

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

DCFTA An. Studies - Notes N8

Creative Industries under the AA/DCFTA

Prepared by Mark Hellyer, 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.

03 November 2017



This project is funded by
the European Union



A project implemented by Consortium led by
GFA Consulting Group GmbH



Funded by
the European Union

Creative Industries under the AA/DCFTA (draft-rev.2)

Context and Relevance of Creative Sector to AA/DCFTA

The relevance of the creative industries sector of AA/DCFTA actually depends upon the definition of “creative industries” used. There is however, no internationally accepted definition of creative industries and therefore, it is difficult to define what to include and therefore, the scope of impact of AA/DCFTA. The UK government, for example, defines *creative industries as: ‘those activities which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property.’*

Comparative Definitions of Creative Industries

	UK	Germany	Spain	France
Architecture	X	X		X
Audio-Visual (Film, TV, Radio)	X	X	X	X
Performing Arts	X	X	X	X
Libraries			X	X
Design	X	X		
Art Market/ Visual Arts	X	X	X	X
Publishing	X	X	X	X
Fashion	X			
Software/ Multimedia	X	X		
Museums/ Cultural Heritage			X	X
Music	X	X	X	X
Crafts	X			
Advertising	X	X		

Source: Adapted from Hölzl, K. (2006) *Creative Industries in Europe and Austria: Definition and Potential*; and Söndermann, M. et al (2009) *Culture and Creative Industries in Germany*.

The reason for government interest in creative industries can be threefold:

1. Local economic development: Regions and cities are often most interested in the contribution of the creative industries to local economic development. The creative

industries have a tendency to cluster together, often in city districts that have been abandoned by traditional manufacturing industries. Creative businesses are also often very small in size, strongly rooted in their local communities, and employers of highly skilled people. As such, they can help to regenerate rundown areas, help a place to diversify its local economy and allow an area to 'rebrand' itself.

2. Support to industrial policy: At a national level policymakers are often more interested in the creative industries as a source of international competitiveness and as a key part of the debate on national industrial policy in the fields of innovation, technology and intellectual property. The digital revolution (or 'digital shift' as it is sometimes known) has put creative businesses, especially in media, on the front line of these issues.
3. Cultural policy: the creative industries have their roots in longstanding cultural traditions. indeed, for many creative businesspeople the cultural value of their work is at least as important as its economic value. In a globalised, connected world many places are wrestling with the question of how to maintain their cultural identity without becoming 'living museums'. Commercial culture can be a way of ensuring the survival of cultural traditions by giving them a new value and importance.

Scope of Potential Impact of AA/DCFTA

Whilst creative industries have a role in Ukraine's national and regional policy agenda, the relevance and impact of the AA/DCFTA is rather limited and can be split by Title of the association Agreement: Title IV (Trade) on potential for export development (and imports from EU) of creative industries and; Title V (Economic and Sector Cooperation) on obligations in related fields of creative industries.

With regards to Title V Economic and Sector Co-operation of the AA, there are three areas of relevance: information society (chapter 14), Audio visual (chapter 15) and Culture (chapter 24). However, the provisions are mostly non-specific in terms of cooperation or dialogue between EU and Ukraine and where there are specifics, such as audio visual, its more related regulator and controls:

- Information society: Chapter 14 provides for cooperation and promotion of increasing access of citizens to and use of ICT, ICT research and ICT infrastructure and exchange of information on best practice. There are provisions for Ukraine to approximate laws relating to e-commerce, information society and electronic communications (although these are provided for in Title V with only reference here. The only tangible provision is the EU commitment to Ukraine's EU Framework Programme for Research and Innovation Horizon 2020
- Audio visual: Chapter 15 opens with a statement that both parties will promote cooperation and co-production in cinema and television (Art. 396) and "could" include training of journalists but again, there are no specifics or obligations for such cooperation. However, there is an obligation for Ukraine to approximate EU Directive 2010/13/EU on the provision of audiovisual media services (Audiovisual Media Services Directive) and the Directive's provisions shall be implemented within 2 years of the entry into force of this Agreement (so this directive should already be in force).
- Culture: Chapter 24 has no specific commitments and simple states promotion of cultural cooperation, especially in international fora such as UNESCO.

The most substantial provisions within the AA/DCFTA are those relating to trade in services. All the "sub-sectors" generally covered within the scope of "creative industries" are defined and subject to both WTO General Agreement on Trade in Services (GATS) and within the schedules for liberalisation (and reservations) for trade in Services contained within Title IV on Trade. Also of relevance in Title IV are provisions strengthening protection of intellectual property (Section 2: Art 161 Ukraine adopting EU acquis) and adopting EU acquis in Electronic commerce and telecommunications services (Chapter 6 Appendix XVII-3). However, these latter commitments develop the national infrastructure that supports the creative sector rather than promotes or develops in per se.

