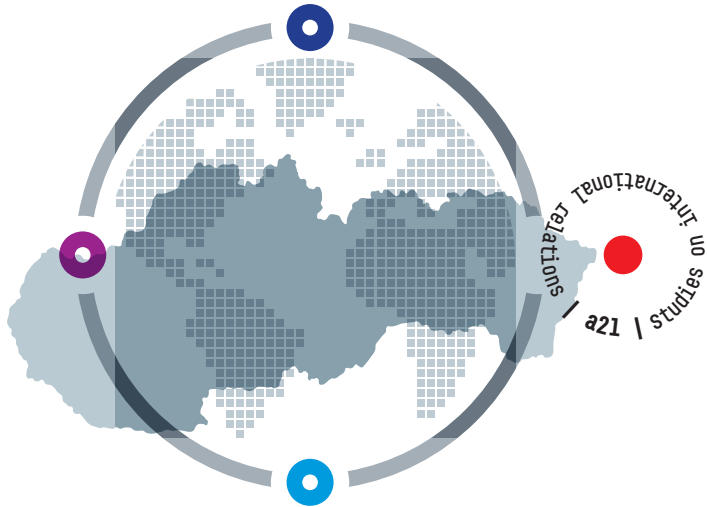




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Prospects for Ukraine's European integration

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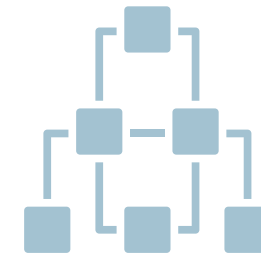
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The overall goal of the SIBSU project is to facilitate the exchange of ideas, knowledge, information and experience among border and custom services of Slovakia, Ukraine and Norway. The aim is to analyze the opportunities for deepening integrated border management and increase awareness and understanding about the work of the border police and custom services in border regions and municipalities in Slovakia and Ukraine. The project also includes an analysis of the impact of the border on the socio-economic development of the border regions, as well as on opportunities for further cross-border cooperation on both sides border.



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Impact of EU-Ukraine institutional framework

Prospects for Ukraine's European integration

Ukraine's Association Agreement and Deep and Comprehensive Free Trade Area (AA/DCFTA) envisages political association and economic integration in the EU, but not membership. However, the dramatic events of 2022 – Russia's military invasion of Ukraine – which began on February 24, 2022, have fundamentally changed Ukraine's European prospects. The EU and NATO member states have rejected Russia's aggression against Ukraine and have offered comprehensive assistance to enable Ukraine to defend itself, as the security of all European countries is at stake. Russia's war against Ukraine has caused tectonic geopolitical shifts on the European continent: the traditionally neutral countries of Finland and Sweden have applied for NATO membership, while Ukraine applied for EU membership, and Georgia and Moldova followed suit.¹ The enlargement of NATO and the EU in the wake of Russia's war against Ukraine may well become part of the post-war ordering of Europe. Stability in Eastern Europe is untenable without Ukraine being firmly anchored in the EU-based European integration, following the Russian aggression in 2022. The new geopolitical momentum triggered by the Russian aggression can be seen in

¹ "Finland and Sweden formally submit NATO membership applications," *NPR*, May 18, 2022. Available online: <https://www.npr.org/2022/05/18/1099679338/finland-and-sweden-formally-submit-nato-membership-applications> (accessed on February 24, 2023); L. Gehrke, "Georgia, Moldova follow Ukraine in applying to join EU," *Politico*, March 3, 2022. Available online: <https://www.politico.eu/article/georgia-and-moldova-apply-for-eu-membership/> (accessed on February 24, 2023).

the decision of the European Council of June 23 and 24, 2022, to grant candidate status to Ukraine and Moldova, which would not have been an option at this time under pre-war circumstances.²

However, regardless of the how's and when's of Ukraine's accession process, integration into the single market is essential for developing cross-border cooperation on the Slovak–Ukrainian border. We assume that the full integration of Ukraine into the EU, which means the Slovak–Ukrainian border will become an internal EU border rather than an external Schengen border, will eliminate the divisive nature of the border and create optimal conditions for cross-border cooperation between local and regional actors in the border areas.

