

German Advisory Group
Institute for Economic Research and Policy Consulting

Policy Paper Series [PP/04/2016]

**DCFTA implementation in Ukraine:
Progress achieved and challenges ahead**

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Berlin/Kyiv, November 2016

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DCFTA implementation in Ukraine: Progress achieved and challenges ahead

Executive Summary

The deep and comprehensive free trade area (“DCFTA”) between Ukraine and the EU – as part of the broader Association Agreement – came into force in January 2016. To comply with the DCFTA, Ukraine has to implement a very large amount of measures over a period of 10 years. In this paper, we review the progress so far in adopting measures related to trade in goods.

National treatment and market access for goods. Ukraine started opening its market, abolished the temporary import surcharge and established tariff rate quotas for sugar, poultry, and pork in line with DCFTA commitments. However, Ukraine increased export duties on metal scrap and introduced quantitative restrictions (an export ban) on wood logs. By doing so, it clearly violated the DCFTA. In sum, implementation is largely on schedule, but two cases of clear violation have been already registered.

Technical barriers to trade (“TBT”). The harmonization of cross-sectoral legislation, of sectoral technical regulations and standards, makes good progress and is on schedule. Also regarding the institutional setup progress was achieved, but further efforts are necessary to develop the system guaranteeing efficient implementation of newly adopted European norms.

Food safety. Ukraine adopted the SPS Harmonisation Strategy and achieved progress in legislative harmonization as well as on the establishment of the requested institutional setup. Thus, implementation is so far on schedule, but a huge amount of tasks lies ahead aggravating the risk of delays. To cope with the foreseen tasks, public authorities need to set priorities and facilitate internal coordination and cooperation.

Customs issues. By introducing “single customs windows” in August 2016, Ukraine pursued to establish transparent, efficient and proportional customs procedures. However, single window reportedly does not work properly yet. Regarding common transit, there is a high risk of delay in transposing provisions of the Common Transit Convention and the Convention on the Simplification of Formalities in Trade in Goods into the Ukrainian legislation.

Public procurement. Ukraine adopted a new Public Procurement Law in December 2015. By doing so, the country made significant progress in the harmonization of public procurement legislation. Furthermore, the on-line procurement system ProZorro was established as a mandatory instrument for over-threshold public procurement. ProZorro won in the category of Public Sector award in the World Procurement Award 2016. The system complies with DCFTA obligations. However, some companies suffered harassment from public institutions after winning public tenders. This case shows how the general problem of a weak rule of law can undermine progress in selected areas.

Protection of intellectual property rights (“IPR”). Ukraine has launched a process of legal harmonization and institution building to meet the Association Agreement requirements, but it is too early to assess results. Reported violations of IPR show however that the key issue to focus is not legislation, but implementation.

Competition policy. Ukraine has implemented many of its legal commitments ahead of schedule but suffered from the weak implementation of legislation. The main efforts are to be on the reduction of the actual level of monopolization in the country. Increasing the independence of the Antimonopoly Committee (AMCU) is a key prerequisite for strengthening competition in a still widely monopolized economy.

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Acknowledgements

The paper is partly based on the Handbook “Deepening EU-Ukrainian Relations: What, why and how?” (edited by Michael Emerson and Veronika Movchan) prepared in the framework of the research project “Understanding the EU’s Association Agreements and Deep and Comprehensive Free Trade Areas with Ukraine, Moldova and Georgia” led by the CEPS (Belgium) in partnership with the Institute for Economic Research and Policy Consulting (Ukraine), Expert-Grup (Moldova) and Reformatics (Georgia).

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1. Introduction

The Association Agreement signed by Ukraine and the EU in 2014 envisages the establishment of a deep and comprehensive free trade area (DCFTA) between the parties. Although the DCFTA contains commitments for both sides, these commitments are rather different.

The EU has committed to liberalizing access to its market by removing all import duties on industrial goods and most of the duties on agricultural goods (for selected agro-food products, partial liberalization is applied in the form of tariff rate quotas). Also, the EU pledged to remove export subsidies on agricultural products supplied to Ukraine. However, the EU has not committed to implementing any regulatory changes.

The implementation of the EU commitments was brought forward in April 2014, in the context of autonomous trade measures. As the DCFTA envisages asymmetrically faster liberalization of market access by the EU, by end-2016, the EU implemented most commitments, although a gradual reduction of remained import duties is scheduled for the coming years.

