

INTEGRATING UKRAINE INTO THE EU'S DIGITAL SINGLE MARKET

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DIGITAL SINGLE MARKET AND THE ASSOCIATION AGREEMENT

Given that the digital revolution is evolving at much faster pace than the industrial revolution once did, digitalizing the economy will determine a country's competitive positions for the upcoming years. Understanding this, the EU began to carry out its Digital Single Market (DSM) Strategy in 2015.¹

In a Joint Statement at the Eastern Partnership Summit in November 2017, the participants agreed to cooperate in harmonizing digital markets to extend the benefits of the EU DSM to the partner countries.² The related deliverable, #7, was listed among the 20 deliverables of the EaP by 2020.³

The structure of the Association Agreement covers the subject of a digital market in a number of places:

- Title IV, Chapter 6, Section 5, Sub-section 3: liberalizing commerce in computer services;
- Title IV, Chapter 6, Section 5, Sub-section 5 and Annex XVII: integrating Ukraine into the EU's internal market of telecommunications services;
- Title IV, Chapter 6, Section 6: cooperation in developing e-commerce;
- Title V, Chapter 14: cooperation in the information society and access to information and communication technologies (ICT);
- Title V, Chapter 15 and Annex XXXVII: approximating policy in the audio-visual sector.

In the telecommunications services sector, the AA offers the prospect of a mutual internal market treatment. According to Art. 4 (3) of Annex XVII of the Agreement, this kind of treatment means that there should be no restrictions on the freedom of a Ukrainian legal entity to provide services on the territory of the EU and vice-versa. This will be possible provided that the EU evaluates Ukraine's fulfilment of its "homework" with regard to approximating Ukrainian legislation and regulations to EU law.

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0192>

² <https://www.consilium.europa.eu/media/31758/final-statement-st14821en17.pdf>

³ https://cdn3-eeas.fpis.tech.ec.europa.eu/cdn/farfuture/dLJ9RdBalFgQqx34lgPlwagsNlujB6cJzDeeiRR0RdQ/mtime:1497363650/sites/eeas/files/swd_2017_300_f1_joint_staff_working_paper_en_v5_p1_940530.pdf

Integrating Ukraine into the DSM is in line with AA provisions and EaP priorities. The AA also offers prospects for an internal market treatment in the telecoms services sector

copyright registration. As a consequence of integrating into the DSM, investments should grow, together with commerce and employment.

In this way, Ukraine's integration into the EU's DSM is a logical objective that flows out of AA provisions and EaP priorities. For Ukraine, the DSM will effectively mean access to the online markets and e-services of EU countries, simplified legal and administrative barriers, enjoying common rules for free cross-border dissemination of online services and content, online payments, simplified procedures for digital contracts, licensing, taxation and

UKRAINE'S DIGITAL MARKET

In 2016, Ukraine's telecommunications market was assessed at nearly UAH 57 billion or a little less € 2 billion, meaning less than 1% of the EU market, which was worth €220bn that same year. The most important market players in telecom are the operators of mobile, satellite and cable networks, and internet service providers. In Ukraine, the biggest of these segments in terms of revenues is the mobile telecoms market.

In 2016, the volume of e-commerce in Ukraine reached \$ 5.65 billion or about 1% of e-commerce in the EU that same year — € 530 billion. On the other hand, Ukraine was in first place among all European countries for growth of e-commerce, which was 30-35% in 2016, and hit 44% in the first half of 2017, compared to 15% growth in EU e-commerce for 2016.⁴ According to various sources, about 25-33% of Ukrainians regularly buy online and pay for their orders with bank cards directly on the site. Both international and Ukrainian e-platforms such as eBay, Taobao, Amazon, Rozetka etc. have grown in popularity. This has also raised a slew of problematic issues that need to be legislated properly, especially when it comes to consumer protection and personal data security in the face of illegal use for the purposes of advertising, and marketing and selling data.

Today, Ukraine's IT sector produces more than 3% of GDP. The industry's total income for 2017 was US \$3.6bn, which places it in third place after agriculture and metallurgy for export volumes.⁵ The domestic IT sector is largely oriented towards export markets: 80-90% of IT services are provided to foreign markets. The sector's main customers for computer and information services are traditionally in the US and the EU.⁶

IT sector products currently form more than 3% of Ukraine's GDP. In terms of exports and incomes, the IT sector is now in third place, behind agriculture and metallurgy

⁴ https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/web_E-commerce__civic_synergy_ua_2018.pdf

⁵ <https://www.kmu.gov.ua/ua/news/sektor-it-mozhe-stati-dodatkovim-lokomotivom-ekonomichnogo-zrostannya-glava-uryadu>, <https://economics.unian.ua/finance/2349038-eksport-it-poslug-z-ukrajini-za-rik-zris-do-36-milyarda-infografika.html>