We also assume that Ukraine's economic integration into the EU single market will have a major impact on the Slovak–Ukrainian border regime, as it will change the existing conditions of the cross-border movement of goods, services, and capital, as well as cross-border cooperation between regional and local actors. The Slovak–Ukrainian border will no longer separate two economic spaces. Implementation of the AA provisions will bring Ukraine closer to Norway's status in relations with the EU and will bring the EU–Ukraine border closer to the border model in place between Norway and EU member states. If Ukraine completes its accession process, it will have to fully harmonize its legislation with the Schengen *acquis* and bring its customs administration system in line with EU law and rules.

Ukraine's AA/DCFTA, and the similar agreements with Georgia and Moldova, concluded under the 2014 Eastern

² "European Council meeting (23 and 24 June 2022) – Conclusions," EUCO 24/22, CO EUR 21, CONL 5, June 24, 2022. Available online: <https://www.consilium.europa.eu/en/press/press-releases/2022/06/24/european-council-conclusions-23-24-june-2022/> (accessed on February 24, 2023).



Partnership Program, are based on the concept of differentiated (and/or flexible) integration of third countries, which the EU has applied toward its neighbors since the early 1990s. They build on agreements previously concluded between the EU and third countries giving access to the EU's common area of four freedoms but not membership: 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; SBs), and the Agreement on the Customs Union with Turkey of 1995 (TCU). The EU AAs concluded at the beginning of 1990s with Central and Eastern Europe countries known as "Europe Agreements" (EAs) can also be included, along with the Stabilization and Association Agreements (SAAs) concluded with the Western Balkan countries in the 2000s.³

³ The first two parts of this study are based on research presented by Alexander Duleba, one of the authors of this chapter, in his article "Differentiated European integration of Ukraine in comparative perspective," *East European Politics and Societies and Cultures* Vol. 36, No. 2, May 2022, pp. 359–77.



Although these agreements are all different, they go far beyond the Free Trade Area (FTA) agreements the EU concluded with other third countries, e.g., Latin American countries, South Korea, Japan. While all FTAs between the EU and third countries contain some integrative elements, under the “classical” or “simple” FTAs, according to Stephen Woolcock, there is no approximation and/or systematic transfer of EU norms. As a rule, the EU’s simple FTAs do not include obligatory approximation with the *acquis*, and regarding integration, most simply require acceptance of the World Trade Organization (WTO) provisions on trade facilitation and transparency in government procurement, investment and competition (the so-called Singapore rules of the WTO).⁴ Unlike the treaty frameworks for EU relations with the EEA countries, Switzerland and Turkey, simple FTAs do not fall within the ambit of integration agreements.

Guillaume Van der Loo states that the *conditio sine qua non* of an integration agreement is the (i) *obligation* for the partner country to (ii) *apply, implement or incorporate in its domestic legal order* a predetermined selection of EU *acquis*. Furthermore, integration agreements include, first, a procedure to amend or update the incorporated *acquis*; second, an obligation for European Court of Justice (ECJ) case-law to conform to the interpretation of the incorporated *acquis*, and third, judicial mechanisms to ensure the uniform interpretation and application of the

⁴ S. Woolcock, “European Union policy towards free trade agreements,” *ECIPE Working Paper* No. 3/2007, p. 4.

incorporated *acquis*.⁵ The AA/DCFTAs of Ukraine, Georgia and Moldova can be categorized as differentiated integration agreements, as they provide for political association and economic integration with the EU through obligatory approximation of the national legislation with the EU *acquis*.⁶

Most scholars in the field use the related concept of “external” and/or “extended” EU governance when discussing (horizontal) the differentiated integration of non-member countries. The concept of EU governance was developed to capture the expanding European integration project through the diffusion of EU policies and rules to non-member countries. Most of the literature looks at the EU as an international relations actor with a foreign policy that is driven by the aim of externalizing its internal, in reality “international” (agreed between member states), environment as well as external forms of differentiated integration that are based on the export (and import) of (parts of) the *acquis*, including within the framework of the European Neighborhood Policy (ENP) and later the Eastern Partnership (EaP).⁷

⁵ 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, Boston: Brill Nijhoff, 2016, pp. 28, 49.