Ukraine's commitments are far more extensive. In addition to the liberalization of market access through elimination of import duties on all industrial products and most of the agricultural products, the country committed to conducting an extensive regulatory harmonization with the EU laws. The regulatory changes will concern safety standards for industrial and food products, customs services, protection of intellectual property rights, competition policy, and state aid, and many other issues. The changes will allow not only reducing non-tariff barriers to trade but also improving the business and investment climate in the country.

The implementation of the DCFTA formally started in January 2016. Since this date, Ukraine has officially begun implementation of its commitments, in particular, a gradual reduction in import duties. However, many regulatory reforms foreseen as commitments within the DCFTA have been advanced well before as other international obligations or due to the internal process of reforms.

Below we consider the implementation of Ukraine's (not EU!) DCFTA commitments related to trade in goods. The following issues are covered market access for goods, technical barriers to trade (TBT), food safety (SPS), customs services, public procurement, protection of intellectual property rights, and competition policy. Main questions are:

- What changes have been already implemented?
- Is Ukraine ahead, in line or behind schedule?
- Is Ukraine fully compliant with its commitments?

The policy recommendations conclude the paper.

2. DCFTA: status quo in implementation and challenges ahead

2.1. National treatment and market access for goods

An opening of a market access for goods is a classical part of any free trade agreement. In the modern world, a level of tariff protection is quite low making economic gains associated with duty-free trade moderate. Still, these changes precede any further – deeper – integration efforts of the countries.

Below we consider that Ukraine has already done in the area of market access liberalization.

i. Liberalization of import duties

In line with the DCFTA commitments, Ukraine has launched a reduction of its import duties vis-à-vis the EU in 2016. In the first year of implementation, average import duties vis-à-vis EU reduced from 4.5% to 1.7%. Transition periods will differ for different product categories, mostly up to seven years, with a notorious exemption of passenger cars that enjoy ten-year transition period and additional safeguard measures that could last until 2030.

Thus, Ukraine started opening its market in line with its DCFTA commitments.

ii. Abolishment of temporary import surcharge

At the end of 2015, Ukraine abolished temporary import surcharge introduced in February 2015 for the balance of payments purposes. The surcharge at 5% for industrial products and 10% for agricultural products was applied non-discriminatingly regarding partner countries and products and was recognized by the WTO as compliant with its norms. Still, Ukraine committed to eliminating the surcharge at the end of 2015 as the balance of payments situation stabilizes.

Thus, Ukraine implemented its commitments regarding temporary import surcharge.

iii. Implementation of TRQs

As a form of partial liberalization of market access, Ukraine established three tariff rate quotas (TRQs) – on sugar, poultry, and pork. The country timely adopted the legislation needed to operate the TRQs and started their implementation in line with the schedule. As of mid-October 2016, TRQ usage was as follows:

- sugar 68%,
- poultry 100%, poultry additional 0.1%,
- pork 23%, pork additional 0.1%

Thus, the commitment is implemented in accord with the Agreement.

iv. Elimination of export duties

Ukraine committed to eliminating all export duties in trade with the EU in ten years. For selected products like sunflower seeds and metal scrap, temporary surcharges could be applied sustaining a previous level of the protection within transition period. In January 2016, Ukraine launched the implementation of this commitment reducing the export duties.

However, in September 2016, the President signed the law allowing a temporary (one-year) increase in export duty on ferrous metal scrap. The law is a clear violation of the DCFTA and has already caused serious concerns of the EU.

Thus, Ukraine has already violated on its commitments regarding export duties on ferrous metal scrap.

v. Quantitative restrictions and bans

Ukraine committed to withstanding from applying quantitative restrictions and bans in a trade with the EU. However, in 2015, a ten-year ban on exports of wood logs was passed, violating the DCFTA commitments. The ban was formally justified largely by environmental protection reasons, but de-facto created benefits for domestic wood-processing industry and also incentivised wood log smuggling.

The replacement of the ban by a less trade-distorting regulation has been put as one of the prerequisites of the provision of the EU macro-financial aid.

Thus, Ukraine violated its DCFTA commitments regarding quantitative restrictions.

Main tasks ahead include:

- Replace protectionist measures with measures meeting UKR legitimate concerns, but avoiding trade distortions; e.g. wood auctions instead of export ban
- Continue liberalization of exports and import duties as agreed

Summing up, Ukraine largely stays on schedule in the implementation of its commitments related to market access, but two cases of clear violation have been already registered. The resolution of these concerns and smooth implementation of liberalization should remain a priority for the government to ensure that the duty-free trade generates expected benefits.

