



*Understanding the EU's Association Agreements and
Deep and Comprehensive Free Trade Areas with
Ukraine, Moldova and Georgia*

The EU's Association Agreements and DCFTAs with Ukraine, Moldova and Georgia: A Comparative Study

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Abstract

This paper compares the three Association Agreements (AAs) and Deep and Comprehensive Free Trade Areas (DCFTAs) that the EU has concluded with Ukraine, Moldova and Georgia. It explores, in particular, the main differences in the 'political' and trade-related chapters and the provisions on legislative approximation. Whereas the scope and contents of these agreements are very similar, some specific differences can be identified in view of the different political and economic priorities of the EU's partner countries.

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A Comparative Study

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Introduction

This study aims to analyse the key differences between the three Association Agreements (AAs) the EU concluded with Ukraine, Moldova and Georgia. Whereas the '3 DCFTA' project already analysed in detail the scope, contents and implementation perspectives of these agreements in three separate 'handbooks',¹ this contribution will explore the most important differences between these landmark agreements.

The texts of these three agreements are very similar for various reasons. First, these agreements were developed in the same policy framework, i.e. the European Neighbourhood Policy and the Eastern Partnership (EaP). When the EaP was launched in 2009, one of the key objectives of the EU was to conclude a new generation of association agreements with the partner countries establishing an ambitious form of political association and economic integration. The latter objective had to be realised by the conclusion of "Deep and Comprehensive" Free Trade Areas (DCFTAs). These ambitious trade agreements, which are now included in the 3 AAs, do not only open up markets for trade in goods but cover all relevant trade-related areas such as services, public procurement, technical barriers to trade (TBT), intellectual property rights (IPR), etc. Moreover, Ukraine, Moldova and Georgia have committed themselves (soft or strong obligations) to approximate to a substantial selection of EU legislation, which in several areas can lead to a far-reaching integration into the EU Internal Market.

Secondly, the starting point of the AA negotiations was also very similar for the three countries. Each of them concluded in the mid-nineties comparable Partnership- and Cooperation Agreements (PCAs) which provided for a similar level of limited economic cooperation (without the establishment of a FTA) and political cooperation. The legal framework was therefore very similar at the start of the AA negotiations for the three countries.

Thirdly, the Moldova and Georgia AAs were clearly modelled upon the Ukraine agreement, which was the first of this new generation of association agreements. The EU-Ukraine AA negotiations were launched in March 2007 (but the DCFTA

¹ The handbooks can be downloaded at <http://www.3dcftas.eu>

negotiations were only launched in February 2008 after Ukraine's WTO membership was assured), and the text of the agreement was initialled in March 2012 (political part) and July 2012 (DCFTA). The AA negotiations with Moldova and Georgia were only launched in, respectively, January and July 2010 and were initialled² during the Vilnius Eastern Partnership Summit in November 2013. EU negotiators recognised that they used the Ukraine agreement as a 'blueprint' for Georgia and Moldova and also the Council's negotiating directives for the Moldova and Georgia AAs were very similar to the one adopted for Ukraine. Meanwhile, the AAs with Moldova and Georgia entered into force on 1 July 2016. The Ukraine AA is largely provisionally applied since 1 November 2014 (political part) and 1 January 2016 (DCFTA) and will fully enter into force after the EU's ratification.³

Therefore, the three AAs and DCFTAs have a very similar structure, provisions and level of market opening. However, in the light of the EU's differentiation and joint-ownership approach in the ENP, there are a number of important differences in the agreement.⁴ For example, the Commission stressed from the outset that the DCFTAs had to be "tailored and sequenced carefully to take into account of each partner country's economic circumstances and state of development".⁵ Indeed, the three countries had a rather different approach towards the AA negotiations. For example, whereas Ukrainian negotiators strongly pushed for transitional mechanisms and safeguard measures in several areas of the DCFTA to protect their domestic market (e.g. in the area of cars and export duties), Georgia had already unilaterally liberalised and deregulated important sectors of its economy during the economic reforms in under the Saakashvilli period. For the same reason Georgian negotiators were also more reluctant towards far-reaching approximation commitments as they were afraid that this could overregulate their economy. The Moldovan negotiators on the other had a more ambitious 'approximation friendly' stance vis-à-vis its DCFTA.

This paper will first compare the political chapters of the AAs (2). Then, the DCFTAs (3) and the AAs' Titles on Economic and Sector Cooperation (4) and General and Final Provisions (5) are explored.

² 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.

³ At the moment of writing this paper, the agreement was already ratified by all the Member States, but not yet by the EU, which is expected soon.

⁴ For a recent analysis on of the ENP, including on the concept of joint ownership and differentiation, see H. Kostanyan (Ed), *Assessing the European Neighbourhood Policy: Perspectives from the literature* (Rowman and Littlefield International - CEPS, London, 2017).

⁵ 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, p. 6.

1. The political chapters of the AAs

1.1 The AA's objectives and (lack of) EU membership perspective

The objectives of the agreements enshrined in the preamble and Article 1 of the AAs are very similar. All three agreements aim “to promote political association and economic integration between the Parties based on common values and close links”, to provide for an institutional framework for political dialogue and to promote, preserve and strengthen peace and stability in the regional and international dimensions in accordance with international law. In addition, the agreements envisage strengthening cooperation in the area of freedom, security and justice with the aim of reinforcing the rule of law and the respect for human rights and fundamental freedom; and to establish conditions for enhanced economic and trade relations leading to the partner countries gradual integration into to EU Internal Market, including by setting up a DCFTA and legislative approximation. The preambles also envisage to strengthen cooperation in the area of Common Foreign and Security Policy (CFSP) and Common Security and Defence Policy (CSDP) and sectoral areas such as energy, climate-change, the fight against organised crime, cross-border and regional cooperation and environmental protection.

