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The EU's Rule of Law Promotion in Ukraine

EXTERNAL LEVERAGE AND DOMESTIC CIRCUMSTANCES

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LibMod Policy Paper

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Context, Development and Challenges of the EU Rule of Law Promotion Policy

Back in the 1950s, the European Community was shaped as a “community of law” (*Rechtsgemeinschaft*).¹ “Integration through law” has been a leitmotif of the development of the Community and, later on, the EU.² The 1997 Amsterdam Treaty amending the Treaty on European Union was the first EU primary law document to grant the rule of law the status of the “founding principle” of the EU. It also created the legal basis for sanctions to address Member States’ “serious and persistent” breach of founding principles. Moreover, the rule of law was affirmed as a prerequisite for EU membership and an objective of the EU Common Foreign and Security Policy (CFSP). Further important changes to the role of the rule of law in the EU legal order were introduced by the 2009 – so far the most recent – Lisbon edition of the TEU.

Art. 2 TEU (Lisbon) refers to the rule of law as a foundational and common value of the EU. The change of the term “principle” to “value” signifies the EU’s emphasis on building “a unique legitimacy for its citizens [...as] a ‘community of destiny’ (*Schicksalsgemeinschaft*) binding the States and peoples of Europe in a union of common shared values”.³ In addition to strong political effects, Art. 2 TEU is designed to produce specific legal effects: as a prerequisite for EU membership (Art. 49); a foundation for introducing sanctions against Member States that do not comply with EU values (Art. 7 TEU) and setting duties for the

operation of the EU institutional framework (Art 13 (1) TEU) and an objective of the EU external action. The latter function is highly relevant amid the strengthening the institutional foundations of the EU external action and the consolidation of its objectives as set out in the Lisbon Treaty. Under Art. 21 (1) (a)(b) TEU, the objectives of the EU external action include safeguarding and consolidating common values, such as the rule of law. The conferral of legal personality on the EU (Art. 47 TEU), the strengthening of the position of the High Representative of the Union for Foreign and Security Affairs (Art. 18 TEU) and the creation of the European External Action Service (EEAS) (Art. 27 TEU) and, not least, the consolidation of the EU external action objectives, has strengthened the legal foundations of the EU external rule of law promotion. These novelties of the Lisbon Treaty also created the basis for stronger and more transparent coordination of EU Member States regarding the external rule of law promotion. Alongside the Member States, the EU rule of law promotion policies envisage cooperating with multilateral organizations (e. g. the Council of Europe, the International Development Law Organization (IDLO)), and bilateral donors (e.g. United States, Canada).

- 1 Klünder, T. (‘What is *Rechtsgemeinschaft*?’ Max Planck Law Perspectives (7 September 2020), <https://law.mpg.de/perspectives/2020/09/07/what-is-rechtsgemeinschaft/>, DOI: 10.17176/20220530-125733-0.
- 2 For the concept of ‘European integration through law’, see Augenstein, D. (ed). ‘Integration through law’ revisited: The Making of the European Polity. Edinburgh/Glasgow: Ashgate Publishing.
- 3 Wouters, J. (2020) Revisiting Art. 2 TEU: A True Union of Values? Available at: https://www.europeanpapers.eu/fr/system/files/pdf_version/EP_eJ_2020_1_15_SS2_Articles_Jan_Wouters_00376.pdf (accessed 28 December 2021).



The EU's rule of promotion policy currently encompasses several key directions with their distinct toolboxes, namely: (i) ensuring the operation of the rule of law within the EU; (ii) promoting the rule of law in the pre-accession context, especially the Balkans; (iii) in the Eastern and Southern Neighbourhoods; (iv) in development cooperation efforts, e.g. in Latin America and Southeast Asia. As explored below, the EU's toolbox to advance the rule of law includes various instruments, ranging from the 2014 Rule of Law Framework, aimed at preventing the escalation of emergent rule of law threats in EU Member States, to the Cooperation and Verification Mechanism for Bulgaria and Romania, and the multi-component "Sofia Priority Agenda" for the Western Balkans.⁴ The application of the EU's rule of law promotion instruments within the EU and in the enlargement context has delivered mixed results. Though contributing to institution-building both within the EU and in the pre-accession context, these instruments did not manage to address fundamental threats to the rule of law, such as the rule of law backsliding in Poland, Hungary and Romania, and wide-spread corruption and state capture in the Western Balkans.⁵ Amid such mixed results, the EU's experience of utilizing the above instruments is highly relevant for rethinking and modernizing its rule of law promotion efforts in Ukraine following Ukraine's acquisition of the EU candidate country status on 23 June 2022.

In its Conclusions, the European Council linked Ukraine's candidate status and its progress towards enlargement negotiations to an array of conditions in the rule of law domain, stipulated earlier by the European Commission. As elaborated, these conditions predominantly concern anticorruption institutions and the judiciary. Though Russia's ongoing war against Ukraine creates challenges for the fulfilment of these conditions, the Ukrainian government expressed commitment to fulfilling respective conditions by the end of 2022.

In the Joint Statement following the 24th EU-Ukraine Summit, issued on 3 February 2023, the EU "acknowledged the considerable efforts that Ukraine demonstrated in the recent months towards meeting the objectives underpinning its candidate status for EU membership, welcomed Ukraine's reform efforts in such difficult times, and encouraged the country to continue on its path and to fulfil the conditions specified in the Commission opinion on its membership application in order to advance towards future EU membership". The Summit Declaration placed particular emphasis on the need for further judicial reform and welcomed progress in ensuring the independent and effective operation of the anti-corruption institutions. Exercising the EU's support for Ukraine's fulfilment of these conditions and progress with the reforms requires considering challenges that the EU's rule of law promotion has faced in other contexts and developing ways to avoid them.⁶

4 For an insight into the scope of the "Sofia Priority Agenda" see: the European Court of Auditors (2022) EU Support for the Rule of Law in the Western Balkans. Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR22_01/SR_ROL-Balkans_EN.pdf (accessed 16 January 2022).

5 See, for instance, Pech, L., Sheppele, K. (2017) Illiberalism Within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies* 19, pp.3–47; Bartlett, W. (2021) International Assistance, Donor Interests and State Capture in the Western Balkans. *Journal of Contemporary European Studies* 29(2), pp. 184–200.

6 ???

First and foremost, it should be recognised that there is no universal consensus as to the scope and substance of the concept of the rule of law and its normative equivalents in other languages, i.e. it is “essentially contested”.⁷ Due to Member States’ divergent constitutional traditions, there are differences in the scope of German *Rechtsstaatlichkeit*, French *état de droit* or *rzády prawa* in Poland that make it necessary to think about the extent to which values are common to all the EU Member States and which rule of law model the EU seeks to “export”.⁸ The EU primary law does not add clarity about the scope of the EU rule of law model, since it neither defines nor operationalizes the concept. Poland used the vagueness of the EU rule of law model to impute political motives behind EU efforts to counter the rule of law crisis in the country that broke out in 2015 due to a series of judicial reforms in Poland.⁹ Though recognizing the differences in Member States’ rule of law traditions, the Commission formulated key components of the concept in the 2014 Framework to Strengthen the Rule of Law, including legality, legal certainty, prohibition of arbitrariness of the executive power, independent and impartial courts, effective judicial review including respect for fundamental rights, and equality before the law. As the Framework does not immediately concern EU external relations, the vagueness of the rule of law concept may determine subjectivity in the policy dialogue on the rule of law and generate partner governments’ disillusionment in the EU rule of law promotion efforts. On the other hand, the ‘essentially contested’ nature of the rule of law concept as such and the vague consensual EU rule of law model may be seen as a valuable opportunity to adapt the EU rule of law action to the local context and provide tailored assistance.¹⁰

Apart from conceptual issues, the EU’s “export” of the rule of law can also face obstacles on the ground. The internalization of the EU rule of law model may be challenged by the partner country’s own rule of law traditions, domestic opposition by veto-players (e.g. oligarchs and big business), or the insufficient legitimacy of the EU rule of law promotion efforts. The latter issue may result not only from the lack of clear and fixed rule of law benchmarks and indicators but also from a lack of awareness on the part of the partner country governments and non-government actors about the intra-EU contestation of the rule of law and the politicization of its enforcement via Art. 7 TEU. With this, the rule of law promotion thus represents a crucial aspect of EU integration and EU foreign policy in different contexts. To rethink and improve the efforts of the EU and Member States to promote the rule of law in Ukraine, it is essential to scrutinise the rule of law promotion toolbox being used within the EU and in the enlargement contexts, where the EU has the strongest interest to advance the rule of law, as well as to develop an understanding of how the various instruments are perceived on the ground, and which are challenged. In addition to learning from the EU’s experience in other contexts, advancing the EU rule of law promotion in Ukraine requires a critical insight into what the EU has already done and what has been achieved.

7 For the notion of the ‘essentially contested’ concept, see: Gallie, B. (1955/1956) Essentially Contested Concepts. *Proceedings of the Aristotelian Society* 56, pp.167-198.

8 Kochenov, D. (2009) The EU Rule of Law: Cutting Paths through Confusion. *Erasmus Law Review* 2(1), pp.1–24; Pech, L. (2012/2013) Rule of Law as a Guiding Principle of the European Union’s External Action. *CLEER Working Papers*. Available at: https://www.asser.nl/upload/documents/2102012_33322cleer2012-3web.pdf (accessed 28 December 2021).

9 Wyrzykowski, M. (2019). Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland. *Hague Journal on the Rule of Law*

10 Burlyuk, O. (2015) Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood. *JCMS* 53(3), pp. 509–523.

In this vein, we will consider the spectrum of the EU rule of law promotion instruments used in the internal and enlargement contexts, and the processes, results and challenges facing EU rule of law promotion efforts in Ukraine in three key domains: anticorruption, judicial reform, and the reform of the law enforcement agencies.

In each of these, we will also refer to assessments of the effectiveness of EU rule of law promotion instruments, based on an expert survey conducted as a part of this study (Annex 3). Throughout the text, we used shortened formulations of figures' titles and factors. For full versions, please see Annex 3.

EU Rule of Law Promotion Instruments Utilized within the EU and in the Enlargement Contexts

The EU uses numerous instruments to advance the rule of law within and beyond the EU. The rule of law crises in Poland and Hungary that started approximately seven years ago gave an impetus to the so-called "Great Rule of Law Debate" in the EU and led to the introduction of an array of new instruments to promote and enforce the rule of law within the EU. An insight into the instruments the EU uses to safeguard and advance the rule of law within the Union and in the pre-accession context is crucial to inform the EU rule of law promotion policy in the Eastern Neighbourhood in general, and in Ukraine in particular.

Rule of Law Promotion Instruments within the EU

The 2014 Rule of Law Framework establishes the foundation for the EU to address the rule of law challenges within the Union. The objective of the Framework is to prevent emerging threats to the rule of law from escalating to the point where the Commission has to trigger the mechanisms of Article 7 of the Treaty of the European Union (TEU). The Framework envisages a three-stage process to address the rule of law threats, namely

(i) the Commission's assessment;
(ii) the Commission's recommendation;
(iii) monitoring the Member State's follow-up to the Commission's recommendation. If the solution is not found within the Framework, the Commission may trigger the "Article 7" mechanism.

Though the European Semester is predominantly an instrument for economic reform coordination, the European Commission mentions it in terms of the EU rule of law promotion toolbox. The reason for this is that 'the integrated surveillance and coordination of economic and employment policies across the European Union' under the European Semester and resulting country-specific recommendations incorporate anti-corruption, the justice sector and public administration aspects.

The EU Justice Scoreboard is designed to present an overview of indicators as to the efficiency, quality and independence of justice systems. It serves as one of the sources for the EU Rule of Law Report.

The EU Rule of Law Report offers an expansive overview of the rule of law situation within the EU with dedicated country chapters. The key aspects covered by the Report include the functioning of Member State justice systems, anti-

corruption frameworks, media freedom and pluralism, and institutional checks and balances. As well as the European Semester and the EU Justice Scoreboard, the EU Rule of Law Report represents a preventive mechanism (while the EU Rule of Law Framework is used to react to acute emergent rule of law threats). It also constitutes the core of the European Rule of Law Mechanism that fosters an annual inter-institutional rule of law dialogue, involving the Commission, the Council, the Parliament, as well as Member States, national parliaments and civil society.

The Cooperation and Verification Mechanism (CVM) was launched as a transitional measure when Romania and Bulgaria joined the EU in 2007, in order to remedy rule of law shortcomings. The CVM includes specific criteria for assessing the progress of Romania and Bulgaria, and the Commission's close monitoring and progress assessment. The rule of law aspects covered by the CVM include the operation of the judicial system, and the fight against corruption and organized crime,

To address the rule of law challenges and emergent threats, Member States are assisted by the Directorate-General for Structural Reform Support (DG REFORM), which helps EU Member States to design and implement structural reforms and serves as a forum for dialogue and exchange on reforms. Under the Structural Reform Support Service, reform assistance requests are handled by the Commission, national experts, international organizations and experts from public bodies or private sector. Member States can seek funding for reforms in the justice and fundamental rights domain from the European structural and investment funds. Such funding presupposes ex ante conditionality and agreement about specific deliverables and deadlines to be met.

The Rule of law "conditionality regulation" has been in force since January 2021 to enable the EU to take measures to protect its budget if breaches of the rule of

law affect or risk affecting EU financial interests. The measures that can be taken under the "conditionality regulation" include the suspension of payments from the EU budget, or financial corrections. The Commission can propose that the Council adopts appropriate and proportionate measures if breaches of the rule of law by a specific Member State pose a threat to EU financial interests. The Commission is currently preparing guidelines to explain how the Commission will apply the rule of law conditionality and how it will complement existing instruments that aim to protect the EU's financial interests (e.g. the investigations by the European Anti-Fraud Office (OLAF)).

