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Approximation with the Eastern  
Partnership Countries:**

**The Case of Ukraine**

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# Resilience in the EU's Market Integration and Regulatory Approximation with the Eastern Partnership Countries:

The Case of Ukraine

*By Roman Petrov and Oksana Holovko-Havrysheva*

## Executive Summary

This policy paper addresses current state of Ukraine's involvement into the EU Single Market Integration as a part of the wider debate on ensuring stability and strengthening resilience in the region. The military aggression of the Russian Federation against Ukraine changed drastically the level of the cooperation in economic matters and fosters Ukraine's access to the EU Single Market far beyond the conditionality principle, which conditioned widening access to the EU market to the progress in the implementation of the EU-Ukraine Association Agreement. The paper highlights the importance of the following issues that influence the economic cooperation between the EU and Ukraine:

- Strengthening resilience in the EaP region as one of the EU priorities for the cooperation has been identified before the outbreak of the war against Ukraine;
- The pre-war cooperation between the EU and Ukraine focused on the implementation of the EU-Ukraine Association Agreement with special attention towards the fulfillment of the obligations arising from the Deep and Comprehensive Free Trade Area (DCFTA) provisions;
- The war outbreak intensified both political and economic cooperation between the EU and Ukraine, where the European Commission, European Parliament and European Council play crucial role in forming the unified approach towards the support of Ukraine during the war and in the post-war period;
- EU support programs grant access for Ukraine to the EU Single Market mostly at unilateral and unconditional basis;
- The candidate status of Ukraine influences the domestic agenda in shaping the legal regulation of economic activities in Ukraine and is one effective measure to support the resilience in and within Ukraine;
- Legal and regulatory approximation will remain a key tool for ensuring the resilient resistance against Russia and stable progress on Ukraine's road towards the EU membership.

### 1. Conceptualizing Resilience in Context of the EU's Eastern Partnership

Climate change, the migration crisis, and the outbreak of COVID-19 have caused unpredictable difficulties for societies and economies worldwide pointing out the need for joint multinational efforts to mitigate the negative impacts of crises. The EU offers multidimensional solutions for

its Member States, helping them to combat the negative consequences of the pandemic and other crises inside the EU. However, crises such as the Covid-19 pandemic reach far beyond the borders of the EU and have important repercussions for its relations with neighbouring states. The EU and third countries alike face the necessity to apply a wide array of resilience instruments to maintain the previously achieved levels of market integration.

At the EU level, the resilience debate was initially linked to environmental issues and economic policies. The development of the EU's systematic approach towards resilience issues occurred in 2012 when the EU linked its humanitarian aid policies with its development policies (Share, 2012), addressing the resilience phenomenon predominantly from economic and environmental perspectives. In 2013, drawing on prior work by the UN, the EU formulated its own approach to resilience and defined it as “the ability of an individual, community, country or a region to prepare, resist, adapt and quickly recover from stress and shocks, without undermining the long-term prospects of its development” (The EU Approach to Resilience, 2012). The EU's vision on resilience took more concrete shape during the period from 2012 to 2016, and in 2014 (Resilience Marker, 2014) the EU introduced resilience-check instruments for its development and humanitarian aid policies.

Importantly for this paper's analysis, the Global Strategy for the European Union's Foreign and Security Policy (European Union GS, 2016) (EUGS 2016 hereafter) extended the reach of the resilience discourse to the EU's external actions. The EUGS 2016 turned resilience into a key concept, which addresses the existential challenges the EU faces and provides a set of policy instruments and tools to anticipate and manage the adverse effects of crises (European Union GS, 2016). The EU's approach to resilience is based on the premise that the individual behavior of citizens shapes the implementation of the EUGS 2016 as much as the collective conduct of social groups and existing state policies. Furthermore, the EU depends upon democratic institutions and a rule-based international order. In this way, the EUGS 2016 introduces the debate about the impact of individuals on policy-making and individual responsibility for policy decisions into the resilience discourse. It also links the resilience debate to broader discussions about EU values in foreign policy and emphasizes communication as a key instrument in developing resilience-based policies.

