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#### **The new EU-Ukraine Enhanced Agreement *versus* the EU-Ukraine Partnership and Cooperation Agreement: transitional path or final destination?**

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*(First draft, not for quotation)*

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## **Introduction**

Ukraine is in anticipation of the new enhanced agreement with the EU. Formal negotiations have started in 2007 and expected to be completed in one or two years. The future enhanced agreement between the EU and Ukraine constitutes a significant importance for both parties. As a result, the scope and objectives of the future EU-Ukraine enhanced agreement became one of the most debated topics among academics and practitioners in the field of the EU external relations law. This is because the EU-Ukraine enhanced agreement will be the first among the new generation of the external agreements to be negotiated by the EU and third countries under the framework of the European Neighbourhood Policy (ENP). Consequently, it will, to certain extent, serve as a template and a point of reference for other future enhanced agreements to be concluded between the EU and other neighbour countries which participate in the ENP.<sup>1</sup> Therefore, the new enhanced neighbourhood agreement between the EU and Ukraine (ENA) will be a model to follow for at least other fourteen ENP countries in line.<sup>2</sup> To date, in Ukraine the future ENA occupies one of the top priorities of the contemporary national political agenda. There is more or less complete harmony among political elites in Ukraine that the ENA will be one of the major factors which influences and, consequently, determines the direction and pace of political reforms in Ukraine in the nearest future. In contrast to the issue of the Ukraine's membership in NATO the idea of joining the EU is shared and supported by the majority of Ukrainians.<sup>3</sup>

However one can see evident internal and external divergences in the perception of the scope and objectives of the future ENA. Internally, the President of Ukraine and the government do not hide their ambitious aspirations to negotiate an ENA which will eventually if not ensure but significantly accelerates the Ukrainian progress towards the full EU membership. On many occasions President Yuschenko stated that by September 2008 a new association agreement can be negotiated with

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<sup>1</sup> The Council stated that "certain aspects of which [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future". Press Release of the General Affairs and External Relations Council meeting on 18 June 2007 (10657/07 (Presse 138)).

<sup>2</sup> *Ibid.* The Council stated that "certain aspects of which [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future".

<sup>3</sup> Recent polls show that about 58% of Ukrainians support the membership of Ukraine in the EU and almost 60% of Ukrainians do not support the membership of Ukraine in NATO. See the report from April 24<sup>th</sup> 2008 at <[www.liga.net](http://www.liga.net)>, last visited May 10<sup>th</sup> 2008.

objectives leading Ukraine towards the full EU membership.<sup>4</sup> In his opinion Ukraine must be admitted to the EU because of its location on the European continent and because of the readiness and desire of the whole Ukrainian nation to adopt and to share European common values. The Ukrainian Minister of Foreign Affairs went further and expressed his dissatisfaction from the format and objectives of the ENP and stated that Ukraine is ready for a new more enhanced format of cooperation with the EU which might lead to the EU membership.<sup>5</sup> The Ukrainian government does not hide its expectations that the future ENA should pursue objectives of political association and close economic integration between the EU and Ukraine with the perspective of the EU full membership for Ukraine.

However many pro-European aspirations of Ukrainian political elite are frequently cooled by more sober approach from Brussels. In January 2008 the Commission President J. Barroso stated that Ukraine has to achieve a higher level of internal political stability before establishing closer relations with the EU.<sup>6</sup> Commissioners from time to time recall in their public speeches that Ukraine has no perspective to join the EU in the short term perspective. Even long standing friends of Ukraine in the European Parliament enthusiastically propose to establish a joint cohabitation but not a marriage between the EU and Ukraine.

These divergences in the perception of the future EU-Ukraine ENA's objectives show that the parties will apply their best external tools and strategies to achieve a compromise which could suit both of them. The Ukrainian side will push hard to negotiate a deal of a transitional nature with clear perspective of the full EU membership in the foreseeable future. The EU's side will perform its best to achieve a long term contractual arrangement which performs an appropriate template for other neighbouring countries and offers adequate prices to ensure the Ukraine's abidance to the EU conditionality policy.