Rule of Law Promotion in the Western Balkans

In the Western Balkans (where Albania, the Republic of North Macedonia and Montenegro are Candidate countries, and Bosnia and Herzegovina and Kosovo are Potential Candidates), the EU rule of law promotion has revolved around the 'Sofia Priority Agenda' adopted at the EU-Western Balkans Summit in 2018. The Agenda encompasses: enhanced support for judicial reform and fighting corruption; the extension of the EU rule of law advisory missions, with increased support from the EU and Member States; enhanced monitoring of reforms through systematic and case-based peer review missions; trial monitoring in the field of serious corruption and organized crime, as well as the improved measurement of results in justice reform, and roll-out support for the European Endowment for Democracy (EED) in the area of the media and civil society. Despite the range of actions under the agenda and two conditionality types under the former Instrument for Pre-Accession Assistance (IPA) (performance rewards, linking new tranches of assistance to the fulfilment of specific conditions), the European Court of Auditors found that the EU action has contributed to reforms, but has had little overall impact on progress in the rule of law in the region,

though the project outputs were achieved in technical terms.¹¹

In a nutshell, largely incentivized by the rule of law crises in Poland and Hungary, the EU has added to its rule of law promotion toolbox, emphasizing not only the ways

to advance the rule of law but also to oppose threats. The instruments the EU uses to foster the rule of law within the Union are, however, peculiar to the EU internal context and cannot so far be explicitly extended to foreign policy.

Tools to Promote the Rule of Law in Ukraine

Prior to granting Ukraine a membership perspective on 23 June 2022, the EU had been exercising its rule of law promotion in Ukraine under the umbrella of the European Neighbourhood Policy (ENP) and Eastern Partnership (EaP). From the inception of the ENP, scholars and policy analysts have questioned the effectiveness of these initiatives and their ability to promote the rule of law, since neither the ENP nor the EaP envisaged a membership perspective for Neighbours.¹² This argument was supported by the argument that Neighbours would not conduct costly and painful domestic reforms without sufficient incentives (researchers see the membership perspective as the strongest incentive the EU can offer to a third country).¹³ Nevertheless, the 18 years since the implementation of the ENP in Ukraine and over a decade of the EaP have demonstrated the EU's ability to generate at least partial policy change and selective rule adoption in the rule of law domain. The efforts of the EU (and Member States¹⁴) to strengthen the rule of law in

Ukraine became particularly active following the 2013 Euromaidan Revolution and the subsequent signing of the EU-Ukraine Association Agreement (AA) in early 2014. In this context, the rule of law can be seen as relevant for both the development of the EU-Ukraine association relations and for facilitating state-building process in Ukraine after the Euromaidan-induced change of power.¹⁵

Over this period, the EU also managed to develop a comprehensive toolbox for the rule of law promotion in Ukraine, combining “soft” and “hard” law instruments. Though Ukraine's membership perspective enables the EU to use conditionality more actively, the toolbox as such will remain relevant. Based on the classification of the EU external rule of law promotion instruments by Pech (2012/2013), the toolbox for the EU rule of law promotion in Ukraine (late 2013 – 2022) has included three key components:

- “Soft” instruments and tools, namely the bilateral political and policy dialogue (e.g. the Annual Human Rights Dialogue, the EU-Ukraine Visa Liberalisation Dialogue and Action Plan on Visa Liberalisation), and the “multilateral track” under the EaP. This category includes the Commission's Opinion on Ukraine's application for membership of the European Union, containing rule of law conditionality in connection with Ukraine's candidate status.

11 European Court of Auditors (2022) EU Support for the Rule of Law in the Western Balkans. Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR22_01/SR_ROL-Balkans_EN.pdf (accessed 16 January 2022).

12 See, for instance, Langebin, J., Wolczuk, K. (2012) Convergence without membership? The impact of the European Union in the neighbourhood: evidence from Ukraine. *Journal of European Public Policy* 19(6), pp. 863–881; Langbein, J., Börzel, T. (2013) Introduction: Explaining Policy Change in the European Union's Eastern Neighbourhood. *Europe-Asia Studies* 65(4), pp. 571–580.

13 This is a typical rationalist argument, considering an actor's willingness to comply as dependent on the benefits it will gain and costs of changing behaviour

14 The subsequent analysis in this section will focus only on the EU rule of law toolbox in Ukraine. Member States' contribution will be covered in the following subsection on the key rule of law programmes in Ukraine.

15 See Wolczuk, K., Žeruolis, D. (2018) Rebuilding Ukraine. An Assessment of EU Assistance. Chatham House Paper. Available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2018-08-16-rebuilding-ukraine-eu-assistance-wolczuk-zeruolis.pdf> (accessed 28 December 2021).

- Unilateral financial and technical assistance instruments, utilized within and outside the scope of the ENP/EaP (e.g. state-building, macro-financial assistance programmes, twinning);
- Bilateral instruments, namely the EU-Ukraine Association Agreement and the EU-Ukraine Association Agenda

An in-detail overview of these tools, presented in Annex 1 “EU Rule of Law

Promotion Toolbox in Ukraine” (late 2013/early 2014–current time), demonstrates that the EU extensively engaged in rule of law promotion activities in Ukraine following the 2013 Euromaidan Revolution, combining the logic of conditionality and capacity-building. Based on this, the analysis will proceed with an insight into the key rule of law programmes implemented in Ukraine by the EU and its Member States over the respective period and assessments of their effectiveness.

Key EU and Member State Rule of Law Promotion Efforts and Programmes in Ukraine, their Results and Challenges

This section of the analysis will explore the rule of law promotion efforts and programmes in three central domains:

- (i) countering corruption;
- (ii) judicial reform;
- (iii) the reform of the law enforcement agencies.

The choice of these sectors is determined by two key factors, namely their long-lasting salience in the EU’s and Member States’ rule of law promotion efforts in Ukraine, and domestic political sensitivity and contestation. With this, the analysis will zoom in on the logic of the EU and Member States’ intervention, key tools (the interplay between conditionality and capacity-building), the design of cooperation between the EU and Member States and/or third parties (e.g. Council of Europe) and, most importantly, the implications of the EU’s efforts and challenges that still require more attention. An in-detail summary of Ukraine’s key tasks in these domains, the instruments the EU applied to facilitate their completion and related results and challenges is presented in Annex 2 “Results and Challenges of the EU’s and Member States’ Rule of Law Promotion Efforts in Ukraine” (late 2013/early 2014-current time).

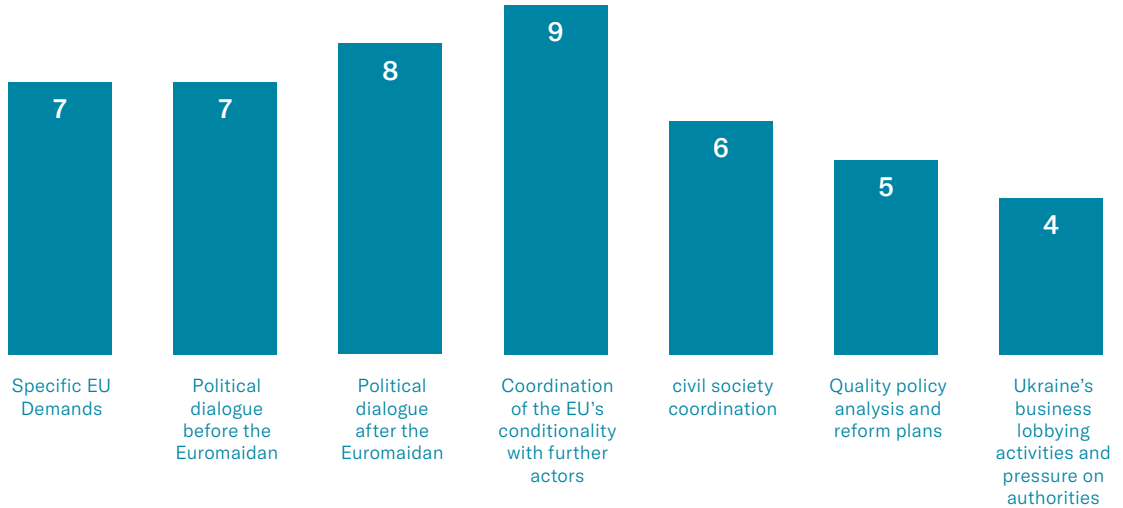
Our analysis of the EU rule of law promotion efforts in Ukraine also includes an expert assessment of the effectiveness of tools used by the EU to advance the rule of law in Ukraine and challenges faced. The survey was conducted in January 2023 among 20 Western and Ukrainian experts on the EU rule of law promotion efforts in Ukraine, representing authorities, NGOs and academia. The text and results of the survey are presented in Annex 3 “Results of the survey “Conditions for the effectiveness of the EU rule of law promotion instruments in Ukraine”. Names of the experts who wished to be mentioned in the study can be found in the “Acknowledgments” section.

As illustrated in the analysis below, the EU has a developed rule of law promotion toolbox it applies in Ukraine, combining political and policy dialogue, conditionality linked to political dialogue and conditionality attached to financial assistance, as well as capacity-building instruments. In June 2022, EU’s political conditionality in Ukraine was reinforced by the granting of a candidate country status to Ukraine and the formulation by the Commission of seven conditions to be fulfilled by Ukraine, including those in the judicial reform and anti-

corruption domains. As shown by our survey results, conditionality attached to political dialogue is assessed by experts as the most effective tool for the EU's rule of law promotion efforts in Ukraine. High effectiveness is

also attributed to conditionality attached to financial instruments and the coordinated use of conditionality with other international actors (e.g. USA, IMF, G7), while technical assistance is seen as less important.

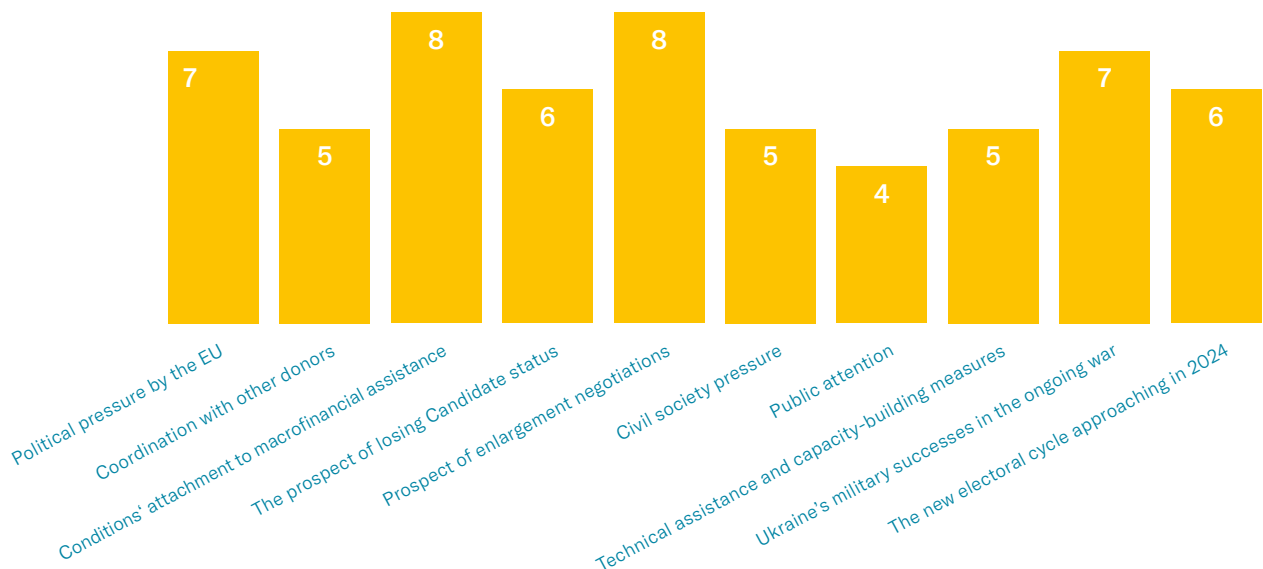
Most effective EU rule of law promotion instruments in Ukraine
(according to survey results, 10 – most effective, 1 – least effective)



The prospect of opening enlargement negotiations with the EU, political pressure by the EU and the attachment of anticorruption conditions to new macro-financial assistance tranches are seen by experts as

key to facilitating Ukraine's further progress towards the rule of law. Of significance are also Ukraine's military successes, given that the continuing war and partial occupation aggravates Ukraine's EU integration path.

Factors, influencing Ukraine's progress to the fulfilment of Commission's conditions
(10 – most important, 1 – least important)



In the assessment of the measures the EU undertook in Ukraine prior to the granting of a candidate country status, civil society coordination and public opinion are recognized by experts as an important contributor to Ukraine's compliance with EU requirements. Nevertheless, political dialogue with concrete milestones, coordinated with other donors and incentivized by both political and financial stimuli, is seen by experts as fundamental for change.

Countering Corruption

Corruption is broadly recognized as a threat to the rule of law, mostly as it allows “certain wealthy and politically powerful elites to take and self-deal amongst themselves – to the detriment of the people – at will and often with impunity”.¹⁶ Anti-corruption efforts are central to the agenda of international donors, such as the IMF, World Bank, the Council of Europe, the EU, as well as bilateral donors. Internally, the EU's anti-corruption competences are limited and contested, with the legal basis for anti-corruption activities belonging to different policy areas and mainly pertaining to the fight against crimes with a cross-border dimension (Art. 83 TFEU). Nevertheless, based on Art. 21 TEU and Art. 215 TFEU, the EU enjoys a considerably leeway to develop anti-corruption policies for third states. In doing so, the EU extensively relies on the analyses and recommendations by specialized agencies, such as the Working Group on Bribery and the UN Convention against Corruption (UNCAC) under the auspices of the OECD, and the CoE Group of States against Corruption (GRECO).¹⁷

Political and Policy Dialogue. Association Agreement

As noted in the recent European Court of Auditors Report, “The European External Action Service (EEAS) and the Commission have addressed corruption [in Ukraine] in a multi-dimensional way by means of political and policy dialogue, project activities, and conditions for budget support and MFA programmes”.¹⁸ The framework for the EU-Ukraine political and policy dialogue in the anti-corruption domain is constituted by Art. 2, 4, 6 and 14 of the EU-Ukraine AA and the EU-Ukraine Association Agenda. In this vein, the post-Euromaidan EU-Ukraine high-level political dialogue has focused on the following anti-corruption issues: (i) the creation and implementation of plans to privatize state-owned enterprises (SOEs); (ii) weakening oligarchs' influence over economy by virtue of market-oriented reforms and anti-corruption efforts; (iii) support for Ukraine's 'de-oligarchization' efforts¹⁹; (iv) ensuring the functioning of the anti-corruption institutions.²⁰

These institutions include the National Anticorruption Policy Council, the National Anticorruption Bureau, the National Agency on Corruption Prevention, Specialized Anti-Corruption Prosecutor's Office, the National Bureau of Investigation, and the High Anti-Corruption Court.¹⁸ On a policy level, the key dialogue on anti-corruption reform has revolved around the reform of SOEs, countering corruption in the energy sector, and the EU's involvement as an “observer” in the process for selecting SOE supervisory board members.¹⁹

16 Razook, E. (2013). Corruption as a threat to the rule of law: Abuse of the corporate entity, secrecy jurisdiction arbitrage and under-regulated financial services. *Open Society Justice Initiative*. Available at: <https://www.justiceinitiative.org/uploads/e7ade000-4cda-4eb5-b703-69f5ea32aa37/razook-pace-corruption-testimony.pdf> (accessed 28 December 2021).

