The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area

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The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area

A New Legal Instrument for EU Integration without Membership

By

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Foreword

World trade was at 16% of the world GDP in 1914, after the first wave of globalization. Today, goods and services exports amount to more than double that percentage – to say nothing of the vast cross-border stocks and flows of investment. What is more, a hundred years ago, most consumer goods were produced in one country. Today, the vast majority of the products you use every day are a mix of components and services delivered by workers all over the world.

Over several years, the European Union (EU) negotiated Association Agreements (AA) and Deep and Comprehensive Free Trade Agreements (DCFTA) with the governments of Armenia (now abandoned), Georgia, Moldova and Ukraine. The shared vision of a mutual trade policy, with unhindered access to each other's markets, would bring prosperity and stability to all those involved. Benefits are clear, as described in this book. However, sadly, these partnerships were construed as being 'hostile' by a dominant neighbour, Russia, who feared these agreements would impact and down-size its own influence in these partner countries. Strangely, Russia only objected to these agreements at a very late stage in the negotiation rounds, and particularly in those involving the EU and Ukraine. What should have been a strictly bilateral agreement between two like-minded partners was being hijacked into a 'Tri-partie' debate on the impact the agreement would have on Russia. Rude but strategic.

I, as the former European Commissioner for Trade during that period, still remember the commotion surrounding the Vilnius Summit (2013). Both parties, the EU and Ukraine, had been working hard to get the AA and DCFTA ready for signature. We had actually been negotiating these agreements since 1999, but they were formally launched in 2008. The EU is Ukraine's largest trading party (1/3 of its trade). So the more ambitious the agreement, the more both sides are able to develop and align their industries, become competitive and benefit from diversifying products and services, a plus-point for consumers.

Unfortunately, just a few days before its signing, the President at that time, Mr Yanukovych, decided to temporarily suspend the agreements' signature. It was an inconsiderate move and a big disappointment, largely felt among the Ukrainian people. Was it because Mr Yanukovych was secretly preparing for Ukraine's membership to Russia's new geopolitical project, the Euroasian Economic Customs Union? Was it because of President Putin's pressure, threats or attractive (gas) promises? Or was Mr Yanukovych just playing both sides, biding time, so to benefit as much as possible, personally? The reasons

for his actions remain a blur, but I think we can safely say 'all of the above'. One force, however, that Mr Yanukovych had completely underestimated, was the voice of the Ukrainian people.

Since the 2014 Euromaidan Revolution, the road for Ukrainians towards democracy and better living standards has not been without its pain and suffering. Ukraine is confronted with both a financial crisis and internal clashes, sparked and maintained by outside interferences, with the annexation of the Crimea as a result. A blatant attack on the territorial integrity of a sovereign Ukraine. What had started with a trade policy, aimed at providing a strong partnership and economic opportunities for the Ukrainian people, has transformed Ukraine into a geopolitical battle field, nestled between two differing spheres of influence.

With a change in leadership, the ousting of Mr Yanukovych, the EU and Ukraine finally signed the DCFTA on the 27th of June 2014, as part of their broader AA. As this book highlights, the agreement is provisionally applied until 31 December 2015 with preferential access unilaterally granted to the Ukraine to the EU market, providing it with the necessary solace until the 2016 implementation of the DCFTA. Since the EU does not recognize Russia's illegal annexation of both the Crimea and Sevanstopol, the imports (goods/services) and investments from these areas are banned.

The solution to the Ukrainian crisis is largely political in nature, but trade openness can also play a positive role. Once the December 2015 deadline passes, Ukraine will gain the widest possible access to one of the largest markets in the world, which will stimulate more growth, stability, promote reforms, reduce poverty, create job opportunities and much more. Not to mention strengthen friendship bonds between the two partners, especially for Eastern EU Member States this is of great, historical, importance. This new-found success for Ukraine will also give Russia an understanding of the regional importance of having independent, prosperous and stronger neighbours, especially if it were to fully implement its own WTO accession commitments.

This book is an interesting read. It provides for a different analysis of the AA/DCFTA. While I experienced the diplomatic discussions behind the scenes, the author looks to the agreement's legal basis and the jurisprudence attached. The research question whether the AA/DCFTA is a new legal instrument for EU integration without promising full membership is vital in answering to the EU's enlargement potential and implications. Therefore, this book complements the current political assessment of the agreement and situation.

An aspect I would like to highlight is that during this experience an important limitation was exposed. That of the unhelpful dependence on natural resources, especially on Russian gas exports, which make up significant

proportions of both the EU and Ukraine's energy needs. It is Putin's leverage over Europe and it must be addressed. For instance, by becoming more energy efficient, strengthening the Single Market and exploring new, possibly renewable energy sources within the borders. The potential idea of the EU gaining preferential access to energy exports from a friendlier partner, the US, via the Transatlantic Trade and Investment Partnership, can possibly fill this gap and have positive benefits for Ukraine too.

With the gradual decline of tariffs around the world, it is clear that the main subject of trade negotiations in this time period will be behind-the-border policies, like regulatory coherence, on public procurement, investment, services but also on setting global standards on sustainability, human and labour rights and the environment. There is no wish for dominance of one region over the other nor to encircle or exclude any trade partner. Working together, preferably at the multilateral level, is and will always be the priority. That's what Russia lacks to understand, the value of cooperation without dominance. There the omens are not particularly positive, thanks to Mr Putin.

Karel De Gucht
European Commissioner for Trade (2010–2014)

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This book is mainly based on my doctoral dissertation, which was defended at the law faculty of Ghent University in December 2014. Only three months earlier, the historical EU-Ukraine Association Agreement – the main subject of this work – was finally ratified by the Ukrainian and European Parliament. Just as the Association Agreement, this research had to face and overcome several challenges. In this process, I have received support and encouragement from many people, which was essential for the continuation and finalisation of this stimulating but demanding exercise.

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Last, but definitely not least, I would like to thank my beautiful Sarah for her never-ending love and support. I dedicate this book to her.

Guillaume Van der Loo
Ghent/Brussels, 1 July 2015

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List of Abbreviations

AA	Association Agreement
ACAA	Agreement on Conformity Assessment and Acceptance (of Industrial Products)
AFSJ	Area of Freedom, Security and Justice
AP	Action Plan
ASEAN	Association of Southeast Asian Nations
CAA	Common Aviation Area
CCP	Common Commercial Policy
CCT	Common Customs Tariff
CEECs	Central and East European Countries
CFSP	Common Foreign and Security Policy
CIB	Comprehensive Institution Building (Programme)
CIS	Commonwealth of Independent States
COMECON	Council for Mutual Economic Assistance
CS	Common Strategy
CSDP	Common Security and Defence Policy
CSR	Common Strategy Russia
CSU	Common Strategy Ukraine
DCFTA	Deep and Comprehensive Free Trade Area
DG	Directorate-General
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EA	Europe Agreement
EaP	Easter Partnership
EaP AAs	Eastern Partnership Association Agreements
EC	European Community
ECAA	European Common Aviation Area
ECJ	European Court of Justice
ECT	Energy Community Treaty
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EEU	Eurasian Economic Union
EFTA	European Free Trade Area
EMAA	Euro-Mediterranean Association Agreement
ENI	European Neighbourhood Instrument
ENP	European Neighbourhood Policy

ENPI	European Neighbourhood and Partnership Instrument
EPA	Economic Partnership Agreement
EU	European Union
EurAsEC	Eurasian Economic Community
FTA	Free trade area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GI(s)	Geographical Indication(s)
GSP	General System of Preferences
ICC	International Criminal Court
ILO	International Labour Organization
IMT	Internal Market Treatment
LNG	Liquefied Natural Gas
MFA	Ministry of Foreign Affairs
MFN	Most-Favoured-Nation
MRA	Mutual Recognition Agreement
NATO	North Atlantic Treaty Organization
NEC	Neighbourhood Economic Community
NIS	Newly Independent States
NPAA	National Programme for the Adoption of the Acquis
OSCE	Organization for Security and Cooperation in Europe
PCA	Partnership and Cooperation Agreement
PHARE	Poland and Hungary Assistance for Reconstruction of Economy
PHLG	Permanent High Level Group
PLO	Palestine Liberation Organisation
RTA	Regional Trade Agreement
SAA	Stabilisation and Association Agreement
SALW	Small Arms and Light Weapons
SES	Single Economic Space
SPS	Sanitary and Phytosanitary Measures
TACIS	Technical Aid to the Commonwealth of Independent States
TAIEX	Technical Assistance and Information Exchange
TBT	Technical Barriers to Trade
TCA	Trade and Economic Cooperation Agreement
TCE	Treaty establishing a Constitution for Europe
TEC	Treaty establishing the European Communities
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRQ	Tariff Rate Quota
TSIA	Trade Sustainability Impact Assessment

UN	United Nations
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of the Treaties
VLAP	Visa Liberalisation Action
WMD	Weapons of Mass Destruction
WTO	World Trade Organization
WTO GPA	World Trade Organization Agreement on Government Procurement
WTO SCM Agreement	World Trade Organization Agreement on Subsidies and Countervailing Measures
WTO TRIPS Agreement	World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights

Introduction

> We are here to sign the Association Agreements between the European Union and each of your countries. These are not just any other agreements – but milestones in the history of our relations and for Europe as a whole. In Kiev and elsewhere, people gave their lives for this closer link to the European Union. We will not forget them.

This statement of the former President of the European Council H. Van Rompuy was made on 27 June 2014 at the signing ceremony of the bilateral Association Agreements (AAs) between the European Union (EU) and Ukraine, Moldova and Georgia.[1] These ambitious AAs will establish a new far-reaching and comprehensive legal framework between the EU and these three countries. Significantly, the EU-Ukraine Association Agreement (hereinafter: the 'EU-Ukraine AA' or 'AA') has become one of the most anticipated and controversial international agreements ever signed by the EU. There are several legal and political reasons that explain why this agreement is such a hot topic.

On the one hand, it was the refusal of the Government of Ukraine in November 2013 to sign the EU-Ukraine AA that sparked a historic chain of events that had an impact not only on the domestic political scene in Ukraine but also on the security, stability and peace in Europe. The February 2014 (*Euro*) *Maidan* demonstrations in Kiev, during which hundreds of thousands of Ukrainians went to the streets and demanded the signature of the AA and closer European integration, led after violent repression against the protestors to the dismissal of President Victor Yanukovych and the establishment of a new pro-European government and president. In addition, the Maidan revolution triggered a political and military conflict in Eastern Ukraine, including Russia's annexation of Crimea. Moreover, due to Russia's role in this conflict, EU-Russia relations have reached rock bottom and both parties adopted (economic) sanctions against each other.

On the other hand, from a legal point of view, the EU-Ukraine AA is considered to be "the most ambitious agreement the European Union has ever offered to a non-Member State, […] opening the most ambitious external relationship ever developed with the [EU]".[2] A cursory reading of the agreement, counting

1 H. Van Rompuy, 'Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine', Brussels, 27 June 2014, EUCO 137/14.

2 H. Van Rompuy, 'Remarks by President of the European Council Herman Van Rompuy at the press conference of the Eastern Partnership Summit in Vilnius', 29 November 2013; H. Van Rompuy, *ibid.*

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around 2,140 pages in the *Official Journal* including 46 annexes, 3 protocols and a joint declaration, already reveals that it is unprecedented both in terms of scope and level of detail.[3] It is a comprehensive framework agreement covering the entire spectrum of EU-Ukraine relations. Hence, it includes provisions dealing with the whole array of EU activities, including economic cooperation, cooperation and convergence in the field of common foreign and security policy (CFSP) as well as cooperation in the area of freedom, security and justice (AFSJ). Of particular significance is the Deep and Comprehensive Free Trade Area (DCFTA). This free trade area, which is an integral part of the EU-Ukraine AA, covers substantially all trade between the EU and Ukraine and aims at the highest possible degree of liberalisation by including legally binding legislative approximation commitments which must lead to "Ukraine's gradual integration in the EU Internal Market".[4]

The EU-Ukraine AA was ratified during an unprecedented synchronised session by both the European Parliament and the *Verkhovna Rada* on 16 September 2014.[5] Because it is a mixed agreement, it still has to be ratified by all the EU Member States before it can enter into force. The agreement is since 1 November 2014 partially provisionally applied, however, as part of the ongoing de-escalation process of the crisis in Ukraine, it was decided during a trilateral meeting between the EU, Russia and Ukraine on 12 September 2014 to delay the provisional application of the DCFTA until 31 December 2015.[6] Until this date, the EU will continue to apply autonomous trade preferences to Ukraine, which in effect open the EU market to Ukraine for trade in goods unilaterally, as envisaged in the DCFTA.

The EU-Ukraine AA essentially has the objective to establish a unique form of political association and economic integration between Ukraine and the EU. This fits in the broader policy framework of the EU's European Neighbourhood Policy (ENP). This EU-driven initiative was launched in 2004 in the light of the 'big bang' enlargement with the Central and East European Countries (CEECs) and Malta and Cyprus. A new policy was deemed necessary at that time to cope with the new neighbours that are not eligible for EU Membership or for those neighbours who (currently) do not have a prospect

3 Association Agreement between the European Union and its Member States, of the one part, and Ukraine of the other part (*OJ*, 2014, L 161).

4 Art. 1(d) EU-Ukraine AA.

5 European Parliament, 'European Parliament ratifies EU-Ukraine Association Agreement', *press release*, 16 September 2014.

6 European Commission, 'Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA', 12 September 2014, STATEMENT/14/276.

on EU accession. The ENP does not only incorporate its 'new' eastern neighbours and the countries of the southern Caucasus, but also the southern Mediterranean countries.[7] Within the ENP, a specific eastern dimension was established when the EU launched, together with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine, the Eastern Partnership (EaP) at a high-level summit in Prague in May 2009.

The EU stressed from the outset that "the ENP remains distinct from the process of EU enlargement".[8] By explicitly separating the ENP from the enlargement process, the EU tries to temper the hope of several ENP partners which could see the ENP as a 'stepping stone' towards EU Membership. This is especially relevant for those EaP partners which are eligible for EU Membership pursuant to Article 49 TEU and who have already expressed their ambition to join the EU. For example, after the Maidan revolution, during which "people gave their lives for [a] closer link to the European Union", the new Ukrainian Government explicitly proclaimed its EU Membership aspirations.[9]

The limitations to the EU's ability and political will to further enlarge made the quest for an alternative to EU Membership in the framework of the ENP and EaP crucial. The new generation of AAs and DCFTAs with the EaP partners (hereinafter: 'the EaP AAs') aims to address this challenge. The EU-Ukraine AA must provide for a new legal framework to associate and integrate Ukraine into the EU, however, without aiming at EU accession. Therefore, this research will argue that this new generation of EaP AAs aims to establish a new and unique form of *EU integration without membership*.

The (economic) integration objectives of the EU-Ukraine AA are clearly enshrined in the agreement. Its first article states that:

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7 The ENP partners are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine.

8 European Commission, 'Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy', COM (2006) 726 final, 4 December 2006, p. 2.

9 For example, Ukrainian President Poroshenko stated at the signing ceremony of the EU-Ukraine AA that "[b]y signing the agreement with the EU, Ukraine, as a European State, sharing common values of democracy and the rule of law, is underlining its sovereign choice in favour of future membership in the EU in accordance with Article 49 of the EU Treaty. The Association Agreement is considered by Ukraine as an instrument of comprehensive preparation to the achievement of this goal" ('Speech of the President at the ceremony of signing the Association Agreement between Ukraine and the European Union', *Official Website of the President of Ukraine*, 27 June 2014).

> [t]he aim of this Association [is] to establish conditions for enhanced economic and trade relations leading towards *Ukraine's gradual integration in the EU Internal Market* [...].[10]

The key instrument of the AA, and especially of its trade part (i.e. the DCFTA), to achieve Ukraine's integration into the EU Internal Market is the inclusion of several provisions which oblige Ukraine to apply, implement or incorporate in its domestic legal order a predetermined selection of EU *acquis.* Therefore, this agreement can be labelled as an 'EU integration agreement'.[11] This term is used to refer to a limited group of international agreements concluded by the EU that oblige a third country to apply or implement a selection of EU legislation. The last two decades the EU has concluded several bilateral and multilateral non-pre-accession agreements that integrate non-EU Member States, to a certain extent, into a section of the EU Internal Market by obliging those countries to apply parts of the EU *acquis.* However, EU integration agreements such as the EU-Ukraine AA face several challenges. For example, how do legal acts, adopted and applied by the EU, which has developed its own legal order of international law,[12] survive transposition into legal systems of third countries? How is the uniform interpretation and application of the EU law guaranteed and how do these agreements deal with an ever developing EU *acquis*?

Therefore, the main research question of this work is to analyse *how* and to *what extent* the EU-Ukraine AA and DCFTA is a *new* legal instrument that integrates Ukraine into the EU. Before further specifying the research questions and objectives of this book (2), a brief introduction on the EU-Ukraine AA's genesis and place in the EU's neighbourhood relations is provided (1).

1 The EU-Ukraine AA and the Union's Neighbourhood Relations: An Introduction

With the signing of the three EaP AAs, a new chapter was opened in the EU's 'neighbourhood' relations. Parallel with its process of enlargement towards

10 Art. 1(d) EU-Ukraine AA (emphasis added).

11 M. Maresceau, 'Les accords d'intégration dans les relations de proximité de l'Union Europeénne', in C. Blumann (ed.) *Les frontiers de l'Union Européenne* (Bruxelles, Bruylant, 2013), pp. 152–191.

12 ECJ, Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenu Administration,* [1963], ECR 1, para. 12.

Turkey[13] and the Western Balkans,[14] the EU has developed a dense and complex network of legal relations with its European and non-European neighbours which resulted in a fascinating but complex "jigsaw puzzle" of legal regimes.[15]

The most developed framework for relations between the EU and non-EU (neighbouring) countries is the European Economic Area (EEA), which entered into force on 1 January 1994.[16] Through the EEA, the members of the European Free Trade Area (EFTA) – with the notable exception of Switzerland – have a closer legal relationship with the EU than any other third country. As it will be analysed further on in more detail, the EEA Agreement allows the three EFTA countries to participate in the Internal Market without being or becoming an EU Member State. The agreement not only extends the application of a very large part of the EU internal market *acquis* on the four freedoms (*i.e.* free movement of goods, persons, services and capital) but also covers "flanking and horizontal policies". In addition, it established a unique institutional framework that guarantees the effectiveness and implementation of the EEA and ensures the "homogeneity" of the EEA market. Therefore, the EFTA-3 countries

13 Turkey has already signed in 1963 an association agreement with the European Economic Community (hereinafter: "the Ankara Agreement") which aims to "facilitate the accession of Turkey to the Community at a later date" and which is still today the legal backbone for the EU-Turkey relationship (for text, see: *OJ*, 1973, C 113/2). Turkey has become a "candidate State" since 1999 and accession negotiations started in 2005, however, they are proceeding at a slow pace. For analysis, see M. Maresceau, 'Turkey: a candidate state destined to join the Union', in N.N. Shuibhne, L.W. Gormly (eds.) *From single market to economic Union, essays in memory of John A. Usher* (Oxford University Press, Oxford, 2012), pp. 315–340.

14 The Western Balkan countries have received a clear membership perspective as these countries have become candidate or potential candidate countries in the framework of the Stabilization and Association Process and have concluded bilateral Stabilization and Association Agreements (SAAs) with the Union (For the text of the SAAs, see: *OJ*, 2004, L 84/13 (Macedonia); *OJ*, 2010, L 108/3 (Montenegro); *OJ*, 2005, L 26/3 (Croatia); *OJ*, 2009, L 107/166 (Albania); *OJ*, 2010, L 108/3 (Serbia). Accession negotiations were launched with Serbia and Montenegro and Croatia was the first Western Balkan country that joined the EU on 1 July 2013. For analysis, see A. Lazowski, S. Blockmans, 'Between dream and reality: challenges to the legal rapprochement of the Western Balkans', in P. Van Elsuwege, R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Oxon, Routledge, 2014), pp. 108–134.

15 A. Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union', *Common Market Law Review* 45, 2008, p. 1436.

16 Agreement on the European Economic Area (*OJ,* 1994, L 1/3).

are considered as the most integrated neighbouring countries of the EU. Despite the fact that Switzerland rejected the EEA model of integration and EU Membership, the country "is economically more integrated within the [...] EU than many of the EU's own Member States"[17] through the conclusion of a patchwork of sectoral agreements with the EU.[18] Another interesting but complex relationship is the one the EU established with the different micro-States, being Andorra, Liechtenstein, San Marino, Monaco and the Vatican State.[19]

A framework for EU neighbourhood relations that is of particular relevance to this research is the ENP because the EU-Ukraine AA was developed in this policy. As noted above, the ENP was established in 2004 in the light of the accession of the CEECs. The aim was to avoid the emergence of new dividing lines between the enlarged EU and the (new) neighbours. The ENP was first outlined by the European Commission in its 2003 "Wider Europe" Communication[20] and was further developed by several other Communications, based on the broad objectives set out by the (European) Council. It builds further on the existing bilateral relations between the EU and the partner countries, *i.e.* on the one hand, the Partnership and Cooperation Agreements (PCAs), concluded during the nineties with most of the former Soviet Republics

17 L. Goetschel, 'Switzerland and European Integration: Change Through Distance', *European Foreign Affairs Review* 8, 2003, p. 313.

18 Important examples are the agreement on the free movement of persons (*OJ*, 2002, L 114/6), the air transport agreement (*OJ*, 2002, L 114/73), the agreement on taxation of savings income (*OJ*, 2004, L 385/30) and the agreements on Swiss association with the Dublin and Schengen *acquis* (*OJ*, 2008, L 53/5; *OJ*, 2008, L 53/42). For analysis see M. Maresceau, 'EU-Switzerland: *quo vadis*?', *Georgia Journal of International and Comparative Law* (39), 2012, pp. 727–755.

19 Liechtenstein can be considered as the most integrated micro-State because it is as an EFTA participant the only micro-State which is a member of the EEA and because it joined the Schengen area in December 2011. In contrast, the Union's relations with Andorra, Monaco and San Marino are governed by a number of agreements, severing selective areas of the EU *acquis* and policies. The most important ones are the agreements establishing a customs union with Andorra and San Marino, the bilateral monetary agreements on the micro-State's use of the Euro and the bilateral agreements on taxation of savings income. For an overview and analysis, see European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Options for Closer Integration with the EU', COM(2012)680 final, 8 November 2013; M. Maresceau, 'The relations between the EU and Andorra, San Marino and Monaco', in A. Dashwood and M. Maresceau (eds.) *Law and Practice of EU External Relations. Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008), pp. 270–308.

20 European Commission, 'Wider Europe-Neighbourhood: a New Framework for Relations with our Eastern and Southern Neighbours', COM(2003) 104 final, 11 March 2003.

and,[21] on the other hand, the Euro-Mediterranean Association Agreements (EMAAs),[22] launched after the November 1995 Barcelona Declaration on the Euro-Mediterranean Partnership.[23]

The ENP pursues a dozen of objectives but the most important ones can be summarised as promoting "stability, security and prosperity", mainly by using instruments and methodologies which are inspired by the EU's (pre-)accession policy such as conditionality, monitoring and differentiation.[24] The ENP is further enriched with regional and multilateral co-operation initiatives of which the most important ones are, regarding the southern ENP partners, the Union for the Mediterranean (the former Euro-Mediterranean Partnership or Barcelona Process) and the 2011 'Partnership for Democracy and Shared Prosperity' and, regarding the eastern ENP partners, the Eastern Partnership (EaP), which was launched in Prague in May 2009. The EaP is an integral part of the ENP but establishes an 'eastern' dimension in the ENP with the aim "to accelerate political association and further economic integration" between the European Union and the EaP partners.[25]

Contrary to the southern Mediterranean neighbours, several EaP partners such as Moldova and Ukraine can be considered as 'European' states – as confirmed in the preamble of their EaP AAs (cf. *infra*) –, and are therefore eligible for EU Membership pursuant to Article 49 TEU.[26] However, this is no guarantee

21 For the text of the PCAs, see: *OJ*, 1998, L 49/3 (Ukraine); *OJ,* 1997, L 327/97 (Russia); *OJ*, 1998, L 181/3 (Moldova); *OJ*, 1999, L196/48 (Kyrgyz Republic); *OJ*, 1999, L 196/3 (Kazakhstan); *OJ*, 1999, L 229/3 (Uzbekistan); *OJ*, 1999, L 205/3 (Georgia); *OJ,* 1999, L 246/3 (Azerbaijan); *OJ*, 1999, L 293/3 (Armenia); *OJ,* 2009, L 35/3 (Tajikistan).

22 For the text of the EMAAs, see: *OJ*, 1997, L 187/3 (PLO); *OJ*, 1997, L 97/2 (Tunisia); *OJ,* 2000, L 70/2 (Morocco); *OJ,* 2000, L 147/3 (Israel); *OJ,* 2002, L 129/3 (Jordan); *OJ,* 2004, L 304/39 (Egypt); *OJ*, 2005, L 265/2 (Algeria); *OJ*, 2006, L 143/2 (Lebanon).

23 Russia, however, decided not to participate in the ENP and preferred a different bilateral strategy, based on the 'Common Spaces' and the Partnership for Modernisation. The legal framework of EU-Russia relations and the envisaged 'New Agreement' with Russia will be further discussed in Chapter 6.2.

24 For a clear overview of the objectives, methodologies and instruments of the ENP, see: M. Cremona, 'The European Neighbourhood Policy. More than a Partnership?' in M. Cremona (ed.) *Developments in EU External Relation Law* (Oxford University Press, Oxford, 2008), pp. 244–299.

25 European Commission, 'Eastern Partnership', COM (2008) 823 final, 3 December 2008.

26 On the geographical criterion of Article 49 TEU, see K. Inglis, *Evolving Practice in EU Enlargement: with case studies in agri-food and environment law* (Martinus Nijhoff Publishers, Leiden/Boston, 2010), p. 40; P. Van Elsuwege, *From Soviet Republics to EU Member States. A Legal and Political Assessment of the Baltic States' Accession to the European Union* (Martinus Nijhoff Publishers, Leiden/Boston, 2008), pp. 170–171.

for admission because 'European' states with EU Membership aspirations still have to fulfill the political and economic conditions laid down in the 'Copenhagen Criteria'. Moreover, the Union is under no legal obligation to admit an applicant. As noted above, the Commission stressed that "the ENP remains distinct from the process of EU enlargement" in order to avoid that the ENP would be perceived as a pre-accession instrument. However, the Commission added that "for European ENP partners, the ENP does not in any way prejudge the possible future development of their relationship with the EU".[27] Former Commissioner for External Relations and the ENP Ferrero-Waldner summarised this policy clearly: "[the ENP] is not an enlargement policy. It does not close any doors to European countries that may at some point wish to apply for membership, but it does not provide a specific accession prospect either".[28]

Thus, the EU envisaged a new legal instrument to establish an ambitious and privileged political and economic relationship with the ENP partners.[29] The first Commission Communication on the ENP contained the vague objective to offer the ENP partners "a stake in the EU's Internal Market" and further integration and liberalisation to promote the free movement of the four freedoms.[30] These objectives were further developed towards the ambition to conclude a new type of ambitious bilateral *association agreements* including *deep and comprehensive free trade areas* (DCFTAs). These DCFTAs must go beyond traditional FTAs – which mainly address tariffs and quotas for trade in goods – by covering substantially all trade in goods and services, addressing non-tariff barriers and containing legally binding commitments on legislative approximation which will contribute to the gradual integration of the partner countries into to the EU Internal Market.[31]

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27 European Commission, 'Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy', COM (2006) 726 final, 4 December 2006, p. 2.

28 B. Ferrero-Waldner, 'Press Conference to launch first seven Action Plans under the ENP', 9 December 2004.

29 Cremona notes that integration is not in itself an EU objective for the ENP, but only an instrument to achieve the ENP objectives (*i.e.* security, stability and prosperity) (M. Cremona, 'The European Neighbourhood Policy as a Framework for Modernization', in F. Maiani, R. Petrov and E. Mouliarova (eds.) *European Integration without EU Membership: Models, Experiences, Perspectives*, EUI Working Papers, 2009/10, p. 6).

30 European Commission, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final, 11 March 2003, p. 10.

31 European Commission, 'Eastern Partnership', COM (2008) 823 final, 3 December 2008, p. 4.

At the heart of the EU-Ukraine AA, especially of the DCFTA, is the obligation on Ukraine to apply, implement or incorporate in its domestic legal order a predetermined selection of EU *acquis*. It is clear that legislative approximation as foreseen in the EU-Ukraine AA/DCFTA is not an objective on its own but is an instrument to achieve economic integration. The key logic behind this legislative approximation process is to tackle non-tariff barriers, to develop a strong and reliable legal environment for business and investment and to create a common legal space which allows Ukraine to integrate (partially) into the EU Internal Market. These binding approximation commitments make the EU-Ukraine AA an EU integration agreement. As it will be clarified further on, 'EU integration agreements' is a theoretical legal concept that refers to a group of international agreements concluded by the EU that oblige a third country to apply, implement or incorporate in its domestic legal order a predetermined selection of EU *acquis*. The obligation on Ukraine to approximate to a selection of EU legislation also relates to another crucial feature of the EU-Ukraine AA and DCFTA, i.e. *market access conditionality.* This implies that in several areas of the DCFTA, Ukraine will only be granted (additional) access to a specific section of the EU Internal Market if the EU determines, after a strict monitoring procedure, that Ukraine has implemented its legislative approximation commitments.

It has to be mentioned that the objective of political association and economic integration was especially revolutionary for the EaP neighbours as the current PCAs do not contain a FTA.[32] The EMAAs with the southern Mediterranean neighbours are already association agreements based on Article 217 TFEU and provide for detailed provisions on the establishment of a 'standard' FTA. Therefore, political association and gradual economic integration into the EU Internal Market through the conclusion of a new generation of AAs and DCFTAs was first offered between 2007 and 2009 to the eastern neighbours in the framework of the EaP. Only in a later stage, mainly as a response to the Arab Spring, DCFTAs were also offered to several Mediterranean ENP partners.[33]

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32 However, the PCAs with Russia, Ukraine and Moldova contain an "evolutionary clause" (cf. *infra*).

33 The DCFTAs were offered to the EaP partners in 2009 (Joint Declaration of the Prague Eastern Partnership Summit, Prague, 7 May 2009, 8435/09 (Presse 78), para. 2). In June 2011, the Council invited the Commission to submit recommendations for negotiating directives for DCFTAs with selected Southern Mediterranean partners (Council Conclusions, 3101st Council Meeting, Foreign Affairs, Luxembourg, 20 June 2011, 11824/11 para. 5) and approved negotiating directives for DCFTAs with Morocco, Jordan, Egypt and Tunisia in December 2011 (European Union, 'The EU's response to the "Arab Spring": The State-of-Play after Two Years', Brussels, 8 February 2013, A 70/13). These envisaged Mediterranean DCFTAs will be further analysed in Chapter 12.5.

The legal backbone to establish economic integration in the framework of the ENP and the EaP will not only be realised through the bilateral AAs and DCFTAs. The EU has concluded, or is negotiating, bilateral and multilateral *sectoral integration agreements* with its neighbours. These sectoral integration agreements are developed outside the ENP framework but overlap with its objectives as they integrate several ENP partners into a specific sector of the EU Internal Market on the basis of binding legislative approximation commitments.[34] Important examples are the 2006 Energy Community Treaty (ECT), concluded between the EU and the countries of the Western Balkans, and which now also includes two ENP partners (*i.e.* Ukraine and Moldova),[35] and the bilateral aviation agreements concluded with several ENP partners that aim to integrate the partner countries in the broader EU aviation market.[36]

Finally, it should be noted that a strict 'economic' reading of the ENP integration objectives would not entirely capture this policy. In the framework of the ENP, integration has besides a trade-related and economic dimension also a broader political dimension.[37] With regard to the EU's ambition to share "everything but institutions", one should also consider, *inter alia*, the EU's promotion of its key democratic values to the partner countries and several elements of cooperation within the areas of Common Foreign and Security Policy (CFSP) and Freedom Security and Justice (AFSJ), including the mobility of persons and workers.

2 Research Objectives and (Academic) Relevance

The key objective of this book is to analyse *how*, and to *what extent*, the EU-Ukraine AA is a *new* legal instrument that integrates a third country (i.e. Ukraine) into the EU.

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34 S. Blockmans, B. Van Vooren, 'Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism', *European Foreign Affairs Review* 17(4), 2012, p. 579.

35 For text, see: *OJ,* 2006, L 198/18.

36 Bilateral aviation agreements have been concluded with the following ENP partners: Morocco, Israel, Jordan, Georgia and Moldova. An aviation agreement with Ukraine has been initialled in 2013 but is not yet signed. These agreements will be further analysed in Chapter 13.

37 M. Cremona, 'The European Neighbourhood Policy', in: A. Ott, E. Vos (eds.) *Fifty years of European Integration. Foundations and Perspectives* (The Hague, T.M.C. Asser Press, 2009), p. 238.

New association agreements have been signed in the framework of the EaP with Ukraine, Moldova and Georgia. From this set of 'Eastern Partnership Association Agreements' (hereinafter: the 'EaP AAs'), the focus in this contribution will be on the EU-Ukraine AA for several reasons. The *first* – most obvious – reason is the simple fact that at the start of this research, the EU-Ukraine AA was the only EaP AA that was being negotiated. Only in the final phase of the research period of this work, the two other EaP AAs with Georgia and Moldova were initialled and made public. Because the EU-Ukraine AA was the first EaP AA that was being negotiated, it was a pioneer agreement in the ENP and a template for the other EaP AAs.[38] The focus will therefore be on the EU-Ukraine AA. Nevertheless, the two other EaP AAs are also incorporated in the analysis as the main differences and resemblances between these three agreements will be explored.

The *second* element that makes Ukraine a unique subject for analysis is the country's EU Membership ambition and its current turbulent relationship with the Union. Already in the early nineties, Ukraine's political leaders expressed, not always in a clear and consistent way, their ambition to upgrade their relations with the EU on the basis of association and even accession. Especially after the 2004 Orange Revolution, when the pro-European Viktor Yushchenko came to power, many observers believed that the EU could not continue to decline Ukraine's EU Membership aspirations after the demonstration of support for European values and integration. After the election of Viktor Yanukovych as President in 2012, EU accession ambitions were tempered. The Yanukovych administration initially declared that the relations with the EU remained a priority for Ukraine and even finished the negotiations on the EU-Ukraine AA. However, the Ukrainian Government decided on the eve of the November 2013 Vilnius EaP Summit – where it was expected that the agreement would be signed – to "suspend" the preparations for concluding the EU-Ukraine AA.[39] After the 'Maidan revolution', the new pro-European Government and President of Ukraine unambiguously declared Ukraine's ambition to apply, in the longer term, for EU Membership.[40] Evidently, these

38 For example, the Council explicitly stated that certain aspects of the EU-Ukraine AA "can serve as a model for other ENP partners in the future" (Council Conclusions on Strengthening the ENP, 19 June 2007, 11016/07).

39 Ukrainian Government, 'Government adopted resolution on suspension of preparation to conclude Association Agreement with EU', *press release*, 21 November 2013.

40 See for example P. Poroshenko, 'Speech of the President of Ukraine at the ceremony of signing the Association Agreement between Ukraine and the European Union', *Press office of the President of Ukraine,* 27 June 2014.

historic events, including the current conflict in Eastern Ukraine, shed a new light on the Union's policies towards Ukraine and on the question of the *finalité* of the EU-Ukraine relationship. A key element in this debate is whether Ukraine should be offered a 'European' perspective. Because the EU has, for the moment, no intention to bind itself to any concrete membership commitments towards Ukraine, it has even become more important to define a model for 'EU integration without membership'. In this view, it is crucial to analyse to what extent the EU-Ukraine AA offers a legal instrument to reach this objective.

Thirdly, Ukraine is a key partner of the EU in the ENP and the EaP. From a (geo)political point of view, it is obvious that Ukraine's position between the EU and Russia and its role as a transit-country for Russian gas is crucial for the EU. This geostrategic importance is today well illustrated by the conflict in Eastern Ukraine. Moreover, from a trade and economic perspective, Ukraine is also an important country in the ENP and EaP. It is by far the largest trade partner of the EU in the EaP. Among the EaP countries, Ukraine was in 2014 the leading destination for EU exports (52% of total EU exports to the EaP countries) and the leading source of EU imports (42% of total EU imports from the EaP countries).[41] Conversely, the EU is the largest trade partner of Ukraine in the world (around 30% of Ukraine's total trade).[42] However, Ukraine's impact on the overall EU trade relations has to be nuanced as the country is only the 25th trade partner of EU in the world, representing around 1% of the Union's total external trade.[43] Moreover, the EU's trade relations with the entire group of ENP countries only represents around 7% of the Union's external trade (5% for the Mediterranean partners and 2% for the EaP partners).[44]

The *final* reason why this work will focus on the EU-Ukraine AA is because Ukraine is a unique example of a country that is involved in two regional economic integration processes. On the one hand, Ukraine has signed the AA, including a DCFTA, with the EU while, on the other hand, it has been involved in several integration initiatives in the post-Soviet area with Russia.[45] The latter has, in addition to (geo-)political concerns, several trade-related objections against the AA and has pressured Ukraine not to sign and implement

41 European Commission, 'Implementation of the European Neighbourhood Policy – Statistics', COM (2015)77 final, 25 March 2015.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 Z., Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area* (Springer, Verlag Berlin Heidelberg, 2010).

the agreement. This situation raises questions to what extent Ukraine can integrate with both the EU and Russia's regional integration initiatives in the post-Soviet area and on the impact of the DCFTA on Ukraine-Russia trade relations.[46]

Thus, a crucial question is how, and to what extent, the EU-Ukraine AA and DCFTA will integrate Ukraine into the EU and create a new framework for 'EU integration without membership'. Although initially the EEA was on several occasions put forward by the European Commission as a blueprint for economic integration with the ENP partners,[47] it is already clear from this introduction that the EU-Ukraine AA and DCFTA will not integrate Ukraine as 'deep and comprehensive' in the EU Internal Market as the EEA Agreement integrates the EFTA-3 in the EU Internal Market on the basis of "a homogeneous European Economic Area".[48] However, the EU-Ukraine AA deserves a more nuanced and detailed analysis than the mere observation that it is 'less ambitious than the EEA'.

In order to analyse the EU-Ukraine AA and the EU's sectoral agreements with Ukraine, a theoretical framework is needed. This contribution will analyse the EU-Ukraine AA by relying on the theoretical concept of 'EU integration agreements'. In this view, Part I of this book will first develop a clear definition and criteria for this legal concept. These criteria will then serve as a tool to analyse and evaluate the relevant integration agreements concluded with Ukraine such as the EU-Ukraine AA and the sectoral integration agreements (i.e. the ECT and the EU-Ukraine aviation agreement). Moreover, this Part will identify the challenges that integration agreements may face, which consequently have to be taken into account when analysing the relevant EU-Ukraine (integration) agreements. EU integration agreements are a heterogeneous group of agreements which share one or more features and vary from 'basic' integration agreements to 'developed' integration agreements. A brief overview of the existing EU integration agreements enables us to compare the EU-Ukraine AA with other integration agreements concluded by the EU.

Thereafter, the research will focus on the EU-Ukraine AA. Part II will analyse the legal framework of the EU-Ukraine relationship 'from partnership and cooperation towards association'. In order to understand the new EU-Ukraine AA and DCFTA, it is necessary to first evaluate its predecessor, i.e. the

46 European Commission, 'Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA', 12 September 2014, STATEMENT/14/276.

47 European Commission, *op. cit.,* footnote 20, p. 15.

48 For this argument, see for example: C. Hillion, 'Integrating an outsider. An EU perspective on relations with Norway', *Europautredningen Rapport* 16, August 2011, p. 11.

EU-Ukraine PCA, and the policy framework in which this agreement is embedded, i.e. the ENP and EaP (Chapter 5). This brief analysis will focus on the contents and historical background of the PCA and the 'integration without membership' objectives and instruments of the ENP and the EaP (e.g. the EU-Ukraine Action Plan and Association Agenda). Then, the legal and political hurdles towards the signing and conclusion of the EU-Ukraine AA will be analysed (Chapter 6). This chapter will not only discuss the difficult negotiation process and different procedural steps for the conclusion of the AA (i.e. initialling, signing and provisional application) (6.1) but covers also the impact of the EU-Ukraine AA on the legal framework of the EU-Ukraine-Russia triangular relationship (6.2). Specific attention is devoted to Ukraine's integration process in the post-Soviet area (6.2.1), Russia's trade-related retaliation measures against the AA and DCFTA (6.2.2) and the EU-Ukraine-Russia trilateral discussions on the DCFTA (6.2.3). It is also explored if the new envisaged legal framework for EU-Russia (trade) relations can reconcile the EU's and Russia's regional economic integration initiatives towards Ukraine (6.2.4).

Then, the contents of the Association Agreement (non-DCFTA part) will be scrutinised (Chapter 7). The focus will be on the legal basis (7.1) and 'integration without membership' objectives of the agreement (7.2), its 'comprehensive character' (7.3) – including the CFSP and AFSJ dimension – and the new forms of 'enhanced conditionality' (7.4).

Part III will analyse the EU-Ukraine DCFTA, which is an integral part of the EU-Ukraine AA. Two key questions are addressed. *First*, to what extent is the DCFTA different from other FTAs, concluded by the EU? For example, what are the novelties concerning dispute settlement, legislative approximation and market access? Which areas are excluded from the scope of the DCFTA? The *second* issue which will be explored is the 'integration' character of the DCFTA. Does the DCFTA actually integrate Ukraine into sections of the EU Internal Market and can it be considered as an EU integration agreement? For this analysis, the criteria developed in Part I on EU integration agreements will have to be taken into account. For example, how is Ukraine's integration into a section of the Internal Market linked with the obligation to apply, implement or incorporate in its domestic legal order a predetermined selection of EU *acquis* (i.e. market access conditionality)? How is the uniform interpretation and application of the EU law guaranteed? Is there a role foreseen for the Court of Justice (ECJ) and its case-law? Does the DCFTA dispute settlement mechanism pose challenges for the autonomy of the EU legal order? Which procedures apply in case of non-implementation?

First, the concept of a "deep" and "comprehensive" FTA (Chapter 8) and the 'traditional' scope of the DCFTA – i.e. trade in goods and flanking

measures – (Chapter 9) will be analysed. Following, the other DCFTA chapters will be explored, focusing on, on the hand, the different forms of market access conditionality and mechanisms to ensure a uniform interpretation and application of the EU *acquis* and, on the other hand, the new or innovative provisions in this agreement (Chapter 10). Also the 'horizontal' DCFTA provisions and mechanisms will be discussed such as the dispute settlement mechanism (DSM), including its potential impact on the autonomy of the EU legal order (Chapter 11). Then, a general assessment of the EU-Ukraine DCFTA is provided (Chapter 12). On the basis of the previous chapters, it will be explored if the DCFTA is: a proper legal instrument for gradual integration in the EU Internal Market (12.1), an innovative or new EU FTA (12.2), a (too) complex and costly agreement (12.4) and a potential blueprint for other EU 'neighbourhood' (integration) agreements (12.5). Also the differences between the Ukraine DCFTA and the Moldova and Georgia DCFTAs will be discussed (12.3). Finally, the integration dimension of the sectoral integration agreements concluded with Ukraine (i.e. the ECT and the aviation agreement) will be analysed and compared with the DCFTA (Chapter 13).

In addition to EU integration agreements, two groups of EU 'neighbourhood agreements' will serve as a point of reference throughout the analysis of the EU-Ukraine AA, i.e. the Stabilization and Association Agreements (SAAs) with the Western Balkan countries and the EMAAs with the Mediterranean ENP partners. In this context, to avoid confusion, it is important to underline the difference between EU 'integration' agreements and EU 'neighbourhood' agreements. EU integration agreements is a theoretical concept used in this work to refer a group of agreements concluded by the EU that oblige a third country to apply, implement or incorporate in its domestic legal order a selection of EU legislation. The concept of EU 'neighbourhood agreements' covers all the international agreements that the EU has concluded with neighbouring countries. These two concepts do not imply two distinct groups of agreements. Instead, EU integration agreements are a specific group of 'neighbourhood agreements' as the EU has only concluded integration agreements with neighbouring countries (cf. *infra*). However, not all neighbourhood agreements are integration agreements because there exist numerous international agreements that the EU has concluded with neighbouring countries that do not include an obligation to apply a selection of EU *acquis*.

This does not imply that this work provides for a comprehensive comparative analysis. Instead, specific elements of these agreements such as the legal basis, institutional framework, provisions related to approximation to the EU *acquis* and case-law of the ECJ will be discussed where relevant for the analysis of the EU-Ukraine AA. For the analysis of the EU-Ukraine DCFTA (Part III),

a comparison will also be made with elements of other FTAs recently concluded by the EU (e.g. EU FTAs with Korea, Colombia/Peru and Central America). This enables us to answer the question to what extent the EU-Ukraine AA can actually be considered as a *new* agreement. Moreover, although the EU's relations with Moldova and Georgia will not be analysed *in extenso*, the key differences between the AAs with Moldova and Georgia and the EU-Ukraine AA will be discussed.

As already indicated in this introduction, at the heart of the EU-Ukraine AA and DCFTA is the obligation on Ukraine to approximate to a predetermined selection of EU legislation. The exportation of the EU's norms and values to third (neighbouring) countries also fits in a broader academic debate on Union's role on the international stage and on the ability of the EU to transform and democratise its neighbourhood. In this discussion, which is not a part of this research, the EU has been attributed several labels, varying from a "*normative power*"[49] to a "*normative hegemon*".[50] The export of the Union's *acquis* to partner countries is also defined as a form of "*external governance*"[51] or "*Europeanization*" of third countries.[52] In this debate, often the distinction is being made between on the one hand, the promotion of the fundamental principles and values of the EU such as those referred to in Article 2 TEU, which is the main focus in the research on the EU's democracy promotion and, on the other hand, the exportation of the Union's Internal Market *acquis* to third countries.[53] The latter is closely intertwined with the concepts of market

49 I. Manners, 'Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies* 40, 2002, pp. 235–258. For an extensive analysis of the exportation of the *acquis communautaire*, see R. Petrov, *Exporting the Acquis Communautaire through European Union External Agreements*, (Nomos Verlagsgesellschaft, Baden-Baden, 2011).

50 H. Haukkala, 'A Normative Power or a Normative Hegemon? The EU and its European Neighbourhood Policy' (2007) EUSA 10th Biennial Conference in Montreal, Canada, 17–19 May.

51 S. Lavenex, 'EU external Governance in Wider Europe', *Journal of European Public Policy* 11(4), 2004, pp. 680–700.

52 A. Gawrich, I. Melnykovska, R. Schweickert, 'Neighbourhood Europeanization through ENP: The case of Ukraine', *Journal of Common Market Studies* 48(5), pp. 1209–1235.

53 See for example C. Hillion, 'Anatomy of EU norm export towards the neighbourhood', in P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), pp. 13–21; R. Petrov, 'Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries', *European Foreign Affairs Review* 13, 2008, pp. 33–52; R. Petrov, *op. cit.,* footnote 49; S. Lavenex, 'A governance perspective on the European Neighbourhood Policy: integration beyond conditionality?' *Journal of European Public Policy* 15(6), 2008, pp. 938–955; S. Lavenex, F. Schimmelfennig, 'EU rules beyond EU

access conditionality and EU integration agreements, and will therefore be the focus of this work.[54] Accordingly, in the following chapters, the distinction will be made between the AA's 'common values conditionality' and 'market access conditionality'.

This book aims to contribute to the existing academic debate on the ENP and the EU's external and trade relations. Over the last decade, an enormous amount of academic literature emerged on the ENP, mainly from a political-science perspective.[55] Although there is an increase in research on the legal aspects of the ENP,[56] this book will try to fill the 'legal' gap in this debate. Due

borders: theorizing external governance in European politics', *Journal of European Public Policy* 16(6), 2009, pp. 791–812; A. Albi, 'The EU's 'External Governance' and Legislative Approximation by Neighbours: Challenges for the Classic Constitutional Templates', *European Foreign Affairs Review* 14, 2009, pp. 209–230 and P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014).

54 F. Schimmelfennig and U. Sedelmeier make the difference between "democratic conditionality" and "*acquis* conditionality" (F. Schimmelfennig, U. Sedelmeier, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', *Journal of European Public Policy* 11(4), 2004, p. 677). However, it has to be noted that this distinction is arbitrary because the EU's common values, such as those enshrined in Article 2 TEU, are also part of the EU *acquis*. For an overview of the academic discussion about the context and meaning of the *acquis* (*communautaire*), see R. Petrov, *op. cit.* footnote 49, pp. 35–40.

55 See for example: J. Kelly, 'New Wine in Old Wineskins: Promoting Political reforms through the New European Neighbourhood Policy', *Journal of Common Market Studies* 44(1), 2006, pp. 29–55; R. Dannreuther, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy', *European Foreign Affairs Review* 11, 2006, pp. 183–201; K. Smith, 'The outsiders; the European Neighbourhood Policy', *International Affairs* 81(4), 2005, pp. 757–773; E. Barbé, E. Johansson-Nogués, 'The EU as a modest 'force of good': the European Neighbourhood Policy', *International Affairs* 84 (1), 2008, pp. 81–96; S. Lavenex, 'A governance perspective on the European Neighbourhood Policy: integration beyond conditionality?' *Journal of European Public Policy* 15(6), 2008, pp. 938–955.

56 See for example, B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence* (Routledge, Oxon, 2012); N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU. A Legal Analysis* (Hart Publishing, Oxford, 2014); C. Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe', in M. Maresceau, A. Dashwood, *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008), pp. 309–333; C. Baudenbacher, 'The Judicial Dimension of the European Neighbourhood Policy', College of Europe *EU Diplomacy Paper* 08/2013, November 2013. For an interdisciplinary approach, see for example E. Lannon (ed.), *The European Neighbourhood Policy's Challenges* (P.I.E. Peter Lang, New York, 2012).

to the recent character of the EU-Ukraine AA – and the EaP AAs in general –, the (legal) academic research on this topic is currently very limited.[57] In this view, the author of this work hopes that this book can initiate the academic debate on this new generation of association agreements and DCFTAs.

This book has mainly a legal focus. However, in EU external relations law, and especially in the legal framework of the Union's relations with Ukraine and the other EaP partners, politics is never far away. This work has not the ambition to be interdisciplinary, however, in order to fully grasp the establishment of the EU-Ukraine AA, the relevant political developments have to be taken into account.[58] Although the recent political developments in Ukraine and their impact on EU-Russia relations are definitely historic and deserve an extensive analysis, it has to be noted that this research does not aim to provide a comprehensive overview of these events as this would lead us too far away from the key research objectives of this work. Nevertheless, considering that all these events were triggered by the EU-Ukraine AA and relate to the *finalité* of the EU-Ukraine relationship, they cannot be ignored either. Therefore, these political events and developments will only be analysed when they were – or still are – relevant for the analysis of the EU-Ukraine AA.

Finally, it has to be noted that this work also has the ambition to be of practical use, going beyond mere academic relevance. Currently, a comprehensive legal analysis of the EU-Ukraine AA is lacking. This is quite remarkable considering the historic events that this agreement has sparked. Moreover, it is striking that several 'close observers' and public officials of EU Member States or even EU institutions have made strong statements or declarations regarding the EU-Ukraine AA whereas it appears that several authors of these statements did – or do – not always know its exact contents. This is to a large extent the result of the new, comprehensive and complex character of this agreement. In addition, opponents of this agreement have often deliberately misrepresented

57 See for example: G. Van der Loo, P. Van Elsuwege, R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', *EUI Working Paper*, LAW 2014/09; G. Van der Loo, 'The EU-Ukraine Deep and Comprehensive Free Trade Area: a coherent mechanism for legislative approximation?' in P. Van Elsuwege, R. Petrov (eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space*? (Routledge, Oxon, 2014), pp. 63–88; C. Hillion, 'Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement', *European Foreign Affairs Review* 12, 2007, pp. 169–182; R. Petrov, 'Legal Basis and Scope of the new EU-Ukraine Enhanced Agreement. Is there any room for further speculation?', *EUI Working Paper*, 2008/17.

58 W. Twining, *Law in Context. Enlarging a Discipline* (Clarendon Press, Oxford, 1997).

its contents in order to manipulate public support for the agreement. A clear, comprehensive but critical legal analysis of this agreement will therefore not only serve academic purposes but can also be a useful instrument for policy makers who are dealing with this topic. Moreover, the results of this research can also be relevant for other neighbouring countries engaged in a revision of their bilateral relationship with the EU. For example, the analysis of several principles and mechanisms of the EU-Ukraine DCFTA could be useful during the negotiations on the DCFTAs that the EU aims to conclude with Morocco, Jordan, Egypt and Tunisia.[59]

59 European Commission, 'The EU's response to the "Arab Spring": The State-of-Play after Two Years', 8 February 2013, A 70/13.

PART 1

Integration Agreements Concluded by the EU: Criteria and Overview

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As indicated in the introduction, the EU-Ukraine AA and several sectoral agreements concluded (or initialled) with Ukraine can be qualified as EU integration agreements because they have the objective to integrate Ukraine partly into the EU by extending – a section of – the EU (Internal Market) *acquis* to this country. However, in order to fully grasp the notion of the concept of an EU integration agreement, clear criteria have to be formulated. The following chapter will therefore develop four criteria which will allow us to define and evaluate integration agreements, including the aforementioned agreements with Ukraine. Moreover, because the different chapters of the EU-Ukraine AA, especially those of the DCFTA, contain different integration objectives and instruments, these criteria can be applied to each of these chapters. In addition, a brief overview of the existing EU integration agreements is provided. Such an overview is a practical tool to compare the relevant EU-Ukraine agreements with the other EU integration agreements. This Part will first provide some general remarks on the legal concept of 'EU integration agreements'.

CHAPTER 1

'Integration Agreements' Concluded by the EU: A Useful but Tricky Legal Concept

As pointed out above, it is the objective of the ENP and the EaP to accelerate Ukraine's (and the other EaP partners') integration into the EU Internal Market. This ambition is clearly enshrined in the EU-Ukraine AA which states in its first Article that: "[t]he aim of this Association [is] to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market [...]".[60] Moreover, also the preamble contains several references to the (economic) integration objectives of this agreement. For example, it states that the parties are desirous of achieving economic integration with the EU Internal Market through the establishment of the DCFTA. As it will be illustrated further on, the key instrument of the DCFTAs, and the EaP AAs as such, to achieve the partner countries' integration into the EU Internal Market is the obligation to apply or incorporate in their domestic legal order a selection of EU *acquis*. Therefore, these agreements can be labelled as 'EU integration agreements'.[61] The last two decades the EU has concluded several bilateral and multilateral non-pre-accession agreements that integrate non-EU Member States, to a certain extent, into the EU Internal Market by obliging those countries to apply parts of the EU *acquis*. Although the categorisation of a body of international agreements concluded by the EU as 'integration agreements' is a useful exercise, this term is hazardous and can be misleading.

First, the EU Treaties do not include a provision that enables a third country to (partially) integrate into the EU. Consequently, they do not provide for a legal basis to conclude such 'integration agreements', contrary to other types of agreements such as trade agreements (Article 207(3) TFEU), association agreements (Article 217 TFEU), co-operation agreements (Article 212(3) TFEU) or development agreements (Article 209(2)). A third State can only *fully* integrate into the EU through the accession process of Article 49 TEU, which makes *partial* accession to the EU impossible. Although some EU Member States are

60 Art. 1(d) EU-Ukraine AA.

61 M. Maresceau, 'Les accords d'intégration dans les relations de proximité de l'Union Europeénne', in C. Blumann (ed.) *Les frontiers de l'Union Européenne* (Bruxelles, Bruylant, 2013), pp. 152–191.

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more integrated than others due to the number of opt-outs to several EU policies and the procedure for enhanced cooperation,[62] leading to what is called an 'Europe *à la carte'* or a 'multi-speed EU', there is no legal basis for a 'partial' EU Membership.[63] A notable exception is however Cyprus, where a geographical limit on the application of full integration applies.[64] The most ambitious relationship with third countries, foreseen in the EU Treaties, is the conclusion of an association agreement on the basis of Article 217 TFEU. This does not imply that association agreements always have the objective to 'integrate' the other contracting party into the EU. As Peers noted: "a particular association agreement might even contain fewer integration obligations than a partnership or co-operation agreement".[65] Article 217 TFEU allows the Union to conclude agreements with third countries establishing an association "involving reciprocal rights and obligations, common action and special procedures", but avoids any reference to the term 'integration'. This provision was indeed used as a legal basis for several agreements with 'integration' objectives such as the EEA. However, there are several association agreements that are not pre-accession agreements[66] or do not have a clear 'integration' objective.[67] Former Commission President Walter Hallstein even stated that "association can be anything between full membership minus 1% and a trade and co-operation agreement plus 1%".[68] It is true that according to the ECJ, association agreements create special, privileged links with a non-member country "which must, at least to a certain extent, *take part in the Community system*".[69] However, it is difficult to see how a third associated State could "take part in the Community [now Union] system" as even in the most advanced formats of

62 Art. 20 TEU.

63 Although this statement was made in another context, the ECJ ruled that "it is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established" (Case C-95/97, *Région Wallonne v. Commission of the European Communities,* [1997], ECR I-1787, para. 6).

64 M. Maresceau, "Integration oriented elements in bilateral agreements concluded by the EU with third States: a few examples" (2010)), to consult at: http://www.europarl.cy/ressource/static/files/ADDRESS_PROF_MARESCEAU_20100624.pdf.

65 S. Peers, 'EC Frameworks of International Relations: Co-operation, Partnership and Association', in A. Dashwood, C. Hillion, (eds.), *The General Law of EC External Relations* (Sweet&Maxwell, London, 2000), p. 176.

66 For example the EMAAs with the Mediterranean ENP partners.

67 See for example the 2002 EU-Chile Association Agreement (*OJ,* 2002, L 352/1).

68 W. Hallstein, *cited in*: D. Phinnemore, *Association: Stepping-Stone or Alternative to EU membership?* (Sheffield Academic Press, Sheffield, 1999), p. 23.

69 ECJ, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd,* [1987], ECR I-3719, para. 9. Emphasis added.

association agreements, such as those preparing for accession, associated candidate States do not really take part in the Union system since these countries are never involved in the decision-making process at EU level.[70] Therefore, the term 'integration agreement' does not suggest an agreement concluded by the EU which would allow a third country to become, to a limited extent, an EU Member State.

A *second* challenging feature of this concept is the fact that several legal scholars refer to the process of integration of third (neighbouring) countries into the EU (Internal Market) on the basis of bilateral agreements, however, without offering a clear definition of this process.[71] Notable exceptions are Lazowski and Maresceau who both formulate a definition and criteria for this phenomenon. The former does not use the term 'integration agreements' but refers to models of "enhanced bilateralism" or "enhanced multilateralism" to define international agreements concluded by the EU which impose on a third country the obligation to apply selected pieces of EU *acquis*.[72] According to this author, these agreements go beyond the mere approximation of laws and imply the clear-cut obligation to *apply* parts of the *acquis*.[73] The notion of 'application' differs according to Lazowski from non-binding 'best endeavour' approximation clauses which are used by the EU in various other agreements with third countries.[74] Maresceau applies a similar strict criterion to qualify an agreement concluded by the EU as an "integration agreement".[75] He also notes that the mere objective of an agreement to establish a form of legal

70 M. Maresceau, *Bilateral Agreements concluded by the European Community* (The Hague Academy of International Law, Recueil des cours, vol. 309, Martinus Nijhoff Publishers, Leiden/Boston, 2006) p. 317.

71 For example, in a recent comprehensive study, K. Pieters examines to what extent the Mediterranean ENP countries are integrated into the EU Internal Market and to what extent the EU Internal Market principles contribute to the Euro-Med integration process. However, a clear definition of "integration into the EU Internal Market" is not provided in this work (K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market*, (T.M.C. Asser Press, The Hague, 2010)).

72 A. Lazowksi, 'With but Without you… The Europeanisation of Legal Orders of the Neighbouring Countries', in A. Ott, E. Vos (eds.), *Fifty years of European Integration: Foundations and Perspectives,* (The Hague, T.M.C. Asser Press, 2009), p. 248; A. Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union', *Common Market Law Review* 45, 2008, pp. 1433–1458.

73 *Ibid.*

74 A. Lazowski, 'Box of Chocolates Integration: The European Economic Area and the Swiss Model Revisited', in S. Blockmans, S. Prechal (eds.), *Reconciling the Deepening and the Widening of the European Union*, (The Hague, T.M.C. Asser Press, 2008), p. 89.

75 Maresceau uses in French the term "un accord d'intégration", M. Maresceau, *op. cit.*, footnote 61.

approximation between the contracting parties is not sufficient to be classified as an integration agreement. He argues that an agreement with a third State is only an "integration agreement" if it incorporates a part of the EU *acquis* which is "interpreted and applied" as if the third State is part of the EU.[76] Therefore, an integration agreement transposes a part of the EU *acquis* in the internal legal order of a third country in order to realize a partial integration in certain domains and policies of the Union.[77] A different conceptualization of this legal phenomenon is provided for by Rapoport. Regarding international agreements concluded with third (non-candidate) countries envisaging a kind of integration into the EU, this author makes a difference between agreements providing for "un *alignement* normatif visant l'établissement d'"espace juridiques intégrés'" and agreements aiming at "un *rapprochement* normatif".[78] Rapoport argues that the former group of agreements, which is similar to the notion of EU integration agreements developed in this work, requires "l'existence d'une obligation permanente de reprise de l'*acquis* par les partenaires et [...] l'instauration de mécanismes d'homogénéisation de l'interprétation des normes régissant les espaces juridiques intégrés".[79]

Although the ECJ never used the term 'integration agreement', its formulation of the objectives of the EEA and the European Common Aviation Area (ECAA) agreement in Opinion 1/00 can serve as an alternative definition for this type of agreements. According to the Court, these agreements aim "to extend the *acquis communautaire* to new States, by implementing in a larger geographical area rules which are essentially those of Community law".[80] By this definition, the Court notes that integration agreements do not apply the EU law in third countries, but a selection of rules which is textually identical to the EU *acquis*.

Although a limited number of legal scholars identify the obligation to apply a selection of EU *acquis* as a key feature of an EU integration agreement, additional criteria need to be developed and specified. The concept of an EU integration agreement does not refer to a specific well-defined group of identical

76 Maresceau uses the terms "identifieé et répertorieé", *ibid,* p. 153.

77 As Maresceau notes: "la reprise d'une partie de l'*acquis* de l'Union en tant que tel dans leur ordre juridique", *ibid,* p. 153.

78 C. Rapoport, *Les partenariats entre l'Union européenne et les Etats tiers européens. Etude de la contribution de l'Union européenne à la structure juridique de l'espace européen* (Bruylant, Bruxelles, 2011), pp. 79–320 (emphasis added).

79 *Ibid*, p. 160.

80 ECJ, Opinion 1/00, Proposed agreement between the European Community and non-Member states on the establishment of a European Common Aviation Area, [2002], ECR I-3493, para. 3.

or similar agreements but more to a heterogeneous group of agreements which share one or more integration element. Therefore, by defining several criteria for the qualification of an EU integration agreement, it is possible to place these agreements on a scale which varies from 'basic' integration agreements (*i.e.* agreements which fulfill only one criterion) to 'developed' integration agreements (*i.e*. agreements which fulfil all the criteria). Moreover, because several agreements concluded by the EU, such as the EU-Ukraine AA, include various chapters with different integration elements, it is even possible to place several chapters of the same integration agreements on such a scale.

CHAPTER 2

The *conditio sine qua non*: The Obligation to Apply, Implement or Incorporate a Predetermined Selection of EU *acquis*

The first criterion to qualify an international agreement concluded by the EU as an integration agreement is the one which has already been put forward in the literature, mentioned above. The *conditio sine qua non* for an integration agreement is the (i) *obligation* for the partner country to (ii) *apply*, *implement or incorporate in its domestic legal order* a predetermined selection of EU *acquis*.

As already observed, such an obligation is stricter than the *best endeavours* approximation clauses, incorporated in several international agreements concluded by the EU.[81] Such clauses do not contain a formal legal commitment as they only prescribe an obligation to act without a requirement to achieve particular results or a sanction in the case the approximation obligation is not fulfilled.[82] The former Europe Agreements (EAs), the SAAs, the PCAs and the EMAAs all contain similar but not identical best endeavours approximation clauses. According to these provisions in the former EAs, the CEECs "shall endeavour to ensure that [their] legislation will be gradually made compatible with that of the Community".[83] This formulation was copied in the first paragraph of the approximation clauses in the PCAs with the post-Soviet countries.[84] Also the approximation clauses in the SAAs contain a similar reference

81 Several authors use the term "harmonisation" instead of approximation, see for example: A. Evans, 'Voluntary Harmonisation in Integration between the European Community and Eastern Europe', *European Law Review* 22, 1997, pp. 201–220.

82 G. Van der Loo, P. Van Elsuwege, 'Competing Paths of Regional Economic Integration in the Post-Soviet Space: Legal and Political Dilemmas for Ukraine', *Review of Central and East European Law* 37, 2012, p. 425.

83 See for example Art. 69 EA Lithuania (*OJ*, 1998, L 51/3) and Art. 69 EA Romania (*OJ*, 1994, L 357/2). The formulation of this clause in the EAs with Poland and Hungary are slightly different. Art. 68 EA Poland states for example that Poland "shall use its best endeavours to ensure that its legislation is compatible with the Community legislation" (*OJ*, 1993, L 348/2). For a detailed analysis of the approximation clauses in the Europe Agreements, see: A. Lazowski, 'Approximation of Laws', in A. Ott, K. Inglis (eds.), *Handbook on European Enlargement. A commentary on the Enlargement Process* (T.M.C Asser Press, The Hague, 2002), pp. 631–638.

84 For example, see: Art. 40(1) PCA Tajikistan and Art. 55(1) PCA Russia.

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as they state that the Western Balkan countries "shall endeavour to ensure that [their] existing laws and future legislation shall be gradually made compatible with the Community *acquis*".[85] The nature of the approximation clauses in the EMAAs is even softer as they only state that "*cooperation* shall be aimed at helping [the Mediterranean partner] to bring its legislation closer to that of the Community"[86] or because there is no asymmetry in the approximation clause. The latter means that the approximation process, established by these provisions, is not a one-way street whereby the partner country makes the commitment to approximate with the Union's *acquis*, but is more based on an equal partnership. For example the approximation clauses in the EMAAs with Egypt, Israel, Jordan and Lebanon state that "the Parties shall use their best endeavours to approximate *their respective laws* in order to facilitate the implementation of this Agreement".[87] Evidently, in practice, it is difficult to imagine that the Union makes a commitment through these provisions to bring its *acquis* closer to the legislation of these Mediterranean countries.

Thus, the mere inclusion of such an approximation clause is not sufficient to qualify an agreement as an EU integration agreement. *First*, due to the voluntary nature of these provisions, they only impose on obligation to act and not to achieve a result. However, as noted by several authors, notable exceptions are the approximation clauses included in agreements with EU candidate countries.[88] The pre-accession process develops the voluntary nature of these clauses into a firm obligation to approximate considering that approximation with the EU *acquis* is one of the pre-accession Copenhagen Criteria. Therefore, in the light of the pre-accession strategy, the approximation clauses in the SAAs obtained a binding character, contrary to those included in the EMAAs and the PCAs.

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85 For example, see Art. 70(1) SAA Albania and Art. 68(1) SAA Macedonia. For an analysis of the legislative approximation process of the Western Balkan countries, see A. Lazowski, S. Blockmans, 'Between dream and reality: challenges to the legal rapprochement of the Western Balkans", in P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Oxon, Routledge, 2014), pp. 108–134. For a comparative analysis between the SAAs and the EAs, see D. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', *European Foreign Affairs Review* 8(1), 2003, pp. 77–103.

86 For example, see: Art. 52 EMAA Morocco and Art. 56 EMAA Algeria (emphasis added).

87 Art. 48 EMAA Egypt, Art. 69 EMAA Jordan, Art. 49 EMAA Lebanon and Art. 55 EMAA Israel (emphasis added).

88 E. Piontek, 'Central and Eastern European Countries in Preparation for Membership in the European Union- A Polish Perspective', *Yearbook of Polish European Studies* (1), 1997, p. 73; A. Lazowski, *op. cit.*, footnote 83, p. 634.

Second, these approximation clauses do not define a clear selection of EU legislation and a timeframe for legislative approximation. At the most, they define broad 'priority areas' of EU Internal Market legislation which should offer the partner country some guidance in their process of approximation to the relevant EU *acquis*.[89] Consequently, they do not provide mechanisms to ensure a uniform interpretation and application of the approximated EU *acquis*. Although this approximation process can bring the domestic legislation of a third country closer to the EU *acquis*, it is not inconceivable that these approximation clauses can lead to an inaccurate approximation of the domestic legislation to the EU legislation.

Therefore, in order to qualify as an EU integration agreement, an agreement must go beyond these standard approximation clauses by *obliging* (*i.e.* no best endeavours commitment) a third country to effectively *apply* a *predetermined* selection of EU *acquis*, or to *transpose* or *implement* it in its domestic legal order.[90] However, it has to be stressed that even EU integration agreements do not lead to formal application of EU law in the third country. Integration agreements imply that a set of legislation textually identical to corresponding EU *acquis* is applied in the domestic legal order of a third country or in its relations with the Union. Even when domestic legislation of a third country is identical to EU *acquis*, "it remains within the boundaries of the national legal order" and EU law does not apply internally.[91] Even the EEA, which is considered by the European Commission "the most far-reaching and comprehensive instrument to extend the EU's Internal Market to third countries",[92] does not apply formally EU law in the participating EFTA countries but "incorporates in the law governing the EEA provisions that are textually identical to the corresponding provisions of Community [now Union] law".[93] It is only through the

89 See for example Art. 55(2) EU-Russia PCA. The 'priority areas' for legislative approximation in the SAAs are slightly more detailed than those in the PCAs and EMAAs. See for example Art. 70(3) SAA Albania. For analysis, see A. Lazowski, S. Blockmans, *op. cit.,* footnote 85.

90 On the 'obligatory' nature of legislative approximation in EU international agreements, see C. Rapoport, *op. cit*., footnote 78, p. 160.

91 A. Lazowksi, 'With but Without you… The Europeanisation of Legal Orders of the Neighbouring Countries', in A. Ott, E. Vos (eds.), *Fifty years of European Integration: Foundations and Perspectives,* (The Hague, T.M.C. Asser Press, 2009), p. 249. The author notes that approximation can lead to application in case of the pre-accession strategy because from the moment a country is an official EU Member State, it is obliged to apply the EU *acquis*.

92 European Commission, 'A review of the functioning of the European Economic Area', SWD(2012) 425 final, 7 December 2012, p. 3.

93 ECJ, Opinion 1/92, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1992], ECR I-2821, para. 2.

homogeneity principle and related procedures in the EEA Agreement that the parties have spelled out the objective to apply the same EU rules and give them the same interpretation throughout the whole EEA (cf. *infra*). Thus, even if integration agreements extend "rules which are essentially those of [Union] law",[94] integration agreements do not apply EU law in a third state.

In EU integration agreements, the obligatory character of the extension of EU *acquis* can take many forms. For example, the last two decades, the EU has concluded several agreements which state that the partner country must "apply" a selected part of EU *acquis*. An evident example is the 1991 EEC-San Marino Agreement on Cooperation and Custom Union which states that this micro-State "shall apply" the common commercial policy *acquis* to third countries.[95] Also non-customs union agreements can contain an obligation to "apply" a part of the EU *acquis* such as the EU-Monaco Agreement on the application of certain Union acts.[96] Variations on this obligation can be found in other integration agreements. For example, the EU-Switzerland Air Transport Agreement states that the relevant *acquis* incorporated in its Annex "shall apply", but makes a reservation that this is only "to the extent that [the *acquis*] concerns air transport or matters directly related to air transport as mentioned in [the Annex]".[97] The agreements with Switzerland, Iceland and Norway on their association with the Dublin and Schengen *acquis* stress the importance of the implementation of the relevant *acquis* as it must be "implemented and applied" by these third countries.[98] The EU-Switzerland agreement

94 ECJ, Opinion 1/00, *op. cit.,* footnote 80.

95 Art. 7(1) Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino (*OJ,* 2002, L 84/43). This agreement only entered into force in 2002, however, an Interim Agreement on trade and trade-related matters was concluded (*OJ*, 1992, L 359/13).

96 Art. 1 and 2(1) Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco (*OJ,* 2003, L 332/42).

97 Art. 2 Agreement between the European Community and the Swiss Confederation on Air Transport (*OJ,* 2002, L 114/73).

98 Art. 2(1) Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (*OJ,* 1999, L 176/36); Art. 2(1) Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis* (*OJ,* 2008, L 53/42) (emphasis added). The agreements on association with the Dublin *acquis* contain a slightly different formulation as they state that the relevant *acquis* "shall be implemented by [the Contracting Party] and applied in [its] relations with the Member States" (Art. 1 Agreement between

on the free movement of persons states that the contracting parties "shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are *applied* in relations between them".[99]

According to another group of agreements such as the 1990 EU-Andorra Customs Union Agreement, third countries must "adopt" (French: "adopter", Dutch: "aannemen") instead of "apply" (French: "appliquer", Dutch: "toepassen") a selected part of EU *acquis*.[100] It is not clear from a reading of these agreements whether there is a difference between the "application" and "adoption" of a piece of EU *acquis*, particularly because no definition of these concepts is provided in these agreements. As it seems that these two terms refer to the same process,[101] a more consistent use would be beneficial for the legal clarity of these agreements.

In addition, several other EU integration agreements include similar but not identical obligations regarding a selected body of EU *acquis*, which further complicates the conceptualisation of this legal phenomenon. Some agreements contain provisions that focus on the "incorporation" or "transposition" of the *acquis* in the domestic legal order. For example, the ECAA and the EEA contain a provision which clarifies how the annexed EU *acquis* "shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order".[102] The Monetary Agreements with Andorra, the Vatican State and San

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the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (*OJ,* 2008, L 53/5); Art. 1(1) Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (*OJ,* 2001, L 93/40)).

99 Art. 16(1) Agreement between the European Community and its Members States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (*OJ,* 2002, L 114/6) (emphasis added).

100 Art. 7(1) Agreement between the European Economic Community and the Principality of Andorra, (*OJ,* 1990, L 374/16). Also Art. 3 of Decision 1/2003 of the EU-Andorra Joint Committee states that Andorra must "adopt" the relevant customs *acquis* and that Andorra "shall take the measures necessary for the implementation [...] of provisions based on [specific Council Regulations]" (Art. 3, Decision 1/2003 of the EU-Andorra Joint Committee (*OJ,* 2003, L 253/3)).

101 For example, the corresponding provision (Art. 7(1)) included in the agreements with Andorra and San Marino on the establishment of a customs union uses the term to "adopt" in the case of Andorra and the term to "apply" in the case of San Marino.

102 Art. 3 Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the

Marino state that these micro-States "shall undertake to adopt all appropriate measures, through direct transposition or possibly equivalent actions, with a view to implementing the EU legal acts and rules listed in the Annex to this Agreement" in the field of, *inter alia*, euro banknotes and coins, banking and financial law and money laundering.[103]

The legal vocabulary of these provisions is further enriched in other EU integration agreements. For example, the ECT obliges the contracting parties to "implement" the annexed EU *acquis*, a process which is referred to in the agreement as "the extension of the *acquis communautaire*".[104] The bilateral aviation agreements with Georgia, Moldova and Morocco state that the contracting parties "shall act in conformity" with the provisions of the annexed EU aviation *acquis* and "shall be responsible, in its own territory, for the proper enforcement of this Agreement and, in particular, the regulations and directives [annexed to the agreement]".[105]

The variation between all these provisions illustrates once more that EU integration agreements are a very diverse group of agreements. Nevertheless, they have one crucial element in common, *i.e.* the obligation to apply, implement or incorporate in the domestic legal order of the partner country a predetermined selection of EU *acquis*.

Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area (*OJ,* 2006, L 285/3) and Art. 7 EEA. According to this provision, an act in the Annex corresponding an EU Regulation must be made part of the internal legal order of the contracting parties whereas an act corresponding an EU Directive shall leave to the authorities of the contracting parties the choice of form and method of implementation. This provision is further analysed in Part III.

103 Art. 8(1) Monetary Agreement between the European Union and the Vatican State (*OJ,* 2010, C 28/13); Art. 8(1) Monetary Agreement between the European Union and the Principality of Andorra, (*OJ,* 2011, C 369/1); Art. 8(1) Monetary Agreement between the European Union and the Republic of San Marino, (*OJ,* 2012, C 121/5). The Monetary Agreement with Monaco includes a different provision regarding the annexed monetary-related legislation, see Art. 9 Monetary Agreement between the European Union and the Principality of Monaco (*OJ*, 2012, C 23/14).

104 Art. 3(a) Energy Community Treaty (*OJ,* 2006, L 198/18). Art. 5 of this agreement uses another formulation and states that the ECT "shall follow" the concerned EU *acquis*.

105 For example, see Arts. 14(1), 15(1), 16(1), 18, 19 and 21(2) EU-Georgia Common Aviation Area Agreement (*OJ*, 2012, L 321/3) and Arts. 14(1), 16(1), 17(1), 18, 19 and 21(2) Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part and the Kingdom of Morocco, of the other (*OJ,* 2006, L 386/57). These agreements, including the aviation agreements with Israel, Jordan and Ukraine will be further analysed in Chapter 13.

Finally, it has to be noted that the selection of EU *acquis* in EU integration agreements is – contrary to the best endeavours approximation clauses discussed above – predetermined. This means that both parties clearly define the scope of EU *acquis* which must be applied. This selection of *acquis* is listed in an Annex to the integration agreement and is hereinafter referred to as "*the incorporated EU acquis*" of an integration agreement.

CHAPTER 3

Criteria to Ensure the Uniform Interpretation and Application of the EU Law

Due to the obligation of an EU integration agreement to apply or to incorporate in its domestic legal order a selected part of the EU *acquis*, the Union's legislation is extended beyond its borders and shared with a third country. Integration agreements thus create a common legal space between the EU and a third country.[106] Although these agreements can serve specific economic, political or legal integration objectives between the EU and a third State, they bring along new challenges for the EU legal order. The EU is increasingly becoming a 'Europe of different speeds' whereby several Member States integrate deeper in certain Union policies than others. By extending parts of the EU *acquis* to third countries, integration agreements give a new dimension to this process, leading to "a complicated matrix – a paradise for lawyers, an incomprehensible jigsaw puzzle for citizens".[107] It is therefore not only crucial that the EU *acquis* is applied and interpreted uniformly *within* the Union, but also in the common legal space with a third country, created by an integration agreement.[108] In other words, the extension of (parts) of the EU Internal Market should not come at the expense of its uniformity and homogeneity. The application or incorporation of a chunk of EU *acquis* in a third country can only function and serve its broader policy purpose when the integration agreement establishes mechanisms to ensure a uniform interpretation and application of the provisions in the integration agreement and their corresponding rules of EU law. These procedures are even called by Maresceau as "le maillon faible de l'accord d'intégration".[109] Indeed, the absence of such mechanisms can lead to asymmetrical rights and obligations between the EU and the other contracting party to an EU integration agreement and undermine the uniformity of the common legal space created by this agreement. In this regard, the Court noted that it is crucial for integration agreements "that conditions of market access will be the same for operators and nationals of States Parties or States covered by the [integration] agreement".[110]

106 A. Lazowski, 'Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union', *Common Market Law Review* 45, 2008, p. 1437.

107 *Ibid*, p. 1443.

108 C. Rapoport, *op. cit.*, footnote 78, p. 169.

109 M. Maresceau, *op. cit.*, footnote 61, p. 153.

110 The Court made this remark in Opinion 1/00 concerning the ECAA (*op. cit.,* Footnote 80). Similarly, regarding the EEA, the Commission noted that if "the stakeholders of the single

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The key challenge of an EU integration agreement is therefore to apply and interpret the annexed selection of EU *acquis* (i.e. the incorporated *acquis*) and the corresponding rules of EU law in a uniform manner. A uniform interpretation does not require that the *acquis* incorporated in an integration agreement must be interpreted exactly in the same way as the corresponding EU rules. As noted above, the ECJ already stressed in Opinion 1/91 that "[t]he fact that the provisions of [an] agreement and the corresponding Community provisions are identically worded does not mean that they must necessarily be interpreted identically".[111] According to the Court, referring to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), an international treaty is to be interpreted not only on the basis of its wording, but also in the light of its objectives.[112]

Guaranteeing this uniformity is not an easy exercise as the EU's *acquis* is developed in the specific EU supranational framework to address the specific challenges the Union is facing, without the input of third countries.[113] The success of the extension of EU legislation to third countries, often with different legal, political and economic systems than that of the Union, depends therefore on the legal instruments to ensure a uniform application of the EU law. This situation is different for the (best endeavours) approximation clauses in the pre-accession agreements (e.g. in the SAAs). Although the legislative approximation process initiated through the pre-accession process can lead to an inconsistent approximation of the domestic legislation of the candidates to the EU *acquis prior* to their accession (cf. *supra*), from their first day of EU Membership, they are subject to the enforcement mechanisms and infringement procedures of the EU. Moreover, the safeguard clauses in the latest Accession Treaties contain additional enforcement mechanisms and post-accession conditionality procedures.[114]

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market face different legal requirements when operating in the EU and the EFTA sides", the legal certainty and homogeneity of the single market is undermined (European Commission, *op. cit.*, footnote 92).

111 ECJ, Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, [1991], ECR 06079, para. 14. See also Case 270/80 *Polydor v Harlequin,* [1982], ECR 329, para. 15–19.

112 *Ibid.* Article 31 VCLT stipulates that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

113 A notable exception are the different procedures of 'decision shaping', included in several integration agreements (cf. *infra*).

114 M. Spernbauer, 'Benchmarking, Safeguard Clauses and Verification Mechanisms – What's in a name? Recent developments in pre- and post accession conditionality and compliance

It is for this reason that the other criteria for EU integration agreements are related to the procedures to ensure the uniform interpretation and application of the EU *acquis*. Whereas the obligation to apply or incorporate a selected part of the EU *acquis* is a *conditio sine qua non* for an EU integration agreement, the other criteria are optional and can be considered more as benchmarks to evaluate the scope, deepness and ambition of the integration agreement. However, evidently, the different criteria are intertwined as the good functioning of the integration agreement depends on the procedures ensuring its uniform interpretation and application.

Although all the EU integration agreements contain various procedures to ensure a uniform interpretation and application of the EU law and the incorporated *acquis*, only the EEA Agreement explicitly refers to the principle of "homogeneity".[115] Homogeneity is a crucial concept of the EEA Agreement as the expansion of the EU Internal Market to the EFTA Member States requires a uniform legal environment.[116] The preamble states that the basic aim of this agreement is to establish "a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level". Thus, with the inclusion of this homogeneity principle, the EEA Agreement deviates from the settled case-law which states that the fact that provisions of an agreement are identical to EU rules does not mean that they have to be interpreted identically. Instead, homogeneity means that the same rules apply and are given the same interpretation throughout the whole EEA and, in particular, that individuals and economic operators are treated in the same way throughout the EEA, regardless of whether EU law or EEA rules are applied.[117] To concept of homogeneity consists out of two elements. The first one is the *judicial homogeneity*, which

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with EU law', *Croatian Yearbook of European Law and Policy* (3), 2007, pp. 273–306; A. Lazowski, 'And Then they were Twenty-Seven…Legal Appraisal of the Sixth Accession Treaty, *Common Market Law Review* (44), 2007, pp. 401–430.

115 A notable exception is the ECAA. According to Art. 16(3) and 18(7) of this agreement, the Joint Committee must preserve "the homogeneous interpretation" of this agreement. For analysis of the principle of homogeneity, see: H.H. Fredrisken, 'Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area', *European Law Journal* (18)6, 2012, pp. 868–886 and M. Cremona, 'The "dynamic and homogeneous" EEA: Byzantine structures and various geometry', *European Law Review* (19), 1994, pp. 508–526.

116 Art. 1 EEA.

117 EEA Joint Parliamentary Committee, 'Report on Homogeneity in the European Economic Area', 8 May 2000.

refers to the uniform interpretation of the law in the EEA.[118] The second one is the *legislative homogeneity*, which concerns the timely amendment of the EEA Annexes to the adoption of corresponding new EU legislation "with a view to permitting a simultaneous application of the latter as of the amendments of the Annexes to the Agreement".[119]

As noted above, the EEA Agreement is the only agreement concluded by the EU that includes this homogeneity principle. This is largely the result of the costly institutional set-up of the homogeneity formula and the lack of countries willing to make such far-reaching commitments. However, EU institutions are increasingly referring to the principle of homogeneity when evaluating the legal framework with third countries. For example, the Council recently criticised the Union's legal framework with Switzerland because it "does not ensure the necessary *homogeneity* in the parts of the internal market and of the EU policies in which Switzerland participates" as it lacks "efficient arrangements for the take-over of new EU *acquis* including ECJ case-law".[120] The Commission also stressed the importance of the "homogeneous interpretation" of the *acquis* in possible future agreements with the micro-States.[121] Moreover, as it will be illustrated further on, specific elements of the EEA homogeneity procedure can already be identified in other existing EU integration agreements.[122]

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118 Art. 105 EEA. For the distinction between legislative homogeneity and judicial homogeneity, see W. Van Gerven, 'The Genesis of EEA Law and the Principles of Primacy and Direct Effect', *Fordham International Law Journal*, 16(4), 1992, pp. 962–967.

119 Art. 102 EEA.

120 Council Conclusions on EU relations with EFTA countries, 3060th Council meeting, 14 December 2010, para. 42 (emphasis added). The challenges and opportunities for a new EU-Switzerland legal framework will be briefly analysed in Chapter 12.5.

121 European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Option for Closer Integration with the EU', COM(2012) 680, 20 November 2012, p. 18 (emphasis added); European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino: Options for their participation in the Internal Market', COM(2013) 793 final, 18 November 2013. The options for a new legal framework with the micro-States will be further discussed in Chapter 12.5.

122 For example, although the EU-Switzerland agreement on the free moment of persons does not explicitly refer to the objective of homogeneity, the Court stated that this agreement "is expected to integrate any relevant new secondary European Union legislation with a view to ensuring *homogeneity* and equivalence of rights and obligations within its area of application" (Case C-656/11, *United Kingdom v Council* (Switzerland), judgment of 27 February 1014, *nyr*, para. 40).

3.1 Procedures to Amend or Update the Incorporated *Acquis*

A key prerequisite for the good function of an EU integration agreement is the inclusion of a procedure to amend or update the incorporated *acquis* (i.e. the selection of EU *acquis* annexed to the agreement that must be applied, implemented or incorporated in the domestic legal order of the partner country). The most obvious reason for this is to update the incorporated *acquis* to the evolutions of the corresponding rules of EU law. For a third country applying a part of the EU *acquis* through an international agreement is shooting on a moving target. During the negotiations on the EU integration agreement, the contracting parties agree on the scope of the EU *acquis* which must be applied. This body of *acquis* is then incorporated in the agreement, mostly in its annexes. Because this selection of *acquis* is agreed upon before the signing of the agreement, it can be referred to as the "pre-signature incorporated *acquis*".[123] However, due to the ever-developing nature of EU law, an integration agreement requires a procedure to update the pre-signature incorporated *acquis* to the evolutions of the corresponding provisions of EU law. The pre-signature incorporated *acquis* can already be outdated before the integration agreement enters into force, especially in the case of mixed integration agreements which usually require a long ratification period. The body of EU legislation incorporated in the integration agreement through such amendment procedures can be called the "post-signature incorporated *acquis*", as this selection is agreed upon after the signature of the agreement.[124]

A second reason for amending the scope of the incorporated *acquis* is the evolution of the ambition or political will of the parties to deepen and widen the level of integration. Several integration agreements prefer an incremental approach whereby initially the application of only a limited body of *acquis* is envisaged, leaving the door open to other areas of EU law.[125] Whether the scope of the *acquis* in the agreement will ultimately be enlarged will mainly depend on the good progress of the implementation of the initial pre-signature *acquis*.

In order to guarantee a smooth amendment of the incorporated *acquis*, EU integration agreements have to be equipped with a proper institutional framework. As both parties have to agree to update or widen the incorporated *acquis*, a *common* institution is required which can take *legally binding* decisions. As it will be noted further on, not all common institutions established

123 R. Petrov, *op. cit.*, Footnote 49, p. 102.

124 *Ibid.*

125 See for example Art. 100(ii) and (iii) ECT.

by EU international agreements have the competence to take legally binding decisions. However, all the EU integration agreements include a common institution (*e.g.* Association Council, Cooperation Council, Joint Committee, etc.) with the competence to amend the annexes to the agreement including, *inter alia*, the incorporated *acquis*.[126] Most EU integration agreements even contain a specific provision explicitly referring to the possibility of the common institution to update the *acquis* in the annexes to evolutions in the EU *acquis*.[127]

There are two models for adapting the scope of the incorporated *acquis*. The post-signature incorporated *acquis* can be developed through either a *static* or a *dynamic* procedure. According to the latter, each and every modification of an EU act at the level of the Union that is incorporated in the integration agreement requires an action on the side of the other contracting party.[128] This does not necessarily mean that every modification at the level of the EU must automatically be transposed to the agreement but that the third country is obliged to at least 'consider' applying the modified EU *acquis*.[129] Nevertheless, in some integration agreements the refusal to match the incorporated pre-signature *acquis* with the relevant evolutions of the corresponding rules of EU law can lead the (partial) suspension or termination of the agreement.[130] Moreover, a limited number of EU integration agreements allow representatives of the third country to participate in the early stages of legislative procedures or are informally

126 See for example Art. 7(2) and Art. 17(8) EU-Andorra Customs Union Agreement and Art. 18 EU-Switzerland Agreement on the free movement of persons. A notable exception are the Monetary Agreements with the Vatican State (Art. 8(3)), San Marino (Art. 8(5)) and Andorra (Art. 8(4)) where it is the Commission which shall amend the annexes. The Joint Committee shall thereafter decide on appropriate deadlines for the implementation of these new acts. See also Art. 11(3) of the Monetary Agreement with Monaco.

127 See for example Art. 26 EU-Georgia Common Aviation Area Agreement.

128 A. Lazowski, *op. cit.*, Footnote 106, p. 1445.

129 See for example Art. 23 EU-Switzerland Air Transport Agreement, Art. 17 ECAA and Art. 27 EU-Morocco Euro-Mediterranean Aviation Agreement. However, Art. 1(2) of the EU-Monaco Agreement on the application of certain Community acts on the territory of Monaco state that acts adopted by the EU in application of the acts referred to in the agreement "shall apply on the territory of Monaco *without the need for a decision of the joint committee*" (emphasis added). Art. 8(1) of the Agreement on the association of Iceland and Norway to the Schengen *acquis* state that "[t]he adoption of new acts or measures related to matters referred to in Article 2 [...] shall enter into force simultaneously of the European Union and its Member States concerned and for Iceland and Norway, unless those acts or measures explicitly state otherwise".

130 See for example Art. 8(4) Agreement on the Association of Iceland and Norway to the Schengen *acquis* and Art. 102(5) EEA.

consulted when new legislation is drafted in the area covered by the agreement. This way, they can express their concerns regarding the envisaged legislative modifications of the *acquis* or try to influence the decision-making process. However, as non-Member States, these countries have no voting right in the final decision-making.[131] Therefore, this process is referred to as "decision-shaping".[132] Because a dynamic procedure is institutionally very demanding (*e.g.* every modification of the EU law covered by the agreement must be notified to the partner country), it is no surprise that they are quite rare. A *static* procedure – which is more common in EU integration agreements –, also allows a common institution to amend the scope of the incorporated *acquis*. However, this procedure does not require considering to update the annexes each and every time a new relevant EU act is adopted, nor are there sanctions foreseen in the case the third country refuses to follow the evolutions in the relevant EU legislation.[133]

The EEA has the most dynamic procedure to amend the incorporated *acquis*. Article 102 EEA foresees that whenever adopting a legislative act on an issue which is covered by the EEA Agreement, the EU institutions have the obligation to transfer the new legislation to the participating EFTA States.[134] It is then the task of the EEA Joint Committee to secure the homogeneity of the EEA legal space and to amend the annexes containing the lists of EU legislation with EEA relevance as fast as possible in order to allow the simultaneous entry into force of the legislation in the entire EEA. In the event the Joint Committee cannot agree on the amendment of the relevant Annex, it shall examine "all further possibilities to maintain the good functioning of this Agreement and take any decision necessary to this effect".[135] The EEA countries are therefore not obligated to amend the EEA Annexes, however, if a compromise is still not reached after six months from the date of referral or date of entry into force of the relevant legislation, the affected part of the EEA Agreement can be suspended.[136] The EEA legislative homogeneity procedure has proved to work very well.[137] For example,

131 See for example Art. 6 Agreement on the Association of Iceland and Norway to the Schengen *acquis* and Art. 23 EU-Switzerland Air Transport Agreement.

132 EFTA Bulletin, 'Decision shaping in the European Economic Area', March 2009.

133 See for example Art. 25 ECT and Art. 27 EU-Morocco Euro-Mediterranean Aviation Agreement.

134 Art. 102(1) EEA.

135 Art. 102(4) EEA.

136 Art. 102(5–6) EEA. However, in practice this procedure has never been invoked. On this point, see European Commission, 'A review of the functioning of the European Economic Area', SWD (2012) 425, 7 December 2012, p. 9.

137 European Commission, *ibid*. To further improve the processing of the *acquis* into the EEA Agreement, a joint process by the EEA EFTA States and the EEAS was launched in October

according to its 2013 annual report, the EEA Joint Committee adopted in that year 235 decisions incorporating 400 legal acts.[138]

3.2 Obligation for ECJ Case-law Conform Interpretation of the Incorporated *Acquis*

Besides catching up with the developments of EU legislation, it is important that the incorporated *acquis* and the corresponding rules of EU law are *interpreted* as uniform as possible. As already noted, the ECJ has consistently held that the fact that provisions of an agreement are identical to EU rules does not mean that they must necessarily be interpreted identically but that also the purpose and the objective of the agreement has to be taken into account.[139] However, in later rulings, the Court nuanced this and stated that this is not the case when there are "express provisions to that effect laid down by the Agreement itself".[140] Indeed, several integration agreements implicitly or explicitly refer the objective to arrive at the most uniform possible application and interpretation of the incorporated *acquis*.[141] This objective is still not the same as an obligation to interpret the incorporated *acquis* identically to the corresponding EU law. This would require the explicit commitment in the agreement to maintain a "homogeneous" interpretation. Therefore, the third criterion of an integration agreement is the inclusion of an 'obligation for ECJ case-law conform interpretation' of the incorporated *acquis*.

Several EU integration agreements contain a provision which states that acts specified in their annexes that are identical in substance to corresponding rules of the TFEU and the TEU and to EU secondary legislation (*i.e.* the incorporated *acquis*) must, in their implementation and application, be interpreted in conformity with

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2011 (see EEA Joint Committee, Annual Report of the EEA Joint Committee, 2012, 7 May 2013, para. 8–11).

138 EEA Joint Committee, Annual Report of the EEA Joint Committee 2013, 26 June 2014.

139 ECJ, Opinion 1/91, *op. cit.*, Footnote 111.

140 ECJ, Case C-351/08, *Christian Grimme v. Deutsche Angestellten-Krankenkasse,* [2009], ECR I-10777, par. 29; Case C-547/10, *Swiss Confederation v. European Commission*, [2013], *nyr* (emphasis added).

141 For explicit references, see Art. 6(1) Agreement of the association of Iceland and Norway to the Dublin *acquis*; Art. 8(1) Agreement on Switzerland's association to Schengen *acquis*. The ECAA even refers to the aim "to preserve the homogeneous interpretation of this agreement" (Art. 16(3)).

the relevant rulings and decisions of the ECJ.[142] In the light of the heterogeneous character of EU integration agreements, there is a large variation between these provisions. The EEA was the first agreement to include an obligation for ECJ case-law conform interpretation but limited the obligation to interpret the relevant EEA provisions only to rulings rendered *prior* to the date of signature of the Agreement.[143] However, Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice states that in the interpretation and application of the EEA Agreement, the EFTA Surveillance Authority and Court "shall pay due account" to the principles laid down by the relevant rulings of the ECJ given after the date of signature of the EEA Agreement.[144] Moreover, the EFTA Court confirmed that in practice, in order to maintain a homogeneous EEA, it has "consistently taken into account the relevant rulings of the CJEU given after [the date if signature]", thereby *de facto* eliminating the temporal limit of Article 6 EEA.[145] Several other integration agreements do not make a difference between pre and post-signature case-law.[146]

Other EU integration agreements such as the ECAA and the agreements with Switzerland on air transport and on the free movement of persons also oblige the partner countries to interpret the incorporated *acquis* in conformity with pre-signature ECJ rulings but add that rulings and decisions given after the date of signature shall be communicated to the contracting parties. At request of one of them, the implications of such later rulings and decisions shall then be determined by the Joint Committee "in view ensuring the proper functioning of [the] Agreement".[147] In the case of the ECAA, decisions taken by

142 However, not all integration agreements include such a provision. See for example the Euro-Mediterranean Aviation Agreement with Morocco. This obligation can also be incorporated in decisions of common institutions, established by the integration agreement. See for example Art. 69(2) of Decision 1/2003 EU-Andorra Joint Committee. Although the Ankara Agreement is mainly left outside the scope of this analysis as this agreement is a pre-accession agreement, for an obligation for ECJ case-law conform interpretation, see also Art. 66 Decision 1/95 EU-Turkey Association Council.

143 Art. 6 EEA. This obligation is reproduced in Art. 3(1) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (*OJ*, 1994, L 344/3). It has to be noted that the ECJ ruled in Opinion 1/91 on the first draft of the EEA that Art. 6 as such was not sufficient to ensure the desired legal homogeneity (*op. cit.*, footnote 111, para. 24).

144 For the impact of relevant post-signature case-law of the ECJ, see also Art. 105 EEA.

145 EFTA Court, joined cases E-9/07 and E-10/07, *L'Oréal,* 2008, EFTA Ct. REP 258, para 28.

146 See for example Art. 21(5) EU-Georgia Aviation Agreement.

147 Art. 16 ECAA; Art. 1(2) EU-Switzerland Air Transport Agreement; Art. 16(2) EU-Switzerland Agreement on free movement of persons.

the Joint Committee under this procedure shall be in conformity with the case-law of the ECJ.[148] These procedures can be considered as 'sovereignty safeguard mechanisms' as they give the partner countries a voice in the discussion on the impact of the post-signature case-law on the agreement.

The agreements with Norway, Iceland and Switzerland on their accession to the Schengen and Dublin *acquis* do not contain such an explicit obligation for ECJ case-law conform interpretation but establish instead a detailed procedure to ensure a uniform interpretation and application of the incorporated *acquis* with a key role for the Joint/Mixed Committee, established by the agreement. The Joint/Mixed Committee must keep under constant review the development of the case-law of the ECJ as well as those of the competent courts of the contracting parties. If the Joint/Mixed Committee cannot ensure the uniform interpretation and application of the *acquis* within two months after a substantial difference in the case-law of the ECJ and the courts of the contracting parties, the issue will be put as a matter of dispute on the agenda of the Joint/Mixed Committee which can lead, in the case the dispute cannot be settled, to the termination of the agreement.[149]

A unique provision in this regard is Article 94 of the ECT. This provision imposes an ECJ case-law conform interpretation of any term or other concept used in this agreement that is derived from EU law, without making a difference between pre and post-signature case-law. When there is no interpretation of the ECJ available, the Ministerial Council "shall give guidance in interpreting this Treaty". Such guidance shall not prejudge any interpretation of the *acquis* by the ECJ at a later stage (cf. *infra*).[150]

3.3 Judicial Mechanisms to Ensure a Uniform Interpretation and Application of the EU Law

The last criterion for an EU integration agreement is the inclusion of judicial mechanisms in the agreement to ensure the uniform interpretation and application of the incorporated *acquis* and the corresponding rules of EU law. This

148 Regarding the ECAA, the ECJ noted that these provisions may not allow a complete homogeneous interpretation of its rules, however, without havening an impact on the autonomy of the EU legal order (Opinion 1/00, *op. cit.*, footnote 80, paras. 37–40).

149 Arts. 6–8 Agreement on the association of Iceland and Norway with the Dublin *acquis*; Arts. 9–11 Agreement on the Association of Iceland and Norway to the Schengen *acquis*; Arts. 5–7 Agreement on the association of Switzerland to the Dublin *acquis*; Arts. 8–10 Agreement on the association of Switzerland to the Schengen *acquis*.

150 This procedure will be further discussed in Chapter 13.

is especially important because the mere obligation for an ECJ case-law conform interpretation (cf. *supra*) can be insufficient to ensure this objective.[151] For example, how is a uniform interpretation guaranteed when there is no relevant case-law of the ECJ available? Two options are possible: either the agreement establishes a preliminary ruling procedure for disputes concerning the interpretation or application of the incorporated *acquis* that allows the ECJ to give a binding ruling on the matter, or the agreement creates a separate court. However, the involvement of the ECJ or the establishment of a court in an integration agreement contains several challenges and risks. *First*, it is not evident that a third country accepts the jurisdiction of a court of the other party, i.e. the ECJ. Only an ambitious level of political will to integrate (partly) in the EU can explain such a 'loss' of sovereignty. *Second*, as it will be illustrated further on, the establishment of a separate court can undermine the autonomy of the EU legal order.

Regarding the former option, *i.e.* EU integration agreements that include a preliminary ruling procedure for disputes concerning the interpretation or application of the incorporated EU *acquis*, it has to be noted that there are only a limited number of examples.[152] The ECAA, inspired by the EEA model, foresees the possibility *for national courts or tribunals of the ECAA partners* to ask the ECJ for a preliminary ruling when a question of interpretation of the agreement, of the *acquis* in its annexes or acts adopted in pursuance thereof, arises in a case pending before that court or tribunal.[153] A 'sovereignty safeguard' is provided in Annex IV of the ECAA. This Annex states that the ECAA partner may stipulate the extent to which, and according to what modalities, its courts and tribunals are to apply this provision.[154] If a court of a contracting party against whose decision there is no judicial remedy under national law is not able to make a referral to the ECJ, any judgment of such court shall be transmitted by

151 ECJ, Opinion 1/91, *op. cit.*, footnote 111, paras. 24–28; Opinion 1/00, *op. cit.*, footnote 80, para. 40.

152 It has to be noted that in the Ankara Agreement the Association Council can ask a preliminary ruling to the ECJ or to any other existing court or tribunal in a dispute relating to the application or interpretation of this agreement (Art. 25).

153 For the compatibility of this agreement with the EU Treaties pursuant to Art. 218(11), see Opinion 1/00 (*op. cit.,* footnote 80). The Commission observed in this Opinion that it negotiated the ECAA on the basis of the principles set out in Opinion 1/92 concerning the creation of the EEA but that in view of both the intention of each of the Associated States to become a Member of the EU and the absence of any institutional links similar to those created for the purposes of the EFTA, it was not realistic to envisage a separate jurisdictional structure to be set up on the lines of the 'twin pillars of the EEA'.

154 Art. 16(2) ECAA.

the contracting party concerned to the Joint Committee which shall act "as to preserve the homogeneous interpretation of this agreement".[155] In the case this Joint Committee cannot guarantee the homogeneous interpretation of this agreement, the dispute settlement mechanism can be invoked according to which the parties to the dispute may refer the dispute to the ECJ whose decision shall be final and binding.[156] Also the EEA Agreement provides, on the one hand, the possibility for the *contracting parties* to request the ECJ to give a ruling on disputes concerning the interpretation of the incorporated EU *acquis*,[157] and, on the other hand, Article 107 and Protocol 34 EEA foresee that EFTA countries may allow their *national courts or tribunals* to ask the ECJ to decide by way of a binding preliminary ruling on the interpretation of an EEA provisions which is identical in substance to a provisions of the EU *acquis*.

Regarding the second option, the establishment of a separate court, there is only one example: the EEA. To achieve the objective "to arrive at as uniform an interpretation as possible of the provisions of the Agreement and those provisions of Community legislation which are substantially reproduced in the Agreement", the EEA Agreement foresees the establishment of a separate court between the EFTA States (hereinafter "the EFTA Court").[158] The EFTA Court was created by the Agreement between the EFTA States on the establishment of a Surveillance Authority and Court of Justice (hereinafter: "the EFTA Surveillance Agreement").[159] The EFTA Court, whose jurisdiction solely extents to the EFTA States, has the competence to decide disputes between the EFTA Surveillance Authority and an EFTA State as well as between EFTA States and review the legality of decisions in the field of competition policy taken by the EFTA Surveillance Authority.[160] Moreover, according to Art. 34 of the EFTA Surveillance Agreement, the EFTA Court shall have jurisdiction to give, at the request of a national court in an EFTA State, advisory opinions on the interpretation of the EEA Agreement. In order to prevent that the interpretation by the EFTA Court of an EEA rule

155 Art. 16(3) ECAA. If the Joint Committee does not succeed in preserving the homogeneous interpretation of this agreement, the DSM of Art. 20 may be applied which can lead to "appropriate safeguard measures" and even the denunciation of the agreement.

156 Art. 16(3) and 20 ECAA.

157 Art. 111(3). If the contracting parties to such a dispute do not agree to ask for a preliminary ruling, a contracting party may take appropriate safeguard measures according to Art. 122 or suspend the relevant part of the EEA as foreseen in Art. 102. This procedure has never been used.