## Objectives and scope of the new enhanced agreement

The issue of objectives and scope of the future EU-Ukraine ENA has become a topic of popular debate by politicians and experts in Ukraine and abroad. Since formal negotiations directives for both parties are not open to public the whole debate is highly speculative exercise. Nevertheless, it is possible to deduce the potential objectives and scope of the future EU-Ukraine ENA from the parties' binding and soft law, political statements and the contemporary EU external policy towards the neighbouring countries.

The scope of objectives of the future ENA as they are seen from Ukraine could be guessed from the non-binding Statement of the Verkhovna Rada of Ukraine "About the initiation of negotiations between Ukraine and EU on the new fundamental agreement" which was issued on February 22d 2007.<sup>7</sup> This Statement welcomes the resolution of the European Parliament issued on April 7<sup>th</sup> 2006 which called the European Commission to launch negotiations on the new association agreement between Ukraine and the EU.<sup>8</sup> In particular, the Verkhovna Rada called the EU to direct

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<sup>4</sup> Interview of President Yuschenko on April 7<sup>th</sup> 2008 at <[www.liga.net](http://www.liga.net)>, last visited May 10<sup>th</sup> 2008.

<sup>5</sup> Interview of the Ukrainian Foreign Minister Volodymyr Ogrzyzko. See the report from February 18<sup>th</sup> 2008 at <[www.liga.net](http://www.liga.net)>, last visited May 10<sup>th</sup> 2008.

<sup>6</sup> EU wants 'political stability' in Ukraine before closer ties by E. Vucheva on 29.01.08, available at <[www.euobserver.com](http://www.euobserver.com)>, last visited May 10<sup>th</sup> 2008.

<sup>7</sup> Postanovlenie (Statement) of the Verkhovna Rada № 684-V "About the launching of negotiations between Ukraine and the EU on new fundamental agreement" on 22.02.07.

<sup>8</sup> Resolution (P6\_TA-PROV(2006)0138) on Elections in Ukraine states at para 10 that the European Parliament "notes that the current Partnership and Cooperation Agreement between the European Communities and Ukraine(3) expires in 2008, and calls on the Commission to begin to negotiate an *Association Agreement* [emphasis added]". This position of the European Parliament was reiterated in Resolution (A6-0217/2007) from July 9<sup>th</sup> 2007 where it stated that "the negotiations should lead to the conclusion of an *association agreement* [emphasis added] that contributes efficiently and credibly to the European perspective of Ukraine and opens the corresponding process".

the negotiations towards the following objectives: 1) To acknowledge the possibility of the EU full membership for Ukraine; 2) to negotiate a new agreement in line with existing agreements between the EU and countries of Central and Eastern Europe; 3) to specify timetables for every stage of integration between the EU and Ukraine in political, economic, energy, security, legal and humanitarian spheres; 4) to ensure that the new ENA will contain provisions which are directly effective in the EU legal order; 5) to conclude the new ENA for a specific time duration; 6) to ensure the long term objectives of the ENA which should target the full membership of Ukraine in the EU and the medium term objectives which should ensure the sufficient access to the EC Internal Market. Therefore, the Ukrainian side aspires to negotiate an association agreement with clear objective of the EU membership and access of the Ukrainian undertakings to the EC Internal Market which resembles either the Europe Agreements (EA)<sup>9</sup> or the Stabilisation and Association Agreements (SAA)<sup>10</sup> with the Western Balkan countries.

The EU institutions are very careful to avoid any premature public discussion about the objectives and scope of the future EU-Ukraine ENA. It is only the European Parliament which openly supported the Ukrainian aspirations and asked to conclude the future ENA as an association agreement with objectives of the membership in the EU. Other EU institutions (with more decision making powers in this field) prefer to keep meaningful silence on this important issue of the EU external policy.

