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# Differentiated European Integration of Ukraine in Comparative Perspective

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This article offers a comparative analysis of Ukraine's Association Agreement against the backdrop of other agreements of the EU with third countries that facilitate their partial integration into the EU's common space of four freedoms, albeit without institutional membership (EEA Agreement of Norway, Iceland, and Liechtenstein; EU–Swiss Bilaterals, and Turkey's Customs Union). In addition, this analysis includes the Stabilisation and Association Agreements of the Western Balkan countries and the former Europe Agreements of the Central European countries. The research draws on concepts of differentiated integration and external governance of the EU. The analysis is built along two dimensions: identification of the regulatory boundary (policy-taking: scope of transposition of the EU *acquis*, legal quality of transposition, and the type of supervision mechanism) and organizational boundary (policy-shaping: inclusion in the EU institutions). The analysis concludes that Ukraine's Association Agreement compared with other EU integration agreements with third countries includes the largest structural asymmetry, that is, a biggest gap between the largest volume of *acquis*, which Ukraine has to incorporate into its national legislation on one hand, and the lowest level of institutional involvement of Ukraine in policy-shaping within the EU on the other.

***Keywords:*** *Ukraine; Association Agreement; differentiated integration; external governance; Eastern Partnership; comparative analysis*

## Introduction

The Association Agreement (AA) of Ukraine, as well as similar agreements of Georgia and Moldova, concluded under the Eastern Partnership (EaP) Program in 2014 follows the concept of differentiated integration of third countries that the EU has applied toward its neighbours since the early 1990s. Former European Commissioners Štefan Füle (for Enlargement and Neighbourhood) and Karel de Gucht (for Trade), who supervised talks on AAs with EaP countries, stated that these agreements are "the most ambitious" the EU has ever negotiated with third countries.[1]

The aim of this article is to testify to the above statements of EU senior officials and to identify the level of "ambitiousness" of Ukraine's AA by comparing it with other similar types of EU agreements that allow partial integration of third countries into the common space of EU's four freedoms, albeit without membership. The following agreements are the subject of comparative review in this article: European Economic Area (EEA) Agreement with Norway, Iceland, and Liechtenstein (concluded in 1992); EU bilateral agreements with Switzerland (EU–Swiss Bilaterals I/II negotiated in 1994–2004); and the Agreement on Customs Union with Turkey of 1995. In order to obtain a more comprehensive comparative perspective on Ukraine's AA, this analysis includes also former EU AAs with the countries of Central and Eastern Europe (CEE) known as "Europe Agreements" (EAs) concluded at the beginning of 1990s, and Stabilization and Association Agreements (SAAs) concluded with the countries of the Western Balkans in the 2000s.

The starting point of this comparative review is an assumption that the degree of "ambition" of each type of the above agreements is identifiable through the extent to which it allows integration of a third country into the EU. In other words, by our benchmark, the more ambitious is an agreement that brings the status of contracting country in relation to the EU as close as possible to the status of EU Member. We testify the level of "ambitiousness" of Ukraine's AA against the backdrop of the above agreements on the basis of four criteria: *scope* of transposition of EU *acquis* into national legislation, *legal quality* of transposition, *supervision* over transposition, and *access to policy-shaping* within the EU.

We argue in this article that the above statements of EU senior officials concerning the "ambitiousness" of Ukraine's AA are only partially true. Moreover, our analysis shows that Ukraine's AA compared with other agreements scrutinized here demonstrates the largest structural asymmetry, that is, the biggest gap between the *largest volume of acquis*, which Ukraine has to incorporate into its national legislation on one hand, and the *lowest level of institutional involvement* of Ukraine into policy-shaping within the EU on the other.

## Differentiated European Integration of "Non-members"

The turning point for approximation of *deepening* and *widening* of the European integration process was the creation of the European Communities' single market following adoption of the Single European Act in 1986 (SEA).[2] The adoption of SEA transformed the European Communities into a unified European Community (EC), thus breaking through to the creation of the European Union (the Maastricht Treaty of 1992, in force since 1 November, 1993). The SEA defined the internal market as "an area without internal frontiers in which the free movement of goods, services, persons, and capital is ensured."[3]

It was the EC's main trading partners, the United States and EFTA countries, that placed the external dimension of SEA on the political agenda by voicing concerns over the effects that completion of the internal market would have on them.[4] David Kennedy and David Webb note that at the time of establishing the single market and transforming EC into the European Union, Brussels insisted that legal and economic integration between the EC and the remaining EFTA countries, after the decision of Austria, Finland, and Sweden to accede to the EU by the mid-1990s, should come before the "grand enlargement" that would include former communist states from CEE. Therefore while EC engaged in talks with Norway, Iceland, Liechtenstein and Switzerland with the aim of identifying modalities for their integration into the single market, consequently it offered CEE countries the conclusion of EAs.[5]

The EEA Agreement between the EU and the three EFTA countries (Norway, Iceland, and Liechtenstein) was signed in 1992 and came into force in 1994. The Agreement provides for the inclusion of EU legislation in all policy areas of the single market. This covers the four freedoms of free movement of goods, services, persons, and capital, as well as competition and state aid rules, but also horizontal policies, including consumer protection, company law, environment, social policy, and statistics.[6]