17 See, for instance, European Parliament (2021) EU Cooperation with the Group of States against Corruption (GRECO). Available at: https://www.europarl.europa.eu/cmsdata/236597/GRECO%20briefing_final.pdf.

18 For the division of competencies between these institutions, see Transparency International (n.d) *Anti-Corruption Infrastructure*. Available at: <https://ti-ukraine.org/en/project/anti-corruption-infrastructure/> (accessed 29 December 2021).

19 European Court of Auditors (2021). Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/SR_fight-against-grand-corruption-in-Ukraine_EN.pdf (accessed 29 December 2021), p.68.

Visa Liberalisation Plan

An important conditionality instrument that gave rise to the in-depth reform of Ukrainian anticorruption legislation and the establishment of anticorruption institutions was the 2010 Visa Liberalisation Action Plan (VLAP). Conditionality under VLAP was divided into two phases, with the first one providing for the adoption of the anticorruption legislation and the second one dealing with its implementation (e.g. ensuring the functioning of independent anti-corruption agency; developing ethical codes and training on anti-corruption with a focus on the judiciary). Furthermore, the VLAP required the development of ethical codes on anticorruption and conducting training for officials involved in matters concerning international and domestic passports, the Border Guard and Customs Services. While in 2013 the Commission assessed Ukraine's progress in the anti-corruption domain as unsatisfactory, the VLAP implementation gained momentum following the Revolution of Dignity, and the second phase of its implementation started in 2014. In this context, the Commission's 5th Progress Report on VLAP implementation introduced an array of specific conditions Ukraine had to fulfil to complete the VLAP, linked to the 2014-2017 State Anti-corruption Strategy, such as the operation of the high-level coordination mechanism to implement the Anticorruption Strategy; operational and independent anti-corruption bodies; effective operation of asset declarations and their verification, and the launch of the Asset Recovery and Management Agency. The new conditions, introduced

by the Fifth Progress Report on VLAP implementation were additionally reinforced by two more conditionality instruments that the EU applied to promote state-building in Ukraine following the Euromaidan, namely the 2014 State-Building Contract (SBC) for Ukraine (Special Measure in favour of Ukraine) worth EUR 355 million and macro-financial assistance, in particular, MFA III (2-4 tranches, up to EUR 1.8 billion under the whole programme) and MFA IV (up to EUR 1 billion).

In synergy with the abovementioned instruments, the VLAP's implementation has led to an array of positive effects, namely the adoption of the 2014-2017 State Anticorruption Strategy and the framework anticorruption legislation (the Law of Ukraine "On Countering Corruption"); the launch of the anticorruption institutions, the creation of the e-asset declaration system and the launch of the Asset Recovery and Management Agency. The key anticorruption institutions, launched in terms of VLAP implementation and its further synergy with the SBC and the MFA III and IV, include the National Anticorruption Bureau of Ukraine (NABU), National Agency of Corruption Prevention (NCP), Specialized Anti-Corruption Prosecutor's Office (SAPO), the Asset Recovery and Management Agency (ARMA), State Financial Monitoring Services of Ukraine (SFMS), and the High Anti-Corruption Court (HACC). The operation of these institutions is, however, concerned with several critical challenges that continue to undermine the fight against corruption in Ukraine. Foremost, grand corruption and state capture in Ukraine prevent the anticorruption institutions from being entirely independent and capable of investigating the high-level corruption cases. Until now, only insignificant numbers of high-level corruption cases have been considered by the HACC. Moreover, gaps in the timing of the launch of anticorruption institutions have presented challenges in the inter-agency cooperation, preventing the institutions from operating as a unified system. For instance, nearly five years elapsed between the launch of the NABU

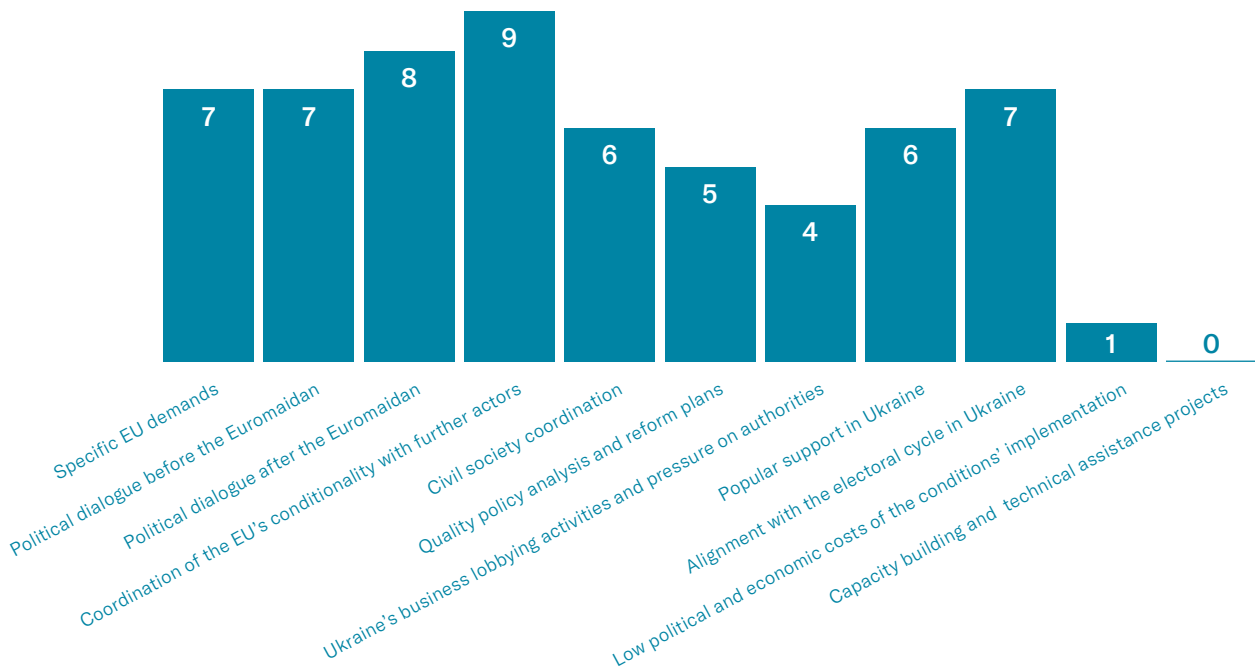
and the HACC. In the meantime, high-level corruption cases were considered by general courts and were prone to the judicial dependence challenges (to be addressed in the section below). Furthermore, the achievements of the VLAP and the implementation-related instruments were repeatedly challenged by domestic actors' attempts to sabotage or reverse change, e. g. to "hack" the e-declarations system and undermine trust to NACP or even to revoke it, as the Constitutional Court of Ukraine attempted to do in 2020. Internal opposition has also caused significant delays in the fulfilment of specific conditions, such as the delayed creation of the National Beneficial Ownership Register and a failure to create the unified portal for

disclosing public expenditure (instead, the Register of entitled public funds' holders and users was created).

Overall, the VLAP and its synergy with the SBC and the MFAs III and IV has led to a significant change in Ukrainian legislative and institutional landscape of countering corruption. Intense political dialogue with the EU, coordination with other donors and alignment with the electoral cycle in Ukraine are seen by experts as the key preconditions for the VLAP's success. As VLAP was adopted soon after the Euromaidan, its success was also facilitated by the socio-political climate in the country at that time, the popular support for a visa-free regime with the EU, and civil society activities.

Determinants of VLAP success

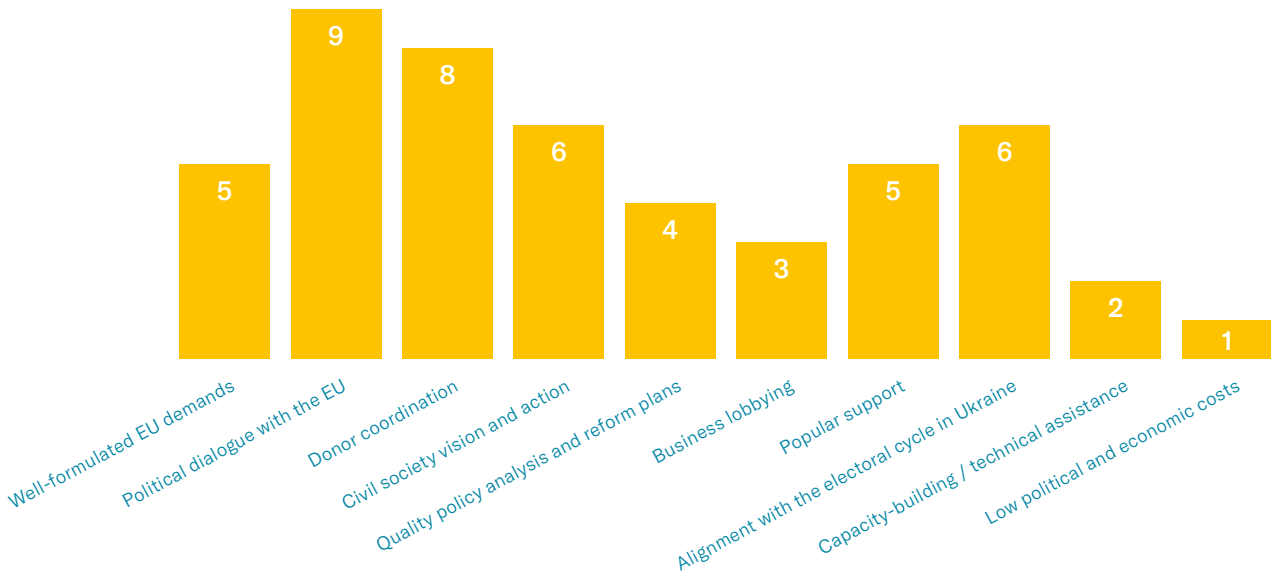
(10 – most important, 1 – least important)



Notably, the determinants of VLAP success are consonant with those that enabled Ukraine to launch a breakthrough asset declaration system and finalize the formation of the anticorruption bodies, with

political dialogue with the EU as a key success factor. Donor coordination and civil society action were also rated as important in this regard:

Factors, conducive to the launch of asset declaration system and the creation of anticorruption bodies (10 – most important, 1 – least important)



State-Building Measures and Macro-financial Assistance

The SBC, MFA III, MVA IV and the 2020-2021 MFA included conditions to build on this change and counter the challenges and gaps in the anticorruption system. The SBC has, in particular, provided for:

- (i) setting up and ensuring effective functioning of a specialised anti-corruption investigative agency for high-level corruption cases in line with international standards;
- (ii) aligning criminal corruption offences with international standards;
- (iii) the introduction and enforcement of provisions on illicit enrichment;
- (iv) pursuing reforms concerned with MPs' and judges' immunity.

While the MFA III predominantly reinforced conditionality under the VLAP and SBC, the MFA IV and the 2020-2021 MFA concentrated on specific gaps in Ukraine's

anticorruption system. In particular, the second tranche under the MFA IV was conditional on the adoption of the anti-laundering legislation in line with the EU legislation, as well as ensuring the operational nature of the Anti-Corruption Court. The 2020-2021 MFA, in turn, linked the required anticorruption changes in Ukraine to the reform of SOEs and the authorisation and operationalisation of the e-case management system to be coordinated between the National Anticorruption Bureau and Specialised Anticorruption Prosecutor's Office.

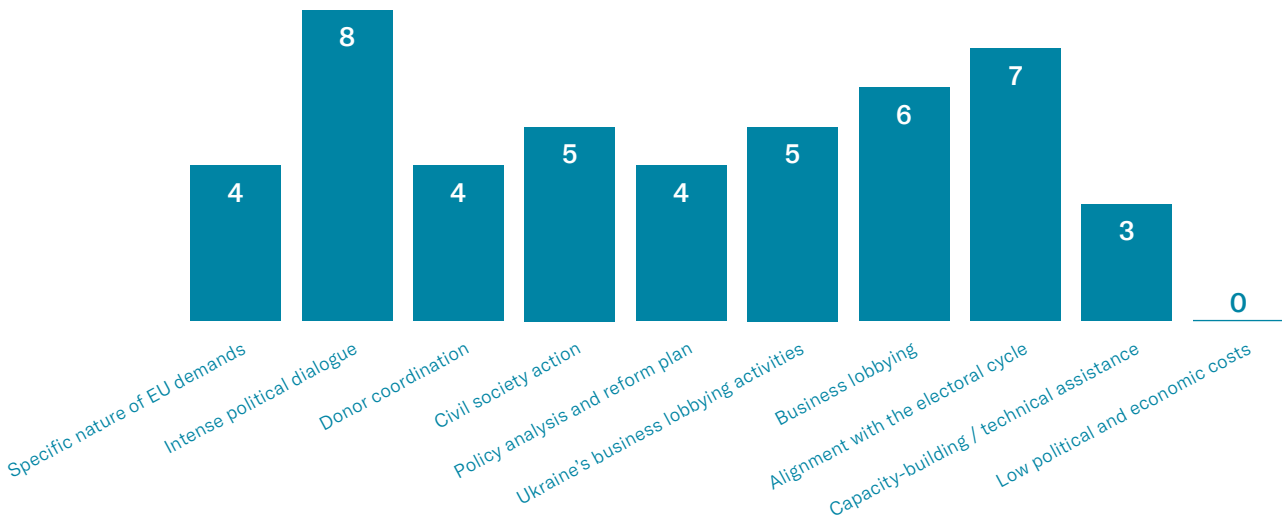
As in the case of VLAP, the implementation of respective conditions involved both achievements and challenges. The achievements to be linked to the State-Building Contract include the creation of the State Bureau of Investigation (SBI), the reform of Ukraine's Criminal Procedural Code, in particular, as to ensuring the independence and authorities of 'investigating judges';

introducing provisions on illicit enrichment to the Criminal Code of Ukraine (this was only done in 2014). The SBC also incentivized the Parliament to counter the challenge of judges' 'overbroad' immunity and lift MPs' immunity (with the latter achieved only by 2019, following the new composition of the Parliament). To implement conditions under the MFA IV and the 2020-2021 MFA, the Parliament adopted profound changes to the 2020-2021 MFA Ukrainian anti-money laundering bill, as well as made changes to the Criminal Procedural Code of Ukraine to facilitate the operation of the new "E-case" system to ensure the "automation of the pretrial investigation between detectives, prosecutors and judges" and facilitate interagency cooperation between NABU,

SAPO and HACC. The MFA IV also gave impetus to the start of the HACC operations that included conducting a high-profile procedure for selecting judges with the involvement of international experts, as well as developing the systems for judges' performance monitoring, and civil society monitoring of the Court's activities. Last but not least, the Government announced the corporate governance reform based on OECD standards. As depicted in the graph below, the implementation of conditions under MFAs was accompanied by political dialogue and civil society involvement, which are recognized by survey participants as the essential prerequisites for the success of reforms.