2.2. *Technical barriers to trade*

In the sphere of technical barriers to trade (TBT), Ukraine committed to aligning its legislation and procedures with the respective norms and practices of the EU.

The ultimate aim of this commitment is to radically reduce non-tariff barriers to industrial products trade. It is to be achieved by establishing Ukraine's system of control over industrial products' safety that is dynamically identical to the EU system. It will allow signing the Agreement on Conformity Assessment and Acceptability of Industrial Products (ACAA) and thereby establish a common market for the products covered by the ACAA.

Box 1. Structure of the TBT system in the EU

The EU system for ensuring industrial products' safety consists of the following key elements:

- i. **Cross-sectoral / horizontal legislation** regulating general product safety, liability for defective products, a common framework for marketing conditions, and requirements for accreditation and market surveillance;
- ii. Sectoral / vertical mandatory **technical regulations** are establishing 'essential' health and safety requirements. Currently, there are about 30 technical regulations of the 'New Approach';
- iii. Voluntary **standards**. Here, 'harmonized' standards play a special role as they provide a presumption of compliance with respective technical regulations. Currently there are about 5,000 harmonized standards in the EU, which is about 20% of a total corpus of the EU standards;
- iv. Various **institutions** conducting conformity assessment procedures, accreditation of the conformity assessment bodies, market surveillance, standardization, and metrology.

The harmonization of the Ukrainian legislation with the EU norms was launched soon after Ukraine's accession to the WTO in 2008, i.e. well before the DCFTA was launched.

Below we assess the progress in key areas in implementing TBT commitments by the middle of 2016.

i. Harmonization of cross-sectoral legislation

According to the DCFTA schedule, the harmonization of horizontal legislation is to be achieved within a year after the Agreement enters into force. Already by the end of 2015, Ukraine's Parliament passed or amended six key laws¹ in the sphere aligning them with the EU norms. Although the European Commission has not yet officially evaluated Ukraine's progress, no major surprises are expected.

Thus, Ukraine is ahead of schedule in this field.

ii. Harmonization of sectoral technical regulations

According to the DCFTA, the sectoral harmonization is to be completed in the period from two to five years, depending on the sector. Formally, Ukraine has already adopted 24 out of 27 sectoral technical regulations envisaged by the Association Agreement. However, most of these regulations are based on, but not identical with the respective EU norms. Since identity is a key precondition for the conclusion of the ACAA, further harmonization efforts are required.

Currently, at least eight technical regulations are closely aligned with the EU directives, including the sectors earmarked for the first round of the ACAA such as electromagnetic compatibility, electrical equipment, and machinery. According to a representative from the Ministry of Economic Development and Trade, Ukraine has already asked for ACAA talks and sent the respective legislation for a formal evaluation of the harmonization efforts.

It should be noted that most progress in bringing technical regulations in full compliance with the EU directives was achieved until the end of 2015 when the EU technical assistance project in the sphere of technical barriers to trade was still active. This highlights the importance of technical assistance from the EU for Ukraine's efforts in the DCFTA implementation.

Thus, Ukraine is largely on schedule in the harmonization of sectoral technical regulations. However, the pace of harmonization slowed down in 2016. Stronger efforts are required to secure a smooth implementation in the future.

iii. Harmonization of standards

Ukraine committed to eventually adopt the entire corpus of the EU standards. Recently, the efforts focused on two issues. First, on the adoption of EU standards, in particular, harmonized standards providing a presumption of conformity with mandatory technical regulations. In 2015, about 2,800 standards aligned with the EU and international standards were adopted. About 60% of all standards currently enacted in Ukraine is internationally-aligned. Second, efforts focused on the abolition of obsolete GOST standards, which were adopted before 1992. Over 14,000 GOST standards were canceled in 2015. Moreover, a mandatory certification, a Soviet-era heritage, will cease to exist starting from 2018.

Thus, Ukraine demonstrates clear progress in this sphere.

¹ Law No. 2735-VI on State Market Surveillance and Control over Non-food Products; Law No. 2736-VI on General Safety of Non-food Products; Law No. 3390-VI on Liability for Damage Caused by Defected Product; Law 1315-VII on Standardisation; Law No. 1314-VII on Metrology and Metrological Activity; Law No. 124-VIII on Technical Regulations and Conformity Assessment

iv. Institutional setup

The adoption of harmonized cross-sectoral legislation means that the country also has to build an institutional framework in line with the EU approaches and structures. The corresponding reforms have already started.