There are however two notable differences between the Ukraine AA on the one hand and the Georgia and Moldova AAs on the other. First, only the preamble of the Georgia and Moldova AAs refer to the ENP and the EaP as the policy frameworks in which these agreements are embedded. The explicit reference to the ENP and the EaP anchors these policy's objectives and principles in the bilateral legal framework between the EU and these two countries. Second, the Moldova and Georgia AAs include in Article 1 a specific objective in the light of their ‘frozen conflicts’ and breakaway regions. With regard to the objective of promotion and strengthening of peace and stability in the regional and international dimension, 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”. In the light of the 2008 Georgia-Russia war, the Georgia agreement even explicitly aims “to promote cooperation aimed at the peaceful conflict resolution”. However, only the preamble of the agreements explicitly refers to Transnistria or Abkhazia/South Ossetia.⁶ Because the text of the agreement of the EU-Ukraine AA was initialled before Russia's annexation of Crimea in March 2014 and the conflict in

⁶ 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 Tskhnavali 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 [...]”.

eastern Ukraine, this situation is not addressed in the EU-Ukraine AA (see also below).

All three agreements also remain silent about EU accession. Despite the efforts of the partner countries during the negotiations, the EU refused to include an explicit (long-term) membership perspective in the agreement. Instead, the agreements include diplomatic language on the three countries' membership ambitions, "recognising" them as a "European countries" sharing a common history and common values and acknowledging their "European aspirations and European choice". However, the agreements do not preclude a membership perspective as they state that they "shall not prejudice and leave open future developments". Only the Georgia AA includes a notable difference. Its preamble recognises Georgia as an "Eastern European country" and not as a "European country", such as it is the case for Ukraine and Moldova. Most likely, this differentiation is included to distinguish the countries in the southern Caucasus geographically from the 'European' EaP countries. The relations between this formulation and Article 49 TEU, pursuant to which only "European States" are eligible for EU Membership, is unclear. It has been argued that this "eastern" tag was included to preclude an accession perspective for Georgia. However, similar to the Ukraine and Moldova AAs, the Georgia AA also state that it "leaves open the way for future progressive developments in EU-Georgia relations".

Like in all EU association agreements, the three EaP AAs include a similar 'general principle clause' (Article 2) defining the "essential elements" of the bilateral relationship, and which is linked to a suspension clause. Violation by one party of these essential elements can lead to immediate suspension of the agreement by the other party. All three AAs refer to respect for democratic principles, human rights and fundamental freedoms as defined in several international agreements and conventions. However, only the EU-Ukraine AA defines "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" as essential elements.

Also the institutional framework of the agreements is almost identical. At the top of the institutional pyramid is the Association Council, composed out of members of the EU Council and the Commission on the one hand and members of the government of the partner country, on the other. The Association Councils are the main institution to monitor and supervise the application and implementation of the agreement. The Association Council is assisted by the Association Committee, which is on its turn assisted by specific sub-committees. The only notable difference between the three agreements is that only the EU-Ukraine AA provides for a legal basis for annual EU-Ukraine summits, which will hold "the highest level of political and policy dialogue" and "provide overall guidance for the implementation of [the agreement] as well as an opportunity to discuss any bilateral or international issues". Such summits, which were already a practice before the AA, are not hold with Moldova and Georgia.

Nevertheless, these countries hold multilateral Summits with the EU in the framework of the Eastern Partnership.

1.2 Cooperation in the area of CFSP

The agreements also include similar provisions related to political dialogue and cooperation in the area of CFSP. On several points the EU-Ukraine AA is a bit more ambitious than the other two agreements. For example, all three agreements envisage practical cooperation in conflict prevention and crisis management, in particular with a view to possible participation in EU-led civilian and military crisis management operations as well as relevant exercises and training. However, only the EU-Ukraine AA explicitly envisages close cooperation between Ukraine and the European Defence Agency (EDA) to strengthen military-technical cooperation. However, with regard to combatting terrorism, illicit trade of small arms and light weapons and conventional arms exports control, the provisions in the Moldova and Georgia AAs are slightly more elaborate. Another difference is that, as mentioned above, only the Georgia and Moldova AAs include provisions concerning their 'frozen' conflicts. 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)). In relation to the International Criminal Court (ICC), only the Ukraine AA requires the ratification of the Rome Statute of the ICC because from these three countries only Ukraine still needs to ratify the Statute. This is complicated by a judgment of the Ukrainian Constitutional Court in 2011, which concluded that several provisions of the Rome Statute are not in conformity with the national constitution.⁷ However, also the two other agreements stress the importance of the implementation of the Rome Statute and the ICC.

⁷ However, on 17 April 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014. Further, on 8 September 2015, the Government of Ukraine lodged a second declaration under article 12(3) of the Statute accepting the exercise of jurisdiction by the ICC in relation to alleged crimes committed on its territory from 20 February 2014 onwards, with no end date.