Even within the academic community there is no uniform position on the future EU-Ukraine ENA. To date, the most outstanding contribution to the academic discussion on the potential scope of the EU-Ukraine enhanced agreement has been offered by Prof. C. Hillion of the University of Leiden.<sup>11</sup> In his work, Hillion provides a comprehensive overview of the possible scope of the future EU-Ukraine enhanced agreement. In particular, he argues that the future EU-Ukraine enhanced agreement will pursue the objectives of setting up a comprehensive and deep free-trade area between the EU and Ukraine, enhanced multi-faceted co-operation (in various fields, such as energy, the environment, transport and education) with emphasis on cross-pillar dimensions, and it will be a reciprocally-binding document. At the same time, the author believes that the new EU-Ukraine association agreement will contain a conditionality clause, and will, therefore, require constant monitoring on the part of the EU. Most importantly, Hillion argues that the future EU-Ukraine enhanced agreement would be an association agreement based upon Article 310 EC, which is “potentially close although not necessarily exactly similar to the EAs or the SAAs with the Western Balkan countries”. The author draws his conclusions from “the terminology of several ENP documents” and “the inherent logic of the Neighbourhood Policy”. Most importantly, he states that “any agreement below association would not be perceived as an enhanced contractual relationship”.

However, there is a view that the scope and legal basis of the new EU-Ukraine ENA could differ from the generally-expected association agreement based upon Article 310 EC.<sup>12</sup> Two considerations are relevant to this opinion. The first consideration is of legal nature. From legal point

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<sup>9</sup> The EAs concluded with the following CEE countries: Poland (O.J. 1993 L 348/2, in force since 1 February 1994), Hungary (O.J. 1993 L 347/2, in force since 1 February 1994), the Czech Republic (O.J. 1994 L 360/2, in force since 1 February 1995), the Slovak Republic (O.J. 1994 L 359/2, in force since 1 February 1995), Romania (O.J. 1994 L 357/2, in force since 1 February 1995), Bulgaria (O.J. 1994 L 358/3, in force since 1 February 1995), Lithuania (O.J. 1998 L 51/3, in force since 1 January 1998), Latvia (O.J. 1998 L 26/3, in force since 1 January 1998), Estonia (O.J. 1998 L 68/3, in force since 1 January 1998), and Slovenia (O.J. 1999 L 51/3, in force since 1 February 1999).

<sup>10</sup> At the moment of writing, the SAAs have been concluded with the FYROM (COM (2001) 90 final) and Croatia (COM (2001) 371 final) and Albania (COM (2006) 8164). The FYROM and Croatia SAAs entered into force on 3 May 2001 and on 12 December 2001 respectively. The Albania SAA is not ratified yet. The EU has launched negotiations on new SAA with Bosnia and Herzegovina, Montenegro and Serbia.

<sup>11</sup> C. Hillion, ‘Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine ‘Enhanced Agreement’’, (2007) 12 *EFA Rev*, pp. 169-182.

<sup>12</sup> R. Petrov, ‘Scope of the new EU-Ukraine enhanced agreement. Is there any room for further speculation?’ (2008) *Max Weber Programme Working Papers* (expected in 2008).

of view, objectives of an association agreement based upon Article 310 EC do not automatically imply that Ukraine could be given a legal commitment on the part of the EU in order to obtain the possibility of joining the EU. Furthermore, the objectives of the EU-Ukraine co-operation in the short-term and medium-term perspective could be achieved either by an association or by a partnership agreement. The second consideration is of political nature. On the one hand, the EU is better to conclude an enhanced agreement which should be in line with the neighbourhood clause (Article 8 TEU as amended by the Lisbon Treaty) and Article 212 Treaty of Functioning of the European Union (TFEU) which provides better procedural arrangement for a third country than Article 217 TFEU (all decisions by the Council related to the conclusion of the partnership agreement can be taken by a qualified majority while the conclusion of the association agreement would require unanimity). On the other, a “privileged” association agreement between the EU and Ukraine might be in contradiction with the objectives of the evolving EU-Russia strategic partnership. On many occasions the Russian government has explicitly stated that it would not welcome the EU closer rapprochement with former Soviet countries which hinder regional integration in the post-Soviet area.<sup>13</sup>