158 Art. 108(2) EEA.

159 For text, see: *OJ*, 1994, L 344/3.

160 Art. 108(2) EEA.

differs from the ECJ interpretation of corresponding EU rules, Article 105(2) of the EEA agreement states that the EEA Joint Committee "shall keep under constant review" the developments of the case-law of the ECJ and the EFTA Court. Crucial is that according to the '*procès-verbal agree ed Article 105*', the decisions of the Joint Committee are not to affect the case-law of the ECJ.[161] If a difference in the case-law of the two Courts is noted, the EEA Joint Committee "shall act as to preserve the homogeneous interpretation of the Agreement". If the Joint Committee does not succeed after two months to preserve the homogeneous interpretation of the Agreement, the dispute settlement mechanism of Article 111 may be applied. Under this provision, the Joint Committee may settle disputes and if a dispute concerns the interpretation of EEA provisions identical in substance to corresponding EU provisions, the contracting parties may agree to request the ECJ to give a binding ruling on the interpretation of these provisions.[162]

The establishment of this judicial mechanism to assure the homogeneity in the EEA illustrated the difficult equilibrium between the judicial procedures to ensure a uniform interpretation and application of the EU law in integration agreements on the one hand, and the preservation of 'the autonomy of the EU legal order' on the other hand. The latter was developed by the ECJ in a series of opinions (1/76, 1/91, 1/92, 1/00). Because this issue will be analysed further on, it is sufficient to note in this context that the first draft of the EEA Agreement had to be reconsidered as a result of an unfavourable Opinion of the ECJ in 1991.[163] The first draft envisaged, *inter alia*, an EEA Court, independent though functionally integrated with the ECJ and composed out of judges from the ECJ alongside judges from the EFTA States, with jurisdiction over questions of interpretation and application of the EEA Agreement.[164] The EEA Court and the Community (now Union) Courts were also to "pay due account" to the relevant principles laid down by any relevant decision delivered by the other

161 ECJ, Opinion 1/92, *op. cit.,* footnote 93, para. 23.

162 Art. 111(3) EEA. If an agreement cannot be reached after six months, a Contracting Party may take safeguard measures according to Art. 112(2) and Art. 133 or suspend the affected part of the agreement according to Art. 102 EEA.

163 For analysis, see: B. Brandtner, 'The 'Drama' of the EEA. Comments on Opinions 1/91 and 1/92', *European Journal of International Law* 3, 1992, pp. 300–238; R. Holdgaard, *External Relations Law of the European Community. Legal Reasoning and Legal Discourses*, (Kluwer Law International, Alphen aan den Rijn, 2008) pp. 82–87; M. Cremona, 'The "dynamic and homogeneous" EEA: Byzantine structures and various geometry', *European Law Review* 19(5), 1994, pp. 508–526; S. Adam, *La procedure d'avis devant la Cour de justice de l'Union européenne* (Bruylant, Bruxelles, 2011).

164 Art. 95 draft EEA.

court.[165] In its Opinion 1/91, the ECJ considered, *inter alia*, that this structure was incompatible with the Community (now Union) legal order since the ECJ would, in accordance with its own case-law, be bound by future decisions of the envisaged EEA Court rendered in respect of the EEA rules that are identical to EU law.[166] Therefore, the ECJ would no longer be completely independent in interpreting these EU rules, which would undermine the autonomy of the EU legal order. Four months after Opinion 1/91, the Court was asked to consider the second draft of the EEA. This time, the ECJ found in Opinion 1/92 that the newly agreed judicial mechanism, described above, was compatible with Community law.[167] It was not until Opinion 1/00 on the legality of the ECAA that the Court provided some conditions that dispute settlement mechanisms (DSMs) in international agreements have to fulfil in order not to undermine the autonomy of the EU legal order (cf. *infra*).[168]

Finally, it has to be noted that the ECJ has been granted a specific jurisdiction in a limited number of EU integration agreements, however, not related to disputes regarding the interpretation and application of the incorporated EU *acquis*.[169]

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165 Art. 104(1) draft EEA.

166 ECJ, Opinion 1/91, *op. cit.*, footnote 111, para. 30–36.

167 ECJ, Opinion 1/92, *op. cit.*, footnote 93.

168 Opinion 1/00, *op. cit.,* footnote 80, para. 11–13. For further analysis on this issue, see I. Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the autonomy of the EU Legal Order', in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart Publishing, Oxford, 2010), pp. 192–199. This issue will be further analysed in Chapter 11.2.

169 The monetary agreements with the micro-States give the ECJ "the exclusive competence/[jurisdiction] for settling any dispute between the parties, which may arise from the application of this Agreement, and which has not been solved within the Joint Committee" (Art. 10 Monetary Agreement with Andorra; Art. 10 Monetary Agreement with Vatican City; Art. 12(1) Monetary Agreement with Monaco and Art. 10 Monetary Agreement with San Marino). Moreover, the Air Transport Agreement with Switzerland and the Monetary Agreement with Monaco include a provision which states that all questions concerning the validity of decisions of EU institutions taken on the basis of their competences under the integration agreement "shall be of the exclusive competence of the Court of Justice" (Art. 20 Air Transport Agreement with Switzerland; Art. 12(4) Monetary Agreement with Monaco). Regarding the air transport agreement with Switzerland, see Case C-547/10, *Swiss Confederation v. European Commission*, 7 March 2013, *nyr*). Such a procedure is also included in the ECAA regarding questions concerning the legality of decision taken by EU institutions under this agreement (Art. 15(3) ECAA).

CHAPTER 4

Overview EU Integration Agreements

Thus, the analyses above provided four criteria for an EU integration agreement (Table 1):

TABLE 1 *Criteria for an EU integration agreement*

1	The inclusion of an obligation to apply, implement or incorporate a predetermined selection of EU *acquis*	*Conditio sine qua non*	
2	The inclusion of a procedure to amend or update the incorporated *acquis*	Benchmarks	Criteria to ensure uniform interpretation and application of the EU law
3	The inclusion of an obligation for ECJ case-law conform interpretation of the incorporated *acquis*		
4	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*		

Whereas the obligation to apply, implement or incorporate in the domestic legal order a predetermined selection of EU *acquis* is a *conditio sine qua non*, the other three criteria, which all concern the uniform interpretation and application of the incorporated EU *acquis* and the corresponding rules of EU law, are not. Because those three criteria are optional, they can be considered as benchmarks rather than strict criteria. They enable us to detect the large variation between the different EU integration agreements and to categorize them on a continuous scale that varies from 'basic' EU integration agreements to 'developed' EU integration agreements.

Table 2 provides an overview of the integration agreements concluded by the EU. It is not the objective to give a detailed description of all these integration agreements. The key features of most of the integration agreements were already discussed in the previous section and several other elements will be analysed throughout this book where it is relevant for the analysis of the EU-Ukraine AA. Nevertheless, a few general observations can be drawn from this Table.

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First, although the number of EU integration agreements is still limited (around 23), an increase can be noted since 2009. This is mainly the result of the conclusion of several monetary agreements with the micro-States[170] and the bilateral aviation agreements with several ENP countries.[171] In addition, the EU is negotiating or envisaging to negotiate integration agreements with other countries such as bilateral aviation agreements with other ENP partners and a new legal framework with the micro-States (cf. *infra*). The three EaP AAs are also integration agreements but they are not included in this overview as they will be analysed in the following chapters.

Second, this Table also illustrates the large variation between the different integration agreements. Especially the procedures to ensure a uniform interpretation and application of the EU law differ among these agreements. As already pointed out, the EEA contains the most elaborate judicial and legislative tools to ensure the objective of homogeneity throughout the EEA. Although the ECJ was initially rather skeptical that this objective could be achieved,[172] there is a broad consensus that the EEA works very well. The biannual EFTA Scoreboard on the state of implementation and compliance by the EFTA countries of the EEA obligations illustrate how well these countries comply with these far-reaching obligations.[173] Also the Council "welcomes that the EEA countries have demonstrated an excellent record of proper and regular incorporation of the *acquis* into their own legislation and encourages them to maintain this good record to ensure the continued homogeneity of the Internal Market".[174] However, it should be noted that the EEA Treaty is to a certain extent an EU integration agreement *hors catégorie*. As the EFTA Court argued:

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170 These monetary agreements were concluded after the Council invited the Commission in February 2009 to assess the 'first generation' of monetary agreements with the micro-States. In July 2009, the Commission suggested to review these first generation agreements (European Commission, 'Report on the functioning of the Monetary Agreements with Monaco, San Marino and Vatican', COM (2009)359 final, 14 July 2009).

171 The bilateral aviation agreements with the ENP countries will be further analysed in Chapter 13.

172 Opinion 1/ 91, *op. cit.*, footnote 111, para. 20.

173 For the latest EFTA Internal Market Scoreboard, see EFTA Surveillance Authority, 'Internal Market Scoreboard' No. 34, July 2014. However, this does not mean that the EEA Agreement does not face challenges. For an overview, see: European Commission, *op. cit.,* footnote 92.

174 Council Conclusions on EU relations with EFTA countries, 3060th General Affairs Council Meeting, 14 December 2010, para 3. See also Conclusions of the 39th meeting of the EEA Council, 1606/13, 21 May 2013.

TABLE 2 *Overview EU integration agreements*

Integration Agreement	Date signature/ entry into force	Substantive legal basis	Obligation to apply, implement or incorporate a selection of EU *acquis*	Procedure to update the incorporated *acquis*	Obligation for ECJ case-law conform interpretation of the incorporated *acquis*	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*
EU-Andorra Customs Union Agreement	28 June 1990/1 January 1991	Arts. 113 and 207 TFEU (ex Arts. 99 and 113 EEC)	Art. 7; Art. 3 Decision 1/2003 EU-Andorra Joint Commitee	Arts. 7(2) and 17(8)	Art. 69(2) Decision 1/2003 EU-Andorra Joint Committee	No
EU-San Marino Customs Union Agreement	16 December 1991/1 April 2002	Arts. 207 and 352 TFEU (ex Arts. 133 and 308 EC)	Art. 7; Art. 1 Decision No 2 /92 EU-San Marino Cooperation Committee; Art. 3 Omnibus Decion No 1/2010 EU-San Marino Joint Committee	Art. 7(2) and 8(3)c	Art. 5 Omnibus Decision 1/2010 EU-San Marino Joint Committee	No
EEA	2 May 1992 /1 January 1994	Art. 217 TFEU (ex Art. 238 EEC)	Art. 1	Arts. 98–104	Art. 6	Arts. 105–110 and 111(3)

TABLE 2 *Overview EU integration agreements* (cont.)

Integration Agreement	Date signature/ entry into force	Substantive legal basis	Obligation to apply, implement or incorporate a selection of EU *acquis*	Procedure to update the incorporated *acquis*	Obligation for ECJ case-law conform interpretation of the incorporated *acquis*	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*
E U-Andorra Protocol on Veterinary Matters	15 May 1997/15 May 1997	Art. 207 TFEU (ex Art. 113 EEC)	Arts. 1 and 2; Arts. 1, 2, 4, 5, 6, 8, 9 and 11 Decision 2/1999 EU-Andorra Joint Committee; Arts. 1, 2, 5, 6, 7, 8 and 9 Decision 1/2001; Arts. 1–5 Decision 2/2003 Joint Committee and Art. 1(1) Decision 1/2005.	Art. 2	No	No
EU-Iceland-Norway Agreement on the Association of Iceland and Norway to the Schengen *acquis*	18 May 1999/26 June 2000	Art. 6(1) of the Protocol to the Treaty of Amsterdam on integrating Schengen acquis in the framework of the EU.	Art. 2	Arts. 6 and 8	Arts. 9, 10 and 11	No

EU-Switzerland Air Transport Agreement	21 June 1999/1 June 2002	Art. 217 TFEU (ex Art. 310 EC)	Art. 1(2), Art. 2	Art. 23	Art. 1 (2)	No
EU-Switzerland Agreement on the free movement of persons.	21 June 1999/1 June 2002	Art. 217 TFEU (ex Art. 310 EC)	Art. 16(1)	Art. 17 and 18	Art. 16(2)	No
EU-Iceland-Norway Agreement on the Association of Iceland and Norway to the Dublin *acquis*	19 January 2001/1 April 2001	Art. 78 TFEU (ex Art. 63(1) EC)	Art. 1	Arts. 2 and 4	Arts. 6, 7 and 8	No
EU-Monaco Agreement on the application of certain Community acts on the territory of Monaco	4 December 2003/1 May 2004	Art. 207 TFEU (ex Art. 133 EC)	Arts. 1 and 2(1)	Art. 1(2)	Art. 1(2) and Arts. 2(2)–(5)	No

TABLE 2 *Overview EU integration agreements* (cont.)

Integration Agreement	Date signature/ entry into force	Substantive legal basis	Obligation to apply, implement or incorporate a selection of EU *acquis*	Procedure to update the incorporated *acquis*	Obligation for ECJ case-law conform interpretation of the incorporated *acquis*	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*
European Common Aviation Area	9 June 2006/-	Art. 100(2) TFEU (ex. Art. 80(2) EC)	Arts. 1 and 3	Art. 17	Art. 16(1)	Art. 16(2)
EU-Switzerland Agreement on the Swiss' Association with the Schengen *acquis*	26 October 2004/1 March 2008	Arts. 77, 78, 74, 114 TFEU (ex Art. 62, point 3 of the first subparagraph of Arts. 63, 66, 95 EC)/ Art. 37 TEU (ex Arts. 24 and 38 TEU)	Art. 2	Arts. 6 and 7	Arts. 8, 9 and 10	No
EU-Switzerland Agreement on the Swiss' Association with the Dublin *acquis*	26 October 2004/1 March 2008	Art. 78 TFEU (ex Art. 63(1)a EC)	Art. 1	Arts. 2 and 4	Arts. 5, 6 and 7	No

Energy Community Treaty	25 October 2005/1 July 2006	Arts. 53, 62, 103, 109, 114, 207 and 192 TFEU (ex. Arts. 47(2), 55, 83, 89, 95, 133 and 175 EC)	Art. 3(a) and Art. 5	Arts. 24 and 25	Art. 94	No
EU-Morocco Euro-Mediterranean Aviation Agreement	12 December 2006/-	Art. 100(2) TFEU (ex. Art. 80(2) EC)	Arts. 14–20 and 21(2)	Art. 27	No	No
EU-Vatican City Montetary Agreement	17 December 2009/1 Januray 2010	Art. 219(3) TFEU (ex Art. 111(3) EC)	Art. 8(1)	Art. 8(3)	No	No
EU-Georgia Common Aviation Area Agreement	2 December 2010/-	Art. 100(2) TFEU (ex. Art. 80(2) EC)	Arts. 14–20 and 21(2)	Art. 26	21(5)	No
EU-Jordan Euro-Mediterranean Aviation	15 December 2010/-	Art. 100(2) TFEU (ex. Art. 80(2) EC)	Arts. 13–19 and 20(2)	Art. 26	No	No
EU-Androrra Protocol on Customs Security Measures	27 January 2011/1 January 2011	207(4)TFEU	Art. 1	Art. 1	No	No
EU-Andorra Monterary Agreement	30 June 2011/ 1 April 2012	Art. 219(3) TFEU (ex Art. 111(3) EC)	Art. 8(1)	Art. 8(4)	No	No

TABLE 2 *Overview EU integration agreements* (cont.)

Integration Agreement	Date signature/ entry into force	Substantive legal basis	Obligation to apply, implement or incorporate a selection of EU *acquis*	Procedure to update the incorporated *acquis*	Obligation for ECJ case-law conform interpretation of the incorporated *acquis*	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*
EU-Monaco Monterary Agreement	29 November 2011/1 December 2011	Art. 219(3) TFEU	Art. 9, 11	Art. 11(3) and (5)	No	No
EU-San Marino Monetary Agreement	27 March 2012 /1 August 2012	Art. 219(3) TFEU (ex Art. 111(3) EC)	Art. 8(1)	Art. 8(5)	No	No
EU-Moldova Common Aviation Area Agreement	26 June 2012/-	Art. 100(2) TFEU	Art. 14–20 and Art. 21(2)	Art. 26	Art. 21(5)	No
EU-Israel Euro-Mediterranean Aviation	10 June 2013/-	Art. 100(2) TFEU	Art. 13–20 and 21(2)	Art. 27	No	No

> the EEA Agreement is an international treaty *sui generis* which contains a distinct legal order of its own. […] The depth of integration of the EEA Agreement is less far-reaching than under the EC Treaty, but the scope and objective of the EEA Agreement goes beyond what is usual for an agreement under public international law.[175]

It is therefore crucial to underline the unique and specific nature of this agreement when comparing other EU integration agreements, such as the EU-Ukraine AA, with the EEA. On the other end of the EU integration agreement scale, less ambitious 'basic' EU integration agreements can be situated such as the EU-Morocco Euro-Mediterranean Aviation Agreement. This agreement does not even include an obligation for ECJ case-law conform interpretation or other judicial mechanisms to ensure the uniform interpretation and application of the annexed EU legislation. The large variation between the EU integration agreements is the result of the different objectives of the policies in which these agreements are embedded, the different levels of ambitions or political will of the partner countries to integrate into the EU and the variation in their administrative and judicial capacity to apply a selection of EU *acquis*.[176]

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175 EFTA Court, *Erla Maria Sveinbjörnsdòttir v. Government of Iceland*, Case E-9/97, 1998, para 95.

176 The different legal bases of EU integration agreements will be discussed in Chapter 7.1.

PART 2

The EU and Ukraine: From Partnership and Cooperation towards Association

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CHAPTER 5

Background of the EU-Ukraine AA: The PCA and ENP

With the signature of the EaP AAs on 27 June 2014, the EU finally established a new form of political association and economic integration with Ukraine and the two other EaP countries. The signature of the EU-Ukraine AA had to herald a new phase in the "ambiguous yet unavoidable"[177] EU-Ukraine relationship. However, in the light of the current conflict in eastern Ukraine, the scope and contents of the EU-Ukraine AA have become the subject of much debate and controversy. In order to understand the EU-Ukraine AA and DCFTA and to be able to answer the question how and to what extent this new ambitious agreement is a new legal instrument for EU integration without membership, a brief analysis of the past and current legal framework of the EU-Ukraine relationship is required. First, the EU-Ukraine PCA will be analysed (5.1). It is not the objective to give a comprehensive analysis of all the PCA provisions as this has already been done elsewhere.[178] Instead, the focus will be on those elements of the PCA that are relevant for the analysis of the EU-Ukraine AA and DCFTA, i.e. its political and historical background (5.1.1), legal basis and objectives (5.1.2), trade-related provisions (5.1.3), direct effect (5.1.4) and institutional framework (5.1.5).

177 M. Maresceau, 'EU Enlargement and EU Common Strategies on Russia and Ukraine: An ambiguous Yet Unavoidable Connection', in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing, Oxford, 2004), pp. 180–219.

178 See C. Hillion, 'The evolving system of European Union external relations as evidenced in the EU partnerships with Russia and Ukraine', *thesis*, Leiden, 2005; C. Hillion, 'Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union', *European Foreign Affairs Review* 3, 1998, pp. 399–415; C. Hillion, 'Institutional Aspects of the Partnership between the European Union and the Newly Independent States of the Former Soviet Union: case Studies on Russia and Ukraine', *Common Market Law Review* 37, 2000, pp. 1211–1235; R. Petrov, 'The Partnership and Co-operation Agreements with the Newly Independent States', in A. and K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press, The Hague, 2002), pp. 175–196; S. Peers, 'From Cold to Lukewarm Embrace: the European Union's Agreements with the CIS States', *International and Comparative Law Quarterly* 44(4), 1995, pp. 829–847; M. Maresceau, *Bilateral Agreements Concluded by the European Community* (Martinus Nijhoff Publishers, Leiden/Boston, 2006) pp. 423–448 and J. Raux, V. Korovkine (eds.), *Le Partenariat entre l'Union Européenne et la Féderation de Russie* (Editions Apogée, Rennes, 1998).

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In the following chapters, the ENP and EaP will be briefly discussed because this was – and still is – the EU's policy framework in which the EaP AAs are embedded (5.2). Particular attention will be devoted to the objectives and instruments of the ENP and EaP (5.2.1), the EU-Ukraine Action Plan and Association Agenda (5.2.2) and the 'neighbourhood clause' provided in Article 8 TEU (5.2.3).

5.1 The EU-Ukraine Partnership and Cooperation Agreement

5.1.1 *Political and Historical Background*

Before Ukraine gained its independence on 1 December 1991, when the country was still a part of the Union of Soviet Socialist Republics (USSR), bilateral relations with the European Economic Community (EEC) were for a long time impossible because the Council for Mutual Economic Assistance (COMECON) countries, the USSR in particular, refused to recognize the EEC's international legal personality.[179] It was only in the light of Gorbachev's *perestroika* and *glasnost* that this situation changed. On 25 June 1988, the EEC and the COMECON signed a *Joint Declaration* on the establishment of official relations between the two parties, which implied a recognition of the EEC by the individual COMECON members.[180] Although the contents of this Declaration was limited, it had a crucial political significance: after years of deadlock and obstruction, both parties demonstrated their willingness to turn a page in each other's mutual history.[181] Soon after this declaration, the Community signed agreements on

179 This does not mean that the trade relations between the EEC and the COMECON members occurred in a legal vacuum in this period. To a large extent, the legal framework for trade relations between these two parties in the period before the 1988 Joint Declaration was determined by unilateral or autonomous Community Commercial Policy measures and sectoral agreements on sensitive products (*e.g.* Agreement in the form of exchange of letters on steel between the EEC and Hungary, 1 May 1978, Bull. EC., 5 (1978), para 2.2.41). A notable exception was also the 1980 Agreement with Romania (for text, see: *OJ*, 1980, L 352/1, for analysis, see: E. Dijmarescu, 'Trade Relations between Romania and the European Community', in M. Maresceau (ed.), *The Political and Legal Framework of Trade Relations between the European Community and Eastern Europe* (Martinus Nijhoff, Boston, 1989), pp. 39–41).

180 The Parties to the Joint Declaration agreed "[to] develop cooperation in areas which fall within their respective spheres of competence and where there is a common interest" (for text, see *OJ*, 1988, L 157/35).

181 M. Maresceau, 'A general survey of the current legal framework of trade relations between the European Community and Eastern Europe', in M. Maresceau (ed.), *The Political and Legal Framework of Trade Relations between the European Community and Eastern Europe* (Martinus Nijhoff, Boston, 1989), p. 4.

Trade and Economic Cooperation (TCAs) with all the COMECON countries. On 19 December 1989, the TCA with the USSR was signed.[182] This TCA, like all the other ones, aimed at the facilitation and promotion of the "harmonious development and diversification of trade [and] commercial an economic cooperation".[183] The agreement provided for a first basic legal framework for trade and economic cooperation between the EEC and the USSR and institutionalised a political dialogue by the establishment of a Joint Committee.[184]

Although these TCAs were revolutionary at that time, they were soon overtaken by events and became outdated. The *glasnost* and *perestroika* had not brought the expected economic reforms in the USSR and following its implosion in 1991, the former Soviet Republics established a new framework for cooperation in the form of a Commonwealth of Independent States (CIS) in Minsk on 8 December 1991. As 'newly independent states' (NIS), the former USSR Republics became sovereign states in their own political, social and economic existence.[185] The CIS was not given legal personality, which ruled out an inter-regional framework agreement between the CIS and the EEC. Regarding the EEC-USSR TCA, after the dissolution of the USSR, the Russian Federation was considered its successor State. For the other former Soviet Republics (except the Baltic States), the EEC-USSR TCA was transformed into a bundle of bilateral agreements through bilateral exchange of letters.[186] Those agreements became the legal framework for the EEC-NIS relations while other agreements were being negotiated.[187]

182 For the text of the TCA with the USSR, see *OJ*, 1990, L 68/3. For analysis, see M. Maresceau, 'The European Community, Eastern Europe and the USSR', in J. Redmond (ed.), *The external Relations of the European Community* (Macmillan, London, 1992), p. 109. It has to be noted that a TCA was first signed with Hungary on 26 September 1988 (*OJ*, 1988, L 372/2). For an analysis of the EEC-Hungary TCA and the unique position of Hungary in the COMECON, see P. Balázs, 'Trade relations between Hungary and the European Community', in M. Maresceau (ed.), *The Political and Legal Framework of Trade Relations between the European Community and Eastern Europe* (Martinus Nijhoff, Boston, 1989, pp. 55–74).

183 Art. 1 EEC-USSR TCA.

184 Art. 22 EEC-USSR TCA.

185 An extraordinary ministerial meeting of the 12 EEC Member States on 16 December 1991 adopted guidelines for the recognition of the new states in the Soviet Union, Bull. EC, 12, 1991, 1.4.13.

186 Bull. EC 7/8, 1993, 1.3.18.

187 For the particular status of the TCA with Belarus today, see M. Karliuk, 'Legislative approximation and application of EU law in Belarus', in P. Van Elsuwege, R. Petrov (eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), p. 230.

After the dissolution of the USSR, a crucial aspect of the Community's *Ostpolitik* was that from the outset, the Community distinguished the region of the former USSR (with the exception of the Baltic States) from that covered by the former non-Soviet COMECON countries (hereinafter referred to as the Central and East European Countries (CEECs)). This differentiation was formalized by the conclusion of different types of agreements and by a set of different unilateral Community measures. The Community concluded on the one hand 'Europe Agreements' (EAs) with the CEECs whereas it concluded less ambitious PCAs with the former Soviet Republics (i.e. the NIS). On the basis of this differentiation, each group of countries was granted a specific kind of Community assistance, *i.e.* PHARE for the CEECs and TACIS for the NIS.[188] The differences between these two legal frameworks have been the subject of extensive academic analysis and will therefore not be examined in this context.[189] Nevertheless, in order to understand the situation as it occurs today, including the EU-Ukraine AA, several elements of this differentiation policy must be highlighted.

The most important element in this differentiation policy was the legal and political nature of the bilateral agreements concluded with these two groups of countries. The Europe Agreements with the CEECs were association agreements based on Article 310 TEC (now Article 217 TFEU), whereas the PCAs were based on, *inter alia*, Articles 133 and 308 TEC (now Articles 207 and 352 TFEU).[190] In August 1990, the Commission recognised that the

188 For the 'Poland and Hungary Assistance for Reconstruction of Economy' (PHARE) programme, see: Regulation (EEC) No 3960/89, amended by Regulation (EC) No 2257/2004 (*OJ*, 2004, L 389/1) and for the 'Technical Aid to the Commonwealth of Independent States' (TACIS) programme: Regulation (EEC) No 2157/91, amended by Regulation (EC) No 2121/2005 (*OJ*, 2005, L 344/23).

189 For an extensive analysis of this differentiation policy, see C. Hillion, 'The evolving system of European Union external relations as evidenced in the EU partnerships with Russia and Ukraine', *thesis*, Leiden, 2005, pp. 38–55; M. Maresceau, E. Montaguti, 'The relations between the European Union and Central and Eastern Europe: A legal Appraisal', *Common Market Law Review* 32, 1995, pp. 1327–1367; P.-C. Müller-Graff, 'The legal Framework for Relations between the European Union and Central and Eastern Europe: General Aspects', in M. Maresceau (ed.) *Enlarging the European Union. Relations between the EU and Central and Eastern Europe* (Longman, London, 1997), pp. 27–41.

190 The first EAs were signed with Poland (*OJ*, 1993, L 348/2), Hungary (*OJ*, 1993, L 347/2) and the Czech and Slovak Federal Republic on 16 December 1991. After the dissolution of the Czech and Slovak Federal Republic, the Czech Republic and Slovakia signed a separate Europe Agreement on 4 October 1993 (*OJ*, 1994, L 360/2 and L 359/2). The same year, EAs were also signed with Romania (*OJ*, 1994, L 357/2) and Bulgaria (*OJ*, 1994, L 358/3). On 12 June 1995, the EAs with the three Baltic States were signed (for text of the agreements, see: Estonia (*OJ*, 1994, L 373/1); Latvia (*OJ*, 1994, L 374/1) and Lithuania (*OJ,* 1994, L 375/1)).

dramatic changes in Central and Eastern Europe called for a more far-reaching response of the Community and proposed the conclusion of association agreements with all the CEECs to replace the existing TCAs, except with the USSR. According to the Commission, "the USSR raise[d] specific questions in the context of internal reform, relations with the Community and integration into the international economic system".[191] The Commission considered the challenges the USSR was facing as too problematic to include the troubled region in the group of the CEECs. The fact that association agreements were only offered to the CEECs should not be underestimated.[192] By not concluding association agreements based on Article 310 TEC with the USSR and its successors, these countries were deprived from creating "special, privileged links" with the Community.[193] This differentiation was further accelerated at the 1993 Copenhagen European Council where the Heads of State and Government of the Union decided that the "associated" CEECs could join the Community if they fulfilled the listed political and economic criteria. This decision implied a political reorientation of the Europe Agreements towards pre-accession agreements because the Commission initially proposed in 1990 the conclusion of these agreements as an alternative to accession.[194] Hillion provides an additional reason why the Community could not conclude EAs with the NIS. According to this author, the Community had to preserve the exclusive and privileged character of the association agreements vis-à-vis the CEECs. The conclusion of association agreements with the NIS would have devaluated the privileged character of the EAs with the CEECs and their efforts to 'return to Europe'.[195] It should be noted that the author already wrote in 1998 that association agreements should, therefore, be offered, on a case-by-case basis to Ukraine, Russia or Moldova once the CEECs have joined the EU and the association agreements would become again "available".[196] This reasoning was quite visionary considering that the Union has now, a decade after the accession of the CEECs, signed the EaP AAs with these countries, with the notable exception of Russia.

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191 European Commission, 'Association Agreements with countries of central and eastern Europe: a general outline', COM (90) 398 final, 27 August 1990, p. 3.

192 M. Maresceau, *op. cit.*, footnote 182, p. 103.

193 ECJ, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd,* [1987], ECR I-3719, para. 9.

194 European Commission, *op. cit.*, footnote 191.

195 C. Hillion, 'Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union', *European Foreign Affairs Review* 3, 1998, p. 408 and *thesis, op. cit.,* footnote 189, p. 53.

196 *Ibid*, p. 408.

The Community did not only differentiate the CEECs from the NIS, but it also concluded two different categories of PCAs with the NIS. The first group of similar agreements consists out of the PCAs with Russia, Ukraine, Belarus and Moldova. The PCAs with these 'Western NIS' were more developed than those of the second group of PCAs, *i.e.* those concluded with the NIS of the Caucasus and Central Asia. For example, the Western PCAs included a similar evolutionary and suspension clause (cf. *infra*).

The European Commission proposed in January 1992 the conclusion of a new set of agreements with the NIS, tailored to each State in order to respond more adequately to the transformation of the former Soviet Union.[197] Because offering association/Europe Agreements to this group of countries was not an option, the Commission proposed an intermediate type of agreements which "would occupy a position between the trade and cooperation agreements and the Europe Agreements, and would involve a wide-ranging opening-up of markets, financial and economic cooperation, a framework for technical assistance and provisions concerning political dialogue".[198] The Council authorised the Commission to launch the negotiations of "Partnership and Cooperation Agreements" with the NIS in 1992[199] and eventually Ukraine was the first country, after Russia, to start negotiations on the PCA on 24 March 1993.[200] Remarkably, already in this first stage of negotiations, Ukraine expressed its aspiration to include, in one way or another, a reference in the agreement that accession of Ukraine to the Community should be a long-term objective.[201] It is not a surprise that the Community refused to include such a far-reaching commitment in the agreement, especially considering that even the Europe Agreements did not contain such a clear provision and were seen, until the 1993 Copenhagen European Council, as an alternative for accession. As it will be illustrated in the following chapters, the issue of an accession perspective would remain a subject of discussion in the EU-Ukraine relationship and was again put on the negotiation table during the EU-Ukraine AA talks.

Ukraine was the first post-Soviet country to sign a PCA in June 1994, however, it only entered into force, after a long ratification period, on 1 March

197 Bull. EC 1/2, 1992, 1.4.2. Already in 1990, when the Commission proposed the conclusion of the EAs with the CEECs, the Commission stated that the TCA with the USSR had to be reviewed to take into account political and economic changes in the USSR (European Commission, *op. cit.,* footnote 191, p. 3).

198 *Ibid.*

199 Bull. EC 1/2, 1992, 1.4.19.

200 Agence Europe, 27 March 1993, No. 5949.

201 *Ibid.*

1998.[202] The PCAs were concluded as mixed agreements as they cover areas that fell outside the Community's competence, such as the provisions on political dialogue.[203] Consequently, all the Member States had to ratify the Agreement along with the Community. This long ratification process was partly circumvented by the classical trick to conclude an "interim agreement on trade and trade-related matters", which was based on Article 133 TEC (now Article 207 TFEU).[204]

5.1.2 *Legal Basis, Objectives and "Essential Elements" of the PCA*

Unlike association agreements, such as the Europe Agreements, the PCAs had no specific legal basis in the TEC. Initially, the proposed *substantive* legal basis of the PCAs was the same as those of the TCAs, *i.e.* the combination of Articles 133 and 308 TEC (ex Articles 113 and 235 TEEC). Article 133 TEC (now Article 207 TFEU) deals with the common commercial policy (CCP), while Article 308 TEC (now Article 352 TFEU) allows the Council, acting unanimously, to take "appropriate measures" if action by the Community proves necessary to attain, in the course of the operation of the common market, one of the objectives of the Community where the Treaty has not provided the necessary powers. The combination of Articles 133 and 308 TEC was used in numerous bilateral agreements of general nature concluded in the pre-Maastricht period, combining a trade chapter with 'cooperation' (economic or development or both).[205] However, the initial Commission proposal for the substantive legal basis of the PCA had to be enriched with a series of other Treaty provisions as a result of the ECJ's well-known Opinion 1/94.[206] As a result, the substantive legal basis of the PCAs was

202 Council and Commission Decision of 26 January 1998 on the conclusion of the PCA between the EC and their Member States and Ukraine (*OJ*, 1998, L 49).

203 Title II PCA Ukraine. For the impact of Opinion 1/94 on the mixed character of the PCAs, see C. Hillion, 'Institutional Aspects of the Partnership between the European Union and the Newly Independent States of the Former Soviet Union: case Studies on Russia and Ukraine', *Common Market Law Review* 37, 2000, p. 1218.

204 For text, see *OJ*, 1995, L 311.

205 M. Maresceau, *op. cit.,* footnote 70, p. 188. Peers even refers to "the era of Article 235 TEC" to describe all the "second generation" cooperation agreements which covered economic cooperation and trade (S. Peers, 'EC Frameworks of International Relations: Co-operation, Partnership and Association', in A. Dashwood, C. Hillion, (eds.), *The General Law of EC External Relations* (Sweet&Maxwell, London, 2000), p. 163.

206 Opinion 1/94 of the Court of 15 November 1994 on the competence of the Community to conclude international agreements concerning services and the protection of intellectual property, [1994], ECR I-05267. For an analysis of this Opinion, see J. Bourgeois, 'The EC in the WTO and advisory opinion 1/94: an Echternach procession', *Common Market Law*

extended, on the basis of the implied powers doctrine, with ex TEEC Articles 54(2), 57(2) and 66 on establishment and services, Articles 75 and 84(2) on transport and Article 73c(2) on the movement of capitals and payments. Furthermore, Articles 99 and 100 TEEC were added to the legal basis in the light of the fiscal provision of the PCA.[207] Thus, Ukraine did not obtain an association agreement based on Article 310 EC (now Article 217 TFEU) but a PCA with a *sui generis* legal basis.

The key objective of the PCA was to establish a "partnership" between Ukraine and the Community (and its Member States) which (i) provides an appropriate framework for political dialogue allowing the development of "close political relations", (ii) promotes trade and investment and "harmonious economic relations" between the parties, (iii) provides a basis for "mutually advantageous economic, social, financial, civil scientific technological and cultural cooperation" and (iv) supports Ukrainian efforts to consolidate its democracy and to "complete the transition into a market economy".[208] This illustrates that the PCA was an "entry-level agreement" that envisaged to establish close political and economic cooperation with the Community and the integration of Ukraine into the world economy.[209]

The preamble and the objectives of the PCA omitted any EU Membership perspective, although this was requested by Ukraine during the negotiations (cf. *supra*).[210] The preamble only states that the parties are "recognizing and supporting the wish of Ukraine to establish close cooperation with European institutions". This indicates once more the difference between the PCAs and the EAs. Although the EAs were initially also seen as an alternative to accession and the Community refused to incorporate a clear membership perspective, in their preamble the parties recognised that it was the associated country's "ultimate objective [...] to become a member of the Community and that association through this Agreement [would], in the view of the Parties

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Review 32, 1995, pp. 763–787. For an analysis of the impact of Opinion 1/94 on the PCAs and the "inflation" of legal bases, see C. Flaesch-Mougin, 'Quel partenaire européen pour la Fédération de Russie: Union Européenne, Communautés, Etats membres?' in J. Raux, V. Korovkine (eds.), *Le Partenariat entre l'Union Européenne et la Féderation de Russie* (Editions Apogée, Rennes, 1998), pp. 66–68.

207 In addition, the Decisions on the conclusion of the PCAs refer also to Art. 95 of the Treaty establishing the European Coals and Steel Community (ECSC) and Art. 101 of the Treaty establishing the European Atomic Energy Community.

208 Art. 1 PCA Ukraine.

209 S. Peers, *op. cit.,* footnote 178, p. 845.

210 Agence Europe, 27 March 1993, No 5949.

help [the associated country] to achieve this".[211] This was a "masterpiece of diplomatic wording"[212] as this formulation satisfied both parties because on the one hand it allowed the CEECs to express their membership objectives and on the other hand it contained no legal or political commitment to enlarge on the part of the Community.

Further, the PCA also contains several "General Principles", such as the *essential element clause*.[213] According to this provision, respect for the democratic principles and human rights defined in the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of a market economy, including those enunciated in the documents of the CSCE Bonn conference, underpin the internal and external policies of the Parties and constitute an "essential element" of the Agreement.[214] According to the Joint Declaration concerning Article 102, annexed to the PCA, violation of one of these elements constitutes a "material breach" of the Agreement and in turn a "case of special urgency", which in derogation from the dispute settlement mechanism of Article 102 can lead to the *immediate* suspension of the Agreement.[215] Thus, this procedure provides the Union with the possibility to suspend the agreement if Ukraine does not comply with the principles enshrined in these documents. The practice to refer to respect of human rights and fundamental freedoms as an "essential element" and to cases of "special urgency" was not new but originated from the 11 May 1992 Council Declaration which foresaw such a clause in the cooperation agreements between the Community and its partners in the Conference on Security and Cooperation in Europe (CSCE) and was rapidly extended to other agreements.[216] This essential element clause could have played a role in the early days of the EU-Ukraine relations in the light of the lack of democratic reforms under the Kuchma regime or, in a later phase, in the light of the cases of "selective justice" (e.g. the Tymoshenko case) under the Yanukovych administration and this government's brutal reaction to

211 See for example the last recital in the Preamble of the Europe Agreement with Poland (*OJ*, 1993, L 348).

212 M. Maresceau, *op. cit.,* footnote 70, p. 353.

213 Art. 2 PCA Ukraine.

214 The same Declaration is included in the PCA with Russia concerning Art. 107 PCA Russia.

215 Art. 102 states that, if either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take "appropriate measures" after supplying the Cooperation Council with all relevant information required for a thorough examination of the situation, except in "cases of special urgency".

216 European Commission, 'On the inclusion of respect for democratic principles and human rights in agreements between the Community and third Countries', COM (95)216 final, 23 May 1995, p. 6.

the Maidan demonstrations in February 2014 (cf. *infra*). However, although this clause looks nice on paper, the number of agreements which have formally been suspended by the EU is extremely limited.[217] If a reaction of the Union is required to address a specific human rights situation in the territory of a contracting party, the EU prefers to act through its CFSP arsenal of restrictive measures based on Article 215 TFEU (e.*g.* arms embargo, freezing of assets, visa bans). Another preferred option is to withhold the signing or ratification of an envisaged agreement instead of suspending or denouncing existing agreements which constitute the legal framework of the relations with that country.[218] The 'nuclear' option of suspending or terminating an agreement is only used as a last option as it might reduce the Union's influence on that country to zero.[219] Therefore, the Union has to find a difficult equilibrium between a strict application of the essential element clause, which can lead to the isolation of a particular country, or a more flexible approach, which can undermine the role of the EU as a promotor of democratic norms and values. This pragmatic approach was very well illustrated by the recent developments in the EU-Ukraine relations. As it will be analysed in the next chapter, in a first phase, the Union threatened to suspend the signature of the envisaged EU-Ukraine AA until the Tymoshenko case and other cases of "selective justice" where properly addressed. Then, in a second phase, as a reaction to the Ukrainian Government's violent use of force against the Maidan demonstrators and Russia's violation of Ukraine's sovereignty and territorial integrity, the EU adopted sanctions against Ukrainian and Russian persons and entities involved (cf. *infra*). In addition, the negotiations with Russia on the 'New Agreement' were suspended.[220] However, the suspension of the existing PCAs with Russia and Ukraine, on the basis of the PCA essential element clauses, was never considered.

5.1.3 *Trade-related Provisions*

When concluding the PCAs with the NIS, none of the latter was a member of the 1947 General Agreement on Tariffs and Trade (GATT) which was modified

217 The only agreement which has formally been suspended is the 1980 Cooperation Agreement with Yugoslavia. For analysis, see M. Maresceau, 'Unilateral Termination and Suspension of Bilateral Agreements concluded by the EC', in M. Bulterman, *et al.* (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Kluwer Law International, Alphen aan den Rijn, 2009), pp. 462–464.

218 *Ibid*, p. 464.

219 *Ibid.*

220 3305th Council Meeting (Foreign Affairs), 3 March 2014, 7196/14.

by the Uruguay Round that established the WTO. However, the PCAs were the first international agreements to impose GATT/WTO obligations on the NIS. The PCAs with Ukraine and Russia apply most-favoured-nation (MFN) treatment according to Article I GATT, while allowing GATT conform exceptions,[221] whereas the other PCAs oblige the contracting parties to MFN treatment in only a limited number of areas.[222] The MFN treatment is also supplemented by the principle of non-discrimination in internal taxes and other charges or regulations.[223] In addition, the Community's Generalized System of Preferences (GSP) was also extended to certain industrial and agricultural products originating in the PCA countries.[224] The PCA also provided for the reciprocal abolition of quantitative import restrictions for goods originating in the countries of the contracting parties. However, Ukraine was during a transitional period allowed to reintroduce quantitative restrictions under strict conditions.[225] The parties also had to guarantee the freedom of transit of goods via or through their territories in accordance with the GATT.[226] Further, the Ukraine PCA applies GATT rules on customs valuation (Article VII GATT), custom fees (Article VIII GATT), marks of origin (Article IX GATT) and publication of trade regulations (Article X GATT) between the two parties.[227] Moreover, in the framework of the DSM, the Cooperation Council had to take into account, "to the greatest extent possible", GATT conform interpretation of PCA provisions referring to a GATT Article.[228]

It is clear that the objective of these PCA trade provisions was to guide Ukraine into the world market economy. However, various derogation measures

221 Art. 10 PCA Ukraine. The exceptions are: (i) advantages granted with the aim of creating a customs union or a free trade area, (ii) advantages granted to developing countries and (iii) advantages accorded to adjacent countries in order to facilitate frontier traffic.

222 For example, Art. 10(1) PCA Moldova states that the parties shall grant MFN treatment to one another in all areas in respect of customs duties and charges applied to imports and exports, provisions related to customs clearance, transit, warehouses, taxes and other internal charges of any kind applied to imported goods and methods of payment and the transfer of such payments.

223 Art. 15 PCA Ukraine.

224 Council Regulation No 3281/94 (*OJ*, 1994, L 348/1) (industrial products) and Council Regulation No 3282/94, (*OJ*, 1994, L 348/57) (agricultural products).

225 See Annex II PCA Ukraine. The transitional period ended on 31 December 1998.

226 Art. 11(1) even states that the principle of freedom of transit of goods is "an essential condition" of attaining the objectives of this agreement.

227 Art. 16 PCA Ukraine. This is also the case in the PCA with Russia (Art. 13), but not with the other PCAs.

228 Art. 89 PCA Ukraine.

in the trade chapter limited the scope of the liberalisation process. The PCA did not provide for the reduction or elimination of customs duties, or a standstill clause, but only incorporated a vague "*evolutionary clause*". On the basis of this provision, the parties considered "whether circumstances allow the beginning of negotiations on the establishment of a free trade area".[229] Another limitation to the PCA's trade liberalisation was the fact that sensitive products such as textiles, coal and steel, nuclear materials and agricultural products are left outside the scope of the agreement. Ukraine concluded separate agreements for trade in textiles and steel[230] and trade in agricultural products was only minimal covered in the PCA title on "economic cooperation".[231] Also the provisions on services and establishment were rather limited.[232] Further, a classic safeguard clause allowed the parties to take "appropriate measures" when domestic products are injured by an increased quantity of imported products.[233]

The PCA also authorised the parties to take anti-dumping and anti-subsidy measures, however, in accordance with the relevant GATT provisions.[234] These provisions were linked with a key hurdle in the Community's early trade relations with the NIS, *i.e.* the "non-market economy status" of the PCA countries. The PCAs did not lift this non-market economy status in respect of any PCA country, apart from Russia which was granted the status of an "economy in transition".[235] For non-market economies, a specific method for the calculation

229 Art. 4 PCA Ukraine. Ukraine insisted on the inclusion of this clause after a similar provision was included in the PCA with Russia. The Council had to broaden the negotiation mandate to include such an evolutionary clause in the PCAs with Ukraine, Belarus and Moldova (Agence Europe, 26 November 1993, No. 6115).

230 Regarding trade in steel, the Community and Ukraine concluded several agreements which established a quota system for Ukrainian steel exports to the Community. The Community gradually increased these quotas, for example, to take into account the EU enlargement. When Ukraine joined the WTO in May 2008, these agreements expired automatically (for text of the agreements, see: *OJ*, 2004, L 384; *OJ*, 2005, L 232 and *OJ*, 2007, L 178). Similar, for trade in textiles, several agreements were concluded which imposed quantitative restrictions on imports of textile and clothing from Ukraine (for text of the agreements, in the form of an *Exchange of Letter*, see: *OJ*, 2001, L 16/3; *OJ*, 2005, L 65/26 and *OJ*, 2007, L 17/18). Also these agreements expired when Ukraine joined the WTO.

231 Art. 60 PCA Ukraine.

232 Arts. 30–40 PCA Ukraine.

233 Art. 18 PCA Ukraine.

234 Art. 19 PCA Ukraine.

235 Preamble PCA Russia. This status had little effect on anti-dumping or subsidy investigations. For analysis of this status, see O. Engelbutzeder, *EU Anti-Dumping Measures Against Russian Exporters. In View Of Russian Accession to the WTO and the EU Enlargement*, (Peter Lang, Frankfurt, 2004), pp. 135–145.

of the normal value applies according to the "analogue country" procedure.[236] The PCA countries, mainly Russia and Ukraine, criticised the Community's (now Union) many anti-dumping procedures against their products and envisaged a "Market Economy Status" as this would reflect their pricing policy more accurately and would lower the dumping margins. In October 2000, some progress was made with the introduction of the "special market economy regime" with respect to imports from Ukraine,[237] after this regime was already applied to Russia in July 1998.[238] It introduced the possibility for individual exporting producers from Russia and Ukraine to be allowed market economy treatment (MET), under strict conditions, by having their normal value determined in accordance with the rules applicable to market economy countries. However, the implications of this status were limited.[239] Eventually, Ukraine was recognized in December 2005 as a fully-fledged market economy country,[240] which implies that for the calculation of dumping margins, costs and prices will be taken from the Ukrainian producers or the Ukrainian market.[241] Nevertheless, despite this status and Ukraine's WTO accession on 16 May 2008, the Union continued to apply several anti-dumping measures on Ukrainian products since also under the 'standard' procedure of the calculation of the normal value, these products were considered as being dumped on the EU market.[242]

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236 Art. 2(7) of the basis anti-dumping Regulation (Regulation No 1225/2009, *OJ*, 2009, L 343/51). For analysis of this procedure, see Van Bael & Bellis, *'EU Anti-Dumping and Other Trade Defence Instruments'* (Kluwer Law International, Alphen aan den Rijn, 2001), pp. 140–201.

237 Council Regulation No 2238/2000 (*OJ*, 2000, L 257/2).

238 Council Regulation No 905/98 (*OJ*, 1998, L 128/18).

239 Only a limited number of companies obtained this status as it was difficult for Russian and Ukraine companies to comply with these conditions such as the 'non-State interference requirement' (O. Engelbutzeder, *op. cit.,* footnote 235, p. 151).

240 According to the preamble of the amending Regulation, the Market Economy Status was granted "in view of the very significant progress made by Ukraine towards the establishment of market economy conditions, as recognized by the conclusions of the Ukraine-European Union Summit on 1 December 2005" (Council Regulation No 2117/2005 (*OJ*, 2005, L 340/17)).

241 Russia was granted the Market Economy Status in 2002. For a critical note on the granting of the Market Economy Status in the light of the Union's anti-dumping amendments of 2002, see O. Engelbutzeder, *op. cit.,* footnote 235, p. 137 and pp. 158–165.

242 See for example Council Implementing Regulation (EU) No 795/2012 of 28 August 2012 amending Implementing Regulation (EU) No 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine (*OJ*, 2012, L 238/1) and Council Implementing Regulation (EU) No 102/2012 of 27 January 2012 imposing a definitive anti-dumping duty on imports of steel

The PCA also included a title on "Economic Cooperation", aimed at contributing to the process of economic reform and recovery and sustainable development of Ukraine.[243] This Title covered a wide variety of topics and contained general and broadly defined provisions ranging from industrial cooperation, via social cooperation and tourism to combating money laundering and drugs trafficking.[244] A number of these provisions had a particular importance for the EU-Ukraine relations, such as cooperation in the civil nuclear sector. However, in general, these provisions were more a declaration of intent with limited results.

The PCA also included a legislative approximation clause (cf. *supra*). According to Article 51 PCA "[t]he Parties recognize that an important condition for strengthening the economic links between Ukraine and the Community is approximation of Ukraine's existing and future legislation to that of the Community". Therefore, Ukraine "shall endeavour to ensure that its legislation will be gradually made compatible with that of the community".[245] This provision identifies several priority areas for legislative approximation such as customs law, company law, public procurement and transport. It also contains a commitment of the Community (now Union) to provide Ukraine with technical assistance which may include the exchange of experts, training activities and seminars and aid for translation of Community legislation in the relevant

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ropes and cables originating in the People's Republic of China and Ukraine as extended to imports of steel ropes and cables consigned from Morocco, Moldova and the Republic of Korea, whether declared as originating in these countries or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009 and terminating the expiry review proceeding concerning imports of steel ropes and cables originating in South Africa pursuant to Article 11(2) of Regulation (EC) No 1225/2009 (*OJ*, 2012, L 36/1).

243 Art. 52 PCA Ukraine.

244 The Title on Economic Cooperation covers industrial cooperation, investment promotion and protection, public procurement, cooperation in the field of standards and conformity assessment, mining and raw materials, cooperation in science and technology, education and training, agriculture and the agro-industrial sector, energy, cooperation in the civil nuclear sector, environment, transport, space, postal services and telecommunications, financial services, money laundering, monetary policy, regional development, social cooperation, tourism, small and medium-sized enterprises, information and communication, consumer protection, customs, statistical cooperation, economics and drugs.

245 For the approximation clause in the PCA with Russia, see Art. 55 PCA Russia. For an extensive analysis of Russia's approximation to the EU *acquis*, focusing on competition law, see A. Matta, 'Understanding and assessing the EU-Russia legal approximation process. The case-study of competition law', *Doctoral thesis*, European University Institute, 2011.

sectors. As already noted, this provision is only a voluntary *best endeavours clause* that contains no formal legal commitment. Considering the criteria developed in the previous Title, the PCA cannot be categorised as an 'EU integration agreement'. This approximation provision does not include a binding obligation to apply, implement or incorporate in the Ukrainian domestic legal order a selection of EU *acquis*, neither does it contain criteria to ensure the uniform interpretation and application of this *acquis*. In addition, this provision fails to provide clear guidelines on the scope of EU legislation to be taken as the basis for approximation and does not include a link with the evolutionary clause.[246]

After the signing of the PCA, several ambitious legislative acts were adopted by the President and Government of Ukraine to implement this legislative approximation clause. These acts even envisaged the gradual "adaptation" of the entire EU *acquis* in order the prepare Ukraine for a FTA and association with the EU and, after complying with the Copenhagen Criteria, for EU accession.[247] Although all these different legal acts and institutional reforms looked nice on paper, in practice, the results of Ukraine's "adaptation" to the EU *acquis* were rather limited.[248] The Ukrainian leadership repeatedly expressed its ambitions to integrate closer into the EU by establishing a FTA and association

246 The legislative approximation clauses in the SAAs are more specific and foresee gradual legislative approximation in two phases. The first phase focuses mainly on the Internal Market *acquis* and the second phase on the other elements of the *acquis* not covered in the first phase. See for example Art. 68 SAA Macedonia.

247 See for example the Edict of the President of Ukraine 'On approval of the Strategy of Integration of Ukraine to the European Union', 11 June 1998, 615/98; the Decree of Cabinet of Ministers of Ukraine, 'Concept of Adaptation of the Legislation of Ukraine to the Legislation of the EU', 16 August 1999, 1496 and the Programme of Integration to the European Union, approved by the Edicts of the President of Ukraine, 14 September 2000, 1072/2000. For analysis, see R. Petrov, 'Recent Developments in the Adaptation of Ukrainian Legislation to EU law', *European Foreign Affairs Review* 8, 2003, p. 140; K. Wolczuk, 'Implementation without Coordination: The Impact of EU Conditionality on Ukraine under the European Neigbourhood Policy', *Europe-Asia Studies* 61(2), 2009, p. 193; R. Petrov, 'Legislative approximation and application of EU law in Ukraine', in P. Van Elsuwege, R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), pp. 137–158; A. Albi, 'The EU's 'External Governance' and legislative Approximation by Neighbours: Challenges for the Classic Constitutional Templates' *European Foreign Affairs Review* 14, 2009, pp. 219–22.

248 *Ibid.*

with the EU and even by EU accession, however, these declarations were not backed up with a coherent and consistent integration policy.[249]

5.1.4 *Direct Effect of the PCA(s)*

The fact that the PCA only established a "partnership", without providing for association or a future accession perspective, does not prevent, according to the ECJ, that certain of its provisions can acquire direct effect.[250] Although the Court never had the chance to interpret the Ukraine PCA, Petrov notes that several provisions of the EU-Ukraine PCA could have direct effect as they are sufficiently clear and precise to be directly effective and are not subject, in terms of implementation and effect, to the adoption of subsequent measures, such as the provisions on key personnel (Art. 35 PCA) and the movement of capital (Art. 48 PCA).[251]

Important in this regard is the PCA provision on labour conditions. Article 24 of the PCA with Ukraine provides that the parties "shall *endeavour* to ensure" that the treatment accorded to the other parties' nationals, legally employed in its territory, shall be free from any discrimination based on nationality as regards working conditions, remuneration or dismissal, as compared to its own nationals.[252] Notably, the corresponding provision in the PCA with Russia is more explicit and states that the parties "shall ensure" non-discrimination in labour conditions.[253] Attention for the exact formulation of this obligation is not unimportant considering that the ECJ examines the potential direct effect

249 In the case of the other post-Soviet countries, the results of the PCA approximation clauses were even more modest. For overview and analysis, see: G. Gabrichidze, 'Legislative approximation and application of EU Law in Georgia'; A. Khvorostiankina, 'Legislative approximation and application of EU law in Moldova'; P. Kalinichenko, 'Legislative approximation and application of EU law in Russia', in P. Van Elsuwege, R. Petrov (eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014); A. Matta, *op. cit.,* footnote 245 and O. Gutu, 'Moldova's Convergence with the *acquis*, a Pro-Growth and Pro-Integration Strategy', *CEPS Working Document* 238/2006.

250 ECJ, Case C-265/03, *Simutenkov*, [2005], ECR I-02579, para. 28. The Court already noted in *Kziber* that the fact that an agreement does not refer to association or future accession to the Community (now Union) does not prevent certain of its provisions from being directly applicable" (Case C-18/90, *Office national de l'emploi v. Bahia Kziber,* [1991], ECR 199, para. 21).

251 R. Petrov, 'Legal Basis and Scope of the new EU-Ukraine Enhanced Agreement. Is there any room for further speculation?', *EUI Working Paper*, 2008/17.

252 Emphasis added.

253 Art. 23 PCA Russia. The other PCAs contain a more asymmetrical obligation as the Community shall only "endeavour to ensure" against discrimination in labour conditions,

of these provisions in the light of their specific wording. According to the well-established case-law of the ECJ, a provision of an agreement between the Union and a non-member country is directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a "clear, precise and unconditional" obligation which is not subject, in its implementation or effect, to the adoption of any subsequent measure.[254] Subsequently, the Court ruled in the *Simutenkov* case that Article 23 of the PCA with Russia lays down "in clear, precise and unconditional terms a prohibition precluding any Member State from discriminating on grounds of nationality against Russian workers vis-à-vis their own nationals" and, therefore, "[it] can be relied on by an individual before a national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end".[255] Although the Court never interpreted Article 24 of the Ukraine PCA, it is clear that it would not have met the "clear, precise and unconditional" test and acquire direct effect as the parties only "endeavour" to ensure non-discrimination in labour conditions. As it will be analysed in the following chapters, such a non-discrimination provision caused legal complications in the EU-Ukraine AA.

The PCA provisions on the coordination of social security of legally employed workers were carefully worded to exclude direct effect,[256] especially after the ECJ's *Kziber* ruling.[257] By explicitly requiring the conclusion of separate agreements to guarantee the coordination of social security systems, direct effect of these provisions was automatically excluded. Thus, legally employed Ukrainian nationals could not invoke this PCA provision on non-discrimination in social security before a national Court.

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whereas these PCA partners "shall ensure" against the non-discrimination of EU nationals in labour conditions (see for example Art. 20 PCA Georgia).

254 ECJ, Case C-12/86 *Demirel* [1987], ECR 3719, para. 23; Case C-192/89 *Sevince,* [1990], ECR 3461, para. 14; Case C-63/99 *Gloszczuk,* [2001] ECR 6369, para. 30 and Case C-171/01 *Wählergruppe Gemeinsam,* [2003], ECR I-4301, para. 54.

255 Case C-265/03, *Simutenkov*, [2005], ECR 02579, paras. 22–23. C. Hillion notes that the Simutenkov ruling mitigated the differentiation between the EAs and the PCAs (C. Hillion, *Common Market Law Review* 45, 2008, pp. 815–833).

256 Art. 25 PCA Ukraine.

257 In this case, the ECJ granted the non-discrimination clause regarding social security in the cooperation agreement with Morocco (Art. 41) direct effect. This judgment upset many Member States so that they since then refused to include the national treatment clause any longer with regard to social security in a number of bilateral agreements. The Europe Agreements were the first 'victims' of this judgment (For analysis, see M. Maresceau, *op. cit.*, footnote 70, p. 282) (Case C-18/90, *Office national de l'emploi v. Bahia Kziber,* [1991], ECR 199).

5.1.5 *Institutional Framework*

The PCA established a regular political dialogue between the parties which will consolidate "the rapprochement between the Community and Ukraine, support the political and economic changes under way in that country and contribute to the establishment of new forms of cooperation".[258] At the top of the institutional pyramid was the Cooperation Council which consisted out of members of the EU Council and Commission on the one hand, and members of the government of Ukraine on the other. It was responsible for monitoring the PCA and played a key role in the DSM of the agreement.[259] A key deficiency of the institutional framework was that the Cooperation Council could only take non-binding "recommendations", unlike the Association Councils under the EMAAs, SAAs and the former EAs.[260] This implied that the Cooperation Council could not take legally binding decisions to settle a dispute arising in the framework of the PCA, oblige the parties to take the necessary measures to implement a decision of the Cooperation Council or to take additional measures to deepen or widen the scope of the PCA.[261] The parties could therefore only further develop their partnership through the conclusion of a new international agreement, which requires a more burdensome procedure than a binding decision of a common institution. In practice, the role of the EU-Ukraine Cooperation Council was rather limited. It was mainly used as an instrument to jointly take stock of the key developments in the EU-Ukraine partnership and to set the agenda for the following year.[262] The most important political issues and trade disputes were – and still are – discussed at the annual "EU-Ukraine Summits". These have no

258 Art. 6 PCA Ukraine.

259 For the DSM, see Art. 96 PCA Ukraine.

260 Art. 96(2) PCA Ukraine. See for example Art. 80 EMAA Morocco, Art. 110 SAA Macedonia and Art. 104 EA Poland.

261 In the case of the PCA Russia, the Cooperation Council was in 2003 replaced by a "Permanent Partnership Council", however, without equipping this new institution with the competence to take legally binding decisions (P. Van Elsuwege, 'The four Common Spaces: new impetus to the EU-Russia Strategic Partnership?' in M. Maresceau, A. Dashwood (eds.), *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008), p. 338.

262 See for example the latest EU-Ukraine Cooperation Council meeting, Council of the European Union, Sixteenth Meeting of the EU-Ukraine Cooperation Council, Brussels, 24 June 2013, Presse 289. In the case of Russia, the institutional framework proved to be a useful instrument to discuss and manage the Russian concerns regarding EU enlargement. For analysis, see P. Van Elsuwege, *op. cit.,* footnote 261.

explicit legal basis in the PCA, contrary to the PCA with Russia.[263] The PCA only states that consultations shall be held as appropriate between the parties "at the highest political level". There is no fixed composition of the EU-Ukraine Summits. Ukraine is mostly represented by its President and the Minister of Foreign Affairs. Before the Lisbon Treaty, the EU was represented by the Head of State or Government of the country holding the Presidency of the European Council[264] and the President of the Commission. They were often "assisted" or "accompanied" by the High Representative for CFSP and the Commissioner for External Relations (and later also for the ENP). Moreover, also the Trade Commissioner could be present when important trade matters were discussed. After the Lisbon Treaty entered into force, the constellation of the EU delegation changed and the EU is always "represented" by the President of the European Council and the President of the European Commission.[265] In addition, the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter, the 'High Representative') can be present. Members of the Commission such as the Trade or Energy Commissioner can also "take part" in the Summits that cover issues falling under their responsibility.[266]

5.1.6 *Concluding Remarks*

The EU-Ukraine PCA was a modest agreement in its objectives and contents and can be considered as an "entry-level" agreement.[267] As the ECJ ruled in the *Simutenkov* case, PCAs are "limited to establish a partnership between the Parties, without providing for an association or future accession of [the NIS] to the Communities" and aim to "the gradual integration between [the NIS] and a wider area of cooperation in Europe".[268] The key objective of the PCAs was indeed cooperation and not integration. The only integration

263 The PCA Russia foresees two of such summits per year (Art. 7 PCA Russia).

264 The President or Prime Minister could be "accompanied" by its Minister of Foreign Affairs (see for example EU-Ukraine Summit, 6 October 2003, Yalta, IP/03/1343).

265 For example, on the 14th EU-Ukraine Summit on 22 November 2010, the Union was only represented by the President of the European Council and the Commission (EU-Ukraine Summit, 22 November 2010, *Joint Press Statement*, MEMO/10/600). Thus, after the Lisbon Treaty, the Head of State or Government of the country holding the rotating EU Presidency was excluded from the Summits.

266 For example, at the EU-Ukraine Summit in Brussels on 25 February 2013, European Commissioners Günther Oettinger (Energy) and Štefan Füle (Enlargement and ENP) also took part in the Summit.

267 S. Peers, *op. cit.,* footnote 178, p. 845.

268 ECJ, C-265/03 *Simutenkov*, *op. cit.,* footnote 255, paras. 27–28.

element of the EU-Ukraine PCA is the fact that it has the aim to "integrate Ukraine into the open international trading system".[269] By imposing GATT obligations on Ukraine, the agreement aimed to guide Ukraine into the world market economy, however, "while holding the country at a controllable distance from the EU Internal Market".[270] Moreover, because the PCA legislative approximation provision was a 'best endeavours' clause, this agreement cannot be categorised as an EU integration agreement. Nevertheless, considering the specific economic, historical and political context in which this agreement was established, the PCA as it resulted was the only feasible option.

Although requested by Ukraine, there was no willingness on the part of the EU to offer Ukraine an association or accession perspective, especially as the EU was already occupied with managing the accession process of the CEECs. Ukraine put considerable but unrealistic hopes on the December 1999 Helsinki European Council, where it was expected that Ukraine's membership aspirations would be recognized.[271] However, the EU Heads of State and Government only declared that the EU "took account [of] Ukraine's European aspirations and pro-European choice",[272] a statement which would become a catchphrase during the following annual EU-Ukraine Summits.[273]

Also the Common Strategy (CS) on Ukraine, which was adopted at the December 1999 Helsinki European Council, did not initiated a shift in the EU's policy towards Ukraine.[274] The Common Strategy instrument was introduced by the Treaty of Amsterdam (former Art. 13 TEU) in order to improve the coherence and effectiveness of EU external action. Common Strategies were also adopted on Russia and the Mediterranean Region.[275] The revolutionary aspect of the CSs was that they provided an all-embracing and cross-pillar framework to bundle and steer the different policies and instruments of the Community, the Union and the Members States to a specific country or region, while leaving the respective decision-making procedures for the tree pillars intact. Despite the cross-pillar potential of the CSs, it is recognised that both the CSU

269 Preamble PCA Ukraine.

270 R. Petrov, *op. cit.,* footnote 178, p. 193.

271 K. Wolczuk, 'Integration without Europeanisation; Ukraine and its Policy towards the European Union, *EUI Working Paper* 2004/15, p. 6.

272 Helsinki European Council, 10 and 11 December 1999, Presidency Conclusions, para. 56.

273 See for example the EU-Ukraine Summit, 4 July 2002, *Joint Statement*, Copenhagen, 10607/02.

274 For text, see *OJ*, 1999, L 331/1.

275 For texts, see *OJ*, 1999, L 157/1 and *OJ*, 2000, L 183/1.

and the Common Strategy on Russia (CSR) were missed opportunities and that they achieved limited results.[276] The CSU was mainly a unilateral EU instrument which did not formulate new objectives for the EU-Ukraine partnership. Moreover, both the CSU and the CSR were fiercely criticized for their complete lack of attention to the EU enlargement process and its impact on Ukraine and Russia. Maresceau even observed that for the drafters of the CSs, "it is almost as if EU enlargement [was] taking place on another planet".[277]

Indeed, the impact of the accession of the CEECs on the neighbours of the enlarged EU was initially largely ignored, or enlargement was presented by the Union as something that was beneficial for "the entire European continent",[278] thus including for Ukraine and Russia. This was remarkable because the enlargement with the CEECs brought the EU to the doorstep of Ukraine and Russia and created common challenges concerning transport and transit, visa regime, energy supplies, and cross-border cooperation. However, when the accession of the first group of CEECs was in sight, the Russian and Ukrainian authorities became aware "that it is not all gold that glitters in the EU's official enlargement discourse".[279] In the case of Ukraine, these issues were addressed in the different PCA bodies[280] where it was recognised that enlargement posed challenges in different areas of cooperation but that "the best way to use the opportunities of enlargement is for Ukraine to intensify its work in aligning its legislation, norms and standards with those of the European Union".[281] In the case of Russia, this issue was more problematic as both the EU and Russia gradually became aware that "the pending EU enlargement [would] open new

276 For an overview of the implementation of the CS on Russia and Ukraine, see M. Maresceau, 'EU Enlargement and EU Common Strategies on Russia and Ukraine: An ambiguous Yet Unavoidable Connection', in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing, Oxford, 2004), pp. 208–216; C. Hillion, 'Common Strategies and the Interface between EC External Relations and the CFSP: Lessons of the Partnership Between the EU and Russia', in A. Dashwood, C. Hillion (eds.), *The General Law of EC External Relations* (Sweet & Maxwell, London, 2000), pp. 287–301 and H. Haukkala, 'The making of the European Union's Common Strategy on Russia', in H. Haukkala, S. Medvedev (eds.) *The EU Common Strategy on Russia. Learning the Grammar of the CFSP* (Finish Institute for International Affairs, Helsinki, 2001), pp. 22–80.

277 M. Maresceau, *op. cit.*, footnote 177, p. 189.

278 Helsinki European Council, 10–11 December 1999, para 3.

279 M. Maresceau, *op. cit.,* footnote 177, p. 195.

280 See for example 7th meeting of the EU-Ukraine Cooperation Council, 18 May 2004, 9259/04 (Presse 151).

281 EU-Ukraine Summit, Copenhagen, 4 July 2002, Joint Declaration.

prospects for [their] relations but at the same time will possibly create new problems including in the sphere of trade, economic co-operation and human contacts".[282] In order to guarantee a smooth accession of the CEECs to the EU in 2004, the EU had to strike some last-minute legal and diplomatic deals with Russia on crucial issues such as the protection of Russian minorities in the Baltic States, the status of Kaliningrad and the extension of the PCA to the new Member States.[283]

It was in this climate that the ENP was developed, including its objectives for 'EU integration without membership' and the new generation of EaP AAs and DCFTAs.

5.2 The ENP and the EaP: The Policy Framework of the EU-Ukraine AA

5.2.1 *Objectives and Instruments of the ENP*

The analysis above illustrates that the Union gradually became aware that a new policy was required towards the new eastern neighbours in the post-Soviet area as a response to the enlargement with the CEECs. The April 2002 General Affairs Council invited the Commission and the High Representative for CFSP to work up ideas on the EU's relations with the new neighbours[284] and the 2002 Copenhagen European Council stated that the Union "remains determined to avoid new dividing lines in Europe" and that the Union wishes "to enhance its relations with Ukraine, Moldova, Belarus and the southern Mediterranean countries based on a long-term approach promoting democratic and economic reforms, sustainable developments".[285] In March 2003 the Commission eventually launched the ENP with its "Wider Europe"

282 EU-Russia Summit, 29 May 2002, *Joint Statement,* Moscow, 9424/02 (presse 171).

283 On this issue, see P. Van Elsuwege, *op. cit.,* footnote 261, pp. 339–341 and *op. cit., 26*, pp. 421–563. For a more recent analysis of the Russian minority issue, see D. Kochenov, A. Dimitrovs, 'EU Citizenship for Latvian "Non-Citizens": a Concrete Proposal', *Jean Monnet Working Papers* (NYU Law School) No. 14/13, 2013.

284 2421st General Affairs Council, Luxembourg, 15 April 2002, 7705/02 (Presse 91), p. 10. In August 2002, a joint letter, entitled "Wider Europe", by EU Commissioner Chris Patten and the EU High Representative for the CFSP, addressed to the Danish Presidency, made already some suggestions for a new "neighbourhood policy". Also former President of the European Commission Romano Prodi proposed the establishment of a new policy towards the EU neighbours to create "a ring of friends" surrounding the Union (R. Prodi, 'A Wider Europe – A Proximity Policy as the key to stability', Speech ECSA World Conference, Brussels, 5–6 December 2002).

285 Copenhagen European Council, Presidency Conclusions, 12/13 December 2002, 15917/2002, para. 24.

Communication,[286] which was endorsed by the Council and the Thessaloniki European Council in the same year.[287] The ENP was further developed by the Commission in its 2004 ENP Strategy Paper[288] and an assessment and review took place in, *inter alia*, 2006 and 2011, however, without changing the overall objectives and policy framework.[289]

In order to avoid a new dividing line in Europe, the ENP had to create "a ring of friends surrounding the Union and its closest European neighbours, from Morocco to Russia and the Black Sea"[290] and had to share "the benefits of the EU's 2004 enlargement with the neighbouring countries in strengthening stability, security and well-being for all concerned".[291] The key objectives of the ENP can be summarised as the promotion of *stability, security and prosperity* to the Union's neighbourhood.[292] The European Council referred to the ENP as a "means to strengthen cooperation with its neighbours and expand prosperity, stability and security beyond the borders of the European Union".[293] For the Council, the overall goal of the ENP is "to work with the partners to reduce poverty and create an area of shared prosperity and values based on free trade, deeper economic integration, intensified political and cultural relations, enhanced cross-border co-operation and shared responsibility for conflict prevention and conflict resolution".[294] These different ENP objectives had to be

286 European Commission, 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104 final, 11 March 2003.

287 2518th External Relations Council, Luxembourg, 16 June 2003, 10369/03 (Presse 166); Thessaloniki European Council, Presidency Conclusions, 19 and 20 June 2003, 11638/03.

288 European Commission, 'European Neighbourhood Policy Strategy Paper', COM (2004) 373 final, 12 May 2004.

289 European Commission, 'Strengthening the European Neighbourhood Policy', COM (2006) 726 final, 4 December 2006; European Commission, 'A new response to changing Neighbourhood', COM (2011) 303, 25 May 2011. For the latest Commission Communication and review of the ENP, see European Commission, 'Neighbourhood at the Crossroads: Implementation of the ENP in 2013', JOIN (2014) 12 final, 27 March 2014.

290 R. Prodi, *op. cit.,* footnote 284, p. 4.

291 European Commission, *op. cit*., footnote 288, p. 3.

292 M. Cremona, 'The European Neighbourhood Policy. More than a Partnership?' in M. Cremona (ed.) *Developments in EU External Relation Law* (Oxford University Press, Oxford, 2008), p. 257.

293 European Council of 16 June 2006, Brussels, Presidency Conclusions, 10633/1/06 REV 1, para. 57. Also the Commission identified the promotion of stability, prosperity and security as the key ENP objectives. See for example the Commission's Wider Europe Communication, *op. cit*., footnote 286, p. 4. See also the joint letter from Chris Patten and Solana, *op. cit*., footnote 284.

294 2421st General Affairs Council, Luxembourg, 15 April 2002, 7705/02 (Presse 91), p. 10. See also GAER Council conclusion on the European Neighbourhood Policy from 14 June 2004 and 18 June 2007.

obtained through instruments and methodologies that were 'borrowed' from the pre-accession strategy such as conditionality,[295] joint ownership and differentiation.[296] The security dimension of the ENP was largely brought out by the European Security Strategy, which was adopted by the European Council in 2003.[297] According this document it is "in the Union's interest that countries in our borders are well-governed" because the enlargement will bring the EU closer to "troubled areas". According to this Strategy, by establishing close and cooperative relations with its neighbours, the Union strengthens its own security. It has been noted that the strong emphasis on security illustrates that the ENP is mainly driven by EU-concerns.[298]

As mentioned above, from the outset, the Union consistently stressed that this policy was distinct from the enlargement process. Former President of the Commission Prodi argued that the EU had to be prepared to offer the new neighbours "more than partnership and less than membership" and share "everything but institutions".[299] However, it was also stressed that "the ENP does not in any way prejudge the possible future development of their relationship with the EU, in accordance with Treaty provisions".[300] This implies

295 The conditionality policy was even reinforced in the ENP review of 2011 with the introduction of the "more-for-more" principle: "the more and the faster a country progresses in its internal reforms, the more support it will get from the EU" (European Commission, 'A new response to changing Neighbourhood', COM (2011) 303, 25 May 2011).

296 J. Kelly, 'New Wine in Old Wineskins: Promoting Political reforms through the New European Neighbourhood Policy', *Journal of Common Market Studies* 44(1), 2006, pp. 29–55; G. Meloni, 'Is the same toolkit used during enlargement still applicable to the Countries of the New Neighbourhood? A problem of mismatching between objectives and instruments', in M. Cremona, G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation? EUI Working Paper* (Law) 2007/21, p. 101. Moreover, the Union adopted in 2006 the European Neighbourhood and Partnership Instrument (ENPI) (Regulation (EC) No 1638/2006 of the European Parliament and the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (*OJ*, 2006, L 310/1). This financial instrument replaced the existing financial instruments (TACIS and MEDA) for the ENP region and Russia for the period 2007–2013. The ENPI is now replaced by the "European Neighbourhood Instrument" (ENI) (cf. *infra*).

297 The European Security Strategy, 'A secure Europe in a Better World', adopted by the Brussels European Council on 12 December 2003.

298 Cremona and Hillion see the ENP even as a regional implementation of the European Security Strategy (M. Cremona, C. Hillion, 'L'Union fait la force? Potential and limitations of the European Neighbourhood Policy as an integrated EU Foreign and Security Policy', *EUI Working Paper* (Law) No 2006/39, p. 3).

299 R. Prodi, *op. cit.,* footnote 284.

300 European Commission, *op. cit.,* footnote 289, p. 2.

that the ENP does not close any doors to EU Membership for the 'European' ENP partners such as Ukraine.[301] Although being clearly "distinct" from the enlargement policy, it cannot be ignored that the ENP has a specific 'integration' agenda with both an economic and a political dimension. The economic integration dimension of the ENP relates to the aim of the EU to gradually and partially integrate the neighbouring countries into the EU Internal Market on the basis of the new DCFTAs. Whereas for the eastern ENP partners, these DCFTAs are included in the new generation of EaP AAs, DCFTAs are offered to several southern ENP partners within the existing legal framework of the EMAAs (cf. *infra*). The political integration dimension of the ENP refers to the instruments and initiatives that aim to bring the ENP partners as close as possible to the EU in different areas such as cooperation within foreign and security policy and the AFSJ (e.g. visa facilitation).[302] The ENP also aims to establish sectoral cooperation in areas such as energy and transport and participation of the ENP partners in EU programmes and agencies.[303] The following chapters will illustrate that these different areas are all covered in the new EaP AAs.

It was already noted that the ENP is developed on the basis of a southern dimension (i.e. the 2008 Union for the Mediterranean and the 2011 Partnership for Democracy and Shared Prosperity) and an eastern dimension (i.e. the

301 Lacking a clear membership perspective, the ENP framework did not satisfy Ukraine, especially after the country explicitly declared its membership aspirations during the Orange Revolution (K. Wolczuk, 'Ukraine and its relations with the EU in the context of the European Neighbourhood Policy', in S. Fischer (ed.) *Ukraine, Quo Vadis?* (*Chaillot Paper* No 108, Institute for Security Studies, 2008), p. 99).

302 For Ukraine, see Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations (*OJ*, 2005, L 182/29); Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information (*OJ*, 2005, L172/84); Agreement between the European Union and Ukraine on the participation of Ukraine in the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL 'Proxima') (*OJ*, 2004, L 354/82).

303 Protocol to the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other part, on a Framework Agreement between the European Union and Ukraine on the general principles for the participation of Ukraine in Union programmes (*OJ*, 2011, L 18/3). For a detailed analysis on the participation of third (ENP) countries in EU programmes and agencies, see C. *Rapoport, Les partenariats entre l'Union européenne et les Etats tiers européens. Etude de la contribution de l'Union européenne à la structure juridique de l'espace européen* (Bruylant, Bruxelles, 2011), pp. 415–551.

EaP).[304] In addition to the key objective of the EaP to establish political association and economic integration with the eastern neighbours through the conclusion of a new set of association agreements and DCFTAs – an objective which is now only realised with three partner countries –, the EaP also developed new instruments such as the Comprehensive Institution-Building (CIB) programme and specific "flagship initiatives". In addition, a multilateral track of the EaP was established, based on four policy platforms: (i) democracy, good governance and stability, (ii) economic integration and convergence with EU policies, (iii) energy security and (iv) contacts between people. The most important achievement of the EaP is that it addresses the problem of the "one-size-fits-all"[305] framework of the ENP as it diverts the 'eastern' ENP partners from those in the southern Mediterranean. However, it can be argued that the EaP does not create an added value for the ENP, in particular for the EU-Ukraine relations.[306] It has the same objectives of the ENP and uses almost the same instruments and methodologies. The two most important new elements that the EaP offers to its partners, i.e. the new EaP AAs and DCFTAs, were in the case of Ukraine already offered before this policy was launched. Moreover, it does not change the lack of a membership perspective in the ENP. This was a big disappointment for Ukraine because it was hoping for such a perspective now that the Union diverted the eastern neighbours from the other non-European southern ENP partners. Not surprisingly, EU Membership references became a recurring subject of discussion and diplomatic controversy during the preparations of the declarations of the different Eastern Partnership Summits. Despite Ukraine's strong request for a reference to EU accession, the EU always refused to commit itself to a clear – or even indirect – membership perspective. Consequently, the declarations always avoided explicit accession language. For example, during the preparations of the 2009 Prague Eastern Partnership Summit, a draft text of the Czech EU presidency referred to Ukraine and the other partners as "European countries" but Germany and the

304 In the 2013 ENP Strategy Paper, the Commission confirmed that the ENP will be further developed on the basis of these two regional dimensions (European Commission, 'The ENP: Working towards a Stronger Partnership', JOIN(2013) 4 final, 20 March 2013, p. 14). Also the Council stressed the importance of the regional dimension of the ENP (Council Conclusions, 3222 Council Meeting, Foreign Affairs, 18 February 2013, 6391/13 (presse 55)).

305 M. Cremona, C. Hillion, *op. cit.,* footnote 298, p.16.

306 For a more detailed analysis of the EU-Ukraine relations in the light of the EaP, see: E. Korosteleva, *The European Union and its Eastern Neighbours. Towards a more ambitious partnership?* (Routledge, London/New York, 2012), p. 20–40 and O. Stegniy, 'Ukraine and the Eastern Partnership: 'Lost in Translation?', in E. Korosteleva (ed.) *Eastern Partnership: a new opportunity for the Neighbours* (Routledge, London and New York, 2012), pp. 52–74.

Netherlands were forced to change this to "Eastern European Partners" and "partner countries" because "European countries" sounded too pro-enlargement.[307] Finally, the Joint Declaration stated that "the Eastern Partnership will go ahead without prejudice to individual participating countries' aspirations for their future relationship with the European Union".[308] In the lead-up to the 2015 Riga Summit, the first Summit after the signing of the three EaP AAs, Ukraine, Moldova and Georgia again requested an EU Membership perspective. The new pro-European Government in Ukraine and the two other newly associated partners had high expectations after the Maidan revolution and the signing of the AAs. However, they had to accept that the final declaration only stated that "Summit participants acknowledge the European aspirations and European choice of the partners concerned". This statement did not go beyond the previous 2013 Vilnius Summit Declaration or other statements made during previous bilateral EU-Ukraine Summits.[309] Instead, the Riga Summit declaration mainly reaffirmed the EU's commitment to the Eastern Partnership, underlined further differentiation between the neighbours, condemned Russia's pressure on the EaP countries and its role in the conflict in eastern Ukraine and promised increased support for the implementation of the AAs and DCFTAs.[310]

Noteworthy, the new High Representative for Foreign Affairs Federica Mogherini and the new Commissioner for ENP and enlargement negotiations Johannes Hahn launched in March 2015 a more fundamental review process of the ENP. In a Joint Consultation Paper, the EU recognises that over the past ten years "the ENP has not always been able to offer adequate reponses" to recent developments in its neighbourhood such as the recent crises in Syria, Libya and eastern Ukraine, "nor to the changing aspirations of our partners".[311] In this view, "there is now a clear need to review the assumptions on which the policy is based, as well as its scope, and how instruments should be used, including how different policy sectors can better contribute to cooperation, ensuring linkages between internal and external priorities".[312] A consultation

307 A. Rettman, 'EU summit text loaded with eastern tension', *EUobserver*, 7 May 2009.

308 Eastern Partnership Summit, *Joint Declaration*, Prague, 7 May 2009, 8435/09 (Presse 78), para. 5.

309 Eastern Partnership Summit, *Joint Declaration*, Riga, 21–22 May 2015, para. 7.

310 For an excellent commentary on the Riga Summit, see H. Kostanyan, 'The Eastern Partnership after Riga: Review and Reconfirm, CEPS Commentary, 29 May 2015. To consult at: http://www.ceps.eu/system/files/HK%20Riga%20summit_0.pdf.

311 European Commission, Joint Consultation Paper: 'Towards a new European Neighbourhood Policy', JOIN (2015) 6 final, 4 March 2015.

312 *Ibid.*

process was launched which has to focus on four priority areas, i.e. differentiation, focus, flexibility and ownership and visibility. This consultation process must lead to a new ENP proposal in the autumn of 2015.[313]

5.2.2 *The EU-Ukraine Action Plan and Association Agenda: Instruments for EU Integration without Membership?*

A crucial instrument in the ENP and the EaP are the Action Plans (APs) that the EU has adopted jointly with each ENP partner and which define the specific political and economic priorities for reform.[314] In the light of the conditionally approach which underpins the ENP, the implementation of these APs is being monitored by the European Commission in annual Progress Reports and progress is then linked to specific ENP benefits such as the conclusion of a new agreement or increased financial assistance. This approach is clearly inspired by the pre-accession strategy.[315]

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313 In April 2015, the Council welcomed this review process and emphasised "the need to work on a revision of the ENP in order to ensure it provides the adequate framework for long term relations with all ENP partners, while making it as well more political and responsive to the diverse challenges in the neighbourhood" (Council Conclusions of the 3382th Council Meeting on the review of the European Neighbourhood Policy, 20 April 2015, 8084/17).

314 The Actions Plans were based on prior "Country Reports", compiled by the Commission. For the Ukraine Country Report, see: European Commission, 'Country Report Ukraine', SEC (2004) 566, 12 May 2004.

315 During the pre-accession process, the CEECs had to approximate to the *acquis communautaire*, as made clear in the 1995 Commission's White Paper on Integration Into the Internal Market, and had to meet the Copenhagen Criteria. Accession Partnerships were adopted, in consultation with each of the candidates, which set out the priorities and objectives on which the candidate country had to focus with a view to meet the EU accession conditions. The candidate countries had to adopt National Programmes for the Adoption of the *Acquis* (NPAA), which indicated how they would implement the priorities as defined in the Accession Partnerships. The candidates' performance in meeting the targets was assessed by the Commission in annual progress reports. Subsequently, the Council determined the pace of accession negotiations as well as the allocation of pre-accession financial assistance on the basis of these reports. For analysis of the pre-accession conditionality and the 1995 White Paper, see M. Maresceau, 'Pre-accession', and P. Nicolaides, 'Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules', in M. Cremona (ed.), *The enlargement of the European Union* (Oxford University Press, Oxford, 2003), pp. 30–36 and 44–78; M.-A. Gaudissart, A. Sinnaeve, 'The Role of the White Paper in the Preparation of the Eastern Enlargement', in M. Maresceau (ed.) *Enlarging the European Union. Relations between the EU and Central and Eastern Europe* (Longman, London, 1997), pp. 27–41.

The Ukraine AP was adopted by the EU-Ukraine Cooperation Council in February 2005 for a period of three years.[316] The integration dimension of the AP was stressed in its introduction. It stated that its implementation "will encourage and support Ukraine's objective of further integration into European economic and social structures" and will lead to "further economic integration" into the EU. It is obvious that the objectives of the AP, and of the ENP in general, go beyond the 'cooperation' objectives enshrined in the PCA. On the basis of the AP, the ENP triggered a "political reorientation" of the PCA.[317] Without being formally renegotiated, the PCA objectives were further articulated and modified by the AP to fit in the overall ENP framework.[318]

The AP touched upon all the possible aspects of the EU-Ukraine relations and it defined priorities in the areas of "Political Dialogue and Reform", "Economic and Social Reform and Development", "Trade, Market and Regulatory Reform", "Co-operation in Justice and Home Affairs", "Transport, Energy, Information Society and Environment", and "People-to-people Contacts". In order to see the wood for the trees, this document contained a list of priorities which required "particular attention". This list of 'super priorities' indicated that the main focus of the AP was to further strengthen to process of democratization in Ukraine and to deepen trade and economic relations. To achieve the latter, the AP prescribed that Ukraine should gradually approximate its legislation, norms and standards with those of the EU. It also formulated a number of concrete measures to be taken by Ukraine which had to prepare ground for Ukraine's WTO Membership. Ukraine's accession to the WTO was crucial for the deepening of the EU-Ukraine trade relations. The AP even stated that Ukraine's WTO accession was a *conditio sine qua non* for the establishment of an EU-Ukraine FTA. Indeed, in the light of the PCA *evolutionary clause*, the AP contained the first clear commitment of the EU to establish a FTA. The implementation of the AP was monitored both by the European Commission and jointly with Ukraine by the PCA Cooperation Council. Although the AP envisaged Ukraine's economic integration into the EU, it can hardly be seen as an instrument for EU integration without membership, as defined in this work.

316 EU-Ukraine Cooperation Council, 'EU-Ukraine Action Plan', Recommendation No. 1/2005, 21 February 2005.

317 C. Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe', in M. Maresceau, A. Dashwood (eds.), *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008), p. 318.

318 *Ibid.*

First, the AP did not fulfil the *conditio sine qua non* criterion of an EU integration agreement for the two reasons: the non-binding legal nature of the AP and the lack of a clear selection of EU *acquis*. Regarding its legal status, the Ukraine AP was not an international agreement concluded by the Union according to Article 218 TFEU[319] but was adopted as a recommendation of the PCA Cooperation Council.[320] As already mentioned, the PCA Cooperation Councils cannot take binding decisions, contrary to the Association Councils established under SAAs and the EMAAs. However, also with the latter, the APs were adopted as a non-binding recommendation of the Association Councils. If they would have been adopted as a decision of the Association Council, they would have become part of the Community (now Union) legal order and potentially acquire direct effect.[321] Therefore, the AP had no binding effect and was more a 'political document'.[322] The AP had the aim to intensify Ukraine's legislative approximation commitments, going beyond the best-endeavours clause of the PCA. However, it did not create a binding obligation on Ukraine to apply a selection of EU *acquis*.[323] Nevertheless, according to Van Vooren, the "soft law" character of the APs also had some advantages. The non-binding soft legal APs could be adopted speedily since they are not burdened by the procedural requirements of traditional international agreements such

319 In contrast to the negotiations of classical EU international agreements, the Commission did not have any particular "negotiating mandate" from the Council to negotiate the AP. The EU position during the AP negotiations was essentially the product of the Commission's own initiative. However, in March 2004, some Member States objected that the Commission should not negotiate the AP on its own and a representative of the Council Secretariat General and a representative of the EU Presidency joined the Commission officials in the EU delegation (C. Hillion, *op. cit.*, footnote 317, p. 315).

320 EU-Ukraine Cooperation Council, 'EU-Ukraine Action Plan', Recommendation No. 1/2005, 21 February 2005. In order to be adopted by the Cooperation Council, the AP required the adoption of a Council Decision. This Council Decision had a dual legal basis: Art. 2(1) of the Council and Commission decision concluding the PCA with Ukraine and ex Art. 15 TEU on CFSP Common Positions (Council Decision on the position to be adopted by the European Communities and their Member States within the Cooperation Council established by the Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, with regard to the adoption of a Recommendation on the implementation of the EU/Ukraine Action Plan, 5428/1/05 REV 1, 9 February 2005).

321 B. Van Vooren, 'A case study of "soft law" in EU external relations: The European Neigbourhood Policy', *European Law Review* 34(5), 2009, p. 712.

322 For a detailed analysis of the legal effect of the APs in the EU legal order, see B. Van Vooren, *ibid*, p. 710.

323 On this point, see C. Rapoport, *op. cit.,* footnote 78, p. 270.

as the ratification procedure and they avoided internal competence struggles.[324] This was particularly important for the APs, considering their (pre-Lisbon) cross-pillar dimension.

In addition, the AP did not meet the basic integration agreement condition because it did not provide for a clear predetermined selection of EU *acquis* which had to be approximated. Instead, for the promotion of democracy, human rights and fundamental freedoms, the AP refered to the norms and standards of international agreements/conventions and organizations such as the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe, the International Labour Organization (ILO) and the United Nations (UN). In the area of trade and economic development, which is closely linked with the objective of economic integration, the AP prioritized the implementation of trade-related PCA provisions and – in the light of Ukraine's WTO accession – GATT and WTO rules.[325] A selection of specific EU Directives and Regulations and a timetable for implementation, as foreseen in the integration agreements discussed above, was not provided. The AP only referred in vague terms to "international and EU rules and standards" or "relevant EU legislation". Therefore, these ENP APs were not considered as clear benchmarks: they formulated too many priorities (in the case of Ukraine almost 300) and often it was not clear who had to do what against which deadline.[326] Therefore, the AP was according to several authors nothing more than "a list of good intentions"[327] or "a shopping list for reform".[328] It is thus no surprise that the implementation record of the AP in Ukraine was – similar to the PCA legislative approximation clause – rather mixed.[329] The Ukrainian instable political

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324 *Ibid.*

325 For example, regarding the movement of goods, the AP referred to GATT Articles XI, XII, XIV, XIX, XX and XXI and "full implementation of PCA commitments in sphere of trade in goods".

326 K. Smith, 'The outsiders; the European Neighbourhood Policy", *International Affairs* 81(4), 2005, p. 764.

327 A. Nowak, D. Miczarek, 'Eastern Dimension of the ENP – A New Challenge for the European Union. The Case of Ukraine' in M. Cremona, G. Meloni (eds.), *The European Neighbourhood Policy: A framework for modernization?, EUI Working Papers* (Law) 2007/21, p. 75.

328 E. Barbé, E. Johansson-Nogués, 'The EU as a modest 'force of good': the European Neighbourhood Policy', *International Affairs* 84 (1), 2008, p. 92.

329 See for example the European Commission progress reports: European Commission, 'ENP Progress Report Ukraine', COM(2008) 164 final, 3 April 2008, p. 1; 'ENP Progress Report Ukraine', SEC(2009) 515/2, 23 April 2009, p. 2; 'ENP Progress Report Ukraine', SEC(2010) 524, 12 May 2010, p. 2.

climate, low administrative competence and lack of coordination between the different ministries within the executive precluded the swift and correct implementation of the AP.[330] An additional reason which explains the weak AP implementation relates to a crucial paradox in the ENP: on the one hand the Union wants to reiterate the success of the enlargement story in the ENP by 'borrowing' pre-accession methodology such as conditionality. However, on the other hand, the Union is not willing to offer the ENP countries the same "golden carrot" of an EU Membership perspective, which was the crucial incentive for the CEECs to approximate with the entire *acquis communautaire* during their accession process.[331]

The EU-Ukraine AP had a lifespan of three years and at the 2008 Paris EU-Ukraine Summit the parties called for the development of a new practical instrument to replace the EU-Ukraine AP.[332] In December of the same year, the Commission published a non-paper on the "successor documents to current ENP Action Plans".[333] This document recognized the APs as a useful instrument in conducting the ENP, but made several suggestions towards improving their effectiveness. According to the Commission, the successor documents should, *inter alia*, broaden the areas of cooperation but maintain the flexibility in order to allow greater adaptability to evolving needs.[334] It was also stated that these new instruments should reflect more fully joint ownership, as this was lacking the previous AP,[335] and include "explicit references to

330 On this issue, see R. Petrov, 'Legislative approximation and application of EU law in Ukraine', *op. cit.,* footnote 247, pp. 145–147; O. Stegniy, *op. cit.,* footnote 306, pp. 54; K. Wolczuk, *op. cit.,* footnote 247, pp. 197–211.

331 R. Dannreuther, 'Developing the Alternative to Enlargement: The European Neighbourhood Policy', *European Foreign Affairs Review* 11, 2006, p. 189; D. Kochenov, 'The ENP conditionality: Pre-Accession Mistakes Repeated' in L. Delcour, E. Toulmets (eds.), *Pioneer Europe? Testing EU Foreign Policy in the Neighbourhood* (Nomos, Baden-Baden, 2008), pp. 105–119.

332 The Cooperation Council extended the AP in 2008 for the period of one year (12th Meeting EU-Ukraine Cooperation Council, 11 March 2008, Brussels, 7516/08 (Presse 71).

333 European Commission, 'Non-Paper on 'the successor documents to current ENP Action Plans', expanding on the proposals contained in the Communication to the European Parliament and the Council on 'Implementation of the European Neighbourhood Policy in 2007', COM (2008) 164, 3 April 2008.

334 The Commission used the term "stand-alone documents", which implies non legally binding documents amenable to adaptation according to evolving needs (B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy* (Routledge, Oxon, 2012), p. 206).

335 The poor joint ownership dimension of the EU-Ukraine AP was well illustrated by the fact that the final AP was almost a copy past of the AP that the Commission proposed (COM

relevant *acquis communautaire*". This is clearly a response to the critiques on the vague character of the APs and their lack of references to specific EU legislation. Finally, the Commission proposed that these new instruments should "promote preparations for the implementation of the new [association] agreements".

On 23 November 2009, the first of such successor documents was adopted by the EU-Ukraine Cooperation Council in the form of an "EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement" (hereinafter: "Association Agenda").[336] This document was again adopted as a recommendation of the Cooperation Council. Therefore, the Association Agenda cannot have a legally binding effect and has the same soft legal value as the AP.[337] Thus, for the same reasons, the Association Agenda is neither an example of an EU integration agreement or instrument. However, compared to the APs, the Association Agenda contains several new elements.

First, when the Association Agenda was adopted, it was already decided that the PCA would be replaced by the EU-Ukraine AA and negotiations were already ongoing for almost two years. Therefore, the key purpose of the Association Agenda is to "prepare and facilitate" the entry into force of the envisaged EU-Ukraine AA and DCFTA.[338] The Association Agenda clearly states that "it does not seek to establish a comprehensive menu of priorities for action since ultimately these will be determined by the Association Agreement itself once it enters into force" and that it "clearly identifies those priorities on a sector by sector basis which require action in anticipation of the entry into force of the Agreement".[339] Thus, the Association Agenda is not an integration

(2004) 791 final, 9 December 2004). For an analysis of the draft EU-Ukraine AP, see C. Hillion, "Thou shalt love thy neighbor': the draft European Neighbourhood Action Plan between the EU and Ukraine', in A. Mayhew, N. Copsey (eds.) *Ukraine and the European Neighbourhood Policy* (Sussex European Institute, 2005), p. 17.

336 EU-Ukraine Cooperation Council, 'Recommendation on the implementation of the EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement', UE-UA 1057/0923, 23 November 2009.

337 At the 2011 Eastern Partnership Summit, it was decided to also establish Association Agendas with the other EaP partners (Joint Declaration of the Eastern Partnership Summit, Warsaw, 29–30 September 2011, 14983/11, Presse 341, para. 4). In June 2014, Association Agendas were adopted with Moldova and Georgia "with a view to preparing for the implementation of [their] Association Agreement, including the Deep and Comprehensive Free Trade Area" (EEAS, 'EU and Republic of Moldova adopt Association Agenda', *press release*, 26 June 2014, 140626/04).

338 EU-Ukraine Association Agenda, p. 2.

339 *Ibid,* p. 2.

instrument as such but facilitates the establishment of the EU-Ukraine AA, which is an integration agreement *par excellence* (cf. *infra*). Moreover, the Association Agenda did not expire when the AA partially entered provisionally into force. On the contrary, the EU and Ukraine updated the Association Agenda on 16 March 2015. The aim of this update was to "prepare and facilitate the implementation of the Association Agreement, by creating a practical framework through which the overall objectives of political association and economic integration can be realised and by providing a list of priorities for joint work on sector by sector basis".[340] It has to be noted that on 17 September 2014, the Ukrainian Parliament also adopted a new "Plan of the implementation of the Association Agreement", which was developed in cooperation with the EU Delegation in Ukraine.[341] Also this plan establishes a programme for the implementation of the EU-Ukraine AA between 2014 and 2017.

Second, the first version of the Association Agenda established an enhanced monitoring procedure, conducted jointly with the Ukrainian authorities by a "Joint Committee at senior officials level".[342] This Committee is responsible for the annual review of the implementation of the Association Agenda.[343] Moreover, it can make necessary adjustments to the Association Agenda and define further priorities. It had the task to amend the Association Agenda to the priorities of the EU-Ukraine AA. In this view, the Joint committee reviewed and amended the Association Agenda on 20 May 2011 and, after the initialling of EU-Ukraine AA, on 24 June 2013.[344] Whereas the first update only introduced several minor new priorities, the second one added several substantial elements. For example, in the light of the Tymoshenko case (cf. *infra*), several new priorities were included in the section on "the independence of the judiciary and the effectiveness of the courts and of the prosecution as well as of law enforcement agencies". Moreover, after the initialling of the EU-Ukraine

340 EU-Ukraine Association Council, 'EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement', 16 March 2015.

341 Government of Ukraine, 'Government approves the Plan of Implementation of the Association Agreement with the EU', *press release*, 17 September 2014.

342 In addition, the implementation of the Association Agenda is being monitored by the Commission in the annual ENP progress reports.

343 Association Agenda section III. 9.

344 The first revision was adopted by the Joint Committee of the Association Agenda at Senior Officials level on 20 May 2011 and was endorsed by the Cooperation Council on 15 May 2012 (15th Meeting of the EU-Ukraine Cooperation Council, Brussels, 15 May 2012, 9993/12 (Presse 206)). The second revision was endorsed by the EU-Ukraine Cooperation Council on 24 June 2013 (16th Meeting EU-Ukraine Cooperation Council, Brussels, 24 June 2013, 11471/13 (Presse 289)).

AA, the updated Association Agenda made more specific and explicit references to the AA. For example, in the area of public procurement, Ukraine is encouraged to begin preparation of the strategy on public procurement "as foreseen by Article 152 of the envisaged Association Agreement". This practice is quite remarkable because it created a soft law obligation to implement specific provisions of an international agreement that was not yet signed.[345] In addition to updating the Association Agenda, this Joint Committee also had the task to prioritise a selection of Association Agenda actions for a specific period.[346] The March 2015 update of the Association Agenda modified this monitoring system in the light of the provisional application of the institutional part of the AA. It is now the Association Committee or another relevant body established by the agreement (cf. *infra*) that will review progress in implementing the Association Agenda as well as define future priorities and any necessary adjustments to the Association Agenda.

5.2.3 *The ENP and Article 8 TEU*

Initially, the ENP and the EaP were established without a Treaty legal basis and were predominantly based on soft law policy instruments such as the APs and the Association Agenda. With the signing of the EaP AAs, a 'hard law' instrument was finally developed to provide the EaP with a new legally binding framework. Moreover, the Lisbon Treaty introduced with Article 8 TEU a specific legal basis for the development of "special relationship[s] with neighbouring countries". Article 8 TEU states:

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation.

345 Even more striking was that already in the first update of the Association Agenda, Ukraine was called upon to begin the preparation of this strategy on public procurement "as foreseen by Article 5 of the *draft* Chapter in the DCFTA" (emphasis added). This was before the initialling of the agreement and this Article 5 finally became, after the renumbering of the (draft) Association Agreement provisions, Article 152.

346 This committee has adopted two lists of Association Agenda priorities, one for 2010 and one for the period 2011–2012 (Joint Committee at Senior Officials Level of the EU-Ukraine Association Agenda, 'List of the EU-Ukraine Association Agenda priorities for 2010', 26 January 2010 and 'List of the EU-Ukraine Association Agenda priorities for 2011–12', 20 May 2011). A comprehensive review of the entire Association Agenda took place on March 2015 (see footnote 340).

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

The idea to introduce a specific Treaty provision for the Union's relations with its neighbours was launched within the European Convention which prepared the Draft Treaty establishing a Constitution for Europe (TCE). According to the *travaux préparatoires*, a separate title on "the Union and its immediate environment" was considered necessary to recognise the importance of the relations between the Union and its neighbours, which resulted in Article I-57 of the defunct TCE.[347] This proposal coincided with the first proposals for the ENP and it is clear that the first Commission's ENP Communications have influenced the wording of Article I-57 TCE.[348] However, this provision, which was largely maintained in Article 8 TEU of the Lisbon Treaty, did not make an explicit reference to the ENP.[349] Instead, the geographical coverage of Article 8 TEU goes beyond the scope of the ENP partners as it applies to "neighbouring countries", thus also to non-ENP countries such as the EFTA Members and the micro-States.[350]

When comparing Article 8 TEU with the traditional association provision, provided by Article 217 TFEU, one can find several similarities. Not only echoes the notion of a "special relationship" in Article 8 TEU the ECJ's definition of an association agreement,[351] the reference to "reciprocal rights and obligations" was "drawn" from Article 217 TFEU by its drafters.[352] Moreover, the "possibility

347 Title IX: The Union and its immediate environment, CONV 649/3, 2 April 2003.

348 For example, the wording of Art. I-57 TCE and Art. 8 TEU is very similar to the 2003 ENP Strategy Paper which states that "the EU should aim and develop a zone of prosperity and a friendly neighbourhood [...] with whom the EU enjoys close, peaceful and cooperative relations" (European Commission, *op. cit.*, footnote 286, p. 17).

349 Conversely, several post-Lisbon Commission Communications explicitly link the principles of Art. 8 TEU with the ENP objectives (see for example European Commission, 'Taking stock of the European Neighbourhood Policy', COM (2010) 207, 12 May 2010, p. 1; European Commission, Joint Consultation Paper: 'Towards a new European Neighbourhood Policy', JOIN (2015) 6 final, 4 March 2015).

350 For example, TEU Declaration No. 3 on Art. 8 TEU states that "the Union will take into account the particular situation of small-sized countries which maintain specific relations of proximity with it".

351 ECJ, Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd,* [1987], ECR I-3719, para. 9 (emphasis added).

352 Title IX: The Union and its immediate environment, CONV 649/3, 2 April 2003. Art. 217 TFEU states that "the Union may conclude with one or more third countries or

of undertaking activities jointly" and the "periodic consultation" is usually provided for under association agreements through the creation of an Association Council or Committee which can take legally binding decisions. It was even explicitly stated that when Article I-57 was drafted by the Convention, "its point of departure" was Article 217 TFEU.[353]

In addition, these two provisions have a vague formulation in common, which allows for a high level of flexibility. This is required to ensure differentiation in the relations with the various partners.[354] It was already noted that association agreements can take several forms, ranging from little more than a limited sectoral or free trade agreement to a broad framework agreement with an integration dimension. In the light of the differentiation which underpins the ENP, the flexibility of Article 8 TEU equally allows the Union to develop various types of relationships with the neighbouring countries, depending on the ambitions of the partner and the Union and the fulfilment of specific criteria, defined by the latter. Whether Article 8 TEU can be used as a legal basis for the conclusion of international agreements between the EU and its neighbouring countries will be explored in the next chapter.[355]

On the one hand, Article 8 TEU can be considered as an alternative to association, whereas on the other hand, this new provision can be seen a specific form of association, tailored to Union's relationship with its neighbours. According to the former, Article 8 TEU aims to differentiate the Union's relationship with its neighbours from traditional association agreements established under Article 217 TFEU.[356] A reason for this could be that association is often perceived as a stepping-stone to EU Membership,[357] although association is no prerequisite to be eligible for EU Membership under Article 49 TEU. In the spirit of the ENP discourse, Article 8 TEU is disconnected from enlargement as it remains silent on EU Membership. However, it does not exclude the right of the neighbours to apply for membership under Article 49 TEU. Instead, Article 8 TEU envisages agreements with the neighbouring countries which have a clear *finalité*, disconnected from the association or (pre-)accession

international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".