Factors, conducive to the launch of the High Anticorruption Court

(10 – most important, 1 – least important)



As with the VLAP (in synergy with the MFA III and IV), an array of challenges still have to be addressed. The operation of the State Bureau of Investigation is hampered by the overlap between its competences and those of the NABU, as well as conflicts as to "spheres of influences" with the Security Service of Ukraine (with which the SBI has to coordinate some aspects of its activities). Institutional challenges also concern the issue of lifting MPs' immunity,

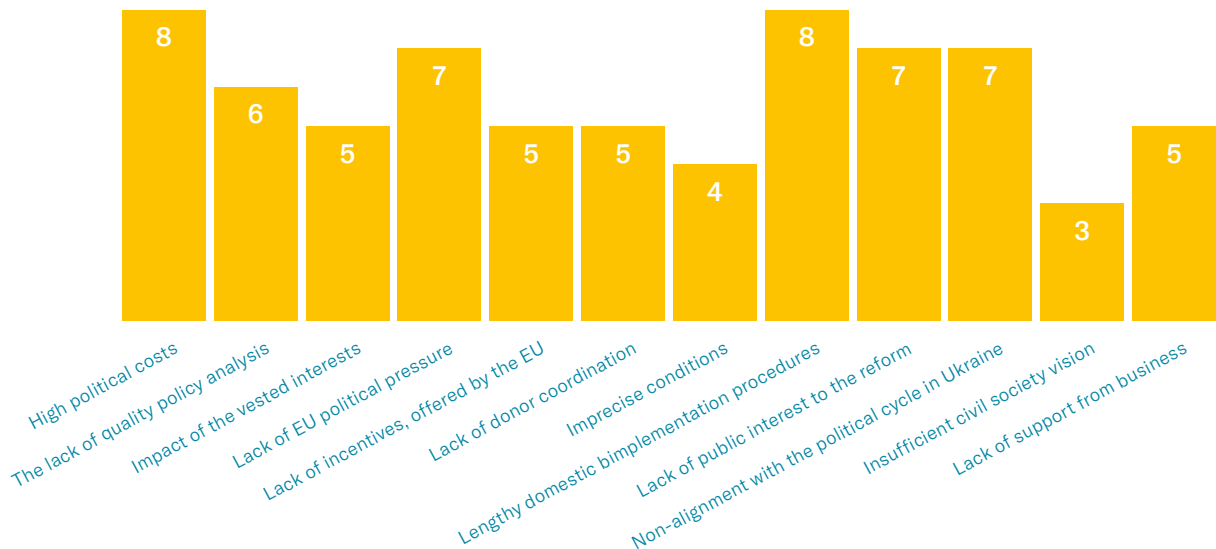
as Ukraine's Prosecutor General has a monopoly over such decisions. Given the extremely sensitive nature of the provisions on illicit enrichment and anti-money-laundering, their operation has been concerned with various instances of "sabotage" (e.g. the Constitutional Court's attempt to revoke illicit enrichment provisions in 2019).

The enforcement of both categories of provisions is additionally challenged by the long-lasting blocking of elections for the

head of the SAPO that has been repeatedly addressed by international community (represented, inter alia, by the EU, the USA, the World Bank) in terms of the political dialogue on the rule of law with Ukraine. The appointment of the SAPO's head was also identified as one of the conditions linked to Ukraine's candidate status and a prospect for opening of the EU-Ukraine enlargement negotiations in the Commission's Opinion on Ukraine's application for membership of the European Union. Challenges with electing the SAPO's head, as well as delays in preparing the legislative foundation for the operation of the "E-case" system hamper the operation of the HACC,

with accusations of inefficiency when countering grand corruption and low numbers of high-profile cases. The overall anticorruption system also gets challenged by the lengthy process of selecting the head of NABU, which is still ongoing. According to the expert survey, the latter issue is determined by the combination of EU-related and domestic conditions. These include high domestic costs of reform, a lack of public interest, as well as lengthy domestic processes needed to implement the conditions. The former primarily deals with the insufficiency of the EU's political pressure regarding this specific reform and challenges of aligning with electoral cycle in Ukraine.

Challenges of appointing the Head of NABU
(10 – most important, 1 – least important)



Numerous challenges also concern the implementation of the corporate governance (SOEs') reform. They include inconsistencies in the legal and regulatory frameworks (especially as to separating the role of a state as an owner /shareholder and the role

of supervisory boards); developing transparent procedures for nominating and dismissing SOE governing bodies; developing state ownership policies and ensuring the pathways to fair competition with private companies.²⁰

²⁰For the OECD's findings as to the corporate governance reform in Ukraine, see: OECD (2021) Key Findings. OECD Review of the Corporate Governance of State-Owned Enterprises in Ukraine. Available at: <https://www.oecd.org/corporate/Key-Findings-OECD-Review-Corporate-Governance-SOEs-Ukraine.pdf> (accessed 2 February 2022).

State-of-the-art Immediately prior and after the Granting of a Candidate Country Status to Ukraine

Countering challenges and, in particular, improving the ability of Ukraine's anti-corruption institutions to address grand corruption, requires intense political dialogue, with messages coordinated between Western donors, the application of further conditionality instruments and, not least, the continuation of the EU's, Member States' and other donors' capacity-building in Ukraine. The former element of the West's efforts to make Ukraine counter corruption effectively can be exemplified by the recent phenomenon of the G7 Ambassadors 2020-2021 Judicial and Anti-Corruption Reform Priorities for Ukraine (adopted following the Constitutional Court's attempt to destroy the foundations of anticorruption in Ukraine) and 2022 Reform Priorities for Ukraine (adopted in light of the escalation of Russia's aggression against Ukraine). The former document introduced specific priorities for NABU, NACP, SAPO and HACC to ensure their operation and inter-agency coordination, including the transparent and merit-based selection of the SAPO head and ensuring the independence of the HACC by providing the Court with necessary infrastructure and "ensuring effective security to judges and their families". In turn, the 2022 Reform Priorities call for: adopting the new Anticorruption Strategy; ensuring support to NCAP in its activities concerning declarations' verification, control of parties' financing and managing corruption risks; addressing the challenge of transparent selection of anti-corruption institutions' heads; strengthening the independence of the HACC and preserving Ukraine's successes in the public procurement domain. Except for the election of the SAPO head, Commission's Opinion on Ukraine's application for membership of the European Union put to the forefront several further conditions in the anticorruption domain, such as:

- (i) the appointment of a new Director of NABU;
- (ii) ensuring that the anti-money laundering legislation complies with the standards of the Financial Action Task Force (FATF);
- (iii) implementing the Anti-Oligarch Law.

According to the recent study on Ukraine's Moldova's and Georgia's first responses to the Commission's conditions, conducted in terms of the CEPS "3 DCFTAs" project, fulfilling the conditions pertaining to anti-corruption remains "a work in progress" for Ukraine. The government's significant achievement on the anticorruption path, triggered by the EU's granting of a candidate country status to Ukraine, had been the appointment of detective Oleksandr Klymenko as SAPO head in July 2022. As traced in more detail in the CEPS study, referenced above, Ukraine made modest progress to appointing the NABU head by forming the Competition Commission. As of February 2023, the selection process is ongoing. Besides, Ukraine adopted three out of six legal acts necessary to comply with the standards of the Financial Task Force (FATF) reform and made progress towards implementing the anti-oligarch legislation. In the latter case, it will only be possible to assess the reform's results following the delivery of an Opinion by the Venice Commission.

Importantly, January 2023 was marked by an array of corruption scandals in Ukraine concerning procurement for the army, as well as tax and land issues. These scandals and the investigations they stem from are seen by experts as illustrative of the anticorruption institutions' activity. They can be also seen as a part of a political agenda by the ruling party, directed both to getting stronger support from the EU and demonstrating progress towards the elections scheduled for 2024 (if the war is over by then). Notably, revoking martial law will most probably lead to a new wave of corruption investigations, because the procurement via "Prozorro" auctions and the publication of officials' asset declarations were stopped for the duration. As survey

data suggest, further political dialogue and EU conditionality will be essential to counter these new challenges.

Though ranked lower throughout the survey compared to conditionality, capacity-building and technical assistance measures represent an essential part of the EU rule of law promotion toolbox in Ukraine.²¹ The EU Anti-Corruption Initiative (EUACI), co-funded by the EU and the Kingdom of Denmark, and implemented by the Ministry of Foreign Affairs of Denmark, is currently the largest and most comprehensive donor-funded anticorruption programme in Ukraine. The EUACI focuses on:

- (i) the capacity-building of anticorruption institutions;
- (ii) enhancing the capacity of local self-government, civil society, media and business in selected Integrity cities (currently: Zhytomyr, Chernivtsi, Chervonograd, Mariupol, and Nikopol);
- (iii) promoting the culture of integrity through partnership with civil society organizations and think tanks (e.g. Transparency International Ukraine).

The EUACI design is illustrative of two key features of the EU's technical assistance to Ukraine in the anticorruption domain, namely the focus on institution- and capacity-building, and partnership and cooperation with various stakeholders, such as local NGOs, think tanks, and international organizations. The former feature can be additionally exemplified by several other EU funded institution- and capacity-building programmes in Ukraine, such as "Rada za Evropu – Capacity-Building in Support of the Verkhovna Rada of Ukraine" or the Twinning programme "Strengthening institutional capacities of the Antimonopoly Committee of Ukraine to conduct market studies and effectively enforce competition law in accordance with EU standards".

Enhancing the anticorruption capacity of the police, prosecution and judiciary through training, the provision of interrogation facilities, and strengthening public-communication and human resources capacity also represents the focal point of the EUAM Ukraine activities. Moreover, good governance and anticorruption is essential to the activities of the EUBAM Ukraine, which focuses on the border and customs domain. The EU's focus on cooperating with various stakeholders in the anticorruption domain can be exemplified by its joint programmes with the CoE and the support for the NGOs' coalition "Reanimation Package of Reforms".

Ultimately, the fight against corruption lies at the heart of the EU rule of law promotion activities in Ukraine, marked by the combination of political and policy dialogue, detailed and synergetic conditionalities, institutions' capacity-building, and support to NGOs. Given the sensitivity of the anticorruption domain, the progress in this sector would hardly have been possible without the conditionality pressures. The key challenges in the anticorruption domain pertain to tackling grand corruption; strengthening the independence of and improving the interagency cooperation between anticorruption institutions (e.g. through transparent selection procedures), as well as preserving the achievements of previous reforms, e.g. in the domains of competition and public procurement. Following the war, we can expect new issues concerning the restoration of the auction-based procurement system and asset declarations.

²¹ For an overview of the EU programmes in the anticorruption domain, see European Court of Auditors (2021). Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/SR_fight-against-grand-corruption-in-Ukraine_EN.pdf (accessed 29 December 2021), pp.62–64.

Judicial Reform

Political and Policy Dialogue.

Association Agreement

Judicial reform is another central dimension of the EU rule of law promotion in Ukraine, vital not only for the rule of law per se but also for ensuring a better business environment and implementing transitional justice in the conflict context. Furthermore, bilateral judicial cooperation in criminal and civil matters constitutes an important aspect of the EU-Ukraine cooperation in Justice and Home Affairs, dating back to the EU-Ukraine PCA and the 2001 EU-Ukraine Action Plan on Justice and Home Affairs. As well as in the anti-corruption domain, the EU exercises broad discretion to design its judicial reform support programmes in third states and does so in close cooperation with Member States (and with the help of their best practices) and international organizations, such as the CoE. The CoE standards and recommendations are broadly used by the EU as benchmarks for its assistance projects in the judicial domain.²² Similar to the anticorruption case analysed above, high-level political and policy dialogues represent crucial avenues for the EU and Ukraine to engage on the issues of judicial reform (often in combination with anti-corruption and/or law enforcement agencies' reform issues). The foundation for political and policy dialogue in the judicial reform domain is constituted by Art. 2, 4, 6 and 14 Association Agreement (AA) and the 2015 Association Agenda, requiring Ukraine to: "(T)ake further steps on judicial reform, in particular, by adopting in line with European standards and in close consultation with the Council of Europe/Venice Commission, a Justice Reform Strategy including a

detailed, comprehensive implementation plan". The 2022 Commission Opinion on Ukraine's application for membership of the European Union highlights the importance of judicial reform in light of Ukraine's candidate status and potential start of the EU-Ukraine enlargement negotiations.

Conditionality

As well as in the anticorruption domain, conditionality has played a crucial role in incentivizing the judicial reform in Ukraine. In this context, the 2010 VLAP referred to the judicial reform in two key contexts, namely:

- (i) the development of ethical codes and the conduct of training courses for public officials in judiciary;
- (ii) judicial cooperation in criminal matters and ensuring effectiveness in law enforcement cooperation.