Notwithstanding the thorny issue of the legal basis of the new EU-Ukraine ENA, more or less uniform consensus could relate to the objectives and the scope of the neighbourhood agreements, and the EU-Ukraine ENA in particular. The objectives of the neighbourhood agreements can be deduced from the general objectives of the ENP, which offers neighbouring countries the chance of participating in various EU activities through close co-operation in the political, security, economic and cultural fields. In accordance with logic of the ENP, the future ENAs’ objectives will not be identical, but will differ in order to reflect the existing status of the relations between the EU and each neighbour country, its needs and capacities, as well as their common interests. The ENAs will be preceded by jointly-agreed tailor-made Action Plans, which cover a number of key areas specific to each neighbouring country as provided by the ENP: 1) political dialogue; 2) economic and social development policy; 3) participation in a number of EU programmes (education and training, research and innovation); 4) sectoral cooperation; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; and 6) Justice and Home Affairs co-operation.<sup>14</sup> It is likely that ENAs will reproduce both general and individually tailor-made objectives of the relevant bilateral Action Plans. Thus, the general objectives of the ENAs could focus on close co-operation in political, security, economic and cultural fields with the eventual access of the neighbour countries to the EC Internal Market. The individual objectives of the ENAs would reflect various strategic priorities of the EU towards specific neighbour countries. It is suggested that the new EU-Ukraine ENA will be either an association or a partnership agreement based upon various articles of the EU founding treaties with cross-pillar dimensions.

It is not excluded that the new EU-Ukraine partnership agreement will have a new ambitious title which emphasises its enhanced character will satisfy the expectations of the Ukrainian political élite. For example, it could be called an “enhanced neighbourhood agreement” or “strategic partnership agreement” in order to emphasise its difference from the Partnership and Cooperation Agreement (PCA)<sup>15</sup> and to underline a new level of political and economic co-operation between the parties without any immediate perspective of full EU membership.

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<sup>13</sup> See the Russia’s Middle Term Strategy towards the EU (2000-2010), available at <[http://www.delrus.ec.europa.eu/en/p\\_245.htm](http://www.delrus.ec.europa.eu/en/p_245.htm)>, last visited 10 May 2008. Also see S. Kashkin, P. Kalinichenko, “‘Problem 2007’ in relations between Russia and the European Union and its legal solutions”, (2005) 3 *Journal of Foreign and Comparative Law*, p.64.

<sup>14</sup> Communication from the European Commission “European Neighbourhood Policy Strategy Paper”, COM (2004) 373 final.

<sup>15</sup> EU-Ukraine PCA (O.J. 1998, L 49), entered in force on 1 March 1998. See V. Muravyov, ‘Polozhenia Ugody pro partnerstvo ta spivrobitnitsvo, yaki reguluyt sferu pidpriemstva ta investitsiy (pitania implementasii)’, 2 (1998) *Ukrainskiy Pravoviy Chasopys* 31-35.

## **The new enhanced agreement is concluded. What is next?**

The future EU-Ukraine ENA will serve as a fundamental pillar of the further rapprochement between the EU and Ukraine in the short and medium terms. However, one can be tempted to ask what will happen after the new agreement enters into force? In other words, will the new EU-Ukraine ENA be able to play more significant role in the EU-Ukraine relations than the outgoing PCA? This question is justified by the ambiguous legacy which the PCAs leave behind after their expiry or their termination in the nearest future.

On the one hand, indeed, the PCAs have been frequently blamed for being “outdated” and “ineffective” contractual arrangement between the EU and the PCA countries.<sup>16</sup> To some extent these concerns are justified. The PCAs were designed as framework EU external agreements. However, in reality, the PCAs covered very limited areas of cooperation which are political and economic. The PCAs were mainly aimed at the establishment of a political dialogue, the facilitation of economic relations between the NIS countries and the EU Member States, the promotion of democratic reforms in the former Soviet countries, human rights protection, and the establishment of a legal order that guarantees the rule of law. The preambles of the PCAs intentionally omit any reference to “the process of European integration” or “the objective of membership in the EU” as this is provided in the EU association agreements<sup>17</sup> but aimed solely at the development of close political relations, the promotion of trade, investment and harmonious economic relations between the parties, and at sustaining mutually advantageous co-operation and support of a PCA country’s efforts to complete its transition into a market economy.<sup>18</sup> Thus, the PCAs served their purpose as a reliable legal instrument in sustaining long-term relations with the PCA countries, while holding them at a controllable distance from closer access to the EC Internal Market.<sup>19</sup> Furthermore, the liberalisation of trade in goods and services is restricted and ‘sensitive sectors’ are taken out of the PCAs’ scope. Few PCA provisions could potentially be regarded as having direct effect in the EC legal order. Unlike the extensive ECJ practice with regard to direct effect of provisions of some EU external agreements (like the EEA Agreement, Ankara Agreement, Europe Agreement) the ECJ record on interpreting provisions of the PCAs is rather modest. It is limited to only one case which states that provisions on non-discrimination treatment in labour conditions in the EU-Russia PCA could be regarded as directly effective.<sup>20</sup>