Against this backdrop, resilience has also become a key policy concept in the EU's relations with its close and far neighbourhood, especially those countries in the Eastern Partnership (EaP). In May 2020, the EU adopted the Joint Communication (Eastern Partnership Policy, 2020) “Eastern Partnership Policy beyond 2020: Reinforcing Resilience – an Eastern Partnership that delivers for all”, which seeks to enhance the cooperation in four EaP-related priority areas: stronger economy, stronger connectivity, stronger society, and stronger governance. This communication set out resilience as an overarching objective for the EU's long-term cooperation with the EaP countries. The focus is put on maintaining their economic resilience, more specifically, their sustainability and integration, environmental and climate resilience, resilience during digital transformations, social resilience for the establishment of inclusive and fair societies and, last but not least, a set of policy-related resilience features aimed to ensure “...accountable institutions, the rule of law and security” (Recovery, Resilience and Reform, 2020: 18). Taken together, these long-term objectives of the EU's policies towards the neighbourhood countries prioritize the following: 1) economic resilience aspects (sustainability, growth, digital economy, circular economy, and climate issues); 2) establish

links to policy resilience aspects (accountability, transparency of governance processes and institutions involved); 3) legal resilience aspects (ensuring rule of law as the key value, combatting corruption, and implementing the conventional framework for the EU's relations with the EaP countries); 4) political resilience (addressing the security aspects).

The EU defines resilience as one of the key points of the EUGS 2016. Therein, it states that the “EU will promote a rules-based global order. The EU foster the resilience of its democracies....our values will determine our external credibility and influence”. (European Union GS, 2016:) Furthermore, the European Council defines resilience as encompassing the following characteristics:

“1) strengthen the preparedness and adaptive capacity of states, societies, communities and individuals to political, structural, socio-economic, environmental, climate-related, demographic, societal or security pressures and shocks;

2) support the capacity of partner countries and civil society facing significant internal or external pressures, to build, maintain or restore core public functions in full respect for democracy, rule of law, human rights and fundamental freedoms, while fostering social and political cohesion and inclusive long-term security and stability and sustainable development;

3) build upon the existing capacity of societies, communities and individuals to manage opportunities and risks in a peaceful and stable manner, and to maintain or restore livelihoods in the face of recurrent pressures and shocks.”

*A Strategic Approach to Resilience, 2017*

Alongside, and fostered by applications of ‘resilience’ by the EU institutions, an ever-growing literature on the conceptualization of the term has developed. However, scholars faced many doctrinal and practical challenges to offer a homogeneous understanding of the notion of ‘resilience’ in EU studies. For instance, Joseph and Juncos (2019) emphasize the ambiguous nature of resilience. They argue that resilience is “a way of thinking, and [...] cannot be externally engineered” and remains “ambiguous” in many aspects, particularly “whether resilience is about risks or resources, whether resilience means stability or change, and what is the role of values”. (Joseph J., Juncos A.E., 2019). Tocci (2020) has also stressed that resilience is a driving leitmotif and practice for many EU policies. She argues that that resilience serves as a building block of EU governance to foster some degree of homogeneity across EU policies, actors and institutions, especially by connecting European values and principles (“principled pragmatism”) to the wider world and, in particular, the EU's neighbourhood (Tocci N., 2020).

Korosteleva and Flockhart (2020) advance two specific meanings of resilience: “1) as a quality of an entity such as a system, organization, or even a person, and 2) as an analytic of governance in the EU” (Korosteleva E.A., Flockhart T., 2020). Moreover, Romanova (2019) highlights the dynamic nature of resilience in internal and external domains of the EU. At the same time, the author is critical about the implementation phase of resilience and argues that “the emphasis on resources and approach to values adopted in neighbourhood and development policies brought this policy implementation closer to the theoretical writings on resilience” (Romanova T., 2019). Pascariu and Rouet (2019) go further and link resilience to EU policies.

The authors particularly emphasise the relevance of resilience for the EU EaP and confirm that resilience is a key tool to achieve the aim of strengthening the EaP's political association and economic integration, which must be based on shared interests and values (democracy, the rule of law, respect of human rights, and fundamental freedoms) (Rouet G., Pascariu G., 2019).