The National Accreditation Agency of Ukraine is an associate member of the European Cooperation for Accreditation and recently achieved recognition of the equivalence of their operated accreditation systems and the reliability of the conformity-assessment results.

The State Service for Food Safety and Consumer Protection (SPSA) was launched in spring 2016 as the key responsible authority in the area of market surveillance. However, it still faces challenges associated with incomplete administrative restructuring; the authority was formed by a merger of several public services.

An independent national standardization body “Ukrainian Scientific Research and Training Centre for Standardisation, Certification, and Quality” (“UkrNDNC”) has been established and already received confirmation of its membership in the ISO and the IEC. In the future, the UkrNDNC is to achieve a full member of the European standardization organization.

In August 2015, the Strategy for the Development of the Technical Regulation System until 2020 was passed, envisaging among other things further institutional development of the system in lines with Ukraine’s DCFTA obligations.

Thus, the progress in the institutional setup was achieved, but further efforts are necessary to develop the system guaranteeing efficient implementation of newly adopted European norms.

Main tasks ahead include:

- Further efforts in harmonization of technical regulations, which should become identical with the EU directives in 2017-2020, depending on the sector;
- Capacity development of institutional bodies involved in standardization, accreditation, conformity assessment, market surveillance, and metrology;
- Development of physical infrastructure, in particular, a network of laboratories.

Summing up, reforms need to carry on, which a much stronger focus on implementation.

2.3. Food safety

In 2015, agriculture and food products reached 41% of total exports of Ukraine amounting to USD 14.5 bn. The EU was the main trade partner of Ukraine absorbing 28% of all country’s agro-food exports. Further harmonization of the Ukrainian legislation with the EU norms and practices could not only widen access to the EU market but also simplify entrance to other markets that recognize the EU norms.

The aim of the DCFTA is to achieve an equal treatment of the EU and Ukraine products on both markets by radically reducing NTBs for food products by establishing a system of food safety control that is dynamically equivalent to the EU.

Below we assess the progress in key areas in implementing food safety commitments by the middle of 2016.

i. Comprehensive Strategy for SPS Legislation Harmonisation

Adoption of the SPS Harmonisation Strategy has been the first benchmark for the implementation of the DCFTA commitments in this sphere. Unlike many other DCFTA chapters, the chapter on food safety issued did not contain an explicit list of EU laws to be transposed into the Ukrainian legislation. This list had to be defined by the SPS harmonization strategy several months after the DCFTA enactment.

In February 2016, the CMU adopted the Comprehensive Strategy for SPS Legislation Harmonisation² in line with the DCFTA commitments. The Strategy envisages harmonization of 255 EU laws in 2016-2021 that seems to be a gigantic task for public authorities. Strong cooperation and coordination efforts, as well as priority setting, are required to meet obligations. The EU approval is awaited for making Strategy the reference document for sector reforms by amending the Association Agreement Annex.

Thus, Ukraine met the first benchmark – the adoption of the SPS Harmonisation Strategy. The task of its successful implementation remains a key challenge.

ii. Legal harmonization

The legislative harmonization in the sphere of food safety progressed before and in parallel with the development of the Comprehensive Strategy for SPS Legislation Harmonisation. For instance, in 2014, the law regarding the identification of animals was amended to align it with the EU requirements, and over 2015, the necessary secondary legislation was passed. In April 2015, the law on animal origin by-products not intended for human consumption harmonized with several EU regulations was adopted³ although its further amendments are necessary to complete the harmonization. The progress was achieved in the harmonization of legislation on seed and seedling.

Currently, several important draft laws regarding the SPS harmonization are submitted to the Parliament, but their adoption process is slow. It concerns e.g. amendments to the law on animal origin by-products (submitted in June 2015, passed in the first reading), a draft law on state control over food safety legislation compliance (submitted in November 2014, passed in the first reading), and the draft law on feeds (submitted in May 2015).

Summing up, Ukraine achieved some progress in legislative harmonization ahead of the DCFTA schedule, but the speed of reforms is low.

iii. Institutional Setup

As a part of institutional reform in the sphere of state control over the safety of products, the State Service for Food Safety and Consumer Protection (SPSA) was established as a single responsible authority. The SPSA replaced some public authorities including the State Veterinary and Phytosanitary Service, the State Inspection for Consumer Protection and the State Sanitary and Epidemiological Service. The reorganization was launched in September 2014, while the SPSA started operations only in April 2016.

