

# Catch me if you can: Updating the Eastern Partnership Association Agreements and DCFTAs

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**Abstract.** The Association Agreements (AAs) and the Deep and Comprehensive Free Trade Areas (DCFTAs) concluded with Ukraine, Moldova and Georgia oblige the EU partner countries to implement in their domestic legal order a significant part of the EU's acquis, which is annexed to these agreements. However, given that the AAs were negotiated before 2013, the annexed acquis is in most cases outdated because the EU has in the meantime adopted acts that amend, implement, supplement or replace the annexed EU legislation. The AAs foresee procedures to update these annexes to catch up with the relevant legislative developments at EU level. This updating exercise is progressing slowly, but more updates are being prepared. This paper will first analyse the key features of the AAs related to legislative approximation, focussing on the procedures to 'update' the annexes (i.e. the procedures that can – or have to – be used to amend the annexed EU legislation to take into account the evolution of EU law). Then, the technical options for broadening the scope of the approximation commitments and market access beyond a mere technical 'updating' are explored. This is followed by a chapter-by-chapter overview of the progress of the updating of the AAs and the relevant legislative developments at EU level.

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## Table of Contents

List of Abbreviations	3
2.1 Ensuring the uniform interpretation and application of the EU acquis	5
2.2 Keeping up with EU law: updating	6
2.3 Deepening and broadening the scope of the AAs/DCFTAs	9
3. Updating in practice	10
3.1 Trade in goods	12
3.2 Customs	13
3.3 Technical Barriers to Trade (TBT)	14
3.4 Sanitary and Phyto-Sanitary regulations (SPS)	16
3.5 Public Procurement	18
3.6 Services and establishment	20
3.7 Financial services	20
3.8 Telecommunications and digital	21
3.9 Transport	22
3.10 Energy	23
3.11 Environment and Climate	25
3.12 Consumer protection	26
3.13 Company law, corporate governance, accounting and auditing	27
3.14 Employment, social policy, public health	28
3.15 Taxation	30
3.16 Statistics	30
3.17 Audio-visual policy	31
3.18. Education, Training, Youth	32
3.19 Financial Cooperation, with anti-fraud provisions	33
4. Conclusions	33

## **List of Abbreviations**

AA: Association Agreement

ACAA: Agreement on Conformity Assessment and Acceptance of Industrial Products

CSA: Classification of Statistical Activities (CSA)

CJEU: Court of Justice of the European Union

DCFTA: Deep and Comprehensive Free Trade Area

EaP: Eastern Partnership

EEA: European Economic Area

EU: European Union

GATS: General Agreement on Trade in Services

IPR: Intellectual Property Rights

SME: Small and Medium-sized enterprise

SPS: Sanitary and Phytosanitary

TBT: Technical Barriers to Trade

TRQ: Tariff-Rate Quota

WTO: World Trade Organisation

UCC: Union Customs Code

## 1. Introduction<sup>2</sup>

It has been almost 6 years since the Association Agreements (AAs) and Deep and Comprehensive Free Trade Areas (DCFTAs) with Ukraine, Georgia and Moldova were (provisionally) applied, and even longer since these agreements have been negotiated.<sup>3</sup> The AAs (which include the DCFTAs as a separate title) oblige Ukraine, Moldova and Georgia to implement in their domestic legal order a significant part of the EU's *acquis*, which is annexed to the agreements. However, given that the AAs were negotiated before 2013, the annexed *acquis* is in most cases outdated, because the EU has in the meantime adopted acts that amend, implement, supplement or replace the annexed EU legislation. The AAs foresee procedures to update these annexes to catch up with the relevant legislative developments at EU level. However, this updating exercise is progressing slowly and most of the annexes to AA/DCFTA chapters remain out of date. This paper will first analyse the key features of the AAs related to legislative approximation, focussing on the procedures to 'update' the annexes (i.e. the procedures that can – or have to – be used to amend the annexed EU legislation to take into account the evolution of EU law). Then, the technical options for broadening the scope of the approximation commitments and market access beyond a mere technical 'updating' are explored. This is followed by a chapter-by-chapter overview of the progress of the updating of the AAs and the relevant legislative developments at EU level.

## 2. Approximation commitments in the AAs

The AAs do not include one general provision related to legislative approximation, but several different approximation clauses. Many chapters in the DCFTAs and several chapters in the titles of the AAs on economic and sector cooperation contain approximation clauses. Most of these provisions impose a *binding* obligation on the partner country to apply, implement or incorporate in their domestic legal order a predetermined selection of EU *acquis*, which is annexed to the agreement.<sup>4</sup> By obliging (thus going beyond 'best endeavour' commitments included in other EU agreements such as the Stabilization and Association Agreements with the Western Balkan countries and the Euro-Mediterranean Association Agreements with the southern Mediterranean) the three Eastern Partnership countries to implement a considerable amount of EU law, the EU's legislative reach is extended beyond its borders. However, these obligations do not lead to the formal application of EU law in these non-EU countries. At most, a set of legislation that is textually identical to corresponding provisions of EU law is applied by Ukraine, Moldova and Georgia in their domestic legal order, or in their relations with the EU. Even when the 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.<sup>5</sup>

<sup>2</sup> This paper benefitted greatly from comments from Michael Emerson (CEPS) and from interviews with officials from the European Commission, the EEAS and the Missions from Georgia, Ukraine and Moldova to the EU.

<sup>3</sup> A large part of the Georgia and Moldova AAs entered provisionally into force on 1 September 2014 and the AAs entered fully into force on 1 July 2016. The Ukraine AA entered (partially) into force on 1 November 2014 (political part of the AA) and on 1 January 2016 (DCFTA) and entered fully into force on 1 September 2017.

<sup>4</sup> However, several chapters in the AAs (non-DCFTA part) include only a soft approximation commitment.

<sup>5</sup> For a more detailed overview of the AAs' approximation clauses, 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).

Most of the approximation clauses in the Eastern Partnership AAs and DCFTAs refer to a clear selection of EU *acquis* that the partner countries need to apply or implement in their domestic legal order, including strict deadlines. Both the list of secondary legislation and deadlines are annexed to the agreement.