On the other hand, one must agree that the PCAs appeared as an innovative breakthrough in the EU external contractual practice in the 1990ies. It was an interesting experiment in the field of EU external policy to set up a contractual relations framework with former Soviet countries and to accelerate democratic and market economy reforms therein. The structure and objectives of the PCAs were evidently inspired by the EAs. Nevertheless, as purely ‘transitional’ agreements, the PCAs were aimed at bringing the PCA countries to the gateway of the world market economy. Importantly, the PCA countries were given the chance to build a solid institutional framework for political dialogue with the EU. Application of the MFN treatment and the GSP regime significantly liberalised mutual trade in goods. Furthermore, companies from the PCA countries could rely on non-discriminatory treatment should they want to establish themselves in the EU. The WTO rules became applicable to trade relations between the Parties and further areas of co-operation were generously provided for.

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<sup>16</sup> For example see Y. Borko, *Evropeiskomy Soyzy i Rossii neobkhodimo Sograshenie o strategicheskoy partnerstve* (Moscow: Probel 2000).

<sup>17</sup> For example, the Preamble of the EU-Hungary EA.

<sup>18</sup> Article 1 of the EU-Ukraine PCA.

<sup>19</sup> For the comparative overview and scrutiny of the PCAs, see R. Petrov, ‘The Partnership and Cooperation Agreements with the Newly Independent States’, in: A. Ott & K. Inglis (eds), *European Enlargement Handbook*, (The Hague, Asser Press, 2002) pp. 175-194.

<sup>20</sup> Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579.

Therefore, considering positive and negative characteristics of the PCAs it would be more correct to conclude that the PCAs have proved as quite effective and successful EU external framework agreements. In the end, most of the PCAs objectives were achieved. Some PCA countries have joined the WTO (Moldova, Georgia, Ukraine, and Kyrgyz Republic), obtained the “market economy” status (Russia and Ukraine) and successfully contributed to many of the EU policies. However, the general dissatisfaction from the PCAs can be explained by the fact that most PCAs became, first, outdated and therefore do not reflect the reality of the recent political and economic environment in relations of the EU with its neighbouring countries and, second, do not reflect expectations from the bilateral relations between the EU and the PCAs countries.

It is not excluded that similar to the PCAs the future EU-Ukraine ENA may follow the same path and become outdated in very short period of time. It might happen due to the same reasons as in the case of the PCAs: a) no satisfaction of the parties from the scope and objectives of the agreement; b) the gradual extension of the parties’ cooperation beyond the scope and objectives of the agreement. One may predict that as soon as the new EU-Ukraine ENA is signed and ratified either of the parties could press for the revision of its elements or a conclusion of another updated and more enhanced agreement as soon as possible. Therefore it is important to focus on short and medium term benefits and challenges the new neighbouring agreement could bring to the parties, in particular for Ukraine.

In the field of political dialogue the new EU-Ukraine ENA is likely to be distinguished by the enhanced institutional framework with right to issue binding decisions at the level of Cooperation/Association Council and a possibility of informal participation of experts from both parties in taking up decisions related to the operation of the agreement and free trade area in particular. In this case, the binding decisions of the Cooperation/Association Council could provide a significant impact on the legal system of Ukraine. It will be one of the first cases when decisions of common institutions set up under the framework of an international agreement could be directly effective in the legal system of Ukraine. The Ukrainian Constitution grants international law acts, which are duly ratified by the Verkhovna Rada, priority over national law (apart from the Constitution itself).<sup>21</sup> Therefore, decisions of the Cooperation/Association Council might have a priority over primary and secondary laws of Ukraine which implies significant impact on the legal system of Ukraine, especially in the field of protection of foreign investors, non-discrimination and application of market economy principles. It is not excluded that the Constitutional Court of Ukraine will be asked to rule on the constitutionality of some decisions by the Cooperation/Association Council if they do not comply with the Constitution of Ukraine.