Switzerland did not conclude an EEA Agreement together with the remaining EFTA states because of a "no" vote in the referendum in 1992. Therefore, its relations with the EU are not framed by one comprehensive agreement but by an extensive set of bilateral agreements. Between 1994 and 2004, the Swiss government negotiated two sets of bilateral sectorial agreements with the EU. The first set of seven such agreements, known as "EU–Swiss Bilaterals I," was concluded in 1998 and came into force in June 2002. A second set of nine agreements, known as "EU–Swiss Bilaterals II," was signed in October 2004. In all 25 agreements, of which 9 was concluded before 1994, the most important is the 1972 Agreement (so called free trade agreement). Together with secondary agreements, the total number of bilateral agreements that frame present-day relations between Switzerland and the EU is about 120 (Swiss Bilateral Agreements [SBAs]). The SBAs facilitate full integration of Switzerland into the air transport sector and the Schengen policy of the EU as well as its partial integration into other EU sectorial policies.[7]

In 2014, the EU initiated negotiations with Switzerland with a view to bringing the bilateral legal regime closer to the EEA model, especially on issues related to institutional matters, including the transposition of *acquis* into the Swiss legal system. However, prospects for progress in the talks became gloomier after the national elections in Switzerland held in October 2019. The far-right Swiss People's Party, a winner of the elections, opposes a new framework agreement considering it as an infringement on Swiss sovereignty.[8]

EU relations with Turkey are regulated by the "Ankara Agreement" (better known as AA) that was concluded in 1963. An additional protocol to the AA establishing the Customs Union was signed in 1970. In 1995, it was agreed at the Association Council meeting that Turkey's Customs Union (TCU) would come into force starting on 1 January 1996. Since then, Turkey has been obliged to adopt *acquis* regulating the single market in the field of trade in goods, including elimination of technical barriers to trade, competition policies, protection of intellectual property rights, and the administration of border procedures, including rules of origin.[9] In 2004, the EU opened accession talks with Turkey; however, in June 2018 it decided that "negotiations are effectively frozen due to backsliding in the area of democracy, rule of law and fundamental rights."[10] In any case, Turkey remains the only candidate country that is already part of the EU Customs Union.

All the above agreements (EEA, SBAs and TCU) are different; nevertheless, they go far beyond the "simple" Free Trade Area (FTA) agreements the EU concluded with other countries, for example, South Korea, Japan, etc. In case of simple FTAs, the EU does not pursue approximation and/or systematic transfer of its norms.[11] Guillaume Van der Loo defines *conditio sine qua non* for an integration agreement as the (1) *obligation* for the partner country to (2) *apply, implement, or incorporate in its domestic legal order* a predetermined selection of EU *acquis*. Furthermore, integration agreements should include, first, a procedure to amend or update the incorporated *acquis*; second, an obligation for ECJ case-law to conform to the interpretation of the incorporated *acquis*; and third, judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*.[12] AAs of EaP countries together with their Deep and Comprehensive Free Trade Area components (AA/DCFTAs) fall within the category of a differentiated integration type of agreement, as they provide for political association and economic integration with the EU by means of obligatory approximation of national legislation with the EU *acquis*.

Parallel to concluding the EEA Agreement in 1992, EU–Swiss Bilaterals I in 1998 and TCU in 1995, the EU concluded EAs with Czechoslovakia, Hungary and Poland in 1992, Slovenia in 1996, Romania in 1997 and Bulgaria in 1998, and finally, SAAs with the Western Balkan countries in the 2000s. The EAs and SAAs, inspired by the earlier AAs of Greece and Turkey of 1960s, include a perspective of full membership with full harmonization with the *acquis*. For the sake of this analysis, we include also EAs and SAAs into the group of examined agreements.

## Conceptual Framework

Differentiated integration (DI) is a concept developed with the aim of the grasping realities of the different engagement of participating states in the European integration process. One of the most comprehensive attempts at explaining DI[13] has been offered by Dirk Leuffen, Berthold Rittberger, and Frank Schimmelfennig. They approached the DI phenomenon in its dynamic interaction and relationship with intra-EU integration by distinguishing between vertical and horizontal integration as well as vertical and horizontal differentiation. They define *vertical integration* as the transfer of policy-making competences from the national to the European level and, at the European level, from intergovernmental coordination and cooperation to supranational centralization, whereas they see *horizontal integration* as the territorial expansion of integrated policies among the member states to new member states, and beyond. They argue that empirical mapping of European integration over time reveals a distinct pattern: overall progress in integration is accompanied by increasing *horizontal* as well as *vertical differentiation*. The level of *vertical integration* varies from policy to policy. Some policies remain exclusively under the purview of the states, whereas others are in the domain of EU supranational policy-making. *Horizontal differentiation* captures the variation in horizontal integration across policies. Some integrated policies apply to the entire EU (and even to several non-member states), whereas others exclude or exempt EU Member States. Finally, they argue that rather than restricting differentiation to a temporary, accidental, or non-systematic feature of European integration, it is an essential and, most likely, enduring characteristic of the EU.[14]