An important innovative element with regard to legislative approximation in the Eastern Partnership AAs concerns the unique form of market access conditionality included in a few chapters of the DCFTAs. This mechanism implies that the associated countries will only be granted a specific form of additional access to the EU internal market if the EU determines, after strict monitoring procedures, that sufficient progress has been made in terms of legislative approximation. This process comprises two stages. First, the associated country has to apply and implement a selection of EU *acquis*, as set out in the annexes to the agreement. The EU monitors the 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. However, they also include new elements such as 'on-the-spot missions', conducted by EU institutions or bodies, in the associated countries.<sup>6</sup> This market access conditionality can be found in the DCFTA chapters on Technical Barriers to Trade (envisaging the conclusion of an Agreement on Conformity Assessment and Acceptance of Industrial Products - ACAA), public procurement (envisaging gradual access to the public procurement markets), services and establishment (envisaging in the case of Ukraine 'internal market treatment') and Sanitary and Phytosanitary Regulations (SPS).

Significantly, other legislative approximation clauses in the DCFTAs or AAs' title on economic and sector cooperation are not explicitly linked with additional market access, which implies that there is a lower incentive for the partner states to actually implement these approximation clauses.

## 2.1 Ensuring the uniform interpretation and application of the EU *acquis*

The fact that the approximation provisions do not lead to the formal application of EU law in these partner countries separates the AAs from the European Economic Area (EEA) Agreement. The EEA, which is considered to be "the most far-reaching and comprehensive instrument to extend the EU's Internal Market to third countries",<sup>7</sup> is based on the *homogeneity* principle. This means that there is between the EU and the participating EFTA States a system of "common rules and equal conditions of competition and providing for the adequate means of enforcement including at the judicial level".<sup>8</sup> In other words, homogeneity implies 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

<sup>6</sup> See for example Article 475 Ukraine AA.

<sup>7</sup> European Commission, 'A review of the functioning of the European Economic Area', SWD (2012) 425 final, 7 December 2012.

<sup>8</sup> Preamble EEA.

applied. In view of this ambitious objective, the EEA provides far-reaching mechanisms (mentioned below) to realize and maintain this homogeneity objective.

Although legislative approximation in the AAs is not based on the principle of homogeneity, it is crucial that the EU *acquis* is interpreted and applied as uniformly as possible. Only this way can legislative approximation serve its broader policy purposes. For example, by ensuring that EU law is interpreted and applied in Ukraine, Georgia and Moldova similarly (or as close as possible) as in the EU, economic operators have the certainty that they comply with EU norms and standards (and therefore can export more easily to the EU Market), simply by respecting their own rules and regulations (i.e. the removal of non-tariff barriers). Or, by implementing EU rules and standards in conformity with the EU's 'best practice', a stable and predictable legal environment is created for business, attracting more (foreign) investment.

Therefore, the AAs include different procedures aimed at ensuring a uniform interpretation and application of the selection of EU *acquis* annexed to the agreement. Such procedures relate to: (i) the updating of annexed EU *acquis*; (ii) the obligation to interpret and apply the annexed EU *acquis* in conformity with the relevant case law of the Court of Justice of the European Union (CJEU); and (iii) a preliminary ruling procedure before the CJEU for disputes concerning the interpretation of the annexed EU *acquis*. This paper only analyses the procedures to update the *acquis*, but the other provisions involving the CJEU are discussed elsewhere.<sup>9</sup>

## 2.2 Keeping up with EU law: updating

The issue of the 'updating' the annexed EU *acquis* to corresponding developments in EU law is a crucial challenge for the EU and the AA partner countries. It should be noted that applying a part of the EU *acquis* through an international agreement is for a third country very much like shooting at a moving target. Due to the ever-developing nature of EU law, procedures are required to update the annexed *acquis* to the evolution of the corresponding rules of EU law.

The AAs include a general procedure which applies to all the annexes covering EU *acquis*. The Association Councils "may" (Ukraine) or "shall" (Georgia and Moldova) update or amend the annexes to the agreement, "taking into account the evolution of EU law" but "without prejudice to the specific approximation provisions of [the DCFTA]".<sup>10</sup> Indeed, several DCFTA chapters foresee specific – and more detailed – procedures for the updating of the annexed EU *acquis* (e.g. in the area of services and public procurement). Moreover, the Association Councils can delegate such powers to the Association Committee or the Association Committee meeting in Trade Configuration.<sup>11</sup> However, these general procedures do not oblige the Association Councils or other Committees to automatically

<sup>9</sup> 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).

<sup>10</sup> Article 463 Ukraine AA.

<sup>11</sup> For more details, see for example Decisions No 1/2014; 2/2014 and 3/2014 of the EU-Ukraine Association Council of 15 December 2014.

consider catching up with EU law each and every time a new EU rule annexed to the agreement is modified (contrary to the EEA)<sup>12</sup>. Because the Association Councils decide “by agreement”, Ukraine, Moldova and Georgia can always veto this process, even if the EU would like to insist on updating the annexes.

**Table 1: General provisions for updating the AA/DCFTAs of Ukraine, Georgia and Moldova**

**The Ukrainian AA, Article 463.3:**

*"The Association Council may update or amend the Annexes to this Agreement to this effect, taking into account the evolution of EU law and applicable standards in international instruments deemed to be relevant by the Parties, without prejudice to any specific provisions included under Title IV (Trade and Trade-related matters) of this agreement".*

**The Georgian AA, Articles 415:**

**Dynamic Approximation**

*"In line with the goal of gradual approximation by Georgia to EU law, the Association Council shall periodically revise and update Annexes to the Agreement, including in order to reflect the evolution of EU law and applicable international instruments deemed relevant by the Parties, and following the completion of the respective internal procedures of the Parties as appropriate. This provision shall be without prejudice to any specific provisions under Title IV (Trade and Trade-related Matters) of this Agreement.*

**The Moldovan AA, Article 450:**

**Dynamic Approximation**

*"In line with the goal of gradual approximation by the Republic of Moldova to EU law, and in particular as regards the commitments identified in Titles III, IV, V and VI of this Agreement, and according to the provisions of the Annexes, the Association Council shall periodically revise and update Annexes those Annexes, including to take into account the evolution of EU law as defined in this Agreement. This provision shall be without prejudice to any specific provisions under Title V (Trade and Trade-related Matters) of this Agreement.*

<sup>12</sup> The EEA has the most strict and comprehensive 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 (Art. 102(1) EEA). 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" (Art. 102(4) EEA). 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 (this procedure has never been used) Art. 102(5-6) 5EEA).



