

## The European Union's ENPI Programme for Ukraine

Support for the implementation of the EU-Ukraine Association Agreement / A4U Project

Project Identification No.  
EuropeAid/137074/DH/SER/UA  
Contract N°: 2015/370-128

**A4U Guidelines N4**  
**Interpretation of the Notion of**  
**„agreement (of draft laws, concept**  
**papers, roadmaps) with EU experts”,**  
**and the Notion “опрацьовано с**  
**експертами ЕС”**

**September 2017**

Prepared by Jan Truszczyński, STE of the A4U EU Project. It reflects views of the STE only and not the official position of the Project, let alone the EUD.



This project is funded by  
the European Union



A project implemented by Consortium led by  
GFA Consulting Group GmbH

## How to use and interpret the notion of „agreement (of draft laws, concept papers, roadmaps) with EU experts” as systematic milestone in Ukrainian planning and reporting on AA implementation

As work on many building blocks towards implementation of AA/DCFTA has been and remains aided by nationals of the EU member states under the ongoing technical assistance projects, there is a legitimate expectation that their involvement in the actual drafting process should be seen as *de facto* quality assurance, substantively at a par with formal EU compliance checks of Ukrainian draft legislation.

What might then be the practical meaning of the notion “agreement with EU experts”? In reality, not every field of Ukraine’s AA implementation work is covered by EU-funded technical assistance projects. Not every project includes legal drafting done by EU experts or comprehensively checked for EU compliance by such experts. And even in situations where the bulk of a legal draft was prepared by a national of EU member state, that person does not have any formal mandate to offer a guarantee of conformity of the draft with EU law. As to the European Commission’s services, they generally give a view on EU-conformity only for pieces of national legislation voted into law and published, so do not intervene at earlier stages of the legislative process.

Given the still limited expertise on EU law in central executive bodies in Ukraine, the full EU compliance checks – based on tables of concordance and resulting in formal statements of compliance – will only gradually come into systematic use. In absence of such full checks, **where is the threshold above which one can assume with reasonable confidence that a draft of an Ukrainian legal/normative act is probably compliant with the relevant EU law?** This assumption of compliance is indispensable, if the “agreement with EU experts” is to play the role of a milestone in measuring Ukraine’s progress towards AA implementation.

**Such assumption seems to be justified in the following situations:**

- when the draft has been for the most part written by an EU expert and not changed in subsequent preparatory work preceding the decision of the Cabinet of Ministers;
- when the draft, authored by Ukrainian nationals, was analysed by an EU sectoral expert and found, at least, to contain no evident incompatibilities with relevant EU law;
- when a draft Ukrainian roadmap or concept paper has been shared with the competent Commission service and explicitly endorsed by that service;

Logically, all situations where the involvement/exposure of technical support from the EU is narrower or less advanced, cannot be interpreted as “agreement with EU experts”, so a “red line” has to be drawn below the level described in the three bullets at the top of the present paragraph.

In cases where the lead Ministry/Service will be in a position to present a statement of compliance with EU law, the scorecard box “agreed with the EU experts” makes as such little sense; therefore, when reporting on progress, an appropriate reference shall be made in the descriptive column of the scorecard.

Given the above considerations, the following guidance could be used by all Ukrainian officials responsible for the operation of reporting and monitoring systems of the Association Agreement:

- Start always by asking the question: is there a basis to assume with reasonable confidence that a draft of Ukrainian legal/normative act is probably compliant with the relevant EU law?
- In all cases where no formal statement of EU compliance is available from the lead ministry, look for other possible evidence that during the drafting process due attention was given to the issue of EU compliance.
- Evidence of such attention must be sufficiently robust and documented. In all cases where it is based on cooperation with EU member state nationals, there should be written proof of existence of one of the following situations: a) draft of a legal/normative act was primarily prepared by a national of an EU member state and did not undergo any substantive change in subsequent preparatory work preceding the decision of the Cabinet of Ministers; b) draft of a legal/normative act, authored by Ukrainian nationals, was analysed by an EU sectoral expert and found to contain no evident incompatibilities with the relevant EU law; c) draft Ukrainian roadmap or concept paper has been shared with the competent service of the European Commission and explicitly endorsed by that service.
- Only where the abovementioned conditions apply, can the lead Ministry/Service declare that they regard their preparatory work as “agreed with EU experts”. The making of such declaration is dependent on prior comprehensive inspection of available documentary evidence (drafts with track changes, exchange of e-mail messages or letters, written decisions or statements by Minister/Head of Service or senior managers of that Ministry/Service). The statement “agreed with EU experts”, proposed by the lead Ministry/Service in its quarterly progress report to GOEEI, must be accompanied – in the descriptive column of the scorecard – by a reference to the main documentary evidence supporting such a statement.
- Upon receipt of the quarterly progress report, the relevant GOEEI official will check the completeness of the information provided. He/she can request access to specified pieces of the supporting documentation in order to verify their robustness. He/she can propose the final uploading of the report only after completion of these tasks.

./.