With regard to (horizontal) DI of non-member countries, most authors in the field refer to the related concept of "external" and/or "extended" governance of the EU (EG). The EG concept has been developed with the aim of grasping a phenomenon of the expanding European integration project through diffusion of EU policies and rules to non-member countries. Most of works in the field have examined the EU as an actor in international relations whose foreign policy is driven by the aim of externalising its internal, but already "international" (agreed between Member States) environment as well as the workings of external forms of DI that are based on export (and import) of (parts of) *acquis*, including within the framework of the European Neighbourhood Policy (ENP) and later, the EaP.[15]

Examining the EU's role in the formation of a new European order and/or "boundaries of the EU-based order in Europe" after the end of the Cold War, Michael Smith developed the concept of *four boundaries* that exist or can be constructed between the EU and its "European" neighbours: geopolitical, institutional/legal, transactional, and cultural.[16] Smith's concept of the EU boundaries proved to be an inspiring base for further research on EG as it helped to grasp the "construction process" of EU-based order in Europe, including through expansion of EU rules via agreements with neighbouring countries.[17]

Sandra Lavenex and Frank Schimmelfennig argue that EU rule expansion can be conceptualized as shifts in the *regulatory* and *organizational* boundaries of EG. "The regulatory boundary refers to the extension of the regulatory scope of EU rules or policies to non-member states, while the organizational boundary refers to the inclusion of non-member states in EU policy-making organizations." They distinguish between three basic institutional forms (ideal modes) of EG, which facilitate diffusion of EU rules and policies to third countries: *hierarchy, network*, and *market. Hierarchical governance* assumes a vertical constellation of actors and takes place in a formalized relationship of domination and subordination. It is based on the production of collectively binding prescriptions and proscriptions. *Network governance* is institutionalized, ongoing coordination, both formal and informal. Actors are formally equal (are in a horizontal constellation), even if power imbalances exist. Finally, they define *market governance* as the outcome of competition between formally autonomous actors. In the context of EU external relations, this can be best seen by competitive pressure of the single market on third countries. Competitive forces can drive an approximation of EU legislation or the adoption of EU standards in third countries, even without a formal requirement.[18]

Finally, Sandra Lavenex developed a comprehensive operationalization of indicators which allow examination of the regulatory (quantitative dimension: scope and/or breadth of integration) and organizational (qualitative dimension: degree of institutionalization and/or depth of integration) boundaries of third countries' integration agreements. She suggests identification of the regulatory boundary through the following three indicators: *scope* of transferred EU acquis (it can range from full projection of *acquis* to more selective norm-transfer), *legal quality* of commitments (which can vary between quasi-supranational harmonization, looser notions of approximation or mere dialogue and information exchange), and *supervision* (compliance with the commitments can be backed by judicial enforcement bodies, regular political monitoring or be based on the legal principle of "good faith"). As regards the identification of the organizational boundary, she points out that the extension of EU rules involves different intensities of organizational *inclusion into EU decision-making structures*. Full organizational inclusion would consist in third countries participating in EU central legislative structures, thus amounting to membership. However, she notes that third countries are granted limited access to EU decision-shaping, which can vary between inclusion in EU structures (e.g., observer status of Norway and Switzerland in the Council dealing with the Schengen policy), access to the EU Comitology committees (without voting rights), EU agencies and programs and/or inclusion in parallel structures (e.g., Energy Community) and different levels of networking and trans-governmental contacts with the EU.[19]

The above definition of indicators for measurement of regulatory (policy taking) and organizational (policy shaping) boundaries we found instrumental in structuring comparative analysis of the selected integration agreements through the identification of their differences and similarities. As far as the *regulatory boundary* is concerned, we compare Ukraine's AA/DCFTA with other integration agreements on the basis of the following three indicators: first, scope of transposition of the EU *acquis*; second, legal quality of this transposition, and third, type of supervision mechanism in place. Finally, we look at the *organisational boundary* of Ukraine's AA/DCFTA against other examined agreements, that is, if and how contracting countries are involved in policy shaping within the EU, especially when it comes to legislating norms they are committed to transpose into their national legislations.

## Scope of Transposition

Guillaume Van der Loo notes that a key feature of the EU–Ukraine and other EaP AAs is their broad and comprehensive character. The EU–Ukraine AA covers the entire spectrum of EU–Ukraine relations and is unprecedented in its breadth (number of areas covered) and depth (detail of commitments and timelines). The DCFTA part of Ukraine's AA goes much further than traditional FTAs, foreseeing not only mutual opening of markets for most goods, but also the gradual liberalisation of services and binding provisions on sanitary and phytosanitary measures, intellectual property rights, public procurement, energy, competition, etc.[20]