Only a few chapters in the DCFTA include a more detailed and comprehensive procedure to ensure that they remain up-to-date with relevant legislative developments at EU level (e.g. the chapters on services and establishment and on public procurement, in particular in the case of the Ukraine AA). According to these procedures, each and every modification of an EU act annexed to the AAs requires an action on the side of the partner country. The most far-reaching procedure can be found in the chapter on services and establishment in the EU–Ukraine DCFTA. Annex XVII to this agreement states that, in order to guarantee legal certainty, the EU will inform Ukraine and the Trade Committee regularly on all new or amended services-related EU legislation. Then, the Trade Committee shall add within three months ‘any’ new or amended EU legislation to the appendices of the relevant chapter which Ukraine shall ‘transpose’ into its domestic legal system. However, as illustrated below, in practice these procedures have not been followed strictly.

Although most of the annexes to the AAs have become outdated (most of the EU *acquis* included in the annexes predates 2012 as the agreements have been initialled in 2013), it appears that the different procedures to update the annexes have so far not been used to the fullest extent. As further discussed below, only a few decisions have been taken by the Association Councils (or Committees) to update (elements of) several DCFTA chapters (see Table 2). This seems to be the result of the long procedural process that is required on the EU’s side to formally adopt such a joint decision (which includes a Commission Proposal and a Council Decision)<sup>13</sup>. Moreover, in several areas the updating of the annexes seems not to be a priority for the respective DGs involved (in particular in several sectoral areas), or for the partner countries.

The AAs provide that the Association Councils are “a forum for exchange of information on European Union and [DCFTA countries] legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures”. However, in practice the preparatory work for the updating of the AAs’ annexes is taking place at the level of the different sub-committees. The draft proposals then follow the institutional hierarchy of the AAs up to the Association Council (or Association Committee meeting in Trade Configuration), which adopt the actual joint decisions. On the EU’s side the EEAS is responsible for the updating of the sectoral (non-DCFTA) chapters and DG Trade is responsible for the updating of the DCFTA chapters. However, both the EEAS and DG Trade rely on the input and expertise from other Commission DGs through inter-service consultations to prepare the updating of the annexes (e.g. DG GROW for the TBT Chapters, DG SANTE for the SPS Chapters and Public Health Chapters, DG Environment and DG CLIMA for the chapters on environment cooperation, DG ENER for the chapters on Energy Cooperation). The preparation of the joint meetings (AA Council, Committee or sub-committees) falls under the responsibility of the EEAS.

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<sup>13</sup> Article 218(9) TFEU.



## 2.3 Deepening and broadening the scope of the AAs/DCFTAs

For policy purposes it is relevant to analyse how – and to what extent – the Association Councils and Committees can also amend the annexes to deepen and broaden cooperation or market integration through legislative approximation – going beyond the mere technical exercise of updating the annexes. The AAs are already now applied for several years and both the EU and the EaP countries aim to deepen their cooperation – as for example evidenced by the ‘Joint Statement by the Ministers of Foreign Affairs of Georgia, the Republic of Moldova and Ukraine on the Future of Eastern Partnership’ (adopted on 5 December 2019)<sup>14</sup> and the Joint Conclusions adopted during the May 2019 EaP’s Foreign Ministers’ meeting<sup>15</sup>. Therefore, the question arises to what extent the Association Councils can also take decisions to amend the annexes to deepen and broaden the scope of the AAs/DCFTAs by deepening or accelerating market integration or by including new areas of cooperation through legislative approximation. Such a procedure would avoid the burdensome procedure of formal Treaty revision, which would require the ratification by the partner countries and by the EU (i.e. the Council and the European Parliament) and all the Member States (in case of ‘mixed’ elements; not falling under Union competences).

The competences of the joint bodies established by the AAs to modify to annexes in order to incorporate entirely *new* areas of EU legislation (for example to foster cooperation or market integration in new areas), are from a strictly legal point of view rather limited. First of all, the Association Councils (or Committees) can only act in those cases explicitly provided for in the agreement. Moreover, with regard to the modification of the annexes covering EU legislation, the agreement specifies that the Association Council can only do so “to take into account the evolution of EU law and applicable standards”.<sup>16</sup> This implies that, from a strict reading of these provisions, the Association Councils do not have the general competence to broaden or widen the scope of the annexes to include new areas of EU legislation. The Association Councils therefore do not have the competence to substantially broaden the approximation commitments of the AA chapters/annexes, or to add new annexes with new areas of EU legislation. However, for those annexes that cover a significant area of EU legislation (e.g. services, energy, and environment), the Association Councils have more flexibility to creatively include areas of EU legislation which are directly or indirectly linked with the objectives of the initial approximation commitments. For those chapters where the approximation commitments are limited and narrowly defined, it will be more difficult to broaden to scope of the listed EU legislation in the name of mere ‘updating’. However, the deepening of existing approximation commitments, for example by incorporating into the agreements/annexes Delegated Acts or Implementing Acts that specify the Regulations and Directives included in the Annexes, would be in conformity with the competences of the AA joint bodies.

<sup>14</sup> <https://3dcftas.eu/library/documents/joint-statement-by-the-ministers-of-foreign-affairs-of-georgia,-the-republic-of-moldova-and-ukraine-on-the-future-of-eastern-partnership>

<sup>15</sup> Eastern Partnership foreign ministers’ meeting: Chair’s conclusions on the occasion of the Eastern Partnership 10th Anniversary, 13 May 2019 <https://www.consilium.europa.eu/en/press/press-releases/2019/05/13/eastern-partnership-foreign-ministers-meeting-chair-s-conclusions-on-the-occasion-of-the-eastern-partnership-10th-anniversary/>

<sup>16</sup> See for example Article 463(3) Ukraine AA.