Thus, Ukraine progressed in the establishment of the institutional setup in line with the DCFTA obligations.

² <http://zakon0.rada.gov.ua/laws/show/228-2016-%D1%80>

³ <http://zakon0.rada.gov.ua/laws/show/287-19>

iv. Access for individual establishment supplying animal-origin products

While the country gradually progresses in a legislative harmonization aiming to ensure equivalent food safety on both EU and Ukraine markets, animal-origin product exporters have gradually got access to the EU market through an authorisation of individual establishments. This complex, lengthy process requires close cooperation between public authorities and enterprises as the EU inspectors verify both national control system and food safety of individual chains before the authorization for an individual establishment is granted.

As of mid-October 2016, Ukraine has authorized exporters in such animal product categories as fishery products (2008), poultry meat (2013), eggs (2014), minced poultry meat and poultry meat products (2015), raw milk and dairy products, snails, collagen (2016).

Thus, Ukraine's exporters supplying animal-origin products achieved significant progress in getting individual access to the EU market.

Main tasks ahead include:

- Harmonization with EU legislation – 255 EU laws to be harmonized in 2017-2021, strong cooperation and coordination efforts are required to meet obligations
- Capacity development of institutional bodies
- Development of physical infrastructure, in particular, a network of laboratories

Summing up, Ukraine is so far on schedule in the implementation of its SPS-related commitments, but a huge amount of tasks lies ahead aggravating the risk of delays. To cope with the foreseen tasks, public authorities need to set priorities and facilitate internal coordination and cooperation.

2.4. Customs issues

Costs of moving goods across the border constitute very important trade impediments in Ukraine. The country is ranked 109 out of 189 countries in the category "Trading across Borders" of Doing Business 2016, and 116 out of 160 in the category "Customs" of Logistics Performance Index 2016.

The aim of the Agreement is to reduce trade costs by ensuring the customs legislation and procedures are stable, transparent, non-discriminatory, and efficient, do not constitute unnecessary barriers to trade and prevent fraud. Also, Ukraine took several specific commitments regarding common transit, authorized economic operators, relief from customs duties and intellectual property rights (IPR) protection.

Below we assess Ukraine's progress in key areas in implementing customs-related commitments by the middle of 2016.

i. Establishment of transparent, non-discriminatory, efficient and proportional customs procedures

Important customs reforms were launched in 2016 responding to the commitment to implement the DCFTA, but also to the need to fight corruption and stimulate economic development by reducing trade barriers. In August 2016, "single customs windows" and a principle of silent consent in the case of 4-hour non-reply of customs officers were introduced. Also, additional video monitoring was established to increase transparency and prevent fraud, and special mobile groups fighting with corruption and smuggling were created.

It is too early to evaluate the ultimate impact of these changes, but first reports show that the reforms have not brought expected results quickly. According to the State Fiscal Service, about 25 thousand declarations were processed through "single customs windows" in August-October

accounting for about a quarter of standard customs turnover. A conflicting secondary legislation, poor intra-governmental cooperation, and insufficient technical capacity are among key reasons for the current slow start of the reform.

Thus, further efforts are necessary to ensure that the proclaimed reform is on track.

ii. Common transit

Ukraine committed to introducing provisions of the Common Transit Convention and the Convention on the Simplification of Formalities in Trade in Goods within the year after the DCFTA launch. It is foreseen that Ukraine will join the EU's common transit system, for which the country has to adopt the New Computerised Transit System (NCTS) allowing an economic operator to submit common transit declarations electronically and to track the status of the goods.

Although the plan for the ratification of conventions and the adoption of the NCTS was passed, no progress is visible. In particular, necessary draft laws regarding the changes in the Customs Code envisaging transpositions of the Conventions' provisions were not registered at the Parliament.

Thus, there is a high risk of delay in transposing provisions of the Common Transit Convention and the Convention on the Simplification of Formalities in Trade in Goods into the Ukrainian legislation.

iii. Authorized economic operators and other changes in Customs Code

A draft law on authorized economic operators (AEO), the recognition of which is another Ukraine's commitment, have been submitted to the Parliament in June 2016, but so far there is no progress. Formally, Ukraine has three years to implement this obligation, but it is in the country's economic interest to move quickly.

Ukraine committed to aligning its legislation with the EU norms and practices on customs duties relief within three years after the enactment of the Agreement. The draft law introducing these amendments have already been registered in the Parliament.