Moreover, in line with the above we argue that Ukraine's AA/DCFTA goes far beyond the scope of transposition of EU *acquis* as compared to the EEA Agreement, SBAs, and TCU. According to representatives of the European Commission who took part in negotiations with Ukraine on AA/DCFTA, the agreement envisages that Ukraine will adopt about 95 percent of the EU trade and economic related *acquis*.[21] By comparison, following Benjamin Leruth, Norway as an EEA country is taking more than three-quarters (or circa 75 percent) of the European legislation.[22]

In addition to the scope of *acquis* covered by EEA Agreement Ukraine's AA/DCFTA also covers agriculture, fisheries, and taxation as well as JHA and CFSP. Compared with TCU, in addition to trade in goods, it also includes trade in services. Ukraine's AA/DCFTA covers substantially all trade, including "sensitive" goods such as agricultural, steel, and textile products. In addition to trade-related issues, AA/DCFTA establishes cooperation with the EU in twenty-eight sectorial policies, which are also based on gradual approximation to the EU *acquis*.[23] In regard to exemptions from the *acquis*, similarly to the EEA Agreement, Ukraine's AA/DCFTA does not include common trade policy and economic and monetary union. However, Ukraine has to consult the EU on the matter of compliance with the Agreement should it plan to establish a traditional FTA with a third country or join a customs union established by third countries.[24]

As to the scope of transposition of *acquis*, AA/DCFTA is the second most "ambitious" type of an EU agreement with third countries, following EAs and SAAs, which, however, included the membership perspective and thus also commitment by the given countries to comply *fully* with the EU *acquis*. At the same time, the AA/DCFTA in terms of the scope of projected *acquis* is more ambitious than EEA Agreement, and much more ambitious than SBAs (with exemption for areas of Schengen and air transport) and TCU. Ukraine's AA/DCFTA envisages the largest adoption of the *acquis* among all existing contractual frameworks of the EU for relations with third countries, which do not include the membership perspective.

## Legal Quality

The key provision underpinning Ukraine's AA/DCFTA sets out the concept of gradual approximation of Ukraine's legislation to EU norms. It includes forty-three Annexes setting out EU legislation to be taken on by a specific date. Timelines vary between two and ten years after the Agreement comes into force.[25]

Another guiding provision of the AA/DCFTA sets out the concept of *dynamic approximation*. This concept reflects the reality that EU law is not static but constantly evolving. Thus, the approximation process of Ukraine's national legislation to the *acquis* should keep pace with the principal EU reforms, but in a proportionate way, taking account of Ukraine's capacity to carry out the approximation. Following the Agreement, the EU should inform Ukraine well in advance about any changes to respective legislation, and subsequently the Association Council can amend annexes to the agreement following changes in the *acquis*. After approximation of its national legislation, Ukraine should request recognition of equivalence.[26]

As already noted above, AA/DCFTA of Ukraine envisages *approximation* of national legislation to the *acquis*, which is a less strict method of transposition compared to *harmonisation*. It offers more flexibility in interpretation of the *acquis* as well as in choosing the methods of its transposition into national legislation. In discussing the legal quality of the *acquis* transposition, Sabine Jeni and Andriy Tyushka point out two important issues relevant for its assessment on the "micro-level": first, all forms of transposition, except harmonization, contain derogations from the *acquis* and should therefore be explicitly measured in order to identify the quality of their transposition; and second, a supervision mechanism plays a key role in assessing the compliance of national legislation with the incorporated *acquis*.[27] Whereas research on explicit transposition of the *acquis* by Ukraine (on a micro-level assessment) goes beyond the scope of this article, in our analysis we stick to the criteria for measurement of the legal quality of *acquis* transposition as identified above by Sandra Lavenex, of course with all due regard to its limitations. In terms of the above "simplified" understanding of the legal quality of transposition of the *acquis* to national legislation of third countries, AA/DCFTAs are less ambitious than the EEA Agreement, TCU, EAs and SAAs.

Ukraine's AA/DCFTA is similar to the EEA Agreement, TCU, SBAs, EAs and SAAs when it comes to its *dynamic nature*, as it includes constant approximation of national legislation not only with the existing but also newly adopted *acquis*. However, in terms of the legal quality of *acquis* transposition, it is less ambitious than the above contractual frameworks, as it does not require a strict legal homogeneity with the *acquis*. The EEA Agreement requires harmonisation with the "legal homogeneity" principle. SBAs include harmonisation of the *acquis* in the two sectors: air transport and Schengen, whereas in the remaining sectors, they envisage "harmonisation with flexibility" ruled by the "equivalence of legislation" principle. And finally, TCU requires harmonisation in the respective field of the single market *acquis* regulating trade in goods, including the common trade policy. Ukraine's AA/DCFTA requires achieving legal equivalence with the *acquis* through approximation, which brings it closer to the Swiss model of DI, which applies the "harmonisation with flexibility" method for transposition of *acquis* into national legislation.