From an economic dimension, resilience is investigated at macro- and micro-levels, addressing the ability of the economy to recover from or adjust to external shocks, combined with the ability to use positive effects and opportunities. Brigugilo et al. (2008) proposed that the resilience index should be measured on indicators such as the macroeconomic stability (fiscal deficit, unemployment and inflation, external debts), microeconomic market efficiency (Economic Freedom of the World Index measuring the performance of the financial markets, labour and business), good governance perspectives (legal structures and security of property risks focusing on the performance of the judicial system, court's impartiality, protection of intellectual property rights, involvement of military into ensuring the rule of law and legal order, the integrity legal system and political system performance), and social development (performance of health and education sectors) (Brigugilo L., Gordon C., Farrugia N., Vella S., 2008).

## 2. Legislative and Regulatory Approximation in EU – Ukraine Single Market Integration

The EU-Ukraine AA replaced the outdated Partnership and Cooperation Agreement (PCA) as the basic legal framework of EU-Ukraine relations on 27 June 2014 (EU-Ukraine AA, 2014: Art.479). Against the political background of the 2004-2005 'Orange Revolution', Ukraine was the first European Neighbourhood Policy (ENP) country to start negotiations on a new Association Agreement as part of a general revision of the bilateral legal framework in March 2007. Bilateral negotiations on the EU-Ukraine DCFTA were only launched in February 2008, after Ukraine's accession to the WTO. A political agreement was reached in December 2011 and the AA was initialled in March 2012. The DCFTA part was only initiated in July 2012. On 15 May 2013, the European Commission adopted proposals for a Council Decision on the signing and conclusion of the EU-Ukraine AA (EU Commission Press Release, 2013). Nevertheless, this agreement was not immediately signed due to EU demands for Ukraine to abandon practices of selective justice (particularly the unlawful imprisonment of opposition leader Yulia Tymoshenko from 05 August 2011 to February 2014) (Urban M., 2013) and to align the the Ukrainian judiciary and law enforcement systems with European standards (Council Conclusions on Ukraine, 2012).

Eventually, on the eve of the EaP Summit in Vilnius, the Ukrainian Government under prime-minister Mykola Azarov decided to suspend the process of preparation for signature of the AA in order "to ensure the national security of Ukraine and to recover trade and economic relations with the Russian Federation" (Decision 905-p, 2013). Arguably, the Ukrainian government's decision cannot be disconnected from the Russian proposal to establish a Eurasian Economic Union building upon the existing customs union between Russia, Belarus, and Kazakhstan (Van der Loo G., Van Elsuwege G., 2012). Following this news, hundreds of thousands of Ukrainians took to the streets. The ensuing *Maidan* revolution led to the dismissal of President Victor Yanukovich on 22 February 2014 and the establishment of an interim government under the leadership of Arseniy Yatsenyuk. Proceeding with the signature of the



EU-Ukraine AA was a clear short-term objective for the new authorities in Kyiv. On 27 June 2014, the entire text of the EU-Ukraine AA was solemnly signed in Brussels along with the EU-Moldova and EU-Georgia AAs. A major impediment for timely entry into legal force of the EU-Ukraine AA was caused by the results of the advisory referendum in the Netherlands on 6 April 2016 (61% of votes were against ratification of the agreement). The Dutch Senate approved the Act of Ratification on 30 May 2017 after the Dutch parliamentary elections. Soon afterwards, on 1 September 2017, the EU-Ukraine AA acquired full legal force and became part of the legal orders of the EU, its Member States, and Ukraine.

One of the core objectives of the EU-Ukraine AA is “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 [...] and to support Ukrainian efforts to complete the transition into a functioning market economy by means inter alia, the progressive approximation of its legislation to that of the Union” (EU-Ukraine AA, 2014: Art.1 (d)). Therefore, legislative approximation is considered a key tool to ensure the gradual and resilient integration of Ukraine into the EU Single Market and the effective implementation of the EU-Ukraine AA. The implementation and application of the AA within the legal system of Ukraine is governed by its constitution (Constitution of Ukraine: Art.9). Overall, the 2019 constitutional amendments (Constitution of Ukraine, Art 85(5), Art 102, and Art 116 (1<sup>1</sup>)) reflected the European aspirations of the Ukrainian population and political elites.