Improved protection of intellectual property rights (IPRs) at customs constitutes another important commitment of Ukraine to be implemented within a three-year timeframe. Again, the draft law aligning Ukraine's legislation with the respective EC regulations have been already developed and submitted to the Parliament.

Thus, there is no formal delay, but slow progress in reform depresses business climate.

Main tasks ahead include:

- Adoption of secondary legislation unblocking efficient use of the "single window";
- Prompt adoption of changes to the Customs Code transposing provision of the Common Transit Convention and the Convention on the Simplification of Formalities in Trade in Goods into the Ukrainian legislation;
- Alignment of Ukraine's transit control system with the EU's New Computerised Transit System (NCTS);
- Adoption of already developed draft laws regarding authorized economic operators and increased IPRs protection at customs;
- Further, focus on proper implementation of launched reforms and the fight against corruption.

Summing up, there is a significant risk of delay with common transit commitments due by the end of 2016. Implementation of other commitments is formally on schedule, but their slow pace undermines Ukraine's economic recovery.

2.5. Public procurement

The public procurement market of the EU accounts about 18% of its GDP offering the great business potential for the Ukrainian companies.

The Association Agreements aims to stimulate trade by providing mutual access to public procurement markets. The mutual market access is linked to the schedule of approximation that is set in five stages, each matching implementation of specific directives with access to specific supplies.

Below we assess Ukraine's progress in key areas in implementing customs-related commitments by the middle of 2016.

i. Legislative Harmonisation

A new Public Procurement Law⁴ was adopted in December 2015. The law is compliant with the relevant EU directive, except for the provisions related to e-auctions. The Ukrainian law is more stringent making the e-auctions compulsory to prevent corruption, while according to the EU norms, such auctions are not mandatory. The law was adopted ahead of the schedule of a legal approximation set in the Association Agreement.

Further legislative harmonization will be conducted in line with the Strategy for Public Procurement Reforms and the respective Roadmap⁵ adopted in February 2016. The EU approval is awaited for making the Roadmap the reference document for sector reforms by amending Annex XXI of the Agreement.⁶ Moreover, the approval will mean completion of the implementation of the first stage of the indicative approximation schedule, thus opening the way for mutual access to supplies for central government authorities.

Thus, Ukraine has significantly progressed in the harmonization of public procurement legislation.

ii. On-line procurement system ProZorro

Ukraine introduced on-line procurement system ProZorro as a mandatory instrument for over-threshold public procurement. The system could also be used for smaller purchases to ensure a better price. According to the Public Procurement Law, all central executive authorities and state-owned natural monopolies must procure through the system since April 2016 and the rest of public entities – since August 2016. The system allows increasing transparency of the public procurement, increasing the efficiency of fiscal expenditures and reducing corruption.

In May 2016, ProZorro won in the category of Public Sector award in the World Procurement Award 2016.

However, important problems remain. Some companies reported having been harassed by state institutions after winning tenders. Such cases if repeated will quickly overshadow gains associated with transparent and competitive on-line procurement system. Thus, the absolute necessity is to strengthen the rule of law in the country.

Thus, Ukraine established efficient and transparent public procurement instrument in line with its DCFTA obligations. However, the reports regarding harassment after winning public tenders could quickly undermine the success of ProZorro if not resolved.

⁴ <http://zakon3.rada.gov.ua/laws/show/922-19>

⁵ <http://zakon5.rada.gov.ua/laws/show/175-2016-%D1%80>

⁶ <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/COM-2016-703-F1-EN-MAIN.PDF>

Main tasks ahead include:

- Assessment of reform progress by the EU-UKR Trade Committee to implement the first phase of mutual market opening (supplies to central government authorities);
- Implementation of Roadmap: further legislative approximation, institutional building, capacity developments;
- Progress on the rule of law needed for providing truly equal access to public procurement.

Summing up, Ukraine is on schedule in the implementation of the public procurement commitments, and reforms should be maintained. However, the most important issue is to ensure the rule of law to shield the achievements gained.

2.6. IPR protection

Protection of intellectual property rights (IPRs) is a key prerequisite for the innovative development of the economy. In Ukraine, the level of the IPRs protection remains very low. According to Global Competitiveness Report 2016-2017, Ukraine is ranked 125 out of 138 countries by category “intellectual property protection.”