## Supervision

Compliance with harmonisation or approximation commitments within the examined agreements of third countries with the EU can be backed by, first, judicial enforcement bodies, as in the case of the EEA Agreement and TCU; second, by regular political monitoring as in the case of EAs and SAAs; or third, based on the legal principle of "good faith" as in the case of Switzerland.[28]

As far as Ukraine's AA/DCFTA is concerned, there is no legal enforcement authority as, for example, the EFTA Court established by the EEA Agreement. The supervisory body, which monitors implementation of the agreement, is of a political nature, that is, an Association Council (AC) at the ministerial level. The AC consists of representatives of the European Commission, Council of the EU, and the government of Ukraine with a rotating chairmanship. It is authorised to monitor the implementation of the Agreement, make binding decisions, and has the right to amend annexes to the Agreement following the evolution of EU legislation.[29] Monitoring means a continuous appraisal of progress in implementing and enforcing measures and commitments covered by the Agreement. It includes assessments of approximation of legislation and is of particular importance for DCFTA, as its positive results are the prerequisite of any further opening for Ukrainian economic operators on the EU market.[30]

Under the AA/DCFTA disputes should be resolved by the AC. The Agreement sets out a Dispute Settlement Mechanism (DSM), which should come into effect if obligations under the Agreement are not fulfilled by one of the parties. For the DCFTA part, another binding trade-specific DSM is set out in the form of a dedicated protocol. This trade-specific mechanism is inspired by the traditional WTO DSM. In addition, the chapter on trade establishes a mediation procedure, including an arbitration panel (led by a jointly agreed independent mediator; the panel shall consist of fifteen individuals nominated by the Joint Trade Committee: five from the EU, five from Ukraine, and five experts from outside the EU/Ukraine).[31] If the arbitration panel fails to resolve a dispute, the final decision lies with the ECJ. If the judgment of the ECJ is not respected by either party of the Agreement, the ECJ is authorised to impose sanctions on the respective party.

Guillaume Van der Loo emphasizes the specificity of the Ukraine AA/DCFTA supervision mechanism compared to EAA, which is that it does not include one single "horizontal" mechanism for market access conditionality and gradual integration into the EU market. Instead, almost every DCFTA chapter contains its own integration mechanism, based on different forms of market access conditionality and different procedures to guarantee the uniform interpretation and application of the incorporated EU *acquis*. However, he notes that two DCFTA chapters (services/establishment and public procurement) have the strictest procedures for market access conditionality and include certain provisions identical to the EEA Agreement. In other DCFTA chapters where the market access conditionality will result in less advanced forms of integration such as the sanitary and phytosanitary chapter, the procedures to ensure uniform interpretation and application are less detailed. He underlines that in Ukraine's DCFTA a strong integration dimension only applies to a limited section of the EU Internal Market (i.e., services/establishment and public procurement) and is conditional upon the strict procedures of market access conditionality. He concludes that DCFTA is thus a far cry from the EEA, which extends the entire EU Internal Market to the EFTA-3.[32]

In summary, the supervision mechanism established by Ukraine's AA/DCFTA includes judicial procedures ensuring uniform interpretation and application of the transposed *acquis*, including DSM, similar to EAs and SAAs. In the event of failure of the established judicial procedures, the ECJ has the final say. Moreover, the two trade-related chapters on services/establishment and public procurement include direct reference to the obligation to follow ECJ case-law conformed interpretation of the transposed EU *acquis*, which might be considered a limited EEA-like element that appeared in Ukraine's AA/DCFTA. However, Ukraine's AA/DCFTA does not include the establishment of a legal enforcement authority, which remains an exceptional feature of the EEA Agreement. Political institutions embodied in the AC and its substructures, which are similar to TCU, EAs, and SAAs, play a key role in supervising transposition of *acquis*. In the end, as regards supervisory mechanisms in place, the AA/DCFTA of Ukraine, EAs and SAAs can be put in the middle between the EEA Agreement, which includes the highest level of supervision with both judicial and political institutions, on one hand, and the lowest level of supervision, which is typical for the Swiss model of DI.

## Inclusion in Policy Shaping

Inclusion of non-member countries into the policy-shaping process within the EU is a delicate political issue, as the right to shape EU norms and policies is a prerogative of its Members. However, inclusion of third countries into the EU internal market since the early 1990s has raised questions about the legitimacy of the EU EG. During talks on the EEA Agreement, EFTA countries resisted accepting an agreement that would impose on them a commitment to import *acquis* without having a chance to participate in its formation.[33] In the end, the EU accepted certain forms of participation of non-member states with integration agreements in its institutions. However, different political and legal conditions under which the EU has been concluding integration agreements with third countries resulted in different forms of their involvement in EU institutions. Thus, in addition to a different scope of harmonisation or approximation with *acquis*, different supervision mechanisms as well as a different legal quality of transposition of *acquis*, the DI of third countries also means different types of their involvement in EU policy shaping. The way non-member states are included in EU policy shaping is important, as it conveys the *degree of their political association* with the EU.