1.3 Cooperation on Justice, Freedom and Security

The provisions in the AAs' Titles on Justice, Freedom and Security are also largely the same. These cover the promotion of rule of law, the protection of personal data, cooperation on migration, asylum and border management, combating organised crime and terrorism, tackling illicit drugs and legal cooperation. All three AAs do not provide new rules with regard to visa-liberalisation, but refer to the bilateral readmission and visa-facilitation agreements and the Visa Liberalisation Action Plans (VLAPs).⁸ However, several provisions in the Moldova and Georgia AAs are more detailed. For example, with regard to the protection of personal data, the Moldova and Georgia AAs state that data protection must be ensured in accordance with relevant EU legislation (e.g. Directive 95/46/EC and Directive 2006/24/EC on data protection) and relevant Council of Europe Conventions. Or, with regard to cooperation on border management, the Moldova and Georgia AAs explicitly envisage cooperation with FRONTEX. But the most important difference relates to the treatment and mobility of workers. Only the Ukraine AA includes a provision on the treatment (Art. 17) and mobility (Art. 18) of workers. Whereas the latter only includes a best endeavours commitment to consider opening up the labour market, the treatment of worker provision includes a binding non-discrimination obligation with regard to workers legally employed in the territory of the other party. Workers who are legally employed in the territory "shall" be free of any discrimination on the basis of nationality as regards working conditions, remuneration or dismissal compared to the nationals of that Member State. Because this provision includes a clear, precise and unconditional obligation, this provision can have direct effect. This means that Ukrainian nationals legally employed in the EU can invoke this provision before Member State courts or the Court of Justice of the European Union as a basis for requesting that court to disapply discriminatory provisions. Indeed, third country-nationals have successfully relied on identical provisions included in other association agreements or even the PCA with Russia.⁹ Because such a provision is not included in the two other AAs, Georgian and Moldovan workers legally employed in the EU do not enjoy the same protection against discrimination based on nationality as Ukrainian nationals.

⁸ Meanwhile Moldova (2014), Georgia (2017) and Ukraine (2017) have been granted a visa-free regime to the Schengen area. Nationals of the three countries who hold biometric passports can travel without a visa to the Schengen area for short stays up to 90 days.

⁹ For a more detailed analysis of the direct effect of this provision, see G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area. A new legal instrument for EU integration without membership?* (Brill, 2016).

2. The DCFTAs

2.1 Trade in goods

Concerning trade in goods, the provisions of the chapters on National Treatment and Market Access for Goods and Trade Remedies are very similar. All three agreements establish a free trade area for goods in conformity with Article XXIV GATT. However, the scope and pace of market opening and sector-specific safeguard measures or transitional mechanisms differ between the three agreements.

With regard to the pace of tariff elimination, only the Ukraine and Moldova DCFTAs foresee a gradual and asymmetric trade liberalisation. 'Gradually' means that the free trade area will be progressively established over a period of maximum 10 years. Asymmetry implies that the EU reduces or eliminates its tariffs faster (in most cases immediately after entry into force) than Ukraine and Moldova. This gives the domestic producers in Ukraine and Moldova the opportunity to boost their exports to the EU market before facing full competition on the home market. Moreover, it has to be noted that both Ukraine and Moldova already benefited from unilateral preferential access to the EU market through EU autonomous trade preferences (ATP).¹⁰

The EU removed immediately its import duties for most industrial goods and the remaining products (e.g. some chemicals, fertilisers, cars and motor vehicles) will be liberalised after a period between 3 to 7 years. Ukraine only had to immediately liberalise around 50 % of its exports of industrial products, but after a transitional period of several years the share of EU exports liberalised by Ukraine will increase to 96 %. Concerning agricultural products, the EU will also liberalise faster than Ukraine. However, the EU will apply TRQs to specific types of cereals, pork, beef and poultry and sugar. Ukraine will also keep applying tariffs on a limited number of agricultural products after the transitional period. In the Moldova DCFTA, the EU will immediately and fully abolish import duties on all Moldovan industrial products, whereas Moldova will phase out its tariffs over a period of 3 to 5 years. Similar to the Ukraine DCFTA, the EU will still apply TRQs to some agricultural products. Unlike the Moldova and Ukraine DCFTAs, the agreement with Georgia does not include transitional periods for the elimination of import duties. As noted in the introduction, this is because of the liberal reforms undertaken earlier by Saakashvili's government, which in 2006 eliminated import tariffs for most products, making Georgia's applied

¹⁰ As a support measure the EU has unilaterally applied the DCFTA tariff regime to Ukrainian products between 23 April 2014 and 1 January 2016 as an ATM (the date of provisional entry into force of the DCFTA) (see Regulation 374/2014). The EU has already applied ATM to Moldova since 2008, first covering only industrial products, but after Russia's import ban on several Moldovan agricultural products, the EU amended these ATM to extend duty-free treatment to Moldovan wine and to grant duty-free quotas for some fruits and vegetables (Regulation 1383/2014). The ATM applied until 31 December 2015.

MFN WTO tariff rate one of the lowest worldwide (1.5%). The only exception to full tariff liberalisation is that the EU will still apply an annual TRQ for garlic.

Another difference is that contrary to the Ukraine DCFTA, the Moldova and Georgia Agreements reduce and eliminate tariffs on the basis of a negative list. This means that these two DCFTAs introduce a general obligation to “eliminate all customs duties”, except as provided in the relevant annexes to the agreement. Thus, the Moldova and Georgia DCFTAs only list the tariff lines which are excluded from the general liberalisation obligation. The Ukraine DCFTA on the other hand is less progressive as it lists all the tariff lines which are subject to tariff elimination or reduction.

Another difference is that only Ukraine has obtained some sector specific concessions. With regard to Ukraine’s car sector, Ukrainian motor vehicles will not only enjoy a particularly long transitional period of 10 years, the DCFTA also foresees a specific safeguard mechanism for passenger cars.¹¹ Another specific transitional mechanisms in the Ukraine DCFTA relates to the prohibition of export duties. Because Ukraine applies export duties on a number of products such as livestock and hide raw materials, sunflowers seeds and types of metal, the EU allowed Ukraine to gradually phase out its export duties during a period of 10 years. Moreover, a specific safeguard measure mechanism is provided for Ukraine’s export duties during a period of 15 years.