The Ukrainian legislature, executive, and judiciary consider the AA not merely an ordinary international agreement but a complex legal framework that contains specific norms that govern the functioning of the association relations between the EU and Ukraine, as well as measures to ensure the gradual integration into the EU internal market and the effective functioning of the EU-Ukraine DCFTA. However, Ukraine’s integration into the EU internal market is not straightforward but strongly linked to the EU’s policy of conditionality and the overall resilience of EU-Ukraine relations. The EU-Ukraine AA bears significant economic and legal importance for Ukraine and constitutes a comprehensive roadmap for reforms in Ukraine (Interfax-Ukraine, 2017). Formally, further integration of Ukraine into the EU internal market depends on the effective application of the vast scope of the “pre-signature” and “post-signature” EU *acquis* (Petrov R., 2011) within the legal system of Ukraine. The scope of the EU *acquis* to be applied by Ukraine covers primary and secondary EU laws, EU legal principles, common values, and even case law of the Court of Justice of the European Union (CJEU), as well as specific methods of interpretation of the relevant EU *acquis* within the Ukrainian legal system. Hitherto, the Ukrainian legal system had not faced a necessity to implement and effectively apply the dynamic legal heritage of an international supranational organisation. The rare exception hereto can offer the Ukrainian practices of the application of the EU sectoral “energy” *acquis* under the framework of the Energy Community, which Ukraine joined in 2010. (Petrov R., 2012). Subsequently, Ukraine’s adherence to the dynamic EU *acquis* via the AA will encapsulate a plethora of challenges to its national legal order. However, formal “black letter” approximation of Ukrainian legislation to the EU *acquis* cannot lead to closer political, economic and legal integration into the EU without a positive and convincing Ukrainian record of sharing EU common values and complying with the EU’s strict conditionality policy, as stipulated in the EU-Ukraine AA Preamble:

“ACKNOWLEDGING that the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of this Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving

convergence with the EU in political, economic and legal areas". (EU-Ukraine AA, 2014: Preamble).

Article 474 of the EU-Ukraine AA affirms that "Ukraine will carry out gradual approximation of its legislation to EU law" as referred to in no less than 44 annexes to the agreement and based on specific commitments and mechanisms identified in both the annexes and specific titles to the agreement. Separate approximation clauses can be found in Title IV of the DCFTA, Title V on Economic and Sector Cooperation, and Title VI on Financial Cooperation. The most elaborate approximation clauses can be found in Title IV on the establishment of the DCFTA. In several DCFTA Chapters, the process of legislative approximation is clearly linked to additional access to the EU Internal Market. For example, in technical barriers to trade (EU-Ukraine AA, 2014: Ch.3 Title IV), Ukraine must 'incorporate the relevant EU *acquis*' in line with the timetable set out in Annex III. Similarly, in Sanitary and Phytosanitary Measures (SPS), Ukraine "shall" approximate its sanitary, phytosanitary, and animal welfare legislation to that of the EU as set out in Annex V (EU-Ukraine AA, 2014: Art.64(1)).