As illustrated below, for trade in goods and services the AAs include a review clause which enables the Association Councils to accelerate the pace and depth of liberalisation. However, if the EU and the AA partner countries want to amend parts of the agreement that do not fall under the 'updating' objectives or as elsewhere explicitly provided for in the agreements, the only option would be a formal treaty change (for example by an exchange of letters). On the EU's side this would require a proposal from the Commission and the approval by both the Council and Commission (and all 27 Member State if the amendment would cover competences falling under shared/Member States' competences). Such a formal treaty change took for example place in one case only, that of Ukraine's AA relating to trade preferences for poultry meat (explained below).

### 3. Updating in practice

So far only a few decisions have been taken by joint AA institutions to update the annexes since the (provisional) entry into force of the agreements. Such decisions have been taken only in relation to DCFTA chapters (with the notable exception of energy in the case of Ukraine (cf. *infra*)), and not with regard to chapters falling under the Title of Economic and Sectoral cooperation. However, at subcommittee level preparations are ongoing also to update several chapters under this Title. The decisions on updates adopted so far are discussed below:

**Table 2: Updates of the AAs / Decisions of the Association Council or other joint committees**

	<b>Ukraine</b>	<b>Moldova</b>	<b>Georgia</b>
<b>Trade in Goods</b>		Decision No 1/2020 of the EU-Republic of Moldova Association Committee in Trade Configuration of 23 January 2020 concerning the update of Annex XV (Elimination of customs duties)	
<b>TBT</b>		Decision No 1/2016 of the Association Committee meeting in Trade Configuration of 19 October 2016 updating Annex XV	Decision 1/2019 of 18 October 2019 of the Association Committee meeting in Trade Configuration
<b>SPS</b>	Decision No 1/2019 of the EU-Ukraine Sanitary and Phytosanitary Management Sub-committee of 18 November 2019	Decision No 1/2016 of the EU-Republic of Moldova Sanitary and Phytosanitary Sub-Committee of 1 June 2016 modifying Annex XXIV-B	Decision No 1/2017 of the EU-Georgia Sanitary and Phytosanitary Sub-Committee of 7 March 2017 modifying Annex XI-B

<b>Services and establishment</b>		<p>Decision No 1/2019 of meeting in Trade Configuration of 4 October 2019 concerning the update of Annex XXVIII-B (Rules applicable to telecommunication services)</p> <p>Decision No 2/2019 of the EU-Republic of Moldova Association Committee Meeting in Trade Configuration of 4 October 2019 concerning the updating Annex XXVIII-D (Rules applicable to international maritime transport)</p>	
<b>IPR</b>			Decisions No 1/2020 and 1/2016 of the Geographical Indications Sub-Committee
<b>Public Procurement</b>	Decision 1/2018 updating Annex XXI - and giving a favourable opinion regarding the comprehensive roadmap on public procurement	Decision No 2/2016 of the Association Committee meeting in Trade Configuration of 19 October 2016 updating Annex XXIX	Decision No 2/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex XVI
<b>Customs</b>	Decision No 1/2018 of the EU-Ukraine Customs Sub-Committee of 21 November 2018 replacing Protocol I to the EU-Ukraine Association Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation	<p>Decision No 1/2016 of the Customs Sub-Committee of 6 October 2016 replacing Protocol II;</p> <p>Decision No 1/2018 of the Association Council of 3 May 2018 as regards the amendment of Annex XXVI</p>	Decision No 1/2018 of the Customs Sub-Committee of 20 March 2018 replacing Protocol
<b>Energy</b>	Decision No 1/2019 of the EU-Ukraine Association Council of 8 July 2019 as regards		

	the amendment of Annex XXVII		
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In what follows we discuss and analyse for each AA/DCFTA chapter that includes legislative approximation commitments the *updating* decisions adopted by the respective joint committees. In addition, we briefly discuss the most important legislative developments that occurred at EU level since the AAs have been negotiated and which are relevant for the three associated countries.

### 3.1 Trade in goods

With regard the deepening and acceleration of the liberalisation of trade in goods, the DCFTAs of the three agreements include a 'rendez-vous clause' which enables the respective Association Committees meeting in Trade configuration, at the request of either Party, to accelerate the elimination of customs duties by a joint decision. For Ukraine and Georgia this is only possible after 5 years after the (provisional) entry into force of the agreement,<sup>17</sup> whereas for Moldova this was already possible immediately after the entry into force of the agreement.<sup>18</sup>

Significantly, the EU and Moldova agreed in 2019 to use this procedure to increase the volume of some agricultural products subject to annual TRQs. Moldova will be granted additional duty-free TRQs to export table grapes (of double the current amount) and plums (of a 50% increase on the current volume), as well as a new duty-free quota for cherries (of 1,500 tonnes). EU producers will also have more export opportunities, as Moldova will increase its TRQ for pork, poultry, dairy and sugar. Moreover, the thresholds triggering the anti-circumvention mechanism for wheat, barley, maize, sugar and processed cereals have also been raised, taking into account the trade patterns over the last few years. The decision was adopted by the Trade Committee in January 2020.<sup>19</sup>

In order to further support Ukraine in its economic and political reforms, the EU adopted in September 2017 temporary autonomous trade measures through a Regulation which supplement the liberalisation under the DCFTA. These measures were granted in the form of zero-tariff quotas for certain agricultural products in addition to the TRQs set out in the DCFTA, and the partial or full removal of import duties on several industrial products.<sup>20</sup> Applying for a three-year period (until October 2020), these autonomous measures create additional annual import quotas at zero tariff for the certain products.<sup>21</sup> Moreover, they

<sup>17</sup> Article 29(4) Ukraine AA and Article 26(5) Georgia AA

<sup>18</sup> Article 147 Moldova AA.

<sup>19</sup> Decision No 1/2020 of the EU-Republic of Moldova Association Committee in Trade Configuration of 23 January 2020 concerning the update of Annex XV (Elimination of customs duties) to the Association Agreement between the EU and Moldova.

<sup>20</sup> Regulation (EU) 2017/1566 of the European Parliament and of the Council of 13 September 2017 on the introduction of temporary autonomous trade measures for Ukraine supplementing the trade concessions available under the Association Agreement.