The *highest level* of involvement of non-member states in EU institutions is represented by the Schengen Association Agreements with Switzerland and EEA countries, which grant them access to the Council of the EU at all levels of its hierarchy, for example, the ministerial level, COREPER, and expert working groups, albeit without the right to vote. This is the only case when non-member states have direct access to one of the central policy-making institutions of the EU.[34]

The *second level* for participation of non-member states in EU policy shaping is involvement of their experts in the EU Comitology. Comitology committees are expert committees set up by the Commission in the agenda-setting stage before the legislative process within central EU institutions. Their purpose is to assist the Commission in drafting new legislation as advisory bodies.[35] The EEA Agreement grants the right to Norway, Iceland, and Liechtenstein to delegate their experts to Comitology committees, without the right to vote. The same right is granted to Turkish experts, however, only in the limited fields of *acquis* that are covered by the TCU.[36]

EU Comitology is also open to Switzerland; however, in contrast to EEA and TCU arrangements, there is no formal binding commitment on the part of the Commission to involve Swiss experts on a regular basis. In addition, rules for participation of Swiss experts in EU Comitology vary depending on the provisions of a given sectorial agreement, as there is no one common institutional arrangement that would provide for one regulatory regime of involvement of Swiss experts in EU comitology. During the preparatory drafting stage of the *acquis*, Swiss experts may be informed and consulted before and after the meetings of EU experts. In most cases, EU–Swiss information exchange procedure means that Switzerland must be notified of the *acquis* once it has been adopted.[37] EAs, SAAs, and AA/DCFTAs do not envisage any participation of experts from contracting countries in EU Comitology. In other words, unlike the EEA, SBAs, and TCU, other types of AAs do not provide for the access of experts of contracting parties into EU Comitology.[38]

The *third level* of involvement of non-member states in EU structures is their participation in EU Programs and Agencies, including in their respective committees. The first EU Agencies and Programs were created in the 1970s with a view to producing and disseminating information of European interest. Agencies and Programs established later on, in the 1990s, were predominantly meant as instruments for implementing EU policies, such as the internal market. Most of the Agencies created from the 2000s onwards were vested with two key new tasks: providing independent scientific/technical advice and information, sometimes in response to serious security crises, and fostering Member States' cooperation in different areas.[39]

The EEA Agreement grants the right to Norway, Iceland, and Liechtenstein to participate in EU Programs and Agencies as they choose and decide, including the level of their involvement, which might range from full membership to observer

**Table 1**
**Types of Integration Agreements: A Comparative Summary**

| Agreement | Scope of *Acquis* Transposition (Policy Taking) | Legal Quality | Inclusion in EU Structures (Policy Shaping) | Supervision | Schengen |
|---|---|---|---|---|---|
| EEA | (nearly) Full EU *acquis*: Single Market, including number of additional sectoral policies<br>Exemptions:<br>agriculture, fisheries, customs union, common trade policy, CFSP, JHA, taxation, economic and monetary union | Harmonisation with the “legal homogeneity” principle<br>Dynamic nature: the all-new EU *acquis* shall be adopted, including the case law of ECJ | Participation (of experts) in:<br>Comitology committees (advisory bodies of EC in drafting new legislation) without right to vote<br>EU Programs<br>EU Agencies<br>(right to participate as full member or observer) | Judicial: Surveillance Authority (can launch infringement procedures against non-compliant Member States)<br>EFTA Court (responsible for enforcing legal homogeneity across the EEA while respecting the jurisdiction of the ECJ) | Full participation on the basis of the Schengen Association Agreement<br>The highest level of involvement in EU structures with access to all three levels of Council (ministerial level, COREPER, and expert working groups) without the right to vote |
| EU–Swiss Bilaterals I/ II | Full EU *acquis* in two sectors: air transport and Schengen<br>Partial *acquis* in the remaining sectors (ca. 120 bilateral sectorial agreements) | Harmonisation in two sectors: air transport and Schengen<br>In the remaining sectors: “harmonisation with flexibility” ruled by the “equivalence of legislation” principle<br>“Autonomer Nachvollzug” rule (Swiss legislative procedure includes checking of each new Swiss legislation on its compliance with EU *acquis)* | In air transport and Bilaterals I package of 7 sectoral agreements (from 2002):<br>participation (of experts) in Comitology committees (advisory bodies of EC in drafting new legislation) without the right to vote<br>EU Programs<br>EU Agencies<br>(are open to participation as full member or observer) | No political or judicial supervision<br>“Good faith” | Full participation on the basis of the Schengen Association Agreement<br>The highest level of involvement in EU structures with access to all three levels of the Council (ministerial level, COREPER, and expert working groups) without the right to vote |