⁶ Cf. O. Spiliopoulos, “The EU-Ukraine Association Agreement as a framework of integration between the two parties,” *Procedia Economics and Finance* 9, 2014, pp. 256–63; R. Petrov, G. Van der Loo and P. Van Elsuwege, “The EU-Ukraine Association Agreement: a new legal instrument of integration without membership?” *Kyiv-Mohyla Law and Politics Journal*, 1/2015, pp. 1–19; P. Van Elsuwege, “Exporting the internal market beyond the EU’s borders: between political ambition and legal reality,” in F. Amtenbrink, G. Davies, D. Kochenov, and J. Lindeboom, eds, *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley*. Cambridge University Press, 2019, pp. 637–50.

⁷ S. Lavenex, “EU external governance in ‘Wider Europe,’” *Journal of European Public Policy* Vol. 11, 4/2004, pp. 680–700; A. Tyushka, “Building the neighbours: the EU’s new Association Agreements and structural power in the Eastern neighbourhood,” *Journal of Contemporary Central and Eastern Europe* Vol. 25, 1/2017, pp. 45–61.

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 the mutual opening of markets to most goods, but also the gradual liberalization of services and binding provisions on sanitary and phytosanitary measures, intellectual property rights, public procurement, energy, competition, etc.⁸

Moreover, in line with the above, we argue that Ukraine’s AA/DCFTA goes far beyond the scope of the transposition of the EU *acquis* when compared to the EEA agreement, Swiss Bilateral Agreements (SBAs) and Turkish Customs Union (TCU). According to an estimation by European Commission representatives who took part in the negotiations with Ukraine on the AA/DCFTA, the agreement envisages that Ukraine will adopt about 95 per cent of the EU trade and economic related *acquis*.⁹ By comparison, according to Benjamin Leruth, Norway, an EEA country, adopts three quarters (or around 75 per cent) of the European legislation.¹⁰

⁸ G. Van der Loo, op. cit., p. 190, 221.

⁹ In 2010, 2011 and 2012, Alexander Duleba interviewed members of the EU’s negotiating team (from EEAS and DG TRADE) about talks on the AA/DCFTA with Ukraine. The interviews took place at the end of each of the years (in November and/or December). In each interview, he asked them to estimate the scope of the *acquis* that Ukraine has to transpose into its national legislation under the agreement. The estimates provided were “around 80 per cent” in 2010, “around 80–90 per cent” in 2011, and “around 95 per cent” in 2012, when negotiations on the text of the agreement were being concluded on the expert level. The last interview took place in Brussels on November 7, 2012.

¹⁰ B. Leruth, “Differentiated integration and the Nordic States: the case of Norway,” *ISL Working Paper*, 2/2013, p. 8.



In addition to the scope of *acquis* covered by the EEA agreement, Ukraine’s AA/DCFTA covers agriculture, fisheries and taxation as well as justice and home affairs and common foreign and security policy. Unlike the TCU, it includes trade in services as well as trade in goods. Ukraine’s AA/DCFTA covers all trade, including “sensitive” goods such as agricultural, steel and textile products. In addition to trade related issues, the AA/DCFTA establishes cooperation with the EU in 28 sectorial policies, which are also based on gradual approximation to the EU *acquis*.¹¹ In regard to exemptions from the *acquis*, similarly to the EEA agreement, Ukraine’s AA/DCFTA does not include common trade policy or the economic and monetary union. However, Ukraine must consult the EU on 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.¹²

As for the scope of the transposition of the *acquis*, the AA/DCFTA is the second most “ambitious” type of EU

¹¹ “Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *Official Journal of the European Union* L161/3, May 29, 2014.

¹² *Ibid*, Article 39, L 161/17.

agreement with third countries, after the EAs and SAAs, which, however, include a membership perspective and thus also commits countries to complying with the *full* EU *acquis*. At the same time, in terms of the scope of the projected *acquis*, the AA/DCFTA is more ambitious than the EEA agreement, and much more ambitious than the SBAs (with exemptions for Schengen and air transport) and the TCU. Ukraine's AA/DCFTA envisages the largest adoption of the *acquis* of all the EU's existing contractual frameworks for relations with third countries, which do not include a membership perspective.