The final important difference is that the Moldova and Georgia DCFTAs include an “anti-circumvention mechanism for agricultural and process agricultural products”. 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.

2.2 Technical Barriers to Trade (TBT)

The provisions in the three TBT chapters are also very alike. These include the affirmation of the WTO TBT Agreement, technical cooperation and rules related to marking and labelling. However, the approximation clauses included in these three TBT chapters include some important differences. The three countries committed themselves to “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”. But the specific nature (strong or soft obligation) and scope of the commitments is slightly

¹¹ Ukraine can hold its import tariff at the level of 10% for up to 15 years if during the previous year (i) imports from the EU exceed 45.000 cars or (ii) imports from the EU amounted to 25% newly registered cars.

different. Ukraine “shall” (strong obligation) incorporate the relevant EU acquis listed in the corresponding annex to the TBT chapter. This Annex does not refer to specific EU acts (i.e. reference to the name and number of EU Directives or Regulations), but instead mentions five specific areas or ‘titles’ of horizontal (framework) legislation and 27 areas of vertical (sectoral) legislation. The former actually covers the horizontal EU New Approach Directives which define the general rules and the institutional framework with regard to marketing of products, liability of defective products, accreditation, market surveillance and product safety.¹² The vertical (sectoral) Directives define for specific product groups (e.g. lifts, safety of toys, medical devices, machinery) the “essential health and safety requirements” that products have to meet before they can be placed on the EU Market. Most of these Directives have to be implemented within two to three years, although some have four to five years. This body of EU legislation is currently being updated in the light of the New Legislative Framework, in particular of the EU’s Decision of 2008 on a common framework for the marketing of products, which aims to improve market surveillance and boost the quality of conformity assessments.¹³ Most likely the corresponding Annex in the Ukraine DCFTA does not include specific references to EU legislation because of these changes under way. In addition, Ukraine “shall” also adopt the ‘corpus’ of European standards, including the harmonised standards. These are developed by the European standardisation bodies (CEN CENELEC and ETSI) and have the “presumption of conformity” with the essential requirements, laid down in the sectoral New Approach Directives. Contrary to the New Approach Directives covered in the Annex, there is no timetable for the transposition of the standards. Finally Ukraine needs to progressively fulfil the conditions for membership of the European standardisation organisations.

The TBT chapters in the Moldova DCFTA is practically the same as in the Ukraine agreement, however their corresponding annexes are different. The annex in the Moldovan TBT chapter is more ambitious than the Ukrainian (and Georgian) one because it covers in addition to the horizontal and sectoral New Approach Directives also a long list of EU legislation (around 80 EU Directives or Regulations) covering products that do not require CE marking (e.g. cosmetic products, motor vehicles, chemicals and pharmaceuticals). For placing these products on the EU market, specific rules and procedures apply. Also the timetable is ambitious as Moldova had to approximate most of these directives by 2014 or 2015, and in some cases 2017 or 2018. However, this timetable is flexible because the agreement allows Moldova to develop a new schedule if it has missed these deadlines.¹⁴ The Annex on Georgia’s

¹² Decision 768/2008/EC; Regulation 765/2008/EC; Directive 2001/95/EC.

¹³ Decision No 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC.

¹⁴ The EU-Moldova Association Trade Committee adopted on 19 October 2016 Decision No 1/2016 which updated Moldova’s TBT Annex. The new Annex includes now the updated New Legislative Framework Directives and a new timetable.

TBT chapter includes on the other hand softer and fewer approximation commitments. With regard to the sectoral Directives, the list in the Annex reflects Georgia's approximation commitments 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. The Annex recognises that some Directives have already been approximated and that other Directives have to be implemented within four, five, or eight years. With regard to the horizontal legislation, Georgia made a softer commitments compared to Moldova and Ukraine as the list of horizontal legislation only serves as "a non-exhaustive guidance for Georgia for the purpose of approximation of horizontal measures for the Union".

All three DCFTAs foresee that the contracting Parties can conclude an Agreement on Conformity Assessment and Acceptance of Industrial Products (ACAA) covering several sectors once they have agreed that, after a check by the EU institutions, Ukraine, Moldova or Georgia have implemented the relevant Directives. An ACAA is a mutual recognition agreement which implies that products covered by the 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. Contrary to the Georgian DCFTA, the Moldovan and Ukraine DCFTA foresee strict verification procedures by the EU to check compliance with the annexed EU legislation.

2.3 Sanitary and Phytosanitary Measures

The chapters on Sanitary and Phytosanitary measures (SPS) are also almost identical. The Parties reaffirm their rights and obligations under the SPS agreement and include provisions on, inter alia, cooperation in the area of SPS, transparency and exchange of information, certification, verification, recognition of equivalence and import checks. However, similar to the TBT chapters, the corresponding annexes related to legislative approximation are different. All three agreements do not define a list of EU legislation to be approximated, but instead require the three countries to submit a comprehensive SPS strategy within three to six months after the entry into force of the agreement. However, only the Annexes in the Georgia and Moldova DCFTA include a section on "principles for the evaluation of progress in the approximation process for the purpose of recognition of equivalence". These are specific approximation guidelines that specify how Moldova and Georgia need to implement the EU legislation included in the SPS strategies.