353 Title IX: The Union and its immediate environment, CONV 649/3, 2 April 2003.

354 P. Van Elsuwege, R. Petrov, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union', *European Law Review* 36(5), 2011, p. 692.

355 Chapter 7.1.2.

356 This thesis is for example argued by P. Van Elsuwege and R. Petrov, *op. cit.*, footnote 354, p. 693.

357 D. Phinnemore, *Association: Stepping-Stone or Alternative to EU Membership?* (Sheffield Academic Press, Sheffield, 1999), p. 23.

process, i.e. the establishment of an area of prosperity and good neighbourliness, founded on the values of the Union.

According to the other interpretation, Article 8 TEU provides for a specific form of association. Hanf even argues that although Article 8 TEU does not explicitly refer to the term "association", due to its textual resemblances with Article 217 TFEU, this provision can be considered as a *lex specialis* to Article 217 TFEU that aims to conclude a new form of association agreements with the Union's neighbours.[358] Such a reading of this provision should be seen in the light of the "inflation" of association agreements the last two decades.[359] Because the Union has concluded various association agreements with non-neighbouring countries,[360] a specific form of association, reserved for the Union's neighbours, would stress the importance the Union attributes to its neighbourhood relations.

Article 8 TEU also has a 'constitutional dimension'. In the TCE, the neighbourhood clause was incorporated in Part I TCE which contained all the fundamental provisions of the EU constitutional order. Article I-57 TCE was the sole article of a specific title "The Union and its Neighbours".[361] This Article preceded Title IX on Union Membership, to which it was thereby structurally related.[362] In the current Treaties, Article 8 TEU was no longer awarded a separate title but is included in Title I "Common Provisions" that includes the Union's foundational values, objectives and principles. Therefore, it does not relate anymore to the enlargement provision (Article 49 TEU), which is included in the Final Provisions of the TEU. This can be considered as an attempt to distinct the neighbourhood relations from the enlargement process. It is even argued that this provision can be read as "constitutionalizing the concept of integration without membership".[363] The fact that Article 8 TEU is now included in the TEU title on Common Provisions, and not in the specific part of the TEU

358 D. Hanf, 'The ENP in the light of the new "neighbourhood clause" (Article 8 TEU)', *College of Europe Research Paper in Law* 2/2011, p. 4.

359 M.-A. Gaudissart, L'association: un mode de cooperation privilegié entre la Communauté et les états tiers? Une analyse juridique des accords conclus sur base de l'article 238 du Traité C(E)E (le nouvel article 310 CE)', *PhD thesis*, Ghent University, 2000, p. 287.

360 See for example the association agreement with Chile (*OJ*, 2002, L 352/3) and EU-Central America AA (*OJ*, 2012, L 346/3).

361 In the draft TCE, the title was "The Union and its immediate neighbourhood".

362 C. Hillion, 'Anatomy of EU norm export towards the neighbourhood', in P. Van Elsuwege, R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), p. 15.

363 D. Hanf, *op. cit.*, footnote 358, p. 5.

devoted to 'EU external action',[364] confers a constitutional status on the Union's neighbourhood relations and integrates the objective of establishing an area of prosperity and good neighbourliness based on the values of the Union into the policy making of the Union. Moreover, Hillion considers that the legal basis for engagement towards the neighbourhood is compulsory because Article 8 TEU uses the term "shall" and not a softer obligation such as "endeavour to".[365] The author even claims that due to such an express mandate for EU engagement, inaction on the part of the Union could qualify as an unlawful failure to act that could be challenged before the ECJ pursuant to Article 265 TFEU.[366] According to this reasoning, the Union's failure to develop an "area of prosperity and good neighbourliness" could be challenged before the Court. However, Article 8 TEU is considered as a programmatic provision,[367] and its vague wording gives the Union's institutions a wide margin of discretion in the choice of instruments and the scope of implementation. Consequently, in accordance with the established case-law of the ECJ, it would be very difficult for the applicant to demonstrate that there is an obligation to act.[368]

364 The fact that Art. 8 TEU was separated in the TEU from the specific CFSP procedures and instruments was criticized by S. Blockmans ('Friends or Foe? Reviewing EU Relations with its Neighbours Post-Lisbon', *CLEER Working Paper* 2011/3, pp. 115–120, p. 116).

365 C. Hillion, *op. cit.,* footnote 362, p. 16. The Commission stressed the obligatory nature of Art. 8 TEU in a recent Communication on the Union's relations with the micro-States. In this document, the Commission stated that the Union currently maintains relations with all the micro-States "as *required* by Article 8 TEU" (emphasis added) (European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Option for Closer Integration with the EU', COM (2012) 680, 20 November 2012).

366 *Ibid.*

367 D. Hanf, *op. cit*., footnote 358, p. 5.

368 For example, in the mid-1980s, the European Parliament initiated a procedure against the Council for failure to act in the field of transport policy. Regarding the establishment of a common transport policy, the Court accepted the Council's argument that it enjoyed a wide discretion with regard to the implementation of the common transport policy and ruled that "the absence of a common policy which the Treaty required to be brought into being does not in itself necessarily constitute a failure to act sufficiently specific in nature to form the subject of an action under Article [265 TFEU]". However, regarding the establishment of the freedom to provide services in the transport sector, the Court ruled that the Council was in breach of the Treaty as it had failed to adopt measures which ought to have been adopted before the expiry of a transitional period and whose subject-matter and nature may be determined with a sufficient degree of precision. Case 13/83, *European Parliament v Council,* [1985], ECR 1513. See also Case 247/87, *Star Fruit Company v Commission,* [1989], ECR 291.

CHAPTER 6

Legal and Political Hurdles towards the Signing and Conclusion of the EU-Ukraine AA

Between the start of the negotiations in 2007 and the signing of the agreement in March and June 2014, several legal and political hurdles challenged the signing and conclusion of the EU-Ukraine AA. It can even be argued that the EU-Ukraine AA is one of the most contested international agreements ever signed by the EU. On the one hand, the negotiations and signature of the EU-Ukraine AA were complicated by domestic developments in Ukraine such as the Tymoshenko case and the Maidan revolution. On the other hand, the EU-Ukraine AA was – and still is – challenged by Russia as it pressured Ukraine to drop the agreement and to join instead its Customs Union with Belarus and Kazakhstan. This chapter will therefore analyse the long and winding road towards the signing and conclusion of the EU Ukraine AA (6.1) and the impact of the EU-Ukraine AA on the legal framework of the triangular EU-Russia-Ukraine relationship (6.2).

6.1 The Long and Winding Road towards the Signing and Conclusion of the EU-Ukraine AA

As a close observer noted: "it has taken Ukraine two waves of mass protests to conclude a new agreement with the EU".[369] Whereas the Orange Revolution of 2004 led to the initiation of the negotiations on the AA, the 'Maidan' uprising paved the way for the signing of this landmark agreement. This chapter will discuss and analyse the difficult process of the signing and conclusion of the EU-Ukraine AA. First, the EU's institutional set-up of the AA negotiations in the pre- and post-Lisbon framework of EU external action will be analysed (6.1.1) and the negotiations of the EU-Ukraine AA will be reconstructed (6.1.2). Thereafter, the initialling and the impact of the Tymoshenko case on the envisaged signature at the 2013 Vilnius Eastern Partnership Summit will be scrutinised (6.1.3). Then, the 'renaissance' of the AA after the Maidan demonstrations will be explored, focusing on the 'two-phase' signature of the agreement (6.1.4).

369 K. Wolczuk, 'Ukraine and the EU: turning the Association Agreement into a success story', European Policy Centre *Policy Brief*, April 2014.

 | DOI 10.1163/9789004298651_008

Finally, the procedural requirements for the AA's provisional application and entry into force are discussed (6.1.5). The Russian pressure on the EU-Ukraine AA during the negotiations and the wider aspects of the triangular EU-Ukraine-Russia relationship will be tackled in the next chapter (6.2).

6.1.1 *The EU's Pre- and Post-Lisbon Institutional Set-up for Negotiating the EU-Ukraine AA*

The EU-Ukraine AA negotiations are an interesting case-study from a point of view of EU external relations law. It was one of the few EU international agreements that have been negotiated before and after the entry into force of the Lisbon Treaty, which had a major impact on the distribution of competences and institutional framework of EU external action.[370] Before the Lisbon Treaty came into force, there was a complicated arrangement which was that the 'political' part of the agreement (i.e. the non-DCFTA part of the AA) was negotiated by a mixture of the old DG RELEX of the Commission, the Secretariat of the Council and the Presidency.[371] The DCFTA was negotiated by DG Trade on behalf of the Commission. After the Lisbon Treaty, with the establishment of the EEAS,[372] "things became much more simple" as the political part of the AA was negotiated by the EEAS and the DCFTA still by DG Trade.[373] However, due to its 'comprehensive' nature, several other Commission DGs such as DG MARKT, AGRI, SANCO, TAXUD, ENER and ENTR were involved in the DCFTA negotiations under the leadership of DG Trade.[374] Moreover, the EEAS was also member of the DCFTA team, but subordinate to DG Trade. It had specific tasks in the DCFTA negotiations such as on the dispute settlement mechanism.[375] Considering the (pre-Lisbon) *cross-pillar* dimension of the AA, the

370 For analysis, see P. Koutrakos (ed.), *The European Union's external relations a year after Lisbon*, CLEER Working Paper 2011/3; P. Van Elsuwege, 'EU external action after the collapse of the pillar structure. In search of a new balance between delimitation and consistency', *Common Market Law Review* 47(4), 2010, pp. 987–1019.

371 Interview 1 EEAS official, 22 June 2012, Brussels.

372 On the establishment of the EEAS, see S. Blockmans, C. Hillion (eds.), *EEAS 2.0. A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service*, 2013.

373 Interview 1 EEAS official, 22 June 2012, Brussels; Interview 2 EU Delegation, 1 March 2012, Kiev.

374 Respectively: Internal Market and Services; Agriculture and Rural Development; Health and Consumers; Taxation and Customs Union; Energy and Enterprise and Industry.

375 On the other hand, for the negotiations on the association agreement (non-DCFTA part), the EEAS also invited DG Trade and other Commission DGs such as DG HOME when needed (Interview 1 EEAS official, 22 June 2012, Brussels).

post-Lisbon institutional set-up for the negotiations of international agreements facilitated in particular the negotiations of CFSP(–related) issues.[376] Before the Lisbon Treaty, DG RELEX was not allowed to speak on CFSP matters during the EU-Ukraine AA negotiations. As an EU negotiator mentioned "we had to invite representatives of the Council Secretariat, often to travel all the way to Ukraine, to speak on one or two lines".[377] After the Lisbon Treaty this could be done by the EEAS, although they had to first consult with the Council. Noteworthy, also the position of the European Parliament during the negotiations was strengthened by the Lisbon Treaty. As now foreseen in Article 218(10) TFEU, the European Parliament had to be "immediately and fully informed at all stages" of the EU-Ukraine AA negotiations. For trade agreements – thus also for the DCFTA part of the EU-Ukraine AA –, Article 207(3) TFEU reinforces this requirement by underlining that the Commission must report regularly to the Parliament during negotiations.[378] It was agreed in an Institutional Framework Agreement between the European Parliament and the Council in 2010 that for the conclusion of international agreements for which the Parliament's consent is required, which is the case for the EU-Ukraine AA (cf. *infra*), the Commission must provide the Parliament with, *inter alia,* draft amendments to adopted negotiating directives, draft negotiating texts, agreed articles, the agreed date for initialling the agreement and the text of the agreement to be initialled.[379]

During the negotiations, the Member States were regularly informed and consulted in the relevant Council Working Groups, notably in the Working Party on Eastern Europe and Central Asia and the Trade Policy Committee.[380] However, Ukrainian negotiators still complained that on several issues, the positions of the different EU negotiating teams were not sufficiently streamlined.

376 For analyses, see M. Gatti, P. Manzini, 'External representation of the European Union in the conclusion of international agreements', *Common Market Law Review* 49, 2012, pp. 1703–1734.

377 Interview 1 EEAS official, 22 June 2012, Brussels.

378 On the role of the European Parliament in international (trade) agreements after the Lisbon Treaty, see Y. Devuyst, 'The European Parliament and International Trade Agreements: Practice after the Lisbon Treaty', in I. Govaere, *et al.* (eds.) *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, Leiden/Boston, 2014), pp. 171–189.

379 Interinstitutional Agreement, 'Framework Agreement on relations between the European Parliament and the European Commission' (*OJ*, 2010, L 307/47).

380 European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part', COM (2013) 289 final, 15 May 2013, p. 3.

They noted that especially DG Trade "did not care on the non-trade part of the agreement".[381] Moreover, several problems arose during the negotiations as a result of the division of competences in the EU legal order and the scope of the Union's Common Commercial Policy (CCP). This was clearly the case in the area of transport services. Although the Member States finally entrusted in the Lisbon Treaty the EU with full exclusive powers in the area of services and commercial aspects of intellectual property rights under the new Article 207(1) TFEU,[382] transport services remain excluded from the scope of the CCP.[383] Article 207(5) TFEU states that the negotiation and conclusion of international agreements in the field of transport is subject to Article 218 and Title VI of part Three TFEU, which concerns the common transport policy and is an area of shared competence.[384] Although Ukraine envisaged the inclusion of far-reaching provisions on road, rail and inland waterways transport,

381 Interview 3 Ukrainian chief negotiator on the DCFTA, 5 March 2012, Kiev. This Ukrainian DCFTA negotiator gave the example of the DCFTA chapter on trade and sustainable development (Title IV AA) and of the chapters on environment and social policy, which are included in Title V on Sector and Economic Cooperation. As in other FTAs recently concluded by the EU, DG Trade insisted to include a separate chapter on "Trade and Sustainable Development" in the Ukraine DCFTA, containing provisions on social, labour and environmental standards. In addition, in the negotiation group on economic and sectoral cooperation, other Commission DGs also negotiated provisions on environment and social policy. The Ukrainian negotiators advocated for a comprehensive approach and to include these issues in one single chapter to avoid duplication or overlap. This argument was not unfounded considering that the DCFTA has a separate dispute settlement mechanism than the title on sectoral and economic cooperation (cf. *infra*). However, according to this Ukrainian negotiator, the negotiators on 'sustainable development' of DG Trade kept insisting on a separate chapter in the DCFTA as they "did not care on the non-trade part of the agreement", which fell under the competence of the EEAS. Finally, Ukraine had no other option than to agree on this point, under the condition that this would not result in legal inconsistencies. Consequently, in the EU-Ukraine AA, environmental and social/labour standards are covered in both the DCFTA (Chapter 13) and in Title V on Economic and Sector Cooperation (Chapter 6 and 21). The specific contents of these chapters will be further discussed in Part III.

382 The only specialty with regard to trade in services is now the 'unanimity requirement' in the Council (Art. 207(4) 1st subparagraph TFEU). For analysis, see M. Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Herrmann, J.P. Terhechte (eds.) *European Yearbook of International Economic Law* (Springer-Verlag, Heidelberg/Berlin, 2010), pp. 123–151.

383 The ECJ excluded transport services from the CCP in Opinion 1/94.

384 Art. 4(2)(g) TFEU. However, transport services can be an exclusive competence if the EU's implied powers in this field are exclusive. On this issue, see P. Eeckhout, *EU external relation law* (Oxford University Press, Oxford, 2011), p. 59.

several EU Member States objected this as they questioned the EU competence in this area.[385] The result was that the parties could only agree on an open ended clause stating that "the conditions of mutual market access in road, rail and inland waterways transport shall be dealt by possible future special [...] transport agreements" and that existing bilateral agreements which are not covered by such future possible agreements shall continue to apply.[386]

6.1.2 *Negotiating the EU-Ukraine AA: A post-factum Analysis*

As noted above, the idea to renew the legal framework with Ukraine and the other EaP partners was developed in the framework of the ENP. In its first Communication on the ENP, the Commission recognised that the PCAs were outdated as they "grant neither preferential treatment for trade, nor a timetable for regulatory approximation".[387] However, not only the initial economic and trade-related objectives of the ENP were formulated rather vague,[388] but also the form, scope and name of the envisaged successor of the PCAs. First, the Commission proposed to conclude "Neighbourhood Agreements" which had to "supplement" (i.e. not replace) existing contractual relations.[389] Later, the Commission clarified that these Neighbourhood Agreements had to be "the next step in the contractual links with each partner country" and that the scope of these agreements had to be defined in the light of progress in meeting the AP priorities.[390] Remarkably, in the case of Ukraine, such a new agreement was in this early period referred to as the "New Enhanced Agreement"[391] because the Ukrainian authorities opposed the 'neighbourhood' label.[392] After a 'positive' evaluation of the implementation of the EU-Ukraine AP and the 2006 parliamentary elections, the parties agreed to launch the negotiations the following year.[393] In January 2007 the Council adopted the negotiating

385 Interview 3 Ukrainian chief negotiator on the DCFTA, 5 March 2012, Kiev.

386 Art. 136 AA. However, the DCFTA includes provisions on international maritime transport, see Art. 135 EU-Ukraine AA.

387 European Commission, *op. cit*., footnote 286, p. 5.

388 As mentioned above, the Commission initially proposed to offer the ENP countries "a stake in the EU's Internal Market" and further integration and liberalisation to promote the free movement of the four freedoms (European Commission*, ibid*).

389 European Commission, *op. cit*., footnote 286, p. 17.

390 European Commission, *op. cit.,* footnote 288, p. 3.

391 This term was for the first time used in the EU-Ukraine AP (*op. cit.,* footnote 316).

392 C. Hillion, 'Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'', *European Foreign Affairs Review* 12, 2007, p. 170.

393 EU-Ukraine Summit, *Joint Statement*, 27 October 2006, 14604/06 (presse 297).

directives for a "New Enhanced Agreement"[394] and negotiations were launched in March 2007.[395] However, the negotiations on the DCFTA only started in February 2008, after the confirmation of Ukraine's accession to the WTO, which was the *conditio sine qua non* to initiate DCFTA negotiations.[396] An important moment during the negotiations was the 2008 Paris EU-Ukraine Summit. During this occasion, a Joint Declaration was adopted which made an end to all speculations on the form of the agreement as it unequivocally stated that "the new agreement between the European Union and Ukraine will be an "*association agreement*"".[397] This offer was later extended to all countries in the EaP during the 2009 Prague Eastern Partnership Summit[398] and negotiations on association agreements with Moldova and Georgia were launched in, respectively, January and July 2010.[399] As mentioned in the previous chapters, already during the PCA negotiations, Ukraine preferred to conclude an association agreement because such an agreement suited better its (ambiguous) EU Membership ambitions. However, at that time, the EU was only willing to offer PCAs since association agreements were 'reserved' for the CEECs (cf. *supra*).[400] Again, during the negotiations on the New Enhanced Agreement, Ukraine expressed its preference to conclude an association agreement in the light of their revamped EU Membership aspirations, proclaimed after the 2004 Orange Revolution. Because the CEECs meanwhile joined the EU and, consequently, association agreements became 'available' for the new eastern EU neighbours,[401] there was no longer any justification for maintaining an alternative for association. Moreover, because the mediterranean ENP partners already established a "special and privileged" relationship with the EU through the Euro-Mediterranean *Association* Agreements, it became indefensible for the EU not to grant the same treatment to the eastern ENP partners.

The negotiations were launched on 5 March 2007 in Brussels and were conducted in 4 negotiating groups: (i) political dialogue and foreign and security

394 Council, 'Directives for the negotiation of a new Enhanced Agreement between the EU and Ukraine', 5463/07, 22 January 2007 (document not accessible).

395 European Commission, 'EU-Ukraine start negotiations on New Enhanced Agreement', *Press release*, 2 March 2007, IP/07/275.

396 Ukraine officially joined the WTO on 16 May 2008 (WTO, 'WTO welcomes Ukraine as a new Member', *Press release,* 5 February 2008).

397 EU-Ukraine Summit, 9 September 2008, *Joint Statement*, Paris, 12812/08 (presse 247) (Emphasis added).

398 Eastern Partnership Summit, *Joint Declaration*, Prague, 7 May 2009, 8435/09 (Presse 78).

399 The DCFTA negotiations with Moldova and Georgia were launched in February 2012.

400 C. Hillion, *op. cit.,* footnote 195.

401 C. Hillion, *op. cit.,* footnote 392, p. 175.

policy, (ii) justice, freedom and security, (iii) economic and sectoral cooperation and, following the confirmation of Ukraine's WTO accession in February 2008, (iv) on the DCFTA. In the first year of the negotiations, both sides reached a broad understanding on the overall objectives, values and principles of the main elements of the 'New Enhanced Agreement'. It was already agreed upon that the new agreement had to be "a comprehensive, ambitious and innovative document covering all areas of EU-Ukraine cooperation".[402] However, already in this early stage of the negotiations, Ukraine expressed its objective to "[move] away from the principles of partnership and cooperation to the principles of political association and economic integration"[403] and even requested an EU Membership perspective. Clearly, the EU negotiators wanted to avoid that the association and membership issue would hold the entire negotiation process hostage. Therefore, it was decided that "the political questions linked to Ukraine's European aspirations, including the question of the title of the agreement, will need to be tackled later on, once the overall scope of the New Enhanced Agreement is clear".[404] Between 2008 and 2009, the parties made good progress in the first three negotiating groups. As noted above, at the 2008 EU-Ukraine Paris Summit, the leaders of the EU and Ukraine agreed that the new agreement would be an association agreement, however, without agreeing on the EU Membership perspective issue. In this period, the parties further agreed on large parts of the text such as the preamble, objectives, general principles and institutional provisions of the agreement.[405] Regarding political dialogue and foreign and security policy, both sides had provisionally closed the negotiations on most matters, with the exception of discussions on references to respect for the principles of independence, sovereignty, territorial integrity and inviolability of borders. Also in the area of Justice, Freedom and Security, the EU and Ukraine agreed on most matters. A notable exception were the provisions regarding movement of persons and a reference to the objective of visa-free travel and judicial cooperation in civil matters.[406] In addition, in the group on Economic and Sector Cooperation, negotiations on all 31 areas were finalised. On 18 February 2008, the DCFTA negotiations were launched, but mainly remaining at general and exploratory stage.

402 Joint Progress Report, 'Negotiations on the EU-Ukraine New Enhanced Agreement', September 2007.

403 *Ibid.*

404 *Ibid.*

405 2nd Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 2008; Third Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 26 November 2009.

406 *Ibid.*

Between 2010 and 2013, the negotiations were finalised. Contrary to the trade part of the agreement, the negotiations on the 'political' part of the AA progressed rapidly. Only a few sensitive issues remained unsolved such as the duration of the agreement,[407] references to the International Criminal Court (cf. *infra*) and the provisions on movement of persons and visa-free travel.[408] The DCFTA negotiations on the other hand proved to be difficult and complex. Key hurdles during these negotiations were energy – especially the relation between the AA and the ECT Treaty – and Ukraine's export duties on several products such as types of scrap metal, seeds and oil-yielding crops.[409] On several issues such as Geographical Indications, EU (tariff-rate) quotas on the import of Ukrainian agricultural products (e.g. cereals) and the protection of the Ukrainian car sector, only an agreement was reached in the final phase of the negotiations in 2011 at 'ministerial' level between Trade Commissioner K. De Gucht and the Ukrainian deputy Minister of Economy V. Pyatnytskyi.[410] Another challenge for Ukraine during the DCFTA negotiations was the lack of civil servants trained in EU and WTO law, especially considering the broad and complex nature of the DCFTA.[411] Due to this lack of human resources, the Ukrainian DCFTA negotiating team was rather small. Nevertheless, EU negotiators noted that they "increasingly became a difficult and hard negotiating partner".[412]

Whereas the AA negotiations were launched under the Presidency of the pro-European Viktor Yyshchenko, it was feared that after the election in February 2010 of Viktor Yanukovych – known for his pro-Russia stance –, the negotiations on the AA would stall. EU negotiators and observers feared that

407 Ukraine initially insisted that the agreement would only have a duration of several years and that after a certain period the parties would revise the text. EU negotiators stated that Ukraine 'officially' argued for such a limited duration to include after several years a more clear 'European perspective'. However, these EU negotiators were afraid that this was a hidden tactic of the Ukrainian negotiators to find a way or instrument to renegotiate several years after the entry into force of the agreement parts of DCFTA that proved to be "painful" for Ukraine (Interview 2 EU Delegation, 1 March 2012, Kiev).

408 4th Joint Progress Report, 'Negotiations on the EU-Ukraine Association Agreement', 8 November 2010.

409 These issues will be further analysed in Part III of this work.

410 Interview 4 Trade Officer at the EU Delegation, 24 February 2012, Kiev; Interview 3 Ukrainian chief negotiator on the DCFTA, 5 March 2012, Kiev; Interview 5 official Unit for Trade and Economic and Sectoral Cooperation, European Union Department, Ministry of Foreign Affairs of Ukraine, 29 February 2012, Kiev.

411 *Ibid.*

412 Interview 4 Trade Officer at the EU Delegation, 24 February 2012, Kiev.

Yankovych would opt for closer relations with Russia and its customs union with Belarus and Kazakhstan instead of an ambitious AA with the EU. The swift signature of an agreement with Russia allowing the Russian Black Sea Fleet to stay in Ukraine for at least another 32 years in exchange for lower gas prices only reinforced this perception. For the first time, Ukrainian officials also publicly criticised the AA, especially the DCFTA.[413] However, during his first official visit to Brussels in March 2010, Yanukovych confirmed that European integration remained a key priority for Ukraine.[414] Also during the AA negotiations, Ukraine continued proclaiming that EU integration and the EU-Ukraine AA was a priority, including an EU Membership perspective, and that Ukraine would not bend for the Russian pressure to join the customs union (cf. *infra*).

The last DCFTA negotiations round (18th) took place on 19–23 September 2011 and on 19 October 2011 a political compromise on the EU-Ukraine DCFTA was reached at a final meeting between Trade Commissioner De Gucht and Vice-Prime Minister Klyuyev, although some "technical issues" still had be fine-tuned.[415] On 11 November 2011, after 21 rounds of negotiations, also an agreement was reached between the chief negotiators on the Association Agreement (non-DCFTA part). During this last AA negations round, a compromise was finally reached on the duration of the agreement[416] and the reference to the International Criminal Court.[417]

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413 For example, a chief Ukrainian negotiator stated that the AA is a "selfish" and "asymmetric" plan designed to open Ukraine's market to EU companies while keeping the single market fenced off (A. Rettman, 'EU Trade pact not at risk, Ukraine ambassador says', *EUobserver*, 4 October 2010).

414 EU-Ukraine Summit, 22 November 2010, *Joint Press Statement*, Brussels, 16691/10 (presse 312).

415 K. De Gucht, 'EU-Ukraine trade negotiations; a pathway to prosperity', Speech at INTA Committee Workshop, Brussels, 20 October 2011.

416 The compromise on the duration of the agreement is that the agreement is concluded for an unlimited period, however, that the parties shall provide for a comprehensive review of the achievement of objectives under this agreement within five years of its entry into force, and at any other time by mutual consent of the parties (Art. 481 EU-Ukraine AA).

417 According to Art. 8 EU-Ukraine AA, the parties "shall cooperate in promoting peace and international justice by ratifying and implementing the Rome Statute of the International Criminal Court (ICC) of 1998 and its related instruments". For Ukraine, this was a delicate issue as in a judgment of 11 July 2001, the Constitutional Court of Ukraine concluded that several provisions of the Rome Statute were not in conformity with the national Constitution. On this issue, see G. Van der Loo, P. Van Elsuwege, R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', *EUI Working Paper*, LAW 2014/09, p. 24.

However, the EU had postponed the discussions on an EU Membership perspective, which was continuously requested by Ukraine throughout the entire negotiation process. Not only was the EU unwilling to offer such a perspective, the uprightness of Ukraine's claim for an EU Membership perspective was also questioned. It was suspected that Ukraine played this 'EU accession card' in order to gain concessions in other areas.[418] This issue was expected to be the subject of discussion at the December 2011 EU-Ukraine Summit, however, two days before the Summit Ukraine dropped its membership perspective request.[419] A strong reference to EU accession was not offered at this Summit but, instead, the leaders recognised that "Ukraine as a European Country with European identity shares a common history and common values with the countries of the European Union and acknowledged that gradual convergence of Ukraine with the EU in political, economic and legal areas would contribute to further progress in EU-Ukraine relations".[420] Moreover, the EU "acknowledged the European aspirations of Ukraine and welcomed its European choice".[421] After this compromise, both parties jointly declared after the Summit that "a common understanding on the full text of the Association Agreement was reached" and that a technical completion of the final consolidated version of the agreement was required with a view to its initialling as soon as possible.[422] Although this Summit finalised the AA negotiations, this event was mainly overshadowed by the Tymoshenko trial and the "perceived deterioration of the quality of democracy" in Ukraine (cf. *infra*).[423]

418 Interview 2 EU Delegation, 1 March 2012, Kiev. On this point, see also S. Matuszak, W. Kononczuk, 'The negotiations on the EU-Ukraine Association Agreement and Russia', *EaPCommunity*, 18 April 2011.

419 A. Rettman, 'Future of EU-Ukraine relations uncertain despite new treaty', *EUobserver*, 19 December 2011.

420 It has to be noted that, contrary to the Council, the European Parliament was more willing the give Ukraine an EU Membership perspective. In a resolution adopted on 1 December 2011, the European Parliament stated that "offering Ukraine a European perspective [is] of great significance and in the interest of both parties" and recommended "to recognise Ukraine's aspirations pursuant to Article 49 TEU, provided that all criteria are met" (European Parliament Resolution of 1 December 2011 containing the European Parliament's recommendation to the Council, the Commission and the EEAS on the negotiations of the EU-Ukraine Association Agreement, P7_TA(2011)0545, *OJ*, 2013, C 165/48).

421 Ukraine-EU Summit, 19 December 2011, *Joint Statement*, 18835/11 (Presse 513).

422 *Ibid.*

423 H. Van Rompuy, 'Remarks of President Herman Van Rompuy following the 15th EU-Ukraine Summit', 19 December 2011 (EUCO 166/11(Presse 511)).

6.1.3 *Initialling the EU-Ukraine AA and Political Hurdles towards the 2013 Vilnius Eastern Partnership Summit*

After the AA negotiations were finished, the EU-Ukraine relations were being complicated by cases of politically-motivated justice in Ukraine. The most important cases were the criminal charges against former Prime Minister Tymoshenko and several other members of her 2007–2010 government. In the summer of 2011, the well-known 'Tymoshenko trial' started. The former Prime Minister was charged with abuse of power when she struck a gas deal with Russia in 2009. Tymoshenko was arrested on 5 August 2011 and eventually found guilty and sentenced to 7 years imprisonment on 11 October 2011, excluding her from the 2012 parliamentary elections. The EU stated that it was "deeply disappointed" with this verdict, that the trial "did not respect the international standards as regards fair, transparent and independent legal process" and that it confirmed that "justice is being applied selectively in politically motivated prosecutions of the leaders of the opposition and members of the former government".[424] The EU called for a fair and impartial process in any appeal case and warned that Ukraine's respect "for universal values and rule of law, and specifically how they will handle these cases, risk having profound implications [on the] conclusion of the Association Agreement".[425]

The Tymoshenko case indeed had an impact on the next procedural steps for the conclusion of the EU-Ukraine AA, i.e. the initialling and signing. By initialling the negotiated text of an agreement, both parties indicate that the negotiations are officially closed. Although this is a pure technical procedural step in the process of the negotiation and conclusion of an agreement, in the case of the EU-Ukraine AA, it was for the first time strongly 'politicised'. Kiev hoped that the EU would have agreed to initial the agreement at the December 2011 EU-Ukraine Summit, however, the text of the agreement was not ready as it needed a final 'legal scrubbing'. In this process, lawyer-linguists go over the agreement to check the consistency and terminology of the agreement. Also the English and Ukrainian versions of the text had to be synchronised. Due to the large and complex contents of the agreement, this task took several months. In addition, several Member States were not keen to initial the text as long as the Tymoshenko case was not properly addressed. This delay was criticised by Ukraine.[426] Although being a mere technical step, also the EU party

424 C. Ashton, 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on the verdict in case of Ms. Yulia Tymoshenko', Brussels, 11 October 2011, 15394/11 (presse 364).

425 *Ibid.*

426 'Azarov: Delay in initialling of Association Agreement with EU not Ukraine's fault', *KyivPost*, 14 March 2012.

had several 'political' reasons to initial the text as soon as possible. First, by initialling the agreement, the text of the agreement would be 'locked' after four years of difficult negotiations. This made it impossible for Ukrainian industrial lobbyist or political forces to pressure the government to put issues agreed upon during the negotiations back on the table.[427] Second, although the initialling of the agreement does not lead to the (provisional) entry into force of the agreement without signature and ratification, it gave Ukraine a tangible signal and incentive to proceed with the AA and not to choose for membership of the Russian-Belarus-Kazakhstan customs union instead (cf. *infra*). Finally, as confirmed by EU negotiators, the swift initialling was also in the interest of the EU because this avoided that Yanukovych "could trumpet victory" and use this event in his campaign for the October 2013 parliamentary election.[428] For these reasons, the European Parliament called in a resolution, adopted on 1 December 2011, for a "rapid initialling" of the EU-Ukraine AA.[429] Eventually, on 30 March 2012, the EU-Ukraine Association Agreement was initialled. On this date, only the pages of the non-trade part of the Association Agreement were initialled as the DCFTA still required some legal scrubbing. To indicate that the DCFTA is an integral part of the EU-Ukraine AA, also the first and the last page of the DCFTA were initialled.[430] After the DCFTA legal proofreading was finished, also this part of the AA was initialled on 19 July 2012.

The cases of "selective justice" had also on impact on the signature of the EU-Ukraine AA. Due to the Tymoshenko case, the EU-Ukraine relations reached rock bottom in 2012. For the first time in 15 years there was no EU-Ukraine Summit held and several EU leaders boycotted the Euro 2012 football championships in Ukraine. However, EU Member States were divided how to respond to the Tymonshenko trial. Whereas eastern EU Member States such as Poland and Lithuania still wanted to sign the agreement as soon as possible, mainly to counterbalance the Russian pressure on Ukraine to join the Russian-led customs union, other Member States such as the Netherlands and France preferred to postpone the signature of the agreement. Eventually, on 10 December 2012, the Council adopted Conclusions on Ukraine that affirmed the

427 G. Van der Loo, 'The EU-Ukraine Association Agreement: Waiting for Godot?', *KyivPost,* 11 March 2012.

428 Interview 2 EU Delegation, 1 March 2012, Kiev.

429 European Parliament resolution of 1 December 2011 containing the European Parliament's recommendation to the Council, the Commission and the EEAS on the negotiations of the EU-Ukraine Association Agreement, P7_TA(2011)0545 (*OJ*, 2013, C 165/48).

430 It is clear that the EU did not want to make a 'political' event from the initialling as no press release on this event was issued.

EU's commitment to signing the agreement, possibly by the time of the EaP Summit in Vilnius in November 2013, if Ukraine demonstrated "determined action and made tangible progress" in three areas: (i) the compliance of the 2012 parliamentary elections with international standards, (ii) progress in addressing the issue of selective justice and (iii) implementing the reforms defined in the jointly agreed Association Agenda (cf. *supra*).[431] During the EU-Ukraine Summit of 25 February 2013, Ukraine expressed is ambition to meet these criteria and the EU noted some progress in several areas but concluded that "more and concrete progress" was required in order to sign the agreement.[432]

In 2013, Ukraine took several measures to meet the conditions set out by the EU. For example, in the area of selective justice, on 7 April 2013, the EU welcomed that Yanukovych had exercised his prerogatives of pardoning in several cases.[433] To prepare Ukraine to implement the DCFTA, an 'Informal Business Climate Dialogue' was established which met for the first time in July 2013 in Kiev, co-chaired by the Deputy Director General of DG Trade and the Ukrainian Minister of Economic Development and Trade. They discussed trade irritants and Ukrainian trade measures which were considered not to be in line with the future DCFTA or Ukraine's WTO commitments.[434] However, as the EaP Vilnius Summit was approaching, the EU warned Ukraine that time was running out for meeting the conditions in the three areas and that more progress was needed. A special European Parliament monitoring mission to Ukraine concluded in October 2013 that Ukraine failed to meet the conditions, especially

431 3209th Foreign Affairs Council meeting, 'Council conclusion on Ukraine', Brussels, 10 December 2012.

432 16th EU-Ukraine Summit, 25 February 2013, *Joint Statement*, 6811/13(presse 72); Press remarks by Herman Van Rompuy, President of the European Council, following the EU-Ukraine Summit, 25 February 2013, EUCO 48/13 (presse 74).

433 Joint Statement by EU High Representative, Catherine Ashton, and Commissioner Štefan Füle on the pardoning of Yuriy Lutsenko, Brussels, 7 April 2013, A 193/13.

434 At this meeting the EU expressed specific concerns regarding, *inter alia,* Ukraine's request to renegotiate a large number of WTO tariff commitments and trade irritants in the Ukrainian automotive industry. The latter concerned a law that was adopted by the Ukrainian Parliament in July 2013 introducing a so called recycling fee for vehicles, which was considered to be a hidden protective trade measure. A similar Russian measure was challenged by the EU in the WTO (WTO, 'Russian federation – Recycling Fee on Motor Vehicles', Dispute DS462, Panel established but not yet composed). The EU urged the Ukrainian authorities to rectify these trade irritants as a matter of urgency in the light of the envisaged signature of the EU-Ukraine AA and DCFTA at the Vilnius Summit. (Delegation of the European Union to Ukraine; 'The EU and Ukraine discussed current bilateral trade and economic issues in Kyiv', *Press release*, 26 July 2013).

those related to the Tymoshenko case.[435] Nevertheless, Lithuania, together with other eastern EU Member States, pushed for signing the AA at the Vilnius summit as this had to be the highlight of the Lithuanian EU Presidency.[436]

When the Ukrainian parliament failed to pass a law on 13 November which would have enabled the release of Tymoshenko, several Member States gave up the signing of the AA.[437] Nevertheless, it was still hoped that a last minute deal would be struck in order to allow the signature at the Vilnius Summit on 28 November 2013. On 18–19 November 2013, the Council discussed Ukraine's progress in fulfilling the conditions for the signature of the AA and stated, one week before the Summit, that "determined action and tangible progress" was still needed.[438] Also Commissioner Füle travelled a few days before the Summit to Kiev to express the determination of the EU to sign the AA, provided that there was progress in meeting the conditions. He stressed the importance of key legislation which the Ukrainian parliament envisaged to adopt on 21 November 2013 regarding parliamentary elections, the prosecutors general's office and medical treatment of prisoners abroad.[439]

However, on 21 November, on the eve of the Vilnius Summit, the Ukrainian government took the EU by surprise as it adopted a resolution which stated that Ukraine "suspended" the process of preparation for signature of the AA in order "to ensure the national security of Ukraine and to recover trade and economic relations with the Russian Federation".[440] This resolution called for measures "to restore the lost production output and areas of trade and economic relations with Russia and other CIS member states" and a new EU-Russia-Ukraine trade commission to promote economic ties.[441] Some EU diplomats argued that Yanukovych snapped for the Russian pressure and gas-reductions whereas other diplomats or observers concluded that he never intended to sing the AA "because the status quo, with Ukraine in limbo between the EU and Russia, ma[de] it easier for him to retain power and enrich his clan".[442]

435 European Parliament, conference of Presidents, Draft Minutes of the extraordinary meeting of 15 October 2013, PE-7/CPG/PV/2013-extra 02.

436 A. Rettman, 'EU adopts legal basis for Ukraine treaty', *EUobserver,* 15 May 2013.

437 'Ukrainian parliament pours cold water over the country's EU prospects', *Euractiv*, 13 November 2013.

438 3273th Council Meeting, Foreign Affairs, 18–19 November 2013, 16364/13 (Presse 482).

439 Delegation of the European Union to Ukraine, 'Statement by Commissioner Füle', 20 November 2013.

440 Government of Ukraine, 'Government adopted resolution on suspension of preparation process to conclude Association Agreement with EU', *Press release*, 21 November 2013.

441 *Ibid.*

442 R. Olearchyk, 'Putin move scuppers EU deal on Ukraine', *Financial Times*, 22 November 2013; A. Rettman, 'Ukraine pulls the plug on EU treaty', *EUobserver*, 21 November 2013.

The language used in the first statement by the High Representative on this Ukrainian U-turn indicated that the EU considered that the agreement was lost.[443] However, on 25 November 2013, the President of the European Council and of the European Commission declared in a joint statement that "the European Union's position remains clear" as the offer of signing "the most ambitious agreement the European Union has ever offered [...] is still on the table". They added that this "require[d] the necessary political will by the Ukrainian leadership, determined action and tangible progress on the conditions set out in December 2012".[444] It was also clear that the EU blamed Russia as the EU leaders "strongly disapprov[ed] the Russian position and actions in this respect". Finally, they declared that "the European Union will not force Ukraine, or any other partner, to choose between the European Union or any other regional entity" and that "it is up to Ukraine to freely decide what kind of engagement they seek with the EU".

The decision of the Ukrainian Government not to sign the agreement was a major blow for the EaP Vilnius Summit and the Lithuanian Presidency. Although the AAs with Moldova and Georgia were initialled and less ambitious 'sectoral' agreements were initialled or signed with Azerbaijan, Georgia and Ukraine,[445] the failure of the EU-Ukraine AA overshadowed the Summit. Remarkably, in a joint declaration adopted during this Summit, the EU *and* Ukraine reiterated their commitment to the signing of the AA on the basis of determined action and tangible progress in the three areas, mentioned above.[446] Following its decision of 21 November, the Ukrainian government indeed sent a mixed message that it would "further the course of reforms directed to Eurointegration" and the process of preparing the AA was only "suspended".[447] It also lobbied with the EU for more financial support before

443 The High Representative stated that the EU was "disappointed" as the signing of the agreement "would have further enhanced the reform course of Ukraine" (Statement by EU High Representative Catherine Ashton on Ukraine, 21 November 2012, 131121/04).

444 Joint Statement by President of the European Council Herman Van Rompuy and President of the European Commission José Manual Barroso on Ukraine, 25 November 2013, EUCO 245/13, Presse 245/13.

445 A visa facilitation agreement with Azerbaijan and a framework agreement with Georgia on participation in EU crisis management operations was signed. Also an aviation agreement with Ukraine was initialled (cf. *infra*).

446 Joint Declaration of the Eastern Partnership Summit, Vilnius, 28–29 November 2013, 17130/13 (Presse 516). In this declaration, the EU and the EaP partners also reviewed the progress made in the Partnership and agreed on an agenda for the way ahead.

447 Government of Ukraine, 'Decision to suspend association is tactical, the strategy remains invariable – Eurointegration', *Press release*, 22 November 2013.

considering signing the AA.[448] But for many EU Member States, Ukraine had lost all its credentials. Nevertheless, the following month, the Commissioner for Enlargement and ENP Füle still tried to persuade the Ukrainian authorities on the signature of the AA and DCFTA. He met on 12 December 2013 with Ukrainian deputy Prime Minister "to discuss ways towards the signature and implementation of the AA" and outlined the benefits of the DCFTA.[449] Both parties agreed to prepare a roadmap for the implementation of the AA/DCFTA and to arrive at a common understanding on the expected benefits of the agreement. The latter was a crucial issue for the EU Commissioner because he complained that the "recently grossly exaggerated speculations about the alleged costs" of the implementation linked to the AA were neither based on facts nor justified.[450] However, these attempts were soon overtaken by the 'Maidan demonstrations'.

6.1.4 *The 'Maidan Revolution' and the Two-phase Signature of the EU-Ukraine AA*

The decision of the Ukrainian government to suspend the signature of the AA triggered an unprecedented chain of events which not only had an impact on the political situation in Ukraine but also on the peace, stability and security in Europe. In November 2013, hundreds of thousands of Ukrainians went to the streets in the so called '*Euromaidan*' demonstrations to protest against this Government decision. They demanded the signature of the AA and closer European integration. The EU proclaimed its support for these protesters "who expressed in a strong and unprecedented manner their support for Ukraine's political association and economic integration with the EU".[451] The President of the European Commission stated that "the European Union has the right and the duty to stand by the people of Ukraine in this very difficult moment, because they are giving to Europe one of the greatest contributions that can be given".[452] After violent repression against the protesters on 30 November 2013, strongly criticised by the EU,[453] the scope of the protests gradually expanded

448 'Füle sees Ukraine's claims of costs of switching to DCFTA as disproportionate', *Interfax-Ukraine*, 28 November 2013.

449 European Commission, 'Association Agreement is an offer to the country and its people', MEMO 13/1146, 12 December 2013.

450 *Ibid.*

451 Statement by High Representative Catherine Ashton and Commissioner Füle, MEMO/13/1077, Brussels, 30 November 2013.

452 Statement of President Barroso on the current situation in Ukraine, MEMO/13/1116, 9 December 2013.

453 Statement by High Representative Catherine Ashton and Commissioner Štefan Füle on last night's events in Ukraine, MEMO/13/1077, 30 November 2013.

and the resignation of President Yanukovych was called for. Mid-January 2014, the EU also fiercely condemned a legislative package, adopted by the Ukrainian parliament, which restricted the Ukrainian citizens' fundamental rights of association, media and press in order to curtail the Maidan demonstrations.[454] The demonstrations reached a climax in February 2014 when the riot police clashed with the protesters and an estimated 100 people were killed. An extraordinary Council Meeting on 20 February 2014 "condemned in the strongest terms all use of violence" and called "to fulfill the legitimate democratic aspirations of the Ukrainian people". In the light of the deteriorating situation, the Council decided to introduce targeted sanctions, which were further widened the following months.[455] Remarkably, even in these turbulent days when serious violations of human rights and fundamental freedoms and the use of excessive force against the Maidan protesters was reported, the EU reiterated its commitment to signing the AA, "as soon as Ukraine [was] ready".[456] Although these reported violations were in sharp contrast with the "shared values" enshrined in the AA, it appears that the EU was afraid to 'lose' the agreement and that is was willing to push it through. But again, political

454 3288th Council Meeting, Foreign Affairs, 'Council conclusions on Ukraine', 20 January 2014.

455 The Foreign Affairs Council Meeting on 20 February 2014 and 3 March 2014 agreed to introduce targeted sanctions including asset freeze and visa ban against those responsible for persons identified as responsible for the misappropriations of State funds and human rights violations, violence and use of excessive force. The Member States also suspended export licenses on equipment which might be used for internal repression. On 5 March 2014, the Council adopted EU sanctions which focused on the freezing and recovery of misappropriated Ukrainian state funds. The sanctions targeted 18 persons identified as responsible for such misappropriation whose assets within the European Union were frozen (Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine, *OJ*, 2014, L 66/26). On 14 April 2014 the Council extended these sanctions to four other persons which were identified as responsible for misappropriation of Ukrainian State funds (Council Implementing Decision 2014/216/CFSP of 14 April 2014; *OJ*, 2014, L 111/91). Several persons who are targeted by these sanctions, including former President Yanukovych, launched proceedings before the ECJ to seek annulment of EU sanctions decisions. Further, the EU adopted restrictive measures against persons responsible for actions which undermined or threatened the territorial integrity, sovereignty or independence of Ukraine (cf. *infra*).

456 3291th Council meeting, Foreign Affairs, 'Council conclusion on Ukraine', 10 February 2014 and 3300th Council meeting, Foreign Affairs, 'Council conclusions on Ukraine', 20 February 2014. Usually, if the EU observes violations of human rights by a country negotiating a new agreement with the EU, the Union postpones the signature of the agreement in question (cf. *supra*, text to footnote 219).

developments determined the signature of the AA. The 'Maidan revolution' eventually led to the dismissal of President Yanukovych on 22 February 2014, who fled the country the day before, and an interim-Government under the leadership of the pro-European A. Yatsenyuk was approved by the Verkhovna Rada on 27 February 2014.[457] Immediately after taking office, the new Interim-Government expressed its ambition to sign the AA as soon as possible.[458]

During an extraordinary European Council meeting on 6 March 2014, the EU Heads of State or Government agreed to sign "all the *political* chapters" of the agreement as soon as possible.[459] In addition, they decided to adopt unilateral measures "which would allow Ukraine to benefit substantially from the advantages offered in the [DCFTA]". According to the European Council, such measures had to entail an offer to apply DCFTA provisions related to the import of goods by reducing tariffs by autonomous trade measures.[460] Both proposed actions clearly indicated the EU's aim to conclude the AA as soon as possible to counter the Russian pressure on Ukraine and to support the new pro-EU Government. However, the compromise to sign only a part of the agreement was criticised by the Ukrainians, who preferred to sign the entire agreement at once.[461] It appears that despite the (geo-)political pressure to act quickly, several political circumstances called for a signature in two phases. First, there was the issue of legitimacy. Under the Ukrainian Constitution, the President is responsible for the signature of international agreements.[462] After the escape of Yanukovych, Ukraine only had an acting President (Olexander Turchynov) who was appointed by the Ukrainian parliament without elections. By agreeing to sign the remaining chapters after the Presidential elections, scheduled on 25 May, the signature of the DCFTA had to be the subject of discussion in election campaigns and, consequently, acquire more legitimacy. Apparently,

457 The Verkhovna Rada of Ukraine has approved A. Yatsenyuk as Prime Minister of Ukraine by its decision on 27 February 2014 (Government of Ukraine, 'Prime Minister of Ukraine and composition of Government appointed', *Press release*, 27 February 2014).

458 See for example Comment of Ukraine's MFA 'on European Parliament resolution on situation in Ukraine of February 27, 2014' (Government of Ukraine, *Press release*, 28 February 2014).

459 European Council, 'States of the Heads of State or Government on Ukraine', Brussels, 6 March 2014 (emphasis added).

460 On 14 April 2014, after a 'fast track' approval process, the European Parliament and the Council adopted a Regulation 'on the reduction or elimination of customs duties on goods originating in Ukraine' (Regulation (EU) No 374/2014). This Regulation will be further discussed in Chapter 9.2.

461 'EU blamed for mishandling Ukraine trade pact agreement', *Euractiv,* 7 March 2014.

462 Art. 106(3) of the Ukrainian Constitution.

also several EU Member States were afraid that an entire signature would provoke Russia.[463] During the January 2014 EU-Russia Summit, the EU made the commitment to discuss the implications of the EU-Ukraine DCFTA on Ukraine. Therefore, according to the Enlargement and ENP Commissioner Füle, the EU postponed the signature of the DCFTA to proceed with the consultations with Russia on the wider implications of the DCFTA.[464] In this view the Ukrainian Ambassador to the EU, K. Yelisieiev, declared on this 'two-phase signature': "this solution is not ideal, but is pragmatic. This is a bird in the hand. It's not intended as an alternative to a crane in the sky, but as a temporary compromise for a few months".[465]

The signature of the 'political' chapters of the EU-Ukraine AA effectively took place on 21 March 2014 during the Spring European Council. These 'political' chapters of the agreement included the preamble, Article 1 (Objectives), Title I (General Principles), II (Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy) and VII (Institutional, General and Final Provisions).[466] It has to be noted that Title III (Justice, Freedom and Security) could also have been considered as a 'political' chapter of the AA. However, several Member States opposed the signature of this chapter on 21 March 2014 as it includes 'sensitive' provisions on treatment and mobility of workers and movement of persons (cf. *infra*).[467] According to H. Van Rompuy, "this gesture symboliz[ed] the importance that both sides attach to this relationship".[468] In other words, this partial signature may essentially be regarded as a political act underlining the parties' commitment to shared values and the objectives of the envisaged association.

463 A. Rettman, 'EU and Ukraine sign 2% of association treaty', *EUobserver*, 21 March 2014.

464 S. Füle, 'EU will consult with Russia over Ukraine's association', Interview with *Euractiv*, 1 April 2014.

465 K. Yelisieiev, 'Ukraine's Association Agreement: a bird in the hand, not a crane in the sky', *Euractiv*, 25 March 2014.

466 Final Act of the Summit between the EU and its Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement, attached to Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Title I, II and VII thereof (*OJ,* 2014, L 161/1).

467 Interview 6 EEAS official, 22 April 2014, Brussels.

468 Statement by President of the European Council Herman Van Rompuy on the occasion of the signing ceremony of the political provisions of the Association Agreement between the European Union and Ukraine, Brussels, 21 March 2014, EUCO 68/14.

The direct legal implications were fairly limited because the provisions of these chapters are rather general in nature (cf. *infra*). Moreover, it was stressed that the 'political' and other parts of the Agreement constitute one single instrument.[469] Therefore, this partial signature did not result into the entry into force of these political chapters, neither into their provisional application, as the remaining procedural requirements of Article 218 TFEU and Article 486 of the AA (on provisional application) still had to be fulfilled. It can only be argued that Ukraine was bound by the 'good faith obligation' of Article 18 of the Vienna Convention on the Law of the Treaties (VCLT) which states that a State which has signed, ratified or has expressed its consent to be bound by a treaty has the obligation "to refrain from acts which would defeat the object and purpose" of that treaty prior to its entry into force.[470]

The Council aimed to sign the remaining provisions of the AA, including the DCFTA, "as soon as possible after the presidential election on 25 May 2014".[471] The presidential elections of 25 May 2014 were won in one round by the pro-European businessman Petro Poroshenko. The EU concluded that the elections were in line with the relevant international standards, despite the hostile security environment in two eastern regions.[472] Both the President of the European Council and the European Commission congratulated Poroshenko on the occasion of his election and declared that they "look[ed] forward to the swift signing of the remaining provisions of the Association Agreement".[473] Also Poroshenko expressed in his inauguration speech the ambition to sign the remaining part of the AA as soon as possible when he stated: "my pen is in my

469 Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement (*OJ*, 2014, L 278/4).

470 However, not only is there an absence of relevant practice, this provision is also criticized as being too vague which discourages the invocation of this rule for the purposes of ensuring its enforcement (P. Palchetti, 'Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?' in E. Cannizzaro (ed.) *The Law of Treaties. Beyond the Vienna Convention',* (Oxford University Press, Oxford, 2011), pp. 25–36).

471 3309th Council meeting, Foreign Affairs, 'Council conclusions on Ukraine', 14 April 2014, Luxembourg.

472 Joint Statement on Presidential elections in Ukraine by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Barosso, 26 May 2014, EUCO 116/14. See also Statement of the Heads of State or Government on Ukraine, 27 May 2014.

473 Message of congratulations of President Van Rompuy and President Barosso on the election of Mr. Petro Poroshenko as President of Ukraine, 3 June 2014, EUCO 121/14.

hands and as soon the EU approves the respective decision, the signature of the President of Ukraine will appear in this fateful document".[474]

The remaining titles of the EU-Ukraine AA and the AAs with Moldova and Georgia were finally signed during the 27 June 2014 European Council.[475] As President Poroshenko noted during the signing ceremony, "it took Ukraine 7 long years to walk the terrible, thorny road towards the political association and economic integration with the EU. This road saw its ups and downs, but today, we are finally here".[476] However, several procedural steps are still required before the EU-Ukraine AA's (provisional) entry into force.

6.1.5 *Procedural Requirements for the Provisional Application and Ratification of the Mixed EU-Ukraine AA*

The EU-Ukraine AA is, just as the two other EaP AAs, a mixed agreement. Due to their political importance, "almost naturally, association agreements are seen as mixed agreements".[477] This is also the case for the EU-Ukraine AA. However, from a strict legal point of view, association agreements do not have to be mixed as such. As A. Rosas notes, "generally speaking, [association agreements] do not need to be mixed, as the Treaty of Lisbon has widened the scope of the common commercial policy and has introduced a fairly wide formulation of supervening exclusivity in Article 3(2) TFEU and what seems to ban an

474 P. Poroshenko, 'Address of the President of Ukraine during the ceremony of inauguration', Press office of the President, 7 June 2014. The idea, raised by the office of the Ukrainian President, to sign the remaining parts of the AA during Poroshenko's inauguration was rejected by the EU ('EU misses opportunity to sign Ukraine's Association Agreement in Kyiv', *Euractiv*, 4 June 2014).

475 Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement (*OJ*, 2014, L 278/4). The Council adopted the Council Decision for the conclusion of the Georgia and Moldova AAs on 16 June 2014, before an agreement on the Council Decision for signature of the EU-Ukraine AA was agreed upon ('Council clears way for signing Association Agreements with Georgia and the Republic of Moldova', 16 June 2014 10983/14 (Presse 340)). For the text of these agreements, see Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (*OJ*, 2014, L 261/4); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (*OJ*, 2014, L 260/4).

476 Speech of the President at the ceremony of signing the Association Agreement between Ukraine and the European Union, Press office of the President of Ukraine, 27 June 2014.

477 M. Maresceau, 'A Typology of Mixed Bilateral Agreements', in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart Publishing, Oxford, 2010), p. 17.

even wider formulation of treaty-making powers in general in Article 216(1) TFEU as well as a more integrated CFSP competence also covered by Article 216 TFEU on Union treaty-making powers".[478] Moreover, since the Lisbon Treaty abolished the pillar structure and created a single legal personality for the EU, the inclusion of CFSP provisions in a broader framework agreement such as the EU-Ukraine AA does not automatically require mixity.[479] In order to render mixity legally more defendable, clauses perceived to fall under Member States competences have been inserted into association agreements or bilateral agreements of a general nature, such as provisions on political dialogue, nuclear non-proliferation or cultural cooperation.[480] This implies that the EU-Ukraine AA needs to be ratified by all the Member States according to their national laws and procedures. This creates an *additional* reinforced unanimity as the *procedural* legal basis of the AA is, *inter alia,* Article 218(8)TFEU, which already requires unanimity for the conclusion of association agreements. As it is traditionally the case, neither the Commission nor the Council has indicated which provisions were responsible for the mixed character of the EU-Ukraine AA. Although it is difficult to identify the provisions in the AA which are exclusive Member State competences, and are consequently 'responsible' for the mixity, it must be stressed that even one single element of an agreement for which the Union has no competence internally "infect the agreement as a whole and makes it dependent on the common accord of the Member States".[481] In the area of cooperation in foreign and security policy, the provisions of Title II of the AA are formulated in broad and general terms. Therefore, it is difficult to identify a specific AA provision in this Title which would not be covered by Title V of the TEU (i.e. General provisions on EU's external action and specific provisions on CFSP). However, in AA Title III on Justice, Freedom and Security, Article 24 on legal cooperation can be considered as falling outside Union competences. Also the DCFTA provisions on

478 A. Rosas, 'Exclusive, shared and national competence in the context of EU external relations; do such distinctions matters?', in I. Govaere, *et al.* (eds.) *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, Leiden/Boston, 2014), p. 24.

479 On this issue, see C. Hillion, R. Wessel, 'Restraining External Competences of EU Member States under CFSP', in M. Cremona, B. De Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart Publishing, Oxford, 2008), p. 104 and M. Gatti, P. Manzini, 'External representation of the European Union in the conclusion of international agreements', *Common Market Law Review* 49, 2012, p. 1720.

480 A. Rosas, *op. cit.,* footnote 478, p. 25.

481 Opinion of Advocate General Kokott delivered on 26 March 2009, Case C-13/7 *Commission v. Council,* para. 121.

enforcement of intellectual property rights, to the extent they deal with criminal enforcement, can be considered as 'mixed'.[482] Moreover, Title V on economic and sector cooperation includes provisions on cooperation in the civil nuclear sector.[483]

Due to its mixed character, it will take several years (usually 3 to 4 years) before all the Member States will have ratified the EU-Ukraine AA. However, in order to circumvent this long ratification process, the AA provides for the possibility of provisional application in Article 486. In this provision the EU and Ukraine "agree to provisionally apply this Agreement in part, as specified by the Union, [...] and in accordance with their respective internal procedures and legislation as applicable".[484] A legal basis for the provisional application of international agreements concluded by the EU was included in the Amsterdam Treaty (now Article 218(5) TFEU). It reflects Article 25 VCLT, which states that a treaty may provide for such provisional application or the negotiating States may agree to it. Another option which was, and still is, used by the EU to alleviate the negative effect of mixity is to sign and conclude formally a separate agreement (often called an 'Interim Agreement') incorporating only those parts of the main agreement – often the trade provisions – that are within the Union (before the Lisbon Treaty: 'Community') competences.[485]

Given the political significance of the agreement, the Council agreed on an exceptional wide scope of provisional application of the EU-Ukraine AA

482 Arts. 158, 207 and Section 3 of Chapter 9 of Title IV EU-Ukraine AA. For example, in the EU-Korea FTA, provisions on criminal enforcement of IPR and a Protocol on Cultural Cooperation were considered as the provisions that caused the mixity of the agreement (see for example European Parliament INTA Study, 'An assessment of the EU- South Korea FTA', 2010). However, the EU-Ukraine DCFTA does not include a separate section on *criminal* enforcement of IPR, contrary to the EU-Korea FTA (*OJ,* 2011, L 127/6, Art. 10.54). This could explain the position of the Commission that the entire DCFTA "fall[s] within the Union's exclusive external competence" (Statement in the Council minutes by the European Commission on the Statement by Hungary, Council of the European Union, Interninstitutional File 2013/0155(NLE), 20 June 2014, not public, *on file with the author*).

483 Art. 342 EU-Ukraine AA.

484 Art. 486(3) EU-Ukraine AA.

485 Such 'Interim Agreements on trade and trade-related matters' were for example concluded for the SAAs, EMAAs and PCAs (e.g. SAA Serbia (*OJ*, 2010, L 28/1); EMAA Lebanon (*OJ*, 2002, L 262/2). For the PCAs, see footnote 204). On such 'Interim Agreements', see C. Flaesch-Mougin, I. Bosse-Platière, 'L'application provisoire des accords de L'Union européenne', in I. Govaere, *et al.* (eds.) *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, Leiden/Boston, 2014), p. 310 and M. Maresceau, *op. cit.,* footnote 477, p. 13.

(and also of the AAs with Moldova and Georgia).[486] Usually, the provisional application or 'Interim Agreements' of association agreements or other framework agreements only cover the trade(–related) elements of the agreement.[487] But in the EU-Ukraine AA, the scope of the provisional application goes beyond the DCFTA and also includes the entire titles on General Principles, Financial Cooperation and General and Final Provisions and provisions regarding political dialogue, rule of law and movement of persons and economic and sector cooperation (Table 3).[488] It has to be noted that the Commission even proposed a broader scope for provisional application, including, *inter alia*, the entire Title on Political Dialogue and Reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy (Table 3).[489] However, the Member States, in particular the UK, raised objections against

486 For the provisional application of the EU-Moldova AA and EU-Georgia AA, see Council Decision 2014/492/EU of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (*OJ,* 2014, L 260/1); Council Decision 2014/494/EU of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (*OJ,* 2014, L 261/1).

487 For example, in the EU-Central America AA, only Part IV on trade is provisionally applied (with the exception of Art. 271 on criminal enforcement IPR) (*OJ*, 2012, L 346/1). Also the provisional application of the EU-Chile AA only addressed institutional and trade-related provision (*OJ*, 2002, L 352/1). Similarly, the 'Interim Agreement on trade and trade-related matters' with the SAA, EMAA and PCA partners only covered trade issues (*op. cit.,* footnote 485). The provisional application of the recent PCA with Iraq also includes provisions on economic and sector cooperation (*OJ,* 2012, L 204/18). Significantly, in the EPA with the CARIFORUM, "all elements falling within the competence of the Community" were applied provisionally (*OJ*, 2008, L 288/I/1).

488 Combined reading of the Council Decision 2014/295/EU (*op. cit.,* footnote 466) and Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII of the Agreement, as well as the related Annexes and Protocols (*OJ*, 2014, L 278/1).

489 European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part', COM(2013) 289 final, 15 May 2013.

TABLE 3 *Proposed and adopted scope of provisional application of the EU-Ukraine AA*

	Scope of the provisional application *proposed* by the Commission	**Scope of the provisional application as *adopted* by the Council**
Title I (General Principles)	*Entirely*	*Entirely*
Title II (Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy)	*Entirely*	Arts. 4–6 (political dialogue and dialogue and cooperation on domestic reform)
Title III (Justice, Freedom and Security)	Arts. 14 (rule of law and respect for human rights and fundamental freedoms), 15 (protection of personal data), 19 (movement of persons), 20 (money laundering), 21 (fight against drugs), 22 (fight against crime and corruption).	Arts. 14 and 19
Title IV (DCFTA)** *Provisional application of the DCFTA delayed until 31 December 2015*	*Entirely*	*Entirely**, with the exception of Art. 158, to the extent this article concerns criminal enforcement of IPR and Arts. 258 and 286, to the extent that those Articles apply to administrative proceedings, review and appeal at Member State level

Title V Economic and Sector Cooperation	Chapters 1 (Energy Cooperation (with the exception of Art. 342)), 6 (Environment), 7 (Transport), 12 (Financial Services), 17 (Agriculture); 18 (Fisheries and Maritime Policies), 20 (Consumer Protection), 26 (Civil Society Cooperation), 28 (Participation in Union Agencies and Programmes) and Arts. 353 (approximation in are of taxation) and 428 (dialogue on employment and social policy)	Chapters 1 (with the exception of Arts. 338(k), 339 and 342), 6 (with the exception of Arts. 361, 362(1)(c), 364 and 365(a)(b)), 7 (with the exception of Art. 368(3) and 369(a)(d)), 12, 17 (with the exception of Art. 404(h)), 18 (with the exception of Art. 410(b) and 411), 20, 26, 28, as well as Arts. 353 and 428
Title VI Financial Cooperation, with Anti-Fraud Provisions	*Entirely*	*Entirely*
Title VII Institutional, General and Final Provisions	*Entirely,* with the exception of Art. 479(1) (repealing PCA), in so far as necessary for the provisional application of this agreement	*Entirely,* with the exception of Art. 479(1) (repealing PCA), in so far as necessary for the provisional application of this agreement
Annexes	Annexes I to XXVI, Annex XXVII (with the exception of nuclear issues), Annexes XXVIII to XXXVI, XXXVIII to XLI, XLIII and XLIV as well as Protocols I-III	Annexes I to XXVI, Annex XXVII (with the exception of nuclear issues), Annexes XXVIII to XXXVI (with the exception of point 3 in Annex XXXII), XXXVIII to XLI, XLIII and XLIV as well as Protocols I-III

the proposed scope of provisional application and agreed on a more limited – but still extensive – scope of provisional application.[490]

This broad scope triggered concerns on the provisional application of the 'mixed' elements of the AA. Evidently, only the AA provisions falling under EU competences – and not the Member States' part of the mixed agreement – can be applied provisionally by the Council Decision for signature and provisional application.[491] Moreover, several Member States' constitutions do not allow for provisional application of international agreements.[492] This problem is partially circumvented by the fact that the provisions responsible for the mixity of an agreement are never specifically indicated (cf. *supra*).[493] It is clear that the Council excluded (potential) mixed provisions from the scope of the provisional application, such as the provisions on (criminal) enforcement of IPR.[494] Moreover, the provisional application of mixed elements is also addressed in the Council Decisions on the signing and provisional application of the EU-Ukraine AA as they state that the listed AA provisions for provisional application shall be applied provisionally "only to the extent that they cover matters falling within the Union's competence, including matters falling within the Union's competence to define and implement a common foreign and security policy".[495] Their preambles also indicate that "the provisional application

490 European Commission, 'Note à l'attention des membres du GRI', 6 June 2014 (not public, *on file with the author*).

491 It has to be noted that some mixed agreements were applied provisionally by a 'Decision of the Council and *the Representatives of the Governments of the Member States of the European Union, meeting within the Council*' (emphasis added) (see for example the provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand (*OJ*, 2007L/134/1)). For criticism on this procedure, see F. Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States', in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart Publishing, Oxford, 2010), p. 258.

492 For example Austria and Portugal. On this issue, see C. Flaesch-Mougin, I. Bosse-Platière, *op. cit.,* footnote 485, p. 313.

493 For example, because the 2010 EU-Korea Framework Agreement is mixed, it can be argued that it includes provisions which fall under Member States' competences. Nevertheless, the Council provisionally applied this agreement in its entirety (text of the agreement: (*OJ*, 2013, L 20/2); Council Decision on signature and provisional application: (*OJ*, 2013, L20/1)).

494 Because criminal enforcement of IPR was considered mixed, it was also excluded from the scope of provisional application in other recent EU FTAs such as the EU-Korea FTA (see footnote 482).

495 See for example Art. 4 Council Decision 2014/295/EU and Art. 4 Council Decision 2014/668/EU (*op. cit.,* footnote 488).

of parts of the Agreement does not prejudge the allocation of competences between the Union and its Member States in accordance with the Treaties". Moreover, several EU Member States and institutions made statements in the Council minutes regarding the provisional application of the AA. For example, Portugal and Hungary made statements on their constitutions and national ratification process, which do not foresee provisional application of international agreements (cf. *supra*).[496] Also the Council, Commission and High Representative issued a joint statement on the provisional application of the AA that declares that the provisional application of the General Principles (Article 2) "is without prejudice to the division of competences between the Union and the Member States" and that the reference to cooperation in Article 14 (rule of law and respect for human rights and fundamental freedoms) does not constitute an exercise by the European Union of competence pursuant to the AFSJ Title of the TFEU.[497]

Another essential procedural step before the AA can enter into force is the consent of the European Parliament. According to Article 218(6)(a)(i) TFEU, the consent of the European Parliament is required for the conclusion of association agreements. Although the EU-Ukraine AA has an extensive CFSP dimension, it is too limited to overrule this requirement.[498] As already noted in the introduction, the EU-Ukraine AA was ratified simultaneously during an unprecedented synchronised session by both the European Parliament and the *Verkhovna Rada* on 16 September 2014.[499] Not only was the European

496 Council of the European Union, 'Relations with Ukraine', Interinstitutional File 2013/0155 (NLE), 11111/14, 20 June 2014 (not public, *on file with the author*).

497 *Ibid.* The Council also made a statement stressing that the provisional application of transport services, falling within the scope of shared competences between the EU and the Member States, "does not prejudge the allocation of competences between them in this area and does not prevent the Member States from exercising their competences with Ukraine for matters not covered by this Agreement, or with another third country".

498 Art. 218(6) TFEU states that only association agreements that "exclusively" relate to CFSP matters must be adopted without the European Parliament's consent. In the recent Case C-658/11, *Commission v. Council,* the Court of Justice clarified that the substantive legal basis of a Council decision adopted for the conclusion of an international agreement determines the procedures to followed. Hence, only when the substantive legal basis *exclusively* relates to the area of CFSP – which is not the case in the EU-Ukraine AA–, the European Parliament does not play a role in this process.

499 For the consent of the European Parliament, see: European Parliament legislative resolution of 16 September 2014 on the draft Council decision on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, with the exception of the provisions relating to the treatment

Parliament's consent adopted with a large majority (535 votes in favour, 127 against and 35 abstentions), it was also adopted considerably soon after the signing of the EU-Ukraine AA (27 June 2014, cf. *supra*). Through this swift consent procedure, the European Parliament aimed to show its solidarity with Ukraine and to support Ukraine's 'European choice'. Earlier, the European Parliament Foreign Affairs Committee had recommended the ratification of the Agreement, however, during the debates in the Committee, several Members of the Parliament stressed "that this use of a fast-track procedure should be an exception [as they] feared it might leave too little time to assess the deal's possible impacts on citizens and businesses in sufficient depth".[500]

Also the role of the European Parliament with regard to the provisional application of the AA has to be mentioned. Whereas the consent of the European Parliament for association agreements was already required before the Lisbon Treaty, after Lisbon, the European Parliament's involvement in the conclusion of trade agreements increased significantly (cf. *supra*). Therefore, the provisional application of association agreements, especially those with an extensive trade part (e.g. the EU-Ukraine AA) has become particularly sensitive to the European Parliament. The decision on provisional application normally occurs at the moment of signing the agreement, thus before its formal ratification and Parliament's official consent.[501] However, for trade and association agreements concluded after the Lisbon Treaty, a practice has been developed by the Commission to only initiate the provisional application of an agreement after having heard the European Parliament. This commitment was first made by EU Trade Commissioner De Gucht regarding the provisional application of the EU-Korea FTA.[502] At the beginning of his mandate, the

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of third-country nationals legally employed as workers in the territory of the other party (13613/2013 – C8-0105/2014 – 2013/0151A(NLE)) (P8_TA(2014)0014); European Parliament legislative resolution of 16 September 2014 on the draft Council decision on the conclusion, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (14011/2013 – C8-0106/2014 – 2013/0151B(NLE)) (P8_TA(2014)0015). The Verkhovna Rada ratified the AA in its Resolution 'On the Statement of the Verkhovna Rada of Ukraine "On the European Choice of Ukraine"', *press release* Information Department of the Verkhovna Rada of Ukraine, 16 September 2014.

500 European Parliament, 'Foreign Affairs MEPs recommend EP consent to EU-Ukraine association deal', *press release*, 8 September 2014.

501 Y. Devuyst, *op. cit.,* footnote 378, p. 183.

502 K. De Gucht, 'The implication of the Lisbon Treaty for EU Trade policy', Speech at S&D seminar on EU Trade Policy, Oporto, 8 October 2010.

Commissioner committed to involve the European Parliament *before* the provisional application of the EU-Korea FTA.[503] This procedure was upheld in later FTAs and even association agreements.[504] In this view, the Commission also considered in its proposal for a Council Decision on the signing and provisional application of the EU-Ukraine AA of 15 May 2013 that "the Council should send the notification referred to in Article 486(4) of the Agreement only after a certain lapse of time so as to allow the European Parliament to express its views".[505] Notably, already in a Resolution adopted on 23 October 2013, the European Parliament called for the provisional application of the EU-Ukraine AA immediately upon signature, clearing the way for provisional application of the agreement.[506] Meanwhile, as noted above, the European Parliament already gave its consent pursuant to Article 218(6) TFEU, even before the provisional application of the EU-Ukraine AA was initiated according to the procedures of Article 486(4) of the agreement.

A final element that complicates the provisional application of the EU-Ukraine AA was decision of the EU to delay the provisional application of the DCFTA. As will be discussed in the following chapter, Russia has, in addition to geo(–political) objections, also several trade-related concerns regarding the EU-Ukraine DCFTA. Russia fears that the DCFTA will interrupt and harm its traditional trade flows with Ukraine. During a trilateral ministerial meeting on 12 September 2014 between the EU, Ukraine and Russia, the EU

503 In this view, the Commission's proposal for the Council Decision on the signing and provisional application of the EU-Korea FTA states that "in light of the significance of the Agreement, the Commission considers that the Council should send the notifications [regarding provisional application] only after a certain lapse of time so as to allow the European Parliament to express its views" (COM (2010) 136 final). The Council Decision on the signing and provision application of the EU-Korea FTA of 16 September 2010 even linked the start of the provisional application of the agreement with the entry into force of the Regulation of the European Parliament and the Council implementing the bilateral safeguard clause of the EU-Korea FTA (*OJ*, 2011, L 127/1). On this issue, see Y. Devuyst, *op. cit.,* footnote 378, p. 184; C. Flaesch-Mougin, I. Bosse-Platière, *op. cit.,* footnote 485, pp. 302–309.

504 For example, for the provisional application of the trade part of the EU-Central America AA, the Commission made in its proposal for the signing and provisional application of the agreement the same request as in the EU-Korea FTA (*ibid*) (COM (2011)678 final).

505 European Commission, *op. cit.,* footnote 489.

506 European Parliament Resolution of 23 October 2013 on the ENP; towards a strengthening of the partnership, P7_TA(2013)0446. In the light of the Russian pressure on Moldova and Georgia, in a Resolution adopted on 17 April 2014, the European Parliament also "expresse[d] its approval of the proposal for a Council decision on the provisional application of the EU-Moldova and EU-Georgia AAs immediately upon signature" (P7_TA(2014)0457).

side agreed, as part of the de-escalation and peace process in Ukraine, to delay the provisional application of the DCFTA until 31 December 2015 (cf. *infra*).[507] As part of this political deal, the EU will at the same time continue the application of its autonomous trade preferences to Ukraine, which in effect opens the EU market to Ukraine for trade in goods unilaterally, as envisaged in the DCFTA, until this date (i.e. 31 December 2015).[508]

The political compromise to delay the provisional application of the DCFTA during this trilateral meeting was brokered by Trade Commissioner De Gucht. In order to take effect, the Council decided on 29 September 2014, after a Commission proposal, to amend the previously adopted Council Decision that covers the signing and provisional application of the DCFTA (i.e. Council Decision 2014/668/EU).[509] It has to be stressed that the delay of the provisional application only applies to the DCFTA. The amending Council Decision of 29 September states that notification concerning the provisional application of the other elements of the EU-Ukraine AA pursuant to Article 486 AA (Table 3) "shall be made without delay".[510] The provisional application of the applicable non-DCFTA provisions started 1 November 2014.[511]

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507 European Commission, 'Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA', 12 September 2014, STATEMENT/14/276. For its part, Russia confirmed that it will not suspend, as retaliation against the DCFTA, its preferential trade regime towards Ukraine as foreseen in the 2011 CIS-FTA. This issue is further analysed in Chapter 6.2.

508 European Commission, 'Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 374/2014 on the reduction or elimination of customs duties on goods originating in Ukraine', COM (2014) 597, 19 September 2014. These autonomous trade measures will be further analysed in Chapter 9.2.

509 Council Decision 2014/691/EU of 29 September 2014 amending Decision 2014/668/EU on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party) and Titles IV, V, VI and VII thereof, as well as the related Annexed and Protocols (*OJ*, 2014, L289/1). For the Commission proposal, see COM (2014) 609, 23 September 2014. For the Council Decision 2014/668/EU, see footnote 488.

510 With regard to the relevant provisions of the DCFTA, the amending Council Decision states that "the notification pursuant to Article 486 of the Agreement shall be made so that provisional application takes effect on 1 January 2016" (*ibid*).

511 'Notice concerning the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States of the one part and Ukraine, of the other part' (OJ, 2014, L 311/1).

6.2 The EU-Ukraine AA and the Triangular EU-Ukraine-Russia Relationship

Before analysing the contents of the EU-Ukraine AA, its place in the legal framework of the triangular EU-Ukraine-Russia relationship must be scrutinised. It is impossible to analyse the EU-Ukraine AA – and EU-Ukraine relations in general – without discussing the Union's relations with Russia and the latter's connection with Ukraine, particularly in the light of the recent conflict in eastern Ukraine. It was the refusal of the Ukrainian government to sign the EU-Ukraine AA in November 2013 and the subsequent Maidan revolution that triggered the armed conflict in in eastern Ukraine, including Russia's "violation of Ukrainian sovereignty and territorial integrity", including its support for the separatists in the eastern Donbas and the annexation of Crimea.[512] The countries located between the EU and Russia are increasingly being perceived as a 'space of competition' between Moscow and the EU since both players have a different – and sometimes incompatible – economic and political integration agenda vis-à-vis their 'shared neighbourhood'. Whereas the role of Ukraine in the post-Soviet area is crucial for Russia in the establishment of its Eurasian Economic Union (cf. *infra*), the country is also pivotal in the EU's ENP and EaP. It is not the aim of this chapter to explore all the historical, political and economic features of this turbulent trilateral relationship. Instead, the focus will be on the legal aspects of the EU-Ukraine-Russia relationship which were, and still are, relevant for the conclusion and implementation of the EU-Ukraine AA. First, Ukraine's integration process in the post-Soviet area is briefly discussed (6.2.1). Then, Russia's trade-related retaliation measures against the AA/DCFTA (6.2.2) and the EU-Ukraine-Russia trilateral discussions on the DCFTA (6.2.3) are analysed. Finally, it will be explored if the new envisaged legal framework for EU-Russia (trade) relations can reconcile the EU's and Russia's regional economic integration initiatives towards Ukraine (6.2.4).

6.2.1 *Ukraine's Reluctant Economic Integration in the Post-Soviet Area*

Parallel with the EU's establishment of the EaP and the negotiations on the AAs with Ukraine, Moldova and Georgia, Russian President (and former Prime Minister) Vladimir Putin launched the idea in October 2011 to develop the customs union between Russia, Belarus and Kazakhstan, established in 2010, into an 'Eurasian Economic Union' (EEU). This Union had to include all 'willing' republics of the former Soviet-Union, creating a full-fledged economic

512 European Council, 'Statement of the Heads of State or Government on Ukraine', Brussels, 6 March 2014.

union.[513] The objective, according to Putin, is not to revive the Soviet-Union but to create "a new powerful supranational association capable of becoming one of the poles in the modern world and serving as an efficient bridge between Europe and the dynamic Asia-Pacific region".[514] Obviously, the success of this project depends – to a great degree – on the participation of Ukraine, which is Russia's largest and most important (trade) partner in the region.

This proposal was not the first ambitious attempt for regional economic integration in the post-Soviet area. Since the establishment of the Commonwealth of Independent States (CIS) in the early 1990s, many ambitious bilateral or multilateral agreements have been concluded to foster economic integration in the region, however, only with modest success. Crucial is that Ukraine has always refused to sign and ratify regional trade agreements with the other post-Soviet countries that went beyond the level of a FTA (e.g. a customs union or economic union), mainly out of fear to lose its newly acquired sovereignty. For this reason, Ukraine was only willing to become an associate member to the September 1993 CIS Treaty on the Economic Union,[515] but agreed to sign in April 1994 the CIS Agreement on the formation of a Free Trade Area. However, this CIS-wide multilateral FTA did not materialise due to Russia's refusal to ratify the agreement.[516] Nevertheless, Ukraine signed and ratified a bilateral FTA with Russia on 24 June 1993.[517] For the same reasons, Ukraine also refused to become a full member of the 2003 Single Economic Space (SES).[518] This agreement, signed on 19 September 2003, envisaged the

513 V. Putin, 'A new Integration Project for Eurasia; The Future in the Making', *Izvestia*, 3 October 2011.

514 *Ibid.*

515 Z. Kembayev, *Legal Aspects of the Regional Integration Processes in the Post-Soviet Area* (Springer, Verlag Berlin/Heidelberg, 2010), p. 81.

516 Even though the 1994 CIS FTA agreement formally entered into force among the ratifying countries, it became virtually ineffective without Russia's participation. For the Russian position on CIS-wide economic integration, see E. Vinokurov, 'Russian Approaches to Integration in the Post-Soviet Space in the 2000s', in K. Malfiet, *et al.* (eds.), *The CIS, the EU and Russia. The challenges of integration* (Palgrave Macmillan, Houndmills, 2007), pp. 22–43 and R. Dragneva, J. De Kort, 'The legal regime for free trade in the commonwealth of independent states', *International and Comparative Law Quarterly* (56), 2007, pp. 233–266.

517 This bilateral FTA entered into force on 21 February 1994 and additional protocols, broadening the scope of the agreement, were concluded on 24 June 1993, 14 November 1997 and 4 October 2001. For an English version of this bilateral Ukraine-Russia FTA, including its Protocols, see the WTO Regional Trade Agreement (RTA) Database (WT/REG250/N/1).

518 An English version of the SES Agreement can be found in the WTO RTA Database (WTO/REG254/N/1).

gradual establishment of a kind of economic union[519] but was essentially a Russian attempt to establish closer economic relations with Ukraine.[520] It was no coincidence that this initiative was launched in the same period of the eastward enlargement of both the EU and NATO and the establishment of the ENP. The accession of the CEECs brought the EU to the borders of the western post-Soviet countries – a region that has traditionally belonged to Russia's geopolitical sphere of influence. Consequently, it can be argued that the SES was mainly inspired to safeguard Russia's economic and geopolitical role in the region. Ukraine agreed to participate in the SES only to the extent that this would not undermine its European integration policy and accession to the WTO.[521] Due to Ukraine's limited participation, Russia abandoned the SES initiative and developed new integration initiatives with more 'willing' post-Soviet countries.

On 26 February 1999, Russia concluded with Belarus, Kazakhstan, Kyrgyzstan and Tajikistan the Treaty on the Customs Union and the Common Economic Space.[522] This treaty envisaged two stages of regional integration: (i) the formation of a customs union and (ii) the creation of a 'Common Economic Space'.[523] With the aim of institutionalising this process, the five countries signed on 10 October 2000 the Treaty on the Establishment of the Eurasian Economic Community (EurAsEC). This Treaty did not contain new trade-related provisions but established a fully-fledged regional organization with a

519 Because Ukraine and Russia had a different vision on the *finalité* of the SES, the SES Agreement was drafted in a very abstract way, avoiding clearly defined objectives and conventional economic-integration terminology (on this point, see G. Van der Loo, P. Van Elsuwege, 'Competing Paths of Regional Economic Integration in the Post-Soviet Space: Legal and Political Dilemmas for Ukraine', *Review of Central and East European Law* (37), 2012, p. 434).

520 S. Shadikhodjaev, 'Trade Integration in the CIS Region: A Thorny path Towards a Customs Union', *Journal of International Economic Law* 12(3), 2009, p. 564.

521 WTO, 'Report of the Working Party on the accession of Ukraine to the WTO', 25 January 2008, WT/ACC/UKR/152, para. 506. The *Verkhovna Rada* ratified the SES Agreement with the reservation that Ukraine would take part in the SES "within the limits that accord with the Ukrainian constitution" (Final Provisions, Agreement on the Establishment of the Single Economic Space).

522 For the text of the agreement, see the WTO RTA Database (WT/REG71).

523 The Common Economic Space was defined as an area "with uniform mechanisms of economic regulation based on free trade principles and harmonized legislation; with a single infrastructure and coordinated taxation, monetary, credit, financial, trading and customs policy, which provides a free flow of goods, services, capital and work force" (Art. 1(1) of the agreement of 26 February 1999, *ibid*).

treaty-based international personality and an institutional set-up.[524] Again, fearing Russian dominance in the EurAsEC initiative, Ukraine refused to join the organization, although in 2002 it agreed to the status of observer.[525] It is within the framework of the EurAsEC that Russia finally succeeded to establish a customs union. When Ukraine refused – especially after the Orange Revolution – to enter into the Russian-proposed SES, Russia focused on the EurAsEC and established between 2007 and 2010 a customs union with Belarus and Kazakhstan (hereinafter: the 'Eurasian Customs Union' or 'the Customs Union') which includes a unified customs tariff and other regulatory tools for trade with third countries.[526]

It also appears that Putin's initiative to establish a Eurasian Economic Union in October 2011, which became a priority in Russia's foreign policy, was a response to Ukraine's – and the other EaP countries' – closer integration with the EU in the framework of the EaP. On 29 May 2014 the agreement establishing a Eurasian Economic Union was signed by Russia, Belarus and Kazakhstan and entered into force on 1 January 2015.[527] Meanwhile, Armenia and Kyrgyzstan

524 The Treaty established an Interstate Council, Integration Committee, Inter-Parliamentary Assembly and a EurAsEC Court. Since February 2012, the Customs Union's main bodies are the Supreme Eurasian Economic Council, the Eurasian Economic Commission and the EurAsEC Court. For analysis, see R. Dragneva, 'The legal and institutional dimensions of the Eurasian Customs Union', in R. Dragneva, K. Wolczuk (eds.), *Eurasian Economic Integration. Law, Policy and Politics* (Edwards Elgar, Cheltenham, 2013), pp. 34–60.

525 Moldova and Armenia also have an observer status. Uzbekistan acceded to the EurAsEC in January 2006 but withdrew its membership in 2008.

526 On 6 December 2007, Belarus, Kazakhstan and the Russian Federation concluded the Treaty on the creation of the Common Customs Union. Formally, the Customs Union came into existence on 1 January 2010 but it was unable to start working fully until 1 July 2011, when the Common Custom Code was ratified by all participating States and the customs control was transferred to the Customs Union's authorities. For a study on the complicated relation between the Customs Union and the EurAsEC, see M. Karliuk, 'Institutional structure of Eurasian Integration', *Belarusian Institute for Strategic Studies* (5), 2012.

527 An English version of the Treaty Establishing a Eurasian Economic Union is currently not available. For texts of international treaties concluded in the framework of the EurAsEC, EurAsEC Court Decisions and Decisions of the Supreme Eurasian Economic Council (in Russian), see the website of the Eurasian Economic Commission: http://www.eurasian-commission.org/en/Pages/default.aspx. For a (mainly economic) analysis of the Eurasian Economic Union, see S. Blockmans, H. Kostantyan, I. Vorobiov, 'Towards a Eurasian Economic Union: The challenge of integration and unity', *CEPS Special Report* No. 75, December 2012.

have joined the Eurasian Economic Union in 2015.[528] Not surprisingly, the post-Maidan government of Ukraine refused to participate in this new project.[529]

Although Russia did not succeed to coerce or entice Ukraine into the EEU, it finally succeeded to sign a CIS-wide FTA on 18 October 2011 with most of the post-Soviet countries, including Ukraine (hereinafter: 'the 2011 CIS FTA').[530] This 2011 CIS FTA eliminates most customs duties on the imports and exports of goods originating in the territory of the other parties but includes several exceptions and transitional periods.[531] This agreement liberalises trade by essentially relying on the WTO rules in the area of, *inter alia*, the abolition of quantitative restrictions (Article XI GATT), the granting of national treatment (Article III GATT), freedom of transit (Article V GATT), safeguard measures (Article XIX GATT and WTO Agreement on Safeguard Measures), technical barriers to trade (WTO TBT Agreement) and sanitary and phytosanitary measures (WTO SPS Agreement).[532] The inclusion of several WTO rules was remarkable because at the moment of signing the agreement, several parties, including Russia, were still not a member of the WTO (cf. *infra*).

6.2.2 *Russia's Trade-related Retaliation Measures and Political Pressure against the EaP AAs and DCFTAs*

Until the establishment of the Eurasian Customs Union in 2010, the Russian pressure on Ukraine to join its regional economic integration initiatives remained limited. However, in 2011 – the same period when the negotiations on the EU-Ukraine AA and DCFTA were finalised –, Russia moved up a gear and tried to convince Ukraine to join the Eurasian Customs Union with several trade benefits and even threatened to retaliate with additional trade barriers if it would conclude the AA and DCFTA with the EU. For example, in April 2011,

528 Armenia signed the EEU Treaty in October 2015 and joined the block in January 2015. Kyrgyzstan's accession Treaty was signed in December 2014 and 2 additional accession Protocols were signed in May 2015. After ratification of these documents by the different EEU Members, Kyrgyzstan will officially accede to the Union.

529 For a recent analysis of the EEU, see P. De Micco, 'When choosing means losing: the Eastern partners, the EU and the Eurasian Economic Union', *European Parliament Study*, DG EXPO/B/PolDep/Note/2015_108, March 2015.

530 For the text of the agreement, see WTO RTA Database (WT/REG343/N/1). This FTA was signed by Russia, Ukraine, Armenia, Belarus, Kazakhstan, Moldova, Tajikistan and the Kyrgyz Republic and replaced the 1994 CIS FTA, which in fact has never worked (see footnote 516). The 2011 CIS FTA entered into force on 20 September 2012 for Russia, Belarus and Ukraine; on 17 October 2012 for Armenia; on 8 December 2012 for Kazakhstan and on 9 December 2012 for Moldova.

531 Art. 2 and Annex 1 2011 CIS FTA (*ibid*).

532 Arts. 3–12 2011 CIS FTA (*ibid*).

only one week after a critical round of negotiations on the EU-Ukraine DCFTA, Prime Minister Putin visited Kiev where he presented to the Ukrainian leadership the benefits of access to the Eurasian Customs Union. Putin tried to entice Ukraine away from the EU-Ukraine AA negotiations by claiming that Ukraine's state revenues would increase by 9 billion USD annually if it joined the Customs Union.[533] Russian officials also promised an annual 8 billion USD gas price reduction as Ukraine would be treated as a domestic consumer if it joined the Customs Union. Moreover, Putin warned against additional customs barriers and "protective trade measures" if Ukraine would sign the AA.[534] During the last months before the November 2013 EaP Vilnius Summit, where it was expected that the EU-Ukraine AA would be signed and the AAs with Moldova and Georgia initialled (cf. *supra*), Russia further increased its pressure on the EaP countries and the EaP AAs/DCFTAs. In August 2013, Russia imposed new customs checks on imports of Ukrainian products, causing a temporary standstill in trade.[535] In the same month, they also banned – officially for food safety reasons – imports of Ukraine's top chocolate brand, *Roshen*, which is owned by the pro-EU businessman and current President of Ukraine P. Poroshenko.[536] In September 2013, Russia also banned wine imports from Moldova, again officially for food safety concerns. However, this move was considered as a retaliation measure against Moldova's intention to initial its AA and DCFTA at the Vilnius Summit. In order to show "political will to respond to unjustified and arbitrary pressures exerted by Russia on its Eastern partners"[537] and to support the Government of Moldova in its efforts to initial and sign the AA, the EU amended in December 2013 the existing autonomous trade preferences towards Moldova in order to fully liberalise, in line with the expected DCFTA, wine imports from this country.[538]

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533 R. Olearchyk, 'Putin woos Ukraine on trade pact', *Financial Times*, 12 April 2011.

534 R. Olearchyk, 'Moscow lures Ukraine with cheap gas', *Financial Times*, 7 April 2011.

535 A. Rettman, 'Ukraine and EU ridicule Russian threats', *EUobserver*, 23 September 2013.

536 'Russia hits at Ukraine with chocolate war', *Euractiv*, 14 August 2013.

537 European Parliament, 'MEPs back freeing wine trade with Moldova to offset Russian trade sanctions', *Press release*, 10 December 2013.

538 Regulation (EU) No 1384/2013 of the European Parliament and the Council of 17 December 2013 amending Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova (*OJ*, 2013, L 354/85). These autonomous trade preferences will be further discussed in Chapter 9.2. It has to be noted that already in 2010, Russia imposed restrictions on imports of wine from Moldova. Also then, the EU responded by increasing the existing tariff-rate quotas for Moldovan wine (on this issue, see F. Hoffmeister, 'The European Union's Commercial Policy a year after Lisbon – Sea change or business as usual?' in P. Koutrakos (ed.), *The European Union's relations one years after Lisbon*, *CLEER Working Paper* 2011/3, p. 89).

For several EaP countries, this Russian trade offensive proved to be efficient. As noted above, the decision of the Ukrainian Government, a few days before the Vilnius Summit, to "suspend" the signature of the AA was mainly the result of this Russian pressure. Moreover, although the negotiations on an AA and DCFTA with Armenia were completed in July 2013,[539] in September of that year, Armenia surprised the EU by announcing its intention to join the Eurasian Customs Union instead.[540]

Also after the partial signature of the EU-Ukraine AA in March 2014 and the full signature of the three EaP AAs in June 2014, Russia continued to impose trade restrictions on the import of products from these three EaP countries. For example, the same day that Moldova ratified its AA (2 July 2014), Russia decided – again officially on sanitary grounds – to ban meat exports and other agricultural products from the country.[541] Again, the EU responded in December 2014 by broadening the existing autonomous trade preferences towards Moldova to include free tariff quotas for fresh apples, grapes and plums.[542] Russia also considered suspending the preferential customs tariffs on Ukrainian products, foreseen in the 2011 CIS FTA. This would mean that Russia would apply the standard Common Customs Tariff (CCT) of the Customs Union on Ukrainian products. Such a procedure is explicitly provided in the 2011 CIS FTA.[543] Annex 6 of the 2011 CIS FTA states that if one of its parties (e.g. Ukraine) establishes a free trade area with a third country (e.g. the EU) which "leads to import growth from such Party in such volumes, which causes injury or threatens to cause injury to the industry of the Customs Union,

539 'Joint Statement by High Representative Catherine Ashton and Commissioner Štefan Füle on completion of negotiations on the future Association Agreement with Armenia', MEMO/13/726, 25 July 2013.

540 European Commission, 'Armenia: EU position on the latest developments', MEMO/13/766, 4 September 2013.

541 L. Norman, 'EU calls on Russia to resolve Moldovan meat ban', *Wall Street Journal*, 3 July 2014.

542 Regulation (EU) No 1383/2014 of the European Parliament and of the Council of 18 December 2014 amending Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova (*OJ*, 2014, L 372/1). For the Commission proposal, see European Commission, 'Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova', COM (2014) 542, 1 September 2014. These autonomous trade measures will continue to apply until 31 December 2015.

543 Annex 6 2011 CIS FTA, *op. cit.,* footnote 530. On this issue, see M. Emerson, 'Trade policy issues in the wider Europe -that led to war and not yet to peace', *CEPS Working Document* No 398/2014.

then the *member states* of the Customs Union shall [...] reserve the right to introduce duties with respect to import of relevant goods from such first Party in volume of rate of the most-favored nation regime".[544] It appears that this annex is tailored to Russia's objections against the EU-Ukraine DCFTA. Another important Russian action in this regard was the stoppage of gas supplies to Ukraine in June 2014. However, this dispute is not considered as a pure political retaliation measure as it also relates to disputes over the gas price and Ukraine's debt for past supplies.[545]

Moreover, Russia also proposed a Customs Union-wide import ban on several Ukrainian products, however, its Customs Union partners refused to do so.[546] Nevertheless, Russia continued *individually*[547] to ban several Ukrainian

544 *Ibid*, emphasis added. The explicit reference to "member states" of the customs union implies that Russia can suspend the CIS FTA preferential tariff on the import of Ukrainian products on its own, even if the two other Eurasian Customs Union partners prefer not to do so.

545 In June 2014, Gazprom stopped gas supplies to Ukraine after negotiations on Ukraine's debts to Gazprom and a new gas price broke down. Following, the Ukrainian state company Naftogaz and Russia's Gazprom filed lawsuits against each other at the Stockholm Arbitration Court. At a trilateral meeting between the EU, Ukraine and Russia on this energy dispute in September 2014, EU Energy Commissioner G. Oettinger proposed an interim-agreement between Russia and Ukraine which would assure the gas supply to Ukraine (and the EU) for the coming winter, until the Stockholm Arbitration Court makes a final decision on Ukraine's debt and the gas price (European Commission, 'Gas talks: Oettinger proposed supply agreement for coming winter', STATEMENT/14/287, 26 September 2014). On 30 October 2014, the EU brokered a 4.6 billion dollar "Winter package" between Russia and Ukraine, covering a period until the end of March 2015. Russia and Ukraine agreed in this package on Ukraine' debt payments and the supply of Russian gas to Ukraine, following monthly and advanced payments (European Commission, 'Breakthrough: 4,6 billion dollar deal secures gas for Ukraine and EU', *press release*, 30 October 2015). In March 2015 the European Commission hosted a follow-up meeting with Ukraine and Russia on Winter Package. The Parties confirmed during this meeting that the Winter Package was being implemented and agreed on the preparations for the supply for the next winter, including by setting up a working group which has to prepare a draft proposal for the next trilateral (European Commission, 'Inaugural trilateral EU-Russia-Ukraine meeting on gas', *press release*, 20 March 2015).

546 A possible reason which was mentioned why Kazakhstan opposed the Russian proposal to increase the customs duties or to impose a Customs Union-wide import ban on Ukrainian products is that the country was afraid that Ukraine would block its WTO accession process ('Belarus and Kazakhstan refuse to accept Russian trade cuts on Ukraine', *Russian Times*, 30 June 2014).

547 The possibility for a member of the Customs Union (i.e. Russia) to individually ban products from a third country, without the agreement of the two other Customs Union members (i.e. Kazakhstan and Belarus), was confirmed in a Decision of the Supreme

products in 2014 and the spring of 2015 such as milk, dairy products, potatoes and types of juices, always officially out of sanitary reasons or because they do not comply with the Customs Union's technical regulations or standards.[548]

The European Parliament adopted several resolutions in which it considered the Russian pressure on the EaP countries and the AAs as "unacceptable" and urged Moscow to "refrain from putting pressure on Ukraine [and the other EaP countries] to join the Russia-Kazakhstan-Belarus customs union".[549] The Parliament also "strongly underlin[ed] the fact that the free choices of the Eastern Partnership countries, which do not have any negative impact whatsoever on trade with Russia, should not make them bear consequences such as trade measures [...] and firmly reject[ed] the zero-sum game paradigm for EU and Russian relations with the Eastern Partnership countries".[550] Also the Commission strongly condemned "any threats from Russia linked to the possible signing of agreements with the European Union, [including] artificial trade obstacles such as import bans of dubious WTO compatibility and cumbersome customs procedures".[551] After the decision of the Government of Ukraine to "suspend" the signature of the AA, the Presidents of the European Council and Commission "strongly disapproved the Russian position and actions in this respect" and stated that the EaP AAs do not come at the expense of relations between the EaP partners and Russia.[552]

Eurasian Economic Council on 24 October 2014 ('On the introduction of customs duties on goods being imported from the Republic of Moldova', Government of the Russian Federation, *Press Release,* 1 August 2014).

548 For an overview of the Russian trade-related retaliation measures against Ukraine, Moldova and Georgia, see D. Cenusa, *et al.,* 'Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia', *CEPS Working Document* No 400, September 2014.

549 European Parliament Resolution of 9 June 2011 on the EU-Russia Summit, P7_TA(2011)0268, para. 22. See also European Parliament Resolution of 23 October 2013 on the ENP, P7_TA(2013)0446, para. 51.

550 European Parliament Resolution of 12 September 2013 on the pressure exerted by Russia on eastern partnership countries (in the context of the upcoming Eastern Partnership Summit in Vilnius), P7_TA(2013)0383. Also in later Resolutions, the European Parliament continued to criticize Russia's pressure on the EaP AAs and stressed that "Russian concerns as regards the EU association process of Ukraine and the other Eastern neighbours must be adequately addressed and explained" (European Parliament Resolution of 17 April 2014, P7_TA(2014)0457).

551 Statement of S. Füle on the pressure exercised by Russia on countries of the Eastern Partnership, SPEECH/13/687, 11 September 2013.

552 Joint Statement by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Barosso on Ukraine, 25 November 2013, (EUCO 245/13).

It could be argued that Russia was largely 'ignored' during the establishment of the EaP and the negotiations of the EaP AAs/DCFTAs.[553] However, since the AA negotiations between the EU and Ukraine were launched in 2007, Russia did not put this issue on the agenda of the EU-Russia Summits to express its concerns,[554] neither did it raise objections through other formal or informal bilateral channels.[555] Instead, it already imposed in 2011 trade bans on products from the EaP countries as a retaliation measure against these countries' decision to negotiate the EaP AAs, before the impact of the these agreements was discussed with EU. Even during the EU-Russia Summits between 2011 and 2013, Russia's pressure on the EaP countries and the EaP AAs was hardly debated.[556] It was only at the January 2014 EU-Russia Summit, after Ukraine's decision not to sign the AA, that this issue was for the first time properly discussed.[557] On this occasion, the EU tried to outline the benefits of the EaP and the AAs for both the common neighbours as for Russia. Again, the EU claimed that the EaP AAs do not affect Russia's economic and trade relations with the common neighbours and are "fully compatible with Russia's existing trade arrangements with these countries".[558] Further, the EU stated that the AA/DCFTAs "can interact constructively with the Customs Union as long as WTO rules are applied and free decision-making is guaranteed".[559] Both parties agreed to pursue bilateral consultations at technical level on the economic

553 On the other hand, it can also be argued that Russia 'ignored' the EU during the establishment of the Eurasian Customs Union. For example, Russia did not inform or notify the EU on the establishment of the Eurasian Customs Union, although it was obliged to do so under Art. 16 EU-Russia PCA.

554 See for example, '*Joint Statement* of the EU-Russia Summit', Khanty-Mansiysk, 27 June 2008.

555 This was confirmed by several senior officials of DG Trade during informal discussions with the author in November 2014 and June 2015.

556 See for example 'Remarks by President of the European Council Herman Van Rompuy', 4 June 2013 (EUCO 131/13); 'Press Statement by the President of the European Council Herman Van Rompuy following the 30th EU-Russia Summit', 21 December 2012 (EUCO 243/12); 'Remarks by the President of the European Council Herman Van Rompuy following the 29th EU-Russia Summit', 4 June 2012 (EUCO 111/12); 'Remarks by the President of the European Council Herman Van Rompuy following the 28th EU-Russia Summit', 15 December 2011(EUCO/162/11).

557 Informal discussions between the EU and Russia on the EaP AAs and regional integration also took place in October and November 2013 (see European Commission and EEAS, 'Frequently asked questions about Ukraine, the EU's Eastern Partnership and the EU-Ukraine Association Agreement', 12 June 2014, 140612/01).

558 'Remarks by President of the European Council Herman van Rompuy following the 32nd EU-Russia Summit', 28 January 2014 (EUCO 27/14).

559 *Ibid.*

consequences of the EU-Ukraine AA. This commitment was repeated by H. Van Rompuy during the signing ceremony of the AAs with Georgia, Moldova and Ukraine on 27 June 2014 as he stated that "there is nothing in these agreements, nor in the European Union's approach, that might harm Russia in any way" and that the EU "stands ready to engage with Russia as much as need be, to dispel misunderstandings where they may exist".[560]

6.2.3 *The EU-Ukraine-Russia 'Trilaterals': Dispelling Russia's Trade-related Concerns?*

Before the signing of the EU-Ukraine AA, in March 2014, the EU and Russia had several technical meetings to discuss the effects of the DCFTA on Russia's economy. During these meetings, a number of elements of the EU-Ukraine DCFTA were discussed such as competition rules and state aid, rules of origin and implications of the envisaged legislative and regulatory approximation. The EU further confirmed that the AA/DCFTA is compatible with Ukraine's participation in the CIS FTAs and that the suspension of these preferential trade agreements between Ukraine and Russia would be "unwarranted".[561] Russia, on the other hand, underlined the importance of the Ukrainian market for Russian exporters of agricultural and manufactured products and suggested establishing a mechanism to ensure transparency on the EU technical regulations that Ukraine must implement according to the DCFTA.[562] On 11 July 2014, after the signing of the EU-Ukraine AA, a first trilateral EU-Russia-Ukraine meeting took place at 'ministerial' level to discuss the effects of the implementation of the EU-Ukraine AA/DCFTA.[563] Before and during this meeting, Russia tried to obtain a commitment of the EU and Ukraine not to implement the DCFTA until the alleged negatives effects of this trade deal were properly addressed.[564] However, on this occasion, the EU and Ukraine refused to postpone the implementation of the DCFTA and to give Russia a

560 Statement by President of the European Council Herman van Rompuy at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine, 27 June 2014 (EUCO 137/14).

561 The first round of discussions at experts' level was held on 12 and 13 March 2014. European Commission, DG Trade, 'EU-Russia technical meeting: effects of the EU-Ukraine Association Agreement/Deep and Comprehensive Free Trade Are on Russia's economy', *Press release,* 17 June 2014.