The most detailed provisions on legislative approximation are included in DCFTA Chapter 6 on Services, Establishment and Electronic Commerce, more specifically in its sub-sections on Postal and Courier Services, Electronic Communications, Financial Services and International Maritime Transport Services.<sup>1</sup> These all contain the same approximation clause according to which "Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*" (EU-Ukraine AA, 2014: Arts. 114, 124, 133 and 138). These provisions are the only ones in the AA that explicitly oblige Ukraine to also approximate its "future" legislation to the EU *acquis*. Annex XVII (EU-Ukraine AA, 2014: Appendix XVII-2 to XVII-5) contains "General principles and obligations" on legislative approximation. This determines how the listed EU legislation will be made binding upon the Parties and 'made part of Ukraine's internal legal order'(EU-Ukraine AA, 2014: Annex XVII, Art.2). In reflecting – but not copying – Article 288 TFEU, Article 2 of this Annex specifies that an act in this Annex corresponding to an EU Regulation or Decision 'shall as such be made part of the internal legal order of Ukraine' whereas an act corresponding to an EU Directive 'shall leave to the authorities of Ukraine the choice of form and method of implementation'. This practice goes alongside the EU approach, that according to the Article 288 TFEU, a Regulation is "directly applicable" in all Member States whereas acts listed in the Annex corresponding to an EU Regulation (or Decision) "must be made part" of Ukraine's legal order, which means that the act still has to be transposed into Ukraine's legal system. This provision only appears in a limited number of integration agreements and was first used in the European Economic Area (EEA) Agreement.

One may argue that the EU-Ukraine AA is not merely a comprehensive legal document but also a template for ensuring better resilience of EU-Ukraine relations, for instance, by referring to institutional tools. Firstly, such institutional tool to support resilience of EU-Ukraine relations deal with the monitoring and supervision of the AA implementation, which includes the Association Council (AC), (Articles 460-463), the Association Committee (Articles 463-466), and the Parliamentary Association Committee (467-468). Furthermore, the EU-Ukraine summits were institutionalized as the highest cooperation body in the areas of political dialogue (Art. 460 (1) AA with Ukraine) and a civil society platform was established to ensure an active

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<sup>1</sup> These Sub-Sections, respectively Sub-section 4–7, are part of Section 5 "Regulatory Framework".



role of civil society institutions during the AA implementation (Article 469-470). The EU-Ukraine AA bodies are the least active in exercising their decision-making power among the EaP countries (Van der Loo G., Akhvlediani T., 2020). They are primarily active at the level of the AC subcommittees (on sanitary and phytosanitary measures, on originating products and adjusting the customs schedules) and at the AC level, which addressed the amendment of the EU-Ukraine AA, namely the annexes on public procurement and energy issues. The AC format started to be used actively for the regulation of the bilateral cooperation only in 2018. Beforehand, from 2014 to 2018, the AC predominantly dealt with topics concerning institutional and procedural issues (AC rules of procedure, the publication of the AC decisions and recommendations in Ukraine, the composition of the subcommittees and the arbitration panel on the dispute on the wood export ban).

Secondly, institutional tools to support resilience of the EU-Ukraine relations are linked to a unique intergovernmental dispute settlement mechanism (DSM) relating to legislative approximation. This procedure only applies to disputes concerning the interpretation and application of provisions relating to legislative approximation in a limited number of DCFTA Chapters (EU-Ukraine AA, 2014: Technical Barriers to Trade (Ch 3), Sanitary and Phytosanitary Measures (Ch 4), Customs and Trade Facilitation (Ch 5), Establishment, Trade in Services and Electronic Commerce (Ch 6), Public Procurement (Ch 8) and Competition (Ch 10)), “or which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law” (EU-Ukraine AA, 2014: Art. 322). If a dispute between the EU and Ukraine in relation to one of these chapters concerns a question of interpretation of an EU legal provision, then the arbitration panel established to resolve the dispute will not decide the question “but request the Court of Justice of the European Union to give a ruling on the question”, which is subsequently binding on the arbitration panel (EU-Ukraine AA, 2014: Art.322(2)). This provision is unique in the sense that no other agreement that has been concluded by the EU grants the EU-Ukraine arbitration panel the competence to seek a preliminary ruling from the CJEU. Only in a limited number of other EU integration agreements can the CJEU respond to preliminary questions from a national court or tribunal: For instance, Art 107 and Protocol 34 EEA Agreement. From this perspective, the provision appears to be one of the instruments ensuring a strong legal connection between the Ukrainian and EU legal systems with the aim of maintaining legal resilience during the AA's implementation.