<sup>21</sup> These are: Natural honey - 2500 tonnes; Processed tomatoes - 3000 tonnes; Grape juice - 500 tonnes; Oats - 4000 tonnes; Wheat - 65 000 tonnes; Maize - 625 000 tonnes; Barley - 325 000 tonnes; Groats and pellets of certain cereals - 7800 tonnes

removed import duties on several industrial products, such as fertilisers, dyes, pigments and other colouring matters, footwear, copper, aluminium, as well as television and sound recording equipment. Talks under the DCFTA 'rendez-vous' clause to further accelerate tariff liberalisation have not yet been initiated.

Remarkably, a formal Treaty revision took place recently when the EU and Ukraine decided to amend a specific element of the EU-Ukraine AA relating to trade preferences for poultry meat. From mid-2016 Ukrainian poultry meat producers created a special poultry cut (breast caps with a small piece of the wing) which fell within the zero-duty tariff line, thus circumventing TRQs under the DCFTA for poultry breasts. As this disrupted the delicate balance in the poultry meat market of the EU, the EU aimed to rectify this loophole and the Council authorised the Commission to open negotiations with Ukraine to find a solution by amending the trade preferences for poultry meat. The EU and Ukraine eventually agreed in 2019 to solve this issue by amending the AA by including the two tariff lines under which the imports of the new type of poultry cut were taking place, in the scope of the existing quota for poultry meat and poultry meat products. As such a revision does not fall under the 'updating' competences of the Association Council, this amendment required the conclusion in December 2019 of an 'Agreement in the form of an exchange of letters between the European Union and Ukraine',<sup>22</sup> which on the EU side needs to be approved by both the Council and the European Parliament. The EU and Ukraine have in the meantime finalised the ratification procedure and the agreement (which was first provisionally applied) entered into force on 1 February 2020. This story illustrates that the EU is in exceptional cases willing to change the agreement through a formal treaty change (in particular when its interests are at stake and if the revision only relates to very specific technical issues).

Also in relation to agricultural products, it has to be noted that the DCFTAs (under the IPR chapter) provide for the possibility to add new geographical indications to be protected (by amending the corresponding annex). Such decision have been taken in the case of Georgia in 2016 and 2020.<sup>23</sup>

### 3.2 Customs

In the area of Customs, the AAs require the partner countries to approximate to the Community Customs Code laid down in Regulation (EEC) 2913/92. But because the Customs Code had become outdated (relying on paper-based processes), it was replaced in October 2013 by the Union Customs Code (UCC, in Regulation (EU) 952/2013). The new UCC will complete the progression to a paperless and electronic customs environment and introduces several new procedures. The substantive provisions of the UCC entered into force on 1 May 2016, but with a transition period until 31 December 2020 to develop new IT systems or to upgrade existing ones.

<sup>22</sup> Agreement in the form of an exchange of letters between the European Union and Ukraine amending the trade preferences for poultry meat and poultry meat preparations provided for 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 part (OJ, 2019, L325)

<sup>23</sup> Decision No 1/2020 of the Geographical Indications Sub-Committee; Decision No 1/2016 of the Geographical Indications Sub-Committee of 10 November 2016 amending Annex XVII-C and Part B of Annex XVII-D.

Accordingly the EU-Moldova Association Council has updated the relevant annex with respect to the UCC (Decision 1/2018 EU-Moldova Association Council). However, similar decisions have not yet been adopted for the Georgia and Ukraine AAs, but are under preparation. Georgia has already gone ahead unilaterally and introduced the requirements of the UCC into its new Customs Code. Ukraine still needs to submit a proposal to amend Annex XV on aligning its customs code to that of the EU.

Although not strictly related to the updating of the DCFTAs (and their annexes), the Rules of Origin of the DCFTAs (included in AA Protocols) have been replaced by the Regional Convention on pan-Euro-Mediterranean preferential rules of origin (PEM Convention).<sup>24</sup> The system of Pan-Euro-Mediterranean cumulation of origin allows for the application of diagonal cumulation between the EU, EFTA States, Turkey, the countries which signed the Barcelona Declaration, the Western Balkans and the Faroe Islands. This means that materials which have obtained originating status in one of the Contracting Parties may be incorporated in products manufactured in another PEM country without those products losing their originating status when exported to a third Contracting Party within the pan-Euro-Med zone. Diagonal cumulation however only applies if a FTA is in place between the Contracting Parties concerned incorporating the PEM Convention. The three DCFTA countries recently joined the PEM Convention: Ukraine in 2017, Moldova in 2015, and Georgia in 2017.

### 3.3 Technical Barriers to Trade (TBT)

In the area of TBT, the EU–Moldova Trade Committee updated the annexes of this chapter, which include the vertical (product-specific) and horizontal (institutional) TBT directives, in order to catch up with relevant EU legal developments. Several EU acts listed in the TBT annexes have indeed been amended, recast or repealed and replaced by new EU acts since the AAs have been negotiated and signed. In particular, around 20 sectoral directives have been replaced in the context of the New Legislative Framework. This Framework, adopted in 2008, aims to gradually improve the internal market for goods and strengthen the conditions for placing a wide range of products on the EU market by strengthening market surveillance and conformity assessments. One of the key elements of the New legislative Framework was Decision 768/2008, which established a common framework for the marketing of products including reference provisions to be incorporated whenever product legislation is revised. During the last decade, mainly after the negotiations of the AAs, the EU updated its sectoral product legislation to align these with Decision 768/2008. Accordingly, the joint Trade Committee in the EU-Moldova AA adopted in October 2016 a decision to update Annex XVI to reflect these recent legislative developments (Decision 1/2016). The new annex contains 35 sectoral directives, including a deadline for approximation. Whereas the horizontal legislative framework (relating to, for example, accreditation, general product safety, liability of defective products and standardisation) remain unchanged, much of the sectoral legislation, in particular those providing for CE

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<sup>24</sup> Decision No 1/2018 of the EU-Ukraine Customs Sub-Committee of 21 November 2018; Decision No 1/2016 of the EU-Moldova Customs Sub-Committee of 6 October 2016; Decision No 1/2018 of the EU-Georgia Customs Sub-Committee of 20 March 2018.



