THE NEW GENERATION OF ASSOCIATION AGREEMENTS BETWEEN THE EU AND ITS EAST EUROPEAN NEIGHBOURS

Prof. Peter Van Elsuwege (Ghent University)

24 April 2015
The [EU-Ukraine Association Agreement] is the most ambitious agreement the EU has ever offered to a non-Member State. It is a milestone 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”.

(H. Van Rompuy, 27 June 2014)
Outline

- Background to the new Association Agreements (AAs) with Ukraine, Moldova and Georgia
  - The Eastern Partnership (EaP) as part of the European Neighbourhood Policy (ENP)

- From Partnership and Cooperation Agreements ...
  - Political and legal context
  - Objectives and evaluation

- To a new generation of Association Agreements
  - Political and legal context
  - What is new?

- Conclusion: a new model of integration without membership?
Background

- Patten/Solana ‘Wider Europe’ paper of August 2002
  - Need for new contractual relations with the EU’s eastern neighbours

  - “European Neighbourhood Agreements”

- ENP Action Plans
  - “Ukraine - enhanced agreement”

- Eastern Partnership
  - Polish-Swedish initiative June 2008 – formally launched in May 2009 (Prague declaration)
  - Ukraine, Moldova, Belarus, Georgia, Armenia, Azerbaijan
  - Political association, economic integration and legislative approximation
From Partnership and Cooperation Agreements …

- concluded in 1990s with all CIS countries (except Belarus) to support economic and political transition process (for initial period of 10 years)
- introduction of GATT legal principles (MFN, etc).
- multi-level institutional framework but only possibility to adopt recommendations (no binding decisions!)
- no free trade arrangement (only ‘evolutionary clause’ in PCAs with Russia, Ukraine and Moldova)
- soft provision on legal approximation
- framework agreement with limited direct legal consequences (exception: Art. 23 PCA Russia cf. Simutenkov case)
To Association Agreements

• **Article 217 TFEU (ex art 310 EC):**
  “The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”

• **ECJ definition of ‘association’ (case 12/89 Demirel):**
  “the agreement … is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system’.
Broader (geo)political context

- Eastern Partnership vs. Eurasian economic integration: legal and political incompatibilities
Overview of bilateral relations

- **Ukraine**
  - The Ukrainian government cancelled the planned signature of the AA on the occasion of the December EaP Vilnius summit on 23 November 2013
    - Start of the *Maidan* revolution
    - March 2014: signature of “political” chapters and autonomous trade preferences (Regulation 374/2014) (AA remains one single instrument!)
    - 27 June 2014: signature of the remaining parts of the AA
    - Provisional application of the DCFTA part postponed until 31 December 2015

- **Georgia and Moldova**: AAs initialled at Vilnius Summit November 2013, signature 27 June 2014; provisional application since 1 September 2014

- **Armenia**: U-turn in August 2013: AA not initialled in Vilnius; Armenia joined the EAEU on 1 January 2015

- **Belarus**: European dialogue on modernisation – Belarus is part of the EAEU

- **Azerbaijan**: Towards a ‘Strategic Modernisation Partnership’
New Association Agreements –
Key features

Comprehensive
- 2140 pages in the *Official Journal*
- 46 annexes
- 3 protocols
- Joint Declarations

Conditionality
- Political and market access conditionality

Complexity
- multiple provisions on legislative approximation and dispute settlement
Association Agreements - objectives

- To promote gradual rapprochement based on common values [...] association with EU policies and participation in programmes and agencies
- To provide an appropriate framework for enhanced political dialogue in all areas of mutual interest
- To establish conditions for enhanced economic and trade integration leading towards [...] gradual integration into the EU internal market, including by setting up a Deep and Comprehensive Free Trade Area
- 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
- No explicit EU membership perspective but …

  ▪ “acknowledges the European aspirations of [Ukraine/Moldova/Georgia] and [welcomes] its European choice” (preamble)

  ▪ “[Ukraine/Moldova] is a European country that shares a common history and common values with the EU MS”
    ▪ Georgia, an Eastern European country, shares historical links and common values with the Member States

  ▪ “this agreement shall not prejudice and leaves open future developments in EU-[Ukraine/Moldova/Georgia] relations” (preamble)

  ▪ Recent Council conclusions: the AA “does not constitute the final goal in EU-Ukraine cooperation”

  ▪ but… gradual “integration” in the EU Internal Market (Art.1)
Institutional framework