562 *Ibid.*

563 European Commission, 'Joint conclusions of the EU-Russian Federation-Ukraine ministerial meeting on the effects of implementation of the EU-Ukraine AA/DCFTA', Statement/14/223, 11 July 2014.

564 A. Rettman, 'Russia seeks new veto on EU-Ukraine pact', *EUobserver*, 10 July 2014.

'veto' on the EU-Ukraine AA/DCFTA. In a joint statement, the three parties could only agree that "while the [DCFTA] aims at creating positive economic effects for all parties involved, their implementation could entail some potential economic risks between Russia and Ukraine, including for economic operators".[565] They decided to launch a consultation mechanism with primary focus on technical barriers to trade (TBT), customs administration and sanitary and phytosanitary (SPS) measures arising from the implementation of the DCFTA. Moreover, Russia undertook to circulate a list of precise concerns and potential risks.

Eventually, a follow-up trilateral ministerial meeting was held on 12 September 2014. For this meeting, Russia had drawn up a long list of concerns regarding the DCFTA and made numerous requests related to the revision of the DCFTA.[566] The EU and Ukraine considered several of these requests as excessive. For example, Russia asked for the removal of hundreds of tariff lines from the DCFTA tariff schedule and the modification of the text of the agreement.[567]

Although the EU and Ukraine refused to make concessions on these two points, they eventually had to accept – under strong pressure from Russia which threatened to suspend the 2011 CIS FTA towards Ukraine – to delay the provisional application of the DCFTA until 31 December 2015.[568] Meanwhile, the EU will continue to apply its autonomous trade measures towards Ukraine, which in effect opens the EU market to Ukraine for trade in goods unilaterally as envisaged in the DCFTA (cf. *infra*). For its part, Russia confirmed that it would not suspend, as a retaliation measure against the DCFTA, its preferential trade regime towards Ukraine on the basis of the 2011 CIS FTA. Several observers considered this deal as a concession to Russia because the Commission had declared earlier that Russia would not get a 'veto' on the DCFTA.[569] Both Ukrainian officials and EU diplomats also criticised this compromise, especially because Trade Commissioner De Gucht had brokered this deal without consulting with the EU Member States. Jacek Saryusz-Wolski, the rapporteur in the European Parliament on the ratification of the EU-Ukraine AA, even stated

565 European Commission, *op. cit.,* footnote 563.

566 Government of the Russian Federation, 'On the status of the EU-Ukraine Association Agreement', *press release*, 15 September 2014.

567 D. Cenusa, *et al.,* 'Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia', *CEPS Working Document* No 400, September 2014.

568 European Commission, 'Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA', 12 September 2014, STATEMENT/14/276. On this point, see (text to) footnote 509.

569 On this point, see text to footnote 565.

that "putting the EU-Ukraine trade deal on ice is the wrong decision [and] sets a bad precedent".[570] However, considering the fragile de-escalation and peace process in eastern Ukraine and the difficult economic situation in the country, this compromise looks not unfavourable for Ukraine. Through the EU's autonomous trade measures, Ukraine will benefit partially from the DCFTA liberalisation (i.e. tariff-free access to the EU Market) while not (yet) being obliged to bear the burdens of this complex trade deal (i.e. opening up the market for EU goods and legislative approximation obligations). Moreover, Russia 'guaranteed' that it would not retaliate against the ratification of the EU-Ukraine AA, which took place 4 days later by both Parliaments. Whether Russia will keep up to its part of the deal (i.e. not suspending the 2011 CIS FTA preferential treatment for Ukrainian goods), it still to be seen. On 19 September 2014, only a few days after the ratification of the AA by both parliaments, the Russian Government adopted a decree which would make it possible, on the basis of Annex 6 of the 2011 CIS FTA (cf. *supra*),[571] to suspend the preferential regime for several Ukrainian products "within ten days in the event that the Government of Ukraine takes action on the practical application of the economic part of the Association Agreement or its implementation".[572] A few days before, the Russian Minister of Economic Development Ulyukayev wrote a letter to the EU Trade Commissioner and the Ukrainian Minister of Foreign Affairs that a so called "creeping implementation" of the DCFTA (i.e. "taking a decision that would not formally begin implementation but would in fact introduce it into a certain stage") would be regarded by Russia as a violation of the compromise reached at the 12 September trilateral meeting and would lead to the cancellation of the 2011 CIS FTA.[573] In a letter to President Putin on 1 October 2014, President of the European Commission Barroso expressed "strong concerns" about this Russian decree and repeated the terms of the 12 September Joint Ministerial Statement.[574]

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570 'Russia demands changes to Ukraine-EU trade deal', *Euractiv*, 18 September 2014.

571 On Annex 6 of the 2011 CIS FTA, see text to footnotes 544 and 584.

572 Government of the Russian Federation, 'On customs and tariffs regulations in respect of goods with Ukraine as the country of origin', *press release*, 19 September 2014.

573 Government of the Russian Federation, 'On the status of the EU-Ukraine Association Agreement', *press release*, 15 September 2014.

574 European Commission, 'Letter from President Barroso to President Putin', STATEMENT/14/294, 1 October 2014. This letter was a reply to a brief of President Putin from 17 September in which Putin threatened with retaliation measures if Ukraine would implement the DCFTA (P. Spiegel, 'Putin demands reopening of EU trade pact with Ukraine', *Financial Times*, 26 September 2014. In this letter, Putin repeated Russia's request to change the text of the agreement).

In the 12 September 2014 Joint Ministerial Statement, the parties agreed to "continue to consult on how to address concerns raised by Russia". The EU, Ukraine and Russia have until 1 January 2016 (i.e. the envisaged date of the provisional application of the DCFTA) to discuss and address Russia's concerns about the DCFTA.[575] As noted above, several Russian demands such as the exemption of numerous DCFTA tariff lines and a modification of the text of the agreement are not open for discussion for the EU (and Ukraine). Both EU officials and the Ukrainian Government stressed that the text of the EU-Ukraine AA "will not change a word".[576] Also the European Parliament stated in a Resolution on 18 September 2014 that "the agreement cannot and will not be changed".[577] Renegotiating the complex text of the agreement, which required 7 years of difficult negotiations, under Russian pressure would indeed jeopardise the EU-Ukraine AA. It would also set a controversial precedent, given that a third country would be able to interfere in a bilateral EU – WTO compatible – trade agreement. Moreover, amending this text would be very difficult form a legal point of view now that the agreement is signed and ratified by both Parliaments and has partially entered provisionally into force. It appears that the text of the agreement can now only be modified through the burdensome procedure of denouncing the current AA and the conclusion of a new international agreement. In this view, the Council and the Commission declared on 29 September 2014 in a Joint Statement on the EU-Ukraine Association Agreement that:

> the Association Agreement is a bilateral agreement and any adaptations to it can only be made at the request of one of the parties and with the agreement of the other, according to the mechanisms foreseen in the text and in compliance with international law and with respective internal procedures of the parties.[578]

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575 European Commission, 'Joint Ministerial Statement on the Implementation of the EU-Ukraine AA/DCFTA', 12 September 2014, STATEMENT/14/276.

576 N. Buckley, 'Kiev in vow on EU trade after pact is delayed', *Financial Times*, 15 September 2014.

577 European Parliament Resolution of 18 September 2014 on the situation in Ukraine and the state of play of EU-Russia relations (P8_TA(2014)0025).

578 'Joint Statement of the Council and the Commission on the EU-Ukraine Association Agreement', *press release*, Press office – General Secretariat of the Council, 29 September 2014. In this Statement, the Council and the Commission also "reaffirm the importance of adequate preparation for the implementation of the [DCFTA], in line with the timeframe in the Council Decision, and taking into account Ukraine's international commitments".

Also the new Trade Commissioner Cecilia Malmström confirmed at a bilateral meeting with the Russian Minister for Economic Development Alexei Ulyukayev that the EU continues "to stand ready to find ways to address the concerns expressed by Russia, within the flexibility provided by the EU-Ukraine DCFTA, which, however, will not be amended".[579] As envisaged in the September 2014 trilateral meeting, the three parties continued to discuss the DCFTA and its impact on Ukraine-Russia trade at technical level in the spring of 2015, however, without making any progress. The three parties could therefore only declare at a third trilateral meeting at ministerial level on 18 May 2015 that: "while some of the issues can be addressed *in the context of the existing flexibilities available in the DCFTA*, and others in the context of the current bilateral or trilateral and plurilateral cooperation frameworks, the Parties have agreed to intensify their efforts and task their experts to achieve practical solutions to the concerns raised by Russia".[580] Three priority areas were identified, i.e. (i) customs cooperation, (ii) technical barriers to trade, and (iii) sanitary and phytosanitary issues.[581]

Several specific Russian concerns vis-à-vis the DCFTA, expressed during or before these trilateral meetings, deserve some comments and legal analysis. *First*, Russia claims that it risks being flooded with goods from the EU when the DCFTA will be implemented. Moscow fears that the EU products imported tariff-free in Ukraine – by virtue of the DCFTA – will be exported tariff free – by virtue of the 2011 CIS FTA – to Russia.[582] However, this argument does not take into account the rules of origin that Russia itself has negotiated in its

579 European Commission, 'European Commissioner for Trade Cecilia Malmström and Minister of Economic Development of the Russian Federation Alexey Ulyukayev discussions focus on EU-Russia trade relations', *press release*, 3 March 2015.

580 European Commission, 'Outcome of the Trilateral Talks on the Implementation of the EU-Ukraine Association Agreement/Deep and Comprehensive Free Trade Area', statement, 18 May 2015. Emphasis added.

581 *Ibid.*

582 M. Medvedkov, senior official at the Russian Ministry of Economic Development, has also warned for a possible "domino effect", whereby as a result of the EU-Ukraine DCFTA, Ukrainian goods will be driven out of Ukraine by EU products and will instead be exported to Russia (S. Aleksashenko, 'For Ukraine, Moldova and Georgia free Trade with Europe and Russia is Possible', *Carnegie Moscow Centre,* 3 July 2014). Another Russian argument against the DCFTA could be that it would reduce Russia's relative competitiveness on the Ukrainian market as Russian enterprises now have to compete with tariff-free imports from the EU. However, also this argument has been nuanced as Russia's exports to Ukraine (e.g. gas) are different from the EU exports to Ukraine (e.g. transport equipment and chemicals (Annex 3.1–3.3)). On this point, see M. Emerson, *op. cit.*, footnote 543.

preferential trade agreements with Ukraine. If the rules of origin of the 2011 CIS FTA are correctly implemented, EU goods that will be exported to Russia through Ukraine will still be considered as goods originating in the EU, and therefore subject to Russia's non-preferential bound MFN tariff (i.e. the CCT of the Customs Union).[583] Moreover, as noted above, a safeguard mechanism is provided in Annex 6 of the 2011 CIS FTA which enables Russia – and the other Customs Union Members – to suspend the preferential tariff on products from Ukraine if the conclusion of a FTA between Ukraine and a third country (e.g. the EU-Ukraine DCFTA) will "lead to import growth from [Ukraine] in such volumes, which causes injury or threatens to cause injury to the industry of the Customs Union".[584] It is clear that "customs cooperation" was identified as a priority area during the last trilateral meeting to accommodate these Russian concerns.[585] Although the EU is – obviously – not responsible for the enforcement of the 2011 CIS FTA rules of origin, the three parties made a commitment in the joint statement to maintain and further improve customs data exchange and electronic verification of origins by means of strengthened customs cooperation. Moreover, Ukraine and Russia stated that they "consider" revising the rules of origin of the 2011 CIS FTA.

It has to be noted that Russia also fears that, as a result of the EU-Ukraine DCFTA, Ukrainian goods will be driven out of the domestic market by cheaper EU products and will instead be exported to Russia at dumping prices.[586] In this view, Russia asked in July 2015 the EU and Ukraine to approve a "risk group" of products. These Ukrainian products would face quotas on exports to Russia after the DCFTA enters into force. However, Ukraine rejected this proposal and stated that "any unilateral introduction by Russia of quantitative restrictions in the shape of tariff quotas will constitute a violation of the CIS Free Trade Agreement and de facto abolition of the free trade regime between Ukraine and the Russian Federation".[587]

A *second* – more complex – Russian concern relates to the DCFTA provisions obliging Ukraine to approximate to the EU's TBT-related legislation and

583 Art. 4 of the 2011 CIS FTA regulates this agreement's rules of origin (*op. cit.,* footnote 530). According to this provision, the parties "shall be guided" by the CIS Rules of Origin Agreement of 20 November 2009 (to consult at the website of the Ministry of Economic Development of the Russian Federation http://www.ved.gov.ru/eng/activities/apec_website_tariffs/). This argument does not cover the effect of intermediate goods.

584 On this point, see text to footnote 543.

585 See text to footnote 581.

586 On this point, see footnote 582.

587 Statement of the Ukraine Trade Representative Natalia Mykolska regarding Russia's possible introduction of quantitative restrictions on imports from Ukraine, 6 July.

technical standards.[588] As it will be explained in further detail hereinafter,[589] the TBT chapter of the DCFTA obliges Ukraine to approximate to the EU's New Approach Directives which define the "essential requirements" related to health, safety and environments issues that products placed on the EU Market must meet. In addition, Ukraine has to progressively transpose the corpus of harmonised European standards, the voluntary use of which shall be presumed to be in conformity with the essential requirements of the New Approach Directives. Moreover, Ukraine has to withdraw conflicting GOST standards, which are the old technical standards developed in the Soviet era and which still to a large extent apply in the post-Soviet countries.[590] If these approximation commitments are properly implemented, the EU will conclude with Ukraine for several sectors an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA). This is a kind of mutual recognition agreement in which the parties agree that industrial products listed in the Annexes of an ACAA, fulfilling the requirements for being lawfully placed on the market of one party, may be placed on the market of the other party without additional testing and conformity assessment procedures (cf. *infra*). Russia fears that these DCFTA obligations will disrupt the traditional trade flows between Ukraine and Russia.[591] In particular, it argues that its products, which are still mainly being produced on the basis of the GOST standards, will be excluded from the Ukrainian market because they will not comply with the stricter essential requirements included in the different EU New Approach Directives which Ukraine has to implement.[592] It appears that this TBT issue is one of the few areas where the DCFTA could indeed – potentially – complicate Ukraine-Russia trade and which the EU is willing to take into consideration.[593] It is true that most of the Russian (GOST) product standards are less developed than the harmonised EU standards. However, it could be that the technical

588 On this issue, see B. Hoekman, J. Jensen, D. Tarr, 'A vision for Ukraine in the World Economy. Defining a Trade Policy Strategy that Leverages Global Opportunities', *Journal of World Trade* 48(4), 2014, p. 805.

589 The DCFTA chapter on TBT is analysed in Chapter 10.1.

590 Art. 56 EU-Ukraine AA.

591 I. Dreyer, 'EU Ukraine DCFTA vs Eurasian customs union: flexibilities on technical standards implementation in sight', *Borderlex*, 29 August 2014.

592 It has to be noted that Russia's technical standards are being replaced by new regulations at the level of the Eurasian Customs Union. On this issue, see WTO, 'Report of the working party on the Accession of the Russian Federation to the World Trade Organization', WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, pp. 171–73.

593 On this point, see also D. Cenusa, *et al.,* 'Russia's Punitive Trade Policy Measures towards Ukraine, Moldova and Georgia', *CEPS Working Document* No 400, September 2014.

standards of Russian products still meet the essential requirements of the EU Directives. Similar to the EU's New Approach system, the DCFTA states that the "voluntary use" of the harmonised EU standards shall have the presumption of conformity with the essential requirements of the EU New Approach Directives.[594] Thus, Russian products which are manufactured according to Russian standards which are different from the harmonised EU standards but nevertheless meet the essential requirements of the New Approach Directives should normally have to be able to enter the Ukrainian market. The problem is that Ukraine's domestic legislation does not allow products from third countries to enter the Ukrainian market if they do not meet the national technical product standards. If this possibility would be provided for by Ukraine's domestic legal system, Russian products that are manufactured in line with different technical standards, but still meet the essential requirements of the EU New Approach Directives, would be able to enter the Ukrainian Market. This scenario is however only possible as long as these products do not fall under an ACAA between the EU and Ukraine (cf. *infra*).

The discussion on the impact of the DCFTA TBT chapter on Ukraine-Russia trade relations is now further complicated by the fact that Russia has lost its exclusive competences on technical regulations to the Customs Union and the EEU. The EU has already criticised the Eurasian Customs Union's technical standards because they are considered not to be fully compatible with the WTO TBT and SPS Agreements.[595]

Although the DCFTA TBT rules could complicate trade relations between Ukraine and Russia, this problem should not be exaggerated. Ukrainian enterprises are still free under the DCFTA to produce products destined for the Russian market in line with the Eurasian Customs Union's standards and Russian producers will still be able to export to Ukraine if their products are manufactured according to the EU standards. On this point, the Commission stated that "EU standards are not a burden for EU companies when exporting to Russia, so why should they cause a problem for Ukrainian companies?"[596] However, it could be argued that complying with two different types of technical standards (i.e. for the domestic market and for the export market) reduces the cost effectiveness of the production process, especially for small and medium sized enterprises.

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594 Art. 56(8) EU-Ukraine AA.

595 European Commission, 'Trade and Investment Barriers Report 2013', COM (2013) 103 final, 28 February 2013, p. 14; European Commission, 'Trade and Investment Barriers Report 2015', COM (2015) 127 final, 17 March 2015, p. 9.

596 European Commission and EEAS, 'Frequently asked questions about Ukraine, the EU's Eastern Partnership and the EU-Ukraine Association Agreement', 12 June 2014, 140612/01.

During the last trilateral ministerial meeting in May 2015, the three parties agreed to establish a dedicated working group to further develop the harmonisation process "with a view to minimising the impact of the regulatory changes" and to "consider the extension of the transition periods for the regulatory alignment when and if appropriate for specific sectors or products, taking advantage of the flexibilities built in the DCFTA".[597] One of these DCFTA "flexibilities" is that the agreement does not define a timetable for Ukraine's approximation to the corpus of EU standards or the withdrawal of the GOST standards. The parties can agree on a very long transitional period for the withdrawal of the GOST standards in Ukraine's legal system, however, this would only postpone the incompatibilities – without solving them. Noteworthy, the simultaneous withdrawal of the GOST standards is a necessary condition to maintain a level playing field on the Ukrainian market. An unfair competition would be created if Ukrainian producers would be obliged to meet the stricter EU standards while having to compete at the same time with Russian imports which do not have meet these EU standards, but only less strict GOST standards.

A *third* Russian objection against the DCFTA is that it would preclude Ukraine from joining the Eurasian Customs Union. Before and during the September 2014 trilateral meeting, Russia requested that Ukraine should be permitted to join the Eurasian Customs Union. Obviously, the EU refused to give in on this point as Ukraine's accession the Customs Union would not only be incompatible with the EU-Ukraine AA/DCFTA but would also raise questions on Ukraine's WTO commitments.

With regard to Ukraine's WTO commitments, Ukraine's accession to the Customs Union would require an adjustment of its 'bound tariffs', laid down in its Schedule of Concession (Art. II GATT), to the Common Customs Tariff (CCT) of the Customs Union.[598] If the CCT is not higher than Ukraine's bound tariffs, there would be no inconsistency between its WTO and Customs Union membership. However, the CCT of the Customs Union, which is largely based on Russia's import tariffs, is higher than Ukraine's bound tariffs,[599] especially

597 Op. cit., footnote 580.

598 Art. II GATT states that a WTO member that agrees to a particular 'bound tariff' rate may not exceed this maximum, however, the actual tariff applied may be lower than the bound tariff.

599 The establishment of the CCT in the Eurasian Customs Union led to a large tariff increase for Kazakhstan whereas most of the Russian and Belarusian tariffs dropped. On the CCT of the Eurasian Customs Union, see A. Mkrchyan, 'The Customs Union Between Russia, Belarus and Kazakhstan: Some Evidence from the New Tariff Rates', *FREE Policy Brief*, October 2013.

because Ukraine significantly lowered its tariffs in the context of its WTO accession process.[600] It is also unlikely that the members of the Customs Union would lower the CCT to the level of Ukraine's bound tariffs to avoid incompatibilities between Ukraine's WTO and Customs Union commitments. This situation could lead to compensation claims from the other WTO members in accordance with GATT Article XXIV(6).[601] A second relevant issue would be that Ukraine, a WTO member, would form a customs union with several non-WTO Members (i.e. Belarus and Kazakhstan).[602] From a strict legal point of view, this raises questions on compatibility with Article I and XXIV(5) GATT,[603] however, in practice, non-membership of the WTO has never been seen as a problematic issue by the WTO members during the evaluation of preferential trade agreements.[604] A relevant example in this regard is that the EU did not object the accession of Kyrgyzstan to the 1999 Agreement on the Customs Union and the Common Economic Space, which was at that time concluded between only non-WTO members.[605]

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600 WTO, 'Report of the Working Party on the accession of Ukraine to the WTO', 25 January 2008, WT/ACC/UKR/152.

601 If, in the formation of a customs union, a constituent member must increase a bound duty because the common external tariff of the customs union is higher than the bound duty applicable before the formation of the customs union, Article XXIV(6) of the GATT requires that the procedure for modification of schedules, set out in Article XXVIII of the GATT, must be applied. See para. 4 and 6 of the "Understanding on the Interpretation of Article XXIV of the GATT 1994".

602 It has to be noted that Kazakhstan finalised the negotiations of its WTO membership terms with WTO members at the Working Party meeting on Kazakhstan's WTO accession on 22 June 2015. Kazakhstan's Accession package is now forwarded to the General Council for formal adoption by all 160 WTO Members. Kazakhstan will become a full-fledged member 30 days after it notifies the WTO of the ratification (WTO, 'Azevêdo welcomes Working Party adoption of Kazakhstan's WTO accession package – next stop: General Council', press release, 23 June 2015).

603 For example, GATT Article XXIV(5) only allows the formation of a customs union "between the territories of the contracting parties". It is considered that the explicit reference to "contracting parties" implies that a WTO Member (e.g. Ukraine) cannot rely on this provision to justify a MFN violation with a non-WTO Member (e.g. Belarus and Kazakhstan). For an extensive analysis on this issue, see W.-M. Choi, 'Legal Problems of Making Regional Trade Agreements with non-WTO-member States', *Journal of International Economic Law* (8)4, 2005, pp. 825–860.

604 G. Van der Loo, P. Van Elsuwege, *op. cit.,* footnote 519, p. 441.

605 Although the EU representative complained during the WTO review of Kyrgyzstan's accession to this agreement that, due to the non-WTO membership status of several of the contracting parties, the EU "did not always know what its partners were doing", it did not consider the non-WTO membership as an obstacle for Kyrgyzstan to accede to the

For more obvious reasons, Ukraine's accession to the Customs Union would also be incompatible with the EU-Ukraine DCFTA.[606] This issue was diplomatically avoided during the EU-Russia Summits[607] and was also not mentioned in the joint statements of the ministerial trilateral meetings. On these occasions, the EU emphasised that the AA and DCFTA is compatible with the *existing* CIS FTAs and agreements between Ukraine and the Customs Union members, however, it remained silent on the consequences of Ukraine's potential accession to the Customs Union. Nevertheless, several EU officials, including former Trade Commissioner K. De Gucht and former Enlargement and ENP Commissioner Füle, unambiguously confirmed that Ukraine's Customs Union membership would be incompatible with the DCFTA.[608] If Ukraine would join the Customs Union, it would have to adopt the CCT of the Customs Union, whose tariffs are higher than those negotiated in the EU-Ukraine DCFTA. Moreover, in this case, Ukraine would also lose its exclusive competence in the field of foreign trade policy as it should have to subscribe to the Customs Union's unified trade regime. This implies that the EU-Ukraine AA would have to be denounced since the EU would only be able to conclude a preferential trade agreement with the Customs Union as a whole, and not with its separate members (e.g. Ukraine).[609] As it will be explained further on, a FTA between the EU and the entire Customs Union is currently not on the EU trade agenda.

The fact that the conclusion of the AA/DCFTA complicates the potential deepening of Ukraine's relations with Russia and the Eurasian Customs Union (and the EEU as such) is difficult to reconcile with the EU's position that the EU-Ukraine AAs does not come "at the expense of" Ukraine's relations with

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agreement (WTO Committee on Regional Trade Agreements, 'Customs Union Between the Kyrgyz Republic, the Russian Federation, Belarus, Kazakhstan and Tajikistan', WT/REG/GENT/M/7, p. 3).

606 For a comparative analysis on this issue, see B. Hoekman, J. Jensen, D. Tarr, 'A vision for Ukraine in the World Economy. Defining a Trade Policy Strategy that Leverages Global Opportunities', *Journal of World Trade* 48(4), 2014, pp. 795–814.

607 *Op. cit.,* footnote 556.

608 See for example 'Statement by EU Trade Commissioner K. De Gucht: The EU is ready when Ukraine is ready', Statement/14/35, 28 February 2014; Statement of S. Füle on the pressure exercised by Russia on countries of the Eastern Partnership', SPEECH/13/687, 11 September 2013.

609 G. Van der Loo, P. Van Elsuwege, *op. cit.,* footnote 519, p. 442. For a similar argument, see V. Pogoretskyy, S. Beketov, 'Bridging the Abyss? Lessons from Global and Regional Integration of Ukraine', *Journal of World Trade* 46(2), 2012, pp. 457–484.

Russia.[610] However, Ukraine – and especially the post-Maidan Government – has not expressed its intention to join the Customs Union or EEU. On the contrary, Russia's recent actions in Eastern Ukraine and Crimea and its trade measures towards Ukraine have even pushed the country further away from regional economic integration with Russia and the EEU. Nevertheless, even after the AA and DCFTA will enter (provisionally) into force, Ukraine can still conclude a FTA with the Customs Union.[611] Officially, the EU even "applauds" closer economic relations between Ukraine and the Customs Union.[612] Such an option was even suggested by the Yanukovych administration when it proposed the "3 + 1" formula. This implied that Ukraine would cooperate with the Customs Union – without acceding to it – by concluding a FTA. However, this plan was soon rejected by Russia.[613]

How the trilateral discussions will further develop is difficult to predict. It appears from the May 2015 trilateral Joint Statement[614] that Russia has accepted that the provisional application of the DCFTA will start on 1 January 2016. However, officials from the EU and Ukraine involved in the technical trilateral working groups are cautious and do not exclude the possibility that Russia will further retaliate against the DCFTA or will demand further postponement of its provisional application.[615] In any case, it has to be stressed that Russia's trade-related concerns cannot be disconnected from its broader geopolitical agenda and policy objectives towards Ukraine. It can be concluded that these technical and trade-related objections vis-à-vis the DCFTA are mainly political tactics used by Russia to achieve its (geo-)political goals: i.e. preclude EU-Ukraine integration and the conclusion of the AA. The analysis above illustrates that only in the area of technical standards, Russia's concerns related to the DCFTA are – to a certain extent – valid. A trilateral compromise on Russia's

610 'Joint Statement by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Barosso on Ukraine', 25 November 2013, (EUCO 245/13).

611 Art. 39 of the EU-Ukraine AA states that "this Agreement shall not preclude the maintenance or establishment of customs unions or free trade areas [...] except insofar as they conflict with trade arrangements provided in this Agreement". As analysed above, accession to the Eurasian Customs Union clearly conflicts with the EU-Ukraine AA.

612 'Statement by EU Trade Commissioner K. De Gucht', *op. cit.,* footnote 608.

613 'Medvedev: Ukraine cannot join Customs Union in Special Format', *KyivPost*, 18 October 2011.

614 *Op. cit.*, footnote 580.

615 Several officials from the EU and Ukraine involved in the technical working groups of the trilaterals confirmed this to the author during several informal interviews in Brussels and Kiev in May and June 2015.

technical objections against the DCFTA is only likely to be found in a context of political rapprochement and military de-escalation and will depend on the progress made in the overall peace-process of the conflict in eastern Ukraine.

6.2.4 *Reconciling Economic Integration Initiatives in the EU-Ukraine-Russia Triangular Relationship: Prospects, Opportunities and Challenges*

The analysis above illustrates that the EU's legal framework for economic integration with Ukraine (i.e. the conclusion of an AA, including a DCFTA) complicates Russia's economic integration objectives towards Ukraine. Therefore, the question raises whether a legal framework can be established between the EU and Russia which can reconcile their conflicting regional economic integration objectives and instruments towards their shared neighbour.

Whereas the EU has opened a new chapter in its relations with Ukraine, Moldova and Georgia with the signature of the EaP AAs, its legal framework with Russia still relies on the bilateral PCA. As illustrated in the previous chapter, the PCAs mainly focused on economic cooperation and not integration. Because the EU-Russia PCA was concluded in the early nineties, several of its provisions have become outdated (cf. *supra*). Moreover, despite their economic interdependency, EU-Russia trade relations have been complicated recent years by numerous disputes. Several Russian trade(–related) measures such as high import tariffs, export restrictions on raw materials, poor intellectual property rights protection, discriminatory road charges on good vehicles, Russia's system of Siberian Overflight Payments, energy dual pricing and import restrictions on meat products and live animals damaged the EU-Russia trade climate.[616] Because the PCA is too limited in scope and contents to properly address and settle these disputes, several policy instruments were formulated to deepen and widen the scope of the PCA regime. For example, the May 2003 St. Petersburg EU-Russia Summit decided to develop, in the framework of the PCA, four *Common Spaces*,[617] including a *Common Economic Space.*[618] In addition, the June 2010 EU-Russia Summit launched the EU-Russia Partnership for Modernisation which will "serve as a flexible framework for promoting reform, enhancing growth and raising competitiveness".[619] Although these two

616 For an overview, see Council of the European Union, 'Key outstanding issues for the EU in its relations with Russia', 10073/11, 12 May 2011.

617 EU-Russia Summit, *Joint Statement*, 31 May 2003, St. Petersburg, 9937/03(Presse 154).

618 The objective of the EU-Russia Common Economic Space is "to create an open and integrated market between the EU and Russia, based on the implementation of common and compatible rules and regulations".

619 EU-Russia Summit, 'Joint Statement on the Partnership for Modernisation', 1 June 2010.

initiatives can contribute to sectoral economic cooperation between the EU and Russia, their results, mainly due to their soft law nature, are rather limited. Therefore, already at the 2006 Sochi EU-Russia Summit, both parties agreed to develop a new comprehensive framework agreement to replace the PCA. Negotiations on a new EU-Russia Agreement (hereinafter: the 'New Agreement') were launched at the June 2008 EU-Russia Summit. The leaders agreed to conclude:

> a strategic agreement that will provide a comprehensive framework for EU/Russia relations for the foreseeable future and help to develop the potential of our relationship. It should provide for a strengthened legal basis and legally binding commitments covering all main areas of the relationship.[620]

Similar to the EaP AAs, the aim is to conclude a broad framework agreement that not only includes trade-related provisions but also tackles all other areas of cooperation. However, this New Agreement will not go as far as the EaP AAs. For example, most likely, the agreement will not be an association agreement since it will be difficult for Russia to accept the asymmetrical relationship and strong conditionality approach which characterises EU association agreements.[621] Moreover, the trade-related provisions of such a New Agreement will be more modest compared to the EaP DCFAs (cf. *infra*).

Since the negotiations on the New Agreement were launched in December 2008, after they were briefly postponed by the EU in the light of the 2008 Russia-Georgia war,[622] little progress has been achieved.[623] A window of opportunity was created for the New Agreement in August 2012 when Russia

620 *Joint Statement* on the launch of negotiations for a new EU-Russia Agreement, Khanty-Mansiysk, 27 June 2008, 11214/08 (Presse 192).

621 R. Petrov, P. Van Elsuwege, 'Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?', *European Law Review* 36, 2011, pp. 699–701.

622 Poland also vetoed the planned opening of the negotiations in November 2006 in response to Russia's ban on the import of Polish meat.

623 In 2010, the negotiators agreed to focus on the trade and investment provisions and until there is sufficient progress in this area, the working groups covering non-trade areas of the New Agreement will not be convened. An informal Drafting Group has met 11 times (the last time in March 2012) to discuss the two draft legal texts on horizontal trade and investment provisions, which the EU submitted in two batches in July 2010 and March 2011 (DG trade, 'Overview of FTA and other Trade Negotiations', to consult at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf).

became, nineteen years after its application, a member of the WTO.[624] This historical step was applauded by the EU as it was argued that Russia's WTO accession did not only result in the country's definitive accession to the world market economy and international trade rules,[625] but that is also could speed-up the establishment of a new legal framework for EU-Russia (trade) relations and even lead to an EU-Russia FTA. For example, the EU High Representative declared that Russia's WTO accession will give "new momentum to negotiations on the new EU-Russia Agreement".[626] Also the European Commission and the European Parliament indicated that Russia's WTO accession will "prove an important stepping stone for deepening the bilateral economic integration, including through the conclusion of the ongoing negotiation on the New Agreement".[627] Moreover, for the first time, references were made by EU Commissioners and the European Parliament to the possibility of an EU-Russia FTA.[628] The President of the European Council mentioned that the New

624 It has to be noted that in June 2009, Belarus, Kazakhstan and Russia notified the WTO their intention to join it as a Customs Union (one entity). Due to opposition of several WTO Members and the lack of a clear precedent for countries to join the WTO as a customs union, the three countries declared in October 2009 that they would resume talks on WTO accession separately, but with synchronised positions.

625 Russia's WTO accession also offered the EU a unique opportunity to address several bilateral trade disputes and allowed the EU to link its approval on Russia's WTO membership to the settlement of these conflicts. This fits in the recent trend whereby incumbent WTO Members are increasingly using their bargaining powers to extract commitments and economic policy changes from acceding countries, even if these go beyond the obligations under the WTO Agreements. However, in the case of Russia's WTO accession, this practice, pursued by the EU, only proved to be effective in a limited number of areas such as the reduction of export duties. For analysis, see G. Van der Loo, 'EU-Russia trade relations: it takes WTO to tango?' *Legal Issues of Economic Integration* 40, 2013, pp. 7–32; M. Tyagi, 'Flesh on legal Fiction: Early Practice in the WTO on Accession Protocols', *Journal of International Economic law* 15, 2012, pp. 391–441.

626 'Speech by High Representative of the Union for Foreign Affairs and Security Policy', European Parliament plenary session, 16 December 2011, 18797/11.

627 European Commission, 'The EU and the WTO. EU welcomes three new member to the WTO', *Press release*, 15 December 2011 and European Parliament, 'Resolution of 14 December 2011 on the upcoming EU-Russia Summit on 15 December 2011 and the outcome of the Duma elections on 4 December 2011', P7_TA-PROV(2011)0575, para. 4.

628 Answering a written parliamentary question of N. Salavrakos of 20 December 2011 (E-011360/2011), former Trade Commissioner K. De Gucht stated that "the objective of the EU is to negotiate a Free Trade Area with the Russian Federation in the future, which would bring the customs tariffs applied between the two sides even lower". However, he noted that this process was complicated by Russia's regional economic integration initiatives. In an *Opinion* 'Recommendation to the Council and Commission on the new

Agreement should go beyond WTO provisions and include "regulatory cooperation, for example in the areas of IPR, public procurement and technical standards [...] and include investment and energy provisions".[629] Such an ambitious EU-Russia FTA could facilitate Ukraine's simultaneous economic integration with both the EU and Russia. However, it seems that different legal and political hurdles preclude the establishment of an EU-Russia FTA in the near future.

First, despite the initial euphoric statements and declarations on the EU's side, the track-record of Russia's first three years as a WTO Member is rather poor. Former Trade Commissioner K. De Gucht even stated during his mandate that "since Russia has become a member of the WTO they are doing exactly the opposite of what they are supposed to do or what they have been promising to do".[630] The latest Trade and Investment Barriers Reports of the European Commission addressed several Russian trade measures that are still deemed incompatible with the country's WTO commitments. For example, for a wide range of products, Russia is still applying import tariffs that are higher than its bound tariffs. Also Russia's import ban of live animals and meat products from the EU, its 'recycling fee' on imported cars and SPS and TBT-related measures are considered incompatible with the WTO Agreements.[631] In July 2013, the EU even launched for the first time a procedure in the WTO Dispute Settlement Understanding (DSU) against Russia regarding its 'recycling fee' on motor vehicles,[632] which was followed by a second case in April 2014 against Russia's

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EU-Russia Agreement', the European Parliament Committee on International Trade declared that 'Russia's accession to the WTO is vital to EU-Russia economic cooperation and to the negotiations on a possible Free Trade Agreement in the long term' (2011/2050, 1 April 2011).

629 H. Van Rompuy, President of the European Council, 'Speech to the EU-Russia Industrialists Round Table, 15 December 2011', *Press release* 503 (EUCO 163/11).

630 K. De Gucht, cited in J. Chaffin, 'Europe cools on Russia's WTO accession', *Financial Times*, 5 December 2012.

631 European Commission, 'Trade and Investment Barriers Report 2014', COM (2014) 153 final, 12 March 2014; European Commission, 'Trade and Investment Barriers Report 2015', COM (2015) 127 final, 17 March 2015, p. 9.

632 WTO, 'Russian Federation – Recycling fee on motor vehicles. Request for consultations by the European Union' (WT/DS462/1), 11 July 2013 (panel established but not yet composed). The EU considers that Russia's 'recycling fee' on motor vehicles, introduced in September 2012, "discriminates arbitrarily and unjustifiably against imported vehicles" because vehicles produced in Russia (and in its Customs Union partners) can be exempted from this fee (European Commission, 'EU challenges Russian 'recycling fee' in the WTO', MEMO/13/671, 9 July 2013).

ban on imports of pigs, fresh pork and certain pig products from the EU[633] and a third case in May 2014 concerning Russia's anti-dumping duties imposed on imports of light commercial vehicles from Germany and Italy.[634] In October 2014 the EU also started WTO litigation against Russia's import duties on certain agricultural and manufacturing products such as paper products, refrigerators and palm oil.[635] Russia, on the other hand, launched in December 2013 its first WTO DSU case against the EU, challenging the EU's cost adjustment methodologies used in anti-dumping investigations against Russian products,[636] and in April 2014 a second case concerning several elements of the EU's 'third energy package'.[637] Noteworthy, Russia's import bans on several products from Ukraine, Moldova and Georgia (cf. *supra*) can now also be challenged in the WTO DSU by these EaP countries. Whereas Russia's Federal Service for Veterinary and Phytosanitary Surveillance (*Rosselkhoznadzor*) usually justifies these import bans on sanitary or phytosanitary (health risk) grounds, they are primarily considered as disguised retaliation measures against these countries' decision to conclude the EaP AAs (cf. *supra*). For example, it appears that several of these import bans are incompatible with Russia's obligations under the

633 WTO, 'Russian Federation – Measures on the importation of live pigs, pork and pig products from the European Union. Request for consultations by the European Union' (WT/DS475/1), 14 April 2014 (panel composed on 23 October 2014). Russia banned imports of pigs from the EU in January 2014. It based its decision on four isolated cases of African swine fever detected in Lithuania and Poland. The Commission considers this ban as "disproportionate" and inconsistent with, *inter alia,* Russia's obligations under the WTO SPS Agreement (European Commission, 'EU challenges Russia in WTO over pork import ban', IP/14/389, 8 April 2014).

634 WTO, 'Russia – Anti-dumping duties on light commercial vehicles from Germany and Italy. Request for consolations by the European Union' (WT/DS479/1), 26 May 2014; European Commission, 'EU Requests WTO Consultations with Russia concerning Anti-Dumping Duties on Light Commercial Vehicles', *Press release*, 21 May 2012.

635 WTO, 'Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products' (WT/DS485), 31 October 2014. The EU considers in this case that Russia imposes import duties on several products that are higher than its bound tariffs (European Commission, 'EU requests WTO dispute settlement panel over Russia's excessive import duties', *press release,* 26 February 2015).

636 WTO, 'European Union – Cost adjustment methodologies and certain anti-dumping measures on imports from Russia. Request for consultations by Russian Federation' (WT/DS/474/1), 9 January 2014 (panel established but not yet composed).

637 WTO, 'European Union and its Member States – Certain Measures relating to the energy sector. Request for consultation by the Russian Federation' (WT/DS/476/1), 8 May 2014. On the compatibility of the EU's third energy package and the WTO Agreements, see G. Van der Loo, *op. cit.,* footnote 625.

WTO SPS Agreement.[638] Ukraine has already criticised Russia's import bans in the WTO SPS and TBT Committee,[639] however, an official case in the WTO DSU has not yet been initiated.

Second, although the EU supported Russia's WTO membership, it did not 'reward' Russia with the prospect of a FTA after its accession. This is different from the EU's trade policy towards the EaP countries, who were promised the conclusion of a (DC)FTA upon accession to the WTO.[640] Despite the vague prospect of free trade in the PCA *evolutionary clause* (cf. *supra*), the Council did not offer the Commission a mandate to negotiate a FTA with Russia in the framework of the New Agreement.[641] Because the Council did not change the Commission's negotiation mandate after Russia's WTO accession, the Commission is still tied to negotiate a non-preferential agreement. Instead, the EU has agreed to focus the negotiations on the New Agreement on regulatory convergence and investment.[642]

A *third* reason why an EU-Russia FTA is unlikely to be established in the near future relates to the Eurasian Customs Union and the EEU. As noted above, since the establishment of the Customs Union, Russia cannot conclude a FTA with a third country on its own, but only together with Belarus and Kazakhstan as one customs union entity. This is clearly illustrated by the ongoing negotiations between the members of the Customs Union and the EFTA States. Although the EFTA first envisaged a FTA only with Russia, after the formation of the Customs Union, the EFTA States had to expand the FTA negotiations towards Belarus and Kazakhstan.[643] Thus, if the EU wants

638 According to this agreement, SPS measures to protect human, animal or plant life or health must be based on scientific evidence, may not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail and cannot be applied in a manner which would constitute a disguised restriction in international trade (Art. 2 WTO Agreement on the Application of Sanitary and Phytosanitary Measures).

639 For example, Ukraine raised concerns regarding Russia's import restrictions on Ukrainian confectionary products in the WTO TBT and SPS Committee (WTO, 'Summary of the Meeting of 25–26 March 2014 – Note by the Secretariat', SPS Committee, G/SPS/R/74, 6 June 2014; WTO, 'Minutes of the Meeting of 19–20 March 2014- Note by the Secretariat', TBT Committee, G/TBT/M/62, 20 May 2014).

640 Council Conclusion on the European Neighbourhood Policy, 3101 Foreign Affairs meeting, 20 June 2011, para. 5.

641 European Commission (DG Trade), *op. cit.*, footnote 623.

642 *Ibid.*

643 Negotiations between the four EFTA States and the three members of the Customs Union were launched on 23 November 2013. In January 2014 an 11th round of negotiations took place in Astana, however, as a reaction to Russia's annexation of Crimea, the negotiations were suspended in March 2014.

to conclude a FTA with Russia, it can only do so by concluding an FTA with the entire Eurasian Customs Union, including Belarus and Kazakhstan. Such an undertaking is not on the EU trade agenda due to the non-WTO membership status of Belarus and Kazakhstan.[644] Moreover, entering into free-trade negotiations with the current authoritarian regimes of Nazarbayev and Lukashenko would be contradictory to the conditionality approach underlying the EU's external action. In an answer to a written Parliamentary question in 2011, former Trade Commissioner K. De Ghucht stated that it is the objective of the EU to negotiate a FTA with Russia, however, adding that "at this stage it is difficult to predict the exact timing and format of the planned negotiations on the FTA with Russia, in particular due to the ongoing economic integration of Russia within the customs union with Kazakhstan and Belarus".[645] It is no secret that the EU is dissatisfied with the establishment of the Customs Union. Although the EU supports and promotes regional economic integration among its trade partners, the Commission has criticised the Eurasian Customs Union because its technical regulations and SPS measures are considered not to be in line with Russia's WTO commitments under the WTO TBT and SPS Agreements.[646] The European Parliament even called the Customs Union a "trade irritant", which has led to higher consolidated tariffs in Russia's WTO accession procedure.[647] Nevertheless, during its WTO accession, Russia ensured that Article XXIV GATT would "constitute the legal basis within which [the Customs Union] would operate" and that "WTO provisions, to the extent that they cover the same issues [as the agreements of the Customs Union], would prevail if a conflict arose".[648] Since its

644 On Kazakhstan's WTO accession, see footnote 602.

645 K., De Gucht, answer to a written parliamentary question of N. Salavrakos of 20 December 2011 (E-011360/2011).

646 European Commission, 'Trade and Investment Barriers Report 2014', COM (2014) 153 final, 12 March 2014.

647 European Parliament, 'Resolution of 9 June 2011 on the EU-Russia summit', P7_TA-PROV(2011)0268, para. 5. On this issue, see also: Council of the European Union, 'Key outstanding issues for the EU in its relations with Russia', 10073/11, 12 May 2011.

648 The relationship between the Customs Union and the WTO is outlined in the 'Treaty on the functioning of the Customs Union in the Multilateral System', which entered into force in November 2011. It states that the provisions of the WTO Agreements become an integral part of the legal framework of the Customs Union (WTO, 'Report of the working party on the Accession of the Russian Federation to the World Trade Organization', WT/ACC/RUS/70, WT/MIN(11)/2, 17 November 2011, para. 1448). It has to be noted that Russia's WTO accession will have several repercussions on the Customs Union. For example, the Customs Union will have to cover "substantially all trade" between its members

establishment in January 2015, the EU did not develop official relations with the EEU. Only contacts are maintained at technical level.[649] In any case, the EU cannot continue to ignore this new regional bloc and will have to develop a strategy for it relations with the EEU. In January 2015, the EEAS drafted an "Issues Paper on its Relations with Russia". In this document, the EEAS considered some level of engagement with the EEU, taking into account the geopolitical importance of this Union and its impact on the EU's bilateral relations with the different Eurasian Economic Union members.[650] However, the Ukraine crisis, the political and trade-related disputes and sanctions between the EU and Russia and the EU's complaints concerning the WTO-inconsistent elements of the EEU do not create a beneficial environment for the development of such a comprehensive strategy.

A *final* hurdle for regional economic integration between the EU and Russia and the envisaged New Agreement is the current dispute between the EU and Russia concerning the latter's role in the conflict in Eastern Ukraine. The EU adopted several sanctions against Russia as a reaction to its "unprovoked violation of Ukrainian sovereignty and territorial integrity" and annexation of Crimea. In an extraordinary meeting on 3 March 2014, the Council "strongly condemn[ed] the clear violation of Ukrainian sovereignty and territorial integrity by acts of aggression by the Russian armed forces" and called on Russia to immediately withdraw its armed forces from Ukrainian territory.[651] Three days later, the European Council suspended the negotiations on the New Agreement as well as on talks on visa matters.[652] How long the negotiations will be suspended is difficult to predict and will depend on the political developments in Ukraine and Russia. The first time the EU suspended the negotiations on the

(Art. XXIV8(a)(i) GATT) and it will not be able to raise its CCT to a level higher than Russia's bound tariffs (cf. *supra*). Moreover, Russia is now obliged to notify its pre-existing and upcoming regional trade agreements for review to the WTO RTA Committee (Art. XXIV 7(a) GATT). For analysis, see G. Van der Loo, P. Van Elsuwege, *op. cit*., footnote 519, p. 444; R. Connoly, 'Russia, the Eurasian Customs Union and the WTO', in R. Dragneva, K. Wolczuk (eds.) *Eurasian Economic Integration. Law, Policy and Politics* (Edwards Elgar, Cheltenham, 2013), pp. 81–99.

649 European Parliament, 'Answer given by Ms Malmström on behalf of the Commission', E-000147/2015, 2 April 2015.

650 This confidential document was made public by the Financial Times, to consult at: http://blogs.ft.com/brusselsblog/files/2015/01/Russia.pdf.

651 3305th Council meeting, Foreign Affairs, *Press Release*, 3 March 2014, 7196/14 (Presse 114).

652 European Council, 'Statement of the Heads of State or Government on Ukraine', Brussels, 6 March 2014.

New Agreement as a response to Russia's war with Georgia in August 2008, talks were actually resumed already after a couple of months because it was considered that a long-term postponement of the negotiations was not in the EU's interest.[653] However, considering the gravity of the Ukrainian crisis and the deterioration of EU-Russia relations, it seems unlikely that EU will now swiftly resume negotiations.

Moreover, also the different sanctions the EU adopted against Russia diminished the prospect of EU-Russia trade integration. On the one hand, the EU adopted a set of sanctions under the form of asset freezes and visa bans against several Russian persons and entities deemed responsible for the violation of Ukrainian sovereignty, the annexation of Crimea and the destabilisation of Eastern Ukraine. The first of this set of sanctions was adopted on 17 March 2014 and identified and targeted 21 persons with a travel ban and an asset freeze within the EU.[654] The following months, the EU expanded this list[655] and broadened the scope of the sanctions, bringing the number of persons and entities under EU sanction in connection with the situation in Ukraine to 151 persons and 37 entities. This includes 145 persons and 24 entities responsible for action against Ukraine's territorial integrity, six persons providing support to Russian decision-makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law.[656]

On the other hand, in view of Russia's continued actions destabilising the situation in Eastern Ukraine, the Council adopted on 31 July a new package of economic sanctions on Russia. More than the visa bans and asset freezes, these 'stage three' sanctions have further deteriorated EU-Russia trade relations. These new sanctions limited the access to EU capital markets for Russian

653 P. Van Elsuwege, 'The Legal Framework of EU-Russia Relations: Quo Vadis?' in I. Govaere, *et al.* (eds.), *The European Union in the World. Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff Publishers, 2013, Leiden/Boston), p. 447.

654 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (*OJ,* 2014, L 78/16).

655 On 21 March 2014, 12 persons were added to the list of persons targeted by these sanctions (Council implementing Decision 2014/151/CFSP of 21 March 2014, *OJ,* 2014, L 86/30) and on 28 April 2014 another 15 additional persons were added (Council Implementing Regulation (EU) 433/2014 of 28 April 2014 (*OJ,* 2014, L 126/8)).

656 For an overview of these restrictive measures (asset freezes and visa bans), including a list of persons and entities subject to sanctions, see: http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

State-owned financial institutions, imposed an embargo on trade in arms, established an export ban for dual use goods for military end users and curtailed Russian access to sensitive technologies, particularly in the field of the oil sector.[657] These economic sanctions were widened on 8 September 2014.[658] In March 2015, EU leaders decided to align these sanctions to the complete implementation of the Minsk agreements.[659] Following this decision, on 22 June 2015 the Council extended economic sanctions for six months, until 31 January 2016.[660] The trade climate further deteriorated as Russia retaliated against these economic sanctions. On 7 August 2014, Russia introduced a ban, for the period of one year, on the imports of beef, pork, fruits and vegetables, poultry, fish, cheese, milk and dairy products from the EU and several other countries that have adopted sanctions against Russia.[661] As a reaction to the EU's extension of the economic sanctions in June 2015, Russia also extended its

657 Regarding Russia's access to EU capital markets, EU nationals and companies may no longer buy or sell new bond, equity or similar financial instruments with a maturity exceeding 90 days, issued by major state-owned Russian banks, development banks their subsidiaries outside the EU and those acting on their behalf. With regard to the exports of certain energy-related equipment and technology to Russia, Member States will have to authorize these exports and export licenses will be denied if products are destined for deep water oil exploration and production or shale oil projects. It must be noted that these measures only apply to new contracts (Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilizing the situation in Ukraine (*OJ,* 2014, L229/13)).

658 On 8 September 2014, the Council broadened the economic sanctions towards Russia. *Inter alia,* EU nationals and companies may no more provide loans to five major Russian state-owned banks and trade in new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued by the same banks, has been prohibited. The same restrictions have been extended to three major Russian defence companies and three major energy companies. Moreover, the ban on dual use goods was extended (Council Decision 2014/659/CFSP of 8 September 2014 (*OJ*, 2014, L 271/54) and Council Regulation 960/2014 of 8 September 2014 (*OJ*, 2014, L 271/3)).

659 European Council Conclusions on external relations, 19 March 2015, press release 134/15.

660 Council Conclusions, 3400th Council meeting, Foreign Affairs, 22 June 2015, Luxembourg. For the legal basis, see Council Decision (CFSP) 2015/971 of 22 June 2015 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

661 Government of the Russian Federation, 'On measures to implement the Presidential executive order on adopting special economic measures to provide for security of the Russian Federation', *Press release,* 7 August 2014. In a Statement, the EU Commission "regrets" these Russian measures which are "clearly politically motivated" and states that it "reserves the right to take action as appropriate" (Statement/14/249, 7 August 2014).

import ban on EU products by one year on 25 June 2015.[662] Despite their economic interdependency, the Ukrainian crisis has lead to a harmful trade war between the EU and Russia, further diminishing the prospect of a new legal framework for EU-Russia trade integration. Interesting to note is that – now that Russia is a member of the WTO –, officials of both the EU and Russia[663] have questioned the compatibility of the economic sanctions of the other party under WTO law.[664]

Thus, several legal and political hurdles considerably limit the options for an overall legal framework for regional economic integration between the countries of the EU-Russia-Ukraine trilateral relationship. An option which was suggested by President V. Putin to overcome the incompatibilities between the EU-Ukraine AA/DCFTA and Ukraine's membership of the Customs Union was that Ukraine should first join the Customs Union – and thus drop the EU-Ukraine AA – and then negotiate, together with the other Customs Union members, one broad FTA with EU.[665] According to Putin, such an agreement would create a FTA "stretching from Lisbon to Vladivostok".[666] However, as analysed above, such an undertaking seems unlikely to occur in the near

662 Government of the Russian Federation, 'On measures to implement the Russian President's Executive Order "On Extending Certain Special Economic Measures in the Interest of Ensuring the Security of the Russian Federation"', Government Decision, 25 June 2015.

663 See for example 'Briefing by Minister of Agriculture Nikolai Fyodorov', Government Meeting of the Government of the Russian Federation, 7 August 2014, *press release* (to consult at: http://government.ru/en/news/14199). Poland has made a request to the European Commission to send a formal complaint to the WTO over Russia's import restrictions (B. Fox, 'Poland demands WTO challenge over Russia food ban', *EUobserver*, 20 August 2014).

664 The trade-related sanctions of both the EU and Russia could raise questions regarding their compatibility with the 'national security exception' of GATT Article XXI – which allows a WTO Member to take "any action which it considers necessary for the protection of its essential security interests". However, it is unlikely that recourse to the WTO DSU can lead to a swift withdrawal of these trade sanctions. Only in a few WTO disputes, Article XXI was invoked by a WTO Member to seek justification for economic sanctions and no WTO panel has ever ruled on the precise meaning and scope of this "ambiguous and broad" article (A.S. Alexandroff, R. Sharma, 'The National Security provision – GATT Article XXI', in P.F.J. Macrory, *et al.* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (Springer, New York, 2005), pp. 1571–1580; P. Lindsay, 'The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure', *Duke Law Journal* 52, 2003, pp. 1277–1313).

665 R. Olearchyk, 'Putin woos Ukraine on trade pact', *Financial Times,* 12 April 2011.

666 V. Putin, *op. cit.,* footnote 513.

future. Therefore, it appears that the maximum feasible option for Ukraine's economic integration with both the EU and Russia is to conclude the AA/DCFTA with the EU and an ambitious FTA with the entire Eurasian Customs Union, without acceding to it. However, such an option was already torpedoed by Russia (cf. *supra*). Moreover, this approach would still face several challenges. For example, Ukraine's DCFTA legislative approximation obligations in the area of TBT would have to be reconciled with the technical regulations adopted at the level of the Eurasian Customs Union.

CHAPTER 7

A Legal Analysis of the EU-Ukraine AA

This chapter will analyse the contents of the EU-Ukraine AA. Although the DCFTA is an integral part of the EU-Ukraine AA, it will be analysed separately in the next Part (III). First, the legal basis (7.1) and the 'integration without membership' dimension of the objectives of the EU-Ukraine AA (7.2) will be explored. Then, the comprehensive nature of this agreement will be scrutinised (7.3) by focusing on its CFSP dimension (7.3.1) and AFSJ dimension, including the provisions on the mobility of workers and persons and (7.3.2) and its institutional framework (7.3.3). Finally, the enhanced forms of conditionality will be discussed (7.4). In this chapter, the 'integration without membership' dimension of the non-trade part of the EU-Ukraine AA will be explored and it will be analysed to what extent the AA is innovative compared to other sets of neighbourhood agreements such as the SAAs and the EMAAs. Moreover, the differences and resemblances with the two other EaP AAs (i.e. the Moldova and Georgia AAs) will be tackled.

7.1 The Legal Basis of the EU-Ukraine AA

A key element of the EU-Ukraine AA that triggered a stirring debate among EU institutions and legal scholars is the legal basis for the conclusion of this agreement.[667] According to the settled case-law of the ECJ, the choice of the legal basis of an EU Decision to conclude an international agreement must rest on objective factors which are amendable to judicial review.[668] Those factors must include in particular the aim and the content of the international agreement. When an agreement pursues several objectives, the "leading objective" will determine the single legal basis. According to the Court's 'centre of gravity test', the dominant objective of a measure – such as an international agreement – "absorbs" the possible other substantive legal bases which are

667 See for example D. Hanf, 'The ENP in the light of the new "neighbourhood clause" (Article 8 TEU)', *College of Europe Research Paper in Law* 2/2011; R. Petrov, 'Legal Basis and Scope of the new EU-Ukraine Enhanced Agreement. Is there any room for further speculation?', *EUI Working Paper*, 2008/17; P. Van Elsuwege, R. Petrov, *op. cit.*, footnote 621; C. Hillion, *op. cit.,* footnote 392; C. Hillion, *op. cit.,* footnote 362.

668 ECJ, Opinion 2/00, Cartagena Protocol, [2001], ECR I-9713, para. 22.

 | DOI 10.1163/9789004298651_009

pursuing objectives of a subsidiary or ancillary nature.[669] Only in the exceptional case of an inextricable link between two objectives without one being incidental to the other, recourse to a dual legal basis may be allowed.[670]

The choice of the legal basis is a crucial procedural step as it reflects the scope and nature of the EU competence to conclude the agreement and the role that the Union's institutions can play in the internal decision-making process. Although the choice of the legal basis is not something which itself is negotiated with the partner country since it is part of a unilateral EU act (i.e. the Council Decision signing the agreement), the Ukrainian negotiators were also interested in this issue. Due to the unprecedented two-phase signature of the EU-Ukraine AA (cf. *supra*), a Council Decision on the signing of the EU-Ukraine AA – indicating the legal basis – had to be adopted both for the 17 March 2014 signature as for the 27 June 2014 signature. First, the substantive legal bases of the EU-Ukraine AA will be analysed (7.1.1). Then, the (potential) role of Article 8 TEU as legal basis for the conclusion of international agreements such as the EU-Ukraine AA is explored (7.1.2). Finally, some general remarks on the legal bases of 'EU integration agreements' are formulated (7.1.3).

7.1.1 *The Two-Phase and 'Split' Substantive Legal Bases of the EU-Ukraine AA*

The Council Decision that was adopted on 17 March 2014 for the signature of the 'political' part of the AA combines the legal basis for EU action in the area of CFSP (Articles 31(1) and 37 TEU) with the traditional provision on association (Article 217 TFEU).[671] The latter is no surprise because it was already agreed upon in 2008 that the new EU-Ukraine agreement would be an "association agreement".[672] As illustrated before, due to the 'availability' of the association agreements and the fact that the Mediterranean ENP partners

669 A good example of this practice can found in Case C-268/94, *Portugal* v. *Council* [1996] ECR I-6177. On the centre of gravity test, see P. Van Elsuwege, 'The Potential of Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty', In M. Cremona, A. Thies (eds.) *The European Court of Justice and EU External Relations Law. Constitutional Challenges* (Hart Publishing, Oxford, 2013), p. 117.

670 Case C-178/03, *Commission v. Parliament and Council,* [2006], ECR I-107, para. 57.

671 Council Decision 2014/295/EU of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Title I, II and VII thereof (*OJ,* 2014, L 161/1).

672 *Op. cit.,* footnote 397.

already have a "special and privileged" relationship with the EU through the EMAAs, there was no longer any justification for maintaining an alternative for association. However, the reference to Articles 31(1) and 37 TEU is remarkable because the EU-Ukraine AA is the first association agreement that combines Article 217 TFEU with a CFSP legal basis.[673] Article 217 TFEU on association is traditionally considered as a 'catch-all' provision, which does not require the adoption of a separate additional legal basis for specific provisions of such an agreement. It can be argued that the unique combination of Article 217 TFEU with CFSP provisions as a legal basis for the EU-Ukraine AA is a consequence of the post-Lisbon legal framework for the conclusion of international agreements. On the one hand, international agreements based both on CFSP provisions and on a provision outside the CFSP can now be concluded by the Union only – through one Council Decision – as the EC and the EU merged into one single legal entity (the EU) and because there is now one single procedural legal basis for the conclusion of international agreements, including for agreements that relate in full or in part to the CFSP (i.e. Article 218 TFEU).[674] On the other hand, the combination of CFSP/TFEU legal bases may be regarded as a logical consequence of the continuing bipolarity of the EU's external action as reflected in Article 40 TEU.[675] According to S. Adam, the specific "shield" contained in Article 40 TEU against mutual encroachments between CFSP and non-CFSP procedures and competences therefore implies "that the 'absorption' doctrine, which is generally applicable for the choice of the appropriate legal basis of international agreements covering more than one field of EU external competence, does not apply to measures that concern both the CFSP and other fields of EU law". Therefore, the mere circumstance that the CFSP component of an international agreement is not predominant cannot

673 Also the Council Decision on the accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia is based on CFSP and non-CFSP provisions. However, contrary to the EU-Ukraine AA, this agreement is not an association agreement as its legal basis combines Arts. 31(1) and 37 TEU with Arts. 209 and 212 TFEU (cooperation with third countries) (*OJ*, 2012, L 154/1).

674 Before the Lisbon Treaty, cross-pillar international agreements based both on the first pillar (EC) and a second (CFSP) or third (JHA/PJCCM) pillar required the adoption of two Council Decisions, following the distinct procedures under former Art. 300 TEC and Art. 24/38 TEU (e.g. EU-Switzerland Agreement on Switzerland's association with the *Schengen acquis* (Council Decision 2008/146/EC (*OJ*, 2008, L 53/1) and Council Decision 2008/149 /JHA (*OJ*, 2008, L 53/50))).

675 S. Adam, 'The legal basis of international agreements of the European Union in the Post-Lisbon Area', in I. Govaere, *et al.* (eds.), *The European Union in the World. Essays in Honour of Professor Marc Maresceau* (Martinus Nijhoff Publishers, 2013, Leiden/Boston), p. 80.

justify the exclusion of the corresponding CFSP provision from its legal basis. This argument also explains why the Council Decisions for the signing of the AAs with Moldova and Georgia, who both have a similar broad CFSP dimension than the Ukraine AA, also have this additional CFSP legal basis next to Article 217 TFEU.[676] In any case, from a procedural point of view, the presence of a CFSP legal basis does not make a major difference because association agreements already require unanimity in the Council.[677] In addition, as argued above, the CFSP dimension of the EU-Ukraine AA is too limited to overrule Article 218(6)a(i) TFEU which requires the consent of the European Parliament for the conclusion of association agreements.[678]

A more controversial element of the EU-Ukraine AA's legal bases concerned the adoption of two separate Council Decisions for the signature and provisional application of the remaining titles of the agreement on 27 June 2014 (i.e. the titles on Justice Freedom and Security (III), the DCFTA (IV), Economic and Sector Cooperation (V) and Financial Cooperation (VI), and the related Annexes and Protocols).[679] Despite the Commission proposal for a single Decision on the basis of Article 217 TFEU,[680] the Council opted to 'split off' the provision relating to the treatment of third-country nationals legally employed

676 Council Decision 2014/492/EU of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (*OJ,* 2014 L 260/1); Council Decision 2014/494/EU of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (*OJ,* 2014 L 261/1).

677 Art. 218(8) TFEU.

678 On this point, see footnote 498.

679 Council Decision 2014/668/EU of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards Title III (with the exception of the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other Party) and Titles IV, V, VI and VII of the Agreement, as well as the related Annexes and Protocols (*OJ*, 2014, L 278/1). The substantive legal basis of this Council Decision is only Art. 217 TFEU because there was no need to add a CFSP legal basis (this Decision does not cover the CFSP-related chapters of the EU-Ukraine AA).

680 European Commission, 'Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part', COM (2013) 290 final, 15 May 2013.

as workers in the territory of the other party (i.e. Article 17 EU-Ukraine AA). This provision formed the subject of a separate Council Decision adopted on the basis of Article 79(2)(b) TFEU, which refers to the rights of third-country nationals residing legally in the Union.[681] The main reason for this complexity is the specific status of the United Kingdom (UK) and Ireland in respect of the EU competences in the AFSJ. Pursuant to Protocol 21 to the Lisbon Treaty, both countries have the discretionary power to decide whether or not they want to take part in the adoption of legislative acts under this title.[682] Taking into account that Article 17 of the EU-Ukraine AA falls within the scope of the AFSJ, in particular Article 79(2)(b) TFEU on the rights of third-country nationals residing legally in the EU Member States, the UK insisted on a separate Council Decision.[683] This fits in the recent trend whereby the UK is increasingly seeking ways to exercise its right to opt out pursuant to Protocol 21. This is clearly illustrated in two recent cases before the ECJ regarding the EEA Agreement and the EU-Switzerland Agreement on the free movement of persons (both named *United Kingdom v. Council*).[684] The subject of litigation in these cases was the choice of the legal basis for the adoption of the EU position within the Joint Committees, established by these agreements, to update the annexed EU social security legislation to the new Regulations 883/2004 and 987/2009. In both cases, the UK, supported by Ireland, contested that a TFEU Internal Market provision (i.e. Article 48 TFEU) was chosen as a legal basis for the relevant Decision and argued instead that Article 79(2)b TFEU had to be used so that it would be able to exercise its right to opt out pursuant to Protocol 21. However, the Court supported the position of the Commission and the Council that the relevant Internal Market provision was the proper legal basis. The Court basically argues that due to the far-reaching integration objectives of

681 Council Decision 2014/669/EU of 23 June 2014 on the signing, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party (*OJ*, 2014, L 278/6).

682 Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice (*OJ,* 2010, C 83/295).

683 In the preamble of Council Decision 2014/669/EU on the signing of the AA on 27 June 2014, the UK, Ireland and Denmark indicate that, on the basis of Protocols 21 and 22, they "are not taking part in the adoption of this Decision and are not bound by it or subject to its application" (*op. cit.,* footnote 681).

684 ECJ, Case C-431/11, *United Kingdom v Council* (*EEA*), judgment of 26 September 2013, *nyr*; Case C-656/11, United *Kingdom v Council* (*Switzerland*), judgment of 27 February 1014, *nyr*.

these agreements,[685] nationals of the four EFTA States have the same status as nationals of EU Member States as far as the application of the EU's social security rules is concerned.[686]

The option of the 'split legal basis' for the EU-Ukraine AA is a very unusual procedure[687] and not undisputable. The preamble of these Council Decisions state that "the aim and content of [Article 17 AA] is distinct from and independent of the aim and content of the other provisions of the Agreement to establish an association between the parties".[688] This is a rather weak legal argument to justify a separate Council Decision for Article 17 AA. It is difficult to see in the light of the Court's settled case-law on the absorption doctrine how the aim and content of Article 17 is "distinct from and independent of" the broad objectives and content of the other provisions of the EU-Ukraine AA. Moreover,

685 According to the Court, these integration objectives: "provide for the fullest possible realisation of the free movement of goods persons, services and capital within the whole EEA, so that the internal market established within the European Union is extended to the EFTA States" (*United Kingdom v Council* (*EEA*), para. 50) and "to bring about the free movement of persons between [the EU and Switzerland] on the basis of the rules applying in the [Union]" (*United Kingdom v Council* (*Switzerland*), para. 55).

686 For analysis, see N. Rennuy, P. Van Elsuwege, 'Integration without membership and the dynamic development of EU law: *United Kingdom v Council* (*EEA*)', *Common Market Law Review* 51(3), 2014, pp. 935–954. It has to be noted that the UK also lost a similar action for annulment concerning the Ankara Agreement. However, due to the different objectives of the Ankara Agreement – compared to the EEA and the Swiss Agreement on free movement of persons – the Court ruled in this case that the corresponding Decision of the Association Council on the extension of the social security legislation had to be based on both Art. 48 TFEU and Art. 217 TFEU (Case C-81/13, *United Kingdom v Council* (Turkey), *nyr*). For comments on this case, see M. Kutlik, 'C-81/13 UK v Council – Third time and still no charm?' *European Law Blog*, 21 April 2015. To consult at: http://europeanlawblog.eu/?p=2750.

687 Another rare example of a 'split' legal basis is the EU's accession to the 2002 Protocol to the Athens Convention relating to the carriage of passengers and their luggage by sea. Denmark argued that this Protocol, which primarily deals with transport (Art. 100 TFEU), contains two provisions on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which relate to Title V of Part Three of the TFEU, and for which Denmark is not bound (Protocol 22 to the Treaties). In this view, the Council adopted two separate Decisions to conclude the accession agreement, one relating specifically to the provisions of the Protocol (Art. 10 and 11) pertaining to the AFSJ (substantive legal basis: Arts. 81(1) and 81(2)(a) and (c) TFEU) and the other relating to the rest of the Protocol (substantive legal basis: Art. 100(2) TFEU). For the Council Decisions, see Decision 2012/23/EU (*OJ*, 2012, L 8/13) and Decision 2012/22/EU (*OJ*, 2012, L 8/1). For critical reflections on this specific procedure, see S. Adam, *op. cit.,* footnote 675.

688 Recital 4, Council Decision 2014/669/EU, *op. cit.,* footnote 681.

as noted above, Article 217 TFEU is considered as a 'catch-all' provision. For example, for other broad association agreements concluded by the EU that also include a non-discrimination provision very similar to Article 17 AA (e.g. the EMAAS and the SAAs (cf. *infra*)), no split legal basis was adopted. In its recent judgment *Commission v Council*, the ECJ considered the addition of specific legal bases relating to readmission of third-country nationals (Article 79(3) TFEU), transport (Articles 91 and 100 TFEU) and environment (Article 191(4) TFEU) unnecessary and unlawful for the signature of a Framework Agreement on Partnership and Cooperation between the EU and the Republic of the Philipiness.[689] In the Court's view, the broad scope of Articles 207 and 209 TFEU dealing, respectively, with common commercial policy and development cooperation was sufficient to cover the entire agreement.[690] Altough the context and the objectives of the EU-Ukraine AA are entirely different, the Court seems to dismiss the inclusion of additional legal bases for specific provisions of framework agreements which are based on the broad TFEU provisions on cooperation or association.

It is therefore no surprise that the adoption of this split legal basis was the subject of intensive discussions in the Council. On 6 June 2014, the Commission circulated in the Council a proposal for a Council Decision on the signing of the remaining parts of the EU-Ukraine AA, with only Article 217 TFEU as a substantive legal basis.[691] However, the UK kept insisting on a split legal basis for Article 17 AA. On 11 June 2014, the Permanent Representatives' Committee could not agree on the proper legal basis, especially on the issue of the split legal basis, and tasked the Eastern Europe and Central Asia Working Party to find an agreement.[692] Eventually, on 18 June 2014, only a few days before the planned signing of the remaining parts of the AA, the Permanent Representatives' Committee reached an agreement on the addition of the AFSJ legal base and the splitting of the Decision into two.[693] Several Member States and the European Commission entered Joint Statements in the Council

689 Case C-377/12, *Commission* v *Council*, Judgment of 11 June 2014, *nyr*.

690 On this point, see G. Van der Loo, P. Van Elsuwege, R. Petrov, 'The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument', *EUI Working Paper*, LAW 2014/09, p. 8.

691 European Commission, 'Note à l'attention des membres du GRI', 6 June 2014 (not public, *on file with the author*). On this issue, see also A. Rettman, 'Legal quibble delays preparations for EU-Ukraine pact', *EUobserver*, 11 June 2014.

692 Council of the European Union, 'Relations with Ukraine', Interinstitutional File 2013/1055(NLE), 11111/14, 20 June 2014 (not public, *on file with the author*).

693 *Ibid.*

minutes to express their disapproval concerning the split legal basis. For example, the Commission stated that it has made a proposal for one Decision based on Article 217 TFEU and, therefore, "disagrees with the addition of legal bases, in particular Article 79(2)(b), with the effect in particular of splitting the Decision".[694] Taking into account the political importance of the EU-Ukraine AA and the aim expressed by all EU institutions to conclude and implement the AA as soon as possible, it seems unlikely that the decision to use a 'split' legal basis will be challenged before the Court of Justice. However, it is not excluded that this could happen for future 'split' Council Decisions of other envisaged agreements. Noteworhty, no 'split' legal basis was adopted for the EaP AAs with Georgia and Moldova because these agreements do not include a provision which corresponds to Article 17 EU-Ukraine AA.

Finally, it has to be mentioned that because the AA covers matters falling under the European Atomic Energy Community competence,[695] a fourth Council Decision has been adopted approving the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the EU-Ukraine AA.[696]

7.1.2 *Quid Article 8 TEU?*

The first chapter of this title already discussed the constitutional dimension of the new 'neighbourhood clause' of Article 8 TEU and its relation with Article 217 TFEU. It has been argued that this provision could also have played a role as a substantive legal basis for the conclusion of the EaP AAs or other neighbourhood agreements.[697] In principle, the location of Article 8 in the TEU, and not in the TFEU, does not prevent its use as a substantial legal basis for the conclusion of agreements. According to Article 216(1) TFEU, the legal basis for concluding international agreements can be found in both Treaties. Moreover, several legal and political elements of Article 8 TEU make this provision suitable as a substantive legal basis for the EU-Ukraine AA. For example, because

694 *Ibid*. The Czech Republic and Austria, Italy and Romania also made Statements indicating that they support the view that Art. 217 TFEU as a legal basis covers all the elements of the association agreement in their entirety and that the "splitting into several decisions which refer to individual articles of an agreement is legally not viable".

695 See for example Art. 342 and Annex XXVII EU-Ukraine AA.

696 Council Decision 2014/670/Euratom of 23 June 2014 approving the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Association Agreement between the European Union and the European Atomic Energy Community and their member States, of the one part, and Ukraine, of the other part (*OJ*, 2014, L 278/8).

697 P. Van Elsuwege, R. Petrov, *op. cit.,* footnote 621.

Article 8 TEU is disconnected from EU enlargement (cf. *supra*), it fits perfectly in the overall ENP and EaP discourse. As illustrated before, the Union initially proposed Ukraine a "neighbourhood" or "enhanced" agreement, without referring to the term "association", since the latter could be perceived as a (long-term) membership perspective. Therefore, the use of Article 8 TEU as a legal basis would have created a "special relationship" with Ukraine, however, without creating false hope as far as accession prospects are concerned. It can even be argued that also after the Union's decision in 2008 to conclude an "association agreement" with Ukraine, Article 8 TEU could still have been used as a legal basis. The explicit political will of both parties to qualify a particular agreement as an association agreement is the strongest indication that an agreement is indeed an association agreement, and not the legal basis.[698] It is true that Article 217 TFEU is the only Treaty provision that foresees the establishment of association agreements, however, an association agreement concluded by the Union does not necessarily have to be based on this provision. For example, the Union has concluded "association agreements" which were not based on Article 217 TFEU or, conversely, several non-association agreements were based on Article 217 TFEU.[699] Thus, the combination of the clear commitment of both parties to be "associated", as expressed at the 2008 EU-Ukraine Summit, and Article 8 TEU, which is closely related to the TFEU association provision, would have been an appropriate match to establish the envisaged EaP AAs. A final feature of Article 8 is that it is considered, similar to Article 217 TFEU, as a 'catch-all provision' which is, in itself, a sufficient legal basis for the conclusion of agreements of a general nature.[700] Nevertheless, recourse to Article 8 TEU for the EU-Ukraine AA would not have avoided the internal discussions about the split legal basis, analysed above.

Despite these arguments in favour of the use of Article 8 TEU, neither the Commission nor the Council considered this provision as a substantive legal basis for the EU-Ukraine AA. Several legal and political factors help to explain

698 M. Maresceau, *op. cit.*, footnote 70, p. 315.

699 For example, the bilateral agreement between the EC and the PLO, signed in 1997 (*OJ*, 1997, L 187/3), was called an "Interim *Association* Agreement" (emphasis added), however, its substantive legal basis was not Art. 217 TFEU (ex. Art. 310 TEC) but were the Treaty provisions on commercial policy and development cooperation. Conversely, the Union has concluded several bilateral agreements based on Article 217 TFEU which were not themselves labelled as "association agreements" or where "association" never had been the subject of discussion during the negotiations with the partner country (e.g. the 1999 Bilaterals I with Switzerland (*OJ*, 2002, L 114/1) and the 1999 bilateral Co-operation Agreement signed with South Africa (*OJ*, 1999, L 311/3)). For analysis, see M. Maresceau, *op. cit.,* footnote 70, pp. 410–412.

700 P. Van Elsuwege, R. Petrov, *op. cit.,* footnote 621, p. 696.

this choice. For example, procedural issues would impede the use of Article 8 TEU as a legal basis for the conclusion of an agreement. Article 8 TEU does not include procedural requirements for the conclusion of agreements, neither does it refer to Article 218 TFEU, which is the general provision for the conclusion of international agreements. Article 218 TFEU prescribes qualified majority voting in the Council as the standard voting procedure but requires unanimity for the conclusion of a specific number of agreements such as "association agreements".[701] It does not refer to Article 8 TEU. Considering the close connection between Article 8 TFEU and Article 217 TFEU, it could be argued that the procedure for the conclusion of association agreements would need to be followed when establishing an agreement on the basis of the former. Consequently, this would require unanimity in the Council and the consent of the European Parliament.[702] Another suggested option would be the double legal basis of Article 8 TEU and Article 217 TFEU.[703] This would clarify the institutional requirements and would combine the Union's ambitions to establish an area of prosperity and good neighbourliness – while avoiding any link with enlargement – and the neighbour's desire to be formally associated to the Union. An alternative interpretation – which seems to be followed by the European Commission and Council – is that, given the absence of any procedural guidelines, Article 8 TEU is not destined to be used as an autonomous substantive legal basis but is purely a programmatic provision.[704] Indeed, several Commission and EEAS officials confirmed that they "have not even considered the use of Article 8 [TEU] as a legal basis [for the EU-Ukraine Association Agreement]".[705] This makes it also unlikely that this new neighbourhood clause will be used as a legal basis for the conclusion of future agreements with

701 Article 218(8) TFEU. Noteworthy, this provision refers to "association agreements" and not to "Article 217 TFEU", as it was the case before the Lisbon Treaty (Art. 300(2) TEC referred to "Article 310"). Therefore, it can be argued that this implies that unanimity in the Council is required for agreements which are titled "association agreements" but which do not have Art. 217 TFEU as a legal basis, and, conversely, that unanimity is not necessarily required for agreements that are based on Art. 217 TFEU but which are not considered to be association agreements.

702 D. Hanf, *op. cit*., footnote 667, p. 4.

703 P. Van Elsuwege and R. Petrov, *op. cit*., footnote 621, p. 698. Petrov also suggested the combination of Art. 8 TEU and Art. 212 TFEU as a legal basis for the conclusion of the EU-Ukraine AA (R. Petrov, *op. cit*., footnote 667, p. 10).

704 G. Van der Loo, P. Van Elsuwege and R. Petrov, *op. cit.,* footnote 690.

705 Interview 1 EEAS official, 22 June 2012, Brussels. This was also confirmed in interview 6 EEAS official, 22 April 2014, Brussels. It is noteworthy that also the European Parliament proposed to conclude the EU-Ukraine AA on the basis of Art. 217 TFEU, without considering Article 8 TEU (Report containing the European Parliament's

other EU 'neighbours' such as those envisaged with Switzerland, Russia and the micro-States (cf. *infra*).[706]

7.1.3 *The (Absence of a) Legal Basis for EU Integration Agreements*

As already noted, the Treaties do not foresee the possibility to conclude 'EU integration agreements' and, therefore, do not provide for a specific legal basis for the conclusion of such agreements. Table 2 (cf. *supra*) clearly illustrates that the legal basis of EU integration agreements can take many forms. In addition to Article 217 (association agreements)[707] and Article 207 (Common Commercial Policy),[708] specific provisions that allow the conclusion of an international agreement in a certain policy area[709] or the implied powers doctrine[710] are used as a legal basis for the conclusion of an EU integration agreement. The Court consistently held that the choice of the legal basis depends on the key objective of the agreement.[711] The obligation on the contracting party to apply a selected part of EU the *acquis* (i.e. the integration character of the agreement) will not determine the legal basis of the integration agreement. It is true that when an integration agreement is a broad framework agreement that has the ambition to establish a privileged relationship between the EU and a third country, this agreement will most likely be based on Article 217 TFEU. This is for example the case in the EEA agreement and the EaP AAs. Arguably, Article 217 TFEU can also be used for the envisaged framework agreement with the micro-States (cf. *infra*). However, for all the other 'sectoral' integration agreements, such as the bilateral aviation agreements, the monetary agreements with the micro-States or the ECT, the legal basis was solely determined by the specific aim of these agreements.

7.2 The 'Integration without Membership' Dimension of the Preamble and Objectives of the EU-Ukraine AA

The preamble and objectives of the EU-Ukraine AA confirm the 'integration without membership' dimension of this landmark agreement. A closer look to

recommendation to the Council, the Commission and the EEAS on the negotiations of the EU-Ukraine Association Agreement, 22 November 2011 (2011/2132(INI))).

706 For the potential application of Article 8 TEU in the EU's relations with Russia, see P. Van Elsuwege and R. Petrov, *op. cit.*, footnote 621, p. 699.

707 See for example the EEA.

708 See for example the EU-Andorra Customs Union Agreement.

709 See for example Art. 219(3) TFEU for the Monetary Agreements with the micro-States.

710 See for example Art. 100(2) for the EU-Georgia Common Aviation Area Agreement.

711 See text to footnote 668.

the preamble and listed objectives is indispensable as it determines, together with the legal basis, the nature of these agreements and defines the *finalité* of the envisaged relationship between the Union and Ukraine. Moreover, the concrete substance of the EU-Ukraine AA must be seen in the light of its specific objectives.

It was previously demonstrated that during the negotiations the EU refused to include any reference to EU accession – even in the longer term –, in the EU-Ukraine AA. The absence of a clear membership perspective implies that this agreement cannot be considered as a pre-accession agreement. To the contrary, the SAAs are more explicit in this respect as their preambles recall the EU's "readiness to integrate to the fullest possible extent [the associated country] into the political and economic mainstream of Europe" and refer to the Western Balkan countries' "status as a *potential candidate for EU membership*".[712] However, the status of potential candidate was not created by the SAAs but simply confirmed an earlier decision of the European Council.[713] Also the 1963 Ankara Agreement includes an explicit reference to Turkey's accession to the Community (now Union) and can therefore as well be considered a pre-accession agreement.[714]

Nevertheless, while carefully avoiding explicit references to EU accession, the EU-Ukraine AA includes diplomatic language on Ukraine's EU membership

712 Emphasis added. See for example the final recital of the preamble of the EU-Macedonia SAA. This recital added that the "potential candidate" status is subject to continuous fulfilment of the Copenhagen criteria and the successful implementation of the SAA, "notably regarding regional co-operation".

713 The "potential candidate" status of the Western Balkan countries was already granted at the Feira European Council in June 2000 and at the 2000 Zagreb Summit (European Council, Presidency Conclusions, Santa Maria de Feira European Council, 19–20 June 2000, Press 2000/1/00, point 67; Zagreb Summit-final Declaration, 24 November 2000, point 4). Meanwhile, Macedonia, Albania, Serbia and Montenegro have become 'candidate countries' (accession negotiations with Montenegro were launched on 29 June 2012 and with Serbia on 21 January 2014) and Croatia joined the EU on 1 July 2013. For analysis, see D. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?' *European Foreign Affairs Review* 8, 2003, p. 97.

714 The preamble of the 1963 Ankara Agreement declares that "the support given by the European Economic Community to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date". Moreover, Article 28 of this agreement states that the contracting parties "shall examine the possibility of the accession of Turkey to the Community". For analysis, see M. Maresceau, 'Turkey: a candidate state destined to join the Union', in N.N. Shuibhne, L.W. Gormly (eds.) *From single market to economic Union, essays in memory of John A. Usher* (Oxford University Press, Oxford, 2012), pp. 315–340.

ambitions, which cannot be found in other 'neighbourhood agreements' such as in the EMAAs or in the current PCAs. First, it is stated in the preamble that the parties aim to strengthen and widen the historical relationship and progressively closer links in an "ambitious and *innovative* way".[715] The latter confirms that the EU-Ukraine AA is unprecedented and is the first of a *new* generation of (association) agreements. Then, the parties recognise that Ukraine as "a European country shares a common history and common values with the Member States of the [EU] and is committed to promoting those values". In addition, the preamble states that the EU "acknowledges the European aspirations of Ukraine and welcomes its European choice". This cautious recognition of Ukraine's EU ambitions is not new since this formulation had become a catchphrase in the joint declarations of the annual EU-Ukraine Summits and was also included in the CSU (cf. *supra*).[716] Moreover, it does not go as far as the preamble of the EAs which, although initially conceived as an alternative for accession, made a more explicit reference to the CEECs membership aspirations by stating that it was the associated country's "ultimate objective [...] to become *a member of the Community* and that association through this Agreement [would], in the view of the Parties help [the associated country] to achieve this".[717] The only new element in the preamble of the Ukraine AA in this regard is the confirmation of "the strong public support in Ukraine for the country's European choice" and the recognition of the importance Ukraine attaches to its European identity.[718]

Nevertheless, in the spirit of the ENP and the EaP, the agreement does not preclude Ukraine's right to apply for EU Membership according to Article 49 TEU. Instead, it states that "this Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations".[719] This confirms the potential dynamic character of the Union's neighbourhood relations, especially with the "European" neighbours. The EAs illustrated that an agreement which is originally conceived as an alternative for EU Membership can develop into a firm pre-accession instrument.[720] In this regard, it is remarkable that as a reaction

715 First recital preamble EU-Ukraine AA.

716 See (text to) footnote 273.

717 Emphasis added.

718 These recitals are not included in the Moldova and Georgia AAs.

719 This reference is also included in the preamble of the EEA, however, with a more explicit reference to accession: "the conclusion of this Agreement shall not prejudge in any way the possibility of any EFTA State to accede to the European Communities".

720 The parallels between the reference to Ukraine as a "European country [which] shares a common history and common values with the Member States of the [EU] and is

to the turbulent 'Maidan' demonstrations, the Council has emphasised on several occasions that "the Association Agreement does not constitute the final goal in EU-Ukraine cooperation".[721] While avoiding explicit references to EU accession or membership, it is obvious that the Council hinted in this direction. Such a statement can be interpreted as a careful attempt from the Council during the Maidan demonstrations to support the pro-EU forces in Ukraine with a – vague – membership perspective. Especially Poland and the Baltic States insisted on such an enlargement hint.[722] However, not all Member States shared this enthusiasm and especially France and the Netherlands objected a clear membership perspective.[723] The final compromise was to state that the AA will not be the "final goal" in EU-Ukraine relations.[724] The Lithuanian foreign minister Linas Linkevicius has declared that, after the lively discussions in

committed to promoting those values" and Art. 49 TEU are obvious. It is even argued that several recitals and provisions of the Ukraine AA reflect the formulation of the Copenhagen criteria. Political criteria such as stability of institutions guaranteeing democracy, the rule of law, human rights and fundamental freedoms are not only defined as "essential elements" of the AA, they are also an integral part of the established political dialogue (Art. 6). Regarding the economic criteria, the establishment of a DCFTA is regarded as an instrument "to complete [Ukraine's] transition into a functioning market economy" (Art. 1(2)d). Last but not least, with respect to the administrative criteria and institutional capacity to implement the *acquis*, the entire agreement is based on Ukraine's commitment to achieve "convergence with the EU in political, economic and legal areas" and the preamble underlines Ukraine's approximation to the EU *acquis* "and [the objective] to effectively implementing it". For analysis, G. Van der Loo, P. Van Elsuwege, R. Petrov, *op. cit.,* footnote 690, p. 10.

721 For example, see Foreign Affairs Council Meeting, 'Conclusions on Ukraine', 10 February 2014, para. 5; Foreign Affairs Council Meeting, 'Conclusions on Ukraine', 20 February 2014, para. 3; Foreign Affairs Council Meeting, 'Conclusions on Ukraine', 3 March 2014, para. 7.

722 Polish foreign minister Radek Sikorski commented this statement and declared that according Art. 49 TEU any European state can join the EU if it meets the criteria and that "we have opened the door and given the hope to the Ukrainian nation that, if Ukraine embarks on the course of reform, then it has the chance to take full advantage of European integration and treaty provisions" (A. Rettman, 'EU gives Ukraine enlargement hint', *EUobserver,* 10 February 2014).

723 During the discussions in the Council, France even wanted to include a reference to make clear that Ukraine will never become member of the EU (V. Pop, 'Centre-right leaders give Ukraine hope of EU membership', *EUobserver*, 7 March 2014).

724 The European Parliament adopted a resolution which "welcomed the recent recognition by the Council that the Association Agreement, including a DCFTA, does not constitute the final goal in EU–Ukraine cooperation" and, in addition, stated that "Article 49 TEU refers to all European States, including Ukraine, which may apply to become a Member of the Union, provided that it adheres to the principles of democracy,

the Council, this statement "is as far as we can go jointly at this point".[725] Again, at the signing ceremony of the three EaP AAs on 27 June 2014, the President of the European Council stated that these agreements "open de most ambitious external relationship ever developed with the European Union [...] and *are not the final stage of our cooperation*".[726] It is difficult to see what the next step in these relations would be without the offer of an EU Membership perspective.

Whereas for the EU, the EU-Ukraine AA and the other EaP AAs are not pre-accession agreements, the partner countries clearly have a different view on this matter. For example, at the signing ceremony of the EU-Ukraine AA, the President of Ukraine Poroshenko declared that:

> [b]y signing the agreement with the EU, Ukraine, as a European State, sharing common values of democracy and the rule of law, is underlining its sovereign choice in favor of future membership in the EU in accordance with Article 49 of the EU Treaty. The Association Agreement is considered by Ukraine as an instrument of comprehensive preparation to the achievement of this goal.[727]

Also after the Ukrainian parliament ratified the EU-Ukraine AA on 16 September 2014, it adopted a Resolution stating that it "considers ratification of the Agreement not only as an impetus for implementing further reforms in Ukraine but also another step on the way to accomplishing its main objective – the European integration – becoming a full member of the European Union".[728] The leaders of Moldova and Georgia made similar statements during and after the signing ceremony of the EaP AAs.[729] Under Article 49

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respects fundamental freedoms and human and minority rights, and ensures the rule of law" (European Parliament Resolution of 27 February 2014 on the situation in Ukraine (P7_TA(2014)0170)).

725 A. Rettman, 'Ukraine accession promise would help EU-Russia relations', *EUobserver*, 13 February 2014.

726 H. Van Rompuy, 'Statement at the signing ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine', Brussels, 27 June 2014, EUCO 137/14 (emphasis added).

727 'Speech of the President at the ceremony of signing the Association Agreement between Ukraine and the European Union', Official Website of the President of Ukraine, 27 June 2014 (to consult at: http://www.president.gov.ua/en/news/30620.html).

728 Information Department of the Verkhovna Rada of Ukraine Secretariat, 'On the Statement of the Verkhovna Rada of Ukraine "On the European Choice of Ukraine"', *press release*, 16 September 2014.

729 A. Rettman, 'Georgia, Moldova and Ukraine cement EU ties', *EUobserver*, 27 June 2014.

TEU, Ukraine indeed has the right to apply for EU Membership. However, it seems unlikely that the EU will commit itself in the coming years to an explicit EU Membership perspective towards Ukraine, such as offering the status of "potential" candidate, taking into account, *inter alia*, the current 'enlargement fatigue' in the EU, the unstable political and economic climate in Ukraine, the conflict in eastern Ukraine and the potential impact on EU-Russia relations.

While avoiding the "accession" or "membership" term, the agreement contains several unambiguous references to the objective to *integrate* Ukraine into the EU (Internal Market). The most explicit one can be found in Article 1, which defines the overall objectives of the AA. It states that the aim of this Association is, *inter alia*:

> to establish conditions for enhanced economic and trade relations leading towards *Ukraine's gradual integration in the EU Internal Market*, including by setting up a DCFTA as stipulated in Title IV of this Agreement [...][730]

Also several recitals in the preamble affirm this integration objective, however, they add that integration in the EU Internal Market is conditional upon Ukraine's implementation of this Agreement and approximation to the selected EU *acquis*.[731] Such a clear-cut reference to the objective to integrate a third country in the EU Internal Market is rather unusual in international agreements concluded by the EU (Table 4). Only the EEA agreement includes such an explicit aim.[732] Although the EEA agreement does not literally uses the term 'integration', it aims to create a "homogeneous EEA" based on the free movement of goods, persons, services and capital. Consequently, "the internal

730 Art. 1(2)d. Emphasis added.

731 For example, the preamble states that "the political association and economic integration of Ukraine with the European Union will depend on the progress in the implementation of the current Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas" and that "the DCFTA, linked to the broader process of legislative approximation, shall contribute to further economic integration with the European Union Internal Market as envisaged in this Agreement".

732 However, Art. 1 of the former EA also stated that it was the aim of this agreement to "provide for an appropriate framework for the [CEEC's] gradual integration into the Community" (see for example Art. 1 EA Poland).

market established within the European Union is extended to the EFTA States".[733] However, as already noted, the EEA agreement is an international agreement *sui generis* which contains a distinct legal order of its own.[734] The EMAAs and the SAAs do not aim at integrating the partner countries into the EU Internal Market. The trade-related aim of the former is to "establish the conditions for the gradual liberalisation of trade in goods, services and capital"[735] and the latter has the objective to support the Western Balkan countries' transition into a functioning market economy and to "develop gradually a free trade area between the EU and [that country]" (Table 4).[736] Indeed, the *finalité economique* of these two groups of agreements is *liberalisation* and not integration. Both sets of agreements only provide for the gradual establishment of a FTA for trade in goods over a transitional period of less than 12 years (cf. *infra*). However, as it will be noted further on, the economic integration objectives of the EMAAs were broadened and deepened in the framework of the ENP and the Union is now also envisaging the "integration" of several of the southern Mediterranean ENP partners into the EU Internal Market on the basis of DCFTAs. Moreover, regarding the Western Balkans, the modest *finalité economique* of the SAAs, i.e. the establishment of bilateral FTAs, cannot be disconnected from their *finalité politique*, i.e. the accession of the associated country into the EU. Although the SAAs do not explicitly aim to integrate the partner country into the EU Internal Market, as pre-accession agreements they have the final goal to accommodate Western Balkans countries to full-fledged EU Membership.

In addition, also the integration agreements concluded by the EU (Table 2) do not always explicitly mention the 'integration objectives' of the agreement. This is quite remarkable because most integration agreements *de facto* lead to

733 ECJ, Case C-431/11, *United Kingdom v Council* (*EEA*), *op. cit.,* footnote 684, para. 50.

734 EFTA Court, *Erla Maria Sveinbjörnsdòttir v. Government of Iceland, op. cit.*, footnote 175.

735 See for example Art. 1(2) EU-Morocco EMAA. However, the preamble of several EMAAs refer, similar to the PCAs, to the partner countries' "integration in the world economy" (see for example EMAA Morocco, Tunisia and Jordan). A notable exception is the recital in the preamble of the EMAA with Israel which states that the parties aim to "promote a further integration of Israel's economy in the European economy".

736 See for example Art. 1(2) SAA Albania. The preamble of the SAAs recalls, however, "the prospect of the [associated] their integration with the European Union on the basis of their individual reform, progress and merit".

the integration of a third (neighbouring) country into a specific section of the EU Internal Market such as aviation (e.g. the ECAA and the bilateral aviation agreements) or energy (e.g. the ECT).[737]

Overall, this 'integration without membership' dimension of the preamble and objectives of the EU-Ukraine AA is largely taken over in the Moldova and Georgia AAs. Nevertheless, there are two important differences. *First*, the preamble of the Moldova and Georgia AAs explicitly refers, contrary to the EU-Ukraine AA, to the ENP and the EaP as the framework in which the previous and future relations are established.[738] However, this is the only reference to these policy frameworks in these AAs. The lack of a link with the ENP and the EaP in these three agreements is remarkable considering that they are an offspring of these policies and must constitute their new legal backbone. A more explicit recognition of these policies in the EaP AAs would have firmly anchored the ENP objectives and principles in the bilateral relationship between the EU and its partners. Arguably, this is the result of the fact that the objectives of the ENP and the EaP are considered too vague or that the ENP is still perceived as unilateral EU policy.[739]

A *second* notable difference is that the preamble of the Georgia AA recognises Georgia as an "*Eastern* European country"[740] and not as a "European country", such as it is the case for Ukraine and Moldova. Most likely, this

737 The preamble of the ECT states that the parties aim to establish an "*integrated market* in natural gas and electricity, based on common interest and solidarity". Art. 1 of the ECAA states that "the ECAA shall be based on free market access, freedom of establishment, equal conditions of competition, and common rules including in the areas of safety, security, air traffic management, social and environment". The bilateral aviation agreements include a similar recital.

738 In addition, the preamble of the Moldova AA "recogni[zes] the importance of the *joint EU-Moldova ENP Action Plan*" as a tool to promote legislative approximation, "thus contributing to *gradual economic integration* and deepening of political association" (emphasis added).

739 Also the objectives (Art. 1) of the EMAAs and the SAAs do no refer to the overall policy frameworks in which these agreements were established (i.e. the Barcelona Process and the Stabilisation and Association Process). However, the preamble of the SAAs "consider the importance of [these Agreements] in the framework of the Stabilisation and Association Process with the countries of south-Eastern Europe, [...] as well as in the framework of the Stability Pact" (e.g. preamble SAA Albania). The preamble of several EMAAs refers to the importance of their "relations in an overall Euro-Mediterranean context" (e.g. EMAA Morocco, Tunisia and Algeria).

740 Emphasis added.

differentiation is included to distinguish the southern Caucasus geographically from the 'Western' post-Soviet countries. The relationship between this formulation and Article 49 TEU, according to which only "European States" are eligible for EU Membership, is unclear. It is argued that this "eastern" tag was included to preclude an accession perspective for Georgia.[741] Although this recital can be interpreted as a political signal that excludes Georgia from the EU-accession track, from a legal point of view, this reference does not prevent Georgia to apply for EU accession as foreseen in Article 49 TEU. Accordingly, the preamble in the Georgia AA also states, similar to the EU-Ukraine AA, that this agreement "shall not prejudice and leaves open the way for future progressive developments in EU-Georgia relations".

The preamble and Article 1 of the EU-Ukraine AA include also several other objectives. Article 1 states:

1. An association between the Union and its Member States, of the one part, and Ukraine, of the other part, is hereby established.
2. The aims of this association are:
   (a) to promote gradual rapprochement between the Parties based on common values and close and privileged links, and increasing Ukraine's association with EU policies and participation in programmes and agencies;
   (b) to provide an appropriate framework for enhanced political dialogue in all areas of mutual interest;
   (c) to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with the principles of the United Nations Charter, and of the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the objectives of the Charter of Paris for a New Europe of 1990;
   (d) to establish conditions for enhanced economic and trade relations leading towards Ukraine's gradual integration in the EU Internal Market, including by setting up a Deep and Comprehensive Free Trade Area as stipulated in Title IV (Trade and Trade-related Matters) of this Agreement, and to support Ukrainian efforts to complete the transition into a functioning market economy by means of, inter alia, the progressive approximation of its legislation to that of the Union;

741 A. Rettman, 'EU-Georgia treaty highlights enlargement fatigue', *EUobserver*, 8 July 2013.

(e) to enhance cooperation in the field of Justice, Freedom and Security with the aim of reinforcing the rule of law and respect for human rights and fundamental freedoms;
(f) to establish conditions for increasingly close cooperation in other areas of mutual interest

The specific aim to establish gradual rapprochement "*based on common values* and close and privileged links" is unique.[742] Whereas the reference to "close and privilege links" echoes the ECJ's definition of an association agreement,[743] the reference to "common values" as a basis for the development of the association is clearly inspired by Article 8 TEU and reflects the objectives of the ENP and the EaP to promote the Union's values in its neighbourhood.[744] However, contrary to Article 8 TEU, this provision refers, in the light of the ENP's joint ownership, to "common" values. Also the "participation in programmes and agencies" was already foreseen in the ENP and the EaP[745] and is further managed in Protocol III to the Agreement. The provisions which must "enhance cooperation in the field of Justice, Freedom and Security" are laid down in Title III of the agreement[746] and "the increasingly close cooperation on other areas of mutual interest" is linked to Title V of the Agreement on "Economic Cooperation and Sector Cooperation". The "appropriate framework for enhanced political dialogue" is provided for in the agreement by a comprehensive institutional framework. Finally, the objective "to promote, preserve and strengthen peace and stability in the regional and international dimensions" reveals the CFSP dimension of this agreement, which is included in Title II on "Political Dialogue and Reform, Political Association, Cooperation and Convergence in the field of Foreign and Security Policy" (cf. *infra*).

The Moldova and Georgia AAs include a specific objective in the light of the 'frozen conflicts' and breakaway regions that are still present in these two

742 Emphasis added. Art. 1(2)a of the Georgia and Moldova AAs uses "political association and economic integration" instead of "gradual rapprochement".

743 ECJ, *Demirel*, *op. cit.*, footnote 351.

744 Art. 1 does not list these common values, however, the preamble states that the parties are committed to a close and lasting relationship that is based on common values, namely "respect for democratic principles, rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination of persons belonging to minorities and respect for diversity, human dignity and commitment to the principles of a free market economy".

745 European Commission, *op. cit.*, footnote 288, p. 10.

746 Title III EU-Ukraine AA 'Justice, Freedom and Security'.

countries today. Regarding the promotion and strengthening of peace and stability in the regional and international dimensions, both agreements add that the parties aim to "join [...] efforts to eliminate sources of tension, enhancing border security, promoting cross-border cooperation and good neighbourly relations".[747] Because neither Transnistria nor Georgia's breakaway regions Abkhazia and South Ossetia are explicitly mentioned in this provision, it can be concluded that these commitments are rather vague and unambitious. Although their preambles include a more explicit language on this issue,[748] it is clear that the AAs were not considered as an appropriate tool for conflict resolution of these frozen conflicts.[749] Because the text of the EU-Ukraine AA was initialled before Russia's annexation of Crimea in March 2014 and the conflict in eastern Ukraine, the agreement does not explicitly address these disputes. Nevertheless, the "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence" are "essential elements" of this agreement[750] and are an objective of the political dialogue.[751] Also the aim "to promote, preserve and strengthen peace and stability in the regional and international dimensions"[752] is relevant in the light of the current conflict in eastern Ukraine. After the signing of the EU-Ukraine AA, several bilateral and unilateral measures were taken to regulate the territorial application of the AA and DCFTA in Crimea (cf. *infra*).[753]

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747 In the light of the aftermath of the 2008 Georgia-Russia war, the Georgia AA also aims "to promote cooperation aimed at the peaceful conflict resolution" (Art. 1(2)e).

748 For example, the preamble of the Moldova AA states that the parties are "recognising the importance of the commitment of the Republic of Moldova to a viable settlement of the Transnistrian conflict, and the EU's commitment to supporting post-conflict rehabilitation". The preamble of the Georgia AA on the other hand states that the parties are recognising "the importance of the commitment of Georgia to reconciliation and its efforts to restore its territorial integrity and full and effective control over Georgian regions of Abkhazia and the Tskhnivali region/South Ossetia in pursuit of a peaceful and lasting conflict resolution [...]" and "the importance of pursuing the implementation of the 12th August 2008 Six-Point Agreement and its subsequent implementing measures [...]".

749 For an extensive analysis on the EU's role in the conflict resolution of these frozen conflicts, see N. Popescu, *EU Foreign Policy and Post-Soviet Conflicts : Stealth Intervention* (Routledge, Oxon, 2012), 176 p.

750 Art. 2 EU-Ukraine AA.

751 Art. 4 EU-Ukraine AA.

752 Art. 1(2)c EU-Ukraine AA.

753 This issue will be further analysed in Chapter 9.3.

TABLE 4 *Explicit and implicit references to EU membership and (economic) integration objectives in EU neighbourhood agreements*

		EU-Ukraine AA
Preamble	*'Explicit' reference to EU accession*	–
	'Implicit' references to EU accession	– Ukraine is a European country that shares a common history and common values with the Member States of the EU and is committed to promoting those values – The EU acknowledges the European aspirations of Ukraine and welcomes its European choice – the Parties note the importance Ukraine attaches to its European identity and the strong public support in Ukraine for the country's European choice – The Agreement shall not prejudice and leaves open future developments in EU-Ukraine relations

SAAs	EMAAs	PCAs	EEA
– The Parties recall the European Union's readiness to integrate to the fullest possible extent [the associated country] into the political and economic mainstream of Europe and its *status as a potential candidate for EU membership* on the basis of the TEU and fulfilment of the [Copenhagen criteria] as well as the SAp conditionalities, subject to the successful implementation of this Agreement[…]	–	–	– The conclusion of this Agreement shall not prejudge in any way the possibility of any EFTA State to *accede* to the European Communities
– The Parties consider the strong links between them and the values that they share and their desire to strengthen those links […], which should allow [the associated country] to further strengthen and extend the relations with the Community	–	–	–
– The Parties consider the European Partnership with the associated country, which identifies priorities for action in order to support the country's efforts to move closer to the European Union[754]			

754 This recital is only included in the SAAs with Bosnia and Herzegovina, Montenegro and Serbia.

TABLE 4 *Explicit and implicit references to EU membership* (cont.)