Therefore, for the purposes of dialogue and promotion of creative industries under the AA/DCFTA, **focus should be on Title IV, Chapter 6 on the Establishment, trade in services and electronic commerce.** The opportunities available to access to the EU for creative industries from Ukraine are as follows:

- EU will allow the establishment of subsidiaries, branches and representative offices of selected Ukrainian services providers (applicable only to audio visual services from the creative sector) and these will be treated equally to national establishments of that member state, subject to the reservations listed in Annex XVI-A by Member state (Section 2 Article 88(2));
- EU provides for cross border (modes 1 and 2 of GATS) market access in supply of creative industry services sectors (except audio visual services) to the EU as specified in Annex XVI-B and will treat those suppliers as nationals, subject to reservations in Annex XVI-B (Section 3 Articles 93 and 94);
- EU shall allow shall allow the temporary entry and stay of business services sellers for a period of up to 90 days in any 12-month period (Article 100);
- EU will allow temporary presence of Ukrainian nations in EU member states to deliver selected Architectural services, urban planning and landscape architectural services; Computer (software) services, Advertising and Entertainment services subject to reservations elaborated by individual EU member states in Annex XVI-C (Section 4, Article 101).

Specific opportunities under the DCFTA for Creative Industries

Ministry of Culture of Ukraine is promoting the development of creative industries under the AA/DCFTA in Ukraine to promote innovative research and creative jobs including *use of local culture and cultural heritage as an assets and access points to enforce diversity, variety and provide rights for public participation and engagement in culture*. This involves identifying the specific market access opportunities in the EU for creative industry services.

Section 3 of Chapter 6 of Title IV of the AA (DCFTA) details cross border delivery of services (mode 1 and 2: cross border and consumption abroad) and Section 4 (mode 4: temporary presence of workers). Very specific commitments in relation to creative industries are provided by the EU, including reservations that limit access are detailed below.

CROSS BORDER SUPPLY

Section 3 provides Ukrainian service providers with access to the EU under Modes 1 and 2. Mode 1 covers the delivery of services cross border (that is the service provider undertakes the service in Ukraine and delivers directly to an EU member state). Mode 2 relates to the users of services travelling to Ukraine to consume them. Section 3 provides both market access and national treatment opportunities (but subject to reservations from some EU Member states):

Section 3 - Cross - Border supply of Services

Article 92

Scope

[...] all services except:

- (a) audio-visual services*

Article 93

Market access

1. With respect to market access through the cross-border supply of services, each Party shall accord services and service suppliers of the other Party treatment no less favourable than that provided for in the specific commitments contained in Annexes XVI-B and XVI-E to this Agreement.

Article 94

National treatment

1. In the sectors where market access commitments are inscribed in Annexes XVI-B and XVI-E to this Agreement, and subject to any conditions and qualifications set out therein, each Party shall grant to services and service suppliers of the other Party, in respect of all measures affecting the cross-border supply of services, treatment no less favourable than that it accords to its own like service and services suppliers.

Architectural services: Ukrainian Architectural firms and individuals will be able to supply services to EU member states with full market access and national treatment subject to the following reservations:

Reading Schedules of Commitments on Trade in Services

The entries constitute a legally binding commitment in a schedule indicating the presence or absence of limitations on market access and national treatment in relation to each of the four modes of supply:

- Where there are no limitations on market access or national treatment in a given sector and mode of supply, the entry reads NONE

- All commitments in a schedule are bound unless otherwise specified. In such a case, where a Member wishes to remain free to introduce or maintain measures inconsistent with market access or national treatment, the term UNBOUND will be stated.

For Mode 1:

AT: Unbound except for planning services.

BE, BG, CY, EL, IT, MT, PL, PT, SI: Unbound

DE: Application of the national rules on fees and emoluments for

services which are performed from abroad

HU, RO: Unbound for landscape architectural services

HR: may supply these services upon approval of the Croatian Chamber of Architects. A design or project elaborated abroad must be recognised (validated) by an authorised natural or legal person in Croatia with regard

to its compliance with Croatian Law.

For Mode 2: None

Computer and Related Services (including Software):

None, meaning full access and national treatment is provided in all member states for cross border supply of computer and software services.

Interior design and other specialty design services: design services may be provided subject to:

For Mode 1:

DE: Application of the national rules on fees and emoluments for all services which are performed from abroad.