During the first phase of the VLAP implementation, the latter priority envisaged the adoption of legal framework on mutual legal assistance, and ratification of the 2nd protocol to the European Convention on mutual legal assistance and conclusion of an agreement with the Eurojust. The second phase required effective implementation of conventions on international judicial cooperation and effective judicial cooperation in criminal matters with the EU Member States' judges and prosecutors. Already the Commission's 2015 (Fifth) Report on VLAP Implementation deemed these conditions as achieved. Though the legislative framework and practices for judicial cooperation distinguished in VLAP have been in place for over five years, the lack of staff in courts represents a capacity constraint. While the VLAP has focused on judiciary through the lens of the Justice and Home Affairs (JHA) matters, the 2014 SBC emphasized the need for justice sector reform, especially in the context of the fight against corruption.

²² See, for instance, High Council of Justice (2019) Implementation of ECHR decisions and judicial reform issues in Ukraine are being discussed in the Council of Europe. Available at: <https://hcj.gov.ua/en/news/implementation-echr-decisions-and-judicial-reform-issues-ukraine-are-being-discussed-council> (accessed 30 December 2021).

The focus on sensitive aspects of the judicial reform was also salient in the conditions attached to MFA III, MFA IV and MFA in the context of the COVID-19 pandemic. In line with the National Justice Reform Strategy 2015-2020, the MFA III required implementing the performance evaluation systems for judges, improving the system of enforcement for civil and administrative cases in line with European standards, and amending the legislation on the judiciary in line with the Venice Commission recommendations to improve its efficiency and performance. The MFA IV focused on ensuring the functioning of the High Anti-Corruption Court of Ukraine. Following the trend for focusing on several 'burning points', the most recent MFA package in connection with the coronavirus pandemic has focused on two conditions, namely the creation of a new High Qualification Commission of Judges of Ukraine (HQCJ) through a transparent selection procedure conducted by the Selection Committee with international participation, and the creation of an Ethics Commission with international participation to assess the integrity and ethics of the High Council of Justice (HCJ) members and to establish a pool of pre-selected Council members. Most recently, the Commission's Opinion on Ukraine's application for membership of the European Union stressed previously set conditions concerning the selection of the HCJ members and the formation of the HQCJ. It also pointed out the need for Ukraine to "enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations".

Capacity-building

Compared to the anticorruption sector, the EU and Member States allocated even more resources to building the capacity of the judiciary and facilitating the justice sector reform. The EU has supported the implementation of the aforementioned conditions, as well as the creation of national justice system reform strategies and the institution- and capacity-building of the judiciary, with an array of ambitious programmes involving the EU, Member States, international donors, and civil society. In this vein, the 2014 SBC emphasized "capacity development, in particular as regards the capacity of civil society to effect oversight over the activities of judicial, legislative and executive bodies" as one of the main directions of activities to be implemented under this State-Building Contract. Over the period from 2014 to 2017, the institution- and capacity-building of the judiciary was primarily exercised through the project "Support to Justice Sector Reforms in Ukraine", implemented by the Consortium of EU Member States under the leadership of the Justice Cooperation International (France). The key mission of the project has been to promote cooperation between key stakeholders in the justice sector, such as the Ministry for Justice, members of the judiciary, representatives of the legal profession and civil society, and further to prepare the policy and legal frameworks for the implementation of the judicial reform. The key contributions of the project included the establishment of the Judicial Reform Council and the coordination of the preparation of the Ukraine Judiciary Development Strategy 2015-2020 and the Roadmap for its implementation. The strategic issues embraced by this document were: strengthening the independence and transparency of the judiciary, restoration of public trust towards the judiciary, improvement of competence, ensuring integrity in the delivery of justice, promoting e-justice (access to justice and the innovative use of technology and improving court procedures).

The EU further supported the implementation of these tasks in terms of the Special Measure III 2016 on Support to the Rule of Law in Ukraine, funded from the general budget of the EU. Component I of the Special Measure focused on justice sector reforms (judiciary, the enforcement of judgments, improved access to justice, state registers and the execution of sanctions), while the Component II had a special focus on the police reform. Building on the previous “Support to Justice Sector Reforms” project, the Special Measure III have an impetus to the umbrella PRAVO-JUSTICE institution- and capacity-building measure, funded by the EU and implemented by the public technical support agency Expertise France. The cross-cutting objective of the PRAVO-JUSTICE measure is to promote “Joint Vision of Justice as a Chain”, including the support to coordination of various stakeholders, inter alia, through the creation and support of Strategic Planning Units (SPUs) at each of the stakeholder organizations, such as the Ministry of Justice and the High Council of Justice. Further priorities of the PRAVO-JUSTICE project include: the support for Regional Justice Reform Councils with a focus on region-specific challenges in the justice domain; greater leadership and accountability of the High Council of Justice; support to newly established private enforcement service; support to the Probation Service of Ukraine; and the development of consolidated Management Information Systems in the justice domain. As well as in the anticorruption domain, a key role in the support for judicial reform is played by the EUAM Ukraine. Since the law enforcement agencies reform on which the EUAM focuses is indivisible from the reform of the judiciary, the EUAM also contributes to the judicial reform, especially when it comes to the operation of the criminal justice system, judicial cooperation, and civil society cooperation. In the judicial reform domain, fruitful cooperation with civil society can be exemplified by the case of the DEJURE foundation’s fight for integrity of the judiciary in terms of the Public Integrity Council (PIC).

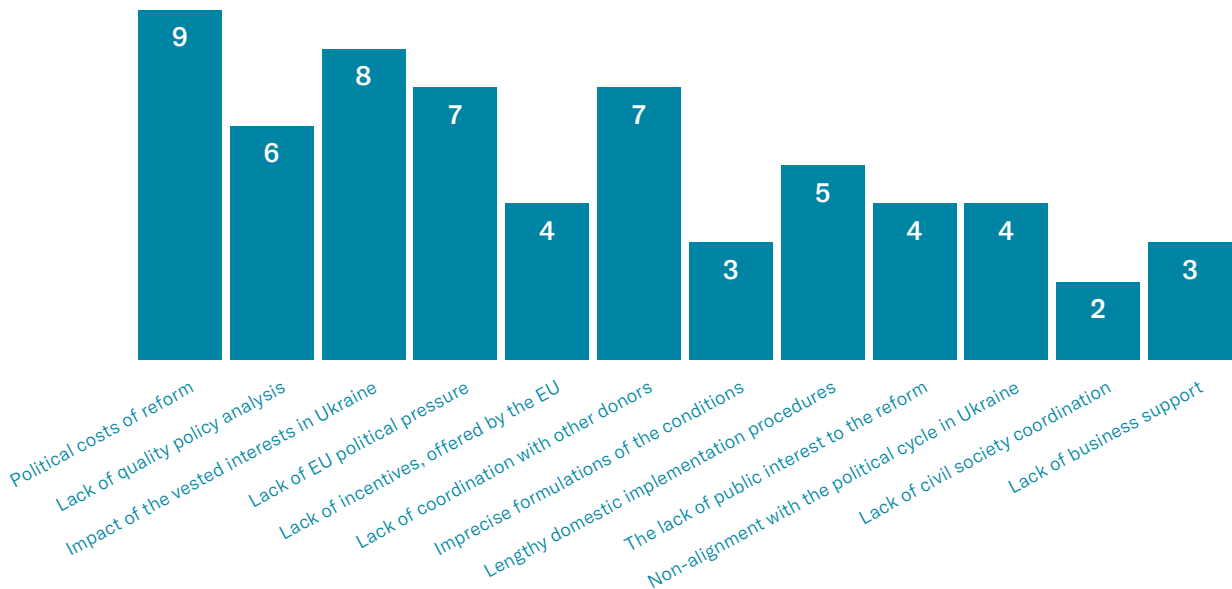
Results, Challenges and Prospects in the Context of Candidate Country Status

Despite the elaborate combination of political dialogue, conditionality and compliance in the judicial domain, the results of the reform efforts are marked by the mixed record of success (as illustrated in Annex 2). Following the SBC conditionality, the Reform Strategy focusing on the judiciary, legal procedures and related issues was adopted in 2015. The Strategy has focused, inter alia, on ensuring the independence and impartiality of judges; optimizing self-governance in the judiciary and the system of judges’ career development; improving judges’ professional level; improving the transparency and openness of the judicial system and the effectiveness of courts’ operation, and law enforcement. Following the 2015–2020 Strategy and the MFA conditionality, the methodology was developed to assess the performance of the courts, rather than specific judges. In line with conditionality under the MFA III, the government of Ukraine invested considerable efforts in reforming the system of enforcing court decisions. The key reform’s results, stressed by the Cabinet of Ministers of Ukraine, include improved access to the occupation of an enforcement officer, introducing private enforcement officers’ service, the launch of the Unified Register of Debtors (including both physical and legal persons), and the integrated e-system to support the enforcement of judicial decisions. Despite these efforts, the challenge of the non-enforcement of court decisions sustains due to several reasons, including the systemic and deeply-entrenched nature of this challenge (also when it comes to the European Court of Human Rights’ (ECtHR) decisions) and competition between state and private enforcement agencies. In practice, enforcement agencies also often face issues with getting banks involved in enforcement procedures and the relevant e-case-management systems.

As analysed above, Ukraine managed to fulfil the MFA IV -based condition as to the launch of the HACC and ensuring its operational nature, including the conduct of a rigorous selection procedure aimed to ensure judges' integrity. Nevertheless, the anticorruption institutions' system continues to suffer from inter-agency coordination challenges, posed, for example, by the dysfunctional nature of the SAPO. This can be seen as a reason behind the relatively small number of cases considered by the Court. As in the case of SAP formation, considerable opposition arose concerning the fulfilment of conditions under the MFA 2020-2021, namely the formation of the High Qualification Commission of Judges of Ukraine (HQCJ) and the High Council of Justice (HCJ) through transparent selection procedures involving international experts. The legal basis for conducting respective

selection procedure was created in June 2021, but as of the beginning of 2023, the HQCJ has not been formed. The non-operational nature of the HQCJ leads to the fact that about 2,000 vacancies for judges in courts cannot be filled, and operating judges experience additional pressure. In turn, the formation of the HQCJ may be further blocked due to the challenge of selecting the members of the HCJ that shall be pre-selected by the foreign expert-led Ethical Council that was formed at the end of 2021 amid civil society's doubts as to the integrity of individuals suggested for the election to the Ethical Council by the Ukrainian Council of Judges. With this, conducting impartial procedures to select the HQCJ and the HCJ members remains a task to be solved. Solving this task during the war can be particularly challenging due to security issues and the priority attributed to other tasks.

Challenges of reforming the HQCJ and HACC
(10 – most important, 1 – least important)



As well as anticorruption-related changes, unfulfilled tasks in the judicial domain were central to the Judicial and Anti-Corruption Reform Priorities for Ukraine and the 2022 Reform Priorities for Ukraine, published by the G7 Ambassadors. The former document contains specific priorities as to launching transparent processes for:

- selecting the HQCJ and HCJ members;
- establishing transparent rules for selecting candidates for judges' positions and qualifications evaluation for the HQCJ;
- introducing more stringent criteria for participation in the Public Integrity Council;
- revising the structure of the Supreme Court;
- revising procedures for the consideration of high-profile administrative cases;
- reorganizing the State Judicial Administration (SIA).

The record of fulfilment is mixed, as the HCQJ and HCJ had not been formed yet, the structure of the Supreme Court was not changed, and no major changes were introduced with respect to the management of high-profile administrative cases, except for those that fall within the jurisdiction of the HACC. Nevertheless, the 2022 Reform Priorities did not preserve all the unfulfilled priorities, but chose to introduce the general priority of intensifying the reform in light of the anticorruption requirements through reforming the HCJ, selecting HQCJ members and filling vacancies for the

positions of judges. It was also suggested to reform the Constitutional Court and Kyiv District Administrative Court and continue reforming two key law enforcement agencies, namely the State Bureau of Investigation and the Prosecutor General's Office.

For the time being, the Commission's Opinion on Ukraine's EU membership application represents a key source of EU justice reform-related conditionality in Ukraine. The Opinion requires Ukraine to "enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a preselection process based on evaluation of their integrity and professional skills in line with the Venice Commission recommendations" and to "finalise the integrity vetting of the candidates for the High Council of Justice members by the Ethics Council and the selection of candidates to establish the High Qualification Commission of Judges of Ukraine". In December 2022, Ukraine adopted new legislation on the Constitutional Court, but it was marked by the deliberate weakening of the international component of the Advisory Group of Experts (AGE), entrusted with judges' selection. Due to harsh criticism from both the EU and civil society, e.g. as stressed during the 3 February 2023 EU-Ukraine Summit, Ukrainian authorities promised to continue working on amendments. The process of forming the HCJ and selecting candidates to establish the HQCJ was resumed after a war-induced stop, and is ongoing at the time of writing.

Law Enforcement Agencies Reform

Quality law enforcement is essential for making the rule of law sector operational. Alongside anticorruption and judicial reform, the law enforcement agencies' reform has been central to the EU's promotion of the rule of law in post-Euromaidan Ukraine. The improvement of law enforcement agencies' operations can be seen as lying at the intersection of the anticorruption reform (the establishment of corruption investigation bodies), judicial reform (ensuring the enforcement of judicial decisions), and the civilian security sector reform. Therefore, EU-Ukraine political dialogue on law enforcement agencies, relevant conditionalities and capacity-building initiatives often come under the auspices of the above-mentioned aspects of the rule of law.

The EU-Ukraine AA (Art. 2, Art. 4-5, Art. 14, Art. 16) and the EU-Ukraine Association Agenda laid down the foundations for the EU-Ukraine dialogue on reform of a number of law enforcement agencies, such as the public prosecutor's office, police and the civilian security service system, and the anticorruption agencies. Notably, the law enforcement agency reforms are important for strengthening the EU-Ukraine political association, especially when it comes to the strengthening of the EU-Ukraine security cooperation and Ukraine's participation in the intergovernmental Permanent Structured Cooperation (PESCO) initiative, as well as the EU-Ukraine cooperation on Justice and Home Affairs and its institutional foundations.²³ Matters concerning the law enforcement agencies' reform are thus frequently addressed in terms of the political and policy dialogue, e.g. as it concerns the long-awaited reform of Ukraine's Security Service (SBU), supported by the International Advisory Group of the Security Service

of Ukraine and the EU Advisory Mission (EUAM).²⁴ Most recently, the Commission's Opinion on Ukraine's application for membership of the European Union stressed the need for Ukraine to adopt an "overarching strategic plan for the reform of the entire law enforcement sector as a part of Ukraine's security environment".