		EU-Ukraine AA
	'Finalité' of the economic integration	– The Parties are desirous to achieve *economic integration*, *inter alia*, through a DCFTA as an integral part of this Agreement [...] – The Parties acknowledge that the political association and *economic integration* of *Ukraine with the EU* will depend on progress in the implementation of the current Agreement [...] – The Parties are desirous of moving forward the reform and approximation process in Ukraine, thus contributing to *gradual economic integration* and deepening of political association – The Parties recognize that a DCFTA, linked to the broader process of legislative approximation, shall contribute to further *economic integration* with the European Union Internal Market.
(Economic) integration-related *objectives* (Art.1)		– Art. 1 (2)a: to promote gradual rapprochement between the Parties based on common values and close and privileged links, and increasing Ukraine's association with EU policies with EU policies and participation in programmes and agencies. – Art. 1 (2)d: to establish conditions for enhanced economic and trade relations leading towards *Ukraine's gradual integration in the EU Internal Market*, including by setting up a DCFTA, and to support Ukrainian efforts to complete the transition into a functioning market economy also through the progressive approximation of its legislation to that of the Union.

SAAs	EMAAs	PCAs	EEA
– The Parties recall the prospect of their *integration* with the European Union on the basis of their individual reform progress and merit	– The Parties consider the commitment to free trade – Promote a further integration of Israel's economy into the European economy[755]	– Considering the commitment of the Parties to liberalise trade	– The objective of establishing a dynamic and homogeneous EEA […] – Determined to provide for the fullest possible realization of the free movement of goods, persons, services and capital within the EEA, as well as for strengthened and broadened cooperation in flanking and horizontal policies
– Art. 1(2) […] develop gradually a free trade area between the Community and [the Western Balkan country]	– Art. 1(2) Establish the conditions for the gradual liberalisation of trade in goods, services and capital[756]	–[757]	– Art. 1: (1) The aim of this Agreement of association is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties[…], with a view to creating a homogeneous EEA (2) […] the association shall entail: the free movement of goods, persons, services and capital, the setting up of a system ensuring that competition is not distorted and that rules thereon are equally respected, as well as closer cooperation in other fields such as research and development, the environment, education and social policy.

755 This recital is only included in the EMAA with Israel.

756 Art. 1(2) of the EMAA with Israel is more nuanced as it refers to "the expansion, *inter alia*, of trade in goods and services, the reciprocal liberalisation of the right of establishment, the further progressive liberalisation of public procurement, the free movement of capital and the intensification of cooperation in science and technology to promote the harmonious development of economic relations between the Community".

757 The evolutionary clause is not listed in the objectives (Art. 1) of the PCAs (in case of Ukraine PCA, Art. 4).

7.3 The Comprehensive Character of the EU-Ukraine AA

A key feature of the EU-Ukraine AA and other EaP AAs is their broad and comprehensive character. The EU-Ukraine AA covers the entire spectrum of EU-Ukraine relations and is "unprecedented in its breadth (number of areas covered) and depth (detail of commitments and timelines)".[758] The comprehensive dimension of the AA is well illustrated by is volume: the agreement counts in total over 2140 pages in the *Official Journal*, including 44 annexes, 3 protocols and a joint declaration. The body of the agreement is composed out of seven Titles:

1. General Principles
2. Political Dialogue and Reform, Political Association, Cooperation and Convergence in the Field of Foreign and Security Policy
3. Justice, Freedom and Security
4. Trade and Trade-related Matters [i.e. the "Deep and Comprehensive Free Trade Area"]
5. Economic and Sector Cooperation
6. Financial Cooperation with Anti-fraud Provisions
7. Institutional, General and Final Provisions

In addition, pursuant to Article 479 EU-Ukraine AA, existing and future agreements relating to specific areas of cooperation "falling within the scope of this Agreement" shall be considered part of the overall bilateral relations as governed by this Agreement and as forming part of a common institutional framework. Due to the broad character of the AA, almost all existing agreements between the EU and Ukraine are covered by this provision.[759] Although these agreements do not become an integral part of the AA as such, together with the various AA provisions clarifying the relationship with other bilateral and multilateral agreements,[760] Article 479 AA aims to harmonise the relationship between the framework AA and the existing and future sectoral agreements.

758 European Commission, 'Information on the EU-Ukraine Association Agreement', http://eeas.europa.eu/top_stories/2012/140912_ukraine_en.htm.

759 For example, Agreement between the European Community and Ukraine on certain aspects of air services (*OJ*, 2006, L 211/24); Agreement between the European Community and Ukraine on the readmission of persons (*OJ*, 2007, L 322/48), The Energy Community Treaty (*OJ,* 2006, L 198/18).

760 For example, see Art. 278 on the ECT and Art. 265 on the WTO.

Thus, the EU-Ukraine AA is a classic example of what used to be called a 'cross-pillar agreement'. It includes provisions dealing with the whole spectrum of EU activities, including cooperation and convergence in the field of foreign and security policy as well as cooperation in the area of freedom, security and justice. Therefore, this chapter will analyse the CFSP dimension (7.3.1) and the AFSJ dimension, including the provisions on the mobility of persons and workers, of the EU-Ukraine AA (7.3.2) and its institutional framework (7.3.3).

7.3.1 *The CFSP Dimension of the EU-Ukraine AA*

Title II of the EU-Ukraine AA illustrates the extensive CFSP dimension of this agreement. It is rather exceptional that CFSP-related provisions of a framework agreement are included in a separate title dedicated to cooperation in foreign and security policy.[761] Moreover, this title includes provisions which go beyond those included in the PCAs, EMAAs and SAAs. Whereas provisions on non-proliferation of weapons of mass destruction (Article 11), combating terrorism (Article 13) and regional stability (Article 9) are also included in several SAAs,[762] the EU-Ukraine AA goes further and includes commitments on conflict prevention, crisis management and military-technological cooperation,[763] disarmament, arms (export) control and fight against illicit trafficking of small

761 A notable exception is for example the EU-Iraq Partnership and Cooperation Agreement (*OJ*, 2012, L 204/20) that includes a title on "Political Dialogue and Cooperation in the field of Foreign and Security Policy". This title includes provisions on, *inter alia*, combatting terrorism and countering proliferation of WMD and SALW. The EU-Vietnam 'Framework Agreement on Comprehensive Partnership and Cooperation' includes a title with a more general name: "Peace and Security" (Title III) (*OJ*, 2012, L 137/1). The EU-Philippines 'Framework Agreement on partnership and cooperation' includes a title on "Political Dialogue and Cooperation" which also contains CFSP-related provisions (*OJ*, 2012, L 134/3).

762 For example, the SAA with Serbia also includes similar provisions on non-proliferation of WMD (Art. 3), combatting terrorism (Art. 7) and, in the light of the Stabilisation and Association Process, on regional cooperation and good neighbourly relations (Arts. 5–6) (the provisions on non-proliferation of WMD and combating terrorism are not included in the SAA Croatia and Macedonia). The CFSP dimension of the EMAAs is much more confined as issues such as "the conditions to require peace, security and regional development" are only part of the political dialogue which must "contribute to consolidating security and stability in the Mediterranean region and in the Maghreb in particular" (e.g. Art. 3–4 EMAA Tunisia). For an extensive analysis on EU Peacebuilding in Kosovo (and Afghanistan), see M. Spernbauer, *EU Peacebuilding in Kosovo and Afghanistan. Legality and Accountability* (Martinus Nijhoff Publishers, Leiden/Boston, 2014).

763 Art. 10 EU-Ukraine AA.

arms and light weapons (SALW)[764] and cooperation and gradual convergence in the area of foreign and security policy, including the Common Security and Defence Policy (CSDP).[765] The parties even envisage increased participation of Ukraine in EU-led civilian and military crisis management operations as well as relevant exercises and training activities in the framework of the CSDP.[766] The EU and Ukraine shall also "explore the potential of military-technological cooperation". This title aims at "gradual *convergence* in the field of foreign and security policy".[767] The EU-Ukraine AA is the first framework agreement which uses the term "convergence". Despite the vague and broad nature of the provisions in this title, it can be argued that "convergence" stands for a *rapprochement* in the area of CFSP and CSDP that goes beyond mere 'cooperation'. This "convergence" can for example lead to a more systematic alignment of Ukraine to CFSP Decisions,[768] dialogue and cooperation regarding conflict prevention and Ukraine's participation in EU-led military crisis management operations.

Taking into account Ukraine's delicate position in the European security architecture between on the one hand, the EU and the NATO allies and, on the

764 Art. 12 EU-Ukraine AA.

765 Art. 7 EU-Ukraine AA. Several of these issues such as the fight against illicit trafficking of SALW are also included in other framework agreements with third countries, recently concluded by the Union (see for example the EU-Mongolia PCA (*OJ*, 2012, L 134/3, Art. 4) and the EU-Philippines PCA (*OJ*, 2012, L 134/3, Art. 9)).

766 The specific modalities and arrangements of Ukraine's participation in EU crisis management operations are already laid down in the Agreement establishing a framework for the participation of Ukraine in the European Union crisis management operations (*OJ*, 2005, L 182/29). Remarkably, the EU-Ukraine AA does not refer to this agreement. Although the participation of the Western Balkan countries or the Mediterranean partners in EU crisis management operations was not foreseen in the SAAs and the EMAAs, the Union has also concluded such framework agreements with the Western Balkan countries (for example, see the Agreement between the European Union and the Republic of Serbia establishing a framework for the participation of the Republic of Serbia in European Union crisis management operations (*OJ*, 2011, L 163/2)) and EMAA partners (see for example Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) (*OJ*, 2005, L 34/47)). For analysis, see P. Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press, Oxford, 2013), pp. 192–200.

767 Art 4(1) and Art. 7(1). Emphasis added.

768 Ukraine has already aligned itself to several CFSP Decisions (see for example Declaration by the High Representative on behalf of the European Union on the alignment of certain third countries with the Council Decision 2014/98/CFSP amending Council Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe, Brussels, 18 March 2014).

other hand, Russia, these provisions are quite far-reaching. This envisaged CFSP and CSDP "convergence" becomes even more relevant in the light of the current military conflict in eastern Ukraine between the Ukrainian army and the pro-Russian separatists, supported by Russia,[769] and the increased presence of Russian troops at the Ukrainian border. An ambitious military cooperation between the EU and Ukraine – whether or not based on these AA provisions – will most likely meet fierce opposition from Russia.[770]

The provisions and objectives in the corresponding Title of the Georgia and Moldova AAs are largely the same. However, these two agreements do not provide for a "Fora for the conduct of political dialogue"[771] but include tailored provisions regarding Georgia's and Moldova's 'breakaway' regions South Ossetia and Transnistria.[772] As noted above, because the text of the EU-Ukraine AA was already initialled before Russia's annexation of Crimea and the outbreak of the conflict in eastern Ukraine, these issues are not explicitly addressed in the EU-Ukraine AA.

7.3.2 *The AFSJ Dimension of the EU-Ukraine AA: Provisions on the Treatment of Workers and Mobility of Persons and (The Preclusion of) Their Direct Effect in the EU Legal Order*

The EU-Ukraine AA includes several AFSJ-related provisions which are grouped in Title III "Justice, Freedom and Security". Similar to other framework agreements that include such a title such as the SAAs,[773] Title III of

769 On 22 July 2014, the Council urged Russia "to stop the increasing flow of weapons, equipment and militants across the border" with Ukraine (Foreign Affairs Council Meeting, 'Conclusions on Ukraine', 22 July 2014).

770 Title II of the EU-Ukraine AA also includes the provision on the ratification of the Rome Statute on the International Criminal Court (Art. 8). On this point, see footnote 417.

771 Art. 5 EU-Ukraine AA.

772 For example, in the light of the presence of Russian troops in South Ossetia after the 2008 war, the parties underline in the Georgia AA, "their full support to the principle of host nation consent on stationing foreign armed forces on their territories […] and agree that the stationing of foreign armed forces on their territory should take place with the explicit consent of the host state, in accordance with international law" (Art. 5). Art. 9 of this agreement also reiterates the commitment of the parties "to peaceful conflict resolution in full respect of the sovereignty and territorial integrity of Georgia within its internationally recognized border as well as the facilitating jointly post-conflict rehabilitation and reconciliation efforts". A similar provision is included in the Moldova AA with regard to the Transnistria (Art. 8(2)).

773 See for example Title VII of the SAAs. The EMAAs do not include a separate title on "Justice, Freedom and Security", however, different AFSJ-related provisions are provided in other titles of these agreements. See for example also Part III Title II of the EU-Central America AA and Title IV "Justice and Security Cooperation" of the EU-Philippines PCA.

the EU-Ukraine AA includes provisions on the consolidation of the rule of law and the reinforcement of "institutions at all levels in general law enforcement and the administration of justice in particular"[774] and cooperation on migration, asylum and border management[775] and protection of personal data[776] and the fight against illicit drugs,[777] (organised) crime, corruption[778] and (the financing of) terrorism.[779]

The most important provisions in this title are those related to the treatment and mobility of workers and the movement of persons.[780] Regarding the treatment of workers, Article 17 of the EU-Ukraine AA states that subject to the laws, conditions and procedures applicable in each Member State and the EU, treatment accorded to workers who are Ukrainian nationals and who are legally employed in the territory of a Member State "shall be free" of any discrimination based on nationality, as regards working conditions, remuneration or dismissal, compared to the nationals of that Member State.[781] Conversely, this applies equally for EU nationals legally employed in Ukraine. The explicit and clear commitment in this provision (i.e. "*shall* be free")[782] goes beyond Article 24 PCA Ukraine which only states that the parties "shall endeavour to ensure" non-discrimination for legally employed nationals of the other party.[783] Because the formulation of Article 17 EU-Ukraine AA is identical to Article 23 PCA Russia,[784] it can be argued that, in the light of the ECJ's *Simutenkov* ruling

774 Art. 14 EU-Ukraine AA.

775 Art. 16 EU-Ukraine AA. This provision states that cooperation will focus, in particular, on tackling the root causes of migration, illegal migration, smuggling of migrants and trafficking in human beings, asylum issues, admission rules, border management, document security and effective return policy.

776 Art. 15 EU-Ukraine AA.

777 Art. 21 EU-Ukraine AA.

778 Art. 22 EU-Ukraine AA.

779 Arts. 20 and 23 EU-Ukraine AA.

780 In the SAAs, these provisions are included in Title V "Movement of Workers, Establishment, Supply of Services, Movement of Capital" (e.g. Art. 49 and 50 SAA Serbia). In the PCAs, the provision on treatment of workers (labour conditions) is included in Title IV "Provisions Affecting Business and Investment" (e.g. Art. 24 PCA Ukraine). However, in the EMAAs the provisions on the treatment and mobility of workers, including the provisions on non-discrimination in the field of social security, are included in Title VI "Cooperation in Social and Cultural Matters" (e.g. EMAAs Tunisia, Morocco, Algeria).

781 Art. 17(1) EU-Ukraine AA.

782 Emphasis added.

783 See text to footnote 252.

784 Art. 23 PCA Russia states that the Community (now Union) and its Member States "*shall* ensure" non-discrimination (emphasis added).

(cf. *supra*), it lays down "in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating on grounds of nationality, against [Ukrainian] workers vis-à-vis their own nationals".[785] Considering that the Court already confirmed the direct effect of provisions identical to Article 17 EU-Ukraine AA in other association agreements[786] and the far-reaching integration objectives of the EU-Ukraine AA, it is obvious that the "purpose and nature" of the EU-Ukraine AA neither prevents Article 17 to acquire direct effect.[787] Therefore, this provision can be relied upon by a Ukrainian national lawfully employed in the territory of a Member State before one of its courts as a basis for requesting that court to disapply discriminatory provisions.

In this context, it has to be noted that the Council Decisions on the signing of the EU-Ukraine AA include a remarkable provision stating that "the Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts or tribunals".[788] This reference fits in a recent trend whereby the EU precludes direct

785 ECJ, *Simutenkov, op. cit.,* footnote 255.

786 For example, the Court also ruled that the provision identical to Art. 17(1) EU-Ukraine AA in the EAs had direct effect (Case C-162/00, *Pokrzeptowicz-Meyer*, [2002], ECR I-1049; Case C-438/00, *Deutscher Handballbund*, [2003], ECR I-4135). Also Art. 10(1) of Decision 1/80 of the EU – Turkey Association Council, which states that "the Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labour forces treatment involving no discrimination on the basis of nationality between them and Community workers", was acquired direct effect by the Court (Case C-171/01 *Wählergruppe,* [2003], ECR I-4301, paras. 54–58). For an overview of the case-law on direct effect of the provisions of the EU-Turkey Association Agreement regarding the status of Turkish workers legally working in a Member State of the EU, see M. Maresceau, *op. cit*., footnote 714, pp. 323–330. Also a provision identical to Art. 17 EU-Ukraine AA in the former cooperation agreement with Morocco was granted direct effect (Case C-416/96 *El-Yassini,* [1999], I-1209) (cf. *infra*).

787 As already mentioned, the Court has attributed direct effect to provisions of agreements ranging from association to 'mere' cooperation (see footnote 250). In this regard, F. Jacobs argues that the reference to the purpose and nature of an agreement in the Court's analysis on the potential direct effect of an agreement has become "little more than a ritual refrain in which an agreement of almost any nature could be said to be capable of having direct effect" (F.G. Jacobs, 'Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice', in M. Maresceau, A. Dashwood (eds.), *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge, 2008), pp. 32–33).

788 See for example Art. 5 of Council Decision 2014/295/EU, *op. cit.,* footnote 671. Such a provision was also included in the Commission proposal for the Council Decision concluding the agreement (European Commission, *op. cit*., footnote 680).

effect of its international agreements, especially of their trade-related provisions. Several recent FTAs concluded by the EU preclude direct effect of (several of) their provisions through the Council Decision concluding the FTA and/or an explicit article in the main text of the agreement.[789] This practice is deemed necessary to ensure consistency with the multilateral DSM of the WTO, which does not have direct effect in the EU's legal order.[790] As EU FTAs increasingly incorporate (elements of) WTO agreements, non-direct effect provisions are included to prevent that WTO rules can acquire direct effect in the EU legal order through the 'back door' of the enforcement of these FTAs.[791] Although the non-direct effect provision in the Council Decisions regarding the EU-Ukraine AA – arguably – targets the trade-related provisions of this agreement (i.e. the DCFTA), it also covers the other AA provisions, including Article 17 on treatment of workers. However, this does not necessarily imply that the direct applicability of this non-discrimination clause is automatically excluded. Contrary to recent EU FTAs, the EU-Ukraine AA does not include a general clause in the text of the agreement that precludes direct effect of the entire AA.[792] Instead, only specific DCFTA provisions are prevented from acquiring direct effect by provisions in the main text of the AA.[793] Thus, direct effect of other EU-Ukraine AA provisions, such as Article 17, is only excluded through the approving Council Decisions. Even though it appears difficult for the Court to ignore the clear-cut instructions of the Council, the implications

789 For examples of Council Decisions on the signing of a FTA that preclude direct effect, see Council Decision on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and: the Republic of Korea (*OJ*, 2011, L 127/1(Art. 8)); Colombia/Peru (*OJ*, 2012 L 354/1, Art. 7) and Central America (*OJ,* 2012, L 346/1 (Art. 7)). For provisions precluding direct effect in the main text of a FTA, see Art. 336 EU-Colombia/Peru FTA and Art. 356 EU-Central America AA. In addition, these two agreements and the EU-Korea FTA include also in certain of their services schedules specific provisions on the exclusion of direct effect.

790 ECJ, Case C-377/02, *NV Firma Leon Van Parys v Belgische Interventie- en Restitutiebureau,* [2005], ECR I-1465.

791 For a comprehensive analysis on this issue, see A. Semertzi, 'The preclusion of direct effect in the recently concluded EU Free Trade Agreements', *Common Market Law Review* 51(1), 2014, pp. 1–34. For critical reflections on this issue, see also J. Bourgeois, 'Redactionele Signalen', *Tijdschrift voor Europees en Economisch Recht* 5, 2014, p. 213.

792 For examples, see footnote 789.

793 These are the entire DSM of the DCFTA and provisions of the services schedules (Chapter 14 of the DCFTA (footnote 45 of the AA) and Annex XVI-A, B and C EU-Ukraine AA). This confirms that the general non-direct effect provision in the Council Decisions on signing the EU-Ukraine AA targets only the trade-related provisions of the EU-Ukraine AA.

of these Council Decisions on the direct effect of Article 17 AA – and the other non-trade related AA provisions – are not straightforward. As Advocate General Saggio observed in his Opinion in *Portugal v. Council*: "[i]t need hardly be stated that a unilateral interpretation of the agreement made in the context of an internal adoption procedure cannot – outside the system of reservations – limit the effects of the agreement itself".[794] Arguably, the objective content of the textual provisions of the agreement takes priority over wishes expressed in separate unilateral declarations. This seems to be in line with the rules of customary international law, according to which "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The text of the treaty is the primary source of interpretation, while external aids such as *travaux prépratoires* constitute a supplementary source".[795] As noted above, it appears that the "purpose and nature" of the EU-Ukraine AA paves the way for the direct applicability of its provisions. Moreover, it has to be noted that the preclusion of direct effect of Article 17 AA would lead to a paradoxical situation that an old and less ambitious PCA with Russia would have more far-reaching direct legal implications than the EU-Ukraine AA.

Remarkably, the Council could have easily avoided the legal uncertainty regarding the direct effect of this non-discrimination clause without opening the door to direct effect of the other (trade-related) provisions. As analysed in the previous chapters, a separate 'split' Council Decision was adopted for Article 17 EU-Ukraine AA. This Council Decision gave the Council the option not to unilaterally exclude direct effect of only this AA provision. However, the Council included also in this Council Decision (on Article 17 AA) the same non-direct effect provision as in the other Council Decisions for the conclusion of the AA.[796]

Thus, Article 17 AA seems to give Ukrainian nationals, legally employed in the EU, the same rights in the field of working conditions and remuneration as the SAAs and several EMAAs grant to workers of, respectively, the Western Balkans and several Maghreb countries.[797] However, this EU-Ukraine AA

794 Opinion of Advocate General Saggio in Case C-149/96, *Portugal v. Council,* [1999], ECR I-8395, para. 20.

795 Judgment of the International Court of Justice of 3 February 1994, *Libyan Arab Jamahiriya v Chad*, quoted in the Opinion of AG Saggio in Case C-149/96, *ibid.*

796 Council Decision 2014/669/EU, *op. cit.,* footnote 681, Art. 3.

797 See for example Art. 49(1) SAA Serbia. Regarding the EMAAs, only the EMAA with Tunisia, Algeria and Morocco include such a clear and precise provision on equal treatment of workers (see for example Art. 64(1) EMAA Tunisia). The provision on equal treatment of workers in the Tunisia EMAA was granted direct effect by the ECJ (Case C-97/05

provision is less ambitious than its corresponding provision in the SAAs which adds that also the legally resident spouse and children of a worker legally employed in the territory of a Member State "shall have" access to the labour market of that Member State, during the period of that worker's authorised stay of employment.[798]

A crucial difference between the EU-Ukraine AA and the EMAAs concluded with the Maghreb countries is that the latter extends the non-discrimination treatment to social security.[799] These social security provisions were already included in the EMAAs' predecessors, i.e. the bilateral cooperation agreements concluded in the 1970s.[800] In its famous *Kziber* ruling, the ECJ confirmed the direct effect of the provision on non-discrimination in the field of social security in the previous cooperation agreement with Morocco.[801] Because of the unforeseen and far-reaching implications of this ruling, the Member States have tried to have the *Kziber* ruling reviewed.[802] However, in its subsequent case-law, the Court consistently confirmed this ruling and applied it as well on the identical non-discrimination provisions in the cooperation agreements with Algeria and Tunisia.[803] Because the non-discrimination provision in the

Gattoussi, [2006], ECR I-11394, para. 24–27). For an overview of the case-law of the ECJ on direct effect of provisions of bilateral agreements, see M. Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press, Oxford, 2013), p. 107–155; M. Maresceau, 'The Court of Justice and Bilateral Agreements', in *The Court of Justice and the Construction of Europe: Analysed and Perspectives on Sixty Years of Case-law* (T.M.C. Asser Press, The Hague, 2013), pp. 693–717.

798 This is not the case in Art. 49(1)b SAA Serbia. The corresponding provision in the three EMAAs also applies to workers allowed to undertake paid employment in the territory of a Member State on a temporary basis (e.g. Art. 67(2) Algeria EMAA).

799 See for example Art. 65 EMAA Tunisia and Morocco and Art. 68 EMAA Algeria. These provisions state, *inter alia*, that "workers of the associated country and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality relative to nationals of the Member States in which they are employed".

800 For the texts of these agreements, see for Algeria, *OJ*, 178, L 263/2; Tunisia, *OJ*, 1978, L 265/2 and Morocco *OJ*, 1978, L 264/2.

801 ECJ, *Kziber*, *op. cit.,* footnote 257, paras. 17–19.

802 See for example the request of the German Government in the *Yousfi* case (Case C-58/93, [1994], ECR I-1353).

803 On the Morocco agreement, see Case C-126/95, *Hallouzi-Choho*, [1996], ECR I-4807, paras. 19–20; Case C-23/02, *Alami,* [2003], ECR I-1309, para. 22; for Article 39(1) of the Agreement with Algeria, see Case C-103/94, *Krid,* [1995], ECR I-719, paras. 21–24 and Case C-113/97 *Babahenini,* [1998], ECR I-183, paras. 17–18.

field of labour and social security in these cooperation agreements have almost *in extenso* been incorporated in the EMAAs, the Court confirmed also the direct effect of these non-discrimination provisions in the EMAAs.[804] Since the *Kziber* judgement, many Member States have refused to include a national treatment clause any longer with regard to social security in bilateral agreements, or such provisions were carefully worded to exclude direct effect.[805] This explains why the provisions on treatment of workers in the EU-Ukraine AA are less advanced than those included in the EMAAs with the Maghreb countries. Remarkably, whereas the PCA still includes a vague provision which envisages the conclusion of agreements for the coordination of social security – thus excluding its direct effect –,[806] the EU-Ukraine AA remains completely silent on this issue.[807]

In addition to the non-discrimination clause of Article 17, the EU-Ukraine AA includes a general provision on the mobility of workers stating that the existing facilities of access to employment for Ukrainian workers accorded by Member States under bilateral agreements "should be preserved and if possible improved" and other Member States shall examine the possibility of concluding similar agreements.[808] Moreover, the Association Council shall examine the granting of other more favourable provisions in additional areas, "taking into account the labour market situation in the Member States and in the EU".[809] This can hardly be seen as a strong commitment on the part of the EU and its Member States.[810]

804 Case C-336/05, *Echouikh,* [2006], ECR I-5223, paras. 39–42; Case C-276/06, *El Youssfi,* [2007], ECR I-2851, para. 50. The Court also confirmed the direct effect of the provision on non-discrimination as regards working conditions, remuneration and dismissal in the EMAA Tunisia (Art. 64(1)), because it contains substantially the same provision as the one already included in the Cooperation Agreement with Morocco (Case C-97/05, *Gattoussi,* [2006], ECR I-11934, para. 27).

805 See footnote 257.

806 Art. 25 PCA Ukraine. See also Art. 24 PCA Russia and Moldova. However, no such agreements have ever been concluded.

807 Instead, in the SAAs, the Stabilisation and Association Council must adopt rules for the coordination of social security systems (e.g. Art. 51 SAA Serbia).

808 Art. 18(1) EU-Ukraine AA.

809 Art. 18(2) EU-Ukraine AA.

810 This provision is also included in the SAAs, however, the only difference is that according to its second paragraph, the SAA Association Council must examine the granting of more favourable provisions in additional areas "after three years" (e.g. Art. 45 SAA Serbia, with the exception of the SAA with Croatia and Macedonia).

Despite the fact that enhancing the mobility of citizens and visa facilitation is "a core objective of the Eastern Partnership",[811] the EU-Ukraine AA does not create new rights in the area of the moment of persons. Instead, Article 19 of the EU-Ukraine AA only refers to the implementation of the existing bilateral readmission and visa facilitation agreement of 2007.[812] Visa facilitation is a hot topic in the EaP and has been a long-standing demand from Ukraine and the other EaP partners.[813] In the framework of the ENP, the Commission made it clear that visa facilitation "can only be addressed in the context of broader packages to address related issues such as cooperation on illegal immigration" and that therefore "visa facilitation agreements are to be negotiated back-to-back with readmission agreements".[814] However, the contents of the visa facilitation agreement with Ukraine, which entered into force on 1 January 2008, is rather modest. This agreement facilitates the issuance of visas for an intended stay of no more than 90 days to the citizens of Ukraine by, *inter alia*, reducing and simplifying the number of documents that need to be presented for several groups of citizens (e.g. business people, members of officials delegations, journalist, students and scientists) and regulating the maximum fees and length of procedures for processing visa applications. In 2013, the visa facilitation agreement was amended in order to provide, *inter alia*, for the extension of certain facilitations to additional categories of Ukrainian visa applicants, such as representatives of the civil society organisations or NGOs as well as for the improvement of existing facilitations for categories of applicants like journalists.[815]

811 Joint Declaration of the Eastern Partnership Summit, Vilnius, 28–29 November 2013, 17130/13, Presse 513, p. 3.

812 For text, see *OJ*, 2007, L 332/48 (readmission agreement) and *OJ*, 2007, L 326/68 (visa facilitation agreement).

813 Ukraine abolished unilaterally visa requirements for EU citizens in 2005.

814 European Commission, *op. cit.,* footnote 289, p. 10. This *quid pro quo* policy to conclude visa facilitation agreements together with readmission agreements as a package deal was first applied towards Russia (for text of the agreements, see *OJ*, 2007, L 129/27 and *OJ*, 2007, L 129/40). For an analysis of the implementation of the visa facilitation process towards Russia, see P. Van Elsuwege (ed.) *EU-Russia Visa Facilitation and Liberalisation. State of Play and Prospects for the Future* (EU-Russia Civil Society Forum, 2013), for a general analysis of the EU's readmission policy, see N. Coleman, *European Readmission Policy. Third Country Interests and Refugee Rights* (Martinus Nijhoff Publishers, Leiden/Boston, 2009), pp. 161–166. This approach was also used towards the SAA countries (see for example the readmission and visa facilitation agreement with Serbia (*OJ*, 2007, L 344/46 and *OJ*, 2007, L 334/137)).

815 For text, see *OJ*, 2013, L 168/11. The agreement entered into force on 1 July 2013.

Although this visa facilitation agreement was welcomed by Ukraine, the country's ultimate goal is to establish a visa-free regime, as envisaged in the framework of the EaP.[816] In November 2010, the Commission presented the Action Plan on Visa Liberalisation (VLAP) to Ukraine.[817] This VLAP sets a series of precise benchmarks for Ukraine on four "blocks"[818] of relevant issues, with a view to both adoption of a legislative, policy and institutional framework (phase 1) and its effective and sustainable implementation (phase 2). The conditionality underpinning this policy is made very clear in the VLAP which states that "the speed of movement towards visa liberalisation will depend on progress made by Ukraine in fulfilling the [VLAP] conditions". However, the VLAP stresses that "there will be no automaticity". Thus, even if Ukraine fulfills all the listed conditions, the lifting of the short-stay visa obligation for Ukrainian citizens is not guaranteed and will require a decision at the EU level. This "automaticity" was the subject of serious discussions during the EU-Ukraine AA negotiations. Initially, the EU negotiators only wanted to include a reference in the agreement to a "long term perspective" of establishing a visa-free regime. The Ukrainian negotiators opposed this and called for a more tangible prospect linked to the progress made in fulfilling the VLAP conditions.[819] The result of this is that the third paragraph of Article 19 states that "the Parties shall take gradual steps towards a visa-free regime in due course provided that the conditions for well-managed and secure mobility, set out in the two phase [VLAP], are in place". This provision links the establishment of a visa-free regime with Ukraine's progress in implementing the VLAP, however, it does not include an irreversible commitment on the part of the EU.

816 The 2011 Warsaw Eastern Partnership Summit stated that once the readmission and visa facilitation agreements are concluded and effectively implemented, the EU and the partner countries "will take gradual steps towards visa-free regimes in due course on a case-by-case basis provided that conditions for well-managed and secure mobility set out in two-phase action plans for visa liberalisation are in place" (Joint Declaration of the Eastern Partnership Summit, Warsaw, 29–30 September 2011). Regarding Ukraine, it has to be noted that already at the 2008 Paris EU-Ukraine Summit, the parties decided to launch a visa dialogue with "the long-term perspective of establishing a visa free regime between the EU and Ukraine" (*op. cit.*, footnote 397).

817 Council of the European Union, 'EU-Ukraine Visa Dialogue – Action Plan on Visa Liberalisation', 14 December 2010, 17883/10.

818 These four blocks are: (1) document security, including biometrics; (2) illegal migration, including readmission; (3) public order and security; and (4) external relations and fundamental rights.

819 Interview 2 EU Delegation, 1 March 2012, Kiev.

The Commission's 2013 progress report on the implementation by Ukraine of the VLAP was rather negative. It recognised "substantial progress in all four blocks of the VLAP", however, added that still some important first phase requirements had to be met regarding document security (e.g. the use of fingerprints as a mandatory biometric feature for passports), asylum, anti-corruption and anti-discrimination.[820] The 2014 Maidan revolution created a new dynamic in this area. As a reaction to these events, the Council reconfirmed its commitment towards the visa-liberalisation process in order to increase people-to-people contacts between the 'civil societies'.[821] In its March 2014 support package for Ukrainian stabilization (cf. *infra*), the European Commission committed to support Ukraine's efforts to move forward the visa liberalisation process "as quickly as possible in line with the agreed conditions under the VLAP". In the May 2014 progress report, the Commission acknowledged "the substantial efforts undertaken by the new government in Ukraine" and concluded that it had addressed the outstanding first phase benchmarks. Therefore, the Commission decided that Ukraine can move to the second phase of the visa liberalisation process during which it will assess whether the necessary implementing regulations, under the four blocks of the VLAP, are effectively adopted and implemented.[822] However, despite this progress, the current conflict in eastern Ukraine, which can cause

820 European Commission, 'Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation', COM (2013) 809 final, 15 November 2013. A VLAP has also been adopted for Moldova and Georgia. For their most recent implementation reports, see European Commission, 'First Report on the implementation by Georgia of the Action Plan on Visa Liberalisation', COM(2013) 808 final, 15 November 2013; and 'Fifth Report on the implementation by the Republic of Moldova of the Action Plan on Visa Liberalisation', COM(2013)807 final, 15 November 2013. In the latter, the Commission concluded that "Moldova meets all the benchmarks set in the four blocks of the second phase of the VLAP". Therefore, the Commission has made in November 2013 a legislative proposal to amend EC Regulation 539/2001 to allow visa-free travel to the Schengen area for Moldovan citizens. The European Parliament approved this proposal in February 2014 and on 14 March 2014 the Council adopted the revised Regulation, thereby abolishing visa requirements for Moldovan citizens who want to travel to the Schengen zone for a short-stay and hold a biometric passport (European Commission, Statement/14/101, 3 April 2014).

821 3300th Council meeting, Foreign Affairs, 'Council conclusions on Ukraine', 20 February 2014. Remarkably, as a reaction to the Maidan demonstrations, the European Parliament even called for an immediate visa-free agreement between the EU and Ukraine (European Parliament Resolution of 27 February 2014 on the future of visa policy (P7_TA(2014)0177)).

822 European Commission, 'Fourth Report on the implementation by Ukraine of the Action Plan on Visa Liberalisation', COM (2014) 336 final, 27 May 2014.

migratory pressure on the EU, will most likely delay this visa-liberalisation process.

In sum, in the area of movement of workers and persons, the EU-Ukraine AA includes only one important improvement vis-à-vis the PCA, i.e. the non-discrimination clause of Article 17. Arguably, this provision can now acquire direct effect, however, the impact of the non-direct effect provision in the Council Decisions on the signing of the AA is still unclear. The EU-Ukraine AA is not as liberal as the SAAs or the EMAAs since it does not include provisions on the spouses and children of legally employed workers or on non-discrimination in the area of social security. It is definitely a far cry from the EEA, which ensures the free movement for workers and self-employed persons among the EU Member States and the three EFTA States, and the EU-Switzerland agreement on the free movement of persons.[823] In addition, the process of visa-facilitation is completely decoupled from the EaP AAs.

Finally, it has to be noted that the title on "Justice, Freedom and Security" in the Moldova and Georgia AAs differs significantly from the EU-Ukraine AA. Although the provisions not related to the movement and treatment of workers and persons are largely the same (i.e. protection of personal data, cooperation on migration and border management, preventing organised crime, combatting terrorism, tackling illicit drugs, etc.), the Moldova and Georgia AAs do not include a provision on the treatment and mobility of workers, corresponding to Article 17 and 18 of the EU-Ukraine AA. Only the provision on the movement of persons (Article 19 EU-Ukraine AA) is taken over in the Moldova and Georgia AAs.[824] It is remarkable that Moldovan and Georgian workers legally employed in the territory of a Member State shall not enjoy the same protection against discrimination based on nationality as Ukrainian nationals will enjoy under Article 17 of the

823 For analysis, see M. Jay, 'Homogeneity, the free movement of persons and integration without membership: mission impossible?' *Croatian Yearbook of European Law and Policy* 8, 2012, pp. 77–115. It has to be noted that in a referendum on 9 February 2014, the Swiss population approved the introduction of quantitative limits to immigration. According to both the Commission and the Council, "the introduction of quotas on immigration by EU citizens goes against the principle of free movement of persons between the EU and Switzerland as enshrined in the bilateral agreement in place". This can have far-reaching consequences since "the EU will [therefore] examine the implications of this initiative on EU-Swiss relations as a whole" (Declaration of the European Commission following the popular vote in Switzerland on the "mass immigration" initiative, 9 February 2014, Memo/14/96; General Affairs Council, 3292nd Council Meeting, 11 February 2014, 6328/14 (Presse 62)). For analysis, see A. Lazowski, 'The end of chocolate box-style integration? EU-Swiss relations after the referendum', *CEPS Commentary*, 28 February 2014.

824 Art. 15 Moldova and Art. 16 Georgia AA.

EU-Ukraine AA. Moreover, considering that the PCAs still "endeavour[ed] to ensure" non-discrimination, it seems that the Moldova and Georgia AAs are a step back regarding equal treatment of legally employed workers.[825]

7.3.3 *The Comprehensive Institutional Framework of the EU-Ukraine AA*

The comprehensive nature of the EU-Ukraine AA is also reflected in its institutional framework. Although the AA's institutional set-up is more elaborate than the one included in the PCA, it is not innovative since it is very similar to those foreseen in other framework association agreements such as the EMAAs and SAAs.[826]

The annual EU-Ukraine Summits are given a clear legal basis as this was not the case in the EU-Ukraine PCA.[827] These Summits shall take place "in principle" once a year and will hold "the highest level of political and policy dialogue" and "provide overall guidance for the implementation of [the AA] as well as an opportunity to discuss any bilateral or international issues of mutual interest".[828] These annual Summits are quite unique as they do not take place with other neighbouring countries, except Russia.[829] Similar to other association agreements, the EU-Ukraine AA also establishes an Association Council composed out of members of the EU Council and Commission on the one hand and members of the Government of Ukraine, on the other hand.[830] This Association Council shall meet at least once a year at ministerial level and is the core institution to monitor and supervise the application and implementation of the agreement.[831] For example, in March 2015 the Association Council amended the Association Agenda to identify new priorities related to the implementation of the AA.[832] In addition, it shall examine any other major issue which concerns the relationship between both parties and play an important role in the dispute settlement mechanism of the AA (cf. *infra*).[833] In contrast to the PCA Cooperation Council, the Association Council can take,

825 In addition, similar to the EU-Ukraine AA, the Moldova and Georgia AAs do not include a provision which envisages the conclusion of agreements for the coordination of social security, although this was the case in their respective PCAs.

826 See for example Arts. 92–99 EMAA Algeria and Arts. 119–125 SAA Serbia.

827 Art. 460 EU-Ukraine AA. Such bilateral annual summits are note foreseen in the EMAAs or SAAs.

828 *Ibid.*

829 The first EU-Ukraine Summit under the Association Agreement took place on 27 April 2015 (17th EU-Ukraine Summit, Joint Statement, 27 April 2015).

830 Arts. 461 and 462 EU-Ukraine AA.

831 *Ibid.*

832 On this point, see text to footnote 340.

833 Art. 477 EU-Ukraine AA.

"by agreement", legally binding decisions which will be binding upon the parties.[834] This binding decision-making power does not only allow the parties to swiftly broaden and deepen the scope of the agreement without the requirement of the conclusion of a new international agreement, it plays also a crucial role in the market access conditionality which underpins the DCFTA. As it will be illustrated further on, after monitoring the implementation of Ukraine's legislative approximation commitments, it will be the Association Council that will decide on further market opening.[835]

The Association Council plays also a crucial role in the updating and amending of the annexed EU *acquis*. Article 463(3) AA states that the Association Council "may" update or amend the Annexes to the agreement to take into account the evolution of EU law, without prejudice to any specific provisions in the DCFTA. This can hardly by seen as a 'dynamic' procedure since the Association Council is not automatically obliged to consider updating or amending the annexes when a corresponding EU act is modified at the level of the Union. However, several DCFTA chapters include a more dynamic procedure (cf. *infra*).

An Association Committee at senior civil servant level will assist the Association Council in the performance of its duties[836] and is in its turn assisted by specific sub-committees.[837] The Association Committee shall meet "in a specific configuration" to address all issues related to the DCFTA (hereinafter: "the Trade Committee"). Such an explicit Trade Committee, which will play an important role in the DCFTA (cf. *infra*), is not established in the EMAAs or SAAs. In addition, a Parliamentary Association Committee and a Civil Society Platform will hold regular meetings and make recommendations to the Association Council.[838] The creation of a bilateral Civil Society Forum is new

834 Art. 463(1). The parties must take appropriate measures to implement these decisions. In addition, the Association Council can also make recommendations.

835 Art. 475(5) EU-Ukraine AA. In several chapters of the DCFTA, the decision regarding market access is specifically endowed to the Trade Committee. This is, for instance, the case with regard to services and establishment (Art. 4 Annex XVII) and public procurement (Art. 154) (cf. *infra*).

836 Art. 464 EU-Ukraine AA. The Association Council may delegate to the Association Committee any of its powers, including the power to take binding decisions (Art. 465(2)). The first meeting of the Association Committee took place on 13–14 July 2015 (EEAS, 'EU-Ukraine Association Committee meeting', *press release*, 14 July 2015).

837 Art. 466 EU-Ukraine AA.

838 The Parliamentary Association Committee is composed out of members of the Verkhovna Rada and Members of the European Parliament (Art. 467) and the Civil Society Platform shall consist out of members of the European Economic and Social Committee on the one hand, and representatives of civil society on the side of Ukraine (Art. 469).

in comparison to other association agreements and reflects the increased focus on civil society involvement in the context of the ENP and the EaP.

The institutional framework in the Georgia and Moldova AAs are almost identical to the one in the EU-Ukraine AA.[839] The only notable difference is that annual bilateral summits are not foreseen in these two agreements. Nevertheless, Georgia and Moldova hold multilateral Summits with the EU in the framework of the EaP.[840]

7.4 Enhanced Conditionality in the EU-Ukraine AA: Common Values Conditionality *vs.* Market Access Conditionality

Conditionality is at the heart of the ENP and it is, therefore, no surprise that this instrument and methodology also occupies a prominent place in the EU-Ukraine AA. Not only has the launch of the negotiations on the AA been made conditional upon Ukraine's fulfilment of the political and economic priorities of the AP, already in the early stages of the conceptualisation of the AA, both parties explicitly stated that the new legal framework will "be governed by the principles of differentiation and conditionality".[841] Indeed, the preamble of the EU-Ukraine AA states that:

> the political association and economic integration of Ukraine with the European Union will depend on progress in the implementation of the current Agreement as well as Ukraine's track record in ensuring respect for common values, and progress in achieving convergence with the EU in political, economic and legal areas.[842]

This recital illustrates that two different forms of conditionality can be distinguished in the EU-Ukraine AA. On the one hand, the AA includes provisions related to Ukraine's commitment to the "common values" on which the

839 Arts. 400–410 Georgia AA and Arts. 433–443 Moldova AA.

840 For the latest EaP Summit, see: Eastern Partnership Summit, *Joint Declaration*, Vilnius, 28–29 November 2013, 17130/13 (Presse 516).

841 Eastern Partnership Summit, *Joint Declaration*, Prague, 7 May 2009, 8435/09 (Presse 78), p. 5.

842 The preamble of the Moldova and Georgia AAs are less explicit and state that "the common values on which the European Union is built – democracy respect for human rights and fundamental freedoms, and the rule of law – lie also at the heart of political association and economic integration as envisaged in this Agreement".

European Union is built (i.e. democracy, respect for human rights and fundamental freedoms, and the rule of law), which can be referred to as *common values conditionality*.[843] On the other hand, a substantive part of AA, namely the DCFTA, is based on an explicit *market access conditionality*. This implies that Ukraine will only be granted (additional) access to parts of the EU Internal Market if the EU decides, after a strict monitoring procedure, that Ukraine has successfully implemented its legislative approximation commitments, which are based on the EU Internal Market *acquis*.[844] Whereas the former can be considered as a form of *negative conditionality* (i.e. the withdrawal of a specific benefit when a certain predetermined condition is not fulfilled), the market access conditionality is a perfect example of *positive conditionality* (the granting of a certain benefit in return for the fulfilment of a predetermined condition).[845]

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843 For a legal analysis of the EU's promotion of its "democratic values" in the ENP, see: N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU. A legal analysis.* (Hart Publishing, Oxford, 2014) and P. Leino, R. Petrov, 'Between "Common Values" and Competing Universals: The Promotion of the EU's Common Values through the European Neighbourhood Policy', *European Law Review* 15, 2009, pp. 654–671. For a political-science analysis on this issue, see S. Lavenex, F. Schimmelfennig, *Democracy promotion in the EU's Neighbourhood. From leverage to Governance?* (Routledge, Oxon, 2013); T. Freyburh, *et al.*, 'EU promotion of democratic governance in the neighbourhood', *Journal of European Public Policy* 16(6), 2009, pp. 916–934 and J. Langbein, T.A. Börzel, 'Explaining Policy Change in the European Union's Eastern Neighbourhood', *Europe-Asia Studies* 65(4), 2013, pp. 571–580.

844 The difference between *acquis* conditionality and non-*acquis* related (values or democratic) conditionality was also made by, *inter alia*, F. Schimmelfenning, U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy* 11(4), 2004, 669–673; D. Kochenov, 'Why the Promotion of the *Acquis* is Not the Same as the Promotion of Democracy and What Can Be Done in Order to Also Promote Democracy Instead of Just Promoting the *Acquis*', *Hanse Law Review* 2, 2006, pp. 171–195; H. Grabbe, 'European Union Conditionality and the *Acquis Communautaire*', *International Political Science Review* 23(3), 2002, pp. 349–268. For a critical analysis on the correlation between *acquis* conditionality and values conditionality see: D. Kochenov, 'The issue of values', in P. Van Elsuwege, R. Petrov (eds.), *op. cit.*, footnote 85, pp. 46–62. In this contribution, Kochenov argues that the promotion of the EU *acquis* in the wider world does not automatically contribute to the promotion of EU's values in the third countries. For a critical view on EU conditionality in the pre-accession strategy, see D. Kochenov, *EU Enlargement and the Failure of Conditionality. Pre-accession Conditionality in the Fields of Democracy and the rule of Law* (Kluwer Law International, The Hague, 2008).

845 For the difference between positive and negative conditionality, see K.E. Smith, 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' *European Foreign Affairs Review* 3, 1998, pp. 253–274.

Both forms of conditionality bear some revolutionary features in comparison to other international agreements concluded by the EU.

7.4.1 *Common Values Conditionality*

The EU-Ukraine AA aims to promote the "common values" on which the EU-Ukraine relationship is based. These values are clearly listed in the agreement worded in the vein of Article 2 TEU.[846] The common values conditionality in the EU-Ukraine AA is linked to its essential element and suspension clause. As already noted, since 1992, most international agreements concluded by the EU include an essential element clause defining the core common values of the relationship, combined with a suspension clause including a procedure to suspend the agreement in case of violation of those essential elements.[847] However, these clauses in the EU-Ukraine AA differ from similar provisions included in, for instance, the SAAs and the EMAAs. For example, in addition to the standard reference to democratic principles, human rights and fundamental freedoms as defined by international legal instruments (the Helsinki Final Act, the Charter of Paris for a new Europe, the UN Universal Declaration on Human Rights and the European Convention on Human Rights and Fundamental Freedoms), the EU-Ukraine AA also defines "respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as countering the proliferation of weapons of mass destructions, related materials and their means of delivery" as essential elements of this agreement.[848] In addition, Article 3 states that the principle of a free market economy "underpins" their relationship. Moreover, the rule of law, good governance, the fight against corruption, the fight against different forms

846 Article 1(2)a and *op. cit.,* footnote 744. A specific reference to human rights and fundamental freedoms is also included in Art. 6 EU-Ukraine AA.

847 See footnote 216. For analysis, see L. Bartels, *Human Rights conditionality in the EU's International Agreements* (Oxford University Press, Oxford, 2005), p. 23.

848 The essential element clause in the EMAAs is more restricted. For example, most EMAAs only refer to "democratic principles and fundamental human rights established by the Universal Declaration of Human Rights" as an essential element (e.g. Art. 2 of the EMAA Algeria). The SAAs are instead more elaborate and refer to "respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation" (e.g. Art. 2 SAA Macedonia). The SAAs with Bosnia and Herzegovina, Montenegro and Serbia also define "full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY)" and the fight against the proliferation of weapons of mass destruction (Art. 3) as an essential element.

of trans-national organised crime and terrorism, the promotion of sustainable development and effective multilateralism "are central to" enhancing the relationship between the parties. These issues are therefore not "essential elements" of this agreement and violation of these principles can therefore not trigger the suspension clause.[849] Nevertheless, they are considered as "general principles" which are crucial for developing closer relations.[850]

Like other suspension clauses included in EU international agreements, the EU-Ukraine AA suspension clause gives a party the exceptional right to *immediately* take "appropriate measures" in case of violation of an essential element of the AA.[851] Remarkable is that the violation of essential elements can also lead, by derogation, to the suspension of rights or obligations provided for under the DCFTA.[852] This is the only case in the EU-Ukraine AA were common values conditionality overlaps with market access conditionality: although the DCFTA has its own DSM, the violation by Ukraine of human rights or fundamental freedoms can lead to the Union's suspension of specific trade benefits, granted to Ukraine under the DCFTA.

Another novelty related to common values conditionality is Article 6 of the agreement that provides a "dialogue and cooperation on domestic reform". This provision states that the EU and Ukraine shall cooperate "in order to ensure that their internal policies are based on principles common to the Parties, in particular stability and effectiveness of democratic institutions and the rule of law, and on respect for human rights and fundamental freedoms".

Despite these limited innovative elements in the EU-Ukraine AA common values conditionality, the following chapters will illustrate that market access conditionality is the most elaborate form of conditionality in this agreement.[853] Finally, it has to be noted that the essential elements and suspension mechanism in the Moldova and Georgia AAs are basically the same as the one included in the EU-Ukraine AA.[854]

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849 Art. 478(3) EU-Ukraine AA.

850 Noteworthy, the preamble of the EU-Ukraine AA states that the common values on which the EU is built are "also essential elements" of this agreement.

851 Under normal circumstances, a party may only take appropriate measures three months after the date of notification of a formal request for dispute settlement. Another exception to his rule is the denunciation of the Agreement not sanctioned by the general ruled of international law (Art. 478).

852 Art. 478(2) EU-Ukraine AA.

853 On this point, see D. Kochenov, 'The issue of values', *op. cit.*, footnote 844, p. 61.

854 Contrary to the EU-Ukraine AA, in the Georgia and Moldova AAs "respect for the principle of the rule of law" and "promotion of respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence" are not considered as essential elements of these agreements.

7.4.2 *Market Access Conditionality*

The EU-Ukraine AA market access conditionality can only be found in the DCFTA. This mechanism is unprecedented and comes in different forms, depending on the specific aim of each DCFTA chapter. The DCFTA illustrates that the process of Ukraine's integration into to EU Internal Market is intertwined with legislative approximation to the EU *acquis*: in several DCFTA chapters Ukraine will only be granted (additional) access to sections of the EU Internal Market if it approximates its domestic legislation to a predetermined selection of EU Internal Market *acquis*. This market access conditionality is quite revolutionary as it is – contrary to the soft law ENP APs and Association Agenda – the first legally binding instrument for legislative approximation in the framework of the ENP and the EaP. Moreover, it can "bring Ukraine closer to adopting EU Internal Market legislation than any other non-candidate country with the exception of the EEA and Switzerland".[855]

In several DCFTA chapters, legislative approximation to the EU *acquis* is a *conditio sine qua non* to obtain additional access to the EU Internal Market. As noted before, legislative approximation, as foreseen in the DCFTA, is not an objective on its own but is an instrument to achieve economic integration. For example, the preamble states that the DCFTA, linked to the broader process of legislative approximation, "shall contribute to further economic integration with the European Union Internal Market" and that the parties are "desirous of moving forward the reform and approximation process in Ukraine, thus contributing to gradual economic integration".[856] The crucial role of legislative approximation as an instrument for integration into the EU Internal Market was also highlighted during the CEECs (pre)-accession process in the 1995 Commission's White Paper on Integration Into the Internal Market.[857] Moreover, the Commission argues that – although it is not the Union's objective to export its *acquis* wholesale to the ENP partners –, "with only a few regulatory models in a globalised world, the EU model tends to be attractive to partners, reducing the 'invention costs' of political and economic costs of reform".[858]

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855 L. Tuis, C.M., Brown, 'The European Union and Regional Trade Agreements', in C. Herrmann *et al.* (eds.) *European Yearbook of International Economic Law* 4, (Springer-Verlag, Berlin, 2013), p. 257.

856 Preamble, EU-Ukraine AA.

857 For analysis, see footnote 315. However, as it is noted in the 1995 White Paper, "alignment [or approximation] with the internal market is to be distinguished from accession to the Union which will involve acceptance of the *acquis communautaire* as a whole".

858 European Commission, 'Tacking stock of the European Neighbourhood Policy', COM (2010) 207 final, 12 May 2010, p. 6.

Legislative approximation of a third country to the EU *acquis* is a crucial tool – and condition – for integration into the EU Internal Market. It was already noted that the DCFTA's legislative approximation dimension fits in the evolution of the EU trade policy that increasingly focuses on the 'deepening' of trade agreements.[859] As customs tariffs worldwide decrease in the framework of the WTO or regional trade agreements, non-tariff barriers such as trade-restricting regulations and procedures have become the main obstacle. Therefore, so-called "behind the border issues" have taken a prominent place on the EU trade agenda. A new generation of EU trade agreements will go beyond the traditional removal of tariff barriers by incorporating provisions on regulatory cooperation.[860] This is especially the case for EU-Ukraine trade relations since Ukraine already considerably lowered its average import duties in the light of its WTO accession[861] and benefited from the EU's Generalized Scheme of Preferences (GSP).[862] Therefore, Ukraine can only significantly enlarge its access to the EU Internal Market by tackling 'behind the border issues'. On this issue, Trade Commissioner K. De Gucht stated:

> A Deep and Comprehensive Free Trade Area is called "Deep" because it does not only tackle trade obstacles at the borders, like eliminating import and export duties, but it also focuses on the regulatory approximation with the EU *acquis*. This means bringing the legislation of our Neighbours closer to that of the EU, in the areas concerned by trade and investment; so that their local manufacturers will meet the EU standards and norms simply by respecting their own rules and regulations.[863]

The annexes to the DCFTA chapters do not only contain technical barriers to trade (TBT)- related *acquis* but also, in the light of the 'comprehensive'

859 M. Cremona, 'The Single Market as a Global Export Brand: Exporting the Single Market', *European Business Law Review* 21(5), 2010, p. 668.

860 European Commission, 'Global Europe: competing in the World', COM (2006) 567 final, 4 October 2006, p. 5.

861 Ukraine's average tariff bindings are now 10.66% for agricultural products and 4.95% for industrial goods, data available at <http://www.wto.org/english/news_e/pres08_e/pr511_e.htm> (accessed 22 March 2013) (last consulted 10 September 2014).

862 Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, *OJ*, 2012, L 301/1.

863 K. De Gucht, 'Trade as a cornerstone for the EU Eastern Partnership', Speech at the European Parliament (Euronest Parliamentary Assembly), 23 January 2012.

character of the DCFTA, EU legislation on competition, energy, services, establishment, public procurement, etc. By obliging Ukraine to implement and apply a selection of the EU *acquis*, a common legal space is envisaged. The aim is to create a level playing field with uniform rules for economic operators. The mechanisms included in the DCFTA safeguarding the uniform interpretation and application of the incorporated EU *acquis* must ensure that the extension of (parts) of the EU Internal Market to Ukraine does not come at the expense of the Internal Market's uniformity and integrity.[864]

These AA obligations to apply or implement a predetermined selection of EU *acquis* make this agreement an 'EU integration agreement'.[865] However, compared to the other EU integration agreements discussed in Title I, the explicit nature of the market access conditionality in the EU-Ukraine AA – mainly in the DCFTA – is revolutionary. The aforementioned EU integration agreements open a section of the EU Internal Market for a third country (e.g. aviation or energy)[866] while at the same time obligating that third country to apply a body of relevant EU *acquis*. However, nowhere in these agreements, an express or explicit link is made between the application of this selection of *acquis* and the specific access to the EU Internal Market. From the moment these EU integration agreements have entered into force, they have unconditionally created a specific market access, irregardless of the track record of the third country's legislative approximation commitments, laid down in the agreement. The only exception to this are the transitional periods included in these agreements.

This is not the case in the EU-Ukraine DCFTA. In several – but not all – chapters of the DCFTA a specific form of additional market access is granted in

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864 The 1995 White Paper on Integration into the Internal Market stated that the Internal Market legislation was chosen as an area "to which the associated countries should give particular attention" since "any substantial failure to apply the common rules in any part of the internal market puts the rest of the system at risk and undermines its integrity" (*op. cit.*, footnote 315, p. 8). Similar to the DCFTA, the 1995 Internal Market White Paper also stressed the importance of the effective implementation and enforcement of the Internal Market *acquis* and provided a "selective and gradual approach" for legislative approximation. Nevertheless, the *finalité* of the legislative approximation to the EU *acquis* in the pre-accession process is different from the one foreseen in the DCFTAs since the latter does not aim at EU accession and, consequently, to the acceptance of the EU *acquis* as a whole (see footnote 857).

865 Regarding the effective implementation, the AA preamble states that Ukraine is committed to gradually approximate its legislation with that of the EU "and to effectively implementing it".

866 Only the EEA is not a 'sectoral' EU integration agreement (cf. *infra*).

two stages. Ukraine has *first* to apply a selection of EU *acquis*, annexed to the agreement. During this process, the EU will monitor Ukraine's approximation efforts, including aspects of implementation and enforcement. These strict and elaborate monitoring procedures copy several practices of the pre-accession and ENP methodology such as the drafting of progress reports. They even include new elements such as "on-the-spot missions", conducted by EU institutions or bodies, in Ukraine.[867] Then, in a *second* phase, the results of the monitoring activities are to be discussed within the joint bodies established under the AA. It is only after a positive assessment by the EU that the Association Council or the Trade Committee shall decide on further market access. As these joint institutions decide by consensus, the EU is in a powerful position to decide on the pace and scope of market opening. Significantly, the failure of these joint institutions to take such a decision shall not be subject to the DSM of the DCFTA.[868] This asymmetrical market access conditionality is therefore difficult to reconcile with the spirit of joint ownership in the ENP and the principles of an equal partnership. However, as it will be illustrated further on, this procedure applies only to several DCFTA chapters. Whereas the 'traditional' part of the DCFTA (i.e. trade in goods and flanking measures) will apply immediately and unconditionally once the agreements enters (provisionally) into force,[869] the strict market access conditionality procedure is only included in the DCFTA chapters which are relatively new on the EU trade agenda (e.g. services and public procurement). The specific modalities and procedures of the different forms of market access conditionality in the DCFTA will be analysed and compared in the next Part on the DCFTA.

7.5 Concluding Remarks

This Part illustrated that with the establishment of the ENP and the EaP, the EU finally developed a comprehensive response to the external challenges of the 'big bang' enlargement and created a policy framework for EU 'integration without membership'. The ENP's and EaP's legal instruments to establish 'a ring of friends' around the EU and to expand prosperity, stability and security beyond the Union's borders were initially only the outdated PCAs and soft-law

867 A general provision on monitoring, covering the entire AA, can be found in Art. 475. However, the following Part will illustrate that several DCFTA chapters have their own specific monitoring procedure.

868 Art. 475(6) EU-Ukraine AA.

869 Moreover, since April 2014, the EU implements its DCFTA tariff commitments towards Ukraine through autonomous trade preferences (cf. *infra*).

instruments such as the APs and Association Agenda. However, the EU gradually developed the objective to conclude a new generation of Association Agreements with the EaP countries to establish an innovative form of political association and economic integration with the EU. Negotiating and signing the EU-Ukraine AA proved to be a difficult task, challenged and complicated by, *inter alia*, domestic political developments in Ukraine and external pressure of Russia. These had an important impact on the procedural steps for the signing and conclusion of the agreement (e.g. the two-phase signature, the split Council Decision, the broad scope and delay of the provisional application).

In sum, the 'integration without membership' dimension and the innovative character of the 'political' (non-DCFTA) part of the EU-Ukraine AA is rather limited. The preamble and Article 1 confirm the EU integration without membership objectives of the agreement. The AA avoids explicit language on EU accession but includes the objective to "gradually *integrate* [Ukraine] in the EU Internal Market". Although such a reference is new, it does not go as far as the EEA that establishes a "homogeneous EEA". It also includes a few new elements such as ambitious CFSP-related provisions aiming at gradual 'convergence' in the field of foreign and security policy. However, the 'political' chapters of the AA are basically comparable to other existing EU neighbourhood agreements. For example, the institutional framework and the AFSJ dimension of the agreement are largely similar to – or even less ambitious than – those included in the SAAs and EMAAs. Regarding the treatment of workers and mobility of persons, the AA's only substantive improvement compared to the PCA is that the non-discrimination provision regarding Ukrainian nationals, legally employed in the EU, is formulated in clear, precise and unconditional terms so that it can acquire direct effect. The impact of the non-direct effect provision in the relevant Council Decisions on Article 17 AA still has to be clarified. Remarkably, this non-discrimination clause is one of the few points where the 'political' part of the EU-Ukraine AA considerably differs from the two other EaP AAs. Also the *common values conditionality* in the EU-Ukraine AA does not bear important innovate elements.

Therefore, it can be concluded that the 'political' (non-DCFTA) part of the AA is neither innovative, nor does it integrate Ukraine into specific policies of the EU. The next Part will illustrate that this is not the case for the DCFTA.

PART 3

The EU-Ukraine DCFTA: A New Legal Instrument for Integration into the EU Internal Market?

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The most innovative part of the EU-Ukraine AA which must lead to "Ukraine's gradual integration in the EU Internal Market" is the DCFTA. It is even claimed that the DCFTA "is the most ambitious deal of its kind ever negotiated by the EU – not in terms of trade volume but in terms of economic integration".[870] Moreover, this trade deal is the largest part of the EU-Ukraine AA because "about 90%" of this agreement is actually the DCFTA.[871]

This Part will therefore analyse the DCFTA and explore its mechanisms and instruments for Ukraine's gradual and partial integration into the EU Internal Market. Specific attention is devoted to those provisions of the DCFTA that are new compared to other FTAs, recently concluded by the EU. First, the concept of a "deep" and "comprehensive" FTA will be discussed (Chapter 8) and the 'traditional' scope of the EU-Ukraine DCFTA (i.e. trade in goods and flanking measures) (Chapter 9). Then, the DCFTA market access conditionality and mechanisms to ensure a uniform interpretation and application of the EU *acquis* will be scrutinised (Chapter 10). This chapter will mainly focus on the DCFTA chapters on Technical Barriers to Trade (10.1), Sanitary and Phytosanitary Measures (10.2), Establishment and Services (10.3) and Public Procurement (10.4). However, the other DCFTA chapters will also be discussed (10.5). The framework for this analysis will be the criteria for EU integration agreements, set out in Part I. In addition, the most innovative elements of these DCFTA chapters will be highlighted. Next, the 'horizontal' DCFTA provisions and mechanisms will be explored (Chapter 11) such as the DCFTA DSM (11.1), including its potential impact on the autonomy of the EU legal order (11.2). Then, a general assessment of the EU-Ukraine DCFTA is provided (Chapter 12). On the basis of the previous chapters, it will be explored if the DCFTA is: a proper legal instrument for "gradual integration in the EU Internal Market" (12.1), an innovative or new EU FTA (12.2), a (too) complex and costly agreement (12.4) and a potential blueprint for other EU 'neighbourhood' (integration) agreements (12.5). Also the differences between the Ukraine DCFTA and the Moldova and Georgia DCFTAs will be explored (12.3). Finally, the integration dimension of the sectoral integration agreements concluded with Ukraine (i.e. the ECT and the aviation agreement) will be analysed and compared with the DCFTA (Chapter 13).

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870 K. De Gucht, 'Ukraine trade negotiations: a pathway to prosperity', speech at INTA Committee Workshop, Brussels, 20 October 2011.

871 K. De Gucht, '"The EU is ready when Ukraine is ready": Statement by EU Trade Commissioner Karel De Gucht on Ukraine', Press conference after the Informal Foreign Affairs Council, Athens, 28 February 2014.

CHAPTER 8

The EU-Ukraine DCFTA: A "Deep" and "Comprehensive" FTA?

Currently, the EU has concluded around 30 FTAs with third countries or groups of countries and is negotiating FTAs with several other key trade partners. All these FTAs vary in their scope, contents and ambitions, depending on the different objectives of the policy frameworks in which these agreements are embedded. The coverage of EU FTAs varies from limited agreements covering only trade in goods, such as the initial EMAA FTAs, to advanced agreements covering almost all the trade sectors between the EU and its partners. FTAs can also be grouped according to their objectives and policy context.[872]

The Union's trade policy increasingly focuses on the *deepening* (i.e. developing deep economic integration through a new generation of trade agreements which go beyond the traditional removal of tariff barriers and quotas by focusing on regulatory convergence and which go beyond trade in goods by also covering other areas such as services, investment, public procurement, competition, intellectual property rights and regulatory barriers) and *widening* (i.e. embedding the economic integration into the wider relationship with the contracting party and the EU's broader foreign policy agenda) of trade agreements.[873] For example, FTAs can be part of a broader association agreement

872 Cremona notes that regional trade agreements can also be categorised on the bases of the types of agreement (association agreement, partnership agreements, simple trade agreements, etc.), on degrees of integration (customs union, free trade area, free trade area plus, etc.) or on geography. For such an overview, see M. Cremona, 'The European Union and Regional Trade Agreements', in D. Herrmann, J.P. Terhechte (eds.) *European Yearbook of International Economic Law* (1) (Springer, Heidelberg, 2010), pp. 245–268. For an overview of FTAs concluded by the EU, see also L. Tuis and C.M. Brown, 'The European Union and Regional Trade Agreements', in C. Herrmann *et al.* (eds.), *European Yearbook of International Economic Law* (4) (Springer, Heidelberg, 2013), pp. 253–260; H. Horn, *et al.*, 'Beyond the WTO? An anatomy of EU and US preferential trade agreements', *Bruegel Institute*, 2009; D.A. Gantz, *Liberalizing International Trade after Doha. Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (Cambridge University Press, Cambridge, 2013). See also the overview of EU FTAs at the website of DG Trade: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_other-countries.

873 This is definitely the case for the EaP DCFTAs as they will cover almost all areas of the trade relations between the Union and the ENP partner and will contain "legally binding

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(e.g. the EU-Central America AA), they can be part of a pre-accession agreement (e.g. the FTAs included in the SAAs) or neighbourhood policy (e.g. the EMAA FTAs and the EaP DCFTAs). In addition, they can have a clear development *finalité* (e.g. the EPAs with the ACP countries),[874] or they can mainly focus on increased market access. Especially the last group of FTAs is increasingly being pursued by the EU since the 2006 Global Europe Strategy.

This strategy proclaimed the ambition of the EU to conclude a new generation of FTAs with the key trade partners which are "comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation including far-reaching liberalisation of services and investment".[875] This policy was mainly triggered by the slow process of multilateral trade liberalisation at the level of the WTO, illustrated by the stalled Doha Round.[876] Although the Commission stressed "that there will be no European retreat from multilateralism", it was argued that "FTAs, if approached with care, can build on WTO rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion". According to this strategy, key issues which remain outside the WTO but can be addressed through FTAs are investment, public procurement, competition, IPR enforcement and other regulatory issues.[877] Moreover, the Commission envisaged to address

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commitments on regulatory approximation in trade-related areas", leading to the partners' "gradual integration in the EU Internal Market" (deepening) and fit in the overall policy objectives of the ENP and the EaP (widening). On the deepening and widening of the EU FTAs, see M. Cremona, 'The Single Market as a Global Export Brand: Exporting the Single Market', *European Business Law Review* 21, 2010, p. 668. On this issue, see also F. Hoffmeister, 'The Deep and Comprehensive Free Trade Agreements of the European Union – Concept and Challenges', in M. Cremona, T. Takács (eds.) *Trade liberalisation and standardisation – new directions in the 'low politics' of EU foreign policy*, CLEER Working Paper 2013/6, pp. 11–23.

874 See for example the EPA with the CARIFORUM (*OJ*, 2008, L 289/I/3).

875 European Commission, 'Global Europe: Competing in the World', COM (2006) 567 final, 4 October 2006, p. 9.

876 The Global Europe Strategy was developed in the context of the Union's broader competitiveness agenda, as presented in the 'Lisbon Strategy for Growth and Jobs'. It was succeeded by the 2010 'Trade, Growth and World Affairs Strategy' which constitutes the external dimension of the Europe 2020 Strategy. Regarding the conclusion of FTAs, this strategy confirms and builds further on the Global Europe Strategy and broadens the geographical scope of the new generation of FTAs to the ASEAN (European Commission, 'Trade, Growth and World Affairs. Trade Policy as a Core Component of the EU's 2020 Strategy', COM (2010) 612, 9 November 2010).

877 Not surprisingly, these issues correspond to a large extent to the rejected WTO 'Singapore issues' (i.e. investment, competition, public procurement and trade facilitation).

sustainable development concerns in its new generation of FTAs by including provisions relating to labour standards and environmental protection. On the basis of two economic criteria (i.e. market potential and the level of protection against EU export interests) the ASEAN, Korea, China, India, Russia, Mercosur and the Gulf-Co-operation Council were identified as "priorities". This new policy was put into practice first with the conclusion of the EU-Korea FTA, which is provisionally applied since 1 July 2011.[878] In addition, the EU has signed similar ambitious FTAs with Central America and Peru/Colombia (2012),[879] has initialled one with Singapore[880] and is negotiating one with India, Canada, Malaysia, Vietnam, Thailand, Mercosur, Japan and the USA.[881] All these FTAs (hereinafter referred to as 'post-Global Europe FTAs') have – or will have – a comprehensive scope, tackling almost every area of trade relations with the partner country and will address 'behind-the-border issues'.

Considering that Ukraine and the other EaP partners only count for around 2% of the total EU external trade,[882] it is no surprise that these countries were not identified, according to the Global Europe's '*economic*' criteria (cf. *supra*), as a priority for the EU trade agenda. Instead, as noted above, the DCFTAs are, as an integral part of broader EaP AAs, mainly developed as an instrument

878 For text, see: *OJ*, 2011, L 127/1/. For the notice on provisional application of the EU-Korea FTA, see *OJ*, 2011, L 168/1.

879 The "Trade Agreement" between the EU and Colombia/Peru was signed in June 2012 and has been provisionally applied with Peru since March 2013 and with Colombia since August 2013. For text of the agreement, see *OJ*, 2012, L 354/3. For notice on the provisional application of these agreements, see *OJ*, 2013, L 201/7. In July 2014, the EU and Ecuador concluded negotiations that allow Ecuador to join Colombia and Peru in their FTA with the EU (European Commission, 'EU and Ecuador conclude negotiations for trade and development agreement', press release, 17 July 2014). The trade part of the EU-Central America Association Agreement (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama), signed in June 2012, is provisional applied since 1 August 2013 with Honduras, Nicaragua and Panama (For text, see: *OJ*, 2012, L 346/1, for notice on the provisional application, see: *OJ*, 2013, L 204/1).

880 The EU-Singapore Agreement FTA was initialled on 20 September 2013 but is not yet signed. The text is of the agreement is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

881 A political agreement on the EU-Canada "Comprehensive Economic and Trade Agreement" (CETA) was reached on 18 October 2013 and the parties agreed on the final text in August 2014. The negotiations on the CETA were officially finalised, together with the negotiations on a Strategic Partnership Agreement, on 26 September 2014 during an EU-Canada Summit.

882 For statistics on EU-ENP trade relations, see European Commission, 'Implementation of the European Neighbourhood Policy – Statistics', COM (2015) 77 final, 25 March 2015.

to achieve the ENP's and EaP's (*political*) objectives to promote security, stability and prosperity beyond the EU's borders and to give the partner countries "everything but institutions" (cf. *supra*). The EaP DCFTAs form a specific group of trade agreements within the new generation 'post-Global Europe FTAs' since they have the unique objective to gradually *integrate* the partner countries into the EU Internal Market on the basis of legislative approximation. Nevertheless, as it will be illustrated further on, several elements of the EaP DCFTAs were clearly inspired by the Global Europe Strategy. For example, they have a similar broad coverage than the other post-Global Europa FTAs.

The ENP trade agenda remains largely bilateral. The Commission underlined the importance of differentiation towards the EaP partners as it noted that the DCFTAs need to be "tailored and sequenced carefully to take account of each partner country's economic circumstances and state of development".[883] Nevertheless, the Commission has a long term vision of an economic community emerging between the EU and its ENP partners. The Commission wants to work towards a network of DCFTAs that can grow into a "Neighbourhood Economic Community" (NEC).[884] This would include such points as the application of shared regulatory frameworks and improved market access for goods and services among ENP partners and some appropriate institutional arrangements such as dispute settlement mechanisms. Initially the Commission hinted that the EEA could, to a certain extent, serve as a blueprint for this NEC.[885] However, due to the large differences in the political and economic background of its members, such a comparison is deemed inappropriate.[886] At the Vilnius Eastern Partnership Summit in November 2013, the EU and its EaP

883 European Commission, 'ENP-A path towards further economic integration. Non-Paper expanding on the proposals contained in the Communication "Strengthening the ENP"', COM (2006) 726 final, p. 6.

884 *Ibid*.

885 For example, the European Commission stated that the long term goal of the ENP is "to move towards an arrangement whereby the Union's relations with the neighbouring countries ultimately resemble the close political and economic links currently enjoyed with the European Economic Area" (European Commission, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM (2003) 104, 11 March 2003, p. 15).

886 S. Gstöhl, 'A Neighbourhood Economic Community – finalité économique for the ENP?' *EU Diplomacy Papers* 3/2008; S. Gstöhl, 'Differentiated Integration and the Prospects of a Neighbourhood Economic Community between the EU and its Eastern Partners', in P. Van Elsuwege and R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), pp. 89–107.

partners agreed to review at the next Summit the possible further steps that could be taken to advance economic integration with a view to creating "an economic area" in the light of the implementation of the EaP AAs and DCFTAs.[887]

The title of the trade part of the EU-Ukraine AA already reveals that it aims to be "deep" and "comprehensive". The *comprehensive* character of the EU-Ukraine DCFTA implies that, in the light of the 'Global Europe' objectives, this trade agreement has a broad range and covers all areas of EU-Ukraine trade relations. Indeed, the DCFTA goes much further than traditional FTAs, foreseeing not only mutual opening of markets for most goods, but also the gradual liberalisation of services and binding provisions on sanitary and phytosanitary (SPS) measures, intellectual property rights (IPR), public procurement, energy, competition, etc. As such, the comprehensive dimension of DCFTA with Ukraine and the other EaP partners is not revolutionary. Most of the post-Global Europe FTAs have a similar broad coverage. Although the EU-Ukraine DCFTA is the first FTA which has an explicit reference to the "comprehensive" nature in its title, the European Commission labels most of the recent EU FTAs also as comprehensive.[888]

The EU-Ukraine DCFTA, which is Title IV of the EU-Ukraine AA, consists out of the following 15 Chapters:

1. National Treatment and Market Access for Goods
2. Trade Remedies
3. Technical Barriers to Trade
4. Sanitary and Phytosanitary Measures
5. Customs and Trade Facilitation
6. Establishment, Trade in Services and Electronic Commerce
7. Current Payments and Movement of Capital
8. Public Procurement
9. Intellectual Property
10. Competition

887 The participants of the Summit also invited the European Commission to conduct a feasibility study on this issue (Joint Declaration of the Eastern Partnership Summit, Vilnius, (17130/13), 28–29 November 2013).

888 For example, the Commission has stated that the EU-Korea FTA is "the most comprehensive free trade agreement ever negotiated by the EU" (European Commission, 'The EU-Korea FTA in practice', 2011). All the other post-Global Europe FTAs are labelled by the Commission as "comprehensive", however, so far only the negotiated trade agreement with Canada has an explicit reference to the term "comprehensive" in its title (i.e. the "EU-Canada Comprehensive Economic and Trade Agreement" (CETA)).

11. Trade-Related Energy
12. Transparency
13. Trade and Sustainable Development
14. Dispute Settlement
15. Mediation Mechanism

These different chapters illustrate the 'comprehensive' nature of the EU-Ukraine DCFTA and confirm that the EU-Ukraine DCFTA follows to a large extent the structure of the preceding 'Global Europe FTAs'.[889] The outline of the DCFTAs with Moldova and Georgia is almost identical to the Ukraine DCFTA.[890]

The *deep* character of the DCFTA on the other hand refers to the process of tackling non-tariff barriers through legislative approximation. This should lead to an "unprecedented deep integration [in the EU] market".[891] Already from the outset, the process of the approximation to the EU *acquis* was considered as a central element of the DCFTAs. However, a clear or consistent language on this process was lacking. For example, in its different policy papers on the DCFTAs, the Commission referred to the process of "alignment with EU standards", "regulatory convergence", "progressive approximation of EU rules and practices"[892] and "regulatory alignment".[893] As it will be illustrated in the following chapters, the incoherent use of these terms is still present in the DCFTA.

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889 For example, the structure of the EU-Ukraine DCFTA is identical to the EU-Korea FTA, with the notable exception of the chapter on "Trade-Related Energy", which is not included in the Korea FTA.

890 The only exception is that the Moldova and Georgia DCFTAs do not contain a separate chapter on Mediation and include a chapter on "General Provisions on Approximation" (Chapter 15) (cf. *infra*).

891 Trade Commissioner K. De Gucht clarified the "deep" and "comprehensive" character of the DCFTAs in its speech before the European Parliament in January 2012 (*op. cit.*, footnote 863). However, these concepts are not always interpreted in the same way. For example, according to F. Hoffmeister, the tackling of non-tariff barriers is an element of the "comprehensive" dimension of the DCFTAs (F. Hoffmeister, 'The deep and comprehensive free trade agreements of the European Union – concept and challenges', in M. Cremona, T. Takács (eds.) *Trade liberalisation and standardization – new directions in the 'low politics' of EU foreign policy*, CLEER Working Papers 2013/6, p. 13). On the "deepening" of FTAs, see also M. Cremona, *op. cit.*, footnote 872, p. 247 and R. Young, J. Peterson, 'The EU and the new trade politics', *Journal of European Policy* 13(6), 2006, pp. 795–814.

892 European Commission, *op. cit.*, footnote 295, p. 8.

893 European Commission, *op. cit.*, footnote 883, p. 6, European Commission, 'Strengthening the European Neighbourhood Policy', COM(2006) 726 final, 4 December 2006, p. 4.

The link between integration into the EU Internal Market and legislative approximation was already discussed in the previous chapter. However, in this context, it must be noted that this "deep" character of the EaP DCFTAs differs from other recent or envisaged 'Global Europe' FTAs. *First*, as tariff barriers are gradually being reduced through multilateral, bilateral and unilateral trade agreements or instruments, the tackling of non-tariff barriers has become a priority on the EU trade agenda.[894] Therefore, to establish 'deeper' economic integration, the EU increasingly goes beyond the existing WTO rules (e.g. Article III GATT, the WTO TBT Agreement and WTO SPS Agreement) in its recent FTAs by including provisions on cooperation on standards and regulatory issues, transparency and harmonisation with international standards or by eliminating the need for duplicative testing or deploying other bilateral instruments such as mutual recognition agreements.[895] In the case of the EU-Ukraine DCFTA, the EU goes a step further in addressing non-tariff barriers by obliging Ukraine to approximate its domestic legislation to the EU *acquis*. As already noted, the idea is to bring the legislation of Ukraine to that of the EU so that Ukrainian exporters will meet the EU standards and norms simply by respecting their own rules and regulations.[896] This must lead to Ukraine's "integration" into the EU Internal Market. Moreover, the EU hopes that this would create a stable legal environment for business that can attract foreign investment. Such an ambitious form of liberalisation or economic integration is only a feasible option with smaller EU trade partners that have less to gain from setting their own standards, predominantly export to the EU and who are willing to make such a far-reaching commitment. With larger trade partners such as the USA and Japan, such an approach is not feasible.

A *second* crucial difference between EU-Ukraine DCFTA and the other recent post-Global Europe FTAs is the market access conditionality, described above. In no other FTA concluded by the EU, access to the EU Internal Market or other forms of liberalisation was – or is – being made conditional upon the partners' approximation to the EU *acquis*. Again, due to this asymmetric and EU-led form of trade liberalisation, market access conditionality is only a realistic option in the Union's relationship with smaller economies which largely depend on the EU Market. It is hard to imagine that such a conditional form of

894 European Commission, *op. cit*., footnote 875, p. 9; *op. cit*. footnote 876, p. 36.

895 See for example Chapter 4 on Technical Barriers to Trade of the EU-Korea FTA. For analysis on the removal of non-tariff barriers in the EU-Korea FTA, see: C.M. Brown, 'The European Union and Regional trade Agreements: A Case Study of the EU-Korea FTA', C. Herrmann, J.P. Terhechte (eds.), *European Yearbook of International Economic Law* (3) (Springer, Heidelberg, 2012), p. 301.

896 See text to footnote 863.

trade liberalisation – which includes EU monitoring and assessment procedures – will be accepted by the key trade partners of the Union, identified in the Global Europe Strategy.

Regarding the process of legislative approximation, the Commission recognised the high political, institutional and administrative costs of this ambitious undertaking as it noted that the DCFTAs "require a high degree of commitment to complex and politically challenging reforms and a strong institutional capacity".[897] However, the Commission argued that these costs will be mainly felt in the short term, whereas the benefits will bear fruit in the longer term. In this view, the DCFTA was presented as a "blueprint for economic reforms" which will create a "modern, transparent and predictable environment for consumers, investors and business people in both markets" and will lead to increased levels of trade, investment and growth.[898] This argument echoes the 2007 Trade Sustainability Impact Assessment (TSIA) for the EU-Ukraine DCFTA. According to this TSIA, an "extended and deep" FTA – which corresponds to the current concept of a DCFTA – will bring Ukraine and the EU by far the most benefits in terms of economic, social and environmental gains compared to a "limited" FTA. For such an agreement, this analysis estimates short run welfare gains for Ukraine of 2.26% and, in the longer run, cumulative gains of 5.29% whereas the impact on the EU economy is limited.[899] However, this study notes that even though the overall effects of such a (DC)FTA would be positive in total, in the short-run, such a scenario will also be costly in terms of regulatory and legislative approximation, investments in new and upgraded standards and production methods.[900] Moreover, several of these types of costs will carry over in the long run and several sectors such as transport services and

897 European Commission, *op. cit.*, footnote 295, p. 8. Concerning the DCFTAs, Trade Commissioner De Gucht noted that the burden of (legislative) reforms is a very demanding task for the economies and governments concerned and stated that "we may be even more aware than some of our Neighbours themselves of the challenges such as regulatory approximation entails" (K. De Gucht, 'Trade as a cornerstone for the EU Eastern Partnership', Speech Euronest Parliamentary Assembly, 23 January 2012).

898 K. De Gucht, 'Ukraine trade negotiations; a pathway to prosperity', speech, INTA Committee Workshop, Brussels, 20 October 2011.

899 The TSIA for the EU-Ukraine trade agreement (now the DCFTA), commissioned and financed by the European Commission, was carried out by ECORYS Netherlands and CASE Ukraine (ECORYS, CASE, 'Trade Sustainability Impact Assessment for the FTA between the EU and Ukraine within the Enhanced Agreement', TRADE06/D01, 17 December 2007).

900 According to this study, the greatest *per capita* economic gains are estimated for Ukraine, whereas the EU's gains are expected to be larger in *absolute value*. On the whole, the trade balance in goods and services for Ukraine should improve (*ibid.*, p. 249).

financial services are expected not to benefit from the trade liberalisation. In its position paper on the TSIA, the Commission confirms this study and concluded "that an extended, i.e. a deep and comprehensive agreement, with a large component of regulatory approximation would be most beneficial to both parties".[901] Although other studies differ in terms of assumptions, baseline scenarios, model details and timing of dataset used, they all come to a similar conclusion: a "deep" and "comprehensive" FTA will have a much more meaningful impact on the economy of Ukraine than a "simple" FTA which only reduces tariffs for trade in goods.[902] Nevertheless, they all recognise the short-term costs of implementing such an agreement, especially the cost of meeting EU technical standards and – more generally – legislative approximation to the EU *acquis*. It has to be noted that several of these studies need to be updated to take into account the current economic crisis in Ukraine.

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901 The Commission also concludes that this outcome corresponds with its objective to conclude "a new generation of FTAs" in the light of the Global Europe Strategy (European Commission, 'Position Paper on the TSIA of the negotiations on a free trade area between the EU and Ukraine', April 2009, p. 7). The Commission already hinted a form of market access conditionality in this document as it claimed that "market access will be conditioned by full regulatory compliance".

902 According to an elaborate study of 2006 of the Centre for European Policy Studies (CEPS) (Brussels) and the International Centre for Policy Studies (ICPS) (Kiev), under contract from the European Commission, a "deep" FTA (also called a 'FTA+') is considered to be the preferred feasible option from other 'integration models' such as a simple FTA, a customs union, and complete market integration (although recognising various challenges such at the costs of approximation to the EU *acquis*) with a prospect of large economic advantages (welfare gains for Ukraine of the order of 4–7%) (M. Emerson *et al.*, 'The Prospect of Deep Free Trade between the European Union and Ukraine', CEPS, 2006). For similar results, see M. Maliszewska *et al.*, 'Deep Integration with the EU and its Likely Impact on Selected ENP Countries and Russia', *CASE Network Reports* No. 88/2009. See also the elaborate study of the ICPS (ICPS, 'Free Trade between Ukraine and the EU: An impact assessment', 2007) and V. Movchan, V. Shportyuk, 'EU-Ukraine DCFTA: the Model for Eastern Partnership Regional Trade Cooperation', *CASE Network Studies & Analyses* No. 445/2012, Warsaw, 2012; 'The Free Trade Agreement between the EU and Ukraine: Conceptual Background, Economic Context and Potential Impact', *European Parliament INTA Study*, Policy Department, EXPO/B/INTA/2011/18; 'Costs and Benefits of FTA between Ukraine and the European Union', *Institute for Economic Research and Policy Consulting*, Kiev, 2010. For a more pessimistic outlook, see J. Francois, M. Manchin, 'Economic Impact of a Potential Free Trade Agreement Between the European Union and the CIS', *IIDE Discussion Paper* 200908-05, 2009, pp. 114–124. For a critical view on the cost of legislative approximation in the EU-Ukraine DCFTA, see: I. Dreyer, 'Trade Policy in the EU's Neighbourhood. Ways Forward for the Deep and Comprehensive Free Trade Agreements', *Notre Europe*, 2012.

CHAPTER 9

The 'Traditional' Scope of the DCFTA: Trade in Goods and Flanking Measures

The first two DCFTA chapters, i.e. National Treatment and Market Access for Goods (1) and Trade Remedies (2) can be considered as the 'traditional' scope of the DCFTA. These chapters are not characterised by market access conditionality as they establish a free trade area for trade in goods, unconditional to approximation to the EU *acquis*. This chapter will analyse the scope and pace of the EU-Ukraine DCFTA customs duties liberalisation (9.1) and the EU's autonomous DCFTA tariff reduction (9.2). Also other relevant provisions concerning trade in goods will be discussed, including those related to export duties, trade remedies and the application of the DCFTA in Crimea (9.3). Moreover, these two EU-Ukraine DCFTA chapters are compared with the Moldova and Georgia DCFTAs (9.4).

9.1 The Scope and Pace of Elimination of Customs Duties

The EU and Ukraine shall progressively establish a free trade area over a transitional period of maximum 10 years, starting from the date of (provisional) entry into force of this Agreement.[903] This transitional period is longer than the one foreseen in most SAAs but shorter than under the EMAAs.[904] However, similar to those two sets of agreements, the EU-Ukraine DCFTA will also establish an asymmetrical liberalisation, meaning that the EU will abolish customs duties, quantitative restrictions and measures having equivalent effect faster than Ukraine. This should give Ukrainian exporters the time to prepare for competition from the EU and support the Ukrainian market. This asymmetrical liberalisation is even further articulated through the EU's autonomous trade preferences towards Ukraine (cf. *infra*). Evidently, the DCFTA will be established in conformity with Article XXIV GATT. Each party must reduce or eliminate customs duties on originating goods of the other

903 Art. 25 EU-Ukraine AA.

904 The transitional periods in the SAAs are maximum 10 years (Macedonia, Albania), 6 years (Serbia, Croatia) or 5 years (Montenegro, Bosnia Herzegovina). In the EMAAs, the transitional period is 12 years.

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party as foreseen in the Schedules of Concessions, annexed to the agreement.[905] Overall, Ukraine and the EU will eliminate respectively 99.1% and 98.1% of their duties in trade volume.[906] According to the Commission, Ukrainian exporters will save 487 million euro annually due to reduced EU import duties and Ukraine will remove around 391 million euro in duties on imports from the EU.[907] Five years after the entry into force of this agreement, the parties may even consider accelerating and broadening the scope of the elimination of their customs duties.[908] Further, the agreement provides a standstill clause stating that neither party may increase any existing customs duty or adopt any new customs duty on goods originating in the territory of the other party.[909] Noteworthy, in February 2015 Ukraine imposed a surcharge of 5% on imports of industrial goods and 10% on imports of agricultural goods as a crisis measure to tackle its significant reduction of monetary reserves and to restore its balance of payments. Although the DCFTA was not – provisionally – into force at the time of the adoption of this measure, this import surcharge clearly violates the standstill clause of the DCFTA. It can be argued that this measure violated the 'good faith obligation' of Article 18 of the (VCLT).[910] Moreover, the EU's autonomous trade measures to Ukraine are conditional on abstention by Ukraine from introducing new duties or increasing existing levels of duties on EU products.[911] Nevertheless, considering Ukraine's economic crisis situation, the EU did not openly object this measure. Also at the level of the WTO, most Members considered this measure to be in line with the WTO rules concerning balance of payments (Art. XII GATT). However, they encouraged Ukraine to terminate this import surcharge by the end of 2016.[912] Regarding the scope and pace of tariff liberalisation, a few sector-specific considerations must be made.

First, regarding the liberalisation of trade in agricultural products, the DCFTA is – for EU 'standards' – quite ambitious. It goes beyond the market opening

905 Art. 29 and Annex I EU-Ukraine AA.

906 European Commission, 'Overview of the Key elements of the EU-Ukraine Deep and Comprehensive Free Trade Area', 26 February 2013.

907 *Ibid*.

908 Art. 29(4) EU-Ukraine AA.

909 Art. 30 EU-Ukraine AA.

910 On this point, see footnote 470.

911 Art. 2(d) Regulation (EU) No 374/2014 of the European Parliament and of the Council of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine (*OJ*, 2014, L 118/1).

912 WTO, 'Members adopt report on Ukraine's import surcharge imposed for balance-of-payments reasons', *press release*, 19 June 2015.

as initially foreseen in the EMAAs and SAAs. However, the liberalisation of agricultural products with these countries is further liberalised by bilateral agreements[913] or complemented by autonomous trade preferences.[914] Trade in agriculture and agro-related products represents a large portion of the overall

913 The EMAAs initially provided only for a limited liberalisation for agricultural products, excluding sensitive products (E. Lannon 'Towards a Union for the Mediterranean: Progress and Challenges in Economic and Trade Relations', Briefing Paper Policy Department External Policies, European Parliament, EXPO/B/INTA/2008/46, 2008, p. 8; K. Pieters, *op. cit.*, footnote 71, p. 115). The 2005 Euro-Mediterranean Roadmap for agriculture (Rabat Roadmap) envisaged the progressive liberalisation of agricultural products "with a possible selected number of exceptions and timetables for gradual and asymmetrical implementation, taking into account the differences and individual characteristics of the agricultural sector in different countries" (Council of the European Union, '10th anniversary Euro-Mediterranean Summit. 5 year Work Programme', 28 November 2005, 15075/05 (Presse 237)). Subsequently, the EU started to negotiate agreements on agricultural, processed agricultural (and fisheries) products with the EMAA partners which, once concluded in the form of an Exchange of Letters, were added as a Protocol to the EMAAs. For example, the EU-Morocco Agreement on agricultural products, processed agricultural products, fish and fishery products established a transitional period for Morocco which must lead to the liberalisation of 70% of imports from the EU in terms of value over a period of ten years. The EU, on the other hand, immediately liberalised 55% of its imports from Morocco. However, for the most sensitive products, trade will not be fully liberalised. For example, the EU still applies Tariff Rate Quotas (TRQs) on sensitive products such as tomatoes, strawberries and courgettes (European Commission, 'Adoption draft agreement between the EU and Morocco in the agri-food and fisheries sector', 16 September 2010). For the text of these agricultural agreements with the EMAA partners, see *OJ*, 2012, L 241/4 (Morocco); *OJ*, 2011, L 328/5 (Palestinian Authority of the West bank and the Gaza Strip), *OJ*, 2010, L 106/41 (Egypt); *OJ*, 2006, L 43/3 (Jordan); *OJ*, 2009, L 313/83 (Israel). It has to be noted that the agreement with Israel does not provide for a transitional period.

914 Similar to the EU-Ukraine DCFTA, most agricultural products are in the (interim agreements of the) SAAs liberalised. However, on most sensitive products (e.g. wine, types of beef, sugar) duty-free TRQs are applied. The Union's autonomous trade measures towards the SAAs further liberalised trade in, *inter alia*, agricultural goods and complemented the SAA provisions. However, under these autonomous trade preferences several sensitive agricultural products still enter the EU under TRQs (Regulation (EU) No 1336/2011 of the European Parliament and the Council of 13 December 2011 amending Council Regulation (EC) No 1215/2009 introducing exceptional trade measures for countries and territories participating in or linked to the European Union's Stabilisation and Association process, *OJ*, 2011, L 347/1). For an overview of the liberalisation of agricultural trade with the SAA partners, see: European Commission, 'Agricultural Trade with Enlargement Countries', to consult at: http://ec.europa.eu/agriculture/bilateral-relations/enlargement-countries/index_en.htm.

EU-Ukraine trade. It is therefore no surprise that the liberalisation of agricultural goods was a key issue and hurdle during the DCFTA negotiations.[915]

The DCFTA establishes close to full liberalisation of trade in agricultural and agro-related goods (Table 5). The pace and depth of this liberalisation differs between several product groups. Ukraine commits itself to reduce 88.5% of the tariff lines on agricultural products to zero within a period of 7 years. However, not all the import duties will be reduced to zero. 8.7% of agro-food tariffs will be subject to a limited linear reduction by 20–60% in 5–10 years (for example dairy, eggs, sugar, animal oils and fats) and for 2.8% of the agro-food tariff lines (e.g. types of meat and sugar groups) tariff-rate-quotas (TRQ) will be applied, implying non-zero effective rate for binding quotas.[916]

The EU liberalisation process for Ukrainian agricultural products is rather different. If the EU commits itself to reduce agro-food tariffs, in almost all cases, it will fully abolish tariffs so that no partial reduction will be applied.[917] Moreover, the EU uses shorter transitional periods than Ukraine: 82.2% of the relevant tariffs will be nullified immediately (contrary to 38.7% by Ukraine) and only 1.2% will be reduced to zero in a transitional period up to 7 years. This illustrates the asymmetric character of the trade liberalisation in agricultural products in the DCFTA.[918] However, the EU will apply more TRQs than Ukraine, especially on specific types of cereals, pork, beef, poultry and sugar.[919] This reduces the scope of the liberalisation process. Nevertheless, in total, regarding agro-food products, the simple average EU tariff will decline from 9.8% to 0.4% by the end of the tenth year, whereas for Ukraine this will be from 8% to 0.9%.[920] According to the Commission, the DCFTA will lead to a tariff reduction

915 For a detailed study on the impact of the DCFTA on trade in agriculture between the EU and Ukraine, see M. Ryzhenkov, *et al.*, 'The impact of the EU-Ukraine DCFTA on agricultural trade', Institute for Economic Research and Policy Consulting, Kyiv, *Policy Paper Series* ADP/PP/01/2013, 2013, p. 12.

916 *Ibid.*

917 An exception are those products to which an entry price applies (e.g. several beverages and vegetables and fruit product groups) (see Commission Regulation (EU) No 861/2010 of 5 October 2010 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, *OJ*, 2010, L 284/1).

918 For the asymmetric trade liberalisation of agricultural products in the EMAAs and SAAs, see footnote 913.

919 Regarding the TRQs, Annex I-A states that "the quantities shall enter on a first-come, first-served basis".

920 M. Ryzhenkov *et al.*, *op. cit.*, footnote 915, p. 18. However, these authors note that the trade-weighted duties will remain much higher in the case of the EU, due to the TRQs and entry prices (reduction from 16% to 9% within ten years).

TABLE 5 *DCFTA tariff reduction (agriculture) by product groups in Ukraine and the EU (share of tariff lines within product group subject to each type of liberalisation)*

Product group	Ukraine					European Union			
	Immediately fixed as zero (%)	Zero in 3 years (%)	Zero in 5–7 years (%)	Partial reduction (%)	TRQ (%)	Immediately fixed as zero (%)	Zero in 3 years (%)	Zero in 5–7 years (%)	TRQ (%)
Live animals	35.9	37.5	23.4	3.1	0.0	100.0	0.0	0.0	0.0
Meat	0.7	8.8	53.3	13.1	24.1	55.4	0.0	0.0	44.6
Dairy and eggs	4.0	1.7	71.0	23.3	0.0	46.8	0.0	0.0	53.2
Fish	64.0	6.1	19.6	10.3	0.0	88.2	11.8	0.0	0.0
Cereals	53.5	5.0	40.9	0.6	0.0	70.1	0.0	0.0	29.9
Vegetables and fruit	26.8	49.8	14.7	8.7	0.0	89.6	0.0	4.6	5.9
Sugar	50.0	5.6	13.0	18.5	13.0	51.0	0.0	0.0	49.0
Coffee & tea	73.0	16.9	4.5	5.6	0.0	93.8	0.0	0.0	6.3
Feeding stuff for animals	18.6	21.4	44.3	15.7	0.0	89.9	0.0	0.0	10.1
Misc edible products	33.3	31.7	16.7	18.3	0.0	89.1	1.8	0.0	9.1
Beverages	10.3	35.6	54.0	0.0	0.0	95.9	0.0	2.3	1.8
Tobacco	80.6	9.7	9.7	0.0	0.0	93.3	0.0	0.0	6.7
Oil-seeds	90.3	3.2	0.0	6.5	0.0	100.0	0.0	0.0	0.0

Crude fertilizers	79.2	13.5	7.3	0.0	0.0	95.6	4.4	0.0	0.0
Crude animal and vegetable materials	51.3	32.2	11.3	5.2	0.0	100.0	0.0	0.0	0.0
Animal oils and fats	33.3	0.0	50.0	16.7	0.0	100.0	0.0	0.0	0.0
Vegetable oils and fats	64.1	11.5	17.9	6.4	0.0	100.0	0.0	0.0	0.0
Mineral or chemical fertilizers	34.4	65.6	0.0	0.0	0.0	32.3	67.7	0.0	0.0
Specialized food & agri machinery	83.1	1.2	15.7	0.0	0.0	100.0	0.0	0.0	0.0

M. Ryzhenkov, *op. cit.*, footnote 915.

of €330 million for Ukrainian agricultural products and €53 million for processed agricultural products.[921]

Second, regarding industrial goods, raw materials and textiles, the agreement foresees the removal or reduction of existing tariffs on most products. Also for these products, there is an asymmetry in the liberalisation process. The transitional period spans over 7 years for the EU while up to 10 years for Ukraine on the most sensitive products (e.g. cars). Nevertheless, most tariff dismantling by the EU will occur immediately, without transitional periods.[922] For example, regarding industrial products, existing EU tariffs on goods from Ukraine will be removed immediately for 94.7% of the products.[923] Also most types of steel will be fully and immediately liberalised by the EU, although these products used to be largely excluded from the EU market.[924] However, special conditions apply for the automotive sector and worn clothing.[925] During the negotiations, Ukraine wanted to protect its car industry. The lobby of car producers is very strong in Ukraine and already had to digest Ukraine's WTO accession which dropped import tariffs from 25 to 10%.[926] The final compromise in the DCFTA is that an exceptional long transitional period will apply (10 years) for passenger cars entering Ukraine.[927] Moreover, Ukrainian negotiators succeeded to include in the agreement specific safeguard measures on passenger cars.[928] For a period up to 15 years after the entry in to force of the agreement, Ukraine is allowed to apply a well-defined specific form of safeguard measures in the form of higher import duties on passenger cars originating in the EU

921 Statement by EU Trade Commissioner K. De Gucht on Ukraine, Press conference after the Informal Foreign Affairs Council (Trade), Athens, 28 February 2014.

922 EU Delegation to Ukraine, 'Myths about the Association Agreement – setting the facts straight' (date unknown).

923 European Commission, 'European Commission proposed temporary tariff cuts for Ukrainian exports to the EU', *Press release*, 11 March 2014.

924 Tariff Schedule EU CN Chapter 72, Annex 1A EU-Ukraine AA. On the previous Community's quota system on Ukrainian steel, see footnote 230.

925 Annex I-B establishes a special transitional regime for trade in worn clothing. It obliges Ukraine to gradually abolish, over a period of 5 years, customs duties on imports of worn clothing, originating in the EU. Along with this gradual liberalisation, the MFN customs duties will be charged on imports of products the value of which is below the entry price.

926 WTO, 'Report of the Working Party on the Accession of Ukraine to the WTO', WT/ACC/UKR/152, 25 January 2008.

927 See CN Chapter 8703 (Ukraine Schedule). The EU will apply a base rate up to 10%, but with a transitional period of only 7 years (see CN Chapter 8703 (EU Schedule)). Both parties will also still apply high tariffs and long transitional periods on several (parts of) other types of vehicles (see CN Chapter 87 of both parties).

928 Art. 44 EU-Ukraine AA.

when – as a result of the DCFTA liberalisation – EU cars are imported into Ukraine in such increased quantities that they cause serious injury to the Ukrainian car industry.[929]

9.2 The EU's Autonomous Trade Preferences: Unilateral Implementation of the DCFTA Tariff Elimination

As mentioned above, one of the measures proposed by the EU in March 2014 to support and stabilise Ukraine's economy was the temporary implementation of the EU's DCFTA tariff sections by means of autonomous trade preferences. The European Council called on 6 March 2014 "to adopt unilateral measures which would allow Ukraine to benefit substantially from the advantages offered in the DCFTA".[930] Following a proposal from the European Commission,[931] the European Parliament and Council adopted, after a 'fast track' approval process,[932] Regulation 374/2014 "on the reduction or elimination of customs duties on goods originating in Ukraine".[933] The regulation entered into force on 23 April 2014. This measure must also be seen in the light of the Russian pressure on Ukraine and the AA in this period (cf. *supra*). The rapporteur in the European Parliament on this Regulation stated that "as Putin closes Russian markets for Ukrainian exports, we are opening them".[934] According to this

929 Annex II sets out the trigger levels for applying the safeguard measures and the maximum safeguard duty to be applied. This procedure may not be combined with a measure under Article XIX GATT 1994 and the WTO Agreement on safeguard measures (Art. 45 *bis* EU-Ukraine AA).

930 European Council, 'Statement of Heads of State or Government on Ukraine', Brussels, 6 March 2014, para. 8.

931 European Commission, 'Proposal for a Regulation of the European Parliament and the Council on the reduction or elimination of customs duties on goods originating in Ukraine', COM (2014) 166 final, 11 March 2014.

932 The Commission encouraged the European Parliament and Council to "fast track" the approval process so that the tariff reduction could be in place in June 2014 (European Commission, 'European Commission proposes temporary tariff cuts for Ukrainian exports to the EU', *Press Release*, 11 March 2014). With the aim to implement the unilateral DCFTA tariff reduction as soon as possible, no amendments were made by the European Parliament to the Commission's proposal.

933 Regulation (EU) No 374/2014 of the European Parliament and of the Council of 16 April 2014 on the reduction or elimination of customs duties on goods originating in Ukraine (*OJ*, 2014, L 118/1).

934 European Parliament, 'MEPs cut customs duties on imports from Ukraine', *Press release*, 3 April 2014.

Regulation, the customs duties on goods originating in Ukraine are to be reduced or eliminated in full line with the EU's DCFTA Schedule of Concession, included in Annex I-A of the EU-Ukraine AA.[935] The idea was thus not to await the (provisional) entry into force of the DCFTA but to advance the implementation of the EU's DCFTA tariffs section so that Ukrainian exporters can benefit from the preferential access to the EU market without providing extra access to EU exports in return. Initially, it was foreseen that this asymmetric application of the DCFTA tariff reduction would be granted until 1 November 2014. The Regulation anticipated that the DCFTA would be provisionally applied before this date, in which case the unilateral system of autonomous preferences would end.[936] At the moment this Regulation was proposed and adopted (March/April 2014), this was a rather optimistic scenario because at that time it was still uncertain whether the DCFTA would even be signed (cf. *supra*). Meanwhile, the EU had to extend the application of these autonomous trade measures to Ukraine until 31 December 2015.[937] As explained in the previous Part, this is the result of the compromise reached at the 12 September 2014 trilateral meeting between the EU, Russia and Ukraine. As part of the de-escalation process in Ukraine, the EU agreed to delay the provisional application of the DCFTA until 31 December 2015 while continuing the autonomous trade measures to Ukraine (cf. *supra*). This way, Ukraine can continue benefiting from tariff-free access to the EU Market – as foreseen in the DCFTA – while not (yet) being obliged to bear the burdens of this complex trade deal (i.e. opening up the market for EU goods and legislative approximation obligations).