In 2016, Ukraine retained the status of a ‘Priority Watch List’ country according to in Special 301 Report published by US Trade Representative (USTR). It is the second lowest status after a ‘Priority Foreign Country’ (the latter Ukraine featured in 2001-2005 and 2013-2014). According to the USTR Office, main problems of Ukraine’s IPRs protection system are a failure to combat the widespread online infringement of copyright and related rights, widespread use of illegal software by the public authorities; and problems with the administration of collecting societies’ system.

The aim of the Agreement is to stimulate innovations by modernizing the IPRs system and strengthening their protection. The Ukrainian legislation is largely compliant with the EU and international norms, so the focus is to be on efficient implementation of the relevant legislation.

Below we assess Ukraine’s progress in key areas in implementing IPRs protection policy commitments by the middle of 2016.

i. Roadmap for Reforms

In June 2016, the CMU approved the Concept of IPRs Protection Reform⁷, and two months later, the Roadmap for its implementation.⁸ The Roadmap envisages reorganization of the state system for the IPRs protection, as well as the implementation of Ukraine’s commitments in the sphere of IPRs. Key legal changes will concern protection of industrial property rights, geographic indications, copyright, and related rights. The special attention is paid to strengthening civil and administrative enforcement procedures.

Thus, reforms plans are developed in line with Ukraine’s commitments, and now their proper implementation is to follow.

⁷ <http://www.kmu.gov.ua/control/uk/cardnpd?docid=249086258>

⁸ <http://zakon0.rada.gov.ua/laws/show/632-2016-%D1%80/print1472117996319564#n8>

ii. Institutional setup

Administrative reform in IPR sphere was launched in mid-2016. In line with the Concept of IPRs Protection Reform, the State Intellectual Property Service was liquidated, and the MEDT became responsible for intellectual property policy. As a next step, the establishment of a national agency for intellectual property is foreseen.

Thus, Ukraine has launched the reform of the institutional setup, but it is too early to assess its efficiency.

iii. Legislative Harmonization

In line with the implementation of Ukraine's DCFTA commitments, several draft laws related to different aspects of copyright protection have been submitted to in Parliament in the first half of 2016. The laws aim to overcome of piracy; improve acquisition, management, and protection of copyright and related rights; and streamline regulation of copyright and related rights on the Internet. However, the pace of their adoption is rather low, and the full compliance with the EU norms to be verified.

Thus, the process of legal harmonization in line with the Association Agreement commitments started, but yet to be completed.

Main tasks ahead include:

- Implementation of Roadmap including harmonization of Ukraine's legislation with the EU norms and establishment of efficient institutional setup;
- Much more emphasis on enforcement of IPRs.

Summing up: Ukraine has launched a process of legal harmonization and institution building to meet the Association Agreement requirements, but it is too early to assess results. However, the focus is to be on implementation of IPRs protection as a key problematic issue in this sphere now.

2.7. Competition policy

The level of monopolization is strikingly high in Ukraine. According to the Global Competitiveness Report 2016-2017, Ukraine's rank is 136 out of 138 countries by "effectiveness of anti-monopoly policy" and 101 by "intensity of local competition." The Anti-Monopoly Committee of Ukraine (AMCU) reported that as of the beginning of 2015, only 43% of markets were competitive, while the rest feature some level of monopolization.⁹ About 10% of markets were fully monopolized, with energy and utilities featuring the highest level of monopolization.

The peer-review of the Ukraine's competition legislation conducted by the UNCTAD experts in 2012 showed the country's laws are largely aligned with international best practices and thus did not require drastic changes.¹⁰ However, as Ukraine's ranks reveal, the law enforcement has to be strengthened significantly.

The aim of the Association Agreement is to boost economic efficiency by reducing monopolization through more effective competition and state aid policy aligned with the EU norms and practices. The task is twofold: to complete legal harmonization and to facilitate its proper implementation.

Below we assess Ukraine's progress in key areas in implementing competition policy commitments by the middle of 2016.

⁹ www.amc.gov.ua/amku/doccatalog/document?id=122547&schema=main

¹⁰ UNCTAD, "Voluntary Peer Review of Competition Law and Policy: Ukraine", 2013

i. Increased transparency of the AMCU

Higher transparency of the AMCU decisions has been among key commitments of Ukraine in the sphere of the competition policy. Several important steps have been taken already. The AMCU started publishing its decisions on the website in July 2015, while several months later, the respective law making the publications mandatory was adopted.¹¹

In September 2015, the AMCU provided an official clarification on the methods of setting penalties for anti-competitive practices¹² aligned with the respective guidelines of the European Commission. At the same time, amendments to the Law on the Protection of Economic Competition regarding the AMCU penalties have not been passed yet, hindered in particular by discussions about the role of courts in appeal procedures regarding the AMCU penalty decisions. According to the European practices, courts should be able to revert the decisions of the anti-monopoly authority. The revised draft law is waiting for the second reading transpose this practice into the Ukrainian legislation.