Notably, compared to the anticorruption sector and the judicial reform, the EU conditionalities on law enforcement agencies have been less streamlined, with different instruments tackling reforms of different law enforcement agencies, rather than progressively tackling the law enforcement sector as a whole. Hence, the 2010 VLAP embraced an array of conditionalities related to the operation of agencies involved in border and migration management, such as the State Border Guard Service of Ukraine and the Customs Service of Ukraine. The first phase of the VLAP required Ukraine to "adopt all necessary measures for the implementation of the law enforcement programme on State Border Development and Reconstruction for the period till 2015 and the State Border Guards Service of Ukraine development concept for the period up to the year 2015, including a legal framework for inter-agency cooperation between the Border Guard Service, law enforcement agencies and other agencies involved in border management and allowing the Border Guard Service to participate in detection and investigation of cross-border crime in coordination with all competent law enforcement authorities". In this vein, the second phase was linked to the effective implementation of the legislation on State Border Guard Service, the provision of relevant equipment and infrastructure

²³ For more information on the EU-Ukraine political association and the role of law enforcement agencies therein, see Razumkov Centre (2021) Ukraine-EU: Path to Political Association. Available at: https://razumkov.org.ua/uploads/article/2021_association_eng.pdf (accessed 02 January 2022).

²⁴ See, for instance, EUAM (2021) Opinion: International Advisory Group on Reform of the Security Service of Ukraine. Available at: <https://www.euam-ukraine.eu/news/opinion/international-advisory-group-op-ed-on-reform-of-the-security-service-of-ukraine/> (accessed 02 January 2022).

for the adoption of the Integrated Border Management (IBM) Strategy and the improvement of both the inter-agency coordination and international cooperation, e.g. with FRONTEX. The Fifth Commission's Progress Report on VLAP implementation (2015) deemed 2010 VLAP conditions fulfilled, pointing to the need to further enhance inter-agency cooperation and conclude the agreement on cooperation with EUROPOL. The respective Agreement on Strategic Cooperation between Ukraine and EUROPOL was concluded in 2016.

In turn, the 2014 conditionality under the SBC concerned only the anticorruption institutions, namely "setting up and ensuring effective functioning of a specialised anti-corruption investigative agency for high-level corruption cases in line with international standards" (i.e. the State Bureau of Investigations). As mentioned above, the MFA III has extensively built up on the SBC with respect to the enforcement of the anticorruption measures, making the MFA conditional on establishing the National Anti-Corruption Bureau, a Specialized Anti-Corruption Prosecution Office and a National Agency for the Prevention of Corruption, ensuring that they are independent and operational, i.e. endowed with the financial resources, staff and equipment required to perform their functions, as well as selected in a transparent manner that allows for ensuring integrity. The achievements and challenges concerned with the establishment and operation of these entities is discussed in the previous section on anticorruption. The MFA IV addressed the operation of the law enforcement agencies in the domain of domestic revenue mobilization, in particular the adoption of the reform plan for the tax and customs administration "with clear deliverables to ensure tax compliance, tax audit, customs and cross-border cooperation, and staff integrity". Building on the MFA IV, the MFA 2020-2021 required Ukraine to continue the reform of tax and customs administrations, in particular to adopt a "competitive and competence-based selection procedure to

the positions of heads of the State Tax Service of Ukraine and the State Customs Service of Ukraine" and pursue the implementation of the tax and customs reform plans, inter alia, using new IT solutions. In line with other MFA programmes, fiscal agencies' reform was officially launched in 2018, with the agency-specific reform plans for tax administration (2022-2024) and customs administration (for 2020) having been adopted. In line with the MFA 2020-2021, competitions for the positions of heads of the State Tax Service of Ukraine and the State Customs Service of Ukraine were introduced. Lengthy and thorny selection procedures, however, resulted in appointing temporary heads of respective agencies, rather than their fully-fledged leaders.

In contrast to the anticorruption domain, EU and Member States' efforts to reform law enforcement agencies in Ukraine are marked by the absence of explicit conditionalities attached to several key institutional reforms, namely police, civilian security sector reform (including the Security Service (SBU)) and the launch of the Bureau of Financial Investigations (BFI). The absence of EU conditionality as to the launch of the BFI can be explained by the fact that ensuring this agency's functionality has been one of the conditions of the International Monetary Fund (IMF) cooperation with Ukraine, and EU's MFA programmes are anyway linked to the fulfilment of IMF conditions.²⁵ As explained elsewhere, the police and SBU reforms were mainly supported by the EU through the institution- and capacity-building activities, though with relatively low success rates. While the initial stage of national police reform in 2015-2016 was deemed a success, later analysis showcase the return to 'business as usual'.²⁶ Though being crucial for the country's national

²⁵ For an insight into the story behind the BFI establishment, see: Gherasimov, C., Solonenko, I. (2020). Rule of Law Reform after Zelenskyi's First Year. A Return to Business as Usual in Ukraine. *DGAP Analysis* No 4, p. 19. Available at: https://dgap.org/sites/default/files/article_pdfs/DGAP-Analysis-2020-4-EN.pdf.

²⁶ Ibid, p.20.

security, the SBU preserves significant immunity to either reforms or stronger parliamentary oversight. There are, therefore, calls for the EU, its Member States and other Western donors to introduce detailed conditionality pertaining to the SBU reform. The cases of police and the SBU reform are thus illustrative of the high share of political dialogue, as well as institution- and capacity-building activities in the EU rule of law promotion efforts in Ukraine.

This statement can be further exemplified by the activities of the EU Border Assistance Mission to Moldova and Ukraine (EUBAM) that was launched in 2005. The Mission's current mandate is valid until 2023 and encompasses the "promotion of border control, customs and trade norms and practices that meet European Union standards, and serve needs of its two partner countries." The EUBAM has contributed to Ukraine's successful implementation of the VLAP and is engaged in the Border Guard and State Customs Service reforms and the improvement of inter-agency coordination and international cooperation in the border management and migration and asylum management domain. Since 2014, an important role in the EU's promotion of the law enforcement agencies' reform in Ukraine has been played by the EU's non-executive EUAM mission, whose goal is "to expedite a sustainable reform of the civilian security sector, providing strategic advice and practical support for specific reform measures in accordance with EU standards and international principles of good governance and human rights". The EUAM's priorities include: the reform of national security and intelligence institutions; strengthening Ukraine's capacity to conduct Integrated Border Management and counter cross-border crimes (in cooperation with the EUBAM); reforming the investigation, prosecution and judicial infrastructure; building trust between communities and police; supporting digital transformation and innovation. The EUAM's broadly formulated mission and priorities thus enables it to cooperate closely with the

government of Ukraine and other stakeholders (e.g. the U.S. Government) to support the reforms of numerous law enforcement agencies, such as the public prosecutor office, police, SBU and intelligence services. Alongside the EUAM, the institution- and capacity-building of Ukraine's law enforcement agencies is supported through agency-specific projects. For instance, Component 2 under the 2016 Special Measure (III) in favour of Ukraine (PRAVO) has focused on reform support in the law enforcement sector with a special focus on police. In this context, support for the police had been originally exercised under the previously mentioned PRAVO-JUSTICE project and later on transferred to the PRAVO-POLICE project that includes 12 support packages concerning a number of law enforcement agencies, such as the National Police of Ukraine, the Office of the Prosecutor General the Qualification and Disciplinary Commission of Public Prosecutors and the SBI. As mentioned in the part of the analysis dedicated to anticorruption, the operation of Ukraine's anticorruption institutions is supported by the EU Anti-Corruption Initiative (EUACI).

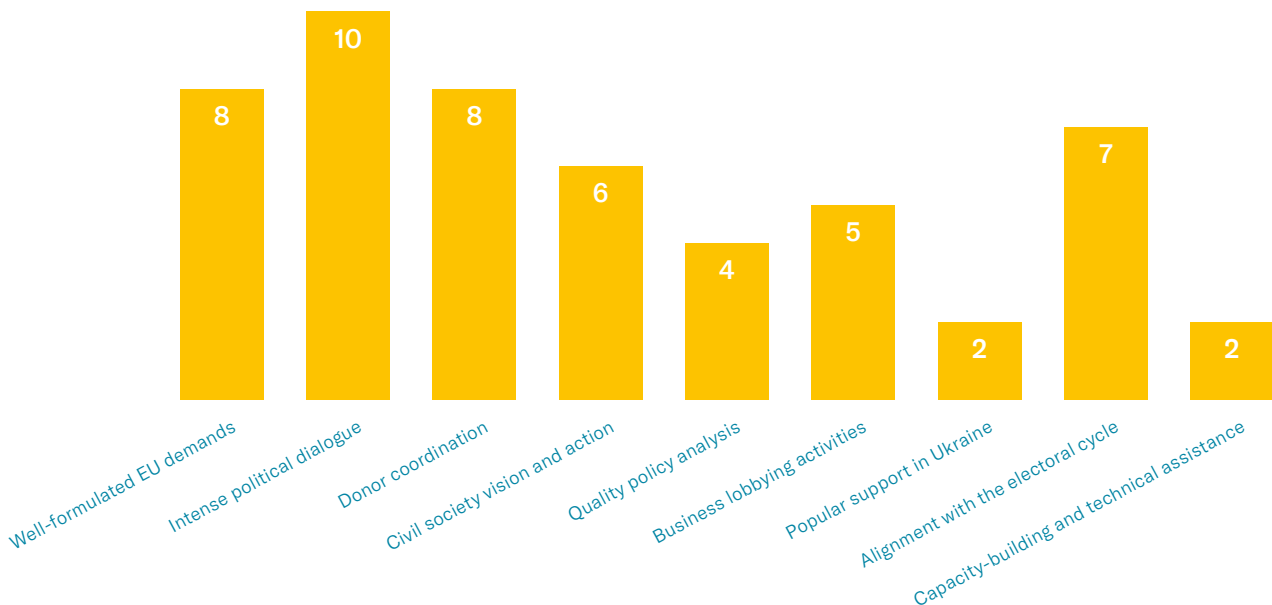
With this, it can be concluded that the support to law enforcement agencies is a critical cross-sector priority for the EU rule of law support in Ukraine, marked by rather patchy conditionality but a strong strategic advice and institution- and capacity-building component. As with the anticorruption and the judicial reforms, the reform of the law enforcement agencies is marked by mixed implementation rates and opposition from vested interests.

Conclusion

Overall, the analysis of the EU and Member States' efforts to advance the rule of law in Ukraine has been marked by a combination of multi-level dialogue, conditionality, institution-building and capacity-building, and the EU's and Member States' active cooperation with numerous relevant stakeholders, such as international donors, civil society and communities. With regard to the three investigated reform domains (anticorruption, judicial reform, and law enforcement agencies), the expert survey demonstrated the central role that conditionality has played in incentivizing change. As shown in the figure below, regular and intense political dialogue with the EU, coordination with other donors (G7, USA) and the alignment with political cycle in Ukraine represent the key factors which make conditionality effective.

Important prerequisites for the rule of law reform in Ukraine also include the reform vision and action by civil society and popular support for reforms. In the foreseeable future, the key thematic priorities for reform will stem from the Commission's Opinion on Ukraine's EU membership application, including Constitutional Court reform, finalizing the HCJ formation and making the HQCJ operational, and appointing the head of NABU. Success of further reform efforts will depend on the duration and outcome of the war, and maintaining civil society support and popular support for European integration and compliance with EU reforms. As of February 2023, there is a high momentum and high societal demand for European integration of Ukraine, which should be used by the EU and civil society in Ukraine to get key reforms implemented.

Challenges of reforming the HQCJ and HACC (10 – most important, 1 – least important)



Annex 1: EU Rule of Law Promotion Toolbox in Ukraine (late 2013 / early 2014 – current time)

Tool	Timeframe	Legal nature and legal basis	Logic of influence	Examples
Soft instruments				
Bilateral political dialogue	Since 1994 (based on Partnership and Cooperation Agreement (PCA))	'Soft' law tool not intended to produce specific legal effects immediately.	Combining linkage (close dialogue and cooperation with the EU at different levels) and leverage (conditionality, promises of rewards and punishments, e.g. the non-provision of rewards)	Annual Human Rights Dialogue covering a broad array of issues including the legal framework for protecting human rights and ensuring democracy and civil society participation.
Commission Opinion on Ukraine's application for membership of the European Union	2022	'Soft' law document that served as foundational for the European Council to grant Ukraine candidate status	Conditionality linked to Ukraine's recently granted candidate status and the prospect of opening the EU-Ukraine enlargement negotiations	Conditionality related to the judicial reform, anticorruption, reform of audiovisual legislation and the reform of the legal framework for national minorities
EU-Ukraine Visa Liberalisation Dialogue and Action Plan on Visa Liberalisation	2010 – 2017	A format of political dialogue, accompanied by Commission's monitoring activities	Conditionality (visa liberalisation as a long-term reward)	Conditionality as to the enactment of the anti-corruption legislation and the operation of anti-corruption bodies
'Multilateral track' under the EaP	Since 2009	'Soft' law tool linked to specific EU funding schemes Exists as a foreign policy initiative, rather than an EU law act	Emphasis on linkages to the EU, Member States and other EaP countries, as well as regional cooperation and capacity-building opportunities	'20 Deliverables for 2020', providing for "strengthening the rule of law and anti-corruption mechanisms" and the monitoring of their achievement
Unilateral financial and technical assistance instruments, utilized by the EU under and beyond the umbrella of the ENP/EaP				
The Neighbourhood, Development and International Cooperation Instrument	2021-2027 (ENI Regulation: 2014-2020)	'Hard' law tool taking the form of EU Regulation 2021/947 of 14 June 2021 (adopted for the period from 2021 to 2027) The Regulation was adopted as a substitute to the European Neighbourhood Instrument (ENI, 2014-2020)	Strong conditionality (incentive-based approach, more-for-more principle) Funds for technical assistance and capacity-building measures	The EU's umbrella Pravo-Justice programme, aimed to promote greater rule of law in Ukraine in line with the EU and comparative standards EU Border Assistance Mission to Moldova and Ukraine
Special Measures in Favour of Ukraine	2014	Commission Implementing Decision of 29.4.2014 on a Special Measure in favour of Ukraine to be financed from the general budget of the European Union	State-building, capacity-building, civil society support	Support to constitutional and justice reforms, civil society support programme
	2016	Commission Implementing Decision of 12.12.2016 on Special Measure III 2016 on Support Rule of Law Reforms in Ukraine (PRAVO) to be financed from the General Budget of the Union	State-building, technical assistance, capacity-building	Support to the implementation of Justice Sector Reform Strategy and Action Plan