HR: Unbound.

For Mode 2: None

Country Codes for EU Member States

AT	Austria	IE	Ireland
BE	Belgium	IT	Italy
BG	Bulgaria	LV	Latvia
CY	Cyprus	LT	Lithuania
CZ	Czech Republic	LU	Luxembourg
DE	Germany	MT	Malta
DK	Denmark	NL	The Netherlands
EU	All EU MS	PL	Poland
ES	Spain	PT	Portugal
EE	Estonia	RO	Romania
FI	Finland	SK	Slovak Republic
FR	France	SI	Slovenia
EL	Greece	SE	Sweden
HR	Croatia	UK	United Kingdom
HU	Hungary		

Entertainment Services (including Theatre, Live Bands, Circus and Discotheque Services): Artists may provide their services cross border (without being present in the market) subject to the following reservations:

For Mode 1:

BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, EL, HR, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, RO, SK, SI, UK: Unbound

For Mode 2:

CY, CZ, FI, HR, MT, PL, RO, SK, SI: Unbound

BG: Unbound, except for theatrical producer, singer group, band and orchestra entertainment services; services provided by authors, composers, sculptors, entertainers and other individual artists ancillary theatrical services

EE: Unbound for other entertainment services, except for cinema theatre services

LT, LV: Unbound, except for cinema theatre operation services

Libraries, archives museums and other cultural services:

For Mode 1:

BE, BG, CY, CZ, DE, DK, ES, EE, FI, FR, EL, HR, HU, IE, IT, LT, LV, LU, MT, NL, PL,

PT, RO, SK, SI, SE, UK: unbound

For Mode 2:

**BE, BG, CY, CZ, DE, DK, ES, FI, FR, EL, HR, HU, IE, IT, LT, LV, LU, MT, NL, PL, PT,
RO, SK, SI, SE, UK:** Unbound

SUPPLY OF SERVICES IN EU MEMBER STATES

Section 4 of Chapter 6 allows for providers of certain services providers from Ukraine (subject to existence of a contract for provision) to travel to EU member states concerned to supply those services (mode 4) for the duration up to 6 months in any one year, will specific qualifications and subject to reservations for specific sectors.

Section 4 – Temporary presence of natural persons for business purposes

Article 101

Contractual services suppliers

1. The Parties reaffirm their respective obligations arising from their commitments under the General Agreement on Trade in Services of 1994 (hereinafter referred to as "GATS") as regards the entry and temporary stay of contractual services suppliers.

2. For every sector listed below, each Party shall allow the supply of services in their territory by contractual services suppliers of the other Party, subject to the conditions specified in paragraph 3 of this Article and in Annexes XVI-C and XVI-F to this Agreement on reservations on contractual service suppliers and independent professionals:

[...]

(d) Architectural services, urban planning and landscape architectural services

(f) Computer and related services

(h) Advertising

(r) Entertainment services

3. The commitments undertaken by the Parties are subject to the following conditions:

- a) The natural persons must be engaged in the supply of a service on a temporary basis as employees of a juridical person, which has obtained a service contract not exceeding twelve months;*
- b) The natural persons entering the other Party should be offering such services as employees of the juridical person supplying the services for at least the year immediately preceding the date of submission of an application for entry into the other Party. In addition, the natural persons must possess, at the date of submission of an application for entry into the other Party, at least three years professional experience (1) in the sector of activity which is the subject of the contract;*
- c) The natural persons entering the other Party must possess: ^{[[[SEP]]]}(i) a university degree or a qualification demonstrating knowledge of an equivalent level (2); and (ii) professional qualifications where this is required to exercise an activity pursuant to the laws, regulations or legal requirements of the Party where the service is supplied.*

- d) *The natural person shall not receive remuneration for the provision of services in the territory of the other Party other than the remuneration paid by the legal person employing the natural person;*
- e) *The entry and temporary stay of natural persons within the Party concerned shall be for a cumulative period of not more than six months or, in the case of Luxembourg, twenty-five weeks in any twelve month period or for the duration of the contract, whichever is less;*
- f) *Access accorded under the provisions of this Article relates only to the service activity which is the subject of the contract and does not confer entitlement to exercise the professional title of the Party where the service is provided;*
- g) *The number of persons covered by the service contract shall not be larger than necessary to fulfil the contract, as it may be requested by the laws, regulations or other legal requirements of the Party where the service is supplied;*
- h) *Other discriminatory limitations, including on the number of natural persons in the form of economic needs tests, as specified in Annexes XVI-C and XVI-F to this Agreement on reservations on contractual service suppliers and independent professionals.*

Architectural services:

EE, EL, FR, IE, LU, MT, NL, PL, PT, SI, SE, UK: None.