Marking<sup>25</sup> and specific sectoral legislation related to motor vehicles<sup>26</sup> and chemicals,<sup>27</sup> has been updated. The timeframe for implementation of these new Directives was rather ambitious (2017-2019). It has to be noted that the EU does not notify the AA partners each and every time when a EU act included in the TBT annexes is updated. Instead, the European Commission (DG Grow) prepares once a year an overview of the new relevant TBT legislation, which is then submitted to the AA partner countries for consideration and for discussion in the joint bodies. The European Commission (DG Grow) prepared in 2019 a new overview and submitted this to the Moldovan authorities during the meeting of the EU-Moldova Association Committee in Trade Configuration in October 2019.

The EU and Georgia have also adopted a similar decision regarding the update of the TBT annex concerning rules applicable to standardisation, accreditation, conformity assessment, technical regulation and metrology.<sup>28</sup> The decision includes 20 (new) sectoral directives which reflect Georgia's priorities with regard to the approximation of the Union's New Approach and Global Approach Directives as included in the Government's Strategy document.<sup>29</sup> The deadlines for implementation are longer compared to the new TBT annex of the Moldova AA (2019-2023).

Significantly, the EU-Ukraine TBT chapter does not require updating as the relevant annex does not include a reference to specific directives or regulations as in the case of the Moldova and Georgia AAs, but only to the relevant titles of sectors or areas of sectoral and vertical legislation. Also in this case the EU submits regularly an overview of new relevant legislation to the Ukrainian authorities, but without leading to formal decisions of the Association Council or Committee.

As discussed elsewhere,<sup>30</sup> the proper implementation and enforcement of TBT legislation is a condition for the conclusion of an Agreement on Conformity and Assessment and Acceptance of Industrial Products (ACAA). By concluding an ACAA, the parties agree that industrial products listed in the annexes of an ACAA, and 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. However, before concluding an ACAA, Ukraine, Moldova and Georgia would first have to fully implement its

<sup>25</sup> Directive 2014/35/EU On electrical equipment designed for use within certain voltage limits;

Directive 2014/29/EU On simple pressure vessels;

Directive 2014/30/EU On electromagnetic compatibility;

Directive 2014/33/EU On lifts and safety components for lifts;

Directive 2014/32/EU On measuring instruments;

Directive 2014/31/EU On non-automatic weighing instruments;

Directive 2014/68/EU On pressure equipment;

Directive 2014/53/EU On radio equipment and repealing Directive 1999/5/EC;

Directive 2013/53/EU On recreational craft and personal watercraft and repealing Directive 94/25/EC;

Directive 2013/29/EU On pyrotechnic articles.

<sup>26</sup> Regulation (EU) No 168/2013 On two- or three-wheel vehicles and quadricycles.

<sup>27</sup> Regulation (EU) No 649/2012 On hazardous chemicals;

Directive 2012/18/EU On dangerous substances, amending and subsequently repealing Directive 96/82/EC;

Directive 2012/19/EU On waste electrical and electronic equipment (WEEE).

<sup>28</sup> Decision No 1/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex III-A to the Association Agreement

<sup>29</sup> Strategy in Standardisation, Accreditation, Conformity Assessment, Technical Regulation and Metrology and Programme on Legislative Reform and Adoption of Technical Regulations, of March 2010.

<sup>30</sup> <https://3dcftas.eu/publications/>



obligations related to the annexed TBT legislation, including the harmonised standards, and the establishment of accreditation and conformity assessment institutions in conformity with EU legislation. An ACAA would consist of a framework agreement, providing for the recognition of equivalence of the conformity assessment, verification and accreditation procedures, and one or more annexes setting out the products covered. The DCFTA countries have identified priority areas to be covered by their respective ACAAs (e.g. simple pressure vessels, low voltage equipment, electromagnetic compatibility and machinery) and progress has been made (as for example recognised in the European Commission's 2019 AA implementation report for Ukraine)<sup>31</sup>, but the EU considers that the implementation and proper enforcement of the legislation is still not sufficient.

### 3.4 Sanitary and Phyto-Sanitary regulations (SPS)

The SPS chapters in the three DCFTAs did not initially include a list of EU legislation for approximation. The agreements obliged instead the respective SPS-subcommittees to adopt a "Comprehensive Strategy for Implementation" (hereinafter; "the SPS Strategies"), which need to include the list of SPS -related legislation that the partner countries have to implement. Such SPS Strategies have been adopted by the respective SPS committees with Moldova (2016) and Georgia (2017).<sup>32</sup> The SPS Strategy with Ukraine was only adopted in November 2019 (although the deadline for this was 3 months after the entry into force of the agreement).<sup>33</sup> However, according to the European Commission 170 acts have already been approximated by Ukraine, or are in the process of approximation.<sup>34</sup> Although the three SPS Strategies are differently structured (see Tables 3-5), their scope is rather similar. Most of the listed acts need to be implemented by 2020 (with most deadlines referring to 2018-2020), although the Georgia SPS Strategy has for several EU acts longer implementation periods (up to 2027).

Despite the fact that these Strategies were adopted several years after the entry into force of the agreement (and are therefore less outdated than the AAs themselves), discussions are ongoing with Georgia to amend its SPS Strategy. In addition to updating the SPS Strategy to bring it in line with recent developments in EU law, Georgia has flagged that "certain EU acts were not relevant for approximation, and should thus be removed from the SPS approximation lists adopted in 2017".<sup>35</sup> The EU has agreed to consider to remove several EU acts from the Strategy, but the SPS Committee has not yet agreed on such a decision. No updates of the SPS Strategies are foreseen for Moldova and Ukraine. The numbers of SPS legislative acts are indicated in the following tables and generally total around 250.