Tool	Timeframe	Legal nature and legal basis	Logic of influence	Examples
Macro-financial assistance (MFA) programmes	2014-2015 (MFA I) – EUR 610 million	Council Decision of 12 July 2002 providing supplementary macro-financial assistance to Ukraine (2002/639/EC) Decision of the European Parliament and of the Council of 7 July 2010 providing macro-financial assistance to Ukraine Memorandum of Understanding (MoU) between the EU and Ukraine of 2013	Conditionality linked to structural reforms with anti-corruption as part of the public financial management measures Upholding the International Monetary Fund (IMF) conditionality	Requirement to implement comprehensive anti-corruption legislation in line with GRECO recommendations and other international standards
	2014-2015 (MFA II) – EUR 1 billion	Council Decision of 14 April 2014 providing macro-financial assistance to Ukraine EU-Ukraine MoU of 12 May 2014	Upholding the International Monetary Fund (IMF) conditionality	Implementation of the Law on Principles of Preventing and Countering Corruption (e-declaration system)
	2015-2017 (MFA III, 1.8 billion in four tranches, last tranche not dispersed)	Decision (EU) of the European Parliament and of the Council of 15 April 2015 providing macro-financial assistance to Ukraine The EU-Ukraine MoU of 22 May 2015	Rule of law conditionality Conditional on the implementation of the Extended Fund Facility (EFF) Agreement with the IMF	Linked to Ukraine's rule of law commitments under the EU-Ukraine Association Agenda
	2018 (MFA IV, EUR 1 billion)	Decision (EU) 2018/947 of the European Parliament and the Council of 4 July 2018 providing further macro-financial assistance to Ukraine EU-Ukraine MoU of 14 September 2018	Strong anti-corruption conditionality linked to each instalment	E.g. creating verification system for electronic asset declarations for state and self-government officials
	2020-2021 (EUR 1.2 billion)	Decision (EU) of the European Parliament and the Council 2020/701 of 25 May 2020 on providing MFA to enlargement and neighbourhood countries EU-Ukraine (MoU) of 23 July 2020	Strong rule of law conditionality Upholding the IMF conditionality	EUR 1.2. billion in two instalments, conditional on reforms in the rule of law and anti-corruption domains
TAIEX (Technical Assistance and Information Exchange) and Twinning programmes	Since 2006	Institution- and capacity-building instruments supporting the approximation of legislation under the AA and contacts between administrations, respectively, funded from the general EU budget	Technical assistance, capacity-building, linkage	E.g. 2018 Twinning project "Strengthening the capacity of the Supreme Court of Ukraine in the field of human rights protection at the national level"
EU Assistance Mission to Ukraine (EUAM)	Signed in 2014, entered into force in 2017	Bilateral mixed agreement, whose parts are the EU and its Member States, of the one part, and Ukraine, of the other part Legal basis under EU Law: Art. 8 TEU, Art. 217 Treaty of the Functioning of the European Union (TFEU)	Basis for political dialogue, technical assistance and capacity-building Common values conditionality (Art.2) listing the rule of law as an 'essential element' and enabling a Party to apply unilateral measures in case the other Party commits a breach of 'essential elements' (with treaty suspension as a measure of the last resort) Substantive norms pertaining to the rule of law	E.g. Art. 2-6, Art. 14, numerous legal certainty, transparency, accountability and the observance of international law-related standards under Title IV "Trade and Trade-related Matters", especially Chapter 12 "Transparency"

Tool	Timeframe	Legal nature and legal basis	Logic of influence	Examples
Bilateral agreements and documents				
EU-Ukraine Association Agreement	Signed in 2014, entered into force in 2017	Bilateral mixed agreement, whose parts are the EU and its Member States, of the one part, and Ukraine, of the other part Legal basis under EU Law: Art. 8 TEU, Art. 217 Treaty of the Functioning of the European Union (TFEU)	Basis for political dialogue, technical assistance and capacity-building Common values conditionality (Art.2) listing the rule of law as an 'essential element' and enabling a Party to apply unilateral measures in case the other Party commits a breach of 'essential elements' (with treaty suspension as a measure of the last resort) Substantive norms pertaining to the rule of law	E. g. Art. 2-6, Art. 14, numerous legal certainty, transparency, accountability and the observance of international law-related standards under Title IV "Trade and Trade-related Matters", especially Chapter 12 "Transparency"
EU-Ukraine Association Agenda and other 'association law' acts	Since 2015	Bilateral documents, adopted by the Association Council	Basis for political dialogue and progress monitoring, technical assistance and capacity-building	E. g. the EU-Ukraine Association Agenda's provisions on judicial reform and preventing and combating corruption

Annex 2. “Achievements and Challenges of the EU’s and Member States’ Rule of Law Promotion Efforts in Ukraine” (late 2013/early 2014-current time)

- Note 1. This table mentions only EU instruments based on conditionality.
- Note 2. As reflected in the analysis of EU programmes, the implementation of the vast majority of the tasks below has been supported by political and policy dialogue, as well as various capacity-building initiatives, such as the EU Anti-Corruption Initiative (EUACI); the project “Support to Justice Sector Reforms in Ukraine”, PRAVO-JUSTICE, as well as the EU Advisory Mission and the EU Border Assistance Mission to Moldova and Ukraine. In many cases, the capacity-building programmes have worked at the crossroads of the priorities in question (e.g. EUBAM helped to build capacity of the Border Guard and Customs Services, *inter alia*, to counter corruption there).

Key Tasks	EU tools	Achievements	Challenges
Countering corruption			
Adopting legislation on preventing and fighting corruption and the establishment of a single and independent anti-corruption agency	Conditionality under the 2010 Visa Liberalisation Plan (VLAP)	<ul style="list-style-type: none"> • The adoption of the 2014-2017 State Anticorruption Strategy and the 2014 Law “On Countering Corruption” • The establishment of the National Anti-Corruption Bureau (NABU) in 2014 	<ul style="list-style-type: none"> • Concerns as to the implementation of the Anti-Corruption Strategy • Ensuring the independence of the NABU
Ensuring a high-level anti-corruption coordination mechanism to ensure the implementation of the 2014-2017 Anti-Corruption Strategy	Conditionality under the 2010 VLAP with concrete conditions formulated under the 5th Commission’s Progress Report on VLAP implementation (2015)	<ul style="list-style-type: none"> • Delimitation of competences between the NABU and other anti-corruption institutions • Creating guidelines for inter-agency cooperation 	<ul style="list-style-type: none"> • Ensuring the independence of anticorruption institutions • Significant time gaps between the launch of different institutions as a challenge to effective inter-agency cooperation • Judicial dependence, leading to challenges in prosecuting individuals, accused of corruption • Addressing grand corruption
Establishing the NABU, a specialized Anti-Corruption Office and a National Agency for Prevention of Corruption (NAPC) with clear guidelines for inter-agency coordination	• 2010 VLAP conditionality, conditionality under MFA III (2015, up to EUR 1.8 billion)	• The establishment of the abovementioned agencies with guidelines for inter-agency coordination, as provided for, <i>inter alia</i> , in Ukraine’s domestic legislation on NABU	<ul style="list-style-type: none"> • Scandal with a “sabotage” and attempts to “hack” the e-declaration system in 2018, undermining the public trust to NAPC • The Constitutional Court’s 2020 notorious decision to revoke the e-declaration system • Lack of efforts to specifically address grand corruption and state capture
Putting in place procedures to ensure the timely publication of all current assets declarations; effective verification of assets and conflicts of interest of public officials	• 2015 VLAP conditionality, MFA III (2015, up to EUR 1.8 billion)	<ul style="list-style-type: none"> • Establishing legal basis for checks on declarations and dealing with conflicts of interest in the 2014 Law “On Countering Corruption” • Entrusting the National Anti-Corruption Agency with the task of declarations’ verification • Launching an e-declaration system 	<ul style="list-style-type: none"> • Scandal with a “sabotage” and attempts to “hack” the e-declaration system in 2018, undermining the public trust to NAPC • The Constitutional Court’s 2020 notorious decision to revoke the e-declaration system • Lack of efforts to specifically address grand corruption and state capture
Ensuring full operability and accuracy of central electronic databases, including on asset declarations and beneficial ownership; and a unified web portal disclosing public expenditure	2015 VLAP conditionality, MFA III (2015, up to EUR 1.8 billion) MFA IV (2018, up to EUR 1 billion)	<ul style="list-style-type: none"> • The creation of the e-declaration system • The creation of the Register of entitled public funds’ holders and users 	<ul style="list-style-type: none"> • Initial failure to create the Register of beneficial ownership • Non-creation of a unified web-portal disclosing public expenditure (yet, the transparency of public expenditure is at least partly realized through Prozorro)
Establishing a National Asset Recovery Office and an effective inter-agency coordination to establish an asset recovery record	2015 VLAP conditionality, MFA III (2015, up to EUR 1.8 billion)	• The establishment of the Asset Recovery Management Agency (ARMA)	• Ensuring the integrity of ARMA and countering the illegal management of resources
Pursuing the immunity reforms related to judges and Members of Parliament	2015 VLAP conditionality 2014 Special Measure in favour of Ukraine (State-Building Contract, SBC) conditionality (up to EUR 355 million)	<ul style="list-style-type: none"> • Solving the challenge of judges’ ‘overbroad’ immunity • Lifting the MPs’ immunity in 2019 	• Prosecutor’s General monopoly over launching prosecution against MPs can be seen as dangerous in light of state capture.

Key Tasks	EU tools	Achievements	Challenges
Setting up and ensuring effective functioning of a specialized anti-corruption investigative agency for high-level corruption cases in line with international standards	2014 SBC conditionality	<ul style="list-style-type: none"> The creation of the State Bureau of Investigation 	<ul style="list-style-type: none"> Duty to cooperate with the Security Service of Ukraine on some categories of investigations
Aligning criminal corruption offences with international standards	2014 SBC conditionality	<ul style="list-style-type: none"> Reform of the Criminal Procedural Code of Ukraine, in particular as to the authorities and independence of an investigating judge 	
The introduction and enforcement of provisions on illicit enrichment	2014 SBC conditionality	<ul style="list-style-type: none"> The introduction of the provisions on illicit enrichment to the Criminal Code of Ukraine only in 2019 (!) 	<ul style="list-style-type: none"> Lengthy procedures to enact the law High threshold of what is considered "illicit enrichment" as compared to officials' income. Enforcement challenges due to the blocking of the Specialized Prosecutor's Office activities.
The establishment of the Anti-Corruption Court and ensuring its operational nature	MFA IV (2018, up to EUR 1 billion)	<ul style="list-style-type: none"> Launching of the High Anticorruption Court and start of its activities in 2019 	<ul style="list-style-type: none"> The blocking of the Specialized Prosecutor's Office activities The low record of court judgments in high-level corruption cases
Verification of 1.000 high-level officials' declarations	MFA IV (2018, up to EUR 1 billion)	<ul style="list-style-type: none"> 1.000 declarations were checked 	
The adoption of anti-laundersing legislation in line with EU standards (reference to the Financial Action Task Force (FATF) standards in the 2022 Commission's Opinion)	MFA 2020-2021 (2020, up to EUR 1.2 billion) Commission's Opinion on Ukraine's application for membership of the European Union (2022)	<ul style="list-style-type: none"> Amendments made to the 2019 Ukrainian anti-money laundering bill for it to meet European standards 	<ul style="list-style-type: none"> The blocking of the Specialized Prosecutor's Office activities. Low threshold for financial monitoring and The lack of elaborate monitoring algorithms for banks
The reform of state-owned enterprises (SOEs)	MFA 2020-2021 (2020, up to EUR 1.2 billion)	<ul style="list-style-type: none"> Official launch of the corporate governance reform based on the OECD standards 	<p>According to the OECD:</p> <ul style="list-style-type: none"> Inconsistencies in the normative and regulatory frameworks Lack of the comprehensive state ownership strategy SEOs' insufficient "competitive neutrality" in the relations with private actors.
The authorization and operationalization of the e-case management system to be coordinated between NABU, SAP and HACC	MFA 2020-2021 (2020, up to EUR 1.2 billion)	<ul style="list-style-type: none"> Amendments introduced to the Criminal Procedural Code of Ukraine to facilitate the operation of the new "E-case" system Adoption of the guidelines as to the operation of the "E-case" system 	<ul style="list-style-type: none"> One-year delay in preparations towards the launch of the system
Implementing the Anti-Oligarch Law to limit the excessive influence of oligarchs in a legal manner and with respect to the forthcoming opinion of the Venice Commission	Commission's Opinion on Ukraine's application for membership of the European Union (2022)	<ul style="list-style-type: none"> First results to be assessed by the end of 2022 	