So far, only the SPS Strategies for Moldova and Georgia have been adopted. Moldova submitted the draft to the European Commission in November 2014 and, following consultations with the European Commission it was finalised in July 2015. It was

approved by the EU-Moldova SPS sub-committee in June 2016.¹⁵ The Moldovan Strategy (i.e. “the list of Union legislation to be approximated to by Moldova”), includes around 240 EU acts, covering general issues related to food-safety, veterinary issues, placing on the market of food, feed and animal by-products, food safety rulers, phytosanitary issues, GMO’s and veterinary medical products. Most EU legal acts have to be approximated in the period 2016-2019. The Georgia Strategy on the other hand, adopted by the EU-Georgia SPS Sub-Committee in March 2017,¹⁶ cover 272 EU acts. However, the implementation period is much longer compared to Moldova. A substantial part of these EU acts only have to be implemented in the period 2020-2026. The other part in the period 2015-2019. Both the preambles of the Moldovan and Georgian SPS Strategy state however that these two countries only “intend” to approximate this list of EU acquis, softening the legal commitment enshrined in the text of the agreement (i.e. “shall”). Ukraine prepared its SPS Strategy (adopted in February 2016 by the Cabinet of Ministers of Ukraine) and submitted the proposal in June 2016. It was finalised in the spring of 2017, but still needs to be formally adopted by the EU-Ukraine SPS Committee.¹⁷ Whereas the final version of Ukraine’s SPS strategy is not yet public, earlier drafts indicate that Ukraine committed to implement around 255 EU acts.¹⁸

2.4 Customs and Trade Facilitation

The chapters on Customs and Trade Facilitation, which aim at reinforcing customs and trade facilitation matters by strengthening customs cooperation are also almost identical. There are only a few minor differences in the corresponding annexes related to legislative approximation. For example, the implementation period for Ukraine is shorter (1-3 years) compared to Moldova and Georgia (2 to 4 years). Moreover, whereas Georgia and Ukraine will need to implement only several elements of the EU Customs Code, Moldova has committed itself to implement the entire Customs Code Regulation.

2.5 Services and Establishment

The main text of the Services and Establishment chapters, covering establishment, cross-border supply of services and temporary presence of natural persons, are largely comparable. However, the respective annexes to these chapters, which include the specific market access and MFN commitments, national treatment obligations and the specific reservations of the parties, are different. It should be

¹⁵ Decision 1/2016 of the EU-Moldova SPS Sub-Committee of 1 June 2016 (OJ, 2016, L 178/28).

¹⁶ Decision 1/2017 of the EU-Georgia SPS Sub-Committee of 7 March 2017 (OJ, 2017, L 98/22).

¹⁷ European Commission, ‘Proposal for a Council Decision on the position to be taken on behalf of the Union within the Sanitary and Phytosanitary Sub-Committee established by 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 (COM (2017) 265).

¹⁸ The draft Ukraine SPS strategy is described in the EU-Ukraine DCFTA handbook (see footnote 1).

noted that it is difficult to compare the market opening for services created by the DCFTAs because the three countries had a different starting point for liberalisation (i.e. their specific commitments laid down in the GATS). For example, Georgia chose for a liberal approach towards trade in services when it joined the WTO, which is reflected in the limited number of reservations in its GATS schedules. Therefore, Georgia did not have much room for further services liberalisation in its DCFTA. Nevertheless, it can be noted that the EU will make more reservations in the list on establishment in the Moldova and Georgia DCFTAs compared to the Ukraine DCFTA.¹⁹ Moreover, only the Moldova and Georgia DCFTAs include a separate list with reservations with regard to key personal, graduate trainees and business sellers.²⁰

A notable difference between the three services chapters relates to legislative approximation and the additional market access linked to these approximation commitments. The Ukraine DCFTA includes in four sub-sections on Postal and Courier Services, Electronic Communications, Financial Services and Transport Services a binding legislative approximation clause: i.e. Ukraine “shall ensure that its existing laws and future legislation will be made gradually compatible with the EU *acquis*”. The corresponding annex includes a list of around 85 Directives or Regulations that have to be approximated and a timetable. Moreover, this annex establishes specific rules how Ukraine should implement this legislation, taking into account the relevant case-law of the CJEU and procedures to catch-up with legislative developments at EU level, and rules on monitoring. After the EU has determined, after a strict monitoring procedure, that Ukraine has effectively implemented these EU rules, the Trade Committee may grant reciprocal “internal market treatment” with respect to the services concerned. This internal market 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 persons of one Party shall be treated in the same way as juridical persons of the other Party. This shall also apply to the freedom to provide services in the territory of the other Party. In practice, this means that for these four specific sections, the reservations of the EU and Ukraine to market access and national treatment, listed in the corresponding annexes, will be lifted.

The Moldova and Georgia DCFTAs on the other hand do not include such a strong approximation clauses. Instead, the provision in the four above-mentioned subsections only state that the Parties “recognise the importance of the gradual

¹⁹ In the EU-Ukraine DCFTA, regarding establishment, the EU party will make 24 horizontal reservations and 61 sectoral reservations whereas in the Moldova DCFTA, the EU party will make 33 horizontal reservations and 129 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).

²⁰ 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.

approximation of *acquis*” included in the annexes. Also the annexes mention that Moldova and Georgia only “undertake” to approximate to the listed EU legislation. The detailed rules on how to implement the EU *acquis*, included in the Ukraine DCFTA, are not taken over in the two other agreements. Moreover, contrary to the Ukraine DCFTA, implementation of this selection of EU legislation is not explicitly linked to the granting of “internal market treatment”.