The key provision underpinning Ukraine's AA/DCFTA sets out the concept for the gradual approximation of Ukraine's legislation to EU norms. It contains 43 annexes setting out which EU legislation is to be adopted by a specific date. Timelines vary from between 2 and 10 years after the agreement comes into force.¹³

Another guiding provision in the AA/DCFTA sets out the concept of *dynamic approximation*. It reflects the reality that EU law is not static but constantly evolving. Thus, the approximation of Ukraine's national legislation to the *acquis* should keep pace with the principal EU reforms, but proportionately so, taking account of Ukraine's capacity to carry out the approximation. Under the agreement, the EU has to inform Ukraine well in advance about any changes to the legislation, and subsequently the Association Council can amend annexes to the agreement following changes to the *acquis*. After approximating its national legislation, Ukraine has to request recognition of equivalence.¹⁴

As already noted above, Ukraine's AA/DCFTA envisages the *approximation* of the national legislation to the *acquis*,

¹³ Ibid, Article 1, L 161/6, and List of Annexes, L 160/180.

¹⁴ Ibid, Articles 66, 67, and 68, L 161/31-L 161/33.

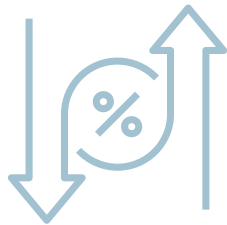
a less strict method of transposition than *harmonization*. It offers more flexibility in interpretation of the *acquis* and in choosing the methods of transposition into national legislation. In discussing the legal quality of the *acquis* transposition, Sabine Jeni and Andriy Tyushka point out two important issues concerning the "micro-level" assessment: first, all forms of transposition, except harmonization, contain derogations from the *acquis* and should therefore be explicitly measured in order to ascertain the quality of transposition; and second, the supervision mechanism plays a key role in assessing the compliance of national legislation with the incorporated *acquis*.¹⁵ Ukraine's explicit transposition of the *acquis* (micro-level assessment) is beyond the scope of this study, so in our analysis we stick to the criteria for measuring the legal quality of the *acquis* transposition, as identified above by Sandra Lavenex, bearing in mind the limitations. On this "simpler" definition of the legal quality of the transposition of the *acquis* to third-country national legislation, the AA/DCFTAs are less ambitious than the EEA agreement, TCU, EAs and SAAs.



¹⁵ S. Jenni, *Mapping Switzerland's Differentiated European Integration*. University of Berne: SPSA Annual Congress 2014, p. 6; A. Tyushka, "Association through approximation: procedural law and politics of legislative and regulatory approximation in the EU-Ukraine Association Agreement," *Baltic Journal of European Studies* Vol. 5, 1 (18), 2015, pp. 56-72.

Ukraine's AA/DCFTA is similar to the EEA agreement, TCU, SBAs, EAs and SAAs as regards its *dynamic nature*, because it includes constant approximation of the national legislation, with both the existing and newly adopted *acquis*. However, in terms of the legal quality of the *acquis* transposition, it is less ambitious than the other contractual frameworks, as it does not require strict legal homogeneity with the *acquis*. The EEA agreement requires harmonization with the "legal homogeneity" principle. SBAs require harmonization of the *acquis* in two sectors – air transport and Schengen – and in the remaining sectors they envisage "harmonization with flexibility" under the "equivalence of legislation" principle. And finally, the TCU requires harmonization of the single market *acquis* regulating trade in goods, including the common trade policy. Ukraine's AA/DCFTA requires legal equivalence with the *acquis* through approximation, which brings it closer to the Swiss model of DI, in which "harmonization with flexibility" is the method for transposing the *acquis* into national legislation.

Compliance with harmonization or approximation commitments within these third country EU agreements can be backed up by, first, judicial enforcement bodies, as in the case of the EEA agreement and the TCU; second, by regular political monitoring as in the case of the EAs and SAAs; or third, based on the legal principle of "good faith" as in the case of Switzerland.¹⁶



¹⁶ See R. Petrov, "Exporting the *acquis communautaire* into the legal systems of third countries," *European Foreign Affairs Review* 13/2008, pp. 33–52.

