implementation, one should take into account that implementation of the deep free trade area component of NEA may, at least partially, coincide with the WTO commitments' implementation. In order to be more precise here, it is necessary to analyse a working party document of Ukraine on the accession of Ukraine to WTO²⁷.

²⁷ Report of the Working Party on the Accession of Ukraine to the World Trade Organization, <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/ACC/UKR152.doc>