2.6 Public Procurement and IPR

The public procurement chapters are almost completely identical. In the former there are only minor differences related to the thresholds²¹ and the timetable included in the approximation schedules, annexed to this chapter.²² The IPR chapters are also similar, however, the Moldova and Georgia agreements are less detailed, for example in the section related to trade-marks. Contrary to the Moldova and Georgia DCFTAs, the Ukraine agreement includes transitional mechanisms with regard to the protections of some Geographical Indications such as Champagne, Cognac, Parmigianino and Feta.²³

2.7 Competition

The chapters on competition include some important differences as the Moldova and Georgia DCFTAs are less ambitious than the Ukraine DCFTA. With regard to antitrust and mergers, all three agreements introduce an obligation to maintain comprehensive competition laws and to establish an independent competition authority. However, only the Ukraine DCFTA takes over the TFEU provisions on cartels, abuse of a dominant position and concentrations (i.e. Art. 101 and 102 TFEU) and includes some broad guidelines with regard to legal protections against decisions of such competition authorities. Moreover, only Ukraine has to approximate to a limited number of provisions of EU competition legislation (Article 256). Also with regard to state aid, only the Ukraine DCFTA has almost copy-pasted the relevant TFEU provisions, including the types of state aid that shall or may be considered to be compatible with EU law (Art. 107 TFEU). The Ukraine and Moldova DCFTAs (but not the Georgian) mention that its state-aid rules have to be interpreted in conformity with the case-law of the CJEU and relevant EU law. The Ukraine DCFTA also includes specific provisions on a domestic system of state-aid control. Such

²¹ For example, the threshold for public supply and service contracts awarded by central government authorities, except for public service contracts, is 133 000 euro in the Ukraine DCFTA and 130 000 in the Moldova and Georgia DCFTA.

²² For each implantation phase, Moldova and Georgia have one or two years more. Meanwhile, the EU and Moldova updated the “Indicative Time Schedule” included in the EU-Moldova AA in a Decision 2/2016 of the EU-Moldova AA Trade Committee.

²³ Another difference is that the Ukraine DCFTA includes a section on “liability of intermediary service providers”. However, similar provisions are included in the services chapters of the Moldova and Georgia DCFTAs.

provisions are less detailed in the Moldova DCFTA or are, in the case of the Georgia DCFTA, absent. The Georgia DCFTA refers instead just to the WTO SCM Agreement.

2.8 Trade-related energy and energy cooperation

Also the DCFTA chapter on trade-related energy is more ambitious and detailed in the Ukraine DCFTA compared to the two other agreements. This is obviously the result of Ukraine's crucial role as a transit country for Russian gas and oil. Because Moldova is also a member of the Energy Community Treaty (EnCT), just as Ukraine, Moldova's trade-related energy chapter is still largely similar to the Ukrainian agreement, with a few notable exceptions.²⁴ The Georgia DCFTA is less detailed, however, it also includes provisions on transit, the relationship with the Energy Community Treaty and market principles. 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. 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. Members of the EnCT are obliged to implement this third energy package, including the third party access rule. Georgia was at the moment of negotiating and signing its AA not a member of the EnCT, However, through the DCFTA, it is obliged to implement a system of third party access. Meanwhile, Georgia has completed its accession to the Energy Community Treaty (Georgia's accession protocol was signed in October 2016 and the Georgian Parliament ratified it in April 2017) and has become a member on 1 June 2017.

In addition to the DCFTA chapters on trade-related energy, all three agreements include also a chapter on energy cooperation in the AA's Title on economic cooperation (see below). Again, the Ukraine chapter is more detailed. For example, in the light of the different Ukraine-Russia gas disputes that impacted EU energy supplies, only the Ukrainian chapter includes a specific "Early Warning Mechanism", which is a mechanism that must provide for an early evaluation and rapid reaction in case of an emergency situation (or threat thereof)). Also more detailed provisions on cooperation in nuclear issues are incorporated, including provisions on the decommissioning of the Chernobyl nuclear plant. All three agreements also include legislative approximation commitments. The approximation commitments are softer than compared to other DCFTA approximation clauses as the three countries only "undertake" to gradually approximate their legislation to the acquis annexed to the agreement. However, the Ukraine and Moldova agreements stipulate that listed EU legislation that is covered by the Energy Community Treaty will need to be implemented as set out in these agreements. Also the Georgian agreement

²⁴ For example, as a landlocked country, the Moldova DCFTA does not include provisions on hydrocarbon resources located in territorial waters.

anticipated Georgia's accession to the EnCT and states that the annexed EU legislation "shall be implemented in accordance with the timeline agreed by Georgia in the framework of the Energy Community Treaty". The scope of the approximation commitments is rather similar, covering EU legislation related to electricity gas, oil, renewable energy, energy efficiency and prospection and exploration of hydrocarbons. Only the annex in the Ukraine agreements includes nuclear-related EU legislation.

2.9 Dispute Settlement, Transparency and Sustainable Development

The DCFTA chapters on dispute settlement,²⁵ transparency and sustainable development are almost identical. With the regard to the latter, only the Ukraine DCFTA makes a commitment to approximate its legislation to the EU acquis, however, no annex with relevant EU legislation is provided. The Moldova and Georgia DCFTAs include on the other hand more detailed commitments regarding multilateral environment agreements, the promotion of corporate social responsibility, trade in forest products and cooperation on trade-related aspects of environment and labour policies, government consultations and biological diversity.