⁶ <https://eba.com.ua/industriya-narostyla-eksport-poslug-na-17-5/>

UKRAINE'S HOMEWORK

In signing the AA, Ukraine committed itself to gradually bringing its existing and future legislation governing the telecommunications sector in line with the EU acquis, commitments that are spelled out in Annex XVII. However, since the AA was concluded, the EU has begun to radically revise its legislation in this sphere as part of setting up the DSM. Thus, the DSM Strategy for Europe requires:⁷

- Removing barriers to cross-border trade in goods and services through the internet by simplifying contractual obligations, e-commerce, reforming copyright rules, avoiding unwarranted geoblocking, protecting consumer rights, unifying taxation, reviewing the rules for providing cable and satellite communications and courier services;
- Harmonizing with the regulations governing digital networks and services in EU countries by revising legislation governing the dissemination of content, telecommunications, audio-visual services, the protection of personal data, the development of public-private partnerships in cyber security, ensuring that information and communication technologies are broadly accessible;
- Taking maximum advantage of potential growth in the EU digital economy by investing in infrastructure and technologies such as cloud computing and big data, and in research and innovations aimed at increasing industrial competitiveness, improving public services, and developing digital skills among ordinary citizens.


Substantive changes to EU legislation mean that AA provisions defining Ukraine's DSM 'homework' need to be updated

As of September 2018, the European Commission had presented 30 legislative propositions related to DSM as part of the implementation of the Strategy, 19 of which were passed by the Council of the EU and the European Parliament.⁸ Taking into account such considerable changes since the conclusion of the AA with Ukraine, now Annexes XVII and XXXVII⁹ both need to be updated to identify the exact extent of Ukraine's 'homework'.

Common tasks for Ukraine and the EU include achieving 20 EaP deliverables till 2020. The EaP deliverable #7 targets on harmonisation of digital markets somewhat duplicate, supplement, elaborate on or are additional to the AA provisions. Most of the defined targets relate to Title V Chapter 14 (Information society), and also to some other AA articles regarding telecommunications services, database protection, cross-border digital communications services, and regulations governing e-commerce.¹⁰

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0192>

⁸ <https://ec.europa.eu/digital-single-market/en/news/creating-digital-single-market-european-commission-actions-2015>

⁹ Annex XXXVII deals with approximating Ukraine's legislation to that of the EU in audiovisual matters and envisages the introduction of provisions from the Audiovisual Media Services Directive #2010/13/EU. However, while Ukraine was still debating the need to amend the law on radio and television broadcasting (<https://detector.media/rinok/article/132891/2017-12-14-syumar-zareestrvala-zakonoproekt-pro-audiovizualni-poslugi>), the EU passed a revised Audiovisual Media Services Directive, #2018/1808 (<https://ec.europa.eu/digital-single-market/en/revision-audiovisual-media-services-directive-avmsd>, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>). This new directive reflects changes in the market itself, where the consumers more and more choose content for themselves and get it online rather than through radio or television broadcasts.

¹⁰ https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/Web_ua_AAEap-deliverables_civic_synergy_ua_2018.pdf pp 6, 13-14.

CURRENT PUBLIC POLICY

Ukraine still lacks a separate central executive body to deal with the development of a digital economy and society. The Ministry of Economic Development and Trade (MEDT) set up a Department of e-Economy in 2015, but it was shut down in 2016. Public policy for the development of information society is partly handled by the State Agency for E-Governance of Ukraine.

Ukraine does not have a separate agency dealing with the digital economy and society

The national regulator for electronic communications in Ukraine is the National Commission for the State Regulation of Communications and Informatisation (NCCIR). The State Service of Special Communication and Information Protection regulates special communications and the protection of state information and telecommunications systems and resources.

The national regulator is not an independent agency and cannot carry out its proper functions

There is no clear and understood division of powers in state administration and regulation of electronic communications, while NCCIR lacks the authority to function properly as an independent regulator in line with EU standards. A poll of stakeholders¹¹ showed that they see a need to reinforce the independence and administrative capacity of the national communications regulator. De jure, NCCIR is not an independent agency as it is subordinated to the President of Ukraine and de facto it does not function as a regulator.

On 17 January 2018, the Cabinet approved the Concept of the development of the digital economy and society of Ukraine for 2018-2020¹² and confirmed an Action Plan for implementing it. Prior to concluding this document, the MEDT spent considerable efforts drafting the foundation document - 'The Digital Agenda for Ukraine - 2020'¹³, - together with leading IT experts and civil society, which was coordinated by the Hi-Tech Office Ukraine.¹⁴ The Concept establishes the key policies, priority areas, initiatives and projects for the digitalisation of Ukraine till 2020.

In the autumn of 2018, the Government drafted a Strategy of Ukraine's Integration into the EU's Digital Single Market (Roadmap), and an action plan for implementing it over 2018-2023 that took into account new EU legislation. At the moment the draft Strategy is being agreed with stakeholders and the EU.

¹¹ https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/Report_USPGS_2017_ukr_final.pdf pp 39-47.