As far as Ukraine's AA/DCFTA is concerned, there is no legal enforcement authority such as the European Free Trade Association (EFTA) Court established by the EEA agreement. The supervisory body which monitors implementation of the agreement is political in nature: the ministerial level Association Council (AC). The AC consists of representatives of the European Commission, Council of the EU and the Ukrainian government and has a rotating chairmanship. It is authorized to monitor implementation of the agreement, make binding decisions and has the right to amend annexes to the agreement to reflect changes in the EU legislation.¹⁷ Monitoring means the continuous appraisal of progress in implementing and enforcing the measures and commitments covered by the agreement. That includes assessments of the approximation of the legislation and is of particular importance regarding the DCFTA, as positive results are prerequisite to further opening for Ukrainian economic operators on the EU market.¹⁸

The supervision mechanism established by Ukraine's AA/DCFTA includes judicial procedures for ensuring the uniform interpretation and application of the transposed *acquis*, including a Dispute Settlement Mechanism (DSM), like the EAs and SAAs. In the event that the established judicial procedures fail, 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 in interpreting the transposed EU *acquis*, which could be considered a limited EEA-like element in Ukraine's AA/DCFTA. However, Ukraine's AA/DCFTA does not foresee the establishment of a legal enforcement authority, which is exceptional to

¹⁷ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part," op. cit., Title VII, Chapter I "Institutional framework."

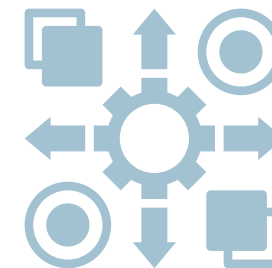
¹⁸ Ibid, Title VII, Chapter I.

the EEA agreement. Political institutions embodied in the AC and its sub-structures, similar to in the TCU, EAs and SAAs, play a key role in supervising the transposition of *acquis*. Ultimately, as regards the supervisory mechanisms in Ukraine's AA/DCFTA, the EAs and SAAs come somewhere 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 of the Swiss model of differentiated integration.

Statements by EU officials that the AA/DCFTAs are among the most ambitious of all the EU's external relationships¹⁹ are only partly true. The claim is only true for one of the three indicators selected for our comparative analysis of the *regulatory boundary* of Ukraine's AA/DCFTA. Indeed, in terms of the scope of *acquis* transposed, Ukraine's AA/DCFTA is the second most ambitious EU agreement with a third country (Ukraine has to transpose approximately 95 per cent of the EU trade and economic *acquis*), after the EAs applied by the Central and Eastern European countries and currently the SAAs with the Western Balkan countries (100 per cent of the *acquis*); though 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* of all the integration agreements the EU has concluded with third countries, which do not include a membership perspective.

In terms of dynamism, Ukraine's AA/DCFTA is similar to the EEA agreement, SBAs, TCU, EAs and SAAs, as it provides for the constant approximation of the national legislation

¹⁹ See e.g., Š. Füle, "Speech at the meeting of the EU-Ukraine Parliamentary Cooperation Committee," European Parliament, Strasbourg, June 14, 2012; K. De Gucht, "EU trade policy looking East," speech at Civil Society Trade Seminar, Warsaw, October 3, 2011.



with both the existing and newly adopted EU *acquis*. However, on the legal quality of *acquis* transposition, Ukraine's AA/DCFTA is less ambitious than these other agreements as it requires approximation with *acquis* and does not require strict legal homogeneity with the EU *acquis*, i.e., harmonization. Approximation means legal equivalence with the EU *acquis*, which brings the Ukraine's AA/DCFTA closer to the Swiss model of differentiated integration that includes a "harmonization with flexibility" method for the transposition of EU *acquis* into national legislation.