- Annual *summits* at highest political level (only with Ukraine)
- *Association Council* at ministerial level
  - Regular political and policy dialogue on implementation
  - With power to adopt binding decisions!
- *Association Committee* at civil servant level
  - Trade Committee and specialised subcommittees
  - With power to adopt binding decisions!
- *Parliamentary Association Committee*
- *Civil Society Platform*
Political dialogue

- gradual *convergence* on political and security measures with the aim of [Ukraine’s] ever deeper involvement into the European security area’ Including a number of specific aims, *inter alia*:
  - Strengthen cooperation and dialogue on *international* security and crisis management
  - Foster practical cooperation to achieve peace, security and stability *in Europe*
  - Promote principles of independence, sovereignty, territorial integrity and inviolability of frontiers (‘good neighbourliness’)
  - Strengthen respect for democratic principles, rule of law and good governance, human rights and fundamental freedoms […] and to contribute to *consolidating domestic political reforms*

- Cooperation in the fight against terrorism, crisis management etc.
- Commitments regarding access to ICC, non-proliferation of WMD, arms export control etc.
Freedom, Security and Justice

- Cooperation in relation to the promotion of the rule of law, independence of judiciary, access to justice and fair trial
- Cooperation regarding migration, asylum and border management
- Prevention of organised crime, corruption and other illegal activities
- Movement of persons
  - Full implementation of visa facilitation and readmission agreements
  - A visa-free regime will be established ‘in due course’ provided that the conditions for well-managed and secure mobility, set out in the Action Plan on Visa Liberalisation, are in place
- Non-discrimination of legally employed workers as far as working conditions, remuneration and dismissal are concerned
  - Only in AA with Ukraine!
  - Opt-out for UK and Ireland + question of direct effect
Trade and Trade-related Matters

- Establishment of a free trade area over a transitional period of maximum 10 years for Ukraine and Moldova (no transition for Georgia)

- “Comprehensive”
  - FTA has a broad range covering all the main area’s of EU-Ukraine trade relations: not only trade in goods but also liberalization of services and binding provisions on IPR, public procurement, competition, energy, SPS, etc.

- “Deep”
  - Legislative approximation as instrument for economic integration
The “Comprehensive” character of the FTA

- Comprehensive character of EU FTA not new (eg. Colombia and Peru (signed 2012), Chili (2003), Mexico (2000), Korea (2011), Canada (-),...)

| 1. National Treatment and Market access for goods | 9. Intellectual Property |
| 2. Trade Remedies | 10. Competition |
| 3. Technical Barriers to Trade | 11. Trade-Related Energy |
| 5. Customs and Trade Facilitation | 13. Trade and Sustainable Development |
| 8. Public Procurement |
The ‘deep’ character of the DCFTA

- Integration in EU Internal Market under the condition of legislative approximation (*market access conditionality*)
<table>
<thead>
<tr>
<th>DCFTA Chapter</th>
<th>Link approximation with market access?</th>
<th>Scope Acquis defined</th>
<th>Procedure to amend scope of acquis</th>
<th>Explicit Obligation ECJ conform interpretation</th>
<th>Monitoring procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Technical barriers to Trade</td>
<td>Conclusion ACAA</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Basic</td>
</tr>
<tr>
<td>SPS</td>
<td>“Determination of equivalence”</td>
<td>No, but “Comprehensive Strategy”</td>
<td>Basic</td>
<td>No</td>
<td>Basic</td>
</tr>
<tr>
<td>Services (4 sections)</td>
<td>Internal Market Treatment</td>
<td>Yes, + timetable</td>
<td>Detailed</td>
<td>Yes</td>
<td>Detailed</td>
</tr>
<tr>
<td>Public Procurement</td>
<td>Market Access</td>
<td>Yes, + timetable</td>
<td>Yes</td>
<td>Yes</td>
<td>Basic</td>
</tr>
</tbody>
</table>
Conclusions – most ambitious agreements ever concluded?

- AA’s political part: ambitious but not innovative (comparable to SAAs/EMAAs)
- DCFTA: “gradual integration into the EU Internal Market?”
  - Exceptionally deep and broad FTA
  - Unprecedented features: market access conditionality and legislative approximation
  - Actual “integration” into the EU Internal Market limited (and conditional)
    - Not comparable to the European Economic Area!

- The proof of the pudding is in the eating...
  - Effective implementation?
  - Divergent expectations?
  - Impact of the Russia factor?
Further information

G. Van der Loo, P. Van Elsuwege and R. Petrov,

*The EU-Ukraine Association Agreement. Assessment of an innovative legal instrument,*

EUI Working Paper LAW 2014/09