These autonomous trade preferences are conditional upon several elements such as Ukraine's compliance with parts the Union's Customs Code Implementing Provisions. Ukraine has to comply with the rules of origin of products and the procedures related thereto as provided in Regulation No

935 This Regulation incorporates in its Annex the Union's DCFTA Schedule of Concessions (included in Annex I-A of the EU-Ukraine AA). However, on several elements, this Schedule had to be amended, for example, because the Commission had to recalculate the quota volumes in the light of the temporarily character of this measure.

936 Art. 7 Regulation (EU) No 374/2014, *op. cit.*, footnote 933.

937 Regulation (EU) No 1150/2014 of 29 October 2014 amending Regulation (EU) No 374/2014 on the reduction or elimination of customs duties on goods originating in Ukraine (*OJ*, 2014, L 313/1). For the Commission proposal, see European Commission, 'Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU) No 374/2014 on the reduction or elimination of customs duties on goods originating in Ukraine', COM (2014) 597, 19 September 2014.

2454/93[938] and with the relevant methods of administrative cooperation.[939] In order to benefit from this tariff reduction, the Regulation also imposes a standstill obligation on Ukraine as it must refrain from introducing new duties or quantitative restrictions or increasing existing levels of duties on imports originating in the EU.[940] Moreover, in the Regulation amending Regulation 374/2014, the EU legislator added that the autonomous trade preferences should also be subject to "respect for democratic principles, human rights and fundamental freedoms and respect for the principle of rule of law provided for in Article 2 of the Association Agreement with Ukraine".[941] If the Commission finds that there is sufficient evidence of failure to comply with these conditions, it may suspend in whole or in part this preferential arrangement.[942] In addition, a safeguard mechanism is included that allows the Commission to reintroduce the normal EU Common Customs Tariff duties as imports from Ukraine threaten to cause serious difficulties to Union producers.[943]

It is questionable whether the adoption of these EU autonomous trade measures is fully compatible with the WTO rules.[944] For previous adopted EU autonomous trade measures, similar to those towards Ukraine, the EU always requested for a WTO waiver – pursuant to Article IX:3 WTO – in order to be permitted to grand preferential treatment to products originating in the countries concerned (for example towards Moldova[945] and the SAA countries[946]).[947]

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938 Regulation No 2454/93 Title IV, Chapter 2, Section 2 on "beneficiary countries or territories to which preferential tariff measures adopted unilaterally by the Community for certain countries or territories apply".

939 Arts. 121 and 122 Regulation No 2454/93.

940 Art. 2(d) Regulation (EU) No 374/2014. On this point, see text to footnote 911.

941 Regulation (EU) No 1150/2014, *op. cit.*, footnote 937.

942 Art. 4 Regulation (EU) No 374/2014.

943 Ar. 5 Regulation (EU) No 374/2014.

944 For a detailed analysis on WTO Waivers, see I. Feichtner, *The law and Politics of WTO Waivers. Stability and Flexibility in Public International Law*, (Cambridge University Press, Cambridge, 2012).

945 WTO, 'European Union, Application of Autonomous Preferential Treatment to Moldova – Extension of the Waiver', Decision of the General Council of 26 November 2013, WT/L/903. On the autonomous trade measures towards Moldova, see (text to) footnote 538.

946 WTO, 'European Union, Preferences for Albania, Bosnia and Herzegovina, the Former Yugoslav Republic Of Macedonia, Montenegro, Serbia as well as Kosovo – Report of the EU', 12 July 2010, WT/L/799.

947 This procedure allows the WTO Ministerial Conference "in exceptional circumstances [...] to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three-fourths of the Members".

Arguably, the main reason for the Commission to circumvent the waiver of Article IX:3 WTO was to avoid a long approval process in the WTO, especially after recent 'bad experiences' with this WTO procedure.[948] According to the Commission, this measure is compatible with the WTO rules as it considers that "this unilateral trade preference [is] an autonomous advance application of a GATT Article XXIV compatible FTA for a very limited period of time".[949] Thus, the Commission argues that a WTO waiver was not required because this tariff reduction is a copy of the EU's tariff commitments in the DCFTA, which will eventually be covered by Article XXIV GATT once the bilateral agreement enters (provisionally) into force. The fact that the provisional application is now delayed until 31 December 2015 does not change this argument. However, this reasoning is contentious because the Commission did not have, at the moment of formulating this argument (March/April 2014), a guarantee that the DCFTA would be signed and provisionally applied.

Recent trade statistics have demonstrated that since these autonomous trade measures have entered into force (23 April 2014), Ukrainian exports to the EU in May and June 2014 increased by 25%, compared to the same period in 2013.[950] Although the causality is difficult to prove, it appears that these autonomous trade preferences have a significant impact on Ukraine's exports to the EU. These statistics also illustrate that Ukrainian exports to Russia decreased by 24.5% over the first 6 months of 2014, allegedly due to the Russian trade-related retaliation measures against Ukrainian exports.[951] On the basis of this data, the EU Delegation in Ukraine concludes that in value, "the

948 For example, in November 2010 the EU requested a WTO waiver pursuant to Article IX:3 WTO concerning autonomous trade preferences for Pakistan. However, this waiver was initially blocked by other WTO Members such as India and Bangladesh, which were worried about its possible impact on their own markets. Eventually the EU was granted the waiver on 22 February 2012 (WTO, 'European Union – Application of Autonomous Preferential Treatment to Pakistan', 4 June 2013, WT/L/883). On this issue, see P. Van Elsuwege, J. Orbie, 'The EU's Humanitarian Aid Policy after Lisbon: Implications of a New Treaty Basis', in I. Govaere, S. Poli (eds.), *EU Management of Global Emergencies. Legal Framework of Combatting Threats and Crises* (Brill Nijhoff, Leiden, 2014), p. 44.

949 See, on the development of this line of argumentation, the response of the Commission's representative to questions during the meeting of the European Parliament Committee on International Trade (INTA), Brussels, 19–20 March, available at <http://www.parlament.gv.at/PAKT/EU/XXV/EU/01/82/EU_18238/imfname_10451522.pdf> (last consulted on 12 September 2014).

950 Delegation of the EU to Ukraine (trade and economic section), 'Ukraine – impact on ATM and restrictions from Russia on exports', *press release*, 25 September 2014.

951 *Ibid.*

increased exports to the EU almost exactly compensate to losses on the Russian side".[952]

9.3 Export Duties, Trade Remedies, Rules of Origin and the Application of the DCFTA in Crimea

The DCFTA also addresses export duties, which was the subject of intensive discussions during the negotiations (cf. *supra*). Ukraine is applying, as an instrument in its trade policy, export duties on a number of products, mainly raw materials such as types of live cattle, sunflower seeds, and types of metal. The EU has increasingly been contesting these export duties on raw materials imposed by Ukraine and other countries inside and outside the WTO framework.[953]

Countries that apply export duties on raw materials argue that export duties, unlike export quotas, are not prohibited by the WTO Agreements if they are applied in a non-discriminatory manner (i.e. according to Article I GATT).[954] However, the EU argues that these export duties are used as an indirect subsidy to domestic industry and that the effect of these duties is to discriminate against foreign buyers and to raise the export price in order to hamper the supply for third country producers for the products concerned.[955] Therefore, some WTO Members – including the EU – have lobbied for an update of the rules on export duties and the inclusion of this issue in the Doha Development Round, however, so far with little traction. Thus, export duties remain largely unregulated in the WTO and its Members are free to charge export duties provided that they are conform to the MFN principle.[956]

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952 *Ibid.* According to these statistics, the increased exports to the EU Market (587 million euro) almost offset the decrease to the Russian side (592 million euro).

953 European Commission, 'On the implementation of the Raw Materials Initiative', COM (2013) 442, 24 June 2013.

954 Article XI GATT. However, the prohibition of export quotas is subject to many exceptions, provided for in Arts. XI:2 and XX GATT.

955 See for example the EU's objection against Russia's export duties on raw materials during Russia's WTO accession process (WTO, 'Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization', WT/ACC/RUS/70,WT/MIN(11)/2, Nov. 17, 2011, para 621–626).

956 For a detailed analysis on the compatibility of export duties with the WTO Agreements, see: G. Van der Loo, 'EU-Russia Trade Relations: it Takes WTO to Tango?', *Legal Issues of Economic Integration* 40(1), 2013, pp. 22–26; M. Matsushita, 'Export Controls of Natural Resources and the WTO/GATT Disciplines', *Asian Journal WTO & International Health*

Because export duties are as such not prohibited under the WTO Agreements, a practice has been developed by the WTO Members to coerce applicant WTO Members such as Russia, Vietnam, China and Saudi Arabia, to reduce their export duties through their accession process, prior to their WTO accession.[957] Accordingly, the EU, together with other WTO Members, complained during Ukraine's WTO accession process that Ukraine's export duties were incompatible with the WTO rules and requested their elimination. Although Ukraine argued that its export tariffs were not inconsistent with the WTO Agreements, it acknowledged that its high export duties could act as trade barriers and needed reduction.[958] Therefore, in the light of its WTO accession process, Ukraine was 'forced' to phase out its existing export duties.[959] This is a clear example of the EU imposing a *WTO-plus* commitment on Ukraine, which are concessions demanded from acceding countries going beyond the multilateral WTO agreements.[960]

Along this *WTO-plus* strategy towards acceding WTO countries, the EU has also addressed export duties in its recent FTAs.[961] This is also the case in the EU-Ukraine DCFTA. Article 31(1) prohibits customs duties, taxes or other measures having an equivalent effect imposed on the exportation of goods to the territory of each other. However, existing customs duties applied by Ukraine on products such as livestock and hide raw materials, seeds of some types of oil-yielding crops and types of scrap metal, will be phased out over a transitional period of 10 years in accordance with a schedule annexed to the agreement.[962] In addition, a specific safeguard measure mechanism is provided for Ukraine's export duties during a period of 15 years following the entry into

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Law & Policy 6, 2011, pp. 281–305 and S.-A. Mildner, G. Lauster, 'Settling Trade Disputes over Natural Resources: Limitations of International Trade law to Tackle Export Restrictions', *Goettingen Journal of International Law* 3, 2011, pp. 251–281.

957 B. Karapinar, 'Defining the legal Boundaries of Export Restrictions: a Case Law Analysis', *Journal of International Economic Law* 15(2), 2012, p. 444.

958 However, not all Members of the Working Party argued that the export duties were incompatible with the WTO rules (WTO, 'Report of the Working Party on the Accession of Ukraine to the WTO', WT/ACC/UKR/152, 25 January 2008, para. 229–230).

959 *Ibid*., para. 232.

960 For the enforceability of these WTO-plus commitments, see the WTO Ruling in *China-Raw Materials* (Panel Report, China-Raw Materials, WT/DS394/R, 5 July 2011). For analysis, see G. Van der Loo, *op. cit*., footnote 956. For a critical analysis of the practice of WTO-plus commitments, see: M. Tyagi, 'Flesh on legal Fiction: Early Practice in the WTO on Accession Protocols', *Journal of International Economic Law* 15, 2012, p. 396.

961 See for example Art. 2.11 of the EU-South Korea FTA and Art. 25 EU-Peru/Colombia FTA.

962 Art. 31(2) EU-Ukraine AA.

force of the agreement.[963] This mechanism allows Ukraine to impose a safeguard measure in the form of a surcharge to the export duty on goods listed in Annex I-D if during a 1-year period the cumulative volume of exports from Ukraine to the EU exceeds a trigger level, set out in this Annex.[964] Also export subsidies on agricultural goods are prohibited.[965]

Further, regarding Non-Tariff Measures, the agreement incorporates the traditional relevant GATT provisions as it states that national treatment has to be granted to the goods of the other party in accordance with Article III of GATT 1994 and because it prohibits import and export restrictions in accordance with Article XI GATT 1994. Also the GATT 'General Exception' Articles XX and XXI are made an integral part of the agreement.[966] In addition, a special provision is included on administrative cooperation.[967] This provision foresees administrative cooperation for the implementation and control of the preferential treatment granted under this agreement and underlines the parties' commitment to combat irregularities and fraud on customs matters. Remarkably, in the event a party experiences a failure by the other party in this regard, it may temporarily suspend the relevant preferential treatment of the products concerned.[968]

Also for trade remedies, the DCFTA mainly relies on the standard relevant WTO Agreements, however, on several elements, it goes beyond the WTO rules. Regarding safeguard measures, the parties confirm their rights and obligations under GATT Article XIX and the WTO Agreement on Safeguards.[969] The DCFTA contains additional rules on transparency and application of measures and a special safeguard mechanism for passenger cars (cf. *supra*).[970] Concerning anti-dumping and countervailing measures, the DCFTA relies on Article VI of GATT 1994, the WTO Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures (SCM).[971] However, it adds specific instruments of the EU's trade defence practice such as the "public

963 Annex I-D EU-Ukraine AA.

964 *Ibid.*

965 Ukraine has also agreed during its WTO accession to remove all export subsidies (WTO, *op. cit.*, footnote 958, p. 63).

966 Art. 36 EU-Ukraine AA.

967 Art. 37 EU-Ukraine AA.

968 This provision is also included in several SAAs (e.g. Art. 46 SAA Serbia) but not in the EMAAs.

969 Art. 40 EU-Ukraine AA. The EU also retains its rights and obligations under Art. 5 of the WTO Agreement on Agriculture.

970 Art. 41 and 42 EU-Ukraine AA.

971 Art. 46 EU-Ukraine AA.

interest" and the "lesser duty" rule.[972] According to the latter, the amount of a (provisional) duty shall not be higher than adequate to remove the injury in the domestic industry.[973] This rule stresses the remedial rather than punitive character of the EU's approach to trade defence.[974] The "consideration of public interest" implies that a party may decide not to impose anti-dumping or countervailing measures when "it is not in the public interest" to do so. Further, the DCFTA contains additional rules on transparency,[975] consultations[976] and dialogue on trade remedies.[977] The DCFTA provisions on anti-dumping and countervailing measures are not subject to the DCFTA DSM.[978]

Finally, the DCFTA contains detailed rules of origin which are provided in Protocol 1 to the Agreement. The EU has committed itself to modernise the origin protocols in its new FTAs[979] and similar to other 'post-Global Europe' FTAs, the EU-Ukraine DCFTA includes detailed rules on the concept of "originating products", territorial requirements, proof of origin and arrangements for administrative cooperation.[980]

Regarding the rules of origin, it has to be noted that Russia's annexation of Crimea created legal complications concerning the territorial scope of the application of the DCFTA. EU preferential trade agreements with other

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972 Respectively Arts. 48 and 49 EU-Ukraine AA. For the application of these instruments in the EU trade policy, see Art. 9(4) and 21 Regulation No 1225/2009 of 30 November 2009, *OJ*, 2009, L 343/51. The SAAs and EMAAs do not contain such provisions.

973 Art. 49 EU-Ukraine AA imposes a strict obligation with regard to the lesser duty rule whereas Art. 9 of the WTO Anti-Dumping Agreement states that such a treatment is only "desirable".

974 F. Hoffmeister, *op. cit*., footnote 891, p. 15.

975 Art. 47 EU-Ukraine AA.

976 Art. 50bis EU-Ukraine AA.

977 Art. 51 EU-Ukraine AA.

978 Art. 52 EU-Ukraine AA.

979 European Commission, 'The rules of origin in Preferential Trade Agreements. Orientations for the future', COM (2005) 100, 16 March 2005. See also Commission Regulation (EU) No 1063/2010 of 18 November 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code.

980 However, these rules of origin do not go as far as those included in the EU-Korea FTA. For example, the EU-Korea FTA includes a duty drawback mechanism. Another notable difference is that regarding the proof of origin, the Ukraine DCFTA still requires in most cases a movement certificate EUR.1 (Art. 16) whereas in the Korea FTA a simple 'invoice declaration' (Art. 15) is the rule (Protocol concerning the definition of 'originating products' and methods of administrative cooperation to the EU-Korea FTA (*OJ*, 2011, L 127/1344)).

'contested' territories such as the Turkish Republic of Northern Cyprus or the Israeli settlements in the West Bank already triggered discussions on the territorial scope of these agreements and the application of their rules of origin.[981] Because the text of the EU-Ukraine AA was already initialled before the Russian annexation of Crimea, this issue, and its impact on the rules of origin, is not addressed in the agreement.

According to the European Council, the EU "strongly condemns the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognise it".[982] Consequently, it can be argued that products originating in Crimea are by the EU still considered to be goods originating in Ukraine and, therefore, benefit from the preferential trade regime foreseen in the DCFTA or in the EU's autonomous trade preferences. However, in practice, only Russian authorities will be able to issue the relevant origin certificates for products manufactured or processed in Crimea. As confirmed by the ECJ, the EU cannot accept the proof of origin issued by authorities other than those designed by name in the relevant (preferential) agreement.[983] Because there are no competent 'Ukrainian' customs authorities in Crimea anymore to establish the origin of the goods as 'Ukrainian', the products can *de facto* not benefit from preferential treatment of the DCFTA. Meanwhile, the European Council has asked the Commission to evaluate the legal consequences of the annexation of Crimea and to propose economic, trade and financial restrictions regarding Crimea for rapid implementation.[984] On a proposal by the Commission, the Council made a first step in this regard on 23 June 2014 when it prohibited the import of goods originating in Crimea or Sevastopol into the EU. However, goods originating in Crimea or Sevastopol which have been granted a certificate of origin by Ukrainian authorities may still be imported into the EU.[985] Moreover, after a requested by the European Council on 16 July 2014, the Council adopted on 30 July 2014 further trade and investment restrictions for Crimea and Sevastopol

981 Case C-432/92, *Anastasiou* (*Pissouri*), [1994], ECR I-3087; Case C-386/08, *Brita GmbH*, [2010], ECR I-01289. For analysis, see M. Maresceau, 'The Brita ruling of the European Court of Justice: a few comments', in I. Govaere, R. Quick, M. Bronckers (eds.), *Trade and Competition Law in the EU and Beyond* (Edward Elgar Publishing, Cheltenham, 2011), pp. 276–289.

982 European Council Conclusion, Brussels, 20/21 March 2014, EUCO 7/1/14, para. 29.

983 ECJ, Case C-432/92, *Anastasiou* (*Pissouri*), *op. cit.*, footnote 981.

984 European Council, *op. cit.*, footnote 982.

985 Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol (*OJ*, 2014, L 183/70).

"in view of the continued illegal annexation of Crimea".[986] These include a ban on new investment in several sectors in Crimea and Sevastopol, including infrastructure projects in the transport, telecommunications and energy sectors and the exploitation of oil, gas and minerals. Also key equipment for these sectors may not be exported to Crimea and Sevastopol.[987] These sanctions were further broadened in December 2014 when the EU outlawed investment in Crimea or Sevastopol. Moreover, Europeans and EU-based companies may no more buy real estate or entities in Crimea, finance Crimean companies or supply related services. In addition, EU operators will no more be permitted to offer tourism services in Crimea or Sevastopol. In particular, European cruise ships may no more call at ports in the Crimean peninsula, except in case of emergency.[988]

Finally, in the Final Act between the EU and Ukraine regarding the signature of the EU-Ukraine AA on 27 June 2014, the parties agreed that the AA – thus not only the DCFTA –:

> shall apply to the entire territory of Ukraine as recognised under international law and shall engage in consultations with a view to determine the effects of the Agreement with regard to the illegally annexed territory of the Autonomous republic of Crimea and the City of Sevastopol in which the Ukrainian Government currently does not exercise effective control.[989]

Also the rules of origin in the Moldova and Georgia DCFTAs do not include specific rules on the goods originating in these countries' 'breakaway regions' (Transnistria /Abkhazia and South Ossetia), despite the fact that these situations already existed at the time of negotiating these agreements.[990] Nevertheless,

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986 Council Decision 2014/507/CFSP of 30 July 2014 amending Decision 2014/386/CFSP concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol (*OJ*, 2014, L 226/20) (for the implementing Regulation, see Council Regulation (EU) No 825/2014 of 30 July 2014).

987 The European Commission has prepared together with the EEAS an 'Information Note to EU business operating and/or investing in Crimea/Sevastopol' (SWD (2014) 300 final, 11 August 2014).

988 Council Regulation (EU) No 1351/2014 of 18 December 2014 amending Regulation (EU) No 692/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol (*OJ*, 2014, L 365/46).

989 Final Act between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Association Agreement, Council of the European Union (*OJ*, 2014, L 278/4).

990 Protocol II EU-Moldova AA and Protocol I EU-Georgia AA.

both agreements include a specific general provision on the "territorial application" of these AAs and DCFTAs.[991] According to these provisions, the AAs will apply "to the territory of [the Republic of Moldova/Georgia]", however, they include specific paragraphs on the territorial application of their respective DCFTAs. It is stated that the application of the DCFTAs in relation to those areas "over which the Government of [Georgia/Moldova] does not exercise effective control, shall commence once [Georgia/Moldova] ensures the full implementation and enforcement of this Agreement, or of [its DCFTA], respectively, on its entire territory".[992] The Association Council shall adopt a decision when "the full implementation and enforcement" of the AA or DCFTA on the entire territory of Georgia or Moldova is ensured. This implies that both parties, including the EU, must agree and confirm that Georgia or Moldova exercise effective control over these areas and are capable to implement the AAs and DCFTAs in these areas.[993] Conversely, if a party considers that the implementation and enforcement cannot be guaranteed in these areas, the application of the DCFTA can be suspended in relation to the areas concerned.[994] These procedures do not only relate to trade in goods and tariff reduction but to the entire scope of the DCFTAs. Accordingly, in these procedures, the AA Association Councils with Moldova and Georgia can only take a decision to suspend or apply the *entire* DCFTA and cannot only cover parts thereof.[995] A similar solution may be expected to apply in relation to the territorial scope of the EU-Ukraine AA, however, it seems unlikely that Ukraine will soon be able to reinstate its "effective control" over Crimea.

9.4 Comparison with the Moldova and Georgia DCFTAs

Overall, the structure and contents of the National Treatment and Market Access for Goods and Trade Remedies chapters in the Moldova and Georgia DCFTAs are largely comparable to the Ukraine DCFTA. However, a few important differences can be identified. *First*, obviously, the sector specific concession granted to Ukraine such as those related to passenger cars, trade in worn clothing and the gradual phasing out of export duties (cf. *supra*) cannot be

991 Art. 462 EU-Moldova AA and Art. 426 EU-Georgia AA.

992 Art. 462(2) EU-Moldova AA and Art. 426(2) EU-Georgia AA. The latter explicitly refers to Georgia's regions Abkhazia and Tskhnivali region/South Ossetia.

993 The Association Council decides "by agreement" (*op. cit.*, footnote 834).

994 Art. 462(4) EU-Moldova AA, Art. 426(4) EU-Georgia AA.

995 Art. 462(5) EU-Moldova AA, Article 426(5) EU-Georgia AA.

found in the Moldova and Georgia DCFTAs. *Second*, the pace and scope of tariff elimination in the corresponding Schedules of Concessions differ in the light of the specific composition and sensitivities of EU-Moldova and EU-Georgia trade relations. A remarkable difference with the Ukraine DCFTA is that the Moldova and Georgia DCFTAs introduce a general obligation on both parties to "eliminate *all* customs duties on goods originating in the other Party as from the date of entry into force of this Agreement", except as provided in the relevant annexes to the agreement.[996] Thus, instead of listing all the tariff lines which are subject to tariff reduction or elimination – as in the case of the Ukraine DCFTA –, the annexes in the Moldova and Georgia DCFTAs only list the tariff lines which are excluded from the general liberalisation obligation. From a point of clear legal drafting, this 'negative list' approach is a notable improvement, however, it requires a more ambitious political commitment by the negotiators.[997] It can be argued that such a progressive form of tariff liberalisation was easier to negotiate with Moldova and Georgia since their economies and exports to the EU are much smaller compared to those of Ukraine. Moreover, Moldova has already been benefiting from EU autonomous trade preferences since 2008.[998] Nevertheless, in both cases, several groups of products will not be fully liberalised. Similar to the Ukraine DCFTA, most exemptions on tariff reduction in the two other EaP DCFTAs can be found in the area of agriculture. The scope of these exemptions is more limited than in the EU-Ukraine DCFTA. In the Moldova DCFTA, the EU will still apply TRQs on a group of agricultural products such as tomatoes, grape juice and garlic.[999]

996 Para. 1 Annex XV EU-Moldova AA, Art. 26(1) EU-Georgia AA, emphasis added.

997 In the SAAs and EMAAs, a 'negative list' approach is only used for the liberalisation of industrial goods (e.g. Art. 20 and 21 SAA Serbia, Art. 17 and 18 SAA Macedonia; Art. 9 and 11 EMAA Morocco).

998 Regulation (EU) No 581/2011 of the European Parliament and the Council of 8 June 2011 amending Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova, *OJ*, 2011, L 165/6. These autonomous trade preferences give all products originating in Moldova free access to the EU market, except for certain agricultural products. For the WTO Waiver, see footnote 945. In addition, as a reaction to the Russian ban of Moldovan wine, the EU amended this autonomous trade preference in September 2013 and fully liberalised, in line with the envisaged DCFTA, wine imports from Moldova (Regulation (EU) No 1384/2013 of the European Parliament and the Council of 17 December 2013 amending Council Regulation (EC) No 55/2008 introducing autonomous trade preferences for the Republic of Moldova, *OJ*, 2013, L 354/85) (see footnote 538 and 542).

999 Annex XV-A, EU-Moldova AA. Products listed in this annex shall be imported in the EU free of customs duties within the limits of the mentioned TRQs. The MFN customs duty rate shall apply to imports exceeding the tariff rate quota limit.

In addition, on several other agricultural products, subject in the EU to an entry price such as several types of fruits and vegetables, an import duty will still be imposed with the exemption of the *ad valorem* component of that duty.[1000] Moldova, on the other hand, shall eliminate tariffs on several agricultural products such as wine and cheese and a limited number of other industrial or textile products over a transitional period of maximum 10 years. Thus, this is again an example of asymmetric trade liberalisation.[1001] An explicit commitment is included in the agreement stating that the parties shall assess three years after its entry into force "the pattern of trade in agricultural products between the Parties, the particular sensitivities of such products and the development of agricultural policy on both sides" and examine the opportunities for granting each other further concessions.[1002] Also in the Georgia DCFTA, the EU will still impose on a limited number of agricultural products TRQs (i.e. only on garlic).[1003] Remarkably, Georgia will – contrary to Moldova and Ukraine – fully and immediately liberalise all its imports from the EU, without any exemptions or transitional periods.

A *third* difference, also in the area of agricultural products, is that the Moldova and Georgia DCFTAs contain a rather unique "anti-circumvention mechanism for agricultural products and processed agricultural products".[1004] Pursuant to this mechanism, if the import from Moldovan or Georgian agricultural products listed in the corresponding Annex exceeds an average annual volume ("trigger volume") in a given year, and in the absence of a sound justification by Moldova or Georgia, the Union may temporarily suspend the preferential treatment for the products concerned.[1005]

1000 Annex XV-B EU-Moldova AA.

1001 Annex XV-D EU-Moldova AA.

1002 Art. 147(5-6) EU-Moldova AA. A similar provision is also included in the SAAs (e.g. Art. 31 SAA Serbia; Art. 29 SAA Albania) and the EMAAs (e.g. Art. 18 EMAA Morocco; 18 EMAA Tunisia).

1003 Annex II-A EU-Georgia AA.

1004 Art. 148 and Annex XV-C EU-Moldova AA; Art. 27 and Annex II-C EU-Georgia AA.

1005 When the volume of imports of one or more categories of products referred to in these annexes reaches 70% of the indicated trigger volume, the EU must notify Moldova or Georgia about the volume of imports of the products concerned. If 80% of the trigger volume is reached, Moldova or Georgia shall provide the EU with "a sound justification for the increase of imports". Only when 100% of the trigger volume is reached, the EU may temporarily suspend the preferential treatment. The suspension is applicable for maximum 6 months. A similar suspension procedure is also foreseen in the SAAs (see for example Art. 32 SAA Serbia and Art. 31 SAA Albania).

The *final* difference is that the Moldova DCFTA includes more detailed procedural rules on safeguard measures.[1006]

9.5 Concluding Remarks

The first two DCFTA chapters (i.e. Market Access for Goods and Trade Remedies) establish the 'traditional' part of the DCFTA liberalisation, i.e. market access for trade in goods. This section is not innovative compared to other FTAs concluded by the EU, neither does it include elements of an EU integration agreement. Market access conditionality is absent in these chapters since the liberalisation will be granted to Ukraine, irrespective of its approximation to the EU *acquis*. The EU's Regulation on the unilateral implementation of the DCFTA tariff reduction through autonomous trade measures further articulates the asymmetric pace of the liberalisation process. Nevertheless, the scope of this liberalisation is exceptionally 'comprehensive' as most products are covered by the DCFTA. It includes a few new elements such as the "public interest" and "lesser duty" rule and the elimination of export duties. Notable exceptions to the liberalisation process are, on the part of the EU, the number of TRQs which will still be applied on several important Ukrainian agricultural export products and, on the part of Ukraine, the specific arrangements in the car sector. Because the Russian annexation of Crimea occurred after the initialling of the AA and DCFTA, the adoption of several *ad hoc* legal acts was required after the signature of the AA to regulate the territorial application of this agreement. The Moldova and Georgia DCFTAs are largely comparable to the Ukraine DCFTA, however, they include a 'negative list' for tariff reduction and less exceptions or sector-specific transitional mechanisms. In sum, these two DCFTA chapters significantly liberalise EU-Ukraine trade relations, however, they do not lead to Ukraine's integration into (sections of) the EU Internal Market on the basis of legislative approximation and market access conditionality. The DCFTA chapters which do include such ambitious procedures are analysed in the following chapter.

1006 Arts. 165-169 EU-Moldova AA. The Ukraine and Moldova DCFTAs confirm also the contracting parties' rights and obligations under Article XIX of GATT 1994 and the WTO Agreement on Safeguards (Art. 40 EU-Ukraine AA; Art. 37 EU-Georgia AA).

CHAPTER 10

The DCFTA: Market Access Conditionality and Mechanisms to Ensure the Uniform Interpretation and Application of the EU *Acquis*

This chapter will first discuss the DCFTA chapters that are characterised by a specific form of market access conditionality, i.e. Technical Barriers to Trade (10.1), Sanitary and Phytosanitary Measures (10.2), Services and Establishment (10.3) and Public Procurement (10.4). The specific mechanisms of market access conditionality and the integration dimension of the each of these DCFTA chapters will be scrutinised. It the light of the key research question, it will be analysed *how* and to *what extent* these DCFTA chapters allow Ukraine to integrate into the EU Internal Market on the basis of legislative approximation. Specific attention is devoted to the procedures that aim to safeguard the uniform interpretation and application of the incorporated EU *acquis*. The analysis will therefore focus on those DCFTA provisions that relate to the criteria of EU integration agreements, developed in Part I and repeated below.

Criteria for an EU integration agreement

1	The inclusion of an *obligation* to apply, implement or incorporate a predetermined selection of EU *acquis*	*Conditio sine qua non*	
2	The inclusion of a procedure to amend/update the incorporated *acquis*	*Benchmarks*	Criteria to ensure uniform interpretation and application of the EU law
3	The inclusion of an obligation for ECJ case-law conform interpretation of the incorporated *acquis*		
4	Judicial mechanisms to ensure a uniform interpretation and application of the incorporated *acquis*		

Moreover, in order to detect the 'innovative' dimension of these DCFTA chapters, their substantive provisions will be explored and compared to those of other EU 'neighbourhood agreements' (i.e. the SAAs and EMAAs) and 'post-Global Europe FTAs' (e.g. the EU-Korea FTA). In addition, the differences in the

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corresponding chapters of the two other EaP DCFTAs (i.e. the Moldova and Georgia DCFTAs) will be highlighted. Also the remaining DCFTA chapters (e.g. competition and trade-related energy) (10.5) and the AA Title on Economic and Sector Cooperation (10.6) will be analysed.

10.1 Technical Barriers to Trade

Chapter 3 of the EU-Ukraine DCFTA aims to reduce obstacles to trade arising from technical barriers to trade (TBT), i.e. the preparation, adoption and application of technical regulations, standards and conformity assessment procedures as defined in the WTO Agreement on Technical Barriers to Trade (hereinafter: 'the WTO TBT Agreement'). Similar to the other post-Global Europe FTAs, the EU-Ukraine DCFTA affirms the existing rights and obligations under the WTO TBT Agreement, which is "incorporated into and made part" of the agreement,[1007] and includes provisions on technical cooperation[1008] and marking and labeling.[1009] However, the DCFTA TBT provisions go far beyond those included in the SAAs[1010] or EMAAs.[1011]

To tackle technical barriers to trade, "Ukraine shall take the necessary measures in order to gradually achieve conformity with EU technical regulations and EU standardisation, metrology, accreditation, conformity assessment procedures and the market surveillance system".[1012] It is not uncommon that EU international agreements promote or oblige neighbouring countries to take over relevant EU

1007 Art. 54 EU-Ukraine AA. For the incorporation of the WTO TBT Agreement, see for example also Art. 4.1 EU-Korea FTA and Art. 73 EU-Colombia/Peru FTA. The EMAAs and SAAs do not incorporate the WTO TBT Agreement.

1008 Art. 55 EU-Ukraine AA. According to this provision, the parties shall strengthen their cooperation in the field of technical regulations, standards, metrology, market surveillance, accreditation and conformity assessment procedures through *inter alia*, exchange of information and data, promoting cooperation between their respective organisations and promoting Ukrainian participation in the work of related European organisations. For example, similar provisions can be found in the EU-Korea FTA (Art. 4.3) and in the EU-Colombia/Peru FTA (Art. 75).

1009 Art. 58 EU-Ukraine AA. According to this provision, labelling or marking requirements shall not be more trade-restrictive than necessary to fulfil a legitimate objective. See for example also Art. 4.9 EU-Korea FTA and Art. 81 EU-Colombia/Peru FTA.

1010 The SAAs only contain one single provision on "standardisation, metrology, accreditation and conformity assessment" (e.g. Art. 77 SAA Serbia and Art. 73 SAA Macedonia).

1011 Most of the EMAAs contain a single provision regarding TBT stating that the parties aim to reduce differences in standardisation and conformity assessment procedures (e.g. Art. 55 EMAA Algeria and Art. 51 EMAA Tunisia).

1012 Art. 56(1) EU-Ukraine AA.

legislation regarding standardisation, metrology or conformity assessment.[1013] For example, the SAAs state that the partner country "shall take the necessary measures in order to gradually achieve conformity with Community [now Union] technical regulations […]".[1014] Also several EMAAs promote "the use of Community [now Union] rules in standardisation, conformity assessment, [etc.]".[1015] Not surprisingly, such far-reaching commitments cannot be found in the post-Global Europe Strategy FTAs as it is not feasible or realistic that large and more developed trade partners of the EU would approximate to the relevant EU TBT-related legislation. Instead, these agreements refer to international standards as a basis for technical regulations[1016] or envisage mutual recognition procedures.

The EU-Ukraine DCFTA includes detailed provisions and procedures that regulate Ukraine's approximation to EU technical regulations and standardisation procedures. Not only is Ukraine obliged to "incorporate the relevant EU acquis into the legislation of Ukraine", it must also "progressively transpose the corpus of European standards (EN) as national standards".[1017] With regard to the former, Ukraine is obliged to incorporate the relevant EU *acquis* in line with the timetable in Annex III. Remarkably, this Annex does not include a specific list of EU secondary legislation as in the case of the other AA annexes related to legislative approximation. Instead, Annex III refers to 5 specific 'areas' or 'titles' of horizontal (framework) legislation and 27 areas of vertical (sectoral) legislation. These different titles cover the EU's 'New Approach Directives' which define the "essential requirements" that products placed on the EU Market must meet and which are currently being replaced or updated in the context of the "New Legislative Framework".[1018]

1013 On the challenges of the application of technical regulations, the progressive adoption of the European Standards and the removal of the GOSTs in the EU-Moldova AA, see D. Cenusa, 'Opportunities of European Standards and destiny of GOSTs', *Analytical Note Expert-Grup*, 26 September 2014.

1014 See for example Art. 11 SAA Serbia and Art. 75 SAA Albania. These provisions state that the parties shall seek to "promote the use of Community technical regulations, European standards and conformity assessment procedures".

1015 Art. 51 EMAA Tunisia, Art. 68 EMAA Jordan, Art. 40 EMAA Morocco and Art. 40 Interim EMAA PLO. However, other EMAAs do not refer to Community legislation but to "European standards" (Art. 55 EMAA Algeria) or "aim to reduce differences in standardisation and conformity", however, without referring to 'Community' standards (e.g. Art. 47 EMAA Israel and Art. 47 EMAA Egypt).

1016 See for example Art. 129 EU-Central America AA and Art. 4.4(b) EU-Korea FTA.

1017 Art. 56 EU-Ukraine AA.

1018 The package of measures known as the "New Legislative Framework" was adopted by the Council on 9 July 2008 and is designed to help the internal market for goods work better and to strengthen and modernise the conditions for placing a wide range of industrial products on the EU market. It includes (i) Regulation (EC) No 765/2008 of the European

With regard to the European standards, the DCFTA states that "Ukraine shall progressively transpose the corpus of European standards as national standards, including the harmonised standards, the voluntary use of which shall be presumed to be in conformity with legislation in Annex III to this Agreement".[1019] Thus, in addition to approximating to the New Approach/New Legislative Framework Directives, Ukraine also has to incorporate the harmonised EU standards. These standards are developed by a recognised European Standards Organisation following a request of the Commission[1020] and have the "presumption of conformity" with the essential requirements, laid down in

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Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 (*OJ*, 2008, L 218/30); (ii) Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (*OJ*, 2008, L218/82) and (iii) Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC (*OJ*, 2008, 218/21). In view of bringing product harmonisation legislation into line with the reference provisions of Decision 768/2008/EC, on 26 February 2014 – thus after the AA was negotiated – an 'Alignment Package' consisting of eight Directives was adopted (i.e. the 'Low Voltage Directive' 2014/35/EU; the 'Electromagnetic Compatibility Directive' 2014/30/EU; the 'ATEX Directive' 2014/34/EU; the 'Lifts Directive' 2014/33/EU; the 'Simple Pressure Vessels Directive' 2014/29/EU; the 'Measuring Instruments Directive' 2014/32/EU; the 'Non-Automatic Weighing Instruments Directive' 2014/31/EU; and the 'Civil Explosives Directive' 2014/28/EU). In addition, legislation aligned to the reference provisions of Decision 768/2008/EC has also been adopted in the areas of pyrotechnic articles (Directive 2013/29/EU), toy safety (Directive 2009/48/EU), restriction of hazardous substances in electrical and electronic equipment (Directive 2011/65/EU), recreational craft (Directive 2013/53/EU), radio equipment (Directive 2014/53/EU) and pressure equipment (Directive 2014/68/EU). Further aligning proposals are pending on medical devices, gas appliances, cableways and personal protective equipment. The 'titles' of horizontal and sectoral legislation in Annex III AA refer to most of these Directives, although not in an explicit way (e.g. by reference number). Most likely, the reason for this is that at the moment the DCFTA was being negotiated, several of these 'New Legislative Framework Directives' were only envisaged or proposed buy not yet adopted. A notable exception is a footnote to Article 56 AA which refers to Decision 768/2008/EC and 765/2008/EC.

1019 Art. 56(8).

1020 These are: the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and European Telecommunications Standards Institute (ETSI). For a comprehensive overview of EU product rules and the implementation of the New Legislative Framework, see the European Commission's 2014

the New Approach Directives. Ukraine is also obliged to withdraw "conflicting national standards, including its application of interstate standards in Ukraine (GOST), developed before 1992".[1021] As noted above, this is contested by Russia as it fears that this will have an impact on its exports to Ukraine. Whereas there is a strict timetable in Annex III for approximation to the legislative framework, no specific deadlines are defined for the transposition of the European standards and the withdrawal of the conflicting GOST standards.

In order to implement these approximation obligations, Ukraine must make the necessary administrative and institutional reforms, develop an effective and transparent administrative system and ensure that its relevant national bodies participate in the European and international organisations for standardisation and conformity assessment. Moreover, a standstill clause states that Ukraine shall refrain from amending its horizontal and sectoral legislation listed in Annex III, except in order to align such legislation with the corresponding EU *acquis*.

The specific additional market access which is offered to Ukraine in this DCFTA chapter is the conclusion of an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA).[1022] ACAAs are a specific type of mutual recognition agreements (MRAs) which foresee mutual recognition of regulatory and verification procedures for industrial products.[1023] By concluding an ACAA the parties agree that industrial products listed in the Annexes of an ACAA, fulfilling the requirements for being lawfully placed on the market of one party, may be placed on the market of the other party without additional testing and conformity assessment procedures.[1024] The conclusion of such an ACAA would thus significantly contribute to the elimination of technical barriers, thereby increasing the accessibility of Ukrainian products to the EU market (and *vice versa*). At the same time, the level of health and safety protection existing in the EU would not be compromised.[1025] The EU concluded ACAAs with most CEECs during their accession

'Blue Guide' on the implementation of EU product rules, to consult at: http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=7326.

1021 Art. 56(8) EU-Ukraine AA.

1022 Art. 57 EU-Ukraine AA.

1023 The EU has concluded MRAs with, *inter alia*, Australia (*OJ*, 1998, L 229/3), New Zeeland (*OJ*, 1998, L 229/62), Canada (*OJ*, 1998, L 280/3), the United States (*OJ*, 1999, L 31/3), Israel (*OJ*, 1999, L 263/10), Japan, (*OJ*, 2001, L 284/3) and Switzerland (*OJ*, 2002, L 114/369).

1024 Art. 5, Protocol to the EU-Israel EMAA on Conformity Assessment and Acceptance of Industrial Products (*OJ*, 2013, L 1/2).

1025 European Commission, 'Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs)', SEC (2004) 1071, 25 August 2004, p. 5.

process[1026] and envisages concluding such agreements with the ENP and SAA partners.[1027]

Although ACAAs do not require legislative approximation between the parties involved,[1028] obviously they must have comparable concepts for product testing and mutually acceptable systems of certification and underlying technical infrastructures.[1029] Therefore, "adoption of the relevant part of the *acquis* by the partner country" is a basic requirement that has to be fulfilled before the EU considers concluding an ACAA.[1030] Indeed, in several agreements, the EU requires that the partner country approximates – to a certain extent – its legislation to EU TBT-related *acquis* before it considers the conclusion of an ACAA.[1031] However, in the EU-Ukraine DCFTA, this mechanism is much more

1026 In the pre-accession process, specific "Protocols to the Europe Agreements on Conformity Assessment and Acceptance of Industrial Products" (PECAs) were negotiated and added as protocols to the EAs (see for example the PECA with Poland (*OJ*, 1998, L 237/9)). A PECA is not concluded with Turkey as this issue is covered in the framework of the Customs Union.

1027 So far, an ACAA covering pharmaceutical products has been concluded with Israel as a protocol to the EU-Israel EMAA (*OJ*, 2013, L 1/2). Preparations for negotiations are – according to DG Trade – "advanced" with Tunisia, Jordan and Morocco. Regarding the SAAs partners, negotiations are ongoing with Macedonia and are being prepared with the other SAA countries (For an overview, see DG Trade, 'Mutual Recognition Agreement newsletter': http://trade.ec.europa.eu/doclib/docs/2014/april/tradoc_152342.pdf.

1028 Although the parties to an ACAA are free to establish and maintain own regulations and standards before and after its signing, the EU's ACAAs encourage third countries "to take appropriate measures, in consultation with the European Commission, to align with and maintain relevant EU practice in the fields of standardisation, metrology, accreditation, conformity assessment, market surveillance, general safety of products, and producers' liability" (Art. 3 EU-Israel ACAA).

1029 European Commission, 'Implementing policy for external trade in the fields of standards and conformity Assessment: a toolbox of instruments', SEC(2001) 1570, 28 September 2001, p. 14.

1030 The other conditions are: (i) an adequate infrastructure in the fields of standardisation, accreditation, conformity assessment and metrology, (ii) regulatory cooperation and technical assistance and (iii) a formal agreement between the EU and the partner country (European Commission, 'Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs)', SEC (2004) 1071, 25 August 2004, p. 6).

1031 For example, the SAAs state that, where appropriate, an ACAA will be concluded "once the [SAA countries'] legislative framework and procedures are sufficiently aligned on those of the Community" (e.g. Art. 77(2)d SAA Montenegro). The corresponding provisions in the EMAAs are less explicit and do not refer to Community (now Union] legislation or do not link such a commitment with the conclusion of an ACAA (with the exception of the EMAA with Morocco). For analysis on the conclusion of EU ACAAs with

explicit and is, therefore, a clear example of market access conditionality. According to Article 57 of the EU-Ukraine AA, an ACAA will only be concluded as a protocol to the AA once, after "a check by the EU Party", "the relevant Ukrainian sectoral and horizontal legislation, institutions and standards have been fully aligned with those of the EU".[1032] Thus, there is a clear obligation on Ukraine to approximate to the relevant EU *acquis* and the additional market access (i.e. the conclusion of an ACAA) will only be granted if the EU considers that the required level of approximation is achieved.[1033] Ukraine has to provide the EU once a year with a report that indicates the progress made in implementing Annex III.[1034]

Because there is an *obligation* on Ukraine to bring its legislation closer to that of the Union, a key element of the *conditio sine qua non* of an EU integration agreement is fulfilled. Nevertheless, for several reasons, the integration dimension of this chapter can be considered as rather weak. *First*, there is no clear selection of EU legislation defined in Annex III to which Ukraine has to approximate (i.e. the incorporated EU *acquis*). Annex III only refers to 'areas' or 'titles' of horizontal (framework) and vertical (sectoral) legislation. As noted above, this is most likely the result of the fact that the horizontal and sectoral New Approach Directives were being updated in the light of the New Legislative Framework during the DCFTA negotiations.[1035] *Second*, a clear legal terminology regarding the approximation commitments is lacking. In this chapter, the agreement mostly refers to the process of "aligning" instead of "approximating" Ukraine's legislation to the EU *acquis*.[1036] The term "alignment" is traditionally

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the EMAA partners, see (F. Misrahi, 'What Prospects for Lifting of technical trade barriers in the Mediterranean? Insights from the Turkish Case', in E. Barbé, A. Herranz-Surrallés (eds.) *The Challenge of Differentiation in Euro-Mediterranean Relations. Flexible Regional Cooperation or Fragmentation* (Routledge, Oxon, 2012), pp. 60–80). Also other recent post-Global Europe FTAs – carefully – envisage the conclusion of MRAs, however, without linking this to approximation to EU *acquis* (e.g. Art. 4.7 EU-Singapore FTA; Art. 4.6(1)a EU-Korea FTA; Art. 131 EU-Central America AA).

1032 Art. 57 EU-Ukraine AA. The ACAA will cover one or more sectors listed in Annex III, however, the parties undertake to consider the extension of its scope to cover other industrial sectors.

1033 Art. 57(3) states that the ACAA shall be added as a protocol to the AA "by agreement between the parties according to the procedure for amending this Agreement". This implies that the EU party can veto the conclusion of an ACAA if it considers that the appropriate level of approximation is not achieved.

1034 Annex III EU-Ukraine AA.

1035 On this issue, see footnote 1018.

1036 See for example Art. 57(1) and (3) and Annex III EU-Ukraine AA.

used in the area of TBT and the conclusion of ACAAs.[1037] However, this term is not being used consistently in this DCFTA chapter as, for example, in one single Article reference is being made to the process of "achieving conformity with", "approximation to", "incorporating into the legislation of Ukraine" and "aligning with" the EU *acquis*.[1038] Remarkably, clear definitions of these different concepts are not provided in the agreement – or elsewhere.[1039] *Third*, due to the lack of a detailed and specific list of EU legislation in Annex III, this DCFTA chapter does not provide specific mechanisms to ensure the uniform interpretation and application of the incorporated EU rules (e.g. procedures to update the incorporated EU *acquis* or an obligation for ECJ case-law conform interpretation).

The TBT chapters in the Moldova and Georgia DCFTAs are largely similar to the Ukraine DCFTA, however, their corresponding annexes are rather different. Contrary to the Ukraine DCFTA, the annexes to the TBT chapters in the two other EaP DCFTAs list a specific selection of EU *acquis*. The annex in the Moldova DCFTA includes around 110 specific EU Directives or Regulations, including strict deadlines for approximation.[1040] In addition to the "legislation based on the principles of the New Approach", which is also largely – but indirectly – covered in Annex III of the EU-Ukraine AA, the annex to the Moldova TBT chapter also contains a detailed list of EU Directives "based on the principles of the New Approach, *but which do not provide for CE Marking*".[1041] This list includes EU Directives related to cosmetic products, construction of motor vehicles, chemicals and pharmaceuticals. Remarkably, in a footnote in this annex it is stated that "references to the Union *acquis* or legislation or to specific Union acts shall be understood to cover any past or future revisions of the relevant acts as well as any implementation measures related to those acts".[1042] This dynamic procedure implies that the recent legislative developments in the context of the New Legislative Framework are automatically transposed to this agreement.[1043]

1037 European Commission, *op. cit.*, footnote 1030.

1038 Art. 56 EU-Ukraine AA.

1039 The inconsistent use of these terms in the DCFTAS – and the AA as such – will be discussed in Chapter 12.4.

1040 Annex XVI Moldova AA. The longest transitional period for approximation is 2018 (irrespective of the date of entry into force of the agreement). The Annex also includes the legislation that is already being approximated.

1041 Annex XVI EU-Moldova AA. *Emphasis added.*

1042 Footnote 4, Annex XVI EU-Moldova AA.

1043 On this point, see footnote 1018.

Georgia's approximation obligations in the area of TBT are less strict than those enshrined in the Moldova and Ukraine DCFTAs. Article 47 and Annex III of the Georgia AA distinguish the sectoral legislation from the horizontal legislation. Annex III includes a list of "sectoral legislation for approximation" and an "*indicative* list of horizontal legislation".[1044] As explicitly mentioned in this annex, the former "reflects Georgia's priorities with regard to approximation of EU's New Approach Directives as included in the Government of Georgia's Strategy in Standardisation, Accreditation, Conformity Assessment, Technical Regulation and Metrology and Programme on Legislative Reform and Adoption of Technical Regulations, of March 2010". This list covers most of the sectoral New Approach Directives, however, they do not take into account the most recent legislative developments that were adopted after the AA's negotiations in the context of the New Legislative Framework.[1045] With regard to the horizontal legislation, Georgia made a softer commitment compared to Ukraine and Moldova. The annex states that the legislation included in the list on horizontal legislation only aims to serve as "a non-exhaustive guidance for Georgia for the purpose of approximation of horizontal measures of the Union".[1046]

Finally, it has to be noted that the Georgia and Moldova TBT chapters have a similar inconsistent vocabulary with regard to legislate 'approximation'.[1047]

10.2 Sanitary and Phytosanitary Measures

Sanitary and Phytosanitary (SPS) measures have increasingly become barriers to trade for the EU in its relations with third countries. Therefore, the EU is addressing this issue by, *inter alia*, including specific SPS chapters in its recent FTAs.[1048] The objective of the EU-Ukraine DCFTA chapter on SPS measures is

1044 Annex III-A and III-B EU-Georgia AA.

1045 For example, this list does not include the changes brought by the 'Alignment Package' of February 2014. Art. 47 of the AA provides for the possibility to amend this list by a decision of the Trade Committee (see footnote 1018).

1046 This annex includes 6 specific EU acts, however, without a timetable for approximation.

1047 For example, Art. 47(2) of the Georgia AA states that Georgia shall "progressively *approximate* its legislation to the relevant Union *acquis*", whereas the corresponding provision in the Moldova AA states that Moldova shall "progressively *incorporate*" the relevant Union *acquis* into its legislation (Art. 173(2)) (emphasis added).

1048 European Commission, 'Sanitary and phytosanitary (SPS) issues', DG Trade Info Brochure, 2013. SPS matters are only marginally covered in the EMAAs and the SAAs. For example, the Macedonia, Montenegro and Bosnia and Herzegovina SAAs only aim "to the gradual harmonisation of veterinary and phytosanitary legislation with Community standards

to facilitate trade in commodities covered by sanitary and phytosanitary measures including animals, animal products, plants and plant products. Similar to other recent EU FTAs,[1049] detailed provisions are included on the affirmation of the WTO SPS Agreement,[1050] recognition for trade purposes of animal health and pest status and regional conditions,[1051] trade conditions,[1052] and certification procedures, verification and import checks and inspection fees.[1053]

The specific additional market access foreseen in this chapter is the *determination of equivalence*. Similar to the conclusion of an ACAA (cf. *supra*), determination of equivalence is also a mutual recognition instrument. It facilitates trade by obliging the importing party to accept the SPS measures of the other party as equivalent, "even if these measures differ from its own, if the exporting party objectively demonstrates to the importing party that its measures achieve the importing party's appropriate level of sanitary or phytosanitary protection".[1054] Although this procedure is foreseen in the WTO SPS Agreement, few examples exist in the EU's trade policy.[1055] Just as it is the case for the conclusion of an ACAA, determination of equivalence can only work between two parties when their SPS measures, standards and regulations are not too different and if the requirements of each set of SPS measures are capable of meeting the SPS objectives of the other. Although this procedure for determination of equivalence is also included or envisaged in other recent FTAs,[1056] it is in the EU-Ukraine

(respectively Arts. 100, 97 and 95). Regarding the EMAAs, only several of these agreements aim at the "harmonisation of phytosanitary and veterinary standards" (e.g. Art. 58 EMAA Algeria; Art. 71 EMAA Jordan; Art. 51 EMAA Lebanon). For exceptions, see Art. 47 EMAA Egypt and Protocol 3 to the EMAA Israel.

1049 For example, this DCFTA SPS chapter is very similar to the 'Agreement on sanitary and phytosanitary measures applicable to trade in animals and animal products, plants, plant products and other goods and animal welfare' which was annexed to the EU-Chile AA (*OJ*, 2002, L 352/2, Annex IV). The SPS chapters in the EU-Colombia/Peru FTA (Chapter 5), the EU-Central America AA (Chapter 5 Title II), the EU-Singapore FTA (Chapter 5) and the EU-Korea FTA (Chapter 5) are also comprehensive but less detailed than the EU-Ukraine DCFTA, especially concerning the procedures for recognition of regionalisation and import checks and inspection fees.

1050 Art. 60 EU-Ukraine AA.

1051 Art. 65 EU-Ukraine AA.

1052 Art. 69 EU-Ukraine AA.

1053 Arts. 70–72 EU-Ukraine AA.

1054 Art. 62(21) EU-Ukraine AA.

1055 Art. 4 WTO SPS Agreement.

1056 A similar procedure is for example provided in the EU-Chile Association Agreement (Art. 7 Agreement on Sanitary and Phytosanitary Measures Applicable to Trade in Animals and

DCFTA that the prospect of recognition of equivalence is for the first time explicitly being made conditional upon the progress of approximation to the relevant EU *acquis*. In the light of the DCFTA market access conditionality, it is only when the EU-Ukraine SPS Sub-Committee decides, after "regular monitoring", that Ukraine's legislative approximation commitments are achieved that the parties shall initiate the process of determination of equivalence.[1057] Because this SPS Sub-Committee shall "decide by consensus between the parties", the EU will be able to determine the pace of this process.[1058]

Article 64 AA states that Ukraine "shall" (i.e. obligation) approximate its SPS and animal welfare legislation to that of the EU "as set out in Annex V". However, similar to the TBT chapter, this annex does not include a specific predetermined selection of EU *acquis*. Instead, it will contain a "Comprehensive Strategy for the implementation of Chapter IV" (hereinafter: "the SPS Strategy"), which must be submitted by Ukraine to the SPS Sub-Committee not later than three months after the entry into force of the AA and which will be added to Annex V.[1059] This SPS Strategy will serve as a reference document for the implementation of this chapter. Thus, the agreement does not put forward a concrete chunk of EU SPS *acquis* for approximation. In order to give the Ukrainian authorities some guidelines for drafting this SPS Strategy, Annex IV (A-C) provides priority areas according to which this Strategy must be structured. Nevertheless, it does not refer to specific EU *acquis* and does not provide a timetable for approximation.[1060] This means that the Ukrainian authorities have no clear template for approximation in order to draft this Strategy. However, the EU can further specify the scope of the SPS-related EU legislation that Ukraine must implement in the SPS Sub-Committee.[1061]

Animal Products, Plants, Plant Products and other Goods and Animal Welfare, Annex IV EU-Chile Association Agreement) and in the Agreement between the European Community and the Government of Canada on sanitary measures to protect public and animal health in respect of trade in live animals and animal products (Art. 6 and 7 (*OJ*, 1999, L 71/3)). See also Art. 5.14 EU-Singapore FTA. Other agreements do not yet incorporate such a procedure but allow the SPS Sub-committee, established by these agreements, to initiate a procedure for the recognition of equivalence (see for example Art. 95 of the EU-Colombia/Peru FTA and Art. 150 of the EU-Central America Association Agreement).

1057 Combined reading of Article 64(3), 66 (4) and para. 2(b) Annex IX EU-Ukraine AA.

1058 This SPS Sub-Committee shall monitor the implementation of this DCFTA chapter, review its Annexes and regularly report to the Trade Committee (Art. 74).

1059 Combined reading of Art. 64(4) and Annex V EU-Ukraine AA.

1060 Annex IV-A covers "SPS Measures", Annex IV-B "Animal Welfare Standards" and IV-C "Other Measures covered by this Chapter".

1061 Interview 11 official DG Trade, 1 October 2014, Brussels.

Accordingly, also this chapter does not include procedures to ensure the uniform interpretation or application of the relevant EU SPS *acquis*. It is only stated that the "the EU Party shall inform Ukraine well in advance of changes to the EU Party legislation to allow Ukraine to consider modification of its legislation".[1062] The SPS Sub-Committee can, by means of a decision, modify the SPS Strategy as well as the other annexes to this chapter, *inter alia*, to take into account the evolution of the corresponding rules of EU law. This can hardly be seen as a dynamic procedure.

The SPS chapters in the Moldova and Georgia DCFTAs are almost identical to the corresponding chapter in the Ukraine DCFTA. The only notable difference is that in the annexes of the Moldova and Georgia SPS chapters, a section on "Principles for the evaluation of progress in the approximation process" is included.[1063] These include detailed provisions on how Moldova and Georgia shall gradually approximate their legislation to that of the EU, based on the "list" of EU SPS and animal welfare legislation that will be incorporated in these annexes (this "list" is analogous to the SPS Strategy in the Ukraine DCFTA, cf. *supra*). Moreover, it is stated that Moldova and Georgia shall approximate their domestic rules by either "(a) implementing and enforcing through the adoption of additional domestic rules or procedures the rules in pertinent basic EU *acquis* or (b) by amending relevant domestic rules or procedures to incorporate the rules in relevant basic EU *acquis*".[1064] In either case, Moldova and Georgia must eliminate any domestic laws inconsistent with the approximated domestic rules and ensure the effective implementation of approximated domestic rules.[1065] In addition, during this process of legislative approximation, these two countries must prepare for each single approximated act a *table of correspondence* which indicates the correspondence between the relevant EU Act and the national legislation.[1066] This table will be reviewed by experts appointed by the Commission and only after a positive evaluation, the process of determination of equivalence can be initiated for an individual measure or a group of measures.[1067] Consequently, this far-reaching

1062 Art. 67(3) EU-Ukraine AA.

1063 Annex XXIV-A EU-Moldova AA; Annex XI-A EU-Georgia AA.

1064 *Ibid*.

1065 *Ibid*.

1066 It is noted in these Annexes that Moldova and Georgia must "pay particular attention to precise translation into the national language, as linguistic imprecision can give rise to disputes in particular if they concern the scope of law". Moreover, these Annexes explicitly foresee that this approximation process may be supported by EU Member States' experts or in the margin of the CIB programmes (twinning projects, TAIEX etc.).

1067 *Ibid*, Part II. A model of such a table of correspondence is included in this Annex.

procedure, which is clearly inspired by the pre-accession methodology, further defines the nature of the approximation obligation as it clearly prescribes how the incorporated EU SPS *acquis* must be extended to Moldova and Georgia. These strict obligations strengthen the integration dimension of these chapters and should be beneficial for the uniform interpretation of the incorporated EU *acquis*. It is obvious that this procedure requires a strong political will from the partner country as it transfers to a large extent the right to regulate SPS-related matters (and thus sovereignty) to the EU level and because Moldova and Georgia agree to be closely monitored by EU authorities. Most likely, elements of these procedures will also be used in the case of Ukraine, although this is not explicitly foreseen in the Ukraine DCFTA.

10.3 Establishment, Trade in Services and Electronic Commerce

Chapter 6 of the DCFTA includes provisions for the progressive reciprocal liberalisation of establishment and trade in services and for cooperation on electronic commerce. Since the adoption of the Global Europe Strategy, the EU has been increasingly concluding FTAs that provide for significant liberalisation of trade in services. This EU-Ukraine DCFTA chapter follows to a large extent the structure of the corresponding chapters in recent post-Global Europe FTAs, including separate sections for, *inter alia*, Establishment, Cross-Border Supply of Services, Temporary Presence of Natural Persons for Business Proposes, Regulatory Framework and Electronic Commerce.[1068] Specific provisions on investment protection are not foreseen, although this falls since the Lisbon Treaty in the ambit of the EU's commercial policy.[1069]

1068 For example, the EU-Korea FTA (Chapter 7), the EU-Peru/Colombia FTA (Title IV), the EU-Singapore FTA (Chapter 8) and the EU-Central America Association Agreement (Title III) provide for a similar broad services liberalisation. Examples of FTAs which include significant provisions on service liberalisation *before* the Global Europe Strategy are the EU-South Africa Agreement on Trade, Development, and Cooperation (Art. 29–30) and the EU-Chile Association Agreement (Art. 95–129).

1069 See footnote 16 to Article 87 EU-Ukraine AA. Such provisions are also not included in other recent FTAs such as the EU-Korea FTA or the EU-Colombia/Peru FTA. However, since 'foreign direct investment' falls since the Lisbon Treaty under the Union's commercial policy (Art. 207(1) TFEU), negotiating directives for the FTAs which are currently being negotiated, such as the EU-USA TTIP, provide for the possibility to negotiate such a chapter, including an investor-to-state DSM (see for example para. 22, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', 17 June 2013 (on file with the author)). Two

The EU-Ukraine DCFTA includes several important novelties regarding sectoral coverage and depth of market access commitments.[1070] Moreover, this chapter includes the most detailed mechanism for market access conditionality and provides for the most elaborate legal framework for 'integration' in the EU Internal Market, including legal instruments to ensure the uniform interpretation and application of the incorporated EU *acquis*. Therefore, this DCFTA services and establishment liberalisation goes beyond the one provided for in the SAAs and the EMAAs.[1071]

Regarding Cross-Border Supply of Services, the agreement offers market access and national treatment in various services sectors such as business services (e.g. professional, real estate and computer services), communication services, construction and related engineering services, distribution services, educational services, environmental services, financial services, health and social services, tourism, recreational, transport and energy services, however, under the condition of several reservations.[1072] The list of services sectors liberalised by the EU, including the Member State-specific or EU-wide market access and national treatment limitations, are laid down in Annex XVI-B. The list of Ukraine's commitments on cross-border services are laid down in Annex XVI-E. Comparing these two lists illustrates that this liberalisation process is

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recent EU FTAs include a chapter on investment protections, i.e. the EU-Singapore FTA (Chapter 9) and the EU-Canada CETA. For discussion see F. Hoffmeister, G. Ünüvar, 'From BITS and Pieces towards European Investment Agreements', in M. Bungenberg, *et al.* (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Hart Publishing, Oxford, 2013), pp. 57–86.

1070 For an elaborate overview of services provisions in EU FTAs, see B. Natens, J. Wouters, 'Mapping Services Liberalisation Commitments in European Union Regional Trade Agreements', *Leuven Centre for Global Governance Studies Paper* nr. 5, August 2013.

1071 Mainly the Jordan and Algeria EMAAs include substantive provisions on establishment and cross-border supply of services (Art. 30–47). The other EMAAs reaffirm GATS MFN obligations (e.g. Art. 32 EMAA Morocco) and include a (soft) commitment according to which the parties agree to widen the scope of the EMAA to cover establishment and services (e.g. Art 31 EMAA Tunisia; Art. 30 EMAA Egypt). Negotiations to liberalise further trade in services and establishment were launched in 2008 with Israel, Egypt, Morocco and Tunisia. However, these negotiations are progressing slowly and are even put on hold for Egypt and Israel. Morocco, Jordan and Tunisia agreed to integrate the bilateral services negotiations in the broader DCFTA negotiations (DG Trade, *op. cit.*, footnote 872). The provisions on services and establishment in the SAAs are more elaborate than those in the EMAAs. For analysis, see B. Natens, J. Wouters, *op. cit.*, footnote 1070, pp. 12–20.

1072 Art. 92–95 EU-Ukraine AA. Audio-visual services, national maritime cabotage and several types of domestic and international air transport services are excluded from this liberalisation process (Art. 92).

quite asymmetrical as Ukraine applies almost no reservations for the sectors included, contrary to the EU Member States.[1073] This is mainly due to the fact that Ukraine liberalised several of its services sectors already significantly during its WTO accession.[1074]

With regard to the temporary presence of natural persons for business purposes (GATS mode 4 services), liberalisation of key personal, graduate trainees and business services sellers is provided.[1075] For contractual services suppliers and independent professionals in sectors listed in the agreement, the parties shall allow the supply of services in their territory of services suppliers of the other party, subject to several conditions and reservations included in the annexes to this chapter.[1076] Again, it is clear that the EU and its Member States impose more reservations than Ukraine.[1077] These EU reservations are no surprise as GATS mode 4 services are being associated with the sensitive issue of access to the labour market of third country nationals.

These two modes of services liberalisation are also covered – with a different scope and depth of commitments – in other recent EU FTAs.[1078] However, two elements in this services chapter distinguish the EU-Ukraine DCFTA from all the other EU FTAs.

First, for the liberalisation of establishment, the Union uses for the first time in the EU-Ukraine DCFTA a 'negative list' approach. Such a list contains the specific services sectors and modes of supply that the contracting parties wish to exclude from the general liberalisation obligation. A positive list on the other hand, traditionally used by the EU,[1079] includes only the services sectors which

1073 For example, many EU Member States made reservations regarding legal services and insurance and banking services.

1074 For Ukraine's WTO Schedule of Commitments in Services, see WTO, 'Working Party on the accession of Ukraine. Schedule of Specific Commitments in Services', WT/ACC/UKR/152/Add.2, 25 January 2008.

1075 Arts. 98–100 EU-Ukraine AA.

1076 Arts. 101 and 102 EU-Ukraine AA.

1077 Combined reading of Annex XVI-C and XVI-F EU-Ukraine AA.

1078 *Op. cit.*, footnote 1068.

1079 Even the post-Global Europa FTAs still use a positive list approach regarding establishment (e.g. Art. 8.8-10 EU-Singapore FTA; Art. 7.13 EU-Korea FTA). A notable exception is the negotiated EU-Canada CETA. Canada insisted on such an approach as it used a 'negative list' in its previous FTAs such as the NAFTA. In a resolution on the EU-Canada CETA, the European Parliament stated that the Commission's choice to include a negative list in the CETA "should be seen as a mere exception and not serve as a precedent for future negotiations" (European Parliament resolution of 8 June 2011 on EU-Canada trade relations, P7_TA(2011)0257).

are being liberalised and, by means of reservations, the market access and national treatment limitations.[1080] According to Art. 88 of the EU-Ukraine AA, subject to the reservations listed in Annex XVI-D and A (i.e. the 'negative lists'), the parties shall grant to each other "as regards the establishment [and operation] of subsidiaries, branches and representative offices of legal persons of [the other party], treatment no less favourable than that accorded to its own legal persons, branches and representative offices or to any third-country legal persons, branches and representative offices, whichever is the better". This negative list approach provides greater flexibility in determining the scope of liberalisation and guarantees automatic coverage of new services. This is especially relevant for the fast evolving services such as internet services. Again, it is clear that the EU and its Member States impose more reservations to national treatment or most favourable treatment than Ukraine when comparing these negative lists.[1081]

The *second* innovation in this DCFTA chapter is the elaborate form of market access conditionality and the related mechanisms to ensure a uniform interpretation and application of the incorporated EU *acquis*. An "unprecedented level of integration"[1082] is offered to Ukraine in several services sub-sections, i.e. Postal and Courier Services, Electronic Communications, Financial Services and Transport Services.[1083] Although these 4 sub-sections provide in a first phase already unconditionally a certain – traditional – type of market access or liberalisation,[1084] the innovative element is that through strict market access conditionality, Ukraine can obtain for these sections "internal market treatment". Such a treatment means that there shall be:

> no restrictions on the freedom of establishment of juridical persons of the EU or Ukraine in the territory of either of them and that juridical

1080 For a discussion on positive *vs*. negative lists and an overview of negative lists in trade agreements, see: A. Mattoo, P. Sauvé, 'Services', in J.-P. Chauffour, J.-C. Maur (eds.) *Preferential Trade Agreements. Policies for Development* (The World Bank, Washington, 2011), p. 251.

1081 The negative list of the EU Party includes "horizontal reservations" and "sectoral reservations" (Annex XVI-A).

1082 European Commission, 'The EU-Ukraine Deep and Comprehensive Free Trade Area', p. 4.

1083 These sub-sections, respectively sub-section 4–7, are part of Section 5 "Regulatory Framework".

1084 For example, the sub-section on postal and courier services reduces the licence requirements (Art. 112); for electronic communications the agreement regulates access and interconnection between providers of publicly available electronic communication networks and services (Art. 118) and for financial services, the agreement foresees provisions on transparent regulation (Art. 127).

> persons formed in accordance with the law of an EU Member State or Ukraine and having their registered office, central administration or principal place of business within the territory of the Parties shall, for the purposes of this Agreement, be treated *in the same way as juridical persons of EU Member States or Ukraine*.[1085]

The fact that a juridical persons of a third country (Ukraine) can have the same freedom of establishment in the EU "as juridical persons of EU Member States" (and *vice versa*), without any restrictions or reservations, is unique and integrates Ukraine as close as possible to the EU Internal Market without being an EEA Member. However, as already indicated, this internal market treatment will only be granted after a strict market access conditionality procedure. The sub-sections on Postal and Courier Services, Electronic Communications and Financial Services all contain the same approximation clause stating that the parties recognise the importance of Ukraine's approximation process and that "Ukraine shall ensure that its existing laws and future legislation will be gradually made compatible with the EU *acquis*".[1086] This process will start on the date of signing of this agreement and will "gradually extend to all the elements of the EU *acquis* referred to in Annex XVII".[1087] It is remarkable that, contrary to the other approximation clauses in the AA, this provision explicitly obliges Ukraine also to approximate its "future legislation" to the EU *acquis*. The approximation clause on Transport Services, which also relies on Annex XVII for its implementation, has a more nuanced formulation as it obliges Ukraine to adapt its legislation to that of the EU "existing at any time" in the field of international maritime transport "insofar as it serves the objectives of liberalisation, mutual access to the Markets of the Parties and the movement of passengers and of goods".[1088] Annex XVII fleshes out these approximation clauses by defining, *inter alia*, general principles and obligations regarding approximation, horizontal adaptations and procedural rules, provisions on monitoring and the selection of EU *acquis* which must be approximated.

1085 Art. 4 Annex XVII EU-Ukraine AA (emphasis added). This also applies to the setting up of agencies, branches or subsidiaries by juridical persons of the EU or Ukraine established in the territory of the other party. Moreover, this treatment also requires that there shall be "no restrictions on freedom to provide services by a juridical person within the territory of the other Party in respect of persons of EU Member States and Ukraine who are established in the EU or Ukraine".

1086 Respectively Arts. 114(1), 124(1) and 133(1) EU-Ukraine AA.

1087 *Ibid.*

1088 Art. 138 EU-Ukraine AA. The formulation of "existing at any time" implies pre-signature and post-signature *acquis*.

Contrary to the two previous discussed DCFTA chapters, this annex clearly defines a selection of EU legislation to which Ukraine must approximate (i.e. the incorporated *acquis*). Appendices XVII-2 to XVII-5 list over more than 85 specific EU Directives and Regulations and indicate the deadline against when (parts of) these EU acts must be implemented.[1089] Also innovative is that this annex includes "General principles and obligations on regulatory approximation" which determines how the incorporated EU *acquis* "will be made part of Ukraine's internal legal order".[1090] In the spirit of Article 288 TFEU, Article 2 Annex XVII specifies that acts referred to in Appendices XVII-2 to XVII-5 shall be made part of Ukraine's internal legal order as follows: an act corresponding to an EU Regulation or Decision "shall as such be made part of the internal legal order of Ukraine" whereas an act corresponding to an EU Directive "shall leave to the authorities of Ukraine the choice of form and method of implementation". Although these provisions reflect Article 288 TFEU's definition of the Union's acts, there are crucial differences. In the Union, a Regulation is "directly applicable" in all the Member States whereas an act corresponding to an EU Regulation (or Decision) in Appendices XVII-2 to XVII-5 "must be made part" of Ukraine's legal order, which means that the act still has to be transposed to Ukraine's legal system. Nevertheless, such a provision introduces a firm obligation on Ukraine to apply and implement the annexed EU *acquis*. This confirms the strong integration dimension of this DCFTA chapter as it fulfills *the conditio sine qua non* of an EU integration agreement. Accordingly, this provision only appears in a limited number of EU integration agreements and was first used in the EEA Agreement.[1091] The difference, of course, is that in the case of the DCFTA (and the EU-Ukraine AA as such), this provision only applies to a limited part of the incorporated *acquis* (i.e. Annex XVII).

1089 Remarkably, this appendix even includes TFEU Articles. For the TFEU Articles referred to in Appendix XVII-2(H) on free movement of capital and payments (Articles 63, 64, 65, 66, 75 and 215 TFEU), the Appendix states that "5 years after the entry into force of the Agreement the Trade Committee shall take a final decision on the implementation timeline for this Treaty provision".

1090 Regarding the process of legislative approximation, this part of Annex XVII also requires periodic consultations within the framework of the Trade Committee and periodic discussions, consultations and exchange of information on existing and new relevant legislation. Moreover, it is stated that "pursuant to the principle of sincere cooperation", the parties shall assist each other in implementing this Annex and shall "refrain from any measure which could jeopardise or delay the attainment of the objectives of this Agreement" (Art. 1(5) Annex XVII).

1091 Art. 7 EEA. See also Art. 3 ECAA.

Also similar to the EEA – and the ECAA – are the "horizontal adaptations and procedural rules". These stipulate the adaptations that must be made to the EU acts, listed in this annex, in order to be implemented in Ukraine's legal system.[1092] Pursuant to these rules, references to "EU Member States" in the listed EU acts shall be understood to include also Ukraine and the term "Community" or "European Union" shall read "EU-Ukraine".[1093] Moreover, references to the "European Union" or the "common market" shall for the purpose of this agreement be understood to be references to the territories of the EU and Ukraine.[1094] This illustrates that for the application of this selection of EU *acquis*, Ukraine is to be regarded as an EU Member State.[1095] The reasons for this far-reaching parallelism with the EEA Agreement is that the implementation of this annex will lead to the internal market treatment for the listed services sections, which equals the far-reaching 'integration without membership' objective of the EEA.

In the spirit of the DCFTA market access conditionality, the internal market treatment will only be granted if the EU determines, on the basis of a strict monitoring process, that Ukraine has fulfilled its approximation commitments. Annex XVII establishes a detailed monitoring procedure, clearly inspired on the ENP and pre-accession methodology. Ukraine has to submit for each services sector a detailed roadmap for the implementation and enactment of the incorporated *acquis* and regularly report on the progress in the overall implementation through the submission of progress reports to the Commission.[1096] Once Ukraine is of the view that a particular EU legal act has been properly implemented, it shall transmit to the competent Commission service the internal act with a *cross-comparison table* ("transposition table") showing the correspondence with each article of the EU legal act as well as, if applicable, a list of Ukrainian legal acts that has to be

1092 In the EEA Agreement, the "Horizontal Adaptations" are added to the Agreement in Protocol 1. There are notable differences with Appendix XVII-A of the EU-Ukraine AA. For example, in the EEA, the provisions on exchange of information and reporting procedures are more elaborate and tailored to the specific EEA institutional framework. Also the ECAA contains such "Horizontal adaptations and certain Procedural Rules" (Annex II ECAA).

1093 Appendix XVII-1 EU-Ukraine AA.

1094 In addition, this appendix also includes, *inter alia*, rules on the territorial application and on references to institutions and languages.

1095 For the corresponding rule in the EEA Agreement, see point 8 Protocol 1 EEA Agreement on Horizontal Adaptations.

1096 Paras. 2–4 Appendix XVII-6 EU-Ukraine AA.

amended or annulled in order to fully implement the EU legal act.[1097] After a positive assessment, the European Commission can propose a decision on internal market treatment to the Trade Committee. In the case of a negative assessment, it shall issue recommendations and determine a new implementing period to ensure full consistency with the EU legal act. This can be followed by further assessments as to whether the recommended measures have effectively been implemented.[1098] This monitoring mechanism is quite far-reaching considering that the EU may assess the progress with "on-the-spot-missions", carried out with the cooperation of the Ukrainian authorities.[1099] In this view, Ukraine must ensure that authorities and bodies under its jurisdiction "continuously apply and adequately enforce all legislation for which the EU's formal assessment of Ukraine's approximation efforts had previously been positive as well as all future EU legislation". It is only after a positive assessment that the Trade Committee may decide to grant reciprocal internal market treatment with respect to the services sector(s) concerned.[1100] Again, this does not imply automaticity as even after a positive assessment of Ukraine's legislative approximation process, a political decision, made by consensus between the two parties, is required for the granting of reciprocal internal market treatment.

It is clear from the analysis above that the EU is very prudent to open up its Internal (services) Market to such a large extent to a third country with a weaker administrative capacity and state of economic development than an EEA Member. The rigorous monitoring by the EU, the focus on the effective and continuous implementation, application and enforcement of the incorporated EU *acquis* and the explicit nature of the market access conditionality is unprecedented. In this view, Ukraine must provide "adequate evidence of the effective enactment and enforcement of the EU legal acts", demonstrate "administrative capacity to enforce the national legislation adopted pursuant to [the approximation clauses in this DCFTA Chapter]" and "provide a satisfactory track record of sector-specific surveillance and investigation, prosecutions, and administrative and judicial treatment of violations".[1101] Moreover, a specific procedure is added to Annex XVII stating that if a party is of the opinion that the other party does not comply with the obligations of this Annex, that party may, by way of derogation from the DCFTA DSM, "immediately"

1097 Para. 3 Appendix XVII-6 EU-Ukraine AA.
1098 Art. 4(8) Annex XVII EU-Ukraine AA.
1099 Para. 4 Appendix XVII-6 EU-Ukraine AA.
1100 Art. 4(3) Annex XVII EU-Ukraine AA.
1101 Appendix XVII-6 EU-Ukraine AA.

suspend obligations arising from this Annex (cf. *infra*).[1102] This means that if Ukraine fails to continue to implement, apply and enforce the annexed EU *acquis* after the internal market treatment is granted, the EU can immediately withdraw – after Ukraine's failure to comply with the arbitration panel ruling – the internal market treatment. In addition, a specific safeguard mechanism is foreseen that allows repealing the internal market treatment if "serious economic, societal or environmental difficulties of a sectoral or regional nature liable to persist have arisen or threaten to arise in either party".[1103]

On the one hand, these provisions considerably limit Ukraine's competence (and thus sovereignty) to regulate its own services and establishment market. This is difficult to reconcile with the general provision in this chapter which states that "each party retains the right to regulate and to introduce new regulations to meet legitimate policy objectives".[1104] On the other hand, these rules and procedures contribute to the uniform application of the incorporated EU *acquis*.

Moreover, this DCFTA chapter includes several additional procedures ensuring a uniform interpretation and application of the incorporated *acquis*, corresponding to the criteria of EU integration agreements. *First*, Annex XVII includes detailed procedures to amend and update the incorporated (pre-signature) *acquis* to the evolutions in the corresponding rules of EU law. The difference is being made between approximation *before* and *after* internal market has been granted in a specific sector. In the former case, Article 3 of Annex XVII states that, in order to guarantee legal certainty, the EU will inform Ukraine and the Trade Committee regularly on all new or amended sector-specific EU legislation. Then, the Trade Committee shall add within three months "any" new or amended EU legislation to the Appendices of this chapter which Ukraine shall "transpose" into its domestic legal system according the same procedure as the pre-signature *acquis*.[1105] The wording of "any" new or amended legislative act implies that there is no option not to amend the appendices to the evolutions of the EU *acquis*, neither is there the option for Ukraine to refuse this adaptation.[1106] Such a procedure is exceptional in EU integration agreement because it requires a strong commitment from the partner country to unarguably take over the every modification of corresponding EU law in the agreement.

1102 Art. 7 Annex XVII EU-Ukraine AA.

1103 Arts. 8–9 Annex XVII EU-Ukraine AA.

1104 Art. 85(4) EU-Ukraine AA. Such a 'right to regulate' is also included in other recent EU FTAs (e.g. Art. 7.1(4) EU-Korea FTA).

1105 Art. 3 Annex XVII EU-Ukraine AA.

1106 However, the Trade Committee may decide whether Ukraine, under exceptional circumstances, can be "partly and temporarily" exempted from transposing this new or amended EU *acquis* (Art. 3(4) Annex XVII).

The procedure to update the scope of EU (secondary) legislation in the Appendices to the evolving EU *acquis* in the case *after* internal market treatment is granted is slightly different. Again, the EU shall notify Ukraine and the Trade Committee "in a timely manner" of any new legally binding acts in the sectors concerned by legislative approximation. The difference now is that the Trade Committee shall decide within three months to add "a particular" new or amended EU legislative act to the appendices.[1107] Thus, contrary to the procedure before internal market treatment is granted, not automatically all the new or amended acts must be approximated. Once the new or amended EU legislative act has been added to the relevant Appendix, fixed deadlines are prescribed within Ukraine must implement this legislation.[1108] Thus, in this case, Ukraine can refuse to add new or amended EU legislative acts to the Appendices. However, if an agreement cannot be reached on the incorporation of a new or amended EU legislative act 3 months after its notification, the EU may decide to suspend the granting of internal market treatment in the sector concerned.[1109] A similar procedure is also included in other EU integration agreements such as the EEA.[1110] Because in both cases every modification of the EU *acquis* must at least be considered to be transposed to the relevant Annex, they can both be considered as *dynamic* procedures.

In practice, these procedures will pose a crucial challenge for the EU and Ukraine after the DCFTA will provisionally enter into force. A large chunk of the EU *acquis* in Annex XVII has been amended in the EU since the DCFTA was negotiated and initialled, especially in the area of financial services. It is questionable if the EU's sophisticated post-financial crisis legislation is the right medicine for Ukraine's serious financial and economic crisis. It appears that in this case a mere copy-pasting of the new legislative developments at the level of the EU to the DCFTA is not realistic or feasible.

1107 Art. 5(2) Annex XVII EU-Ukraine AA.

1108 A Regulation and Directive shall be implemented and enforced at the latest 3 months after the entry into force date or transposition period provided for in the Regulation or Directive, unless otherwise decided by in the Trade Committee. An assessment of the implementation of these adaptations will be carried out according to the principles of the monitoring mechanism of Appendix XVII-6.

1109 Art. 5(5) Appendix XVII EU-Ukraine AA.

1110 Art. 102(5) EEA (this procedure has never been applied in practice). In the EU-Switzerland Agreements on Association with the Schengen and Dublin *acquis*, this can lead to the termination of the agreement, unless the Mixed Committee decides otherwise within 90 days (respectively Art. 7(4) and Art. 4(6)). For a similar procedure, see the EU-Iceland-Norway Agreement on the Association of Iceland and Norway to the Dublin and Schengen *acquis* (respectively Art. 4(6) and Art. 8(4)). On this issue, see also (text to) footnote 130.

Second, in order to ensure the uniform interpretation, Annex XVII also includes an obligation for ECJ case-law conform interpretation of the incorporated *acquis*. Article 6 of Annex XVII foresees that: "[i]nsofar as the provisions of this Annex and the applicable provisions specified in the Appendixes [to this Agreement] are identical in substance to corresponding [TFEU provisions] and to acts adopted pursuant thereto, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Union". This provision does not make a difference between pre-signature and post-signature case-law as the EEA Agreement (cf. *supra*),[1111] nor does it include a procedure requiring that the implications of relevant post-signature case-law have to be determined by a joint institution, as it is the case in several other EU integration agreements.[1112]

The chapters on Establishment, Trade in Services and Electronic Commerce in the Moldova and Georgia DCFTAs are less ambitious. Although the main text of these chapters in the Moldova and Georgia DCFTAs are largely comparable to the Ukraine DCFTA,[1113] the crucial difference lays in the annexes. *First*, there are minor differences in the scope of the liberalisation process. Although the different lists of EU commitments are largely comparable to those in the Ukraine DCFTA, in the Moldova and Georgia DCFTAs, the EU will make more reservations in the negative list on establishment[1114] and a separate list on reservations on key personal, graduate trainees and business sellers is included.[1115] On the other hand, the broad commitments made on the part of Moldova and Georgia are comparable to those Ukraine made in its DCFTA.[1116]

1111 Art. 6 EEA.

1112 See for example Art. 16 ECAA; Art. 1(2) EU-Switzerland Air Transport Agreement; Art. 16(2) EU-Switzerland Agreement on free movement of persons. On this issue, see also text to footnote 147.

1113 A notable difference in the main text of the agreement is that in the Moldova and Georgia DCFTAs a specific subsection on "Liability of Intermediary Service providers" is included (Sub-Section 2 of Section 6 on Electronic Commerce). In the Ukraine DCFTA, these provisions are included in the DCFTA IPR chapter.

1114 In the EU-Ukraine DCFTA, regarding establishment, the EU party will make 25 horizontal reservations and 80 sectoral reservations whereas in the Moldova DCFTA, the EU party will make 33 horizontal reservations and 128 sectoral reservations (Annex XXVII-A EU-Moldova AA). In the Georgia DCFTA, the EU party will make 33 horizontal reservations and 128 sectoral reservations (Annex XIV-A).

1115 Annex XXVII-C (EU party) and Annex XXVII-G (Moldova) EU-Moldova AA and Annex XIV-C (EU party) and Annex XIV-G (Georgia) EU-Georgia AA.

1116 Annex XXVII-E to XXVII-H EU-Moldova AA and Annex XIV-E to XIV-H EU-Georgia AA. However, it has to be noted that Georgia will make more reservations regarding establishment than Moldova.

Second, the sub-sections on Postal and Courier Services, Electronic Communications, Financial Services and Transport Services in the Moldova and Georgia DCFTAs share the same approximation clause stating that the parties only "*recognise*[ ] *the importance* of the gradual approximation of [Moldova's and Georgia's] existing and future legislation to the list of the Union *acquis* included in [the relevant] Annex".[1117] This clause in the Georgia DCFTA adds that the parties will do so with a view to considering further liberalisation in trade in services. Thus, this clause imposes a much softer obligation on Moldova and Georgia to approximate than the corresponding provisions in the Ukraine DCFTA (i.e. "shall ensure").[1118] Another crucial difference is that – contrary to the Ukraine DCFTA – the relevant annexes in the Moldova and Georgia agreements do not provide for internal market treatment, nor do they include provisions to ensure the uniform interpretation or application of the *incorporated acquis*.[1119] The annexes only include a list of specific EU legislation which Moldova and Georgia "undertake to gradually approximate". In these agreements, implementation of these approximation commitments is not explicitly linked to additional market access (i.e. internal market treatment). Only the approximation clause in the Georgia DCFTA hints to "further liberalisation in trade in services". In this view, these annexes do not include "horizontal adaptations and procedural rules" or other provisions on how the incorporated EU *acquis* must be implemented in the domestic legal order. Accordingly, they lack a dynamic mechanism to update the incorporated *acquis* or an obligation for ECJ case-law conform interpretation. This implies that the integration dimension of these two DCFTA chapters is much weaker than the corresponding services and establishment chapter in the Ukraine DCFTA.

10.4 Public Procurement

DCFTA Chapter 8 Public Procurement envisages the reciprocal and gradual access to the parties their public procurement markets on the basis of the principle of national treatment at national, regional and local level for public contracts and concessions in the traditional sector as well as in the utilities sector.[1120] This chapter applies to works, supplies and services public contracts, as well as

1117 Arts. 230, 240, 249 and 253 EU-Moldova AA (emphasis added) and Arts. 103, 113, 122 and 126 EU- Georgia AA.

1118 *Op. cit.*, footnote 1086.

1119 Annex XXVIII EU-Moldova AA and Annex XV EU-Georgia AA.

1120 Art. 148 EU-Ukraine AA.

works, supplies and services contracts in the utilities sectors and works and services concessions, however, only to contracts above the value of certain thresholds.[1121] Similar to the DCFTA services and establishment chapter, this chapter differs from other FTAs concluded by the EU due to the 'deepness' of the envisaged economic integration and the strict market access conditionality.

Access to third countries' public procurement markets has become recent years a key issue on the EU trade agenda. Both in the Global Europe Strategy and its successor "Trade, Growth and World Affairs", the Commission identifies public procurement as "an area of significant untapped potential for EU exporters" and advocates for a policy of actively seeking to open procurement markets in the major emerging markets.[1122] Therefore, the EU was an active player in the revision of the 1994 WTO Plurilateral Agreement on Government Procurement (GPA)[1123] and proposed the Commission in 2012 a Regulation on the access of third-country goods and services to the Union's Internal Market in public procurement.[1124] In addition, the EU negotiated the inclusion of public procurement commitments in recent FTAs. In these agreements, the EU envisaged that tenders by public authorities should in principle be open to bidders from the other party on a non-discriminatory basis.[1125] For example, several post-Global Europe FTAs include national treatment commitments for the types of procurement covered by these agreements, replicate the WTO GPA provisions and include provisions on transparency requirements and judicial protection.[1126] However, the EU-Ukraine DCFTA goes even a step

1121 Art. 149(1) EU-Ukraine AA. For the thresholds, see Annex XXI-P.

1122 European Commission, *op. cit.*, footnote 875, p. 8.

1123 On 15 December 2011, negotiators reached an agreement on the outcomes of the re-negotiation of the GPA and this political decision was confirmed on 30 March 2012 by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Public Procurement, WTO (GPA/113). The revised GPA entered into force on 6 April 2014.

1124 The Commission proposed a Regulation on access to international public procurement markets which aims to establish "a comprehensive EU external public procurement policy that governs the access of foreign goods and services to the EU public procurement market and includes mechanisms to encourage the EU's trading partners to start market access discussions" (COM (2012) 124 final, 21 March 2012). The proposal includes, *inter alia*, a mechanism that would allow EU countries, after approval of the EU Commission, to prevent non EU-firms from bidding for public procurement contracts worth €5 million or more unless their home countries reciprocate by allowing EU forms to do likewise.

1125 The EMAAs include only a short and non-binding objective of opening up procurement markets (e.g. Art. 41 EU-Morocco EMAA).

1126 These rules are included in Art. 151 of the EU-Ukraine DCFTA. For the national treatment (and non-discrimination) obligation in the post-Global Europe FTAs, see for example Art. 10.4

further and offers "an unprecedented example of the integration of a non-EEA-Member into the EU Single Market".[1127] Pursuant to Article 154, the EU Party:

> "shall grant access to contract award procedures to Ukrainian companies – whether established or not in the EU Party – pursuant to EU public procurement rules under treatment no less favourable than that accorded to EU Party companies", and *vice versa*.[1128]

Because the envisaged market access is so ambitious – as in the services and establishment chapter –, detailed provisions and annexes are included establishing a strict market access conditionality, including mechanisms to ensure the uniform interpretation and application of the incorporated EU *acquis*. Again, the agreement clearly states that "Ukraine shall ensure that its existing and future legislation on public procurement will be gradually made compatible with the EU public procurement *acquis*".[1129] The scope of the incorporated EU *acquis* is clearly defined in Article 148 and Annex XXI-A, which also provides for a strict timetable. The key *acquis* to which Ukraine must approximate are Directives 2004/18/EC[1130] and 2004/17/EC.[1131] However, these directives do not have to be

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EU-Singapore FTA; Art. 175 EU-Colombia/Peru FTA and Art. 211 EU-Central America AA. These provisions state that the parties must accord to the goods and services of the other party and to the suppliers of the other party offering such goods or services, treatment no less favourable than the treatment accorded to its own goods, services and suppliers. The FTA with Korea, which is a party to the GPA, is remarkable because it incorporated already the revised version of the GPA (provisionally, with certain exceptions), although it was not yet ratified at the moment of signature of the EU-Korea FTA (Art. 9.1(4)). For the difficulties on public procurement during the EU-Canada CETA negotiations, see F. Hoffmeister, *op. cit.*, footnote 891, p. 16. For an overview of procurement provisions in EU RTAs, see S. Woolcock, 'Public Procurement in International Trade', European Parliament *INTA Study*, 2012, p. 15–17.

1127 European Commission, 'Overview of the key elements of the EU-Ukraine Deep and Comprehensive Free Trade Area', 26 February 2013, p. 4. On this point, see also European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part', COM(2013) 289 final, 15 May 2013.

1128 Art. 154(3) EU-Ukraine AA.

1129 Art. 153(1) EU-Ukraine AA.

1130 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ*, 2004, L 134/114.

1131 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *OJ*, 2004, L 134/1.

approximated in their entirety and at once. *First*, Annex XXI-B to XXI-N dissects these public procurement Directives in "basic elements", "mandatory elements", "non-mandatory elements" and "provisions […] outside the scope of the process of legislative approximation". Whereas Ukraine is obliged to approximate to the "mandatory" and "basic" elements, for the "non-mandatory" elements, it is up to Ukraine to decide whether it wants to implement them.[1132] The provisions which fall "outside the scope of the process of legislative approximation" are not subject to the process of legislative approximation and therefore "do not need to be transposed into Ukrainian legislation".[1133]

Moreover, Annex XXI-A provides an "indicative time schedule for institutional reform, legislative approximation and market access". This time schedule foresees five phases that each indicate the selection of provisions of the two public procurement Directives that Ukraine must implement by cross referring to Annexes XXI-B-N (i.e. the mandatory, basic and non-mandatory elements of these two Directives).[1134] In addition, it provides for each phase a time schedule and the specific market access that the parties must grant to each other. By prioritising the approximation process in five phases, the parties envisage an incremental approach that should attribute to the effective implementation of Ukraine's legislative approximation commitments. Each phase shall be evaluated by the Trade Committee and the *reciprocal* granting of market access will only take place, in the spirit of market access conditionality, after a positive assessment by this Committee.[1135] Thus, contrary to trade in goods (cf. *supra*), this liberalisation will not be asymmetrical (i.e. the EU will not up open its public procurement market for Ukrainian companies faster than Ukraine will do for EU companies). This practice is in line with the recent developments in the EU's trade policy. For example, 'reciprocity' is also at the heart of the Commission's proposed external procurement policy.[1136]

The Trade Committee shall only proceed to the evaluation of a next phase once the measures to implement the previous phase have been carried out and approved by that Committee. This evaluation shall take into account "the quality of the legislation adopted as well as its practical implementation".[1137] However, a detailed monitoring mechanism or "horizontal adaptations and

1132 Ukraine is free to decide whether to implement these elements within the timeframe set out in the time schedule. However, the EU recommends the implementation of these elements (see Annex XXI-I).

1133 See for example Annex XXI-K EU-Ukraine AA.

1134 Annexes XXI-B to XXI-J also make cross references to these 5 phases.

1135 Art. 153(2) EU-Ukraine AA.

1136 *Op. cit.*, footnote 1124.

1137 Art. 154(2) EU-Ukraine AA.

procedural rules", as included in the chapter on services and establishment (cf. *supra*), are not foreseen. Instead, this chapter focuses more on the establishment of an appropriate institutional framework and mechanisms to ensure the proper functioning of the public procurement system.[1138]

Similar to the DCFTA SPS chapter, Ukraine must submit prior to the commencement of legislative approximation a "comprehensive roadmap for the implementation of [the Public Procurement] Chapter" which will be the reference document for the implementation of this Chapter.[1139] This roadmap must comply with the phases and time schedules of Annex XXI-A and cover all aspects of legislative approximation and institutional capacity building with regard to public procurement.

Contrary to the chapter on services and establishment, this public procurement chapter does not contain an elaborate or dynamic procedure allowing or obliging the parties to amend or update the (pre-signature) incorporated *acquis* to the evolutions of the corresponding rules of EU law. Moreover, no distinction is made between approximation *before* and *after* market access has been granted. Article 153(2) only foresees that the Commission shall notify Ukraine of any modifications of the relevant EU *acquis* and that it will provide appropriate advice and technical assistance for the purpose of implementing such modifications. However, Ukraine is under no legal obligation to update the pre-signature public procurement *acquis*. Article 153(2) only states that "due account shall be taken [...], if this should become necessary, of any modifications of the EU *acquis*". The specific nature of this obligation is not unimportant considering that the Directives 2004/18 EC and 2004/17 EC were recently (February 2014) being replaced by a new legislative package for modernisation of public procurement in the EU.[1140] Therefore, after the (provisional) entry

1138 Art. 150 EU-Ukraine AA requires the establishment by Ukraine of a central executive body responsible for economic policy tasked with "guaranteeing a coherent policy in all areas related to public procurement" and an impartial and independent body tasked with the review of decisions taken by contracting authorities during the award of contracts.

1139 Art. 152 EU-Ukraine AA.

1140 Directives 2004/17 and 18 EC were being replaced by Directive 2014/24/ EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (*OJ*, 2014, L 94/65) and Directive 2014/25 EU of the European Parliament and the Council of 26 February 2014 on public procurement by entities operating in the water, energy transport and postal services sectors and repealing Directive 2001/17/EC (*OJ*, 2014, L 94/243). Moreover, a new Directive on the award of concession contracts was adopted (Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts, OJ, 2014, L 94/1). These Directives were approved by the European Parliament on 15 January 2014 and adopted by

into force of this agreement, it will be crucial that the relevant annexes and the indicative time schedule are updated as soon as possible to take into account these new public procurement directives.

To ensure the uniform interpretation of the public procurement *acquis*, Article 153(2) states that in the process of legislative approximation "*due account* shall be taken of the corresponding case-law of the European Court of Justice and the implementing measures adopted by the European Commission".[1141] This obligation is however 'softer' than the corresponding Article 6 of Annex XVII in the services and establishment chapter (i.e. "shall" be interpreted in conformity with relevant ECJ case-law, cf. *supra*).[1142] Whereas in the case of services and establishment, Ukraine has no possibility to divert from the ECJ interpretation when implementing and applying the relevant *acquis*, this obligations is less strict for the public procurement *acquis*. However, also this provision does not make a distinction between pre- and post- signature case-law.

The public procurement chapter in the Moldova and Georgia DCFTAs are almost identical to the Ukraine DCFTA. The only minor difference is that the indicative time schedules in the Moldova and Georgia DCFTAs foresee a longer implementation period.[1143] Remarkably, these two agreements also incorporated the 'old' Directives 2004/17 and 18 EC. The Council and European Parliament already agreed on the new public procurement package in June 2013,[1144] the same month when the negotiations on these two DCFTAs were finished. Although the Directives were only adopted by the Council on 11

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the Council on 11 February 2014. The Member States have until April 2016 to transpose the new rules into their national law (except with regard to e-procurement, where the deadline is September 2018).

1141 *Emphases added*. Remarkable is that a footnote in Annex XXI states that in the case a question raises on the interpretation of certain provisions of the relevant Directives in the course of legislative approximation, "the legislative approximation shall be performed *mutatis mutandis*, taking into account the EU-Ukraine relations as stipulated in this Agreement" (footnote 135).

1142 *Emphasis added*.

1143 In the Ukraine DCFTA, the implementation period for the first two phases are, respectively, 6 months and 3 years after the entry into force of the agreement. In the Georgia agreement, this is, respectively, 9 months and 5 years (Annex XVI-A EU-Georgia AA). In the case of Moldova, this is 9 months and 3 years (Annex XXIX-B EU-Moldova AA).

1144 The Council and European Parliament agreed in June 2013 on the package, however, the Parliament only voted the package at the plenary session of 15 January 2014 (European Parliament, 'New EU-Procurement rules to ensure better quality and value for money', *press release*, 15 January 2014).

February 2014,[1145] the DCFTA negotiators did not anticipate this new legislative package on public procurement.

10.5 DCFTA Chapters without Market Access Conditionality

In the four DCFTA chapters analysed above, a clear form of integration into the EU Internal Market on the basis of market access conditionality could be identified. However, the DCFTA includes several other chapters which will unconditionally liberalise trade between the parties. Thus, in these chapters, (additional) market access will not depend on Ukraine's approximation to a selection of EU *acquis*. Nevertheless, several of these chapters include commitments on the part of Ukraine to approximate to a body of EU legislation. Because the approximation process in these chapters will not result into an ambitious form of "integration" in the EU Internal market – as it is the case in the area of services/establishment and public procurement (cf. *supra*) –, the mechanisms to ensure a uniform interpretation and application of the incorporated EU *acquis* are less detailed. It is not the objective to provide here an in-depth analysis of these DCFTA chapters. Instead, their most innovate elements will be highlighted and the provisions on legislative approximation will be discussed.

10.5.1 *Competition*

The EU-Ukraine DCFTA contains an elaborate chapter on competition, including provisions on antitrust and mergers and state aid.[1146] EU FTAs increasingly include competition provisions, however, the degree of detail varies and relates to the EU trading partners' domestic competition legislation. Incorporating competition provisions in FTAs is just one of the instruments in the EU's (bilateral) external competition policy, next to the conclusion of Memorandums of Understanding, Dedicated Cooperation Agreements and Policy Dialogues with third countries.[1147] Especially the FTAs concluded after the Global Europe

1145 *Op. cit.*, footnote 1140.

1146 Chapter 10 DCFTA, EU-Ukraine AA.

1147 Non-binding Memorandums of Understanding between the Commission and the competition authority of other jurisdictions have been concluded with, *inter alia*, Brazil (2009), China (2012), India (2013) and Russia (2011). "First generation" bilateral agreements dedicated to competition have been concluded with the USA (1995); Japan (2003); Canada (1999); Korea (2009). "Second generation" agreements are being negotiated with Switzerland (signed in May 2013, not yet into force) and Canada. For an overview, see the website of DG Competition (http://ec.europa.eu/competition/international/bilateral/),

Strategy – which called for the inclusion of competition provisions in the new FTAs –, include an entire chapter dedicated to competition.[1148]

Similar to these recent EU FTAs, in the area of antitrust policies, the EU-Ukraine DCFTA states that – echoing Article 101 and 102 TFEU – (a) agreements, concerted practices and decisions by associations of undertakings, which have the objective or effect of impeding, restricting, distorting or substantially lessening competition, (b) the abuse by an undertaking of a dominant position or (c) concentrations between undertakings which result in monopolisation in the territory of either party are "inconsistent with this Agreement, in so far as they may effect trade between the parties".[1149] Both parties must maintain competition laws and authorities which address and enforce this competition legislation.[1150] Further, it includes provisions on public enterprises, state monopolies, exchange of information and enforcement cooperation and consultations.[1151] The novelty in this chapter is that pursuant to Article 256, Ukraine "shall approximate its competition laws and enforcement practices to the part of the EU *acquis*". Such a commitment cannot be found in other post-Global Europe FTAs, which do not require substantive changes in the legislation of the partner country.[1152] However, in the SAAs, PCAs and EMAAs, approximation to the EU competition *acquis* is covered by

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for analysis see V. Demedts, 'International Competition Law Enforcement: Different Means, One Goal?' *The Competition Law Review* 8(3), 2012, pp. 223–253.

1148 Also several EU (trade) agreements concluded before the Global Europe Strategy include provisions on competition such as the EU-Chile AA (Art. 172–180); the EU-South Africa Trade, Development and Cooperation Agreement (Arts. 35–44) and the EU-Mexico Global Agreement (Art. 11) (for an overview, see: J. Bourgeois, 'Competition Policy: The Poor Relation in the European Union Free Trade Agreements', in I. Govaere, *et al.* (eds.) *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers, Leiden/Boston, 2014), pp. 381–397. See in this volume also the contribution of P.J. Slot, 'Bilateral Treaties in the Field of Competition Law', pp. 399–416). The EMAAs and the SAAs include provisions that mirror Arts. 101, 102 and 107 TFEU. For an analysis of the competition provisions in the EMAAs, see D. Geradin, N. Petit, 'Competition Policy and the Euro-Mediterranean Partnership', *European Foreign Affairs Review* (8), 2003, pp. 153–180 and K. Pieters, *The Integration of the Mediterranean Neighbours into the EU Internal Market*, (T.M.C. Asser Press, The Hague, 2010), pp. 122–126.

1149 Art. 254 EU-Ukraine AA. For the corresponding provision in recent EU FTAs, see e.g. Art. 11.1(3) EU-Korea FTA and Art. 259(2) EU-Colombia/Peru FTA. A similar but not identical provision is also included in the SAAs and EMAAs (see for example Art. 36 EMAA Morocco and Art. 69 SAA Macedonia).

1150 Art. 255 EU-Ukraine AA.

1151 Arts. 257–260 EU-Ukraine AA.

1152 See for example Art. 11.1(2) (including the footnote to this Article) EU-Korea FTA.

the vague approximation clauses (cf. *supra*). Remarkably, the selection of EU *acquis* which Ukraine undertakes to approximate is not included in an annex but in Article 256, i.e. in the main text of the agreement. This implies that the procedure that allows the Association Council to amend the annexes of the AA (cf. *infra*)[1153] cannot be used to update this selection of legislation to evolutions in the corresponding EU competition *acquis*. Because this chapter does not foresee in its own specific mechanisms to amend or update this body of EU competition legislation, it appears that the scope of the incorporated *acquis* is 'locked' and can only be modified by the burdensome procedure of a formal Treaty change. An EU trade official explicitly called this an "error",[1154] however, now that the agreement is initialled and signed, it is difficult to rectify this. Other mechanisms to ensure the uniform interpretation and application of this legislation are also absent.