In the field of economic and social development policy Ukraine will likely to be expected to embark upon the regulatory approximation of national legislation to that of the EU in the fields of employment, social policy, and health/consumer protection. There are many fields of Ukrainian law which are already have been aligned with international and EU standards. If provisions of the new EU-Ukraine ENA contain binding approximation commitments in the fields of economic and social policies it will imply that the Ukrainian courts may refer in their judgements to the EU *acquis* as an authoritative source of law. One of the most problematic issues to be considered is equal access to jobs by Ukrainian and third country nationals, safety at work, rights of disabled, anti-discrimination laws.

The participation of Ukraine in the EU funded programmes will accelerate new domestic reforms in the fields like research and education. At present Ukrainian nationals have very limited access to the EU funded research and education programmes. Thus, Ukraine could be asked to contribute financially many of these programmes as other non EU Member States do. Participation of Ukrainian nationals in the EU funded programmes will initiate considerable reforms in the field of

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<sup>21</sup> Article 9 of the Ukrainian Constitution provides that “international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine”.



research and higher education (university autonomy, higher education funding, and transparency) in order to improve international competitiveness of the Ukrainian universities and scholars.

In the field of Justice and Home Affairs co-operation Ukraine will be expected to align its legislation to that of international and EU standards in fields of fight with organised crime, human trafficking, fight with drugs and terrorism and in other issues of asylum and immigration. Cooperation in these fields would require not only professional cooperation between the Ukrainian and the EU institutions like Europol, Frontex and Eurojust but also more active participation of Ukrainian experts and judges in projects like the judicial network in civil, commercial and criminal matters. Such cooperation would imply not only legislative measures but also high efficiency in implementation and enforcement of law and professional networks cooperation.

Finally, in the field market opening in accordance with the principles of the WTO and convergence with EU standards Ukraine will be expected to ensure better access of foreign investors to the national goods, services and capital markets without any discrimination which, undoubtedly, imply more pressure on the Ukrainian courts to consider such claims in line with the WTO and EU acquis.

## **Concluding remarks**

To conclude, we have set out a number of considerations which lead us to believe that the outgoing PCAs and the newcoming ENAs will possess several similar characteristics. Both of these agreements are most likely to be framework agreements of cross pillar nature which entail considerable legal and regulatory reforms in the neighbouring countries before they can obtain better access to the EU Internal Market. Similarly to the PCAs the new ENAs risks to be outdated in a very short period of time. Two factors may justify this judgement. The first factor is the broad framework character of the future ENAs. Constitutional reforms in the EU are not completed and could continue even after the Lisbon Treaty enters into force. It is possible that the EU will occupy new areas of competence which are not recently covered by the EU founding treaties. Thus, sooner or later the EU will face a necessity to revise the scope of framework agreements with third countries in order to align them with its own competences. The second factor is a possible dissatisfaction of the parties from the objectives and scope of these agreements. On the one hand, the EU side will be pressed to offer at least a passage about long term European perspectives of the neighbouring countries which can be relied on by at least some neighbouring countries in their integration aspirations. On the other hand, it is most likely that the future ENAs will avoid any specific enlargement formulas inherent to the EAs and SAAs thereby causing some degree of dissatisfaction for the EU and a neighbouring country.

However, the ENAs can be highly valued for its short term impact on the neighbouring countries. In particular the ENAs may offer significant impact of the legal systems of the parties. It will concern the impact on the neighbouring countries' judiciary which will face binding decisions issued by the common institutions as a new source of national law. Furthermore, the ENAs will accelerate considerable domestic reforms in the fields of legal and regulatory harmonisation in the neighbouring countries. Therefore, we conclude with suggestion that the future EU-Ukraine ENA as well all other future ENAs will not be a final destination of the EU policy towards the neighbouring countries but are likely to serve as a transitional path on the road of closer rapprochement between the enlarged EU and its neighbouring environment.