**Interpretation and use of the notion “опрацьовано с експертами ЕС” (eq. prepared, developed with EU experts), proposed as replacement of the currently applied scorecard milestone (“погоджено с експертами ЕС”)**

The proposal for the new description of the scorecard milestone - *опрацьовано с експертами ЕС* – offers a more realistic picture of the usual level of involvement of EU citizens in the process of legislative/normative work in Ukraine; it indicates that there was practical cooperation, without going as far as to imply that there was some formal agreement from the side of the involved EU citizens for the outcome of such cooperation (*погоджено с експертами ЕС*).

However, not every involvement of EU citizens during the legislative preparatory phase can be deemed to offer reasonable confidence that a draft of an Ukrainian legal/normative act is probably compliant with the relevant EU law. (*Even in cases where there is a deep and meaningful involvement we cannot speak of a watertight guarantee that a draft act is 100% compliant with the acquis; the final arbiter of that is, after all, only the Court of Justice of the European Union in its decisions or its preliminary rulings*). The concept of compliance is of key importance in work on legislative approximation, and it is in this context only that any reference to cooperation with EU citizens performing as experts makes sense, by helping to assess the degree and/or likelihood of such compliance. Information on the assumed existence of compliance is relevant and important to Ukrainian ministers and members of parliament in their lawmaking function, it is equally relevant and important to the EU side. So it is necessary to define and agree a set of framework conditions which must be met if a text/draft/project is to earn the assessment “*опрацьовано с експертами ЕС*”.

Let us look at a few situations drawn from past and present practice, showing different levels of involvement of EU citizens performing as experts. The list is not fully exhaustive, but covers most of real life cases:

- 1) The expert(s) took part in an oral exchange about the framework assumptions for new legislation and the scope of main intended provisions of such legislation, but there is no written agreed record from such exchange (minutes, email message with the readout/understanding from an EU expert participating in it;
- 2) The expert(s) commented in writing on the assumptions of a legislative project, but did not participate in the actual drafting of the bill;
- 3) The expert(s) were approached by UA for comments on the draft of legal/normative act, but covered in their written answers/comments only on a few selected provisions, without offering any general view on compatibility of the draft with EU law;
- 4) The expert(s) contributed to the drafting of all substantive provisions of a legal/normative act and there is a written record of their contributions, but the

draft has undergone several substantive changes in subsequent preparatory work in Ukrainian central executive bodies;

- 5) The draft of a legal/normative act has been written by EU expert(s) and not substantively changed in subsequent preparatory work preceding the decision/approval of the Cabinet of Ministers; (*substantive change in broad meaning, i.e. not only the deletion/addition of substantive provisions, as is known even a change from “and” to “or” or replacement by “and/or” can have a far-reaching consequence for the application of a legal act*);
- 6) The draft, authored by Ukrainian nationals was analysed by an EU sectoral expert and found (in writing) to contain – at least – no evident incompatibilities with the EU law;
- 7) A draft Ukrainian AA/DCFTA-related roadmap or concept paper has been shared with the competent European Commission service and explicitly endorsed by that service;
- 8) A competent European Commission service has presented to the Ukrainian side a comprehensive assessment of EU-compatibility of a legislative product which is still in the intra- or inter-ministerial pipeline; same for comments on draft legislation made on own initiative of the Commission and communicated formally to the UA side; (*this is extremely rare, but can take place in very specific situations, so is included in the list for the sake of completeness*);
- 9) EU expert(s) have participated in the entire intra-governmental preparatory work on legislation, including work on tables of concordance between UA and EU provisions and/or quality check of such tables in case where these were compiled only by UA nationals; the statement of EU-compliance issued by the relevant line minister relies on written evidence from the process as described in this paragraph.

Given the above considerations and taking account of the above list, the following guidance could be used by every Ukrainian official responsible for the operation of reporting and monitoring systems of the Association Agreement:

- Start always by asking the question: is there a basis to assume with reasonable confidence that a draft of Ukrainian legal/normative act is probably compliant with the relevant EU law?
- In all cases where no formal statement of EU compliance is available from the lead ministry, look for other available evidence that during the drafting process due attention was given to the issue of EU compliance.
- Evidence of such attention must be sufficiently robust and documented. Your rule of thumb is that among the situations described in the list above, cases 1 to 4 do not give sufficient support to a reasonable assumption of EU compliance. Only the cases 5 to 9 are to be interpreted as sufficient basis for assuming that the statement “*опрацьовано с експертами ЕС*” is equal to completion of this milestone and achieving the draft’s probable compliance with the relevant *acquis*.

- Therefore, only in cases 5 to 9 can the lead ministry/service declare that they regard their preparatory work as prepared or developed with the EU experts. The making of such declaration is dependent on prior comprehensive inspection of available documentary evidence (drafts with track changes, exchange of e-mail messages or letters, written decisions or statements by Minister/Head of Service or senior managers of that ministry/service. The statement “*опрацьовано с експертами ЕС*” proposed by the lead ministry/service in its quarterly progress report to GOEEI, must be accompanied – in the descriptive column of the scorecard – by a reference to the main documentary evidence supporting such a statement.
- Upon receipt of the quarterly progress report, the sectoral GOEEI expert will check the completeness of the information provided. He/she can request access to specified pieces of the supporting documentation in order to verify their robustness and adequacy. He/she can propose the final approval of this milestone and of its uploading in the system only after completion of these tasks.

J. Truszczyński, STE A4U