With regards to the *organizational boundary*, insofar as Ukraine's AA/DCFTA concerns participation in EU policy-shaping, it does not provide for the most ambitious of the institutional arrangements, which are those the EU has established with EEA countries, Switzerland and Turkey. Ukraine has access to the two lowest levels of non-member state participation in the EU institutions: the international organizations to which the EU belongs but which are not part of the EU institutions, e.g., the Energy Community and EU programs and agencies. However, unlike the EEA countries, Turkey and Switzerland, Ukraine does not have access to EU Comitology, which is the first expert level of the pre-legislating process in the central EU institutions.

The EaP AA is the second most ambitious type of EU integration agreement in 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 in terms of the contracting party being included in the EU's legislating and decision-making process (policy shaping). In other words, the comparative review shows that the AA/DCFTAs have the greatest structural asymmetry of the existing integrative contractual frameworks for EU relations with third countries that fall within the category of differentiated integration. Compared to other agreements (EEA, SBAs and TCU), the biggest gap is between the largest scope of approximation with the EU *acquis* on one hand and the lowest level of institutional involvement of Ukraine in EU policy-shaping on the other. Based on the above finding, we argue that there is room to further upgrade the institutional association of EaP countries with the EU in line with the EU's existing legal practice in relations with third countries that are integrated into the EU common area of the four freedoms, which would eliminate the discrepancy in the EaP type of AA.

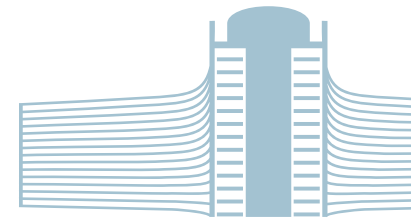
The implementation of Ukraine's AA is a test case for the EU in preserving its capacity to act as a transformative actor in Europe through expanding its common area of four freedoms. It is a test that applies particularly to Eastern Europe and is especially challenging given Russia's aggressive behavior toward Ukraine since 2014. We believe that it is in the interests of both the EU and Ukraine to make their relationship more symmetrical, and that applies especially to the institutional mechanisms for mutual interaction and cooperation. Russia's military aggression against Ukraine must be met with a change to the paradigm of the EU's approach toward Ukraine's EU perspective. If the EU wants to stabilize the situation in Eastern Europe in the long term, it needs to anchor Ukraine in the EU-based integration processes. Otherwise, the destabilization of Eastern Europe will continue, at a cost to the security of EU countries and the prospects for shared prosperity, including the EU's ability to deliver on its strategic objectives. The paradigm shift entails a move away from the perception that Ukraine's ability to reform and

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prepare for EU integration is solely down to Ukraine toward the view that it is also a job for the EU institutions and for all member states.

Moreover, Ukraine needs both material and moral and political support from the EU – after two revolutions (2004–2005, 2014) and a war (starting in 2014) over European values, it deserves an unambiguous European perspective. Ukraine's integration should take place under a special fast-track procedure, which will require extraordinary commitment and performance by the government and civil society in Ukraine, as well as extraordinary assistance from the EU institutions and member states. Slovakia's fast-track accession process could serve as a model for Ukraine's EU integration. Thanks to special assistance from the European Commission, which set up a High-Level Group to help Slovakia implement the *acquis*, and robust assistance from member states, including neighbors, Slovakia managed to complete its accession process within four years (2000–2003). Ukraine deserves a similar approach, and its government is prepared to invest its best efforts in handling the EU integration at least as well as the Slovak government did at the time. At the same time, we believe that the Norway model of EU relations, based on the rules established by the EEA agreement, contains elements that would help Ukraine better manage its integration process, such as third-country access to EU institutions prior to membership.



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Slovak Foreign Policy Association (SFPA), founded in August 1993, is an independent, non-partisan and non-profit organization whose activities are devoted to active contribution to the integration of the Slovak Republic to the community of democratic states and their political and security structures. It is the oldest foreign policy think-tank in Slovakia. Through its programs of meetings, seminars, workshops and publications, the SFPA spreads objective information about international relations from primary sources. Its research center (RC) was established in 1995. In accordance with its status, the RC SFPA provides:

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- stimulates the interest of wider Slovak public in the global events as well as a deeper understanding of the significance of foreign policy and its link to the domestic policy.

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