Key Tasks	EU tools	Achievements	Challenges
Strengthening the fight against corruption, incl. by the appointment of a new head of SAPO and completing the selection procedure and appointment of the head of the NABU	Commission's Opinion on Ukraine's application for membership of the European Union (2022)	First results to be assessed by the end of 2022	Long-lasting and politicized challenge pertaining to the appointment of the SAPO head
Judiciary (except for the anti-corruption-related tasks)			
The development of ethical codes and the conduct of trainings for public officials in the judiciary	Conditionality under the 2010 Visa Liberalisation Plan (VLAP)	• The condition is deemed fulfilled by the EU Party	
Developing judicial cooperation in criminal matters, incl. the adoption of relevant legislation and ratifying international instruments	Conditionality under the 2010 Visa Liberalisation Plan (VLAP)	• The condition is deemed fulfilled by the EU Party	
Ensuring effective implementation of conventions on international judicial cooperation and effective judicial cooperation in criminal matters with judges and prosecutors from EU Member States	Conditionality under the 2010 Visa Liberalisation Plan (VLAP)	• The condition is deemed fulfilled by the EU Party	• Capacity challenges due to the lack of supporting staff in courts, as of 2021
Adopting the justice sector reform strategy with the focus on anti-corruption issues	2014 SBC conditionality (up to EUR 202 million)	• Adoption of the 2015-2020 Reform Strategy focusing on the judiciary, legal procedures and related issues	
Implementing the performance evaluation system for judges	MFA III (2015, up to EUR 1.8 billion)	• Adoption of the Methodology to assess courts', rather than individual judges' performance	• Ensuring sufficient capacity for conducting the evaluations of courts' performance • Evaluating the performance of individual judges
Improving the system of enforcement of civil and administrative cases in line with European standards	MFA III (2015, up to EUR 1.8 billion)	• Launch of the reform for courts' decisions' enforcement including the introduction of the private enforcement companies	• Systemic nature of the challenge with courts' decisions' enforcement in Ukraine (inter alia, due to long-existing moratoria on the alienation of different types of debtors' property) • "Competition" between state and private enforcement agencies • Challenges as to the e-case-management and getting banks involved in enforcement procedures
The creation of a new High Qualification Commission of Judges of Ukraine (HQCJ) through a transparent selection procedure conducted by the Selection Committee with international participation	MFA 2020-2021 (2020, up to EUR 1.2 billion) Commission's Opinion on Ukraine's application for membership of the European Union (2022)	• The "unblocking" of the HQCJ's activities in July 2021, with the legislative support for foreign experts' participation in judges' selection	• Lengthy and thorny procedure of adopting the new HQCJ legislation, inter alia, due to the judges' opposition to international experts' involvement • As of February 2022, the HQCJ had not been formed.
The creation of an Ethics Commission with international participation to assess the integrity and ethics of the High Council of Justice members and establish a pool of pre-selected Council members	MFA 2020-2021 (2020, up to EUR 1.2 billion)	• The launch of a foreign expert-led Ethical Council in December 2021	• Civil society's doubts as to the integrity of individuals suggested for the election to the Ethical Council by the Ukrainian Council of Judges

Key Tasks	EU tools	Achievements	Challenges
Finalizing the integrity vetting of the candidates for the HCJ members by the Ethics Council and the selection of candidate to establish the HCJ	Commission's Opinion on Ukraine's application for membership of the European Union (2022)	First results were to be revealed by the end of 2022	All-encompassing war challenge
Enacting and implementing legislation on a selection procedure for judges of the Constitutional Court of Ukraine, based on the Venice Commission's recommendations	Commission's Opinion on Ukraine's application for membership of the European Union (2022)	• First results were to be revealed by the end of 2022	All-encompassing war challenge
Law enforcement agencies (except for the anti-corruption-related tasks)			
Adopting measures for the implementation of the law enforcement programme on State Border Development and Reconstruction until 2015	Conditionality under the 2010 Visa Liberalisation Plan (VLAP)	• The condition is deemed fulfilled according to the Report by the EU Party	• Challenges noted by the EU Party as to the State Border Guard Service's capacity to engage in international cooperation
Adopting the State Border Guard Service of Ukraine development concept including the framework for inter-agency coordination	2010 VLAP conditionality	• The condition is deemed fulfilled according to the Report by the EU Party	
Effective implementation of the legislation on State Border Guard Service	2010 VLAP conditionality	• The condition is deemed fulfilled according to the Report by the EU Party	
The provision of relevant equipment and infrastructure for the adoption of the Integrated Border Management (IBM) Strategy	2010 VLAP conditionality	• The condition is deemed fulfilled according to the Report by the EU Party	
The improvement of inter-agency coordination and international coordination, e.g. with FRONTEX	2010 VLAP conditionality	• The condition is deemed fulfilled according to the Report by the EU Party	• Inter-agency information exchange and cooperation challenges • Challenges as to the access to INTERPOL databases at border crossing points
The adoption of the reform plan for the tax and customs administration with a focus on revenue mobilization	MFA IV (2018, up to EUR 1 billion)	• Launch of the fiscal agencies' reform in 2018 • Adoption of the agency-specific reform plans for tax administration (2022-2024) and customs administration (for 2020)	• Relatively slow tempo of reform plans' implementation
Conducting competitive and competence-based selection procedure to the positions of heads of the State Tax Service of Ukraine and the State Customs Service of Ukraine	MFA 2020-2021 (2020, up to EUR 1.2 billion)	• Announcing competitions for the positions of heads of the State Tax Service of Ukraine and the State Customs Service of Ukraine in 2021	• Lengthy competition procedures • Appointment of temporary, rather than permanent Heads of respective bodies
Adopting an overarching strategic plan for the reform of the entire law enforcement sector as part of Ukraine's security environment	Commission's Opinion on Ukraine's application for membership of the European Union (2022)	• No action yet, first results to be announced close to the end 2022	All-encompassing war challenge

Annex 3: Results of the survey “Conditions for the Effectiveness of the EU Rule of Law Promotion Instruments in Ukraine“

The Survey was filled in by 20 Ukrainian and Western experts on the EU rule of law promotion in Ukraine, representing authorities, civil society organizations and academia. Some of the experts chose to be anonymous, while others provided their contact details. Automatically aggregated results are presented below:

1. Which EU rule of law promotion instrument do you consider MOST effective?²⁹

Please grade the instruments below from 1 (least effective) to 10 (most effective).

Conditionality attached to regular EU-Ukraine political dialogue	10
EU-Ukraine Association Agreement	6
The 2010 Visa Liberalisation Plan, i.e. conditionality connected to visa liberalisation	9
Macro-financial assistance	8
Coordination of conditionality with further actors (e.g. the G7, the USA, the International Monetary Fund (IMF))	7
EU Advisory Mission to Ukraine (EUAM), aimed at supporting the civilian security sector reform	4
EU technical assistance and capacity-building efforts (e.g. projects “Support for Justice Reforms in Ukraine”, PRAVO-JUSTICE)	3

2. Which factors (both EU-related and domestic) do you consider essential for EU conditionality to work?

Please grade factors below from 1 (non-essential) to 10 (most essential)

The use of well-formulated specific demands on the part of the EU	9
Regular and intense political dialogue between EU institutions and representatives of its projects, on the one side, and Ukrainian authorities, on the other side	10
Coordination of the EU's conditionality with further actors (e.g. the G7, the USA, the International Monetary Fund (IMF))	8
Ukraine's civil society's coordinated vision of the reform and coordinated acting upon this (domestic advocacy, communication with international donors/ actors)	6
Availability of quality policy analysis and a precise reform plan in Ukraine	4
Ukraine's business lobbying activities and pressure on authorities	5
Popular support in Ukraine for the Ukrainian government acting upon the EU's conditionality	2
Alignment with the electoral cycle in Ukraine	7
Presence of capacity-building or technical assistance projects that support the implementation of EU's demands	2

²⁹ We define “effectiveness” as an ability of the EU to use an instrument to attain specific goals, set in its programming.

3. In your opinion, which factors (both EU-related and domestic) were most conducive to Ukraine's completion of requirements under the 2010 Visa Liberalisation Plan and the fact that Ukraine was eventually granted visa liberalisation with the EU in 2017?

Please rate options below from 1 (least conducive) to 10 (most conducive)

The use of well-formulated specific demands on the part of the EU	7
Regular and intense political dialogue between EU institutions and representatives of its projects, on the one side, and Ukrainian authorities, on the other side before the Euromaidan	7
Regular and intense political dialogue between EU institutions and representatives of its projects, on the one side, and Ukrainian authorities, on the other side after the Euromaidan	8
Coordination of the EU's conditionality with further actors (e.g. the G7, the USA, the International Monetary Fund (IMF))	9
Ukraine's civil society's coordinated vision of the reform and acting upon it (pressure on authorities, communication to donors/ international actors)	6
Availability of quality policy analysis and a precise reform plan in Ukraine	5
Ukraine's business lobbying activities and pressure on authorities	4
Popular support in Ukraine for the Ukrainian government acting upon the EU's conditionality (i.e. high population's demand for visa-free travels)	6
Alignment with the electoral cycle in Ukraine	7
Presence of capacity-building or technical assistance projects that support the implementation of EU's demands (e.g. the operation of the EU Border Assistance Mission to Moldova and Ukraine)	3
Low political and economic costs of the conditions' implementation ³⁰	1

4. Which factors (both EU-related and domestic) have been most conducive to the creation of anti-corruption institutions and the system of assets' declaration by officials and the verification of declarations?

Please rate options below from 1 (least conducive) to 10 (most conducive)

The use of well-formulated specific demands on the part of the EU	5
Regular and intense political dialogue between EU institutions and representatives of its projects, on the one side, and Ukrainian authorities, on the other side	9
Coordination of EU's conditionality with further actors (e.g. the G7, the USA, the International Monetary Fund (IMF))	8
Ukraine's civil society's coordinated vision of the reform and acting upon it (pressure on authorities, communication to donors/ international actors)	6
Availability of quality policy analysis and a precise reform plan in Ukraine	4
Ukraine's business lobbying activities and pressure on authorities	3
Popular support in Ukraine for the Ukrainian government acting upon the EU's conditionality	5
Alignment with the electoral cycle in Ukraine	6
Presence of capacity-building or technical assistance projects that support the implementation of EU's demands	2
Low political and economic costs of the conditions' implementation	1

³⁰ The implementation of a condition did not require significant financial investments from the government (economic costs) and was not concerned with significant political risks (political costs).

5. What have been the most important prerequisites for the beginning of the High Anticorruption Court's launch?

Please rate options below from 1 (least important) to 10 (most important)

The specific nature of the demands of the EU	4
Regular and intense political dialogue between EU institutions and representatives of its projects, on the one side, and Ukrainian authorities, on the other side	8
Coordination of conditionality with further actors (e.g. the G7, the USA, the International Monetary Fund (IMF))	4
Ukraine's civil society's coordinated vision of the reform and acting upon it (pressure on authorities, communication to donors/ international actors)	5
Availability of quality policy analysis and a precise reform plan in Ukraine	4
Ukraine's business lobbying activities and pressure on authorities	5
Popular support in Ukraine for the Ukrainian government acting upon the EU's conditionality	6
Alignment with the electoral cycle in Ukraine	7
Presence of capacity-building or technical assistance projects that support the implementation of EU's demands, such as the European Anticorruption Initiative	3
Low political and economic costs of the conditions' implementation	0

6. Which challenges prevented Ukraine from complying with the conditions pertaining to the judicial reform, such as the formation of the High Council of Justice and unblocking the activities of the High Qualification Commission of Judges of Ukraine?

Please rate options below from 1 (least important) to 10 (most important)

Political costs in Ukraine of complying with the EU's conditionality	9
The lack of quality policy analysis and a precise reform plan in Ukraine	6
Impact of the vested interests in Ukraine	8
The lack of political pressure, exercised by the EU	7
The lack of incentives, offered by the EU	4
The lack of coordination with other donors, such as the USA or the IMF	7
Insufficiently precise formulations of the conditions	3
Lengthy domestic bureaucratic procedures, needed to implement the conditions	5
The lack of public interest to the reform	4
Non-alignment with the political cycle in Ukraine	4
The lack of civil society's coordinated vision of the reform and related advocacy activities	2
The lack of business' support for judicial reform	3

7. Which factors have been for a long time preventing the Ukrainian Party from complying with the conditions related to the appointment of Head of the Specialized Anticorruption Prosecutor Office and the Director of the National Bureau of Investigations?³¹

Please rate options below from 1 (least important) to 10 (most important).

Political costs of complying with the conditions	8
The lack of quality policy analysis and a precise anticorruption reform plan in Ukraine	6
Impact of the vested interests	5
The lack of political pressure, exercised by the EU	7
The lack of incentives, offered by the EU	5
The lack of coordination with other donors, such as the USA or the IMF	5
Insufficiently precise formulations of the conditions	4
Lengthy domestic bureaucratic procedures, needed to implement the conditions	8
The lack of public interest to the reform	7
Non-alignment with the political cycle in Ukraine	7
The lack of civil society's coordinated vision of the reform and related advocacy activities	3
The lack of business' support for the anti-corruption reform	5

8. In your opinion, which factors are essential for Ukraine's advancement to the implementation of the rule of law conditions attached to the European Council's decision to grant Ukraine the EU candidate country status?

Please rate the options below from 1 (least essential) to 10 (most essential).

Political pressure, exercised by the EU	7
Coordination with other donors, such as the USA and the IMF	5
Attachment of these conditions to the next tranches of macro-financial assistance	8
The prospect of losing Candidate status (negative conditionality)	6
The prospect of opening EU's enlargement negotiations with Ukraine	8
Strengthening of the civil society's pressure on the authorities	5
Mobilization of public attention to the fulfilment of respective conditions	4
Intensification of the EU's technical assistance and capacity-building measures	5
Ukraine's military successes in the ongoing war	7
The new electoral cycle approaching in 2024	6

³¹ Oleksandr Klymenko was eventually appointed as a head of the Specialized Anticorruption Prosecutor Office on 28 July 2022.

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About this policy paper

This policy paper was prepared for the project which LibMod implemented in cooperation with the Policy Planning Unit of the German Federal Foreign Office in 2021-22. The project brought together high-profile experts from think-tanks in the EU, Ukraine, and North America to discuss the EU's long-term policy towards Ukraine in key areas and develop policy recommendations. All policy papers initially served as input papers for the discussions and were finalised before being published.

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Corruption is broadly recognized as a threat to the rule of law. In the assessment of the measures the EU undertook in Ukraine prior to the granting of a candidate country status, civil society coordination and public opinion are recognized by experts as an important contributor to Ukraine's compliance with EU requirements. Nevertheless, political dialogue with concrete milestones, coordinated with other donors and incentivized by both political and financial stimuli, is seen by experts as fundamental for change.

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