Thirdly, an institutional tool to support resilience of the EU-Ukraine relations is constituted via *ad hoc* agencies that can either influence or interfere in the most urgent issues arising in EU-Ukraine relations and during the implementation of the EU-Ukraine AA. For instance, in 2014, the EU established the AA-based institutional framework ‘Support Group for Ukraine’<sup>2</sup> (SGUA) through a decision by the President of European Commission. The SGUA is a unique institutional mechanism embedded into the Directorate General for Neighbourhood and Enlargement Negotiations (DG NEAR), which aims to scrutinize the EU's cooperation with Ukraine and to coordinate assistance and financial support to Ukraine, a country in which external shocks in international politics and world economy can significantly influence the political trajectories of its development and may lead to a situation in which substantial reforms are delayed. The priority areas for the cooperation are predominantly linked with the implementation of the EU-Ukraine AA in the economic area and focus on agriculture and sanitary/phytosanitary matters, reforming economic and fiscal policies, developing financial

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<sup>2</sup> Support Group to Ukraine, available at [https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/ukraine/sgua\\_en](https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/ukraine/sgua_en), last accessed on 01 September 2021.

cooperation, and enhancing cooperation in energy and environmental sectors, as well as overall policy development, cooperation in the field of justice and home affairs, and sectoral cooperation in areas such as social matters, education, and research. The SGUA has a twofold task: On the one hand, it serves as the one-stop-window for EU initiatives on the enhancement of cooperation with Ukraine in different areas, which can be supported through its high-level expertise on Ukraine in sectoral matters. On the other hand, it also serves as the key contact point for Ukrainian authorities in the launching of cooperation with the EU, alongside the EU-Ukraine AA-based institutions. However, as Soloninka notes, the SGUA's impact on the relations between the EU and Ukraine remains rather limited, since this body is not even well-known at EU-level (Soloninka, 2020).

To sum up, the AA offered in the pre-war time legislative and institutional tools to support resilience in EU-Ukraine relations. In terms of legislative resilience, the objective of implementing the EU-Ukraine AA encouraged the Ukrainian legal system to 'export' the substantive scope of the EU-relevant *acquis*. For this purpose, the EU-Ukraine AA contained extensive approximation clauses that oblige Ukraine to approximate not only relevant existing but also future legislation to the EU *acquis*. Furthermore, the EU-Ukraine AA encompasses a unique possibility to refer matters of interpretation of any provisions of the AA that replicate the relevant EU *acquis* to the CJEU. Therefore, the legislative and regulatory approximation is a key instrument for ensuring resilience from legal and policy-making perspectives. Concerning institutional tools, the AA-based flexible institutional framework for the EU-Ukraine relations underpins their resilience. The Association Council, Association Committee, and Parliamentary Association Committee, the specific dispute settlement mechanism, and the Civic Society Platform can be seen as additional institutional instruments, aimed at ensuring the resilience of policy and governance reforms in a wider perspective. At the EU level, the ECJ and the European Commission are currently those institutions with the most significant influence on EU-Ukraine relations: the ECJ through the preliminary ruling procedure, and the Commission, through the SGUA – the Commission's task force unit dealing with EU-Ukraine Cooperation – which is embedded in DG NEAR since 2014. However, the role and importance of the SGUA in the development of EU-Ukraine relations seemed to be underestimated and not visible.

### 3. Conclusion

The invasion of the Russian Federation to Ukraine on February 24<sup>th</sup>, 2022, represents a critical historical momentum for the European integration project. It must be acknowledged that the EU faces a serious existential crisis. The Russian Federation, as a military and political superpower, openly challenged the international security order, undermined the foundations of international law by disregarding the territorial sovereignty of Ukraine, repeatedly broke the UN Charter and openly contraposed the Western and European common democratic values with self-developed notions of "sovereign democracy" and "traditional values". Ignorance of these events could run against the spirit of Article 21 TEU and would irrevocably undermine the role of the EU as a global actor. In these critical circumstances Ukraine appeared to be ready and resolute not only to fight for its survival but also protect for the ideological and political credibility of the EU on the battlefield. This immense challenge pushed the EU to employ the whole arsenal of its political, economic and security tools to stop Russia from its aggressive behaviour and to do everything plausible to restore the territorial integrity of Ukraine and, in the end, to restore peace on the European continent.

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