3. Economic and Sectoral cooperation.

In addition to the DCFTAs, all three AAs include a Title on economic and sector cooperation.²⁶ These chapters cover a wide range of areas, including broad cooperation commitments and legislative approximation clauses.

Most chapters on economic and sectoral cooperation in the three AAs are very similar, such as those on economic dialogue;²⁷ taxation; statistics; transport; industrial and enterprise policy and mining; financial services; company law; accounting; auditing and corporate governance; information society; audio-visual policy; culture; tourism; consumer policy; employment; social policy and equal opportunities; public health; education training and youth; sport; civil society cooperation and participation in EU agencies and programmes and cross-border and regional cooperation.

Some chapters are however slightly different. For example, in the area of environment the approximation clauses are not identical. The Ukraine AA includes references to EU acquis related to genetically modified organisms and only the Moldova and Georgia agreements cover EU legislation on chemicals (e.g. Regulation 689/2008 concerning the export and import of dangerous chemicals and the REACH

²⁵ The Ukraine DCFTA includes a section on mediation in the body of the agreement. In the Moldova and Georgia DCFTAs this section is included in the annexes.

²⁶ The Georgia AA has a separate title for Economic (Title V) and "Other Cooperation Policies (Title VI).

²⁷ This chapter is titled Macro-Economic Cooperation in the Ukraine AA.

Regulation 1907/2006). Moreover, several chapters in the Georgia AA are less detailed. For example, the chapter on management of public finances is less comprehensive compared to the other two agreements. It relies instead on the policy paper on "Public Internal Financial Control", approved by the Government of Georgia. Several approximation clauses in the title on economic cooperation also illustrate Georgia's more reluctant approach vis-à-vis legislative approximation. For example, with regard to statistics, Georgia will only approximate to the EU acquis "wherever relevant". Contrary to the Moldova and Ukraine AAs, the chapter on agricultural and rural development in the Georgia AA does not include a legislative approximation obligation. Moldova and Ukraine have committed themselves to approximate to the EU's acquis related to food safety, organic farming, marketing standards for live animals, animal products, and plants, fruits and vegetables. However, these issues are nevertheless addressed in Georgia SPS Strategy (see above). There are also some obvious differences related to the countries' geographical location. For example, the Moldova chapter on fisheries and maritime Policy is less detailed because it is a landlocked country and the Ukraine AA includes a specific chapter on the Danube river.

Finally, some chapters are not included in some agreements. Only the Ukraine AA includes a chapter on cooperation in civil space research and space applications and the Moldova AA also covers a chapter on public administration reform; corruption and fraud; and the protection and promotion of the rights of the child. Contrary to the Moldova and Georgia AAs, the Ukraine agreement does not include a chapter on climate action and civil protection.

4. General and final provisions

Also the Titles on 'General and Final Provisions' are very similar. These Titles cover institutional provision (see above), general provisions on legislative approximation, dispute settlement and the duration and entry into force of the agreement. There are however notable differences related to the territorial application of the agreement. Only the AA's with Moldova and Georgia explicitly prevent the application of these agreements in their respective 'frozen conflicts' or 'breakaway regions', i.e. Transnistria (Moldova) and Abkhazia and South Ossetia (Georgia). The territorial application clauses of both agreements state that the AAs will apply "to the territory of [the Republic of Moldova/Georgia]", but add a specific paragraph on the territorial application in relation to those areas "over which the Government of [Georgia/Moldova] does not exercise effective control". Without explicitly referring to Transnistria / Abkhazia and South Ossetia, it is obvious that these territories are targeted. This specific paragraph states that the application of the AA or the DCFTA in these areas will only commence "once [Georgia/Moldova] ensures the full implementation and enforcement of this Agreement, or of [its DCFTA], respectively, on its entire territory". The application needs to be activated by a decision of the

Association Council. Because the Association Councils decide by consensus, both parties, including the EU, must agree and confirm that Georgia or Moldova ensure the implementation and enforcement of the AA or DCFTA over these territories. 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. Whereas it is unlikely that the EU-Georgia AA or DCFTA will be applied in Abkhazia and South Ossetia in the near future, the EU-Moldova Association Agreement decided on 18 December 2016 that the Moldovan DCFTA (thus not the entire AA) shall apply to the entire territory of Moldova from 1 January 2016, including Transnistria.²⁸ Although the Moldova DCFTA entered provisionally into force from 1 September 2014, the ATM continued to apply until 31 December 2015 (see above). Significantly, the decision of the Association Council confirming that the DCFTA will be applied to the entire territory of Moldova was preceded by a technical 'deal' between the EU, Moldova and the leadership of Transnistria.²⁹ Because Transnistria was facing the end of preferential access to the EU with the termination of the ATP regime, the EU, Moldova and Transnistria launched informal discussions on how to extend the DCFTA to Transnistria from 1 January 2016, after the termination of the ATP. The EU facilitated negotiations between the leadership of the breakaway region and Moldova on an agreement on the conditions that the separatist enclave has to meet in exchange for facilitated access to the EU market.³⁰ Remarkably, the EU did not insist that the entire DCFTA needs to be applied in Transnistria, most likely because from economic, legal and political point of view this would not be realistic. However, this is actually incompatible with the territorial application clause of the DCFTA which states that the Association Council can only apply the entire DCFTA to Transnistria (and not only parts thereof).

As noted above, the territorial application clause of the EU-Ukraine AA does not address the annexation of Crimea and Sevastopol by Russia because this situation occurred after the initialling of the agreement. However, the territorial application of the AA was addressed in the Final Act between the EU and Ukraine regarding the signature of the EU-Ukraine AA on 27 June 2014.³¹ In this document, the EU and Ukraine agreed that the AA -thus not only the DCFTA:

²⁸ Decision 1/2015 EU-Moldova Association Council of 18 December 2015.