BE, ES, HR, IT: Economic needs test for IP.

LV: Economic needs test for CSS.

FI: The natural person must demonstrate that (s)he possesses special knowledge relevant to the service being supplied.

DK: Economic needs test except for CSS, and stays of up to three months.

BG, CY, CZ, DE, FI, HU, LT, RO, SK: Economic needs test.

AT: Planning services only, where: Economic needs test.

HR, HU, SK: Residence requirement.

CSS = Contract Service Suppliers

IP = Independent professionals

Computer and Related Services (including Software):

EE, EL, FR, IE, LU, MT, NL, PL, PT, SI, SE: None.

ES, IT: Economic needs test for IP.

LV: Economic needs test for CSS.

BE: Economic needs test for IP.

DK: Economic needs test except for CSS stays of up to three months.

AT, DE, BG, CY, CZ, FI, HU, LT, RO, SK, UK: Economic needs test.

HR: Residency requirement for CSS. Unbound for IP.

Advertising:

BE, CY, DE, EE, ES, FR, HR, IE, IT, LU, NL, PL, PT, SI, SE, UK: None.

AT, BG, CZ, DK, EL, FI, HU, LT, LV, MT, RO, SK: Economic needs test.

Entertainment Services other than audiovisual services (including Theatre, Live Bands, Circus and Discotheque Services):

AT, BG, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SK,

SE: Advanced qualification may be required. Economic Needs Test.

SI: Duration of stay limited to 7 days per event. For circus and amusement park services duration of stay is limited to a maximum of 30 days per calendar year.

FR: Unbound for CSS, except if:

— The artists have obtained an employment contract from an authorised entertainment enterprise.

— The work permit is delivered for a period not exceeding nine months renewable for the duration of three months.

— Compliance with an Economic Need Test is required. Main criteria: assessment of the labour market situation in the area of activity concerned in the geographical area where the service is to be provided.

— The entertainment enterprise must pay a tax to the Office Français de l'Immigration et de l'Intégration.

CY: Economic needs test for Live Bands and Discotheque Services.

BE, UK: Unbound.

Recommendations

In order to support the development of creative industries from Ukraine in selling to the EU market under the AA/DCFTA, a number of actions from Ministry of Culture are recommended:

1. It is first important to decide the scope of policies and to define the exact coverage of creative industrials within a Ukrainian context. The Government may choose to assess all the creative industries or concentrate on just a few sub-sectors.

2. Next to explain the specific opportunities under the AA/DCFTA for the individual creative industry service providers in terms of:

- a) Selling of services in the EU
- b) Establishment in EU member states (branches) (mode 3 of delivery)
- c) Cross border supply (modes 1 and 2)
- d) Temporary presence of workers (business and individuals) (mode 4)

3. Mapping of the creative industries sector in Ukraine to better understand the size and importance of each component and sector within the whole group. Following the UK mapping exercise of 1998 (largely regarded globally as the first one), Hong Kong, Singapore, Taiwan, Korea and China all developed analyses of their creative industries, based to a greater or lesser extent on the UK model. Australia, New Zealand and Scandinavia also undertook mapping of creative industries, though sometimes with significant differences from the UK 's approach. A mapping exercise seeks to assess the value of the creative industries to the wider economy. This mapping can be achieved on a regional and national basis through:

- Literature review
- Statistical analysis of official government data
- Directories
- Liaison with industry partners (NGOs and private business and professional bodies)
- Survey of sectors

4. Equally importantly is the need to better understand and build capacity of the creative industry sectors to select EU markets, understand the market and how to practically sell/promotes their services in each segment. These will be different for each service sector and for each EU member State (for example, selling art including paintings, photographs and commissions thereof can be to establish galleries or through art consultants to commercial sector whereas selling architectural services will be either directly under public procurement contracts, subcontracting to EU firms or through advertising to individual consumers, which are very different requirements).

5. Finally, the Ministry of Culture needs to a Roadmap for development of the creative industries under the DCFTA aimed at (inter alia):

- Raising awareness nationally regarding the economic and cultural importance of the sector;
- Monitor implementation of obligations of Government of Ukraine under the DCFTA in related spheres (notably, protection of intellectual property rights in Ukraine and enforced in the EU);
- Enter, where provisions of the AA define, dialogue and cooperation with the EU to promote creative industries, cooperate with EU sectors and resolve constraints (eg mutual recognition of qualifications);
- Develop sector specific development models to promote the various creative industries sectors in Ukraine to sell to the EU under the DCFTA.