Another novelty in this chapter are the detailed provisions on state aid. Instead of building upon the WTO SCM Agreement – as in the case of several recent EU FTAs –,[1155] the agreement includes provisions which are inspired by TFEU Articles. Reflecting Article 107(1) TFEU, Article 262 of the EU-Ukraine AA states that any aid granted by Ukraine or the EU Member States through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the proper functioning of the AA insofar as it affects trade between the parties. Following, it lists the types of state aid that "shall" or "may be considered to" be compatible with the functioning of the Agreement and which are largely taken over from Article 107(2) and (3) TFEU.[1156] Thus, this section (i.e. state aid) does not include a specific list of secondary EU legislation that must be approximated by Ukraine but it 'incorporates' relevant TFEU provisions. Moreover, the parties agree to apply the provisions of this section, including the provision on transparency, "using as sources of interpretation the criteria arising from the application of Articles 106, 107 and 93 of the [TFEU], including the relevant jurisprudence of the [ECJ], as well as relevant secondary legislation, frameworks, guidelines

1153 Art. 463 EU-Ukraine AA.

1154 Interview 7 Cabinet of the European Commissioner for Trade, 18 June 2014.

1155 For example, the EU-Korea FTA builds upon the WTO SCM Agreement but also includes additional disciplines which are not, as such, covered by this WTO Agreement (Art. 11.11 EU-Korea FTA). See also Art. 12.5 EU-Singapore FTA. However, not all recent FTAs include -or refer to- the WTO SCM (e.g. the EU-Colombia/Peru FTA).

1156 The difference is that Art. 262 of the EU-Ukraine AA refers specifically to the "aid to achieve objectives allowed under the EU horizontal block exemption regulations and horizontal and sectoral state aid rules" and to aid for investment to comply with the mandatory standards of the EU Directives listed in Annex XXIX (cf. *infra*).

and other administrative acts in force in the European Union".[1157] The explicit obligation to apply and assess competition rules according to the corresponding TFEU provisions was also included in the SAAs and several EMAAs.[1158] However, the reference to the relevant jurisprudence of the ECJ is new. Still, this obligation for ECJ-conform interpretation is less strict than the analogue provision in the DCFTA services and establishment chapter since the jurisprudence of the ECJ only servers as "a source of interpretation".

Also new is that Ukraine commits itself to adopting a system of state aid control, similar to that of the EU, including an independent authority entrusted with the necessary powers for the full application of the DCFTA state aid provisions.[1159] These rules on subsidies apply to all goods and services covered by the agreement, however, a notable exception are agriculture and fisheries.[1160] The DCFTA DSM applies to the state aid section but not to the provisions on antitrust and mergers (cf. *infra*).[1161]

Finally, it has to be noted that the competition chapter in the Moldova and Georgia DCFTAs are less detailed and comprehensive. The competition chapter in the Moldova DCFTA also introduces a general obligation to maintain comprehensive competition laws and to establish an independent competition authority, however, without building upon TFEU provisions. It also lacks an obligation to approximate to EU competition legislation.[1162] Although the TFEU provisions on state aid are not taken over in this chapter as in the case of the Ukraine DCFTA,[1163] it is stated that "aid shall be assessed on the basis of the criteria arising from the application of the competition rules applicable in the EU, in particular Article 107 TFEU and interpretative instruments

1157 Art. 264 EU-Ukraine AA.

1158 See for example Art. 73(2) and (7) EU-Serbia SAA and Art. 71 (2) and (7) EU-Albania SAA. The EMAAs including such an obligation are Art. 36 (2) EU-Morocco EMAA; Art. 36 (2) EMAA Tunisia and Art. 53(2) EMAA Jordan. See also Art. 16 of the EU-Turkey Ankara Agreement.

1159 Art. 267 EU-Ukraine AA.

1160 Art. 266 EU-Ukraine AA.

1161 Most EU FTAs include a provision that excludes competition clauses from the ambit of the DSM (e.g. Art. 180 EU-Chile AA). However, in recent EU FTAs, provisions on state aid/subsidies are covered by the DSMs (e.g. Art. 12.14 EU-Singapore FTA). For a discussion and analysis on the exclusion of competition provisions in FTAs from the DSM, see D. Sokol, 'Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements', *Chicago-Kent Law Review* 83, 2008, pp. 231–292 and J. Bourgeois, *op. cit.*, footnote 1148.

1162 Arts. 333–338 EU-Moldova AA.

1163 This is the case in Art. 262 EU-Ukraine AA.

adopted by the EU Institutions, including the relevant jurisprudence of the [ECJ]".[1164] The Georgia DCFTA is less specific on this point and only includes an obligation to maintain antitrust and merger legislation and to enforce these rules through an independent authority.[1165] Contrary to the two other DCFTAs, the Georgia DCFTA refers to the WTO SCM, however, without introducing specific commitments that prohibit types of subsidies.[1166]

10.5.2 *Trade-related Energy*

A unique chapter in the DCFTA is the one on "Trade-related energy".[1167] No other FTA concluded by the EU includes such a chapter. However, several EU (trade) agreements contain provisions on energy *cooperation*.[1168] Evidently, this chapter is the result of Ukraine's crucial role as a transit-country for Russian gas and oil. This was highlighted during several Ukraine-Russia gas disputes between 2005 and 2014, which threatened the gas supply to several EU Member States.

This chapter covers electricity, crude oil and natural gas (in gaseous state or as LNG). Regarding energy prices, it states that the price for the supply of gas and electricity to industrial consumers shall be determined solely by market prices. However, the parties may impose "in the general economic interest" an obligation on undertakings which relates to the price of supply of gas and electricity. Remarkably, this "general economic interest" must be interpreted in the same sense as it is understood in Article 106 TFEU and, "in particular as provided for in the case law of the EU Party".[1169] Another important provision in this regard is the prohibition of dual pricing. Ukraine uses a two-tier pricing policy charging domestic consumers, including industrial users, lower energy prices compared to its energy export prices. The EU complained that Ukraine's dual energy pricing policy makes energy artificially cheap for the domestic Ukrainian industry, causing an unfair advantage to Ukrainian producers in the energy intensive sectors (e.g. metal and fertilisers) and that this has led to energy intensive products being dumped on the EU market. Irrespective of

1164 Art. 340 EU-Moldova AA. This obligation shall apply within five years from the date of entry into force of this agreement.

1165 Art. 204 EU-Georgia AA. However, standard provisions on state monopolies, dispute settlement, the relationship with the WTO and confidentiality are foreseen (Arts. 205–209).

1166 Art. 206 EU-Georgia AA.

1167 Chapter 11 DCFTA, EU-Ukraine AA.

1168 See for example Art. 57 EU-Morocco EMAA; Art. 109 EU-Serbia SAA; Art. 61 EU-Ukraine PCA. The EU-Ukraine AA includes, in addition, a chapter on energy cooperation (cf. *infra*).

1169 Art. 269 EU-Ukraine AA.

whether gas dual pricing is WTO consistent or not, the EU Commission has regarded this as a trade distortive practice, causing an unfair competition on the EU market. Therefore, the Commission imposed over the years several anti-dumping duties on several energy intensive products from Ukraine (e.g. petrochemical products and steel) to offset the trade distortive effects of energy dual pricing.[1170] During its WTO accession, Ukraine managed – contrary to Russia – to escape from any ('WTO-plus') accession commitments on dual pricing.[1171] WTO law does not contain energy-specific rules, apart from WTO Members' commitments on trade in energy services, incorporated in the GATS. Moreover, due to the complex nature of energy dual pricing, its legality under the WTO regime remains an open question as no WTO panel has had the chance to rule on the consistency of energy dual pricing with the WTO Agreements. Arguably, energy dual pricing, as such, is not prohibited under the WTO Agreements. It is not captured by the GATT rules on internal maximum price control measures (Art. III:9), General Elimination of Quantitative Restrictions (Art. XI:1) and State-Trading Enterprises (Art. XVII) but may fall in some cases under the WTO SCM and the WTO Agreement on Anti-dumping.[1172] Because the legality of (Ukraine's) dual pricing policy is unclear at the level of the WTO and because the EU did not address this issue during Ukraine's WTO

1170 For example, see Council Regulation No 1911/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Algeria, Belarus, Russia, and Ukraine following an expiry review pursuant to Art. 11(2) of Regulation No. 384/96 (*OJ*, *2006,* L 365/21). These EU anti-dumping measures to offset Ukraine's (and Russia's) dual pricing policy are criticised, see V. Pogoretskyy, 'The system of Energy Dual Pricing in Russia and Ukraine: The consistency of the Energy Dual Pricing System with the WTO Agreement on Anti-dumping', *Global Trade and Customs Journal* 4(10), 2009, pp. 313–323 and V. Pogoretskyy, D. Behn, 'The tension between trade liberalization and resource sovereignty; Russia-EU energy relations and the problem of natural gas dual pricing', Paper presented to the Political Economy of Energy in Europe and Russia (*PEEER*) *Conference*, University of Warwick, 3 September 2010, pp. 20–23.

1171 WTO, *op. cit.*, footnote 926, p. 17. During Russia's WTO accession process, the EU envisaged to eliminate Russia's dual energy pricing policy through WTO-plus commitments, however, with mixed results. For analysis, see G. Van der Loo, 'EU-Russia Trade Relations: it Takes WTO to Tango?', *Legal Issues of Economic Integration* 40(1), 2013, pp. 17–21. On WTO-plus commitments, see also (text to) footnote 960.

1172 For a detailed analysis on the compatibility of Energy Dual pricing with the WTO Agreements, see V. Pogoretskyy, 'Energy Dual Pricing in International Trade: Subsidies and Anti-dumping Perspectives', in Y. Selivanova (ed.), *Regulation of Energy in International Trade Law*, (Kluwer law International, Alphen aan den Rijn, 2011), pp. 181–228; Y. Silovanova, 'The WTO and Energy. WTO Rules and Agreements of Relevance to the Energy Sector', *International Centre for Trade and Sustainable Development*, 2007, p. 30.

accession process through WTO-plus commitments, a provision in the DCFTA is included which prohibits dual energy pricing. Article 270 of the EU-Ukraine AA states that "neither party shall adopt or maintain a measure resulting in a higher price for exports of energy goods to the other Party than the price charged for such goods when intended for domestic consumption".

In addition, this chapter prohibits customs duties and quantitative restrictions on the import and export of energy goods, however, some situations are listed when quantitative restrictions are justified.[1173] Regarding transit of energy goods, the DCFTA incorporates elements of Article V GATT 1994 and of Article 7 of the 1994 Energy Charter Treaty, which both cover (the freedom of) transit.[1174] Moreover, the parties also ensure that transmission system operators take the necessary measures to minimise the risk of accidental interruption or stoppage of transit and transport. Moreover, the chapters states that a party through whose territory energy goods transit or are transported shall not, in the event of a dispute over any matter involving the parties, interrupt or reduce the existing transport or transit of energy goods. It is added that a party shall not be held liable for an interruption where that party is impossible to supply or transit energy goods as a result of action attributable to a third country.[1175] These provisions are clearly inspired by the previous gas conflicts and tailored to the EU-Ukraine-Russia triangular energy relationship.

For transport of electricity and gas, and in particular third-party access to fixed infrastructure, Ukraine must approximate its legislation to the EU *acquis* as referred to in Annex XXVII and the 2005 Energy Community Treaty (ECT).[1176] Thus, also this chapter imposes an obligation on Ukraine to approximate to a selection of EU (energy) legislation. However, this is not an explicit form of market access conditionality as the implementation of these approximation commitments is not directly linked to additional market access. Significantly, the incorporated *acquis* in this annex makes cross references to Ukraine's commitments under the ECT. The listed Directives and Regulations must be implemented "as indicated in the Protocol concerning the Accession of Ukraine to the Energy Community Treaty".[1177] Significantly, the scope of the energy *acquis*

1173 These are: (i) public policy or public security, (ii) protection of human, animal or plant life or health, or the protection of industrial and commercial property (Art. 271(2) EU-Ukraine AA).

1174 Art. 272 EU-Ukraine AA incorporates Art. V:2, V:4 and V:5 of GATT 1994 and Articles 7:7 and 7:3 of the Energy Charter Treaty.

1175 Art. 276 EU-Ukraine AA.

1176 Art. 273 EU-Ukraine AA.

1177 Annex XXVII EU-Ukraine AA.

in this DCFTA annex goes beyond those of the ECT.[1178] The relation between the DCFTA and the ECT commitments is clearly defined. In the event of a conflict between the DCFTA and the ECT or EU *acquis* incorporated in the ECT, the provisions of the latter will prevail.[1179] Moreover, for the implementation of this chapter, preference must be given to the adoption of ECT-consistent legislation and neither party can use the DCFTA DSM in order to allege a violation of the provisions of the ECT.[1180] Consequently, although this chapter does not include specific mechanisms to ensure a uniform interpretation and application of the incorporated EU energy *acquis*, the uniform interpretation is indirectly 'ensured' by the relevant ECT mechanisms. However, as it will be analysed further on, these ECT mechanisms are not sufficient to achieve this objective.

This chapter also includes provisions on cooperation on infrastructure, the establishment of an independent regulatory authority and access to and exercise of the activities of prospecting, exploring for and producing hydrocarbons.[1181] It has to be noted that this DCFTA chapter is supplemented by another chapter in Title V of the AA (i.e. Economic and Sector Cooperation) on "Energy cooperation, including nuclear issues". Although Ukrainian negotiators preferred to have one overall chapter on energy, the EU party imposed to split this subject over two titles in the AA.[1182] This has important implications because the energy-related provisions in the 'cooperation' chapter fall outside the ambit of the DCFTA DSM. This chapter establishes, *inter alia*, cooperation in several energy-related issues and an "Early Warning Mechanism". This mechanism must provide for an early evaluation of potential risks and problems related to the supply and demand of natural gas, oil or electricity and the prevention and rapid reaction in case of an emergency situation (or a threat thereof). Again, these provisions are clearly tailored to the specific challenges of the EU-Russia-Ukraine energy relationship.[1183]

Because Moldova and Georgia are less important for the EU regarding transit of Russian gas and oil, the provisions in their DCFTA trade-related energy

1178 For example, Annex XXVII includes EU *acquis* on nuclear issues, the maintenance of minimum stocks of crude oil and on the prospection and exploration of hydrocarbons, which is not incorporated in Ukraine's ECT accession protocol.

1179 Art. 278(1) EU-Ukraine AA.

1180 Art. 278 EU-Ukraine AA. In the event of a dispute as regards this DCFTA energy chapter, legislation or other acts which are consistent with the ECT or the incorporated *acquis* in the ECT shall be presumed to be conform to the DCFTA (Art. 278(2)).

1181 Respectively Arts. 274, 277 and 279 EU-Ukraine AA.

1182 Interview 3 Ukrainian chief negotiator on the DCFTA, 5 March 2012, Kiev.

1183 Art. 340 EU-Ukraine AA and Annex XXVI.

chapters are less detailed. Whereas the Moldova DCFTA chapter on trade-related energy is still similar to the Ukrainian one,[1184] the corresponding chapter in the Georgia DCFTA is less detailed. It only includes provisions on transit and the relationship with the ECT[1185] and a broad commitment on market principles.[1186] Noteworthy is that the Georgia DCFTA includes a provision stating that each party shall ensure on its territory the implementation of a system of "third party access" to energy transport facilities and LNG and storage facilities.[1187] This third party access, which obliges the operators of transmission networks to grant third parties (i.e. companies other than their related companies) non-discriminatory access, is a crucial element of the EU's third energy package.[1188] Members of the ECT are obliged to implement this third energy package,[1189] including the third party access rule. Georgia is – currently – not a member of the ECT, however, through the DCFTA, it is now also obliged to implement a system of third party access.[1190] Because Moldova is already an ECT member, this provision is not included in its DCFTA.[1191]

10.5.3 *Intellectual Property, Movement of Capital, Customs and Trade Facilitation, Transparency and Trade and Sustainable Development*

The other DCFTA chapters largely resemble to the other 'post-Global Europe FTAs' since they are not based on market access conditionality or do not

1184 Chapter 11 DCFTA Moldova. Contrary to the chapter in the Ukraine DCFTA, it does not include provisions on customs duties and quantitative restrictions, cooperation on infrastructure and access to and exercise of the activities of prospecting, exploring for and producing hydrocarbons.

1185 For example, the parties shall ensure transit in accordance with the provisions of GATT 1994 and the Energy Charter Treaty (Art. 211). The DCFTA also includes provisions on uninterrupted transit and obligations for operators of energy transport and regulatory authorities (respectively Arts. 213 and 214).

1186 Arts. 216 and 218 EU-Georgia AA.

1187 Art. 217 EU-Georgia AA.

1188 For third-party access in the third energy package regarding natural gas, see Art. 32 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (*OJ*, 2009, L 211/94).

1189 Recommendation 2010/02 of the Ministerial Council of the Energy Community Treaty on the implementation of amendments to the "*acquis Communautaire* on energy".

1190 Georgia has been an observer to the ECT since December 2007 and applied for full membership in January 2013.

1191 Both the Georgia and Moldova AAs include – similar to the Ukraine AA – a chapter on energy cooperation in the Title on Economic and Sector Cooperation (respectively Chapter 2 and 14). These chapters do not establish an "Early Warning System".

include strict legislative approximation obligations. Nevertheless, these chapters include important provisions on the liberalisation of EU-Ukraine trade relations and will therefore be briefly explored.

Contrary to the SAAs and EMAAs,[1192] the EU-Ukraine DCFTA contains a detailed chapter on the protection of IPR, including detailed provisions on copyright, designs, patents and geographical indications (GIs). The aim of this IPR chapter is to facilitate the production and commercialisation of innovative and creative products and to achieve an adequate and effective level of protection and enforcement of IPR.[1193] It builds upon the WTO TRIPS Agreement,[1194] however, similar to the other post-Global Europe FTAs, this DCFTA chapter goes beyond the WTO rules by including provisions on, *inter alia*, enforcement of IPR.[1195] Regarding copyrights, the parties must comply with several international conventions and agreements. Also provisions on the duration of authors' rights, cooperation on collective management of rights, broadcasting and communication to the public, protection of technological measures and rights of management information and release rights are incorporated.[1196] New articles are included on the protection of cinematographic or audiovisual works, protections of previously unpublished works, scientific publications, distribution rights and the protection and authorship of computer programs.[1197] Also the sub-section on GIs goes beyond Article 22 and 23 of the WTO TRIPS Agreement. Instead of a

1192 Regarding IPR, the SAAs only include a vague provision stating that the parties confirm "the importance that they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights" and that the partner (SAA) country shall ensure a level of IPR similar to that existing in the Community (now Union), including effective means of enforcing such rights. Also a commitment to accede to international agreements, including the WTO TRIPS Agreement, is provided (e.g. Art. 73 SAA Albania). A similar provision, stating that the partner countries shall grant and ensure adequate and effective protection of IPR "in accordance with the highest international standards", is included in the EMAAs (e.g. Art. 44 EMAA Algeria).

1193 Art. 157 EU-Ukraine AA.

1194 Art. 158 EU-Ukraine AA requires the adequate and effective implementation of the WTO TRIPS Agreement.

1195 IPR was identified as a priority for the new generation of FTAs in the Global Europe Strategy (*op. cit*., footnote 875). Accordingly, the recent EU FTAs with, *inter alia*, Korea, Singapore and Colombia/Peru include an elaborate chapter on IPR. For analysis, see J. Drexl, 'Intellectual property rights and implementation of recent bilateral trade agreements in the EU', Max Planck Institute for Intellectual Property and Competition Law, *Research Paper* No. 12–09, 2012 and J. Drexl, H.G.R.- Khan, S.N.-Phlix (eds.), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, Heidelberg, 2014).

1196 Sub-section 1 (Section 2), Chapter 9 EU-Ukraine DCFTA.

1197 Respectively Arts. 163, 165, 166, 171, 180 and 181 EU-Ukraine AA.

legislative approximation clause, foreseen in other DCFTA chapters (cf. *supra*), a recognition provision is included stating that the parties agree that a selection of the GI legislation of the other party meets certain elements regarding registration and control of GIs, annexed to the agreement.[1198] In addition, the annexes contain an elaborate list of geographical indications of agricultural products and foodstuffs and types of wines and spirit drinks of both parties which will be protected against commercial use or misuse of the protected name for comparable products not compliant with the product specification of the protected name or false or misleading indication of the origin or nature of such a product.[1199] However, products that were produced and labelled before the DCFTA entered into force, but which do not comply with these GI requirements, may continue to be sold until stocks run out. Moreover, a transitional period of 7 or 10 years is provided during which Ukrainian producers may still use a selection of EU GIs for their comparable products such as Champagne, Cognac, Parmigiano Reggiano and Feta.[1200] Also similar to the other recent EU FTAs is the attention for civil enforcement procedures of IPR, however, explicit provisions on criminal enforcement are not foreseen.[1201] The IPR chapters in the Moldova and Georgia DCFTAs are less detailed but still largely comparable to the Ukrainian one. For example, the Georgia and Moldova DCFTAs do not foresee a transitional period and temporary measures for GIs.

Regarding current payments and movement of capital, DCFTA Chapter 7 includes provisions on the free movement of capital. Ukraine "undertakes" to complete the liberalisation of transactions on the capital and financial account balance of payments equivalent to the liberalisation in the EU. There is a link to the DCFTA services and establishment market access conditionality mechanism because a positive assessment of the Ukrainian legislation on capital movements is "a necessary precondition" of any decision by the Trade Committee to grant internal market treatment with respect to financial services (cf. *supra*).[1202] Chapter 5 on Customs and Trade Facilitation aims at reinforcing

1198 Combined reading of Art. 201(1) and (2) and Annex XXII-A. A similar procedure is also foreseen in other recent FTAs (see for example Art. 10.18 EU-Korea FTA) (however, this is not the case in e.g. the EU-Singapore FTA (Art. 11.17).

1199 Annex XXII C-D and Art. 202(3) and (4) and Art. 204 EU-Ukraine AA. New geographical indications can be added to these annexes through a decision of the Sub-Committee on Geographical Indications (Arts. 203 and 2011).

1200 Art. 208 EU-Ukraine AA.

1201 Provisions on criminal enforcement are provided in the EU-Korea FTA (Art. 10.54-61, on this issue, see footnotes 482 and 494).

1202 Art. 145(3) EU-Ukraine AA. This provision is not included in the Moldova and Georgia DCFTA chapters on Current Payments and Movement of Capital.

customs and trade facilitation matters by strengthening customs cooperation. It includes commitments of the parties that their trade and customs legislation shall be "stable and comprehensive, as well as that provisions and procedures shall be proportionate, transparent, predictable, non-discriminatory, impartial and applied uniformly and effectively".[1203] It includes, *inter alia*, a protocol on "mutual administrative assistance in customs matters"[1204] and relevant provisions of the GATT 1994.[1205] Notable is that for provisions on transit, this chapter anticipates the WTO Trade Facilitation Agreement, which was adopted at the Bali Ministerial Conference in December 2013.[1206] In addition, Article 84 states that Ukraine shall gradually approximate to the EU customs legislation and international standards as set out in Annex XI. This annex includes a selection of EU customs *acquis* which must be "incorporated into Ukrainian law" and a strict timetable.[1207] However, again, nor is this legislative approximation explicitly linked with additional market access, neither does it include provisions to ensure the uniform interpretation and application of this selection of incorporated EU legislation. Similar to other recent EU FTAs, a provision on relations with the business community is provided[1208] and an elaborate protocol on rules of origin. The Customs and Trade Facilitation chapter in the Moldova and Georgia DCFTAs is almost identical to the Ukrainian DCFTA.[1209]

In addition, the EU-Ukraine DCFTA includes – similar to the other recent EU FTAs – detailed rules on transparency.[1210] Next to publication requirements, Chapter 12 of the DCFTA contains far-reaching rules on administrative and "review and appeal" procedures. According to the latter, each party shall establish

1203 Art. 76 EU-Ukraine AA.

1204 Art. 81 and Protocol 2 EU-Ukraine AA.

1205 Art. 79 EU-Ukraine AA.

1206 Art. 76(4)a EU-Ukraine AA. For the Agreement on Trade Facilitation, see 'Ministerial Decision of 7 December 2013', WTO Ministerial Conference, ninth session, 3–6 December 2013, WT/MIN(13)/36.

1207 Regarding approximation to Regulation (EC) No 450/2008 laying down the Community Customs Code – Modernized Customs Code (MCC), Annex XV makes the difference between MCC provisions (i) only applicable to EU Member States and not relevant for approximation, (ii) provisions for approximation based on the principle of best endeavour and (iii) provisions for approximation.

1208 Art. 77 EU-Ukraine AA. See for example Art. 6.16 EU-Singapore FTA and Art. 64 EU-Peru/Colombia FTA.

1209 The only notable difference is that the scope of the incorporated *acquis* is less elaborate (Annex XIII EU-Georgia AA and Annex XXVI EU-Moldova AA).

1210 Chapter 12 EU-Ukraine DCFTA. The chapters on transparency in the Moldova and Georgia DCFTAs are almost identical.

or maintain impartial and independent courts or other independent tribunals or procedures for the purpose of the prompt review and, where warranted, correction of administrative action in areas covered by the DCFTA.[1211] As noted by Hoffmeister, "while such requirements are not spectacular for well-established states with and independent judiciary, they may be more demanding for countries in transition".[1212] These requirements will indeed be a challenge for Ukraine.

Finally, the DCFTA contains a chapter on Trade and Sustainable Development.[1213] Although earlier EU FTAs or framework agreements made reference to the principle of 'sustainable development',[1214] only the post-Global Europe FTAs include a separate chapter on "Trade and Sustainable Development".[1215] Similar to these recent FTAs, the EU-Ukraine DCFTA chapter on sustainable development incorporates provisions on social, labour and environmental standards.[1216] Although recognising the right to regulate, the parties shall ensure that their legislation provides for "high levels of environmental and labour protection".[1217] Regarding labour protection, a minimum obligation is included to "implement in their laws and practices" internationally recognised core labour standards and the ILO Conventions that the parties have ratified, including the ILO 1998 Declaration on Fundamental Rights and Principles at Work.[1218] In addition, the parties reaffirm their commitment to implement the multilateral environmental agreements to which they are party.[1219] Important is the stand-still

1211 Art. 286 EU-Ukraine AA.

1212 F. Hoffmeister, *op. cit.*, footnote 891, p. 18.

1213 Chapter 13 DCFTA, EU-Ukraine AA.

1214 The first agreement which included the principle of sustainable development was the 1993 EU-Hungary EA. For an overview of the development of the concept of 'sustainable development' in the EU's trade and development policies, see L. Bartels, 'Human rights and sustainable development obligations in EU free trade agreements', in D. Kleimann (ed.), *EU Preferential Trade Agreements: Commerce, Foreign Policy and Development Aspects*, European University Institute, 2013, pp. 127–140. See also in this volume the contribution of F. de Andrade Correa, 'The integration of sustainable development in trade agreements of the European Union' (pp. 141–156).

1215 Part IV Title VIII EU-Central America AA; Chapter 13 EU-Korea FTA; Title IX EU-Colombia/Peru FTA; Chapter 13 EU-Singapore FTA.

1216 For an overview of social norms and standards in bilateral EU FTAs, see L. Van den Putte, *et al.*, 'Social norms in EU bilateral trade agreements: a comparative overview', *CLEER Working Paper* 2013/4, pp. 35–48.

1217 Art. 290 EU-Ukraine AA. As noted in the previous title, in addition to the DCFTA chapter on sustainable development, also AA Title V on Economic and Sector cooperation includes provisions on labour standards and the environment (see footnote 381).

1218 In addition, the parties will also "consider" ratification and implementation of other ILO Conventions (Art. 291 EU-Ukraine AA).

1219 Art. 292 EU-Ukraine AA.

clause in Article 296 stating that neither party shall lower its social or environmental standards in order "to encourage trade or investment" between them.[1220] It is also stressed that these standards should not be used for protectionist trade purposes.[1221] Similar to the other recent EU FTAs, a civil society institution and a specific Trade and Sustainable Development Committee and "Group of Experts" is established which will monitor and discuss the implementation of this Chapter.[1222] These institutions are not equipped with hard enforcement mechanisms as they can only adopt non-binding recommendations or opinions.[1223] Moreover, for any matter arising under this chapter, the parties shall only have recourse to these institutions.[1224] This implies that the DCFTA DSM cannot be used for disputes regarding 'sustainable development'. Consequently, non-implementation of the commitments laid down in this chapter cannot lead to the immediate suspensions of DCFTA rights, unless they are considered as an "essential element" of this Agreement (cf. *supra*). A novelty is that an approximation clause is included stating that, as a way to achieve the objectives referred to in this chapter, Ukraine "shall approximate its laws, regulations and administrative practice to the EU *acquis*".[1225] However, this is only a vague commitment as this provision even lacks a selection of EU *acquis* for approximation. Still, this provision is difficult to reconcile with the parties' "right to regulate" their own levels of domestic environmental and labour protection.[1226]

The corresponding chapters in the Moldova and Georgia DCFTAs include more detailed commitments regarding multilateral environmental agreements and forest products and provide for additional provisions on biological diversity and cooperation on sustainable development.[1227]

10.6 Economic and Sector Cooperation

The DCFTA (Title IV of the AA) is flanked by a separate title on "Economic and Sector Cooperation" (Title V). This title provides for economic and sector

1220 Art. 296 EU-Ukraine AA.

1221 Arts. 291(4) and 292(3) EU-Ukraine AA.

1222 Art. 299 and 300 EU-Ukraine AA.

1223 For example, the parties "shall make their best efforts to accommodate advice or recommendations" of the Group of Experts on the implementation of this chapter (Art. 301(2)).

1224 Art. 300(7) EU-Ukraine AA.

1225 Art. 290(2) EU-Ukraine AA.

1226 Art. 290(1) EU-Ukraine AA.

1227 Chapter 13 EU-Moldova AA, Chapter 13 EU-Georgia AA. However, these two chapters do not include an approximation clause.

cooperation in almost 30 areas such as taxation statistics, science, technology, environment, transport, tourism and culture. The different chapters of this title mainly focus on "cooperation" by including broad – or even vague – provisions on cooperation in a certain area. Although these provisions do not create directly additional market access, their implementation will be beneficial for the establishment of the DCFTA. Thus, this title can be considered as including flanking measures for the DCFTA. For example, it is obvious that macro-economic cooperation and cooperation in the areas of statistics, transport and industrial and enterprise policy will facilitate the DCFTA implementation. A similar broad title on economic and sector cooperation is also included in other EU agreements such as the EMAAs and the SAAs.[1228] However, the main difference is that in the EU-Ukraine AA almost every chapter of Title V includes a basic *standard legislative approximation* clause.[1229] Pursuant to this provision Ukraine "shall" gradually approximate its legislation to the EU *acquis* as foreseen in the corresponding Annex.[1230] Each of these annexes provides for a specific selection of EU *acquis* which Ukraine "undertakes to gradually approximate" and a timetable.[1231] However, specific procedures to ensure a uniform interpretation and application of this incorporated EU *acquis* are not included. Other approximation clauses in this title are even less ambitious as they only confirm Ukraine's objective of legislative approximation in a certain sector without providing for a

1228 See for example Title VII EU-Ukraine PCA; Title V EU-Morocco EMAA; Title VIII EU-Serbia SAA.

1229 The title on economic cooperation in several EMAAs includes one general approximation clause (e.g. Art. 52 EU-Morocco EMAA). In the SAAs, the title on "Cooperation policies" includes several approximation commitments, however, these are less detailed than in the DCFTA and do not refer to an annex which includes a selection of EU *acquis* (e.g. Arts. 94, 96 and 97 EU-Serbia SAA) (cf. *supra, op. cit*., footnote 246).

1230 This is the case for: Chapter 4 Taxation (Art. 353 – Annex XXVIII); Chapter 6 Environment (Art. 363- Annex XXIX); Chapter 13 Company Law, Corporate Governance, Accounting and Auditing (Art. 387- Annex XXXIV and XXXV); Chapter 15 Audio Visual Policy (Art. 397- Annex XXXVII); Chapter 20 (Art. 417- Annex XXXVIII); Chapter 21 Cooperation on Employment, Social Policy and Equal Opportunities (Art. 424- Annex XXXIX) and Chapter 22 Public Health (Art. 428- Annex XL). The approximation clauses of Chapter 12 Financial Services (Art. 385) and Chapter 14 Information Society (Art. 394) refer to the approximation mechanism of Chapter 6 Establishment, Trade in Services and Electronic Commerce of the DCFTA (cf. *supra*). As noted above, Chapter 1 on Energy Cooperation makes cross references to Ukraine's approximation obligations under the ECT (Art. 341 and Annex XXVII).

1231 Whereas these standard approximation clauses in the body of the AA include a strong obligation to approximate (i.e. "shall"), their corresponding annexes include a softer obligation as it is stated that Ukraine only "undertakes to approximate its legislation".

predetermined chunk of EU *acquis* for approximation[1232] or because they lack a strict approximation commitment.[1233]

As noted above, implementation of these approximation commitments will not lead to additional market access for Ukraine. Consequently, an incentive lacks for Ukraine to actually implement this large selection of EU legislation. The annexes to this Title refer to over 60 pages of EU *acquis*, including sophisticated legislation in the area of environment and consumer protection – which is considered costly and complex to implement and enforce (cf. *infra*). In this view, the implementation of this Title will be a crucial challenge for Ukraine. On the other hand, because this approximation process is not linked with additional market access and will not directly lead to Ukraine's 'integration' into sections of the EU Internal Market, the EU did not insist to include specific and sophisticated mechanisms to ensure the uniform interpretation and application of the incorporated EU *acquis*. In this view, Title V does not include specific procedures to update the incorporated *acquis* or an obligation for ECJ case-law conform interpretation. In addition, non-implementation of these approximation commitments cannot be challenged through the DCFTA DSM, which only covers Title IV of the EU-Ukraine AA. Although the titles on economic and sector cooperation are in the Moldova[1234] and Georgia[1235] AAs structured differently, their contents is largely the same.

1232 Chapter 9 Cooperation in Science and Technology (Art. 375(1)) and Chapter 18 Fisheries and Maritime Policy (Art. 410). According to Chapter 5 Statistics, Ukraine's national statistical system should "take into account the EU *acquis* in statistics", which is set out in the annually updated Statistical Requirement Compendium and which is "considered by the Parties as annexed to this Agreement (Annex XXIX)" (Art. 355).

1233 Chapter 17 on Agriculture and Rural Development states that the parties shall "support" gradual approximation to the relevant EU legislation (Art. 405). Accordingly, the listed EU Regulations, Directives, Decisions, Recommendations and Communications in Annex XXXVII to this chapter constitute only "the legislative references when gradual approximation of legislation in a specific sector or product are considered by the Ukrainian side". Chapter 23 on Education, Training and Youth states that the parties shall "cooperate taking into consideration" the provisions of several Recommendations listed in the Annex to this Agreement. Chapter 18 Fisheries and Maritime Policy states that Ukraine has to ensure the implementation of a sustainable fisheries policy "based on priority areas in the EU *acquis*" (Art. 410). For a similar soft commitment see also Chapter 7 on Transport (Art. 368- Annex XXXI).

1234 Contrary to the EU-Ukraine AA, Title IV on Economic and Sector Cooperation in the Moldova AA includes a chapter on Public Administration and Reform (Chapter 1); Climate Action (Chapter 17); Civil protection (Chapter 22) and Cooperation in the Protection and Promotion of the Rights of the Child (Chapter 27) but it does not include a Chapter on space cooperation.

1235 The Georgia AA includes a separate title for Economic Cooperation (Title V) and "Other Cooperation Policies" (Title V). Contrary to the EU-Ukraine AA, the latter also includes a Chapter on Climate (Chapter 4) and Civil protection (Chapter 22).

CHAPTER 11

Horizontal DCFTA Provisions and Mechanisms

In addition to the DCFTA chapters that include substantive provisions on trade liberalisation and economic integration, the DCFTA, and the AA as such, also contain several 'horizontal' provisions and mechanisms. These are provisions supplementing and completing the liberalisation and economic integration processes laid down in the other 'substantive' DCFTA chapters, analysed above. The most important horizontal mechanism is the DCFTA DSM (11.1). This DSM raises questions on the exclusive jurisdiction of the ECJ to interpret the EU law and the autonomy of the EU legal order (11.2). In addition, other horizontal provisions related to legislative approximation are provided in the EU-Ukraine AA (11.3).

11.1 The DCFTA DSM

First, it has to be mentioned that for disputes concerning the interpretation, application or implementation of the non-DCFTA part of the AA, a standard dispute settlement mechanism is provided. Pursuant to this DSM the Association Council can settle disputes, after a consultation period, by way of a binding decision.[1236] If an agreement cannot be reached in the Association Council after three months, the complaining party is allowed to take "appropriate measures".[1237]

However, for disputes concerning the interpretation and application of DCFTA provisions, a separate and more sophisticated DSM is laid down in chapter 14 of Title IV.[1238] Earlier EU FTAs, including several SAAs and the initial EMAAs, were based on a traditional diplomatic approach to dispute

1236 Art. 477 EU-Ukraine AA.

1237 Art. 478 EU-Ukraine AA. In the selection of appropriate measures, priority shall be given to those which least disturb the functioning of the AA. Moreover, such measures may not include the suspension of any rights or obligations provided for under the DCFTA, with the exception of violations of essential elements (see footnote 851).

1238 As noted above, several elements of the DCFTA are excluded from this DCFTA DSM such as parts of the chapter on Trade Remedies (Art. 52), Trade and Sustainable Development (Art. 300(7)) and antitrust and mergers (Art. 261) (see, respectively, footnotes 978, 1224 and 1161).

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settlement.[1239] Such a procedure – which is similar to the DSM for the non-DCFTA part of the EU-Ukraine AA – relies essentially on consultations and diplomatic negotiations as the key mechanisms to solve trade disputes. Although the option to have recourse to arbitration was sometimes available, these arbitration procedures were rather weak (e.g. they required the agreement of both parties and lacked procedural deadlines and procedures for compliance with the arbitration ruling).

The EU-Ukraine DCFTA DSM goes far beyond these traditional diplomatic DSMs as it includes, similar to the dispute settlement mechanisms included in the post-Global Europe FTAs, a "quasi-judicial model of trade adjudication",[1240] which is largely inspired by the WTO Dispute Settlement Understanding (DSU). All the recent FTAs concluded by the EU include a similar DSM which is based on the WTO DSU.[1241] Nevertheless, several differences are considered as improvements over the WTO system, tailored to better suit the bilateral setting of the agreement, such as faster procedures, a permanent list of panelists and rules on transparency.[1242]

If there is a dispute regarding the interpretation and application of DCFTA provisions, the EU-Ukraine DCFTA DSM foresees that the parties shall first

1239 The SAAs with Macedonia (Arts. 111 and 118), Albania (Arts. 119 and 126) and the former SAA with Croatia (Arts. 113 and 120) provided for such a limited diplomatic dispute settlement procedure. However, the SAAs with Bosnia and Herzegovina, Serbia and Montenegro include, in addition to the diplomatic dispute settlement procedure, a protocol on disputes settlement which is – similar to the EU-Ukraine DCFTA DSM – modelled on the WTO DSU. The DSM established by these protocols only applies to the SAAs' trade (–related) provisions (see for example Protocol 7 EU-Serbia SAA). The EMAAs, on the other hand, initially included only a standard diplomatic dispute settlement procedure based on a vague arbitration procedure (e.g. Art. 82 EMAA Egypt, Art. 86 EMAA Morocco). However, more elaborate dispute settlement protocols for disputes regarding the EMAA trade provisions, also modelled on the WTO DSU, have been recently concluded with several EMAA partners (cf. *infra*).

1240 I.G. Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?', in L. Bartels, F. Ortino (eds.), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, Oxford, 2006), p. 383.

1241 The first agreements to include such a quasi-judicial model of dispute settlement were the 2000 EU-Mexico FTA and the 2002 EU-Chile AA (Title VIII). All the post-Global Europe FTAs include also a similar broad DSM for trade disputes modelled on the WTO DSU (see for example Article 14 EU-Korea FTA; Title X (Part IV) EU-Central America AA; Title XII EU-Colombia/Peru FTA; Chapter 15 EU-Singapore FTA).

1242 C.M. Brown, 'The European Union and Regional trade Agreements: A Case Study of the EU-Korea FTA', in C. Herrmann, J.P. Terhechte (eds.) *The European Yearbook of International Economic Law* (Springer, Heidelberg, 2011), p. 306.

seek to come to an agreement through consultations.[1243] If the parties have failed to resolve the dispute by recourse to consultations, the complaining party may request the establishment of an arbitration panel which shall rule on the dispute.[1244] An important difference with the previous standard diplomatic DSMs is that either side has the right to establish an arbitration panel and that one party cannot block the initiation of arbitration proceedings by refusing to appoint its arbitrator. This problem actually occurred in the EU-Ukraine trade relations under the PCA framework.[1245] In a rare attempt by the EU to use the standard PCA DSM in a dispute with Ukraine over laws promoting automobile production, Ukraine blocked the dispute resolution by simply refusing to appoint its own arbitrator.[1246] Instead, in the EU-Ukraine DCFTA DSM, a permanent list of panelists is provided out of which the parties may choose their nominees for a given dispute.[1247] If the parties cannot agree on the composition of the panel (three arbitrators), the panelists will be drawn by lot from the permanent list.[1248] These arbitrators must comply with a Code of Conduct which is annexed to the Agreement.[1249] Rulings of the arbitration panel shall be binding and each party must take the necessary measures to comply with them.[1250] However, it is explicitly stated that "they shall not create any rights or obligations for natural or legal persons", thus excluding direct effect.[1251] As noted above, this is mainly to avoid direct effect of the WTO provisions, incorporated in the DCFTA.[1252] If the party complained against fails to take such measures to comply with the ruling without offering a temporary compensation, the other party is entitled to suspend obligations arising from

1243 Art. 305 EU-Ukraine AA.

1244 Art. 306 EU-Ukraine AA.

1245 For the procedure, see Art. 96 PCA Ukraine.

1246 M. Bronckers, N. McNelis, 'The EU Trade Barriers Regulation Comes of Age', in A. von Bogdandy, *et al.* (eds.) *European Integration and International Coordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International, The Hague, 2002), p. 64.

1247 Art. 323 EU-Ukraine AA. The Trade Committee must establish a list of 15 independent individuals. Each of the parties shall propose five individuals to serve as arbitrators and the two parties shall also select five individuals that are not nationals of either party and who shall act as a chairperson to the arbitration panel. This procedure is different in the WTO DSU which uses *ad hoc* panellists.

1248 Art. 307(3) EU-Ukraine AA.

1249 Annex XXV EU-Ukraine AA.

1250 Art. 312 EU-Ukraine AA provides for a procedure to determine the "reasonable period of time" to comply with the arbitration panel ruling.

1251 Art. 321(2) EU-Ukraine AA.

1252 On this point, see text to footnote 789 and A. Semertzi, *op. cit.,* footnote 791.

the DCFTA "at a level equivalent to the nullification or impairment caused by the violation".[1253] Compared to the WTO DSU, this procedure is significantly quicker (maximum 150 days between the establishment of a panel and its ruling, contrary to 9 months in the DSU). Moreover, there is no appellate forum in the DCFTA DSM.[1254] The relation between the DCFTA DSM and the WTO DSU is clarified in Article 324, which states that the provisions of this chapter are without prejudice to possible dispute settlement under the WTO. However, the parties are not allowed to pursue dispute settlement under both systems as regards the same measure until the first proceeding has finished.[1255]

A separate mediation mechanism is included that the parties can use to tackle market access problems due to non-tariff measures.[1256] The aim of this chapter is not to review the legality of a measure, but to find a quick and effective solution to market access problems without recourse to litigation. This mechanism functions through the appointment of a mediator who can advise and propose a non-binding solution within 60 days.[1257] This mechanism does not exclude the possibility to have recourse to dispute settlement.[1258]

As already indicated above, this DCFTA DSM is almost identical to the dispute settlement procedures included in the recent post-Global Europe FTAs. Moreover, following a 2006 Council Decision which authorised the Commission to open negotiations with the EU's EMAA partners to establish a dispute settlement mechanism related to the EMAA trade provisions, dispute settlement protocols modelled on the WTO DSU – hence similar to the Ukraine DCFTA DSM – have been concluded with Tunisia, Jordan, Egypt,

1253 Art. 315(2) EU-Ukraine AA. When suspending obligations, the complaining party may choose to increase its tariff rates to the level applied to other WTO Members in a volume of trade to be determined in such a way that the volume of trade multiplied by the increase of the tariff rates equals the value of the nullification or impairment caused by the violation.

1254 Another notable difference with the WTO DSU is that interested natural or legal persons established in the parties' territories are authorised to submit *amicus curiae* briefs to the arbitration panel (Art. 319 EU-Ukraine AA).

1255 Art. 324 EU-Ukraine AA. In addition, this provision states that a party shall not seek redress of an identical obligation in both forums unless the selected forum fails to rule on the particular matter because of jurisdictional or procedural reasons.

1256 Chapter 15 DCFTA EU-Ukraine. A similar procedure was also proposed in the WTO by the EU (WTO, 'Non Tariff Barriers – Proposal on Procedures for the Facilitation of Solutions to NTBs Communication from the African Group, Canada, European Communities, LDC Group, NAMA –11 Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland', TN/MA/W/88, 23 July 2007).

1257 Art. 331 EU-Ukraine AA.

1258 Art. 333 EU-Ukraine AA.

Lebanon and Morocco.[1259] Nevertheless, the EU-Ukraine DCFTA DSM includes two unique elements, i.e. a separate procedure for urgent energy disputes and a dispute settlement procedure relating to legislative approximation. Regarding energy disputes, the EU-Ukraine DCFTA DSM foresees quicker procedures relating to the consultations, the composition of the arbitration panel and the issuance of the (interim) panel report if one party considers that dispute settlement is urgent because of an interruption of any transport of gas, oil or electricity, or a threat thereof.[1260] This procedure, obviously tailored to the challenges of to EU-Ukraine-Russia triangular energy relationship, should allow the parties to react in a swift manner to potential future energy disputes. The dispute settlement procedure relating to legislative approximation will be discussed in the following chapter (11.2).

11.2 DCFTA Dispute Settlement Procedures Regarding Legislative Approximation: Challenges for the Autonomy of the EU Legal Order?

The DCFTA also includes a specific DSM exclusively related to legislative approximation. Article 322 establishes a unique procedure that only applies to disputes concerning the interpretation and application of provisions relating to legislative approximation in a limited number of DCFTA chapters, "or which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law".[1261] If a dispute in relation to one of those chapters concerns a question of interpretation of a provision of EU law, it is stated that:

> the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such

1259 For texts, see: Tunisia (*OJ*, 2010, L 40/75); Jordan (*OJ*, 2011, L 177/1), Egypt (*OJ*, 2011, L 138/2); Morocco (*OJ*, 2011, L 176/2) and Lebanon (*OJ*, 2010, L 238/20). A notable difference is that compared to the EU-Ukraine DCFTA, the procedures in these EMAA DSM protocols are longer (e.g. maximum 180 days between the establishment of a panel and its ruling (Art. 8(1) EU-Morocco DSM Protocol)). As noted in footnote 1239, the latest SAAs also include such a DSM.

1260 Arts. 305(5); 307(8); 308(4) and 310(3) EU-Ukraine AA. A separate conciliation and remedies procedure for urgent energy disputes is also provided (Arts. 309 and 314).

1261 These chapters are Technical Barriers to Trade (Chapter 3), Sanitary and Phytosanitary Measures (Chapter 4), Customs and Trade Facilitation (Chapter 5), Establishment, Trade in Services and Electronic Commerce (Chapter 6), Public Procurement (Chapter 8) and Competition (Chapter 10).

> cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.[1262]

Consequently, this procedure is not a mere dispute settlement procedure, it is also a unique judicial mechanism to ensure the uniform interpretation and application of the incorporated *acquis*, as defined in the first title of this book.[1263] The innovative element in this procedure is that it is the arbitration panel which is attributed the *obligation* to ask the Court for a preliminary ruling for disputes relating to the interpretation of the incorporated EU *acquis*.[1264] As already noted, similar procedures exist in other EU integration agreements, however, in these cases the contracting parties (e.g. the EEA) or their national courts or tribunals (e.g. the ECAA or the EEA) or the Association Council (e.g. the Ankara Agreement) have the *possibility* (thus no obligation) to ask the ECJ for a preliminary ruling.[1265]

As mentioned in Title I and illustrated by Opinion 1/91, the establishment of judicial mechanisms to ensure a uniform interpretation and application of the EU law in EU integration agreements on the one hand and the preservation of the exclusive jurisdiction of the ECJ to interpret the Union's *acquis* – and by extension the autonomy of the EU legal order – on the other hand, are not always easy to combine. Nevertheless, it seems that the procedure provided for by Article 322 AA has found the right equilibrium.

1262 Art. 322(2) EU-Ukraine AA.

1263 Contrary to the preliminary ruling procedure in the EU (Art. 267 TFEU), the arbitration panel cannot ask for a preliminary ruling concerning the *validity* of EU acts.

1264 Such a preliminary ruling procedure can only be initiated before the Court of Justice and not before the General Court as the Statute of the latter does not provide for the possibility for preliminary rulings (Art. 256 (3) TFEU). This is, however, less clear in other EU integration agreements such as the EU-Switzerland Air Transport Agreement which gives "the Court of Justice of the European Communities [now Union]" the exclusive competence to rule on questions concerning the validity of decisions of Union institutions taken on the basis of their competence under this agreement (see footnote 169). For example, in an action for an annulment of a Commission Decision, initiated by Switzerland on the basis of this procedure, the Court decided that this action for annulment had to be brought, in first instance, before the Court of First Instance (now the General Court), and not before the Court of Justice (see Case C-547/10, *Switzerland v Commission*, *nyr*). For a critical analysis on this decision, see M. Maresceau, 'EU-Switzerland: *quo vadis*?', *Georgia Journal of International and Comparative Law* (39), 2012, p. 749; G. Van der Loo, 'Zwitserse Bondsstaat/ Europese Commissie', *Tijdschrift voor Europees en Economisch Recht* 7/8, 2013, pp. 333–336.

1265 See (the text to) footnotes 152 to 157. For examples of international agreements concluded by the EU that grant the ECJ a specific form of jurisdiction, see footnote 169.

First, it has to be stressed that the establishment of an arbitration panel in an international agreement, concluded by the EU, to rule on disputes regarding the interpretation and application of that agreement, is as such not prohibited. The ECJ noted in Opinion 1/91 that an international agreement which provides for its own system of courts, including a court with jurisdiction to settle disputes between the contracting parties to an agreement, and, as a result, to interpret its provisions, is in principle compatible with EU law.[1266] Crucial is that it added that such rulings must be binding on the EU institutions, including the Court of Justice.[1267]

Second, a crucial difference between the EU-Ukraine AA and the EEA is that in the latter the unique objective of homogeneity is explicitly enshrined, which has the express aim of extending EU law for uniform interpretation and application to the three EFTA States. With the inclusion of this objective, the EEA Agreement deviates from the settled ECJ case-law which states that the fact that provisions of an agreement are identical to EU rules does not mean that they must necessarily be interpreted identically (cf. *supra*).[1268] Accordingly, the underlying idea of the EEA homogeneity objective is that it should no longer be possible to dissociate the international agreement from identical provisions of EU law.[1269] This implies that any interpretation of the incorporated EU *acquis* in the EEA Agreement has an impact on the corresponding rules of EU law. On this issue, the ECJ ruled that, "the [EEA] Agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community [now Union] law".[1270] This was exactly one of the reasons why the ECJ rejected the first draft EEA Agreement.[1271] The ECJ ruled that due to this homogeneity objective, the proposed EEA Court would have been allowed to interpret Community law – without being bound by ECJ's rulings. This would have conflicted with the exclusive jurisdiction of the ECJ to interpret Community (now Union) law.

Because the EU-Ukraine AA does not include such an explicit homogeneity objective, in the absence of Article 322 AA, the DCFTA arbitration panel would

1266 Opinion 1/91, *op. cit.,* footnote 111, paras. 39–40.

1267 *Ibid.*

1268 *Ibid,* para. 14 and Case 270/80 *Polydor v Harlequin,* [1982], ECR 329, para. 15–19.

1269 I. Govaere, 'Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the autonomy of the EU Legal Order', in C. Hillion, P. Koutrakos (eds.), *Mixed Agreements Revisited* (Hart Publishing, Oxford, 2010), p. 197.

1270 Opinion 1/91, *op. cit*., footnote 111, para. 45.

1271 For analysis, see B. Brandtner, 'The 'Drama' of the EEA. Comments on Opinions 1/91 and 1/92', *European Journal of International Law* 3, 1992, pp. 300–328; M. Cremona, *op. cit.,* footnote 163.

be able to rule on the interpretation of the incorporated EU *acquis,* but not on the corresponding provisions of EU law as such (even though these are worded identically). Consequently, it would not encroach on the ECJ's exclusive jurisdiction to interpret the EU law.[1272] Nevertheless, it appears that Article 322 is still included in the EU-Ukraine DCFTA to avoid that the arbitration panel would rule on the interpretation of the incorporated EU *acquis,* which is textually identical to rules of EU law. Article 322 is not superfluous considering that the rulings of the arbitration panel are binding on the parties, thus including on the EU Member States. If the arbitration panel would be allowed – in the absence of Article 322 AA – to rule on the interpretation of a DCFTA provision which is textually identical to a rule of EU law, this interpretation would be binding on the EU Member States. Because in this case the arbitration panel would not be bound by ECJ's rulings,[1273] a situation could occur that, on the one hand, in its relations with Ukraine, the EU and its Member States are bound by a particular arbitration panel interpretation of a rule of the incorporated EU *acquis*, whereas, on the other hand, for intra-Union relations, they are bound by a different ECJ interpretation of the corresponding rule of EU law. Although from a strict legal point of view such a scenario would – due to the absence of the homogeneity objective – be possible, it would not be beneficial for the establishment of the common legal space that the EU-Ukraine AA envisages. Thus, Article 322 avoids such a schizophrenic situation by *obliging* the arbitration panel to ask for a preliminary ruling to the ECJ when there is a dispute on the interpretation of the incorporated EU *acquis*.

In order to be certain that Article 322 AA does not affect the autonomy of the EU legal order, the different criteria of the ECJ, laid down in Opinion 1/00, can be applied to this specific DSM procedure. In this Opinion, the Court ruled that the autonomy of the EU legal order is not affected by a DSM set up under an international agreement if the Union and its institutions are, in the exercise of their internal powers, not bound by a particular interpretation of rules of Union law, referred to in that agreement (i) and that the essential character of the powers of the EU (ii) and its institutions (iii), as conceived in the Treaties, remain unaltered.[1274] Regarding the first criterion, it was illustrated that, due to Article 322 and the lack of an explicit homogeneity objective, the arbitration panel cannot interpret EU law, neither provisions of the agreement which are

1272 Art. 19 TEU.

1273 As already noted, only in the services chapter, there is a strong *obligation* for ECJ case-law conform interpretation of provisions which are identical to EU *acquis* (cf. *supra*).

1274 Opinion 1/00, *op. cit*., footnote 80, para. 12–13. For analysis, see I. Govaere, *op. cit.,* footnote 1269, p. 192 and R. Holdgaard, *op. cit.,* footnote 163, p. 86.

identical to EU law. Consequently, the Union and its institutions can never, in the exercise of their internal powers, be bound by an interpretation of the arbitration panel of rules of EU law, referred to in the DCFTA.[1275] In addition, Article 322 AA does not alter "the essential character" of the powers of the EU and its institutions. Crucial in this regard is that this provision states that the rulings of the ECJ will be binding on the arbitration panel. As noted by the Court in Opinion 1/91, purely advisory opinions would change the nature and the function of the ECJ as it is conceived in the Treaties.[1276]

It is clear from this analysis of Article 322 that this procedure is far-reaching from the perspective of transfer of sovereignty. Ukraine accepts in an international agreement to be bound by the interpretation of a court of the other contracting party (i.e. the ECJ) for *any* dispute regarding the interpretation of provisions of that agreement that are actually rules of the 'internal' law of that other party (i.e. the EU). The fact that Ukraine accepts this role of the ECJ for these disputes only 'indirectly' (i.e. through a preliminary ruling procedure, initiated by an arbitration panel), was considered by an EU official as a good political compromise as it partially conceals the explicit nature of Ukraine's submission to the ECJ.[1277] Nevertheless, considering the broad scope of the incorporated EU *acquis* in the DCFTA, this is an extreme commitment which can only be explained by a strong political will of Ukraine to be integrated into the EU. Contrary to this DCFTA procedure, the EEA and the ECAA do not impose an *obligation* to ask for a preliminary ruling for disputes concerning the interpretation of the incorporated EU *acquis.* In addition, the EEA and ECAA include 'sovereignty safeguards' allowing the partner countries to decide whether or not to ask for a preliminary ruling to the ECJ. However, these procedures may lead to the last resort 'nuclear' option of suspension or denunciation of the agreement.[1278]

1275 As mentioned above (footnote 161) a crucial element in the EEA Agreement on this point is the *procès-verbal agréé ed article 105* according to which decisions taken by the Joint Committee under Art. 105 (which states that the EEA Joint Committee shall keep under constant review the development of the case-law of the ECJ and the EFTA Court and shall act so as to preserve the homogeneous interpretation of the EEA Agreement) are not to affect the case-law of the Court of Justice.

1276 Opinion 1/91, *op. cit.*, footnote 111, paras. 59–65.

1277 Interview 7 Cabinet of the European Commissioner for Trade, 18 June 2014.

1278 For example, in the EEA, a partner country can block the decision process in the Joint Committee for a decision aiming at the preservation of the homogeneous interpretation of the agreement (Art. 105). Subsequently, the dispute settlement procedure of Art. 111 "may" be applied according to which, for disputes concerning the interpretation of the incorporated EU *acquis*, the contracting parties "may agree" (thus no obligation and both

There are no important differences in the dispute settlement mechanisms (both the general DCFTA DSM and the specific DSM for legislative approximation) in the Georgia and Moldova DCFTAs.[1279]

11.3 Horizontal Provisions Related to Legislative Approximation

The last group of 'horizontal provisions' that completes the substantive DCFTA chapters is related to the process of legislative approximation. As these provisions are included in Title VII on Institutional, General and Final Provisions, they apply to the entire AA and not only on the DCFTA. Thus, they also complement the different legislative approximation provisions in Title V on Economic and Sector Cooperation.

A general legislative approximation provision is foreseen which applies to all the different legislative approximation commitments included in the EU-Ukraine AA. Article 474 AA states that "Ukraine will carry out gradual approximation of its legislation to EU law" as referred to in the Agreement and its Annexes. Thus, this provision does not create new obligations but refers to the other approximation clauses in the Agreement.

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parties must agree) to request the ECJ to give a ruling on the interpretation of the relevant rules. However, if the contracting parties have not decided to ask for such a preliminary ruling, the other party may, in order to remedy possible imbalances, take safeguard measures or suspend the affected part of the agreement according to Article 102 EEA. Moreover, Article 107 and Protocol 34 EEA only provide the EFTA States with the possibility (no obligation) to allow a court or tribunal to ask the ECJ to decide on the interpretation of an EEA rule. Similarly, in the one-pillar structure of the ECAA, for a question on interpretation of the incorporated EU *acquis*, national courts or tribunals of an ECAA partner are not obliged to ask for a preliminary ruling (Art. 16 and Annex IV ECAA). If, in the absence of such a preliminary ruling, the Joint Committee cannot preserve the homogeneous interpretation of the agreement, the dispute settlement procedure of Art. 20 may be initiated according to which the parties "may" (thus again no obligation) refer the dispute to the ECJ whose decisions shall be final and binding. If parties cannot agree on such a preliminary ruling, the contracting parties may take safeguard measures or denounce the agreement according to Art. 20(4) ECAA. Both procedures have never been used. Moreover, Annex IV ECAA states that the ECAA partners may stipulate the extent to which, and according to what modalities, its courts and tribunals are to apply this provision (on this point, see text to footnotes 152 to 157).

1279 A notable exception is that the DSM chapter in the Moldova and Georgia DCFTAs does not – contrary to the Ukraine DCFTA – include a footnote stating that "this Title shall not be construed as conferring rights or imposing obligations which can be directly invoked before the domestic courts of the Parties", thus excluding direct effect.

A notable horizontal provision is included for the updating of the incorporated EU *acquis*, annexed to the AA. Article 463 AA states the Association Council may update or amend *all* the annexes to the agreement,[1280] "taking into account the evolution of EU law" but "without prejudice to the specific approximation provisions of [the DCFTA]". Consequently, this provision does not apply to the DCFTA chapters such as those on services and public procurement which have their own specific – and more detailed – procedures to update the incorporated EU *acquis* (cf. *supra*). This procedure can hardly be seen as a dynamic mechanism for the updating of the incorporated EU *acquis* since the Association Council is not *obliged* to amend the Annexes, neither must it consider every modification of the corresponding EU rule at the level of the AA. Because the Association Council decides "by agreement", Ukraine can always veto this process, even if the EU insists on updating the annexes.[1281] It has to be stressed that the Association Council is only allowed to amend the annexes related to legislative approximation.

The last important horizontal provision is the 'monitoring clause'.[1282] This provision establishes a monitoring mechanism for the implementation of this Agreement and focuses on the appraisal of Ukraine's approximation to the EU law, "including aspects of implementation and enforcement", as defined in the AA. It supplements the specific monitoring provisions included in the different AA – mainly DCFTA – chapters. Pursuant to this procedure, the assessments may be conducted individually or jointly by the parties. Ukraine must report to the EU on its progress related to legislative approximation before the end of the transitional periods set out in the annexes. This monitoring may include "on-the-spot missions" with the participation of EU institutions, bodies and agencies or independent experts and the results of these monitoring activities shall be discussed in the relevant committees.[1283] Again, these procedures are far-reaching from a 'sovereignty' point view. Nevertheless, this general monitoring procedure is still less detailed than the procedures included in several DCFTA chapters where the implementation of the legislative approximation commitments will lead to ambitious additional market access (e.g. services and public procurement (cf. *supra*)).

1280 Annexes I to XLIII EU-Ukraine AA.

1281 Art. 463(2) states that the Association Council will be a forum for exchange of information on EU and Ukrainian legislative acts, "both under preparation and in force, and on implementation, enforcement and compliance measures".

1282 Art. 475 EU-Ukraine AA.

1283 Art. 475(3) EU-Ukraine AA.

This general monitoring clause makes references to the DCFTA market access conditionality as it states that the Association Council may agree on further market opening, as defined in the DCFTA, if the parties agree that Ukraine has "implemented and enforced" its relevant DCFTA commitments. Significantly, the failure of the Association Council to decide on such further market opening cannot by challenged in the DCFTA DSM.[1284] These horizontal provisions regarding legislative approximation are almost identical in the Moldova and Georgia AAs.[1285]

1284 Art. 475(6) EU-Ukraine AA.

1285 See Arts. 448–452 EU-Moldova AA and 414–416 EU-Georgia AA. The only difference is that in the Moldova and Georgia AAs, a separate provision is included on "dynamic approximation". This provision prescribes that the Association Council "shall periodically revise and update [the] Annexes, including to take into account the evolution of EU law as defined in this Agreement", without prejudice to any specific provision under the DCFTA (Art. 49 EU-Moldova AA and Art. 415 EU-Georgia AA). The provision in the Georgia AA refers to "the completion of the internal procedures of the Parties". Although these provisions refer to a "dynamic" procedure, it is clear that they establish – similar to the corresponding provisions in the EU-Ukraine AA –, only a static mechanism to update the incorporated *acquis*.

CHAPTER 12

An Assessment of the EU-Ukraine DCFTA

Although the EU-Ukraine DCFTA has the unique and ambitious objective to "gradually integrate Ukraine into the EU Internal Market", it is clear from the analysis above that the integration dimension of the DCFTA is rather mixed (12.1). Moreover, it can be concluded that also the 'innovative' dimension of the DCFTA is limited and mainly relates to the different forms of market access conditionality (12.2). Although the overall coverage and contents of the Moldova and Georgia DCFTAs are largely similar to the Ukraine DCFTA, several important differences can be identified (12.3). The complexity of the EU-Ukraine DCFTA and the scope of its approximation clauses are unprecedented, which will result in high implementation costs and raises questions regarding the legitimacy of the approximation process (12.4). This leads to the conclusion that this trade agreement can only be used – to a certain extent – as a blueprint for a limited number of other envisaged EU international agreements (12.5).

12.1 A Legal Instrument for Gradual Integration in the EU Internal Market?

The DCFTA analysis illustrated that this trade deal does not include one single 'horizontal' mechanism for market access conditionality and gradual integration into the EU Internal market. Instead, almost every DCFTA chapter contains its own integration mechanism, based on different forms of market access conditionality and different procedures to guarantee the uniform interpretation and application of the incorporated EU *acquis* (Table 6). Therefore, the integration dimension of the DCFTA varies from chapter to chapter.

An important observation is that the more ambitious the integration objective or (additional) market access of a DCFTA chapter is, the more detailed the market access conditionality and mechanisms to ensure a uniform interpretation and application of the incorporated EU *acquis* are. This is clearly visible in the DCFTA chapters on services/establishment and public procurement. These are the only two DCFTA chapters where juridical persons of Ukraine will be able to actually "integrate" in the EU Internal Market and to be treated "in

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TABLE 6 *DCFTA procedures for market access conditionality and procedures for the uniform interpretation and application of the incorporated EU acquis*

					Procedures for uniform interpretation and application EU *acquis*		
	DCFTA chapter	**Additional EU market access**	**Incorporated EU *acquis* for approximation**	**Monitoring procedure**	**Procedure to amend or update incorporated EU *acquis***	**Obligation for ECJ case-law conform interpretation of incorporated EU *acquis***	**Preliminary ruling procedure**
DCFTA chapters *with* market access conditionality	Technical barriers to trade	Conclusion of an ACAA	Indirect references to the New Approach Directives and their updates (Annex III)	Basic/strict (Arts. 56(4); 57(3))	Static (Art. 463(3))	–	Art. 322
	Sanitary and phytosanitary measures	Determination of equivalence	No predetermined selection of EU *acquis* ("Comprehensive Strategy" (Annex V))	Basic/strict (Arts. 64(3); 74(2))	Static procedure to update the "Comprehensive Strategy" (Art. 74(2))	–	Art. 322
	Services & establishment (4 sub-sections)	Internal market treatment (IMT)	Predetermined selection EU *acquis* + timetable and "general principles and obligations on legislative approximation"/"horizontal adaptations and procedural rules" (Annex XVII)	Strict (cross-comparison table, progress reports, etc. (Annex XVII))	Before IMT: Dynamic (amend or update to "any" new or amended corresponding EU Act) After IMT: Dynamic (Annex XVII)	Binding (Annex XVII)	Art. 322

TABLE 6 *DCFTA procedures for market access conditionality and procedures for the uniform interpretation and application of the incorporated EU acquis* (cont.)

					Procedures for uniform interpretation and application EU *acquis*		
	DCFTA chapter	**Additional EU market access**	**Incorporated EU *acquis* for approximation**	**Monitoring procedure**	**Procedure to amend or update incorporated EU *acquis***	**Obligation for ECJ case-law conform interpretation of incorporated EU *acquis***	**Preliminary ruling procedure**
	Public procurement	Access EU internal market	Predetermined selection EU *acquis* in annex, including classification and 'indicative time schedule' (Annex XXI)	Strict (Art. 153(2); Annex XXI)	Static (Arts. 153(2); 463(3))	"Due account" must be taken (Art. 153(2))	Art. 322
DCFTA chapters *without* market access conditionality	Competition	–	Predetermined selection of EU competition *acquis* listed in the main text of the agreement (Art. 256)	Basic (Art. 475)	–	"A source of inspiration" for the implementation of state aid provisions (Art. 264)	Art. 322
	Trade-related energy	–	Predetermined selection EU energy *acquis* (+cross reference ECT obligations)	Basic (Art. 475)	Static (Art. 463(3))	–	Art. 322

	Intellectual property, movement of capital, customs, transparency, sustainable development	–	Only chapter on Customs and Trade Facilitation and Sustainable Development include an approximation clause (no selection EU *acquis* annexed to the latter)	Basic (Art. 475)	Static (Art. 463(3))	–	Art. 322
Title V economic & sector cooperation	Chapters with a "standard legislative approximation clause"	–	Predetermined selection of EU *acquis* in annex + timetable	Basic (Art. 475)	Static (Art. 463(3))	–	–

the same way as juridical persons of EU Members States",[1286] without any restriction. The envisaged "Internal Market Treatment" in the area of establishment and the full access of Ukrainian companies to the EU public procurement market indeed constitute, according to the Commission, "unprecedented example[s] in allowing possible access of Ukraine, as a non EEA member to the EU [Internal] Market".[1287] Accordingly, these two DCFTA chapters have the strictest procedures for market access conditionality. Although the parties will already significantly liberalise trade immediately and unconditionally once the agreement enters (provisionally) into force (e.g. market access, national treatment and the incorporation of relevant WTO rules), the partial 'integration' into the EU Internal Market (i.e. the Internal Market Treatment and full access to the EU's public procurement market) will only by granted after strict monitoring procedures related to Ukraine's approximation to the incorporated EU *acquis*. As it was illustrated, these monitoring procedures are far-reaching and include pre-accession inspired elements such as cross-comparison tables and focus as well on the effective and continuous implementation, application and enforcement of the incorporated EU *acquis*. This strict market access conditionality reveals that the EU is very cautious to open up its services/establishment and public procurement market for a third country with a less developed economy and administrative capacity than an EEA country. Moreover, this market access conditionality does not imply automaticity. Even if the relevant EU institutions confirm that Ukraine has achieved the required level of legislative approximation, a political decision still has to be taken by the Trade Committee to reciprocally open up the markets. Hand in hand with this strict market access conditionality are the detailed procedures to ensure the uniform interpretation and application of the incorporated EU *acquis*. It was noted that due to the strong integration dimension of the DCFTA services/establishment chapter – and to a lesser extent the public procurement chapter – certain provisions are even taken over from the EEA Agreement. Although the objective of a homogeneous interpretation and application of the incorporated services and establishment *acquis* throughout the EU and Ukraine is not explicitly envisaged, the services/establishment chapter includes EEA-like rules on how the incorporated EU *acquis* has to be made part of the internal

1286 Art. 3; Annex XVII EU-Ukraine AA.

1287 European Commission, 'Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part', COM (2013) 289, 15 May 2013.

legal order of Ukraine (cf. Article 7 EEA), on ECJ case-law conform interpretation of the incorporated EU *acquis* (cf. Article 6 EEA) and provides for "horizontal adaptations and procedural rules" (cf. Protocol 1 of the EEA). In addition, dynamic procedures to update the annexes and an ECJ preliminary ruling procedure related to the interpretation of the incorporated EU *acquis* are included. These elaborate procedures have to ensure that Ukraine's integration into the EU Internal Market does not come at the cost of its correct and uniform functioning and, consequently, lead to a *de facto* homogenous interpretation of the incorporated services *acquis*.

Accordingly, in the DCFTA chapters where the market access conditionality will result in less advanced forms of integration into the EU Internal Market such as the SPS chapter (i.e. the determination of equivalence), the procedures to ensure the uniform interpretation and application are less detailed (Table 6).

This is even more the case in those DCFTA chapters where there is no market access conditionality and, consequently, where legislative approximation will not result in additional liberalisation or integration into the EU Internal Market (e.g. competition, trade-related energy, customs and trade facilitation). These chapters will unconditionally liberalise EU-Ukraine trade relations, irrespective of Ukraine's legislative approximation track record. Nevertheless, it was observed that several of these chapters include an approximation clause (e.g. competition, trade-related energy, customs and trade facilitation and trade and sustainable development). The fact that the implementation of these approximation clauses will not result into additional liberalisation or 'integration' into a section of the EU Internal Market has two important consequences. *First*, because an integration dimension is absent in these chapters, the EU did not impose to flank these approximation clauses with strict procedures to ensure the uniform interpretation and application of the incorporated EU *acquis*, as it is for example the case in the services/establishment chapter. These chapters lack an obligation for ECJ case-law conform interpretation and only provide for static procedures to update the annexes and a basic monitoring mechanism (Table 6). Although these inadequate procedures can undermine the establishment of a common legal space between the EU and Ukraine, it will not affect the functioning of the EU Internal Market. Legislative approximation in these chapters only aims to export a section of the EU Internal Market *acquis* to Ukraine, and not to fully integrate Ukraine into a section of the Internal Market. *Second*, because the implementation of the approximation clauses in these chapters is not 'rewarded' with a form of (additional) integration into the EU Internal Market, there is no tangible incentive for Ukraine to actually implement these provisions. Implementing and enforcing the EU Internal Market legislation in areas such as competition, trade-related energy

and sustainable development is a complex and costly undertaking, both for the public and private sector (cf. *infra*). Although the Commission argues that this approximation process will also be beneficial for the modernisation of the Ukrainian economy and will spur foreign investments, these are only long-term benefits. This reasoning equally applies to the approximation clauses in Title V on Economic and Sector Cooperation, where Ukraine undertakes to approximate to a huge chunk of EU *acquis* without being offered a specific form of additional market access.

Due to the large variation between the different DCFTA chapters, it is difficult to give an all-embracing assessment of the integration dimension of the DCFTA. Considering the criteria developed in Title 1 of this work, it is clear that the DCFTA is, as an integral part of the AA, an EU integration agreement. It contains numerous obligations to apply, implement, or incorporate in the domestic legal order a predetermined selection of EU *acquis* (the *conditio sine qua non* of an EU integration agreement) and several of its chapters meet one or several of the benchmarks regarding the uniform interpretation and application of the EU *acquis*. However, only the DCFTA chapter on services/establishment – and to a lesser extent public procurement – meet all three benchmarks, i.e. a dynamic procedure to update the incorporated EU *acquis*, an obligation for ECJ case-law conform interpretation of the incorporated *acquis* and a judicial mechanism to ensure the uniform interpretation of the incorporated EU *acquis* (i.e. Article 322). Only in these chapters, the uniform interpretation and application of the EU law is sufficiently guaranteed. Although the objective of homogeneity is not enshrined in the AA or DCFTA, it is almost *de facto* achieved in the services/establishment chapter. As argued above, this is the result of this chapters' aim to actually integrate juridical persons of Ukraine into a section of the EU Internal Market. Only a few other ambitious EU integration agreements meet all three benchmarks such as the EEA and the ECAA (Table 2). The integration dimension of the other DCFTA chapters is much more restricted since they do not include an obligation for ECJ case-law conform interpretation or because they lack a dynamic procedure to update the incorporated EU *acquis*. Several chapters do not even meet the *conditio sine qua non* of an EU integration agreement as they do not include an obligation to apply or implement a selection of EU legislation.

The DCFTA differs from the other EU integration agreements because it is an integral part of an overall framework agreement (i.e. the EU-Ukraine AA). Most EU integration agreements are sectoral and integrate a third country only into a section of the EU Internal Market (e.g. energy and aviation). The only framework integration agreement is the EEA, which extends the entire EU Internal Market to the EFTA States. However, the EEA includes only one single

horizontal mechanism to ensure the homogeneity objective. The DCFTA, on the other hand, includes a patchwork of different mechanisms to achieve a uniform interpretation and application of the incorporated EU *acquis*.

Finally, the question raises to what extent the DCFTA meets its own objective and the one of the ENP and the EaP to "gradually integrate Ukraine into the EU Internal Market". Again, the answer is mixed. It is obvious that the DCFTA goes beyond traditional EU FTAs, even beyond the recent ambitious post-Global Europe FTAs. The scope and depth of the liberalisation is exceptionally large. It includes almost full liberalisation of industrial and – to a lesser extent – agricultural goods and provides for detailed rules on competition, TBT, SPS, IPR and trade-related energy. These DCFTA provisions are ambitious, but largely remain within the boundaries of the EU's common commercial policy. This is not the case for the additional unprecedented forms of "integration" into the EU Internal Market. However, this integration dimension only applies to a limited section of the EU Internal Market (i.e. 4 sections of services/establishment and public procurement) and is conditional upon the strict procedures of market access conditionality. The DCFTA is thus a far cry from the EEA which extends the entire EU Internal Market to the EFTA-3.

12.2 An Innovative EU Trade Agreement?

It was also the aim of this contribution to find out to what extent this DCFTA is, as a part of the overall AA, a 'new' or 'innovative' EU trade arrangement. Obviously, the scope of liberalisation commitments, including specific exceptions and transitional periods, is in every trade agreement unique and depends on the specific composition of the trade relation in question and the contracting parties' state of economic development and political will to liberalise.

The overall structure and coverage of the EU-Ukraine DCFTA is exceptionally broad, however, it is not revolutionary. As illustrated above, in the light of the Global Europe Strategy, the EU-Ukraine DCFTA is indeed "comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation"[1288] as it tackles every priority on the EU (external) trade agenda, including services and establishment, competition, IPR, energy and public procurement. Therefore, the EU-Ukraine DCFTA has the same broad coverage as the other post-Global Europe FTAs (e.g. Korea, Colombia/Peru, Central America). In addition, it was demonstrated that most substantive provisions of the EU-Ukraine DCFTA

1288 European Commission, 'Global Europe Strategy', *op. cit.*, footnote 860, p. 9.

(e.g. those related to services, competition, DSM, public procurement, IPR, trade and sustainable development) are very similar to those included in these recent EU FTAs.

However, two key elements distinguish the EU-Ukraine DCFTA from all the other EU FTAs. The *first* innovative DCFTA feature concerns the numerous legislative approximation provisions, linked with market access conditionality. In no other post-Global Europe FTA, a partner country makes the commitment to approximate its legislation to the EU *acquis* in order to liberalise or even integrate into (a section of) the EU Internal Market. Such an ambitious form of economic integration is only feasible with smaller trade partners with an economy in transition who mainly export to the EU market and, as a result, have less to gain from setting their own standards and trade-related legislation. Moreover, it requires a strong political willingness of the partner countries to integrate into the EU. Ukraine and the other EaP partners definitely fall in this category. It is hard to imagine that large developed trade partners such as those identified in the Global Europe Strategy would be willing to make the commitment to approximate to the EU *acquis* and accept such far-reaching conditionality mechanisms. This is for example clearly illustrated in the area of TBT. Although several post-Global Europe FTAs envisage the conclusion of an ACAA or a MRA, it is only in the EU-Ukraine DCFTA that the adoption of these trade instruments is explicitly being made conditional to approximation to the EU *acquis*.[1289]

The *second* unique element of the EU-Ukraine DCFTA are the unprecedented forms of "integration" in the EU Internal Market in the area of services/establishment and public procurement. These prescribe that juridical persons of Ukraine must be treated "in the same way as juridical persons of EU Member States" (cf. *supra*). However, these ambitious forms of Internal Market integration are not offered on a silver platter, considering the strict market access conditionality and mechanisms to ensure the uniform interpretation and application of the incorporated EU *acquis*.

In addition, the DCFTA includes a number of new provisions which are not directly related to market access conditionality. For example, it was noted that for the liberalisation of establishment, for the first time a negative list approach is used. Also the DCFTA provisions on staid aid, trade-related energy and the DSM for legislative approximation (Art. 322) cannot be found in other EU FTAs (Table 7). However, such differences are rather exceptional. Therefore, it can be

1289 See (text to) footnote 1056.

TABLE 7 *Unique DCFTA provisions* (*not related to market access conditionality*)

DCFTA chapter	Unique provision(s)
Establishment, trade in services and electronic commerce	– Negative list approach for liberalisation of establishment (Art. 88) – Internal market treatment for four sub-sections (Art. 3; Annex XVII)
Public procurement	– Full access to EU Public Procurement Market (Art. 154(3))
Competition	– Legislative approximation clause (Art. 256) – TFEU inspired provisions on state aid (Arts. 262–267)
Trade-related energy	(This entire chapter is unprecedented)
Dispute settlement mechanism	– Separate DSM procedures for urgent energy dispute (Arts. 305(5); 307(8); 308(4) and 310 (3)) – DSM relating to legislative approximation (Art. 322)

concluded that the EU-Ukraine DCFTA is largely similar to the other post-Global Europe FTAs, with the exception of the various forms of legislative approximation, market access conditionality and the conditional full integration in several sections of the EU services/establishment and public procurement market.

12.3 The EU-Ukraine DCFTA Compared to the Moldova and Georgia DCFTAs

Also the differences between the Ukraine DCFTA and the two other EaP DCFTAs were identified in this Part. A high degree of heterogeneity between these DCFTAs would indicate a strong 'differentiation' policy by the EU. Conversely, a high degree of homogeneity would assume a 'one-size-fits-all' approach by the EU.

On the one hand, it is clear that the DCFTAs in the three EaP AAs are largely comparable. This was also the case for the trade part of other sets of 'neighbourhood agreements' such as the EMAAs and the SAAs. This is mainly so

because these agreements were developed in the same policy framework and have the same policy objectives. In this view, the Council's negotiating directives for the EU-Moldova and EU-Georgia DCFTAs (and AAs as such) were "almost a copy-paste" of the one for the EU-Ukraine DCFTA.[1290] The EU-Ukraine DCFTA was the first of its kind and the Moldova and Georgia DCFTAs were clearly modeled upon the Ukrainian example. Consequently, not only do these EaP DCFTAs have the same structure and broad coverage, also the depth and pace of market access and the different forms of market access conditionality are in most areas very similar.

On the other hand, the Commission already stressed from the outset that the DCFTAs must be "tailored and sequenced carefully to take account of each partner country's economic circumstances and state of development".[1291] Indeed, several important differences between these DCFTAs are a result of this approach (Table 8). For example, specific concession granted to Ukraine regarding the automotive sector, export duties and trade in worn clothing are not taken over in the Moldova and Georgia DCFTAs. Or, conversely, because the EU-Moldova and EU-Georgia trade relations were already significantly liberalised through unilateral trade measures and because of these countries' smaller export capacities (compared to Ukraine), only a limited number of exemptions are included in the goods and services liberalisation and even a negative list approach for tariff reduction is used.

Further, it was noted that several chapters in the Moldova and Georgia DCFTAs such as those on competition, trade-related energy and IPR are less detailed or comprehensive. Moreover, one of the most far-reaching integration-oriented elements of EU-Ukraine DCFTA, i.e. the internal market treatment in the serves/establishment chapter, is not included in the Moldova and Georgia DCFTAs. Moreover, several specific provisions are new in the Moldova and Georgia DCFTAs such as the anti-circumvention mechanism for agricultural products and the "Principles for the evaluation of progress in the approximation process" in the SPS chapters.

The fact that the Moldova and Georgia DCFTAs were modeled upon the Ukraine agreement also clearly had an impact on the duration of the DCFTA

1290 Interview 8 DG Trade official, 12 June 2013, Brussels. The Trade Policy Committee adopted on 2 December 2011 the negotiating directives for the Moldova and Georgia DCFTAs (Trade Policy Committee, Notice of meeting and provisional agenda, 2 December 2011 (CM 5649/11)).

1291 European Commission, *op. cit.*, footnote 883, p. 6.

negotiations. For the Ukraine DCFTA, it took the negotiators almost 4 years to conclude the negotiations whereas the Moldova and Georgia DCFTAs were negotiated in 18 months. The DCFTA negotiations with Ukraine were already finished when those with Moldova and Georgia were launched[1292] and, not surprisingly, the Commission negotiators "took the Ukraine [DCFTA] as a blueprint to negotiate the agreements with Moldova and Georgia".[1293] However, this explains only partly the shorter negotiating process for the Moldova and Georgia DCFTAs. The negotiations with Ukraine also required more time because the Ukrainian negotiators "were more difficult to deal with than those of Georgia and Moldova".[1294] As mentioned above, the Ukrainian negotiators strongly insisted on specific transitional arrangements – e.g. in the automotive sector and regarding export duties. In addition, the larger size of the Ukrainian economy and export capacity brought more challenges for the protection of the EU Market. Finally, it has to be noted that the negotiations only occurred at bilateral level. Although some technical multilateral platforms are established in the framework of the EaP to discuss common economic and trade-related challenges,[1295] the three EaP partners never discussed their bilateral DCFTA negotiations with the EU among each other at a high political (e.g. ministerial) level. Nevertheless, on a more technical level, Ukrainian negotiators shared their DCFTA negotiation experiences with Georgian and Moldovan colleagues during their respective DCFTA negotiations.[1296]

1292 The DCFTA negotiations with Moldova and Georgia were launched in February 2012 and were concluded with Moldova in June 2013 and with Georgia in July 2013. The DCFTA negotiations with Ukraine were launched in February 2008 and were concluded in October 2011 (cf. *supra*).

1293 Interview 8 DG Trade official, 12 June 2013, Brussels.

1294 *Ibid*.

1295 For example, one of the four multilateral platforms established in the framework of the EaP deals with "Economic Integration and Convergence with EU Policies". During the second meeting of this multilateral platform on 9 November 2009, a separate panel on "Trade and Trade Related Regulatory Approximation, linked to the DCFTAs" was established to exchange information, experiences and best practices as regards the preparation for the implementation of the DCFTAs (EEAS, 'Platform 2: Work programme 2014–2017').

1296 EU negotiators even noted that during the DCFTA negotiations with Moldova some officials of the MFA of Ukraine were present (Interview 2 EU Delegation, 1 March 2012, Kiev). A chief Ukrainian DCFTA negotiator confirmed that he advised the Georgian DCFTA negotiators (Interview 3 Ukrainian DCFTA negotiator, 5 March 2012, Kiev).

TABLE 8 *Key differences between the Ukraine DCFTA and the Moldova and Georgia DCFTAs*

(DCFTA) chapter	Ukraine DCFTA	Moldova DCFTA	Georgia DCFTA
Market access for goods/ trade remedies	Positive list for elimination of customs duties on import (Art. 29(1))	Negative list for elimination of customs duties (Annex XV)	Negative list for elimination of customs duties (Art. 26(1))
	No anti-circumvention mechanism for agricultural products	Anti-circumvention mechanism for agricultural products (Art. 148)	Anti-circumvention mechanism for agricultural products (Art. 27)
	No specific safeguard clause	Specific safeguard clause (beyond WTO rules) (Arts. 165–169)	No specific safeguard clause
Technical barriers to trade	No specific selection of EU *acquis* annexed (Annex III)	Specific selection of EU TBT *acquis* annexed (Annex XVI)	Specific selection of EU TBT *acquis* annexed (Annex III-A/B)
Sanitary and phytosanitary measures	No "Principles for the evaluation of progress in the approximation process" included	"Principles for the evaluation of progress in the approximation process" included (Annex XXIV-A)	"Principles for the evaluation of progress in the approximation process" included (Annex XI-A EU-Georgia AA)
Services and establishment (4 sub-sections)	Strong approximation commitment ("shall ensure") (Arts. 114(1); 124(1); 133(1) and 138)	Soft approximation commitment ("recognise [...] the importance" of approximation to the EU *acquis*) (Arts. 230; 240; 249; 253)	Soft approximation commitment "recognise [...] the importance" of approximation to the EU *acquis* (Arts. 103; 113; 122; 126)

	Internal market treatment envisaged (Art. 4; Annex XVII)	No internal market treatment envisaged	No internal market treatment envisaged
	Detailed monitoring procedures and rules to ensure the uniform interpretation and application of the incorporated EU *acquis* (Annex XVII, cf. Table 6)	No detailed monitoring procedures and rules to ensure the uniform interpretation and application of the incorporated EU *acquis* (e.g. no dynamic mechanism to update the incorporated *acquis* and no obligation for ECJ case-law conform interpretation)	No detailed monitoring procedures and rules to ensure the uniform interpretation and application of the incorporated EU *acquis* (e.g. no dynamic mechanism to update the incorporated *acquis* and no obligation for ECJ case-law conform interpretation)
Competition	Approximation clause (Art. 256)	No approximation clause	No approximation clause
	TFEU inspired rules on antitrust and mergers (Art. 254)	General provisions on antitrust and mergers (Arts. 334–335)	General provisions on antitrust and mergers (Arts. 203–204)
	Detailed rules on state aid, including obligation to adopt a system of state aid control, similar to that in the EU (Arts. 262–267)	Detailed rules on state aid, however, no commitment to adopt a system of state aid control	No detailed rules on state aid but refers to the WTO SCM Agreement (Art. 208)
Trade-related energy	Detailed trade-related energy rules (Arts. 268–280)	Similar to the Ukraine DCFTA, however, no prohibition of customs duties and quantitative restrictions on the import and export of energy and cooperation on infrastructure	Only provisions on transit, relationship with ECT and market principles (Arts. 211–218). Also a "third party access" clause (Art. 217)

TABLE 8 *Key differences between the Ukraine DCFTA and the Moldova and Georgia DCFTAs* (cont.)

(DCFTA) chapter	Ukraine DCFTA	Moldova DCFTA	Georgia DCFTA
IPR	Detailed rules on copyrights, trademarks, GIs, designs, patens and enforcement	Less detailed rules than the Ukraine DCFTA regarding, *inter alia*, copyrights (e.g. no provisions on computer programmes and databases), trade-marks (e.g. no rules on grounds for revocation) and GIs (no transitional period or temporary measures)	Less detailed rules than the Ukraine DCFTA regarding, *inter alia*, copyrights (e.g. no provisions on computer programmes and databases), trade-marks (e.g. no rules on grounds for revocation) and GIs (no transitional period or temporary measures)
Trade and Sustainable Development	(Vague) approximation clause (Art. 290(2))	No approximation clause	No approximation clause
Trade-related elements of 'General and Final Provisions' of the AA (Title VII)	No specific provision on the territorial application of the DCFTA in 'breakaway regions' (i.e. Crimea)	Specific provision on the territorial application of the DCFTA in those areas over which Moldova "does not exercise effective control" (i.e. Transnistria) (Art. 462)	Specific provision on the territorial application of the DCFTA in those areas over which Georgia "does not exercise effective control" (i.e. Abkhazia and South Ossetia) (Art. 426)

12.4 A (too) Complex and Costly Agreement?

The analysis of the DCFTA also demonstrates that this trade deal is an extremely complex legal instrument. The complex nature of the DCFTA does not only relate to its comprehensive scope but also to the different mechanisms of market access conditionality and the inconsistent legal terminology in the area of legislative approximation. The wide scope of EU legislation that Ukraine must approximate also raises questions on the 'implementation costs' of the DCFTA and its impact on the domestic legislative process.

First, the fact that almost every chapter of the DCFTA has its own form of market access conditionality and mechanism to ensure the uniform interpretation and application of the incorporated EU *acquis* (Table 6) makes this agreement a fascinating subject for legal scholars but an extreme difficult legal instrument to implement. In no other EU integration agreement, such a large set of different procedures can be found. To a certain extent, the variation between these mechanisms is the result of the different objectives of each DCFTA chapter. As already explained, in those chapters where a far-reaching integration in the EU Internal Market is envisaged, the procedures which must ensure a uniform interpretation and application of the incorporated EU *acquis* are much more elaborate. However, also the chapters that do not envisage such an ambitious form of integration do not share a uniform mechanism for legislative approximation. For example, in most cases the *acquis* for approximation is annexed to the agreement, however, in one DCFTA chapter the incorporated *acquis* is listed in the main text of the agreement (i.e. Competition) and in other chapters no specific selection of EU *acquis* is clearly specified (e.g. SPS). Some DCFTA chapters include a (soft) obligation for an ECJ case-law conform interpretation of the incorporated *acquis* or a dynamic procedure to update this *acquis*, whereas these procedures are absent in other chapters (Table 6). All this makes this agreement not a textbook example of clear legal drafting. It is from both a legal and political point of view understandable that the DCFTA chapters that do not envisage an ambitious form of 'integration' in the EU Internal Market have less detailed rules regarding the preservation of the uniform interpretation and application of the incorporated EU *acquis*. Why indeed should Ukraine commit itself to such far-reaching commitments vis-à-vis the EU *acquis* in those areas where legislative approximation will not be rewarded with additional market access, especially in the absence of clear EU Membership perspective. However, the large variation between the different chapters which do not have such an integration objective is more difficult to understand. A more harmonised approach for market access conditionality and related procedures regarding the uniform interpretation and application

of the incorporated EU *acquis* would have made the agreement a lot more consistent and, consequently, easier to implement. Although some 'horizontal' procedures are included (e.g. the DSM regarding legislative approximation (Article 322), the procedure to update the Annexes (Article 463(3)) and the monitoring clause (Article 475)), the discrepancy between the different DCFTA chapters is too big. A better option would have been to establish two horizontal procedures. One market access conditionality mechanism, including detailed procedures for the preservation of the uniform interpretation and application of the incorporated EU *acquis*, for those DCFTA chapters which envisage actual 'integration' in the EU Internal Market and another, more limited, horizontal mechanism for the other DCFTA chapters were legislative approximation only aims to export the EU *acquis*, without leading to 'integration' in the EU Internal Market. In order the preserve the good and uniform functioning of the EU Internal Market, the former would have to include strong EEA inspired provisions such as those included in the current DCFTA services/establishment chapter. The latter, on the other hand, would only require basic procedures such as a static mechanism to update the incorporated EU *acquis* and joint monitoring procedures. Such procedures would be easier to accept for the partner country.

A *second* inconsistency which was noted in the DCFTA analysis, but which deserves closer attention, are the different legal terms that are being used throughout this trade deal to impose a 'legislative approximation' obligation on Ukraine. Although different legal terms are used to refer to the process of 'approximation', the *nature* of the approximation obligation in the different DCFTA approximation clauses is uniform. Each DCFTA approximation clause imposes on Ukraine a strict *obligation* to 'approximate' to a predetermined selection of EU *acquis*. Every DCFTA approximation clause states that Ukraine *shall* act (Table 9). Thus, the DCFTA approximation provisions are not mere voluntary 'best endeavours clauses' such as those in the PCAs, SAAs or EMAAs. Instead, they impose an obligation on Ukraine to act and to achieve result. Consequentially, non-implementation of these approximation commitments cannot only lead to a refusal on the part of the EU to grant additional market access but can also be considered as a failure to comply with the DCFTA, which can be challenged through the DCFTA DSM. It is exactly this strong obligation that makes the DCFTA, as a part of the AA, an EU integration agreement (i.e. the *conditio sine qua non* of an EU integration agreement). Only Title V on Economic and Sector Cooperation includes several non-binding 'best endeavours' approximation commitments.[1297]

1297 See footnote 1233.

However, the type of action that Ukraine is obliged to undertake in the legislative approximation process is referred to in the DCFTA by many different legal terms. Already in its first documents that proposed and conceptualised the ENP/EaP DCFTAs, the Commission used a mishmash of legal terms such as "alignment with the EU *acquis*"[1298] "convergence in regulatory areas",[1299] "approximation of EU rules and practices",[1300] "regulatory approximation" and "adoption of elements of the EU *acquis*".[1301] Table 9 illustrates that also in the final DCFTA, different legal terms are used interchangeably to define the specific approximation obligations. The overall process of Ukraine's approximation to the EU law under the DCFTA – and the AA as such – is referred to in the preamble and objectives (Article 1) of the AA as "legislative approximation" or "regulatory approximation".[1302] However, as it is demonstrated in Table 9, almost every DCFTA chapter uses different legal terminology in its approximation clauses. According to this patchwork of legal concepts, Ukraine must "approximate to", "align to" or "achieve conformity with" the EU *acquis* or make its domestic legislation "compatible" with the EU *acquis* or "incorporate" it in its domestic legal order. Moreover, it was even illustrated in the analysis on the TBT chapter that one single DCFTA provision can include several different approximation terms.[1303]

These legal terms are increasingly being used interchangeably by the EU in its external – especially neighbourhood – relations.[1304] For example, it was demonstrated in Part 1 of this research that a consistent terminology regarding third countries' obligations vis-à-vis the EU *acquis* is also lacking in the other existing EU integration agreements. Remarkably, the European Commission never provided clear definitions of these legal terms and concepts, neither did it indicate the distinction between them. Also in the other EU integration agreements, clear definitions of these concepts were never included. This is not unimportant considering that both parties can have a different interpretation

1298 European Commission, *op. cit.*, footnote 883, p. 6.

1299 European Commission, 'Strengthening the ENP', *op. cit.*, footnote 289, p. 5.

1300 European Commission, *op. cit.*, footnote 289, p. 8.

1301 European Commission, *op. cit.*, footnote 25.

1302 Also the general approximation clause in the Final Provisions (Art. 474) refers to the process of "legislative" and "regulatory" approximation.

1303 See text to footnote 1038.

1304 On this point, see A. Matta 'Differentiating the methods of *acquis* export. The case of the Eastern neighbourhood and Russia', in P. Van Elsuwege, R. Petrov (eds.), *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space?* (Routledge, Oxon, 2014), pp. 21–45.

of vague terms such as "approximation to" or "conformity with" the EU *acquis*. Only the EEA and, to a lesser extent the ECAA, include additional rules that further specify the approximation commitments (e.g. "the horizontal adaptations and procedural rules"). In the EU-Ukraine DCFTA, such rules are only included in (the annexes to) the services/establishment chapter (cf. *supra*). The DCFTA negotiators on both sides even declared that the development of such definitions was never considered during the negotiations, despite the large variation between these terms.[1305] A Ukrainian negotiator acknowledged that the differences between these legal terms were noticed but that never an attempt was made to clarify them.[1306] Surprisingly, different EU negotiators stated that these terms refer to the same process and that there is actually no distinction between them.[1307] But then the questions raises why different legal terms where used if they refer to the same legal process? According to both EU and Ukrainian negotiators, the main reason for this legal inconsistency is that almost every DCFTA chapter was negotiated by a different negotiating team of DG Trade or other Commission DGs, using each their own legal vocabulary to define the approximation obligations.[1308] During the negotiations, the different EU negotiators never clearly harmonised this legal jargon. As a result, this created a large variation between the different approximation provisions. During the 'legal-scrubbing' phase, this legal irregularity was noted by the lawyer-linguists. However, when they reported this back to the EEAS and Commission officials in charge, the position of the latter was to leave the text of the agreement unchanged, as long as it did not create explicit legal inconsistencies.[1309] A more harmonised and consistent language in the different approximation clauses would have reduced the complexity of this agreement.

A final element that makes the implementation of the DCFTA and Title V on Economic and Sector Cooperation a complex undertaking is the extreme wide scope of EU legislation to which Ukraine must approximate. In total, Ukraine has to approximate to, *inter alia*, (parts of) 298 Directives and 81 Regulations

1305 Interview 8 DG Trade official, 12 June 2013, Brussels; Interview 9 Ukrainian negotiator (of Ministry of Justice of Ukraine), 31 May 2013, Brussels; Interview 6 EEAS official, 22 April 2014, Brussels.

1306 Interview 9 Ukrainian negotiator (of Ministry of Justice of Ukraine), 31 May 2013, Brussels.

1307 Interview 8 DG Trade official, 12 June 2013, Brussels; Interview 6 EEAS official, 22 April 2014, Brussels.

1308 Interview 9 Ukrainian negotiator (of Ministry of Justice of Ukraine), 31 May 2013, Brussels; Interview 6 EEAS official, 22 April 2014, Brussels.

1309 Interview 6 EEAS official, 22 April 2014, Brussels.

TABLE 9 *DCFTA legislative approximation obligations/clauses*

DCFTA chapter	Legislative approximation commitment/clause
TBT	– "Ukraine *shall* take the necessary measures in order to gradually *achieve conformity* with EU technical regulations […] and undertakes to follow the principles and practices laid down in relevant EU Decisions and Regulations" (Art. 56(1)) – "Ukraine *shall* […] *incorporate* the relevant EU *acquis* into the legislation of Ukraine" (Art. 56(2)(i)) – *align* progressively to the relevant EU *acquis* (Arts. 56(5); 57(1) and (3))
SPS	– "Ukraine *shall approximate* its [SPS] legislation to that of the EU" (Art. 64(1))
Services and establishment (4 sub-sections)	– "The Parties recognise the importance of the approximation of Ukraine's existing legislation to that of the EU" and "Ukraine *shall* ensure that its existing laws and future legislation will be gradually *made compatible* with the EU *acquis*" as foreseen in Annex XVII (Arts. 114(1); 124(1); 133(1)) (see also Art. 138) – Annex XVII on "Regulatory Approximation" includes, *inter alia*, (a) "General principles and obligations on regulatory approximation" stating that EU Regulations or Decisions referred to in the incorporated *acquis* "*shall* as such *be made part of the internal legal* order of Ukraine" whereas EU Directives referred to in the incorporated EU *acquis* "shall leave to the authorities of Ukraine the choice of form and method of implementation" and (b) "horizontal adaptations and procedural rules"
Public procurement	– "Ukraine *shall* ensure that its existing and future legislation on public procurement will be gradually *made compatible* with the EU public procurement *acquis*" (Art. 153(1))
Competition	– "Ukraine *shall approximate* its competition laws and enforcement practices to the EU *acquis*" (Art. 256)
Trade-related energy	– "The Parties *shall adapt* their legislation, as referred to in Annex XXVII […] and in the Energy Community Treaty" (Art. 273) – Several Directives and Regulations *shall be implemented* as indicated in the ECT whereas other Directives "*shall be reflected* in the Ukrainian legislation" in a first phase and *be implemented* in a second phase (Annex XXVII)

TABLE 9 *DCFTA legislative approximation obligations/clauses* (cont.)

DCFTA chapter	Legislative approximation commitment/clause
Customs and trade facilitation	– Ukraine *shall* approximate and *incorporate* into its domestic law the incorporated EU customs legislation (combined reading of Art. 84 and Annex XV)
Trade and sustainable development	– "Ukraine *shall approximate* its laws, regulations and administrative practice to the EU *acquis*" (Art. 290(2))
The standard approximation clauses in Title V on Economic and Sector Cooperation	– Ukraine "*shall* gradually *approximate* its legislation to the EU *acquis*" as foreseen in the relevant Annexes (see footnote 1230). For other approximation obligations in this Title, see footnote 1232 and 1233. However, it has to be noted that a softer – and therefore conflicting – commitment is included in the corresponding Annexes to this Title (i.e. Ukraine only "undertakes" to approximate).

(Table 10).[1310] However, a large part of the incorporated EU *acquis* is included in Title V, which includes a 'softer' obligation to approximate (cf. *supra*).

In no other EU integration agreement, the scope of the pre-signature incorporated EU *acquis* is so extensive, with the exception of the EEA. Moreover, due the static and dynamic procedures to update the incorporated EU *acquis*, the selection of EU *acquis* to which Ukraine must approximate will only widen in the future (i.e. the post-signature *acquis*). The procedures to catch up with the relevant legislative developments at EU level will be a key challenge for Ukraine. For example, it was noted in the previous chapters that in the area of (financial) services and public procurement the incorporated EU *acquis* in the DCFTA is already now obsolete, before the DCFTA's provisional application.

Although the scope of the incorporated EU *acquis* in the EU-Ukraine AA is only a fraction of the entire EU *acquis* to which candidate countries must approximate – and eventually, from the date of EU accession, must apply – its correct implementation and enforcement will also pose a huge challenge for Ukraine. The DCFTA has strict deadlines for legislative approximation.

1310 This number is the result of the author's own analysis (Table 10). Other authors could come to a different number by using a different calculation method. For example, according to Wolczuk, the AA envisages Ukraine's approximation to "80–90% of the *acquis*", which seems exaggerated (K. Wolczuk, 'Ukraine and the EU: Turning the Association Agreement into a Success Story', European Policy Centre *Policy Brief*, April 2014).

TABLE 10 *Indication of the scope of the incorporated EU acquis in the EU-Ukraine AA*[1311]

	Chapter	**EU acts which have to be (partially) approximated**
DCFTA	TBT	30 Directives, 1 Decision and 1 Regulation (Annex III (i.e. the New Approach Directives as updated in the New Legislative Framework)) + the corpus of European standards, including the harmonised standards
	Customs and trade facilitation	4 Regulations (Annex XV)
	Services and establishment	70 Directives, 14 Regulations, 1 Decision and 6 TFEU provisions (Annex XVII)
	Public procurement	5 Directives (Annex XXI)
	Competition	4 Regulations (Art. 256)
	Trade-related energy	14 Directives and 2 Regulations (Annex XXVII)
	Title V Economic and Sector Cooperation (including *acquis* on energy cooperation; taxation; environment; transport; company law, corporate governance, accounting and auditing; audio-visual policy; agriculture and rural development; consumer protection; employment, social policy and equal opportunities; public health).	56 Regulations, 179 Directives, 8 Recommendations and 4 Decisions (Annexes XXVII–XLII)
	Total	– 81 Regulations – 298 Directives – 6 Decisions – 6 TFEU Provisions – 8 Recommendations – The corpus of European standards, including the harmonised standards (TBT)

1311 International Conventions and Treaties that are listed in the Annexes and to which Ukraine must approximate are not included in this Table. Moreover, the scope of EU

For example, for several incorporated services-related EU Directives, the DCFTA transitional periods for implementation are only a few months longer than the implementation periods included in these Directives for the EU Member States.[1312] However, most DCFTA transitional periods for implementation are still longer than the transitional periods included in the latest EU Accession Treaties.[1313] In Title V on Economic and Sector Cooperation, the transitional periods for the implementation of 'complex' *acquis* such as in the area of environment and transport can run up to 9 years.[1314]

The large scope of the incorporated EU *acquis* does not only affect the complexity of the agreement, it also relates to the DCFTA's 'implementation costs' and raises questions on the constitutional legitimacy of the AA's approximation process. Regarding the former, it was already noted that Ukraine's approximation to the EU *acquis*, as foreseen in the EU-Ukraine AA and DCFTA, will be a costly affair, both for the public and private sector. The larger the scope of the incorporated EU *acquis*, the larger the implementations costs of the AA and DCFTA will be. It is recognised that the "cost of compliance" to the EU *acquis* will be the highest for Ukraine in areas such as environment, transport, energy, competition and SPS measures.[1315] Therefore, Mayhew noted, before the DCFTA negotiations were launched, that Ukraine should "take on as much

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acquis to which Ukraine will have to approximate in the area of SPS has still to be determined in the SPS Strategy. It has to be stressed that not all EU acts listed in the annexes have to be approximated in their entirety.