*(continued)*

**Table 1 (continued)**

| Agreement | Scope of *Acquis* Transposition (Policy Taking) | Legal Quality | Inclusion in EU Structures (Policy Shaping) | Supervision | Schengen |
|---|---|---|---|---|---|
| TCU | Partial EU *acquis* (Single Market in the field of trade in goods, incl. elimination of technical barriers to trade, competition policies, protection of intellectual property rights, administration of border procedures including rules of origin and common trade policy) | Harmonisation in the respective field of Single Market *acquis* regulating trade in goods, including common trade policy<br>Dynamic nature: all new respective EU *acquis* shall be adopted | Participation (of experts) in respective selected Comitology committees<br>EU Programs<br>EU Agencies<br>(open to participation) | Political: Association Council<br>Judicial:<br>Jurisdiction of the ECJ in respective areas | No<br>JHA dialogue (not part of agreement), including on migration, asylum, border management, and visas |
| EAs/SAAs | Full *acquis* | Harmonisation<br>Dynamic nature: all new EU *acquis* shall be adopted | No access to Comitology committees<br>EU Programs<br>EU Agencies<br>(open to participation) | Political: Association Council<br>Dispute Settlement Mechanism<br>In case of failure: jurisdiction of ECJ, which can impose sanctions | No<br>JHA dialogue (part of AA), including on migration, asylum, border management, and visas |
| AA/DCFTAs | (almost) Full EU *acquis*<br>Single Market *acquis* plus 28 sectoral policies (circa 95% of trade and economic related *acquis*)<br>Exemption:<br>customs union, economic and monetary union | Approximation (DCFTA)<br>Dynamic nature: all new EU *acquis* shall be adopted | No access to Comitology committees<br>EU Programs<br>EU Agencies<br>(open to participation) | Political:<br>Association Council<br>Dispute Settlement Mechanism<br>In case of failure: jurisdiction of ECJ, which can impose sanctions | No<br>JHA dialogue (part of AA), including on migration, asylum, border management, and visas |

Source: Author's own elaboration.

status.[40] Currently, Iceland participates in twelve EU Programs; Norway participates in eleven and Liechtenstein in three. All three EEA countries participate in seventeen EU Agencies that have been transformed into something like joint EU–EAA agencies[41]; moreover, Norway has concluded bilateral agreements with an additional fourteen EU Agencies.[42] Participation in EU Programs and Agencies is also open to Switzerland, Turkey, SAAs, Euro-Med, and EaP countries. Switzerland participates in four Programs and seven Agencies.[43] Turkey participates in seven Programs and four Agencies.[44] Ukraine participates in four Programs and ten Agencies.[45]

Finally, the *fourth avenue* for institutional cooperation of non-member countries with the EU, which also serves as a channel for transposition of EU *acquis*, are multilateral or regional platforms and/or international organisations established by the EU with non-member states, for example, the Energy Community. As to its legal status, the Energy Community is an international organisation dealing with energy policy. The organisation was established by an international treaty in October 2005, which came into force in July 2006. The treaty brings together the EU, on one hand, and countries from South-East Europe and the Black Sea region on the other. Ukraine acceded to the Energy Community on 1 February 2011.[46]

In summary, Ukraine's association with the EU in terms of its involvement in the policy-shaping process within the EU does not provide for the most ambitious institutional arrangement in the field, which the EU has established with non-member states over the last three decades. Ukraine has access to the two lowest levels of participation of non-member states in EU institutions: first, international organisations of which the EU is part, although they are not part of EU institutions, for example, the Energy Community; and second, EU Programs and Agencies, which are advisory entities to central EU institutions, although they do not participate directly in the EU legislating process.

The EEA countries, Turkey, and Switzerland are the only non-member countries that have access to EU Comitology, which is the basic level of the EU pre-legislating process within the central EU institutions. Even though their experts can participate in Comitology meetings as observers without the right to vote, they do have a chance to influence the shape of respective EU law and policies through presenting their legislative positions. Finally, the right of the EEA countries and Switzerland to participate in all three levels of the Council of the EU (ministerial level, ambassadorial level [COREPER], and expert working groups) dealing with Schengen policy, is rather a unique phenomenon in the existing policy-making routine of the EU.

## Conclusions

The above comparative analysis of Ukraine's AA brings us to the following conclusion: Statements by EU officials that AA/DCFTAs provide the most ambitious external relationship ever developed with the EU are only partly true. Their statements are true only regarding one of the three indicators we have selected for comparative analysis of a *regulatory boundary* of Ukraine's AA/DCFTA. Indeed, as to the scope of *acquis* transposition, Ukraine's AA/DCFTA is the second most ambitious type of the EU DI agreement with third countries (Ukraine shall transpose approximately 95 percent of EU trade and economics-related *acquis*), following the most ambitious former EAs with CEE countries and present SAAs with the Western Balkan countries (100 percent of *acquis*); however, the latter included a membership perspective. In this respect, Ukraine's AA/DCFTA is much more ambitious than the EEA Agreement, SBAs, and TCU. Ukraine's AA/DCFTA envisages the largest adoption of *acquis* compared with all integration agreements the EU has ever concluded with third countries, which do not include a membership perspective.

Ukraine's AA/DCFTA is similar to the EEA Agreement, SBAs, TCU, EAs, and SAAs when it comes to its dynamic nature, as it provides for constant approximation of national legislation not only with the existing, but also newly adopted EU *acquis*. However, in terms of the legal quality of *acquis* transposition, Ukraine's AA/DCFTA is less ambitious than the above agreements as it requires approximation with *acquis* and does not require achieving strict legal homogeneity with the EU *acquis*, that is, harmonisation. Approximation stipulates achieving a legal equivalence with EU *acquis*, which brings Ukraine's AA/DCFTA closer to the Swiss model of DI that includes a "harmonisation with flexibility" method for transposition of EU *acquis* into national legislation.