<sup>31</sup> European Commission, 'Association Implementation Report on Ukraine', SWD(2019) 433 final

<sup>32</sup> Decision No 1/2016 of the EU-Republic of Moldova Sanitary and Phytosanitary Sub-Committee; Decision No 1/2017 of the EU-Georgia Sanitary and Phytosanitary Sub-Committee of 7 March 2017

<sup>33</sup> Decision No 1/2019 of the EU-Ukraine Sanitary and Phytosanitary Management Sub-committee of 18 November 2019 modifying Annex V to Chapter 4 of the Association Agreement

<sup>34</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019SC0370&from=EN>

<sup>35</sup> EU-Georgia Association Committee in Trade Configuration, 5-6 December 2019, Joint Report, to consult at: [https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc\\_158659.pdf](https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158659.pdf)

**Table 3: Overview Ukraine SPS Strategy**

<b>Ukraine SPS Strategy</b>	
General legislation - Public health	11
Labelling and information about foodstuffs	6
Measures applicable to animal products	24
Other Measures & Measures to be included after the approximation of legislation	28
Chapter II Animal Health	25
Animal diseases	15
Identification and registration of animals	11
Animal by-products	5
Measures applicable to feed and feed additives	17
Animal Welfare	9
Chapter 3 Phytosanitary measures	91
<b>Total</b>	<b>242</b>

**Table 4: Overview Moldova SPS Strategy**

<b>Moldova SPS Strategy</b>	
General	10
Veterinary	78
Placing on the market of food, feed and animal by-products	28
Food Safety rules	51
Specific Rules for feed	10
Phytosanitary	49
GMO	10
Veterinary medical products	6
<b>Total</b>	<b>235</b>

**Table 5: Overview Georgia SPS Strategy**

<b>Georgia SPS Strategy</b>	
Veterinary	101
Food safety	84
Plant Protection	87
<b>Total</b>	<b>272</b>

### 3.5 Public Procurement

The annexes in the chapters on public procurement in the three DCFTAs refer to outdated EU public procurement legislation (Directives 2004/17 and 18). In 2014 the EU adopted a new legislative package on public procurement, which replaced these directives. The new procurement package aims to simplify the EU procurement regime, introduce more flexibility, establish better access to EU procurement markets for SMEs, and ensure that greater consideration is given to social and environmental criteria. Moreover, a specific Directive has been adopted on the award of concession contracts (Directive 2014/23). This legislative package was adopted in February 2014 and the member states had until April 2016 to transpose the new rules into their national law.

In order to catch up with these new EU public procurement rules, the EU-Moldova and EU-Ukraine Trade Committees adopted a decision to amend the relevant annexes.<sup>36</sup> The new acts for approximation are Directive 2014/23 on the award of concession contracts, Directive 2014/24 on public procurement, as well as the Directive 2014/25 on procurement by entities operating in the water, energy, transport and postal services sectors. Yet, these directives do not have to be implemented in their entirety or at once. As initially foreseen in these annexes, the EU legislation on public procurement is divided into “basic”, “mandatory” and “non- mandatory” elements (i.e. provisions that are not mandatory but recommended for approximation) and elements “that fall outside the scope of legislative approximation”. A time schedule links the gradual approximation to the applicable parts of this legislation with specific types of market access

In the case of Ukraine this time schedule sets out five phases indicating the elements of the EU public procurement directives (i.e. the “basic elements” and “other elements” as identified in the annex) that Ukraine has to implement and the specific market access that Ukraine and the EU will grant to each other. The market access granted in each phase (see Table 6) implies that the EU shall grant access to contract award procedures to Ukrainian companies – whether established or not in the EU – that is no less favourable than that accorded to EU companies and vice versa. This schedule also indicates that the EU and Ukraine will open their respective procurement markets gradually and simultaneously. Unlike other DCFTA chapters such as trade in goods, the EU will not grant access to a section of its procurement market until Ukraine offers the same market access to the EU. Moreover, each phase shall be evaluated by the Trade Committee and the reciprocal granting of market access will only take place following positive assessment by this Committee, which will take into account the quality of Ukraine’s legislation, as well as its practical implementation. The Trade Committee shall only proceed to the evaluation of the next phase once the measures to implement the previous phase have been carried out and approved.

In addition to updating the public procurement annex to the new procurement package, the decision of the Association Council also gave a favourable Opinion regarding Ukraine’s comprehensive procurement roadmap, adopted by the Government of Ukraine on 24

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<sup>36</sup> Decision No 1/2018 of the EU-Ukraine Association Committee in Trade Configuration; Decision No 2/2016 of the EU-Moldova Association Committee in Trade Configuration.

February 2016. Ukraine was required by the DCFTA to submit such a comprehensive roadmap to the Trade Committee for the implementation of this procurement chapter, covering all reforms in terms of legislative approximation and institutional capacity building. This roadmap complies with the five phases of the indicative schedule.

In the case of the Moldova AA a similar decision was taken to update the public procurement annex, also including a similar Indicative Time Schedule.<sup>37</sup> The only substantial difference is that Moldova has more time to implement the first 3 phases of the schedule (from 9 months to 6 years) compared to Ukraine. Moreover, in April 2018 the EU-Moldova Association Committee in Trade Configuration approved Decision 1/2018 which gave a favourable opinion regarding the National Strategy for Public Procurement for the period of 2016-2020, and the action plan for its implementation was adopted by the Moldova by Government Decision No 1332 of 14 December 2016. The EU has also updated the annex on public procurement in the Georgia AA, also on the basis of an Indicative Time Schedule similar to the one adopted with Ukraine and Moldova.<sup>38</sup>

**Table 6: The new Indicative Time Schedule for the EU-Ukraine AA**

<b>Phase</b>	<b>Action</b>	<b>Indicative time schedule</b>	<b>Market access granted to EU by Ukraine</b>	<b>Market access granted to Ukraine by EU</b>
1	Implementation of the basic standards, the institutional reforms and the public procurement roadmap	6 months	Supplies for central government authorities	Supplies for central government authorities
2	Approximation and Implementation of the basic elements of Directive 2014/24 and of Directive 89/665/EEC	3 years	Supplies for state, regional & local authorities & bodies governed by public law	Supplies for state, regional and local authorities & bodies governed by public law
3	Approximation and Implementation of basic elements of Directive 2014/25 and of Directive 92/13/EEC	4 years	Supplies for all contracting entities in the utilities sector	Supplies for all contracting entities
4	Approximation and Implementation of other elements of Directive 2014/24 and approximation	6 years	Service & works contracts & concessions for all contracting authorities	Service & works contracts & concessions for all contracting authorities

<sup>37</sup> Decision No 2/2016 of the EU-Moldova Association Committee in Trade Configuration.