1312 For example, the provisions of Directive 2002/92 EC on insurance mediation must be implemented by Ukraine within 2 years after the entry into force of the AA whereas the Member States also had two years to comply with this Directive (between 15 January 2003 and 15 January 2005) (*OJ*, 2003, L 009/3). Ukraine must implement Directive 2008/6/EC on the accomplishment of the internal market of Community postal services within 2 years after the entry into force of the AA. In the EU, this Directive entered into force on 27 February 2008 and had to be implemented by 31 December 2010 (*OJ*, 2008, L 52/3).

1313 The author came to this conclusion after comparing, *inter alia*, the transitional periods in the EU-Ukraine AA and the Accession Treaty of Croatia for the implementation of (elements of) Directive 2008/50 EC on air quality (Annex XXX EU-Ukraine AA (3–5 years) and Annex V Accession Treaty Croatia (2 years)). On this point, see A. Lazowski, 'European Union, Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty', *Croatian Yearbook of European Law and Policy* (8), 2012, pp. 1–39.

1314 See for example the transitional periods for the incorporated EU *acquis* regarding technical and safety conditions in the area of transport (8 years) (Annex XXXII).

1315 L. Delcour, K. Wolczuk, 'Approximation of the National Legislation of Eastern Partnership Countries with EU Legislation in the Economic Field', *European Parliament Policy Department Study*, 2013; A. Mayhew, *Ukraine and the European Union: Financing Accelerating Integration* (Warsaw, 2008), pp. 38–49.

of the *acquis* as it can justify economically and can manage legally in order to gain and benefit from access to the single market, but keeping back costly and inappropriate approximation where there are no development benefits or immediate economic gains for the country".[1316] According to this argument, only the DCFTA legislative approximation commitments that will result in additional market access (i.e. those included in the DCFTA chapters on SPS, TBT, services/establishment and public procurement) would be appropriate. However, the EU-Ukraine DCFTA and Title V on Economic and Sector Cooperation include numerous legislative approximation commitments that will not be 'rewarded' with additional market access or 'integration' in the EU Internal Market.

In the view of the European Commission, (partial) integration in the EU Internal Market goes hand in hand with approximation to the EU *acquis* in 'flanking' areas such as competition and social and environmental policy as these are "essential to the functioning of the internal market".[1317] In addition, the Commission stresses that the EU *acquis* in these areas offers a model for reform and modernisation for the Ukrainian economy. However, it can be questioned to what extent the complex and developed EU *acquis* is always the right blueprint for reform for countries such as Ukraine with a much weaker transition economy and limited administrative capacity.[1318] The current (economic) crisis in Ukraine even creates additional challenges for the implementation of the DCFTA and its legislative approximation obligations. This issue was already raised during the CEEC's accession process, however, in this case, the final EU Membership status justified the approximation process to the entire EU *acquis*.[1319] Lacking a specific membership perspective, this does not apply to the EU-Ukraine AA.

In this view, it will be crucial that Ukraine will develop, jointly with the EU institutions, a kind of a National Programme for the adaptation of the *acquis* (NPAA), which is used in the pre-accession policy, in order to prioritise and manage the implementation process of these approximation obligations. With the last update of the Association Agenda, the EU and Ukraine tried to develop a document which has to "prepare and facilitate the implementation of the

1316 A. Mayhew, *ibid*., pp. 39–49.

1317 European Commission, 'White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union', COM (1995)163 final, 3 May 1995.

1318 On this issue, see I. Dreyer, 'Trade Policy in the EU's Neighbourhood. Ways Forward for the Deep and Comprehensive Free Trade Agreements', *Notre Europe Paper*, May 2012.

1319 K. Wolczuk, *op. cit*., footnote 1310.

Association Agreement" and which makes "a list of priorities for joint work on sector by sector basis" (cf. *supra*).[1320] However, this document is rather general and does not define clear guidelines for Ukraine. Noteworthy, the Government of Ukraine adopted on 17 September 2014 a "Plan of implementation of the Association Agreement".[1321] This plan, which is developed with the input of the EU Delegation in Ukraine, aims to provide an overall strategy for the implementation of the EU-Ukraine AA for the period 2014–2017.

The enormous amount of EU legislation that Ukraine has to implement or "incorporate in its domestic legal order" also raises questions regarding the legitimacy of the AA's approximation exercise from a Ukrainian constitutional perspective. This issue deserves a detailed analysis on its own, however, it can only be briefly explored in this context.[1322] The "constitutional legitimacy of the approximation of domestic legislation to the EU *acquis*" was first questioned during the CEEC's pre-accession process.[1323] It was noted that the pre-accession process, and especially the legislative approximation exercise, strengthened the powers of the executive branch of the governments of the candidate countries to the detriment of the legislature.[1324] In order to transpose the 80,000 pages of *acquis communautaire* into national law as rapid as possible, all the candidate countries had introduced some kind of fast-track procedure for getting EU legislation through the Parliament.[1325] Accordingly,

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1320 EU-Ukraine Association Council, 'EU-Ukraine Association Agenda to prepare and facilitate the implementation of the Association Agreement', 16 March 2015.

1321 Government of Ukraine, 'Government approves the Plan of Implementation of the Association Agreement with the EU', *press release*, 17 September 2014.

1322 For a recent analysis of the constitutional challenges of the implementation of the EaP AAs, see R. Petrov, 'Constitutional Challenges for the Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia', *European Public Law* 21(2), 2015, pp. 241–253.

1323 A. Albi, 'The EU's 'External Governance' and Legislative Approximation by Neighbours: Challenges for the Classic Constitutional Templates', *European Foreign Affairs Review* 14, 2009, pp. 209–230. For a broader analysis on this issue, see A.E. Kellermann, J. Czuczai, S. Blockmans, *et al.* (eds.) *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)candidate Countries. Hopes and Fears* (T.M.C. Asser Press, The Hague, 2006).

1324 W. Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', *European Law Journal* 10(4), 2004, pp. 371–401.

1325 H. Grabbe, 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* 8(6), 2001, p. 1017. This author noted that due to the technocratic bias of the EU's pre-accession strategy, the 'administrative' character of this process and the fact that the executive was privileged over the legislature in

there was very little parliamentary involvement in the legislative process: "the speedy procedures for the *acquis*-related legislation ran the risk of reducing parliaments to little more than rubber stamps and undermine[d] the overall institutionalisation of parliaments".[1326] Although the approximation obligations foreseen in the AA and DCFTA only cover a part of the EU *acquis*, it is not excluded that the same situation could occur in Ukraine during the implementation process of this agreement. For example, it was demonstrated that the implementation of the EU-Ukraine AP and Association Agenda were heavily dominated by the executive, with a minor role for the *Verkhovna Rada.*[1327] Therefore, in order not to repeat these (pre-)accession anomalies during the implementation of the EU-Ukraine AA, the Ukrainian legislature should be attributed a strong and permanent role in the approximation process. However, the EU-Ukraine AA does not involve the Verkhovna Rada in a structural manner in the approximation process. Only the Parliamentary Association Committee provides a limited forum for members of the European Parliament and of the Verkhovna Rada to meet and discuss the implementation of the AA.[1328]

12.5 A Blueprint for Other EU 'Neighbourhood' (Integration) Agreements?

The EU-Ukraine DCFTA – and the AA as such – was to a large extent a blueprint for the agreements with Georgia and Moldova (cf. *supra*). However, the question raises to what extent this DCFTA can function as a template for other envisaged EU international agreements? The most important DCFTA novelties that were identified in this analysis were the mechanisms for market access conditionality and (limited) forms of 'integration' in the EU Internal Market. Therefore, the EU-Ukraine DCFTA is only a useful point of reference for the legal framework of trade relations with those countries who also have the ambition to 'integrate' in the EU Internal Market and who are, in return, willing to accept the far-reaching elements of market access conditionality. As already noted, partial integration into the EU Internal Market on the basis of legislative

terms of political attention and resources, both human and financial, "core executive" accession teams emerged.

1326 D. Malovà, T. Haughton, 'Making Institutions in Central and Eastern Europe, and the Impact of Europe', in P. Mair, J. Zielonka (eds.), *The Enlarged European Union: Diversity and Application* (Franks Cass Publishers, London, 2002), p. 111.

1327 K. Wolczuck, *op. cit.*, footnote 247.

1328 Art. 467 EU-Ukraine AA.

approximation only makes sense for countries with a smaller economy – in transition – who have less to gain from setting their own standards and who mainly export to the EU Internal Market due to, for example, geographical proximity. On top of this economic rationale, the partner countries must also politically be willing to liberalise trade relations in such a "deep and comprehensive" way and, in the light of market access conditionality, to accept to be 'monitored' and 'evaluated' by the EU and to partly give up the right to regulate their own economy. This excludes the possibility that the EU-Ukraine DCFTA will be used as a 'template' during the ongoing or envisaged trade negotiations with large developed trade partners such as the USA and Japan or in those with distant economies such as the ASEAN or MERCOSUR countries.

In this view, it has to be analysed to what extent the EU-Ukraine AA and DCFTA could be relevant for the EU's legal framework with other EU 'neighbouring' countries. Three groups of countries are to be considered: (i) the remaining – non-associated – EaP countries, (ii) the Mediterranean ENP countries and (iii) the micro-States and Switzerland.

12.5.1 *The Remaining – Non-associated – EaP Countries*

Although the EU initially offered Association Agreements to all EaP partners "who are willing and able to comply with the resulting commitments",[1329] it seems very unlikely that the EU will establish a new legal framework with the remaining non-association EaP countries (i.e. Armenia, Azerbaijan and Belarus) using the EU-Ukraine AA and DCFTA as a template. A new comprehensive legal framework is not envisaged with Belarus and due to the incompatibility between the conclusion of a (DC)FTA and membership of the Eurasian Customs Union (cf. *supra*), the EU-Ukraine DCFTA will not be used as a blueprint for a possible future legal framework for trade relations with Belarus. Due to Belarus' Eurasian Customs Union membership, any future bilateral agreement with the EU is bound to be non-preferential.[1330] Moreover, as long as Belarus is not a member of the WTO, the country is not 'eligible' for a FTA with the EU. In addition, the authoritarian regime of Lukashenko also makes a political association between the EU and Belarus unlikely in the near future.[1331]

1329 Joint Declaration of the Prague Eastern Partnership Summit, *op. cit.*, footnote 33.

1330 The Council authorised the Commission to open negotiation on a new agreement renewing the agreement on trade in textile products with Belarus in September 2009, however, considering the formation of the Eurasian Customs Union, "Belarus does not currently see a possibility of extending the bilateral textile agreement" ((DG Trade, 'Overview Trade Negotiations', *op. cit.*, footnote 814).

1331 At the Riga EaP Summit, the participants welcomed "the steps taken in EU-Belarus

With Azerbaijan, AA negotiations were launched in July 2010,[1332] however, these do not cover a DCFTA because of Azerbaijan's non-WTO membership status. Although the EU reiterated its readiness to launch, following Azerbaijan's WTO accession, negotiations on a DCFTA,[1333] it is highly doubtful that Azerbaijan is interested in the conclusion of such an ambitious trade deal with the EU.[1334] Moreover, Azerbaijan already indicated that is not interested anymore in the conclusion of an AA.[1335] In August 2013, additional negotiations were launched for a more limited "Strategic Modernisation Partnership" which run in parallel with – and are complementary to – the AA negotiations.[1336] However, also the negotiations on this Modernisation Partnership stalled.[1337] With regard to Armenia, the negotiations on an AA and DCFTA were finished in July 2013, however, the country announced in September of that year its wish to join the Eurasian Customs Union and EEU instead (cf. *supra*). Nevertheless, at the

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relations and look[ed] forward to the follow-up on the Interim Phase on modernisation, including some possible projects, and the resumption of the EU-Belarus Human Rights Dialogue", *op. cit.*, footnote 309.

1332 European Commission, Joint Staff Working Document, 'Implementation of the European Neighbourhood Policy in 2013. Regional report: Eastern Partnership', SWD (2014) 99 final, 27 March 2014, p. 6.

1333 Joint Declaration of the Eastern Partnership Summit, *op. cit.*, footnote 33. The Commission has not received a mandate to negotiate a (DC)FTA with Azerbaijan (DG Trade, 'Overview Trade Negotiations', *op. cit.*, footnote 872).

1334 Due to its large oil and gas exports, Azerbaijan is in a position of economic strength and is less 'in need' of a DCFTA with the EU. Moreover, several elements of the EaP AAs/DCFTAs (e.g. transparency, monitoring and an essential element/suspension clause) will not be acceptable for the present authoritarian leadership in Azerbaijan. On this point, see M. Emerson, 'Countdown to the Vilnius Summit. The EU's Trade Relations with Moldova and the South Caucasus', *European Parliament Policy Department Study*, January 2014.

1335 A. Rettman, 'Azerbaijan and EU race to agree 'modernisation' pact', *EUobserver*, 27 September 2013.

1336 European Commission, 'EU-Azerbaijan: Commitment to widen cooperation and support modernization', *press release*, MEMO/13/775, 29 August 2013. The Commission noted that progress on the Strategic Modernisation Partnership is linked to progress in the AA negotiations (Answer given by Mr Füle on behalf of the Commission on a Parliamentary question of Adrian Severin, 20 November 2013, E-011368/2013).

1337 The Riga EaP Summit Declaration avoided the "association" term for Azerbaidjan but welcomed "the progress made in defining a stronger basis for an upgraded contractual framework for EU-Azerbaijan bilateral relations in all areas of mutual interest". However, the website of DG trade states that negotiations on the update of the current PCA, including its trade and investment related provisions, have been suspended (DG Trade, 'Overview Trade Negotiations', *op. cit.*, footnote 814).

November 2013 Vilnius Eastern Partnership Summit, the EU and Armenia jointly "reconfirmed their commitment to further develop and strengthen their cooperation in all areas of mutual interest within the Eastern Partnership framework, [and stressed] the importance of reviewing and updating the existing basis of their relations".[1338] After a strategic pause, Armenia and the EU resumed talks on a possible new agreement to replace the PCA. The EU and Armenia started first with a 'scoping exercise' during which both parties tried to identify the areas that can be included in the new agreement and to clarify "the areas that are compatible with Armenia's new commitments under the Eurasian Economic Union".[1339] During this exercise, the defunct EU-Armenia AA was taken as a point of reference. On 19 May 2015 the Commission adopted a recommendation for the Council to authorise the opening of negotiations on a legally binding agreement between the European Union and Armenia.[1340] However, because membership of the EEU and its customs union rules out a bilateral preferential (DC)FTA with the EU (cf. *supra*), any future legal framework for EU-Armenia relations will be much less ambitious than the initialled EU-Armenia AA and DCFTA. Although most elements of the political parts of the AA can be kept in the new agreement, the DCFTA and several sectoral policy areas will be incompatible with Armenia's EEU membership (e.g. the chapters on market access for goods (i.e. tariff reduction and elimination), TBT, SPS and services). Moreover, it is still to be seen to what extent Armenia is willing and able to commit itself to legislative approximation commitments in the context of its EEU accession. In any case, this envisaged agreement between the EU and Armenia has the potential to serve as a test case for the EEU members' ability to pursue bilateral trade relations with the EU.[1341]

Also the other envisaged trade agreements – sometimes included in a broader framework agreement – with other post-Soviet countries are unlikely to be similar to the EU-Ukraine DCFTA. As concluded in the previous Part,[1342] the conclusion of bilateral (DC)FTAs with Russia and Kazakhstan is currently not on the EU trade agenda due to, *inter alia,* the establishment of the Eurasian Customs Union and the EEU. However, it has to be noted that the EU initialled

1338 Joint Declaration of the Eastern Partnership Summit', Vilnius, 28–29 November 2013, 17130/13.

1339 EEAS, 'Proposal for a framework agreement between the EU and Armenia', *press release*, 21 May 2015.

1340 *Ibid.*

1341 On this point, see L. Delcour, H. Kostanyan, B. Vandecasteele and P. Van Elsuwege, 'The Implications of Eurasian Integration for the EU's Relations with the Countries in the Post-Soviet Space', *Studia Diplomatica*, 2015, *forthcoming*.

1342 See Chapter 6.2.

in January 2015 an "Enhanced Partnership and Cooperation Agreement" with Kazakhstan.[1343] Although this agreement expands the scope of the current EU-Kazakhstan PCA by including, *inter alia,* new trade and investment provisions, it does not include a FTA. If negotiations on a New Agreement with Russia would be relaunched to replace the PCA,[1344] also the trade part of this new agreement will have to be non-preferential, excluding market access issues. Even if in a distant future a FTA would be negotiated between the EU and the entire Eurasian Customs Union or EEU, it appears unlikely that both parties will be willing to conclude an agreement as "deep and comprehensive" as the Ukraine DCFTA. With the partner countries in Central Asia, the EU does not envisage, for the moment, the conclusion of new framework agreements or FTAs.[1345]

12.5.2 *The 'Mediterranean' DCFTAs*

The *second* group of 'neighbouring' countries to be considered are the southern Mediterranean ENP partners. As demonstrated in this Part, the initial EMAAs provided only for a liberalisation of trade in industrial goods over a transitional period of less than 12 years. More sensitive agricultural, fishery and processed agricultural products were largely left outside the scope of these agreements and most EMAAs contain little services liberalisation. Also the EMAAs' provisions regarding TBT, SPS measures, IPR, public procurement, competition, transparency and movement of capital are limited or absent. However, already from the very outset (i.e. the 1995 Barcelona Declaration), the parties agreed to further broaden and deepen the EMAA FTAs and to gradually establish a free-trade area covering most goods and services by 2010.[1346] Although this deadline was "missed",[1347] several bilateral EMAA FTAs were gradually updated and broadened to match them with the revamped trade objectives of the ENP and the Union for the Mediterranean. In the framework

1343 EEAS, 'EU and Kazakhstan initial Enhanced Partnership and Cooperation Agreement', *press release*, 20 January 2015. The text of this agreement was at the moment of writing this book not yet public.

1344 See (text to) footnote 652.

1345 Council, 'Council Conclusions on the EU Strategy for Central Asia', 22 June 2015, 10191/15.

1346 Barcelona Declaration adopted at the Euro-Mediterranean Conference, 28 November 1995. This envisaged EU-Mediterranean free trade area has to be developed not only through the bilateral EMAA FTAs, but also through bilateral agreements among the Mediterranean partners (e.g. the 2004 Agadir Agreement establishing a FTA between Egypt, Jordan, Morocco and Tunisia).

1347 F. De Ville, V. Reynaert, 'The Euro-Mediterranean Free Trade Area: An Evaluation on the Eve of the (Missed) Deadline', *L'Europe en Formation* (356), 2010, pp. 193–206.

of the ENP, new DCFTAs were first offered to Ukraine and the other EaP Partners, whereas the existing EMAAs had to be "deepened and expanded to include other regulatory areas such as [...] SPS, IPR, public procurement, trade facilitation and competition".[1348] In this view, additional bilateral agreements on agricultural products were concluded and added as a Protocol to the respective EMAAs with Morocco, Egypt, Jordan, Israel, the Palestinian Authority and supplementary DSMs have been concluded with Tunisia, Jordan, Egypt, Lebanon and Morocco (cf. *supra*).[1349] Negotiations were also launched with Israel, Egypt, Morocco and Tunisia to further liberalise trade in services[1350] and a protocol on geographical indications was initialled with Morocco.[1351] Nevertheless, even these 'broadened' EMAA FTAs are still a far cry from the three EaP DCFTAs. It was only after the Arab Spring that DCFTAs were offered to the Mediterranean partners[1352] as "an economic and trade answer" to the revolutionary developments in the region.[1353] The Council adopted negotiating directives for DCFTAs with Morocco, Jordan, Egypt and Tunisia in December 2011. These four countries were selected because they are all WTO members, parties to the 2004 Agadir Agreement and were perceived – at that time – as having implemented sufficient economic and political reforms, including the bilateral ENP Action Plans.[1354] So far negotiations were only launched with Morocco in March 2013 but are also expected to start with Tunisia in the autumn of 2015.[1355] Contrary to the EaP DCFTAs, the envisaged DCFTAs with

1348 European Commission, *op. cit.*, footnote 883, p. 5.

1349 See, respectively, footnote 913 and 1259.

1350 See footnote 1071.

1351 European Commission, 'The EU and Morocco strike a deal on the protection of Geographical Indications', press release, 16 January 2016.

1352 European Commission, 'A new response to a changing neighbourhood', COM (2011) 303 final, 25 May 2011.

1353 E. Lannon, 'An economic response to the crisis: towards a new generation of deep and comprehensive free trade areas with the Mediterranean partner countries', in European Parliament, *Policy Department Workshop*, The Euromed Region after the Arab Spring and the New Generation of DCFTAs, January 2014, p. 41.

1354 G. Van der Loo, 'Enhancing the Prospects of the EU's Deep and Comprehensive Free Trade Areas in the Mediterranean: Lessons from the Eastern Partnership', *CEPS Commentary*, 24 June 2015.

1355 The EU and Morocco also agreed to integrate the bilateral negotiations on trade in services in the broader DCFTA negotiations. Despite considerable progress on most chapters in the first four negotiation rounds, Morocco insisted on introducing a break in July 2014. Before continuing the trade talks, the Moroccan government wants to assess the results of its own new sectoral impact assessments, which were called for by the Moroccan civil society, fearing negative impacts on key sectors of their economy and the government's

these Mediterranean countries will not be included as a separate title in a new framework (association) agreement. Instead, these DCFTAs will most likely be added as a protocol to the existing EMAAs.[1356] Evidently, in the light of the ENP's differentiation policy, the 'Mediterranean' DCFTAs will differ from the three EaP DCFTAs, depending on the economic situation and political will of the partner countries. In this view, the scope and the depth of trade liberalisation will vary. However, the overall structure and objectives of the DCFTAs will most likely be similar.[1357] The Mediterranean DCFTAs were developed in the same ENP policy framework and have the same objective of "progressive economic integration with the EU Internal Market [...] through progressive approximation of EU rules and practices".[1358] The Council even explicitly stated that certain aspects of the EU-Ukraine DCFTA "can serve as a model for other ENP partners in the future"[1359] and Commission officials confirmed that the Council's negotiating directives for the Mediterranean DCFTAs are similar to the one that was adopted for Ukraine.[1360] Elements of the EU-Ukraine DCFTA which could be taken over in the Mediterranean DCFTAs, tailored to the needs and political will of the partner countries, are for example the provisions on competition, IPR, customs and trade facilitation, transparency and trade and sustainable development. To tackle non-tariff barriers, the conclusion of an ACAA, as foreseen in the EU-Ukraine DCFTA, is also envisaged with the Mediterranean ENP countries.[1361] Regarding trade in services/establishment and public procurement, it is to be seen whether both the EU and the

ability to regulate economic and social sectors (on this issue, see G. Van der Loo, *ibid.*). Technical preparations are ongoing with Jordan but a DCFTA scenario has become very unlikely for Egypt considering its fragile post-Arab Spring political climate (European Commission (DG Trade), *op. cit.*, footnote 872). The EU and Tunesia have finished the scoping exercise of their envisaged DCFTA and both parties confirmed to launch negotiations in the autumn of 2015 (European Commission, 'Tunesia brings good news to Brussels', blog post from Trade Commissioner Cecilia Malmström, 27 May 2015).

1356 For the difference between Union's envisaged "free trade areas" and "free trade agreements" with the Mediterranean countries, see E. Lannon, 'An economic response to the crisis: towards a new generation of deep and comprehensive free trade areas with the Mediterranean partner countries', *European Parliament*, The Euromed Region after the Arab Spring and the New Generation of DCFTAs, January 2014, pp. 41–42.

1357 A notable exception could be the chapter on 'Trade-related aspects of energy', as these 4 Mediterranean partners are no transit countries for gas or electricity to the EU.

1358 European Commission, 'A new response to a changing neighbourhood', COM (2011) 303 final, 25 May 2011, p. 8.

1359 Council Conclusions on Strengthening the ENP, 19 June 2007, 11016/07.

1360 Interview 8 DG Trade official, 12 June 2013, Brussels; Interview 12 DG Trade official, 15 June 2015, Brussels.

Mediterranean countries will be willing to make the same far-reaching 'integration' commitments as in the EU-Ukraine DCFTA. For example, the EU will not be keen to liberalise GATS mode 4 services (i.e. temporary presence of natural persons for business purposes) as this is often perceived to relate to the EU Member States' sensitivities regarding labour market opening and immigration. On the other hand, an EU-Ukraine DCFTA-type of "Regulatory Framework" for services, including legislative approximation commitments, will be difficult to accept for the Mediterranean countries. Regarding dispute settlement, the separate bilateral DSM protocols that have been concluded with several EMAA partners already provide a solid legal framework for trade-related dispute settlement, similar to the one foreseen in the EU-Ukraine DCFTA.[1362] However, these bilateral DSM agreements do not include a procedure that obliges the arbitration panel to refer to the ECJ for disputes regarding the interpretation of the incorporated EU *acquis*, similar to Article 322 of the EU-Ukraine AA. An important difference between the EaP DCFTAs and the envisaged Moroccan DCFTA is that in the latter the EU aims to include a chapter on investment protection, including an investor-to-state dispute settlement (ISDS) mechanism.[1363] Moreover, the Moroccan DCFTA will most likely not include chapters on tariff reduction for industrial goods (which have been almost fully liberalised by the EMAA) and agricultural and fisheries products (which are already covered by the recent agricultural protocol).[1364]

Whether the Mediterranean partners will accept the same explicit forms of market access conditionality and will commit themselves to the same approximation commitments and procedures to ensure the uniform interpretation and application of the incorporated EU *acquis* as Ukraine will depend on the 'integration ambition' of each EMAA partner. Contrary to several EaP countries such as Ukraine, the EMAA partners never expressed or proclaimed EU membership ambitions, especially because they are not eligible for EU Membership.[1365] In any case, if the EU and these Mediterranean countries would find common ground for a DCFTA based on market access conditionality and legislative approximation, it will be crucial that the irregularities

1361 On this issue, see K. Pieters, 'Deep and comprehensive free trade agreements: liberalisation of goods and services between the Mediterranean neighbours and the EU', *CLEER Working Paper* 2013/3.

1362 See footnote 1259.

1363 On this point, see (the text to) footnote 1069.

1364 Interview 12 DG Trade official, 15 June 2015, Brussels.

1365 A notable exception is Morocco who applied on 20 July 1987 to join the EEC. This application was rejected by the Council on the grounds that Morocco is not a European State.

identified in the EU-Ukraine DCFTA are not repeated. Therefore, it is recommended that such a 'Mediterranean DCFTA' would include only two horizontal mechanisms for market access conditionality, as suggested above. One elaborate mechanism, including detailed procedures to ensure the uniform interpretation and application of the incorporated EU *acquis*, for those DCFTA chapters which establish actual 'integration' in the EU Internal Market and another, more limited, horizontal mechanism for the other DCFTA chapters. In order to reduce the costs of legislative approximation and implementation of the DCFTA, it will be important that these envisaged DCFTAs will not overload the partner countries with 'costly' legislative approximation commitments which will not result, directly or indirectly, to additional market access. This would not imply that the EU cannot use these DCFTAs to export and promote its social and labour-related legislation – for example in the chapter on trade and sustainable development. In addition, the legal terms regarding legislative approximation should be clarified and used in a consistent way.

12.5.3 *The Micro-States and Switzerland*

The last group of countries that has to be considered are the micro-States and Switzerland. With the former, it was already noted in the introduction that the EU is currently revising its legal framework with Andorra, Monaco and San Marino. According to the Council, the EU's relations with these micro-States are "extensive but fragmented" and it invited the Commission and the EEAS for an analysis of the possibilities and modalities of their possible "progressive integration into the EU Internal Market".[1366] According to the Council, "due attention needs to be given to the institutional, political and economic impact of a possible new framework, in particular in view of the need to ensure the integrity of the Internal Market".[1367] The Commission considered 5 options: (1) a status quo, (2) a sectoral approach which would consist of negotiating several sectoral agreements for access to parts of the internal market, (3) the conclusion of a framework association agreement, (4) participation in the EEA and (5) EU Membership. The Commission prefers a framework association agreement as the other options are politically difficult to realise (option 4), have proved to be unworkable (e.g. option 2 in the case of Switzerland), or

1366 Council Conclusions on EU relations with EFTA countries, 3060th Council meeting, 14 December 2010.

1367 Council of the European Union, Report of the Presidency on EU relations with the Principality of Andorra, the Republic of San Marino and the Principality of Monaco, 14 June 2011, 11466/11.

because they can only be realised in the long term (option 5).[1368] Moreover, the Commission proposes one single multilateral association agreement between the EU and the three micro-States as three separate agreements risk opening the door to "complexity and unnecessary differentiation".[1369] It further argues that such a multilateral association agreement should not only offer these micro-States "a high degree of integration in the EU Internal Market, its flanking measures and horizontal policies" but could also cover cooperation in other areas as appropriate, such as justice and home affairs, agriculture, fisheries, regional policy and foreign policy.[1370] Eventually, the Council adopted a negotiation mandate to negotiate association agreement(s) with Andorra, San Marino and Monaco in December 2014 and the negotiations were launched on 18 March 2015.[1371] Considering the Council and Commission's aim to create a legal instrument to gradually "integrate" these micro-States in the EU Internal Market, the objectives of this envisaged framework association agreement are very similar to those of the EaP AAs and DCFTAs.

However, despite these similarities, the EU-Ukraine AA and its DCFTA can hardly be of any use for the development of a new legal framework between the EU and these micro-States. The first and most obvious reason is that the legal, political, historical and economic relations between the EU and the micro-States are too different from the Union's relations with the EaP partners. Whereas Ukraine is geographically one of the largest EU neighbours with a weak economy and institutional and administrative capacity, the micro-States are the smallest neighbours of the EU with a stable – but very small – economy and administrative capacity.[1372] Also the unique specificities of these micro-States, such as their close and longstanding relation with several EU

1368 European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino. Option for Closer Integration with the EU', COM (2012) 680, 20 November 2012, p. 18; European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino: Options for their participation in the Internal Market', COM (2013) 793 final, 18 November 2013.

1369 *Ibid.* According to the Commission, such a multilateral agreement could include a common framework consisting of key principles and institutional provisions, but should nevertheless be sufficiently flexible to take into account each country's circumstances.

1370 *Ibid.*

1371 Council, 'Council adopts mandate to negotiate association agreement(s) with Andorra, Monaco and San Marino', *press release*, 16 December 2014, 16972/14. This press release reveals that the parties still have to agree to conclude one single multilateral association agreement or different bilateral association agreements.

1372 For example, the Council recognised that "enhanced participation of the three countries in the Internal Market could have a positive, though limited economic impact on the EU"

Member States, contribute to the *sui generis* character of their integration with the EU. Moreover, contrary to Ukraine, these three micro-States have already now an extensive and sophisticated legal framework with the EU, including several sectoral EU integration agreements (cf. *supra*).[1373] Finally, it is clear that the Commission aims to conclude an agreement with a much deeper 'integration' dimension than the EU-Ukraine AA and DCFTA. For example, in its Communications on the envisaged association agreement with the micro-States, the Commission mentions "horizontal and institutional issues with a view to ensuring the *homogeneity* of the Internal Market".[1374] According to the Commission, the association agreement with the micro-States should need to address: "(a) the dynamic adaptation of the agreement(s) to the evolving *acquis*, (b) the homogeneous interpretation of the agreement(s), (c) independent surveillance and judicial enforcement and (d) dispute settlement".[1375] It even notes that the EU could draw on the successful experience of the EEA Agreement in this respect.[1376] As it was concluded above, these elements are hardly present in the EU-Ukraine DCFTA. In addition, the Commission stresses the importance of homogeneity for this envisaged association agreement. This far-reaching integration principle is not enshrined in the EU-Ukraine AA or DCFTA (cf. *supra*). In this view, the EEA is a much more relevant point of reference for the envisaged association agreement(s) with the micro-States than the EU-Ukraine AA and DCFTA. When adopting the negotiation Directive for the association agreement(s) with these micro-States, the Council even stated that the level of market access offered by this agreement "should in due course be comparable to that enjoyed by the non-EU European Economic Area member states".[1377]

(Council Conclusion on EU relations with the Principality of Andorra, the Republic of San Marino and the Principality of Monaco, 6 December 2013, 16075/13).

1373 For a detailed overview of the legal framework between the EU and these three micro-States, see European Commission, 'Obstacles to Access by Andorra, Monaco, and San Marino to the EU's Internal Market and Cooperation in other Areas', SWD(2012) 388, 20 November 2012. For analysis, see M. Maresceau, *op. cit.*, footnote 19.

1374 European Commission, 'EU Relations with the Principality of Andorra, the Principality of Monaco and the Republic of San Marino: Options for Their Participation in the Internal Market', COM (2013) 793 final, 18 November 2013.

1375 *Ibid.*, p. 5.

1376 On the relevance of the EEA framework for this envisaged Association Agreement, see European Commission, *ibid.*, pp. 5–6.

1377 Council, 'Council adopts mandate to negotiate association agreement(s) with Andorra, Monaco and San Marino', press release, 16 December 2014, 16972/14.

This analysis equally applies to the EU's relation with Switzerland. The Council called for a revision of the EU's legal framework with Switzerland since it concluded that the current bilateral sectoral approach "has become complex and unwieldy to manage and has clearly reached its limits".[1378] Although Switzerland is – together with the EEA partners – the most integrated third country in the EU Internal Market through the conclusion of numerous (integration) agreements, the Council stated that this sectoral approach "does not ensure the necessary homogeneity in the parts of the Internal Market and of the EU policies in which Switzerland participates" as it lacks "efficient arrangements for the take-over of new EU *acquis* including ECJ case-law, and for ensuring the supervision and enforcement of the existing agreements".[1379] Therefore, the Council deems it necessary to establish a new legal framework which provides for, *inter alia*, a dynamic legally binding mechanism as regards the adaptation of the existing agreements to the evolving EU *acquis*, the homogeneous interpretation of the agreements and an independent surveillance and judicial enforcement mechanism. On 6 May 2014, the Council authorised the opening of negotiations on an "institutional framework agreement" with Switzerland which must address these horizontal institutional issues.[1380] The EU-Ukraine AA and DCFTA is not an appropriate 'template' for this envisaged EU-Switzerland agreement for the same reasons why it is not a useful point of reference for the development of the envisaged association agreement(s) with the micro-States. As the fourth largest trade partner of the EU in the world with a strong developed economy which is already now closely integrated in the EU Internal Market, Switzerland is too different from Ukraine and the other EaP partners. Moreover, the envisaged agreement with Switzerland will not be a broad and comprehensive preferential trade agreement such as the EU-Ukraine DCFTA but will be a horizontal "institutional framework agreement" which will build upon and govern the existing EU-Switzerland bilateral agreements. Also the "homogeneity" objective and the aim to establish

1378 Council Conclusions on EU relations with EFTA countries, 3060th Council Meeting, 14 December 2010, para. 48 and Council Conclusions on EU relations with EFTA countries, 3213th Council Meeting, 20 December 2012, para. 31.

1379 Council Conclusions on EU relations with EFTA countries, 3060th Council Meeting, 14 December 2010, para. 42.

1380 Council of the European Union, 'Negotiating mandate for an EU-Switzerland institutional framework agreement', 6 May 2014, Presse (267) 9525/14. It has to be noted that the outcome of the Swiss popular initiative on an "Initiative against mass immigration" of 9 February 2014 complicates the further development of this new legal framework. For analysis, see A. Lazowski, 'The end of chocolate box-style integration? EU-Swiss relations after the referendum', *CEPS Commentary*, 28 February 2014.

dynamic procedures to adapt the existing agreements, spelled out by the Council and Commission, clearly go beyond the integration dimension of the EU-Ukraine AA and DCFTA. In addition, Switzerland will most likely also insist on 'sovereignty safeguards' in this new legal framework. As it was noted, such procedures are not explicitly included the EU-Ukraine AA or DCFTA. It seems unlikely that Switzerland would agree to a type of market access conditionality which would allow EU institutions to 'monitor' and 'evaluate' the domestic Swiss legislative process.[1381]

In sum, the EU-Ukraine DCFTA can only be used, to a certain extent, as a blueprint during the negotiations of the 'Mediterranean DCFTAs'. However, in the light of the EU's differentiation policy and the Mediterranean partner countries' different political and economic situation and EU integration ambitions, these DCFTAs will have to be tailored to their specific needs and preferences. Moreover, it will be crucial that the unnecessary complexities and irregularities of the Ukraine DCFTA will not be repeated.

1381 On the options for a new EU-Switzerland bilateral agreement, see C. Rapoport, *op. cit.*, footnote 78, pp. 223–230.

CHAPTER 13

Sectoral Integration Agreements in the ENP: The Energy Community Treaty and the Common Aviation Area

The 'integration' objectives of the ENP are not only realised through the bilateral AAs and DCFTAs but also through sectoral EU integration agreements. Contrary to the EaP AAs, which are broad framework agreements, sectoral EU integration agreements only have the aim to integrate a third country into a limited section of the EU Internal Market by obliging them to apply or implement a part of the Union's 'sectoral *acquis*'. In its 2011 revision of the ENP, the Commission indicated that "enhanced cooperation can take place in all sectors relevant to the Internal Market, ranging from social policy and public health to consumer protection, statistics, company law, research and technological development, [...], tourism, space and many others". Most of these areas are now tackled in the EU-Ukraine AA, mainly in Title V on Economic and Sector Cooperation (cf. *supra*). However, as noted above, most of the provisions in Title V merely define general objectives on cooperation in a certain area and do not include binding obligations or commitments.[1382] This is not the case in the sectoral integration agreements which the EU has concluded over the years with several ENP countries. Such agreements are legally binding agreements and aim to achieve gradual integration in a sector of the EU Internal Market by extending a part of the EU *acquis* to a third country. They can be multilateral, such as the ECT, or bilateral, such as the bilateral aviation agreements with several ENP partners (Table 11).

TABLE 11 *EU integration agreements concluded in the framework of the ENP*

	Bilateral	**Multilateral**
Framework	– EaP AAs/DCFTA	– (EEA)[1383]
Sectoral	– Bilateral aviation agreements (e.g. with Moldova, Georgia, Morocco, Ukraine, Jordan and Israel)	– ECT

1382 However, most legislative approximation clauses in this title include a strict obligation (i.e. no 'best endeavours commitment') (on this point, see text to footnote 1230).

1383 The EEA is distinct from the ENP but is included in this table by way of illustration.

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Because Ukraine is a member of the ECT, this agreement will be the main subject of this chapter (13.1). Also the Common Aviation Area Agreement with Ukraine and the other ENP partners will be discussed (13.2) and some general remarks on sectoral EU integration agreements will be formulated (13.3). It is not the objective of this chapter to give a detailed analysis of these sectoral integration agreements as this has already been done extensively elsewhere.[1384] Instead, the focus will be on the 'integration' dimension of these agreements, which will be compared with the EU-Ukraine AA and DCFTA.

13.1 The Energy Community Treaty

The ECT was initially concluded only between the European Community on the one hand, and the countries of the Western Balkan (Albania, Bulgaria, Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Romania, Serbia and Kosovo) on the other hand and entered into force on 1 July 2006.[1385] In 2006, the Commission proposed to expand the geographical scope of the ECT to the ENP partners[1386] and, eventually, Moldova and Ukraine joined in, respectively, May 2010 and February 2011.[1387] The establishment of the ECT fits in the EU's

1384 For an analysis of the ECT, see M. Hunt, R. Karova, 'The Energy *Acquis* Under the Energy Community Treaty and the Integration of South East European Electricity markets: An Uneasy relationship?' in B. Delvaux, M. Hunt, K. Talus (eds.), *EU Energy Law and Policy Issues* (Euroconfidential, Brussels, 2009), pp. 51–85; H. Prange-Gstöhl, 'Enlarging the EU's internal energy market: Why would third countries accept EU rule export?' *Energy Policy* (37), 2009, pp. 5296–5303; R. Karova, 'Energy Community for South East Europe: rationale behind and implementation to date', *EUI Working Paper* RSCAS 2009/12; R. Petrov, 'Energy Community as a Promoter of the European Union's 'Energy *Acquis*' to Its neighbourhood', *Legal Issues of Economic Integration* 39(3), 2012, pp. 331–356; D. Buschle, 'Exporting the Internal Market – Panacea or Nemesis for the European Neighbourhood Policy? Lessons from the Energy Community, College of Europe EU *Diplomacy Paper* 2/2014; P. Van Elsuwege, 'The EU's governance of external energy relations: the challenges of a 'rule-based market approach', in D. Kochenov, F. Ambtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, Cambridge, 2014), pp. 215–237. For a comparative study between the ECAA and the ECT, see M. Charokopos, 'Energy Community and European Common Aviation Area: Two Tales of One Story', *European Foreign Affairs Review* 18(2), 2013, pp. 273–296.

1385 The ECT is not a mixed agreement, however, EU Member States may become participants without voting rights in the institutions of the ECT pursuant to Art. 95 ECT.

1386 European Commission, 'Strengthening the European Neighbourhood Policy', *op. cit.*, footnote 893, pp. 8–9.

1387 Protocol concerning the accession of Ukraine to the Energy Community Treaty, 24 September 2010; Protocol concerning the accession of Moldova to the Energy Community

recent external energy policy, which received a major boost by the Commission's Communication 'On Security of Energy Supply and International Cooperation [...]' in 2011[1388] and obtained a legal basis in the Lisbon Treaty.[1389] Moreover, energy security has become a key element of the ENP and EaP,[1390] especially after the different Ukraine-Russia energy disputes (cf. *supra*).

The ECT is a clear example of an EU integration agreement as it *obliges* the partner countries to "implement" a predetermined selection of EU legislation.[1391] The obligatory nature of this approximation process is even further articulated in Article 6 of the ECT, which reflects the principle of loyal cooperation enshrined in Article 4(3) TEU. The ECT distinguishes between *acquis* that is compulsory (i.e. the EU legislation on energy, environment, competition and renewable energy and resources)[1392] and *acquis* covered by best endeavours clauses.[1393] Although both the EU-Ukraine AA – especially the DCFTA – and the ECT are EU integration agreements, they have several important differences.

First, it seems that the integration objectives and the *finalité* of the legislative approximation process in the ECT are less strict. The ECT essentially provides for the extension of EU legislation on energy, environment and competition to non-EU countries and envisages establishing an "integrated market in natural

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Treaty, 17 March 2010. As already noted, Georgia applied for ECT Membership in 2013 (see footnote 1190).

1388 European Commission, 'On security of energy supply and international cooperation – "The EU Energy Policy: Engaging with Partners beyond our borders"', COM(2011) 539 final, 7 September 2011.

1389 In the Lisbon Treaty, for the first time a specific title and provision is devoted to energy. Even though Art. 194 TFEU makes no explicit reference to the external dimension of the Union's energy policy, through the implied powers doctrine, the Union can adopt international measures that are necessary to achieve the EU's internal (energy) objectives. On this point, see P. Van Elsuwege, *op. cit.*, footnote 1384, p. 215.

1390 For example, energy security is one of the four thematic platforms in the EaP. For the core objectives and work programme of the EaP Energy Security Platform, see European Commission, 'Eastern Partnership – Platform 3 Energy Security. Work Programme 2014–2017'.

1391 On this point, see text to footnote 104.

1392 Respectively, Arts. 10, 12, 18, and 20 ECT. In the area of competition, Arts. 18 and 19 ECT refer to Arts. 81 TEC (now Art. 101 TFEU), 82 TEC (now Art. 102 TFEU), 86 TEC (now Art. 106 TFEU) and 87 TEC (now Art. 107 TFEU) (see Annex III ECT). As noted above, in the competition chapter of the DCFTA, only the DCFTA provisions on state aid explicitly refer to Arts. 106 and 107 TFEU, which must be used "as sources of interpretation", including the relevant ECJ jurisprudence (see text to footnote 1157).

1393 Arts. 13–14 ECT.

gas and electricity, based on common interest and solidarity".[1394] This should lead to a stable regulatory and market framework, capable of attracting investment. Although the preamble states that the parties aim to create a "single regulatory space for trade in gas and electricity", it does not include the objective to "integrate [the partner countries] in the EU Internal [energy] Market" as it is the case in the EU-Ukraine AA (Article 1), neither does it incorporate the strict homogeneity principle as foreseen in the EEA. Significantly, the ECT provides for the possibility to adapt the annexed *acquis* "to both the institutional framework of this Treaty and to the specific situation of each of the Contracting Parties".[1395] This procedure allows tailoring the incorporated energy *acquis* to the needs and requirements of the ECT partners.[1396] As the Deputy Director of the ECT Secretariat Buschle notes: "homogeneity should not turn into a straightjacket". He argues that export of energy *acquis* requires "a certain degree of flexibility and creativity in shaping EU rules" so that they can be adapted to the specific needs of the law-importing countries.[1397] However, this flexibility can come at expense of the uniformity of the envisaged "single regulatory [energy] space".[1398] In any case, in the EU-Ukraine AA or DCFTA, such a procedure is not foreseen. Despite the risks this procedure entails for the uniform interpretation and application of the EU acquis, it would have provided the possibility to adapt certain elements of the incorporated EU *acquis* in the EU-Ukraine AA to the specific situation and needs of Ukraine.

Second, the ECT has a unique institutional framework and DSM, tailored to the multilateral nature of this agreement. The ECT "holds the middle ground between a traditional international organization administering a treaty, and an institutional set-up that is reminiscent of the Union itself".[1399] It is comprised of, *inter alia*, a Ministerial Council, a Permanent High Level Group (PHLG), a Secretariat and a Regulatory Board. The Ministerial Council, which consists out of one representative of each party and two representatives of the Union, can take legally binding decisions or non-binding recommendations,[1400] provides

1394 Preamble ECT.

1395 Arts. 24 and 5 ECT.

1396 An example of this adaptation procedure under Art. 24 ECT is the extension of Moldova's deadline to unbundle its gas transmission system operator under the Third Energy Package (Decision No. 2012/05 Ministerial Council of the ECT).

1397 D. Buschle, *op. cit.*, footnote 1384, p. 18.

1398 On this point, see A. Lazowski, *op. cit.*, footnote 15, p. 1148.

1399 S. Blockmans, B. Van Vooren, 'Revitalizing the European 'Neighbourhood Economic Community': The Case for Legally Binding Sectoral Multilateralism', *European Foreign Affairs Review* 17(4), 2012, 585. On this point, see also C. Rapoport, *op. cit.*, footnote 78, p. 136.

1400 Art. 76 ECT.

general policy guidelines and adopts procedural acts.[1401] The PHLG shall assist the Ministerial Council with its work[1402] and the Secretariat provides administrative support to the Ministerial Council and reviews the proper implementation by the parties of their ECT obligations and 'energy *acquis*'.[1403] Whereas *all* the decisions of the EU-Ukraine AA Association Council must be taken by consensus,[1404] the ECT Ministerial Council decides only in some areas by unanimity (i.e. regarding the creation of a single energy market) and in other areas by majority (i.e. on the "extension of the *acquis communautaire*") or by a two third majority of the votes cast (i.e. regarding operation of network energy markets).[1405] Regarding the DSM, the ECT does not include a "quasi-judicial model" in which an arbitration panel plays a crucial role, as in the EU-Ukraine DCFTA and other post-Global Europe FTAs (cf. *supra*).[1406] Instead, it establishes a DSM that echoes the infringement procedure known under the EU Treaties.[1407] Failure to comply with the ECT Treaty may be brought to the attention of the Ministerial Council by a reasoned request of any party, the Secretariat or the Regulatory Board. Also private bodies may approach the Secretariat with complaints.[1408] When the Ministerial Council determines, by unanimity, the existence of a serious and persistent breach by a party, it may suspend certain of the rights deriving from application of this Treaty to the party concerned, including the suspension of voting rights.[1409]

Third, the ECT procedures to ensure a uniform interpretation and application of the incorporated EU (energy) *acquis* are rather different from those included in the DCFTA. Only the ECT procedure to keep up with the relevant legal developments of the corresponding EU energy *acquis* is similar to those of (several chapters of) the DCFTA. Article 25 of the ECT states that the Energy Community "*may* take measures to implement amendments to the [incorporated *acquis*], in line with the evolution of European Community [now Union]

1401 Art. 47 ECT.

1402 Art. 53 ECT.

1403 Art. 67 ECT.

1404 Art. 463(1) EU-Ukraine AA.

1405 Respectively, Arts. 85, 79 and 83 ECT. The latter requires a positive vote of the EU party.

1406 See text to footnote 1240.

1407 It has to be noted that the Ministerial Council adopted more detailed rules on dispute settlement in the Procedural Act 2008/01/MC, 27 June 2008. These rules establish, *inter alia*, a preliminary ruling procedure preceding the submission of a case of non-compliance, which will be managed by the ECT Secretariat.

1408 Art. 90 ECT.

1409 Art. 92 ECT.

law".[1410] Thus, this is a basic *static* procedure that only provides for the possibility (no obligation) to update the incorporated energy *acquis*.[1411] However, so far, this static procedure has proved to work sufficiently. A good example of this is that on 6 October 2011, the ECT Ministerial Council adopted, by unanimity, the EU's Third Energy Package and incorporated this in the ECT.[1412] Moreover, in order to ensure a uniform interpretation of the EU energy *acquis*, the ECT does not establish a judicial authority within the Energy Community or a preliminary ruling procedure to the ECJ. Instead, Article 94 of the ECT states that:

> The institutions shall interpret any term or other concept used in this Treaty that is derived from European Community law in conformity with the case law of the Court of Justice or the Court of First Instance of the European Communities. Where no interpretation from those Courts is available, the Ministerial Council shall give guidance in interpreting this Treaty. It may delegate that task to the Permanent High-Level Group. Such guidance shall not prejudge any interpretation of the *acquis communautaire* by the Court of Justice or the Court of First Instance at a later stage.

Thus, for disputes on the interpretation of the incorporated EU *acquis* where there is case-law "available", this obligation for ECJ case-law conform interpretation is similar to the corresponding procedure in the DCFTA services/establishment chapter (cf. *supra*). Also this ECT procedure does not make a distinction between pre-signature and post-signature ECJ case-law. However, in the absence of relevant case-law, the ECT does not provide for a preliminary ruling procedure, analogous to the procedure of Article 322 of the EU-Ukraine AA. Instead, it leaves the interpretation in the hands of the Ministerial Council or the PHLG. It is questionable whether this can guarantee a uniform interpretation of the incorporated EU *acquis*. Not only can the

1410 Emphasis added. As noted above, the Ministerial Council may also take Measures to adapt the incorporated *acquis* "taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties" (*op. cit.*, footnote 1395).

1411 As analysed above, in the DCFTA, all the mechanisms to update the incorporated EU *acquis* are static and require unanimity, with the exception of those included in the services/establishment chapter.

1412 Ministerial Council Decision 2011/02 of the Energy Community Treaty on the implementation of the Third Energy Package, 6 October 2011.

Ministerial Council or PHLG only give "guidance", this procedure can also be considered as "too politicized".[1413] It will be the representatives of the contracting ECT parties, including from non-EU Member States, that must give interpretation to ECT provisions, which are in essence rules of EU law, and not an independent Court. An alternative mechanism to ensure the uniform interpretation would have been to *oblige* the Ministerial Council to ask for a *binding* preliminary ruling to the ECJ when there is a dispute concerning the interpretation of the incorporated EU *acquis*, similar to the procedure of Article 322 EU-Ukraine AA. However, such a procedure requires a more far-reaching 'integration' commitment of the partner countries as they must submit themselves to the ECJ. This is especially the case for those ECT Members which have no EU-accession perspective (i.e. Ukraine and Moldova). In any case, Article 94 ECT does not affect the exclusive jurisdiction of the ECJ to interpret EU law as the "guidance" of the Ministerial Council shall not prejudge any interpretation of the EU *acquis* by the ECJ at a later stage. Moreover, similar to the procedure of Article 322 AA, it can be argued that even without this last sentence of Article 94 ECT, the autonomy of the EU legal order would not be exposed as the ECT does not aim to establish a "homogeneous" energy market.[1414]

Because the ECT is still a relatively new agreement, it is too soon to assess the DSM and procedures ensuring a uniform interpretation and application of the incorporated EU energy *acquis*. For example, so far, the procedure under Article 94 ECT has not been used. Nevertheless, the Commission concluded that the ECT DSM "has proved efficient in cases where parties were open to negotiating an amicable solution [...], however, that the ultimate solution of the dispute may go beyond the strict interpretation of the Energy Community *acquis*".[1415] Regarding the implementation of the ECT obligations by Ukraine, the last ECT implementation report was rather negative. Although it recognises some tangible results in the area of electricity, it concludes that Ukraine must accelerate the speed of reforms to implement the EU *acquis* in the areas of gas, renewable energy and environment. Also Ukraine's implementation of the Third Energy Package – in particular the unbundling requirement – is lagging behind.[1416] As a result, the ECT Secretariat initiated several DSM proceedings against Ukraine for failure to comply with the ECT *acquis* related to

1413 S. Blockmans, B. Van Vooren, *op. cit.*, footnote 1399, p. 592.

1414 On this point, see text to footnote 1272.

1415 European Commission, 'Report from the Commission to the European parliament and the Council under Article 7 of Decision 2006/500/EC', COM(2011) 105, 10 March 2011.

1416 Energy Community Secretariat, Annual implementation Report, 1 August 2014.

electricity,[1417] environment,[1418] state aid,[1419] and renewable energy.[1420] This poor track record does not predict a swift implementation of Ukraine's energy-related AA and DCFTA approximation commitments.

Finally, it has to be noted that the European Commission has stated in its recent proposal for an EU Energy Union that it will propose "to strengthen the Energy Community, ensuring effective implementation of the EU's energy, environment and competition *acquis*, energy market reforms and incentivising investments in the energy sector". According to the Commission, the goal will be "closer integration of the EU and Energy Community energy markets".[1421]

13.2 The (EU-Ukraine) Common Aviation Area Agreement

A second area in the ENP where gradual integration into the EU Internal Market is envisaged through sectoral integration agreements is aviation. Following the *Open Skies* judgments of the ECJ in November 2002,[1422] the Commission gradually developed a Community (now Union) external aviation policy.[1423] One of the key pillars of this external aviation policy is, next to conclusion of "comprehensive agreements with major partners" and "restoring legal certainty" (i.e. amending bilateral agreements with EU Member States through Horizontal Agreements), the establishment of a "Common Aviation Area" (CAA) with neighbouring countries.[1424] The ultimate objective of the CAA is "the establishment of a single pan-European air transport market, based on a common set of rules and encompassing up to 60 countries with approximate one billion inhabitants".[1425] The CAA policy has been designed to

1417 Energy Community Case 01/2012/Electricity.

1418 Energy Community Case 01-05/2013/Environment.

1419 Energy Community Case 08/2014/UA/Competition.

1420 Energy Community Case 03-07/2014/Renewable Energy.

1421 European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy', COM(2015) 80 final, 25 February 2015.

1422 E.g. Case C-467/98, *Commission v. Denmark* (*Open Skies*), [2002], ECR I-9519. For analysis, see C. Hillion, 'A look back at the Open Skies Judgments', in M. Bulterman, *et al.* (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot* (Kluwer Law International, Alphen aan den Rijn, 2009), pp. 257–266.

1423 European Commission, 'Developing the agenda for the Community's external aviation policy', COM(2005) 79 final, 11 March 2005.

1424 European Commission, 'The EU's External Aviation Policy – Addressing Future Challenges', COM(2012) 556 final, 27 September 2012.

1425 European Commission, 'Common Aviation Area with the Neighbouring Countries by 2010 – Progress Report', 2008.

create mutual market access to the air transport markets of the parties, linked to legislative approximation towards EU aviation legislation. Again, integration into the EU Internal (aviation) Market goes hand in hand with legislative approximation as "the process of market opening and regulatory convergence take place in parallel in order to promote fair competition and the EU's safety, security, environmental and other standards".[1426] This CAA complements the broader 'integration' objectives of the ENP and is implemented through bilateral aviation agreements with, *inter alia*, the southern and eastern ENP partners. In the light of the ENP differentiation policy, the CAA agreements are tailored to the specific needs and requirements of each neighbour. However, in order to limit fragmentation of the CAA and differentiation of rights, obligations and market opportunities between the parties involved, in the longer term, the different individual bilateral and multilateral CAA agreements "could be merged".[1427]

The most elaborate CAA agreement so far is the multilateral European Common Aviation Area Agreement (ECAA), signed on 6 June 2006. Because the ECAA is concluded with the Western Balkan countries, who do not participate in the ENP as they are (potential) candidate countries, this agreement is not an ENP instrument *sensu stricto*. Several elements of this agreement were already discussed in the previous chapters. However, to understand the bilateral aviation agreements with the ENP partners, the key features of the ECAA are briefly analysed.

The ECAA provides for free market access, non-discrimination on grounds of nationality, freedom of establishment, equal conditions of competition and rules in the areas of safety, security, air traffic management, social and environment. As already noted, the ECAA includes far-reaching provisions to preserve the uniform interpretation and application of the incorporated EU *acquis*.[1428] The Commission even negotiated the ECAA on the basis of the EEA principles. However, in view of both the intention of ECAA partners to join the EU and the absence of any institutional links between these partners, a separate supervisory or jurisdictional structure in the lines of the 'twin pillars' of the EEA was not considered.[1429] Not only does the ECAA include a dynamic procedure to

1426 European Commission, 'The EU and neighbouring regions. A renewed approach to transport cooperation', COM(2011) 415 final, 7 July 2011.

1427 European Commission, *op. cit.*, footnote 1425.

1428 See (text to) footnotes, 147,148, 153, 1091, 1092 and 1112. For an analysis of these procedures, see C. Rapoport, *op. cit.*, footnote 78, pp. 143–151.

1429 ECJ, Opinion 1/00, *op. cit.*, footnote 80.

update the incorporated EU *acquis*,[1430] it also contains an obligation for pre-signature ECJ case-law conform interpretation of the incorporated EU *acquis*.[1431] The implications of the relevant post-signature ECJ rulings shall be determined by the Joint Committee "in view of ensuring the proper functioning of this Agreement".[1432] Similar to Article 94 ECT, the exclusive jurisdiction of the ECJ is ensured since decisions taken by this Joint Committee "shall be in conformity with the case law of the Court of Justice". It was also noted that the ECAA establishes a preliminary ruling procedure to ensure the uniform interpretation of the incorporated EU *acquis*, however, additional 'sovereignty safeguards' are provided.[1433] Similar to the EEA and the EU-Ukraine DCFTA services/establishment chapter, the ECAA also includes "horizontal adaptations and procedural rules".[1434] Although these ECAA procedures are far-reaching, the ECJ concluded that they "not allow completely homogeneous interpretation of its rules".[1435] This does not create legal complications considering that the establishment of a 'homogeneous ECAA' is not explicitly envisaged in this agreement.

In addition to the multilateral ECAA, the EU has concluded bilateral aviation agreements with the eastern and southern ENP partners after the Commission launched a common aviation policy towards the ENP countries in 2004.[1436] Compared to the multilateral ECAA, the procedures to ensure a uniform interpretation and application of the incorporated EU *acquis* in these bilateral agreements with the ENP countries are more restricted. With the EMAA partners, aviation agreements have been concluded with Morocco, Jordan and Israel.[1437] Contrary to the ECAA, these 'Euro-Mediterranean Aviation Agreements' do not include detailed rules on how the annexed EU *acquis* on,

1430 When a contracting party adopts new relevant legislation, it must inform the other parties via the joint committee not later than one month after its adoption. Then the Joint Committee shall (i) integrate the new or amended legislation in the Annexes, (ii) adopt a decision to the effect that the new or amended legislation in question is to be regarded as in accordance with the ECAA Agreement or (iii) decide on any other measures to safeguard the proper functioning of this Agreement (Art. 17 ECAA).

1431 Art. 16(1) ECAA.

1432 Art. 16(1) ECAA. On this point, see footnote 147.

1433 See (text to) footnotes 153–157 and 1278.

1434 Annex II, see also (text to) footnote 1092.

1435 ECJ, Opinion 1/00, *op. cit.*, footnote 80, para. 40.

1436 European Commission, 'A Community aviation policy towards its neighbours', COM(2004) 74 final, 9 February 2004.

1437 For text, see *OJ*, 2006, L 386/57 (Morocco); *OJ*, 2012, L 334/3 (Jordan); *OJ*, 2013, L 208/3 (Israel). Negotiations are ongoing with Lebanon and Tunisia.

inter alia, aviation safety, air traffic management, environment and social aspects must be implemented in the legal order of the partner countries.[1438] Moreover, the aviation agreements with Jordan and Israel do not include a strict obligation to apply, implement or incorporate in their domestic legal order the annexed EU *acquis*. Instead, they contain several unique approximation provisions which state that "the Contracting parties shall ensure that their legislation delivers, at a minimum, the standards specified [in the annexes (i.e. the incorporated EU *acquis*)]", under the conditions set out in the agreement.[1439] Because the annexed *acquis* does not have to be implemented or applied as such, but only serves as a minimum benchmark, these two aviation agreements are not EU integration agreements *sensu stricto*. Regarding the other criteria of an EU integration agreement, all three Mediterranean aviation agreements provide for a dynamic procedure to update the incorporated EU *acquis*, similar to the one included in the ECAA.[1440] However, an obligation for ECJ case-law conform interpretation is not included, neither a preliminary ruling procedure to settle disputes related to the interpretation of the incorporated EU *acquis*.[1441]

More recently, the EU has also signed "Common Aviation Area Agreements" with Georgia and Moldova.[1442] Although their coverage is similar to the 'Mediterranean' aviation agreements – especially to the one with Morocco –, their procedures to ensure the uniform interpretation and application of the incorporated EU aviation *acquis* are slightly more sophisticated. In addition to

1438 These Euro-Mediterranean Aviation Agreements do not include "horizontal adaptations and procedural rules" or a provision similar to Art. 3 ECAA. Instead, these agreements state that "each Contracting Party shall be responsible, on its own territory, for the proper enforcement of this Agreement and, in particular, the regulations and directives related to air transport listed in [the Annexes]" (e.g. Art. 21 Euro-Mediterranean Aviation Agreement with Morocco).

1439 Arts. 13–19 Euro-Mediterranean Aviation Agreement Jordan. The corresponding approximation clauses in the Euro-Mediterranean Aviation Agreement with Israel are slightly different and state that Israel "shall ensure that [its] relevant legislation, rules or procedures deliver, at minimum, the level of regulatory requirement and standards relating the air transport specified in [the annexes]" (Arts. 13(2), 17(2), 18 and 20). The "equivalent regulatory requirements and standards of European Union legislation" are listed in Annex IV and are further specified in Annex VI.

1440 Art. 27 Euro-Mediterranean Aviation Agreement Morocco; Art. 27 Euro-Mediterranean Aviation Agreement Israel, Art. 26 Euro-Mediterranean Aviation Agreement Jordan.

1441 Contrary to the ECAA, these Euro-Mediterranean Aviation Agreements provide for an arbitration procedure in the DSM (e.g. Art. 23 Euro-Mediterranean Aviation Agreement Morocco).

1442 For text, see *OJ*, 2012, L 321/3 (Georgia) and *OJ*, 2012, L 292/3 (Moldova).

a dynamic procedure to update the incorporated EU *acquis*,[1443] an obligation for ECJ case-law conform interpretation is incoporated.[1444] The latter even goes beyond the ECAA as no distinction is being made between pre- and post signature case-law (for an overview and comparison, see Table 2).

On 28 November 2013, at the Vilnius Eastern Partnership Summit, the EU also initialled a Common Aviation Agreement with Ukraine.[1445] This aviation agreement was considered as a meager consolation prize because the Yanukovych government had a few days before the Vilnius Summit decided not to sign the much more important Association Agreement (cf. *supra*). The new post-Maidan government is still committed to the signature of this aviation agreement. The signature was scheduled on 5 June 2014 but was postponed by the EU side due to an outstanding dispute between Spain and the United Kingdom concerning the territorial application of the agreement in Gibraltar.[1446]

The EU-Ukraine Common Aviation Area Agreement is largely similar to those concluded with Georgia and Moldova. Also this agreement aims "to create a Common Aviation Area based on mutual market access to the air transport markets of the Parties, with equal conditions of competition, and respect of the same rules – including in the areas of safety, security, air traffic management, social harmonization and the environment".[1447] The incorporated EU *acquis* in the annexes cover areas such as aviation safety, air traffic management, security, environment, economic regulation, competition, consumer protection and social aspects. Nevertheless, three new elements can be detected in this bilateral aviation agreement.

First, contrary to the other bilateral aviation agreements with the ENP countries, the Ukraine agreement includes a stricter and more detailed approximation

1443 Art. 26 EU-Georgia Common Aviation Area Agreement; Art. 26 EU-Moldova Common Aviation Area Agreement.

1444 Art. 21(5) EU-Georgia Common Aviation Area Agreement; Art. 21(5) EU-Moldova Common Aviation Area Agreement.

1445 Draft Common Aviation Area Agreement between the European Union and its Member States and Ukraine, Annex to the proposal for a Council Decision on the conclusion of a Common Aviation Area Agreement between the European Union and Ukraine, Council of the European Union, Interinstitutional File 2014/0007, 16 April 2014. As this draft text still has to pass the 'legal scrubbing' phase, it could be that there are minor differences with the final version that will be published in the Official Journal, after signature.

1446 Government of Ukraine, 'Common Aviation Area Agreement signing between Ukraine and the EU to be postponed', *press release*, 5 June 2014. Currently, it is not clear whether the MH17 plane crash on 17 July 2014 in eastern Ukraine will have an impact on the signing and ratification of this agreement.

1447 Preamble EU-Ukraine Common Aviation Area Agreement.

obligation. Several provisions are included stating that "Ukraine shall adopt the necessary measures to incorporate in its legislation and effectively implement the requirements and standards referred to in [the incorporated *acquis*]".[1448] Also a general provision on "General Principles of Regulatory Cooperation" states that "the Parties shall cooperate through all possible means to ensure the progressive incorporation in Ukraine's legislation of the [incorporated EU *acquis*], as well as the implementation by Ukraine of these provisions".[1449] In addition, periodic consultations within the framework of the Joint Committee on the interpretation of the incorporated EU *acquis* will take place and consultations and exchange of information when the EU adopts new relevant aviation legislation. Notably, Annex I specifies how the annexed EU aviation *acquis* must be made part of the internal legal order of Ukraine. It states that:

> A national act of Ukraine adopted with the aim to implement the provisions of the corresponding European Union Regulations and Directives shall be legally binding upon Ukraine, while the form and method of implementation is on disposal of Ukraine.[1450]

The *second* novelty is that a specific transitional arrangement is included, based on a strict market access conditionality.[1451] Annex III lays down a transitional arrangement, existing out of two "periods", pursuant to which "Ukraine's effective implementation of all provisions and conditions stemming from this agreement shall be carried out". In a first period, only a limited section of the agreement's envisaged market integration shall be applicable. For example, air carriers of the EU and air carriers licensed by Ukraine shall be permitted to exercise unlimited traffic rights between any point in the EU and any point in Ukraine.[1452] Only after Ukraine has "incorporated into the national legislation" a large section of the annexed EU aviation *acquis*, the second transitional

1448 See Arts. 7(1–2); 9(1–2); 10(2–3); 11(1–2); 13(1–2) and 14(1–2) EU-Ukraine Common Aviation Area Agreement. These provisions also state that "the Parties shall act in conformity with their respective legislation concerning the requirements and standards [specified in the annexes]".

1449 Art. 4 EU-Ukraine Common Aviation Area Agreement.

1450 Annex I EU-Ukraine Common Aviation Area Agreement.

1451 Combined reading of Arts. 5(2), 33 and Annex III EU-Ukraine Common Aviation Area Agreement.

1452 Annex III Section 2 EU-Ukraine Common Aviation Area Agreement. Under certain conditions, Ukraine shall also be involved as an observer in the work of the Committee established under the terms of Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports.

period will be initiated. In this period Ukraine will be granted more access to the EU aviation market, as prescribed in the agreement.[1453] Finally, "full implementation" of the agreement will be realised after Ukraine incorporates the entire body of annexed EU legislation.[1454] This transitional regime is based upon a strict monitoring system. When Ukraine considers that it has properly implemented a body of the incorporated EU aviation *acquis*, it shall inform the European Commission which shall make an assessment of this approximation process.[1455] It is only when the European Commission determines that Ukraine has fulfilled its approximation commitments that it shall submit the matter to the Joint Committee. This committee will then take a decision that Ukraine qualifies for passing to the next transitional period.[1456] Because the Joint Committee decides by consensus, the EU can determine the pace of this process.[1457] This far-reaching procedure is not included in the other aviation agreements but resembles to some mechanisms of the EU-Ukraine DCFTA.[1458]

Finally, the EU-Ukraine Common Aviation Area Agreement includes some new procedures to ensure the uniform interpretation and application of the incorporated EU aviation *acquis*. Similar to the aviation agreements with Moldova and Georgia, it includes a dynamic procedure to update the annexes to keep up with the developments of the relevant EU law.[1459] Also the incorporated *acquis* must be interpreted in conformity with the relevant case-law of the ECJ, without distinguishing between pre-and post signature case-law.[1460] New is the obligation to interpret the incorporated *acquis* in conformity with the relevant decisions of the European Commission. Moreover, when there arises in the DSM a dispute concerning the interpretation or application of the incorporated EU

1453 Annex III Section 3 EU-Ukraine Common Aviation Area Agreement.

1454 Sections 3 and 4 Annex III EU-Ukraine Common Aviation Area Agreement. Another condition is that the airspace under Ukraine's responsibility must be organised in line with the EU requirements applicable for the establishment of functional airspace blocks. "Full implementation" of the agreement shall imply that air carriers of the EU/Ukraine shall be permitted to exercise unlimited traffic rights between points in Ukraine/the EU, intermediate points in the ENP and ECAA countries, as well as in the EFTA countries, provided that the flight is part of a service that serves a point in a Member State/Ukraine (Section 4 Annex III).

1455 Art. 33(2) EU-Ukraine Common Aviation Area Agreement.

1456 Art. 33(3) EU-Ukraine Common Aviation Area Agreement.

1457 Art. 29(2) EU-Ukraine Common Aviation Area Agreement.

1458 This transitional mechanism, based upon market access conditionality, is similar to the 'indicative time schedule' in the DCFTA public procurement chapter (cf. *supra*, footnote 1134).

1459 Art. 15 EU-Ukraine Common Aviation Area Agreement.

1460 Art. 28(5) EU-Ukraine Common Aviation Area Agreement.

aviation *acquis*, the Joint Committee "shall respect the [relevant] rulings of the Court of Justice" and decisions of the European Commission.[1461] This procedure does not go as far as Article 322 of the EU-Ukraine AA/DCFTA because the Joint Committee is not obliged to ask for a binding preliminary ruling to the ECJ.

The integration dimension of the EU-Ukraine Common Aviation Area Agreement is thus stronger than in the other bilateral aviation agreements with the southern and eastern ENP partners. As already noted, the long-term goal is to integrate all the different aviation agreements "into a single ECAA".[1462] In this view, the current ECAA agreement includes a provision that allows the EU to ask "any State or entity which is prepared to make its laws on air transport and associated matters compatible with those of the [Union], and with which the [Union] has established a framework of close economic cooperation, such as an Association Agreement" to join the ECAA.[1463] However, because today most of these bilateral aviation agreements must still enter into force (Table 2), this step will not be realised in the near future.

13.3 Sectoral Integration into the EU Internal Market: The Way Ahead?

According to Blockmans and Van Vooren, "legally binding sectoral multilateralism" (i.e. multilateral sectoral integration agreements such as the ECT and the ECAA) is the preferred option to realise the economic integration objectives of the ENP and, eventually, the "Neighbourhood Economic Community".[1464] They prefer "a neo-functionalist integration rationale whereby the goal will be reached through an incremental progress, building regional block after regional block: energy community, aviation community, transport community, etc".[1465] According to these authors, the advantage of these multilateral sectoral integration agreements is that they exploit the economic interdependence of groupings of countries on the EU's borders and – ultimately – secure peace and prosperity across the continent. It is true that these multilateral sectoral integration agreements can serve the integration objectives of the ENP, however, they should be complementary to, and not an alternative for, a broad bilateral framework integration agreement with the ENP countries.[1466] Integrating the ENP countries merely through several multilateral sectoral integration

1461 Art. 30(1) EU-Ukraine Common Aviation Area Agreement.

1462 European Commission, *op. cit.*, footnote 1426, p. 4.

1463 Art. 32 ECAA.

1464 On the Neighbourhood Economic Community, see text to footnote 884.

1465 S. Blockmans, B. Van Vooren, *op. cit.*, footnote 1399, p. 580.

1466 It has to be noted that these authors made this argument before the three EaP AAs were initialled and signed.

agreements would create a complex web of agreements.[1467] As illustrated above, the EU already criticised and revised its relations with Switzerland because these are considered too sectoral and fragmented. Moreover, because these ENP sectoral agreements are not based on a firm common values conditionality, the EU would lack a legally binding instrument to promote its values as foreseen in 8 TEU. Finally, concluding only multilateral agreements with the ENP partners – who have various 'EU integration' ambitions – includes the risk that the pace and scope of integration will be determined by the lowest common denominator, dissatisfying the ENP partners with stronger EU ambitions. For example, a Transport Community Treaty was negotiated with the countries of the Western Balkans in 2009, however, the signing of this multilateral sectoral integration agreement has been held hostage by the politics on, *inter alia*, the recognition of Kosovo as an independent and sovereign State.[1468]

Thus, multilateral or bilateral sectoral integration agreements are the right instrument to address transnational challenges in the EU's neighbourhood in areas such as energy and aviation, however, they must built further on a general bilateral framework agreement which governs the overall relations between the EU and the partner country. This option is now pursued in the EaP with the conclusion of the framework AAs, which complement the existing multilateral ECT and the bilateral aviation agreements. In the case of Ukraine, the relation between the AA and the sectoral agreements is clearly defined. As already noted, Article 479(4) of the AA states that "existing agreements relating to specific areas of cooperation falling within the scope of this Agreement shall be considered part of the overall bilateral relations as governed by this Agreement and as forming part of a common institutional framework". Consequently, this provision covers the ECT and the EU-Ukraine Common Aviation Area Agreement.[1469] Although these sectoral agreements are not 'incorporated' in the AA, they cannot be dissociated from the objectives of the AA and their implementation and further development can be discussed in the institutional framework of the AA. Moreover, the hierarchy between the sectoral agreements and the AA is clearly defined in the latter.[1470]

1467 Similar to Blockmans and Van Vooren's concept of legally binding sectoral multilateralism, Rapoport discusses "la création d'esapaces juridiques communs entre la Communauté et les Etats candidats via des *accords sectoriels multilatéraux*" (C. Rapoport *op. cit.*, footnote 78, pp. 131–152 (emphasis added)).

1468 On this issue, see S. Blockmans, B. Van Vooren, *op. cit.*, footnote 1399, pp. 598–602.

1469 The EU-Ukraine AA already envisaged the conclusion of a Common Aviation Area Agreement (Art. 137).

1470 In the event of a conflict between the DCFTA and the ECT, the provisions of the latter will prevail (see footnote 1179 and 1180).

Conclusion

1 Final Conclusion

Despite the fact that the EU-Ukraine AA is considered to be "the most ambitious agreement the European Union has ever offered to a non-Member State"[1471] and the historic events that it has triggered, the exact contents of this new agreement is still rather unknown. Therefore, this contribution aimed to provide a comprehensive legal analysis of this fascinating but complex agreement. The key research objective of this book was to analyse *how* (i), and to *what extent* (ii), the EU-Ukraine AA is a *new* (iii) legal instrument that integrates a third country (i.e. Ukraine) into the EU.

First, regarding the question *how* the EU-Ukraine AA integrates Ukraine into the EU, the main integration instrument of the AA, and especially its DCFTA part, are binding legislative approximation commitments. Legislative approximation is a crucial tool for economic integration into the EU (Internal Market) as it tackles non-tariff barriers and creates a level playing field for economic operators and a common legal space between the EU and Ukraine. By obliging (thus going beyond 'best endeavours commitments') Ukraine to apply or incorporate in its domestic legal order a predetermined selection of the EU *acquis*, the Union's legislation is extended beyond its borders. These binding legislative approximation commitments make the EU-Ukraine AA an 'EU integration agreement' (Table 1). However, these obligations do not lead to the formal application of EU law in Ukraine. At the most, a set of legislation that is textually identical to corresponding provisions of EU law is applied by Ukraine in its domestic legal order, or in its relations with the EU.

These binding approximation commitments are flanked by two mechanisms, one related to market access conditionality and another related to the uniform interpretation and application of the incorporated EU *acquis*. Regarding the former, it was observed that in several chapters of the DCFTA, Ukraine will only be granted (additional) access to a section of the EU Internal Market if the EU determines, after strict monitoring procedures, that Ukraine has properly implemented its legislative approximation commitments. It is crucial that the incorporated EU *acquis* in the EU-Ukraine AA is applied and interpreted as uniform as possible. Therefore, the AA includes several mechanisms that must guarantee this objective. However, because the EU-Ukraine AA lacks the explicit objective of homogeneity, the incorporated EU *acquis*

1471 H. Van Rompuy, 'Statement at the Signing Ceremony of the Association Agreements with Georgia, Republic of Moldova and Ukraine', Brussels, 27 June 2014, EUCO 137/14.

 | DOI 10.1163/9789004298651_016

and the corresponding rules of EU law do not necessarily have to be interpreted and applied identically.

Whereas the legislative approximation obligations, mainly included in the DCFTA, are an instrument for Ukraine's gradual and partial "integration" into the EU Internal Market, a limited number of other AA provisions aim to bring Ukraine closer to non-Internal Market related EU 'policies'. For example, the envisaged "convergence" in the area of CFSP will not 'integrate' Ukraine in the EU's CFSP structures, however, it is clear that these provisions aim to establish a *rapprochement* that goes beyond a mere form of 'cooperation'. Moreover, through the *common values conditionality*, the AA aims to promote its key values (e.g. full respect for democratic principles, rule of law, good governance, human rights and fundamental freedoms) to Ukraine and accelerate the deepening of political relations.

The *second* element of the key research question is to *what extent* the EU-Ukraine AA integrates Ukraine into the EU. Regarding the trade part of the AA, it was demonstrated that the scope and depth of the DCFTA's liberalisation process is exceptionally large. Most trade in goods will be fully liberalised, although there are several exceptions such as the limited number of TRQs that the EU will continue to apply on several Ukrainian agricultural products. To allow the Ukrainian market to prepare for competition with tariff-free imports from EU goods, some specific transitional or safeguard measures are foreseen in the area of, *inter alia*, the car sector, export duties and geographical indications. Moreover, the DCFTA considerably liberalises or facilitates trade in all other trade(–related) areas such as services, public procurement and energy and includes detailed rules on IPR, competition, SPS and TBT. These DCFTA provisions are comprehensive and far-reaching, however, they largely remain within the boundaries of EU's common commercial policy. The actual 'integration' into the EU Internal Market, provided by the DCFTA, is rather limited. The only DCFTA chapters where juridical persons of Ukraine will be able to integrate in the EU Internal Market and to be treated "in the same way as juridical persons of EU Member States",[1472] are services/establishment and public procurement. The "Internal Market Treatment" in the area of services/establishment and the envisaged access of Ukrainian companies to the EU public procurement market constitute "unprecedented example[s] in allowing possible access of Ukraine, as a non EEA member to the EU Market".[1473]

1472 Art. 3 Annex XVII EU-Ukraine AA.

1473 Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, COM(2013) 290 final,15 May 2013.

However, these ambitious forms of integration in the EU Internal Market are not presented on a silver platter. Part III illustrated that the more ambitious the integration dimension of a DCFTA chapter is, the more detailed the market access conditionality and mechanisms to ensure a uniform interpretation and application of the incorporated EU *acquis* are (Table 6). In this view, the DCFTA chapters on services/establishment and public procurement have the strictest procedures for market access conditionality. Although trade in these areas will already be significantly liberalised immediately and unconditionally once the agreement enters (provisionally) into force (e.g. market access, national treatment and incorporation of relevant WTO rules), the limited elements of partial 'integration' into the EU Internal Market will only be granted after strict monitoring procedures related to Ukraine's approximation to the selected EU *acquis*. These procedures are clearly inspired by the pre-accession methodology as they include elements such as cross-comparison/transposition tables and focus as well on the effective and continuous implementation, application and enforcement of the incorporated EU *acquis*. Moreover, even if the monitoring institutions give a positive assessment of Ukraine's relevant legislative approximation commitments, the EU party must still agree in the DCFTA Trade Committee to grant this Internal Market Treatment (i.e. no automaticity). These strict monitoring procedures illustrate that the EU is very cautious to 'integrate' in its services/establishment and public procurement market a third country with a less developed economy and administrative capacity than an EEA country. In addition, the procedures to ensure a uniform interpretation and application of the incorporated EU *acquis* in these two DCFTA chapters are very detailed. For example, the sub-sections of the services/establishment DCFTA chapter covered by the Internal Market Treatment meet all three 'benchmarks' of an EU integration agreement as they include EEA-inspired rules on how the incorporated EU *acquis* must be made part in the Ukrainian legal order, "horizontal adaptations and procedural rules" and an obligation for ECJ case-law conform interpretation of the incorporated EU *acquis*. Moreover, a dynamic procedure to update the annexes to the evolutions in the corresponding EU legislation and a preliminary ruling procedure to the ECJ is provided for. Therefore, it can be argued that *de facto* homogeneity is guaranteed in these DCFTA areas.

Accordingly, with regard to the DCFTA chapters where the market access conditionality will result in less advanced forms of additional integration into the EU Internal market such as the TBT and SPS chapters, the procedures to ensure a uniform interpretation and application are less detailed. This is even more the case in those DCFTA chapters where legislative approximation will not result in *additional* liberalisation or integration into the EU Internal Market

(e.g. competition, trade-related energy, customs and trade facilitation) or in AA Title V on Economic and Sector Cooperation. Although the absence of detailed procedures to ensure the uniform interpretation and application of the incorporated EU *acquis* in these chapters can undermine the establishment of a common legal space between the EU and Ukraine, it will not affect the functioning of the EU Internal Market. Legislative approximation in these chapters only aims to export a chunk of the EU Internal Market *acquis* to Ukraine, and not to fully integrate (juridical persons of) Ukraine into a section of the Internal Market. Arguably, because the implementation of the approximation clauses in these chapters is not 'rewarded' with additional access to the EU internal market, there is no tangible incentive for Ukraine to actually implement these demanding approximation commitments.

Thus, the goal to "gradually integrate Ukraine into the EU Internal Market", enshrined in Article 1 of the AA, is only limitedly realised. Although the DCFTA is an exceptionally ambitious trade deal, almost fully liberalising all trade between the EU and Ukraine, the actual 'integration' of Ukraine into the EU Internal Market will only be established, after strict conditionality, in a limited number of areas. It appears that this explicit "integration" objective is too ambitious and, considering its political and legal challenges, difficult to realise. The conclusion of a more ambitious EEA-like integration agreement with Ukraine and the other EaP partners requires a level of economic development comparable to the EFTA States. However, the DCFTA includes procedures to deepen and widen its integration dimension (e.g. through decisions of the Association Council and Trade Committee). In the light of the agreement's conditionality approach, this process will depend on Ukraine's progress in implementing its current DCFTA obligations.

Moreover, Ukraine's integration into the EU (Internal Market) on the basis of the EU-Ukraine AA/DCFTA is complemented by *sectoral EU integration agreements* such as the ECT and the initialled bilateral aviation agreement. Also these agreements include detailed procedures aiming at the uniform interpretation and application of the incorporated (sectoral) EU *acquis*, however, they are different from those included in the DCFTA.

Also the broader non-trade related integration dimension of the AA must be considered. The AA does not explicitly aim to 'integrate' Ukraine into non-Internal Market related areas such as the CFSP and the AFSJ. Instead, it has the objective to establish a "gradual rapprochement" between the EU and Ukraine through, *inter alia*, "associating" Ukraine with EU policies and enhancing "cooperation" in the field of Justice, Freedom and Security.[1474] With the notable

1474 Art. 1 EU-Ukraine AA.

exception of the 'convergence' in the area of CFSP, the integration dimension of this 'political' part of the AA is limited. It only includes traditional elements of an EU association agreement such as an essential element and suspension clause, political dialogue and a joint institutional framework that can take binding decisions. Also the AA's integration dimension in the area of movement of persons is very limited. In the chapter on AFSJ matters, the provisions on treatment of workers and mobility of persons only include one important difference compared to the PCA regime, i.e. the non-discrimination clause concerning treatment of workers (Article 17). Although this provision is now defined in clear, precise and unconditional terms, it is still unclear whether it can acquire direct effect in the light of the non-direct effect provision included in the Council Decisions concluding the AA.

For the *third* aspect of the main research question (i.e. the *new* character of the EU-Ukraine AA), both the agreement's contents and procedural requirements for its conclusion must be explored. Regarding the former, this research illustrated that mainly the trade part of the EU-Ukraine AA includes innovative elements. The overall structure and broad coverage of the DCFTA is very similar to other post-Global Europe FTAs. However, one key element distinguishes the EU-Ukraine DCFTA from all the other (recent) EU FTAs, i.e. the strict market access conditionality. In no other FTA concluded by the EU, the partner country is obliged to approximate to a selection of EU *acquis* to liberalise trade or to obtain additional market access. This is no surprise because it is not evident that a third country is willing to make such extensive integration commitments. In addition, several other elements of the DCFTA are unique such as the Internal Market Treatment in the area of services/establishment and public procurement, the negative list approach for the liberalisation of establishment, the entire chapter on trade-related energy and the DSM relating to legislative approximation (Table 7). The 'political' part of the AA is very similar to other EU neighbourhood association agreements such as the EMAAs and the SAAs. The EU-Ukraine AA provisions related to non-discrimination of workers are even less ambitious than those included in the SAAs and several EMAAs. Only a few elements of AA provisions related to the common values conditionality (i.e. the essential element and suspension clauses), the institutional framework (e.g. the Civil Society Forum) and "convergence" in the area of CFSP are new.

On the other hand, the procedural steps for the conclusion of the EU-Ukraine AA included several remarkable and uncommon (legal) features, mainly as a result of the complex domestic and international political context in which this agreement was established. In the light of the Maidan revolution, the EU decided to sign this landmark agreement in two phases. First, the 'political' chapters of

the AA were signed and then, in a second phase, the remaining chapters of the agreement. Also the advanced unilateral implementation of the EU's DCFTA tariff commitments towards Ukraine through autonomous trade measures is unprecedented. Moreover, the scope of the AA's provisional application is exceptionally broad as it goes far beyond the trade-related provisions of the AA (Table 3). Remarkably, for the first time, the EU 'delayed' a part of the provisional application of an international agreement (i.e. the DCFTA) under pressure from a third country (i.e. Russia). Another unique – and contentious – element of this agreement is its legal basis. Whereas the combination of the traditional association provision (i.e. Article 217 TFEU) with CFSP legal bases (i.e. Articles 31(1) and 37 TEU) is new but comprehensible in the post-Lisbon legal framework for EU external action, the option to split off the AA provision relating to the treatment of third-country nationals legally employed in the territory of the other party (Article 17) is disputable. A separate AFSJ legal basis (Article 79(2)(b) TFEU) is adopted for this AA provision to allow the UK, Ireland and Denmark to 'opt out' from the application of this provision pursuant to Protocols 21 and 22 to the Treaties. The legal justifications for this 'split' legal basis are rather weak and the European Commission and several Member States disagreed with this practice. Also the synchronised and simultaneous ratification of the agreement by both the European Parliament and the Verkhovna Rada on 16 September 2014 was unprecedented.

Therefore, the answer to the key research question has to be nuanced. The EU-Ukraine AA is an exceptionally 'deep' and 'broad' EU association agreement, covering all the political and trade-related areas of the EU-Ukraine relationship aiming at Ukraine's gradual integration in the EU Internal Market on the basis of legislative approximation. Yet, it is not revolutionary as both the 'innovative' and 'integration' dimension of this agreement are limited and mainly relate to the different DCFTA mechanisms of legislative approximation and market access conditionality.

This analysis also demonstrated that the EaP AAs signed with Moldova and Georgia are very similar to the one with Ukraine. They have the same objectives, structure and broad coverage than the EU-Ukraine AA, however, some important differences were identified. The 'political' part of the Moldova and Georgia AAs does not include provisions on the treatment and mobility of workers, corresponding to Article 17 and 18 EU-Ukraine AA and Georgia is labeled as an "*Eastern* European country". Moreover, these two agreements include several references to Moldova's and Georgia's frozen conflicts and breakaway regions (i.e. Transnistria and Abkhazia/South Ossetia). In the EU-Ukraine AA, the Russian annexation of Crimea and the conflict in eastern Ukraine is not addressed because these events occurred after the initialling of

the agreement. Nevertheless, several 'post-signature *ad hoc* measures' were taken to regulate the territorial application of the AA and DCFTA in Crimea. Also the DCFTA parts of these three agreements include some differences (Table 8). For example, regarding trade in goods and services, the Moldova and Georgia DCFTAs contain less exemptions or reservations than the Ukraine DCFTA. Conversely, several other chapters such as competition, trade-related energy and IPR are less detailed or comprehensive in the Moldova or Georgia DCFTAs. Moreover, the most far-reaching integration element of the Ukraine DCFTA, i.e. the Internal Market Treatment in the services/establishment chapter, is not explicitly included in the two other DCFTAs.

2 Outlook (1 July 2015)

Now that the EU-Ukraine AA is finally signed and ratified by the Ukrainian and EU Parliament – but still requires the ratification of all the EU Member States –, Ukraine is facing the most challenging task with regard to the AA, i.e. its implementation. The Ukrainian Government and Parliament have emphasised that this process will be the key priority for Ukraine the coming years. However, the implementation of the EU-Ukraine AA will be a difficult and demanding exercise due its comprehensive and complex nature and Russia's objections – and potential retaliation measures – against this agreement.

With respect to the former, it was illustrated that the complex nature of the EU-Ukraine AA will hamper its correct and swift implementation. The complexity mainly lays in the DCFTA part as it has numerous different mechanisms for market access conditionality and procedures to ensure the uniform interpretation and application of the EU *acquis* (Table 6), an inconsistent legal vocabulary regarding the 'approximation' obligations (Table 9) and an extremely wide scope of 'incorporated' EU legislation (Table 10). To reduce the complexity of this agreement a better option would have been to establish only two *horizontal procedures* in the DCFTA. Firstly, one market access conditionality mechanism, including detailed procedures for the preservation of the uniform interpretation and application of the incorporated EU *acquis,* leading to *de facto* homogeneity, for those chapters that envisage actual 'integration' in the EU Internal Market. A second procedure would then include a less far-reaching horizontal mechanism for all the other DCFTA chapters. The latter would not have to include detailed monitoring procedures and mechanisms to ensure the uniform interpretation and application of the annexed EU Internal Market rules as the objective of these chapters is only to 'extend' the EU *acquis*. Additionally, definitions on how

the annexed EU *acquis* must be approximated, implemented and applied would have to be provided.

The large scope of annexed EU legislation to which Ukraine must approximate will raise the 'implementation costs' of the agreement for both the public and private sector in Ukraine. Moreover, it is questionable to what extent the complex and developed EU *acquis* is always the right blueprint for a country such as Ukraine with a weaker administrative capacity and a transition economy – which is currently facing a huge financial crisis. It was also noted that these approximation obligations can undermine the role of the Ukrainian Parliament in the legislative process. Therefore, it will be crucial that Ukraine develops, jointly with the EU institutions, an all-embracing programme for the implementation of these approximation obligations and that the EU's financial assistance to Ukraine cushions the implementation costs of this agreement. The Ukrainian Government made on 17 September 2014 the first step in this regard with the adoption of the "Plan of Implementation of the Association Agreement with the EU".[1475] However, such an implementation plan can only succeed in a stable political climate and when the new post-Maidan political elite in Kiev is willing and capable to modernise Ukraine – often by challenging vested interests of certain economic and political elites in the country.

The implementation of the EU-Ukraine AA, and especially the DCFTA, is also challenged by Russia. The EU and Russia have conflicting economic integration objectives towards Ukraine (i.e. the DCFTA *vs.* Eurasian Customs Union and EEU membership). Moreover, in addition to its well known (geo-) political concerns (i.e. 'loosing' Ukraine to the EU and the impact on its traditional sphere of influence), Russia also has trade-related and technical objections vis-à-vis the DCFTA. However, these trade-related concerns cannot be disconnected from Russia's broader geopolitical agenda and policy objectives towards Ukraine. Most of Russia's trade-related concerns are exaggerated and it can be concluded that these are mainly political tactics used by Moscow to achieve its (geo-)political goals: i.e. hamper EU-Ukraine integration and the conclusion of the AA. Only in the area of technical standards, Russia's concerns related to the DCFTA are – to a certain extent – valid. How the trilateral discussions will further develop is difficult to predict. It appears from the May 2015 trilateral Joint Statement[1476] that Russia has accepted that the provisional application of the DCFTA will start on 1 January

1475 Government of Ukraine, 'Government approves the Plan of Implementation of the Association Agreement with the EU', *press release*, 17 September 2014. On this issue, see text to footnote 1321.

1476 *Op. cit.,* footnote 580.

2016. Nevertheless, it is not excluded that Russia will further retaliate against the DCFTA. A trilateral compromise on Russia's technical objections against the DCFTA is only likely to be found in a context of political rapprochement and will depend on the progress made in the overall peace-process and de-escalation of the conflict in eastern Ukraine.

Whereas the EU-Ukraine AA was to a large extent a template for the AAs with Moldova and Georgia, this book demonstrated that it can only serve as a 'blueprint' for a limited number of other envisaged EU international agreements. Due to its specific integration dimension, the EU-Ukraine AA can only be useful for the envisaged legal framework with third countries who also have the ambition to 'integrate' into the EU Internal Market and who are, in return, willing to accept the far-reaching elements of market access and common values conditionality. Partial integration into the EU Internal Market on the basis of legislative approximation is only feasible with third countries with a smaller (transition) economy which have less to gain from setting their own trade-related legislation and mainly export to the EU Internal Market due to, *inter alia*, geographical proximity. Moreover, these countries must be willing to be 'monitored' and 'evaluated' by the EU in the light of the market access conditionality. The EU-Ukraine AA is demanding from a sovereignty point of view as Ukraine must accept, in several areas, a binding role of the (case-law) of the ECJ and because it loses its right to regulate several elements of its economy. Therefore, it was concluded that the Ukraine DCFTA can only be a useful point of reference during the DCFTA negotiations with the Mediterranean ENP partners, however, only on the condition that the complexities and irregularities identified in the EU-Ukraine DCFTA are properly addressed (e.g. only two *horizontal procedures* for market access conditionality and clear definitions regarding legislative approximation commitments).

Due to the historic events that it has triggered, the EU-Ukraine AA is one of the most controversial agreements ever signed by the EU. The decision of the former Government of Ukraine not to sign this agreement caused the Maidan revolution and sparked the conflict in eastern Ukraine. These events seriously damaged the Ukrainian economy, brought a military conflict at the borders of the EU, led to Russia's annexation of Crimea and resulted in a far-reaching EU-Russia (trade) dispute. This is rather paradoxical considering that the objective of the ENP and the EU-Ukraine AA is to promote "stability, prosperity and security" beyond the EU's borders. How the peace-process and de-escalation of the conflict in eastern Ukraine – in or outside the framework of the September 2014 and February 2015 'Minsk agreements' – will further evolve is difficult to predict. The pace of political events in Kiev the last 18 months have illustrated that it is impossible – and not wise – to forecast political

developments in Ukraine and their impact on the EU-Ukraine AA. In any case, a stable and definitive solution for the conflict in eastern Ukraine is currently not in sight, which does not create a beneficial environment for the implementation of the comprehensive and complex EU-Ukraine AA.

The *finalité* of the EU-Ukraine AA and the EU-Ukraine relationship as such is not predetermined. The post-Maidan Ukrainian Government has already declared in unambiguous terms that they see the AA as "an instrument of comprehensive preparation to the achievement of [EU Membership]".[1477] On 25 September 2014, President Poroshenko even presented a "Strategy of reforms 2020", a comprehensive reform programme that aims to prepare Ukraine for the application of EU Membership in 2020.[1478] However, although the EU repeatedly declared that the AA does not "constitute the final goal in EU-Ukraine cooperation",[1479] it is clear that there is currently no consensus in the EU capitals and institutions to give Ukraine a clear membership perspective. Thus, whereas the EU-Ukraine AA will function for the EU as an instrument for 'EU integration without membership', this agreement is perceived in Ukraine as a step towards EU accession. For the moment, these two different visions on the *finalité* of the EU-Ukraine AA can be reconciled. How long this schizophrenic situation will be able to continue remains to be seen.

1477 'Speech of the President at the ceremony of signing the Association Agreement between Ukraine and the European Union', Official Website of the President of Ukraine, 27 June 2014 (to consult at: http://www.president.gov.ua/en/news/30620.html).

1478 President of Ukraine, 'Strategy of Reforms 2020: The Purpose of Reforms is Membership in the EU', *Press office of the President of Ukraine*, 25 September 2014.

1479 3305th Council meeting, Foreign Affairs, *Press Release*, 3 March 2014, 7196/14 (Presse 114).

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2 International Agreements Concluded by the EU

2.1 *Bilateral*

- Albania

  Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part (*OJ*, 2009, L 107/166).
- Algeria

  Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria (*OJ*, 1978, L 263/2).

  Euro-Mediterranean Association Agreement between the European Community and its Members States, of the one part, and the People's Democratic Republic of Algeria, of the other part (*OJ*, 2005, L 265/2).
- Andorra

  Agreement between the European Economic Community and the Principality of Andorra (*OJ,* 1990, L 374/16).

  Protocol on veterinary matters supplementary to the Agreement in the form of an exchange of letters between the European Economic Community and the Principality of Andorra (*OJ,* 1997, L 148/16).

  Monetary Agreement between the European Union and the Principality of Andorra (*OJ,* 2011, C 369/1).
- Armenia

  Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part (*OJ*, 1999, L 293/3).
- Azerbaijan

  Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part (*OJ,* 1999, L 246/3).

- Bosnia and Herzegovina
  Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part (not yet published in *OJ*, see COM (2008) 182 final).
- Canada
  EU-Canada Comprehensive Economic and Trade Agreement, not yet published in the *OJ*. A consolidated version of the text is available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.
- Chile
  Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (*OJ,* 2002, L 352/1).
- Croatia
  Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part (*OJ,* 2005, L 26/3).
- Egypt
  Euro-Mediterranean Association Agreement between the European Communities and its Member States and the Arab Republic of Egypt (*OJ,* 2004, L 304/39).

  Agreement in the form of an Exchange of Letters between the European Community and the Arab Republic of Egypt concerning reciprocal liberalisation measures on agricultural products, processed agricultural products and fish and fishery products, the replacement of Protocols 1 and 2 and their annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (*OJ*, 2010, L 106/41).

  Protocol between the European Union and the Arab Republic of Egypt establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (*OJ*, 2011, L 138/2).
- Georgia
  Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part (*OJ*, 1999, L 205/3).

  Common Aviation Area Agreement between the European Union and its Member States and Georgia (*OJ*, 2012, L 321/3).

  Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (*OJ*, 2014, L 261/4).

· Iraq

Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part (*OJ,* 2012, L 204/20).

· Israel

Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (*OJ,* 2000, L 147/3).

Agreement in the form of an Exchange of Letters between the European Community and the State of Israel concerning reciprocal liberalisation measures on agricultural products, processed agricultural products and fish and fishery products, the replacement of Protocols 1 and 2 and their annexes and amendments to the Euro Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (*OJ*, 2009, L 313/83).

Protocol to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, on Conformity Assessment and Acceptance of Industrial Products (CAA) (*OJ*, 2013, L 1/2).

Euro-Mediterranean Aviation Agreement between the European Union and its Member States, of the one part, and the Government of the State of Israel, of the other part (*OJ*, 2013, L 208/3).

· Jordan

Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part (*OJ,* 2002, L 129/3).

Agreement in the form of an Exchange of Letters between the European Community and the Hashemite Kingdom of Jordan concerning reciprocal liberalisation measures and amending the EC Jordan Association Agreement as well as replacing Annexes I, II, III and IV and Protocols 1 and 2 to that Agreement (*OJ*, 2006, L 43/3).

Protocol between the European Union and the Hashemite Kingdom of Jordan establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part (*OJ*, 2011, L 177/1).

Euro-Mediterranean Aviation Agreement between the European Union and its Member States of the one part and the Hashemite Kingdom of Jordan, of the other part (*OJ*, 2012, L 334/3).

- Kazakhstan
  Partnership and Cooperation Agreement between the European Communities and their Member States, and the Republic of Kazakhstan (*OJ*, 1999, L 196/3).
- Korea (Republic of)
  Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (*OJ*, 2011, L 127/6).

  Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (*OJ*, 2013, L 20/2).
- Kyrgyz Republic
  Partnership and Cooperation Agreement between the European Communities and their Member States, and the Kyrgyz Republic (*OJ*, 1999, L196/48).
- Lebanon
  Interim Agreement on trade and trade-related matters between the European Community of the one part, and the Republic of Lebanon, of the other part (*OJ*, 2002, L 262/2).

  Euro-Mediterranean Agreement establishing an Association between the European Community and its Members States, of the one part, and the Republic of Lebanon, of the other part (*OJ*, 2006, L 143/2).

  Agreement in the form of a Protocol between the European Community and its Member States and the Republic of Lebanon establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part (*OJ*, 2010, L 238/20).
- (Former Yugoslav Republic of) Macedonia
  Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (*OJ*, 2004, L 84/13).
- Mexico
  Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States of the one part, and the United Mexican States, of the other part (*OJ*, 2000, L 276/45).
- Moldova
  Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other part (*OJ*, 1998, L 181/3).

  Common Aviation Area Agreement between the European Union and its Member States and the Republic of Moldova (*OJ*, 2012, L 292/3).

Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (*OJ*, 2014, L 260/4).

- Monaco

  Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco (*OJ,* 2003, L 332/42).

  Monetary Agreement between the European Union and the Principality of Monaco (*OJ*, 2012, C 23/14).

- Montenegro

  Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Montenegro, of the other part (*OJ*, 2010, L 108/3).

- Morocco

  Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (*OJ*, 1978, L 264/2).

  Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (*OJ,* 2000, L 70/2).

  Agreement between the European Union and the Kingdom of Morocco on the participation of the Kingdom of Morocco in the European Union military crisis management operation in Bosnia and Herzegovina (Operation ALTHEA) (*OJ*, 2005, L 34/47).

  Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part (*OJ,* 2006, L 386/57).

  Agreement between the European Union and the Kingdom of Morocco establishing a dispute settlement mechanism (*OJ*, 2011, L 176/2).

  Agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (*OJ*, 2012, L 241/4).

- Norway

  Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (*OJ,* 1999, L 176/36).

Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway (*OJ,* 2001, L 93/40).

- Palestine Liberation Organisation

  Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip (*OJ*, 1997, L 187/3).

  Agreement in the form of an Exchange of Letters between the European Union, of the one part, and the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, providing further liberalisation of agricultural products, processed agricultural products and fish and fishery products and amending the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other (*OJ*, 2011, L 328/5).
- Philippines

  Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (*OJ*, 2012, L 134/3).
- Russia

  Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part (*OJ,* 1997, L 327/97).

  Agreement between the European Community and the Russian Federation on readmission (*OJ*, 2007, L 129/40).

  Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation (*OJ*, 2007, L 129/27).
- San Marino

  Interim Agreement on Trade and Customs Union between the European Economic Community and the Republic of San Marino (*OJ*, 1992, L 359/13).

  Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino (*OJ*, 2002, L 84/43).

  Monetary Agreement between the European Union and the Republic of San Marino (*OJ*, 2012, C 121/5).
- Serbia

  Agreement between the European Community and the Republic of Serbia on the facilitation of issuance of visas (*OJ*, 2007, L 334/137).

Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part (*OJ*, 2010, L 108/3).

Interim Agreement on trade and trade-related matters between the European Community, of the one part, and the Republic of Serbia, of the other part (*OJ*, 2010, L 28/1).

Agreement between the European Union and the Republic of Serbia establishing a framework for the participation of the Republic of Serbia in European Union crisis management operations (*OJ*, 2011, L 163/2).

- Singapore

  EU-Singapore Free Trade Agreement, text not yet published in *OJ*, but to consult at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

- South Africa

  Agreement on Trade, Development and Cooperation between the European Community and its Member States, on the one part, and the Republic of South Africa, on the other part (*OJ*, 1999, L 311/3).

- Switzerland

  Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons (*OJ*, 2002, L 114/6).

  Agreement between the European Community and the Swiss Confederation on Air Transport (*OJ*, 2002, L 114/73).

  Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (*OJ*, 2004, L 385/30).

  Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (*OJ*, 2008, L 53/5).

  Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland (*OJ*, 2008, L 53/42).

- Tajikistan

  Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part (*OJ,* 2009, L 35/3).

- Tunisia

  Cooperation Agreement between the European Economic Community and the Republic of Tunisia (*OJ*, 1978, L 265/2).

Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (*OJ*, 1997, L 97/2).

Protocol between the European Union and the Republic of Tunisia establishing a dispute settlement mechanism applicable to disputes under the trade provisions of the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (*OJ*, 2010, L 40/75).

- Turkey

  Agreement establishing an association between the European Economic Community and Turkey (*OJ*, 1973, C 113/2).

- Ukraine

  Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Ukraine, of the other part (*OJ*, 1998, L 49/3).

  Agreement between the European Union and Ukraine on the participation of Ukraine in the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL 'Proxima') (*OJ*, 2004, L 354/82).

  Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations (*OJ*, 2005, L 182/29).

  Agreement between Ukraine and the European Union on the security procedures for the exchange of classified information (*OJ*, 2005, L172/84).

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1 This list includes only interviews that have explicitly been cited in this work. The author conducted numerous other interviews with officials from different EU and Ukrainian institutions, however, these were not explicitly mentioned in this book.

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