The increase in transparency of the AMCU decisions is a step forward contributing to a better business climate in Ukraine. To establish proper balance of powers, it is important to pass the law allowing courts to revert the AMCU decisions.

ii. Simplification of the AMCU procedures

In January 2016, the Parliament adopted the law simplifying concentration practices and their harmonization with the EU norms.¹³ The law envisages among other things higher thresholds for controlled concentrations, simplified procedures for some types of concentrations and a removal of 30% market-share criterion for notification of the concentrations. The law adoption was ahead of schedule set in the Association Agreement.

The implication of the concentration procedures is a positive step praised by the business.

iii. State Aid Law

The framework law on State Aid to Commercial Entities passed in 2014¹⁴ aligns the system of state aid provision with the EU norms. The AMCU becomes responsible for monitoring and authorizing state aid, assessing its impact on competition and recovering unlawfully granted aid. Expectedly, the law implementation will streamline the state aid practices in Ukraine reducing the risk of corruption, supporting efficient fiscal expenditures and stimulating the economic development.

The main body of the law will enter into force in August 2017, still ahead of schedule set in the Association Agreement.

Thus, the major revision of the state aid system in Ukraine will be launched in mid-2017.

Main tasks ahead include:

- Further efforts in harmonization of legislation, in particular regarding the appeal procedures for the AMCU decisions;
- Strengthening the independence of the AMCU as a key prerequisite for the efficient implementation of the competition policy;
- More focus on measures to reduce the level of monopolization in practice;
- Speeding up of privatization and unbundling process

¹¹ <http://zakon5.rada.gov.ua/laws/show/782-viii>

¹² http://search.ligazakon.ua/l_doc2.nsf/link1/FN013589.html

¹³ <http://zakon5.rada.gov.ua/laws/show/935-viii/>

¹⁴ <http://zakon4.rada.gov.ua/laws/show/1555-18/paran205#n205>

Summing up, Ukraine has implemented many of its legal commitments ahead of schedule but suffered from the weak implementation of legislation. The main efforts are to be on the reduction of the actual level of monopolization.

3. Conclusions and policy recommendations

The formal implementation of the DCFTA was launched only in January 2016, but for the most of its provisions, the harmonization of the legislation and the development of institutional setup has begun much earlier. This fact allowed Ukraine to demonstrate a good progress in the DCFTA implementation and – more importantly – to start gathering benefits associated with the trade agreement.

At the same time, the implementation was not equally smooth in all considered areas. In several cases, Ukraine explicitly violated its commitments. The legal harmonization has been slower than expected, and risk of delays is aggravating. Moreover, the weak rule of law threatens to undermine success achieved in the legal sphere.

To promote the further successful implementation of the DCFTA, several recommendations could be put forward:

Recommendation 1: Defer from adoption of protectionist measures not in line with DCFTA

The Verkhovna Rada should revise its decisions regarding a ban on wood logs exports and an increase in export duty on metal scrap. In both cases, less trade-distorting instruments should be used to meet the legitimate concerns of Ukraine, e.g. on environmental or security issues.

Recommendation 2: Pay attention to schedules

The establishment of clear roadmaps and action plans for the implementation of the DCFTA commitments is a positive step introducing transparency and predictability to the economic policy of the country. However, these gains should not be devalued by major delays.

In particular, timely implementation of action plans requires closer work with Parliament:

- to ensure that draft laws envisaging adaptations to EU norms are passed in time and without distortions;
- to counterweight protectionism mood and abolish questionable norms (develop efficient ways to tackle real problems, not sector lobbyist interests).

Recommendation 3: Progress in implementation

It is necessary to ensure that adopted norms work efficiently and that the rule of law prevails. Thus, the implementation of public service and judiciary reforms should remain top in the general reform agenda.

Recommendation 4: Continue dialogue with business

A successful implementation of the DCFTA largely depends on how business uses the opportunities provided by the DCFTA and mitigate associated challenges. A regular and efficient public-private dialogue should be continuously pursued allowing to navigate implementation in the most effective and timely manner.

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