¹² <https://www.kmu.gov.ua/ua/news/uryad-shvaliv-koncepciyu-rozvitku-cifrovoyi-ekonomiki-ta-suspilstva-ukrayini-na-2018-2020>

¹³ <https://goo.gl/BUui46>

¹⁴ Hi Tech Office Ukraine is an association of enterprises involved in high technology (<http://www.ht-office.org>) whose purpose is to help establish positive conditions for innovative business and the digital economy to develop in Ukraine. The National Council of Hi Tech Office Ukraine includes representatives from the Ministry of Economic Development and Trade, the Verkhovna Rada and the Presidential Administration, which ensures effective interactions between the private and public sectors.

IMPLEMENTATION DYNAMICS

In the last few years, Ukraine managed to take a series of steps to approximate legislation and regulation. For instance, in 2015, a law on e-commerce was adopted that nevertheless did not regulate a slew of issues regarding harmonisation with EU legal norms.¹⁵ In November 2018, the law on electronic trust services came into effect, which updated legislation governing electronic identification such as digital signatures in line with the eIDAS Regulation.

In recent years, Ukraine took steps to approximate its legislation and regulations, but it is not keeping up with the pace of updates to EU legislation

At the same time, Ukraine still lacks a strategy to ensure access to high-speed internet (broadband access). New legislation on electronic communications and radio spectrum has still not been passed. The draft laws on electronic communications that are currently registered in the Rada do not meet EU norms¹⁶ and new EU Electronic Communications Code.¹⁷

In early 2016, a Cyber Security Strategy was approved and in May 2018 the law on the basic principles of ensuring the

cyber security of Ukraine came into effect. A legislative proposal on critical information infrastructure is in the process of being drafted. However, both the legislation and the Cyber Security Strategy action plan need to be amended to meet the requirements of NIS Directive on network and information system security¹⁸ and the new Cybersecurity Act currently being approved in the EU that, in particular, will introduce the new approach to cyber security certification.¹⁹

Meanwhile, Ukraine has not completely ratified the Council of Europe's Convention on Cybercrime, having not yet agreed to apply the section of the Convention on digital evidence.²⁰ Because of this, law enforcement agencies often seize computers as material evidence (e.g. in investigations of piracy), claiming that existing legislation does not provide for the use of copies. This worsens conditions for IT business. In spring 2017, the law on government support for cinematography was adopted, instituting new mechanisms for protecting copyright and other rights on the internet. However, this did not resolve the problem with the dissemination of illegal content on pirate sites that are generally not hosted in Ukraine.

In 2018, the Government's action plan for implementing the Concept of the development of the digital economy and society was not backed by public financial and organisational resources. Coordinating and organising the fulfilment of the action plan is the job of the Coordination Council for development of the digital economy and society,²¹ chaired by the First Deputy Prime Minister - Minister of Economic Development and Trade. The

The Government approved a Concept of the Development of the Digital Economy and Society that was drafted with input from the IT industry and the civil society, but failed to fund its implementation in 2018

¹⁵ For more on the problems with public policy in e-commerce in Ukraine, see: https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/web_E-commerce__civic_synergy_ua_2018.pdf

¹⁶ http://osf.org.ua/data/blog_dwnl/BE_brief5_UKR.pdf

¹⁷ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2018.321.01.0036.01.ENG

¹⁸ <https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive>

¹⁹ http://europa.eu/rapid/press-release_IP-18-6759_en.htm

²⁰ <http://zakon.rada.gov.ua/laws/show/2824-15>, <https://inau.ua/news/inau-proponuye-implementuvaty-yevropeysku-konvenciyu-pro-kiberzlochynnist-na-osnovi-napracyuvan>

²¹ <https://www.kmu.gov.ua/ua/news/v-ukrayini-rozpochala-robotu-koordinacijna-rada-z-rozvitku-cifrovoyi-ekonomiki>

functions of the secretariat and coordination of activities of the working groups are carried out by Hi Tech Office Ukraine.²²

RECOMMENDATIONS

For Ukraine

- Set up either a separate central executive body or a department within the Ministry of Economic Development and Trade in charge of the development of the digital economy and society;
- Include expenditures in the State Budget to carry out the action plan of the Concept for developing a digital economy and society in Ukraine for 2018-2020 and have the Government decide to launch a Digital Transformation Fund;
- Draft and adopt a law on the digital economy and society that reflects the provisions of EU law, EaP objectives, and national data security priorities;
- Draft a coherent strategy for fostering broadband access to the internet;
- Draft and adopt a law on electronic communications that reflects the new EU Electronic Communications Code;
- Reinforce the independence and regulatory capacities of the national communications regulator;
- Ratify the Council of Europe's Convention on Cybercrime in its entirety. Amend domestic legislation and the cyber security strategy action plan in line with the NIS Directive and other new EU legislation;
- Amend the Law "On e-commerce" to harmonise it with EU legislation.

For the EU

- Provide political, technical and expert support for Ukraine to integrate into the Digital Single Market;
- Provide funding for priority projects implementing the Concept of the development of the digital economy and society in Ukraine.

²² <https://goo.gl/oTE6EH>