²⁹ See for example Answer given by Ms Malmström on behalf of the Commission Question for written answer to the Commission, Ivan Jakovčić, 4 April 2016. In this answer the Commission also confirms that representatives of Transnistria region were invited to, and took part in observer capacity in, the negotiations on the DCFTA.

³⁰ This agreement has not been made public but is described in, inter alia, S. Secrieru, 'Transnistria Zig-zagging towards a DCFTA', PISM Policy Paper N. 4, January 2016.

³¹ 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).

“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”.

Almost immediately after Russia’s annexation of Crimea the European Council stated that it does not recognise Russia’s annexation of these territories.³² Moreover, as a part of the EU’s non-recognition policy, the Council imposed substantial restrictive measures on economic relations with Crimea and Sevastopol, including an import ban on goods from Crimea or Sevastopol into the EU (unless they have Ukrainian certificates) and trade and investment restrictions in several sectors, including a full ban on investment in Crimea or Sevastopol.³³ On 17 June 2016, the Council extended these measures until 23 June 2017.

Conclusion

It is clear from the analysis above that the three agreements are very similar. However, in the light of the different economic situations and political preferences in the partner countries, some differences related to these agreements ‘comprehensive’ and ‘deep’ nature can be identified.

With regard to the ‘comprehensive’ dimension of these agreements, they all three have the same broad coverage. The agreements address virtually all aspects of political and economic cooperation. The only notable difference related to coverage is that only the Ukraine AA includes an important non-discrimination clause for legally employed workers and that only the Moldova and Georgia AAs incorporate provisions related to their ‘frozen’ conflicts or breakaway regions. The structure and outline of the DCFTAs is almost identical. Only the Ukraine DCFTA includes specific safeguard or transitional measures (e.g. related to cars and export duties).

However, there are some important differences with regard to the ‘deep’ dimension of the AAs. These are mainly related to the DCFTA and its approximation clauses (see Annex 1). Overall, the provisions in the Ukraine DCFTA are more far-reaching (e.g. in the area of services and competition), but there are some chapters where the Moldova or Georgia DCFTAs are more detailed or ambitious (e.g. the Moldovan TBT chapter). The heritage of the Georgia’s liberal trade policy under the Saakashvilli government is clearly illustrated in the DCFTA chapters on goods (e.g. no transitional periods and low MFN rate) and services. On the other hand, several chapters, such as the TBT chapter and those in the Title on Economic and Sector cooperation,

³² European Council Conclusion, Brussels, 20/21 March 2014, EUCO 7/1/14, para. 29.

³³ <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>

demonstrate the Georgia was more cautious and realistic in its approximation commitments, both related to the nature (soft vs. strong) and coverage of the commitments.

Annex 1. Key differences between the three DCFTAs

(DCFTA) Chapter	Ukraine DCFTA	Moldova DCFTA	Georgia DCFTA
Market Access for Goods / Trade remedies	Transitional and asymmetric trade liberalisation	Transitional and asymmetric trade liberalisation	No transitional asymmetric trade liberalisation
	Sector specific safeguard or transitional measures (cars, export duties and textiles)	No sector specific safeguard measures	No sector specific safeguard measures
	Positive list for elimination of customs duties on import	Negative list for elimination of customs duties	Negative list for elimination of customs duties
	No anti-circumvention mechanism for agricultural products	anti-circumvention mechanism for agricultural products	anti-circumvention mechanism for agricultural products
Technical Barriers to Trade	No specific reference to the New Approach Directives	Approximation to EU legislation for products not requiring CE marking	Softer approximation obligation ("non-exhaustive guidance")
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	"Principles for the evaluation of progress in the approximation process" included
	SPS Strategy not yet formally adopted	SPS Strategy	SPS Strategy
Services and establishment (4 sub-sections)	Strong approximation commitment ("shall ensure")	Soft approximation commitment ("recognise [...] the importance" of approximation to the EU acquis))	Soft approximation commitment ("recognise [...] the importance" of approximation to the EU acquis
	Internal Market Treatment envisaged	No Internal Market Treatment envisaged	No Internal Market Treatment envisaged
	Detailed monitoring procedures and rules to ensure the uniform interpretation and	No detailed monitoring procedures and rules to ensure the uniform interpretation and application of the	No detailed monitoring procedures and rules to ensure the uniform interpretation and application of the

	application of the incorporated EU acquis	incorporated EU acquis	incorporated EU acquis
Competition	Approximation clause (Art. 256)	No approximation clause	No approximation clause
	TFEU inspired rules on anti-trust and mergers	General provisions on antitrust and mergers	General provisions on antitrust and mergers
	Detailed rules (TFEU-inspired) on state aid, including obligation to adopt system of state aid control, similar to that in the EU	Detailed rules on state aid, however, no broad commitment to adopt system of state aid control	No detailed rules on state aid but refers to WTO SCM Agreement
Trade-related energy and energy cooperation	Detailed trade-related energy rules and "early warning mechanism"	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 EnCT and market principles. Also "third party access" clause.
IPR	Detailed rules on copyrights, trademarks, GIs, designs, patents and enforcement. Transitional period for GIs.	Less detailed rules than with regard to copyrights (e.g. no provisions on computer programmes and databases), trademarks (e.g. no rules on grounds for revocation) and GIs (no transitional period or temporary measures)	Less detailed rules with regard to copyrights (e.g. no provisions on computer programmes and databases), trademarks (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