When it comes to supervisory mechanisms, Ukraine's AA/DCFTA is similar to the TCU, former EAs, and current SAAs. They can all be placed in the middle between the EEA Agreement, which includes the highest level of supervision with both judicial and political institutions, on the one hand, and the lowest level of supervision, which is typical for SBAs.

In respect of the *organisational boundary*, Ukraine's AA/DCFTA, as far as it concerns participation in the policy-shaping within the EU, does not provide for the most ambitious institutional arrangement in the field, which the EU has established with EEA countries, Switzerland, and Turkey. Ukraine has access to the two lowest levels of participation of non-member states in EU institutions: international organisations to which the EU belongs though they are not part of EU institutions (e.g., the Energy Community) and EU Programs and Agencies. However, unlike EEA countries, Turkey, and Switzerland, Ukraine does not have access to EU Comitology, which is the first expert level of the pre-legislating process taking place within central EU institutions.

The above findings lead us to the conclusion that the EaP type of AA is the second most ambitious type of EU integration agreements in the EU legal practice in its relations with third countries when it comes to the scope of absorption of the EU *acquis* (policy taking). However, it is the least ambitious agreement regarding the inclusion of the contracting party into the legislating and decision-making process within the EU (policy shaping). In other words, this comparative review shows that AA/

DCFTAs include the largest structural asymmetry in the existing integrative contractual frameworks for EU relations with third countries that fall within the category of DI. Against the backdrop of other agreements (EEA, SBAs, and TCU), there is a biggest gap between the largest scope of approximation with the EU *acquis* on one hand and the lowest level of institutional involvement of Ukraine into policy-shaping within the EU on the other. Based on the above finding, we argue that there is a room for a further upgrade of the institutional association of the EaP countries with the EU in line with the existing legal practice of the EU in its relations with third countries that are integrated in the EU common area of four freedoms, which would eliminate the existing discrepancy in the EaP type of AAs.

The implementation of Ukraine's AA is a test case for the EU to preserve its capacities to be a transformative actor in Europe through expanding its common area of four freedoms. The above test the EU is confronted with in Eastern Europe is especially challenging in the context of the aggressive behaviour of Russia towards Ukraine since 2014. We believe that it is in the interest of both the EU and Ukraine to bring more symmetry into their relationship, including in the field of institutional mechanisms for their mutual interaction and cooperation.

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## Notes

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12. G. Van der Loo, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A New Legal Instrument for EU Integration without Membership* (Leiden, the Netherlands: Brill Nijhoff, 2016), 28, 49.

13. Cf. A. C. Stubb, "A Categorization of Differentiated Integration," *Journal of Common Market Studies* 34, no. 2 (1996): 283–95; *Which Europe? The Politics of Differentiated Integration*, ed. K. Dyson and A. Sepos (London: Macmillan, 2010); K. Holzinger and F. Schimmelfennig, "Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data," *Journal of European Public Policy* 19, no. 2 (2012): 292–330.

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19. S. Lavenex, "Concentric Circles of flexible 'EUropean' Integration: A Typology of EU External Governance Relations," *Comparative European Politics* 9, nos. 4/5 (2011): 372–93, 374–76.

20. G. Van der Loo, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership*, 190, 221.

21. In 2010, 2011, and 2012, the author of this article interviewed members of the EU negotiating team (from EEAS and DG TRADE) for talks on AA/DCFTA with Ukraine. Interviews with the same members of the team took place at the end of the respective years (in November and/or December). In

each interview, he asked them to estimate a scope of *acquis* that Ukraine should transpose into its national legislation in accordance with the agreement. The estimates provided in their replies were "around 80%" in 2010, "around 80-90%" in 2011, and "around 95%" in 2012, when negotiations on the text of the agreement were concluded on expert level. The last interview took place in Brussels on 7 November 2012.

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24. Ibid. Article 39, L 161/17.

25. Ibid. Article 1, L 161/6, and List of Annexes, L 160/180.

26. Ibid. Articles 66, 67, and 68, L 161/31-L 161/33.

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28. Cf. R. Petrov, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries," *European Foreign Affairs Review* 13 (2008): 33–52.

29. Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Title VII, Chapter I "Institutional framework."

30. Ibid., Title VII, Chapter I.

31. Ibid., Title IV, Section 3.

32. G. Van der Loo, *The EU–Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership*, 304, 308–9, 311.

33. Cf. S. Lavenex, "The External Face of Differentiated Integration: Third Country Participation in EU Sectoral Bodies," *Journal of European Public Policy* 22, no. 6 (2015): 836–53.

34. Ibid.

35. Cf. R. H. Pedler and G. Schäfer, *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (Maastricht, the Netherlands: European Institute of Public Administration, 1996).

36. Cf. Lavenex, "Concentric Circles."

37. Cf. M. Vahl and N. Grolimund, *Integration without Membership: Switzerland's Bilateral Agreements with the European Union* (Brussels: Centre for European Policy Studies, 2006).

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