<sup>38</sup> Decision No 2/2019 of the EU-Georgia Association Committee in Trade Configuration of 18 October 2019 updating Annex XVI to the Association Agreement.

	and implementation of Directive 2014/23			
5	Approximation and implementation of "other elements" of Directive 2014/25	8 years	Service & works contracts for all contracting entities in the utilities sector	Service & works contracts for all contracting entities in the utilities sector

### 3.6 Services and establishment

Similar the chapters on trade in goods (cf. *supra*), the DCFTA chapters on services and establishment include review clauses that allow the parties to progressively deepen liberalisation by reviewing the annexed lists including the numerous reservations to market access and national treatment applicable to trade in services and establishment (which reflect the parties' services commitments in the GATS).<sup>39</sup> However, using these clauses is not yet being considered.

With regard to updating the legislative approximation commitments in the area of services and establishment, it has to be noted that one of the most substantial legislative approximation obligations in the DCFTAs are in the chapters on trade in services and establishment, in particular in relation to postal and courier services, financial services, telecommunication services and international maritime transport. As discussed elsewhere,<sup>40</sup> the proper enforcement and implementation of this body of EU legislation can lead in the case of the EU-Ukraine AA to 'internal market treatment' in these sectors,<sup>41</sup> which would require application of very detailed and dynamic procedures to update the annexes to keep up with EU law. Indeed, the EU's body of legislation in these areas has developed significantly. The Commission has notified the DCFTA countries about the relevant changes in EU law (although not always as fast as required by the agreements).<sup>42</sup> However, almost no decisions have been taken by the Association Councils or Committees to update these annexes – although discussions are ongoing at subcommittee level. The major sub-sectors covered under this chapter are discussed separately below, in view of their complexity and importance.

### 3.7 Financial services

In the case of Ukraine, Annex XVII-2 covers more than 30 EU acts in the area of banking, insurance, securities, UCITS, market infrastructure, payments, anti-money laundering, and free movement of capital. However, most of this legislation predates the 2008 financial and banking crisis and the new package of EU legislation that resulted out of this. The annexes

<sup>39</sup> See for example Article 89 and 96 Ukraine AA and Article 213 Moldova AA.

<sup>40</sup> <https://3dcftas.eu/publications/>

<sup>41</sup> 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 (Art. 4 Annex XVII Ukraine AA).

<sup>42</sup> See for example Annex XVII Ukraine AA.

therefore need to be updated. The Commission notified Ukraine in 2018 of the amendments to the acquis listed in Annex XVII, which in some cases also envisage revised dates for approximation. The EU and Ukraine have been discussing the revision of the financial services annex and aim to finalise the update in 2020 (together with the 3 other services sectors, i.e. postal and courier; telecommunication; and international maritime transport). Although it is too early for the Commission to consider the granting of internal market treatment, the Commission has flagged that this “may be envisaged once Ukraine effectively implements the EU acquis and ensures adequate administrative capacity to implement and enforce it”.<sup>43</sup> The most challenging piece of new EU legislation is the MIFID II directive, which inter alia concerns the regulation of complex financial instruments such as derivatives which hardly exist in the small scale financial markets of the three AA states.

The EU and Moldova have agreed on updating their respective financial services annex. The agreed draft annex,<sup>44</sup> which still requires formal adoption by the Trade Committee, includes however only a limited number of new EU acts on, for example, the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and information accompanying transfers of funds.<sup>45</sup> Exploratory discussions are also ongoing with Georgia.

### 3.8 Telecommunications and digital

In line with the development of the Digital Single Market launched in 2015, the EU has significantly modified its legislation, including its laws on electronic communications. Some of these changes are incorporated in the Decision 1/2019 (by the EU-Moldova Association Committee) that amends Annex XXVIII-B (Rules applicable to telecommunication services).

Compared to Georgia and Ukraine, Moldova already had the most extensive list of commitments, with 12 legal acts to be approximated within ambitious timelines. The decision further updates Moldova’s commitments in line with the new EU laws which update legal acts initially included in the annex. These new EU acts refer to network neutrality and users’ rights related to electronic communications networks and services<sup>46</sup>, the re-use of public sector information<sup>47</sup> and the electronic identification and trust services.<sup>48</sup> Having in place these new legal acts will enable Moldovan companies to participate more effectively

<sup>43</sup> European Commission, Report on the Implementation of Free Trade Agreements – 2018 (COM(2019) 445).

<sup>44</sup> European Commission, Proposal for a Council Decision on the position to be taken on behalf of the European Union, in the Association Committee meeting in Trade configuration established by 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 concerning the update of Annex XXVIII-A (Rules applicable to financial services), Annex XXVIII-B (Rules applicable to telecommunication services) and Annex XXVIII-D (Rules applicable to international maritime transport) to the Agreement (COM/2017/0754 final).

<sup>45</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC; Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006

<sup>46</sup> Regulation (EU) 2015/2120 amending Directive 2002/22/EC.

<sup>47</sup> Directive 2013/37/EU amending Directive 2003/98/EC.

<sup>48</sup> Regulation (EU) No 910/2014 repealing Directive 1999/93/EC. The decision also includes one implementing regulation and three implementing decisions that implement the Regulation (EU) No 910/2014.

in online tenders, including for EU funding grants for which they are eligible. They also tackle high rates of piracy and the use of illegal software by governments, which is an important concern for Moldova.

In addition, this decision updates Moldova's commitments with a number of implementing decisions and directives from 2005 to 2019 that implement rules on regulatory framework for radio spectrum policy.<sup>49</sup>

Amendments do not cover the most recent directive on the new Electronic Communications Code <sup>50</sup> that introduces new rules for spectrum use, mobile connectivity, 5G and strengthens the security and protection of consumers. The Code, as the first update of European telecom rules since 2009, was adopted in 2018 and is supposed to be transposed into the national legislation of member states by 21 December 2020.

As noted above, discussions are also ongoing with Ukraine to update its annex on telecommunication services.

### 3.9 Transport

With regard to road haulage, the updating of Ukrainian annex is under preparation, with a Decision expected in the autumn of 2020. Once concluded, updates for the Moldova and Georgia AAs are expected to follow. Most EU acts in the annex have been replaced, but the changes have been evolutionary, and not of major significance.

A new more radical directive ('Mobility package') is in the course of negotiation between the Council and Parliament. This would notably amend conditions on social aspects of road haulage. But this would not be ripe for updating of the annex until some time later.

There is no plan at present for updating the legislation related to rail transport. The Commission appreciates that the rail reform process in Ukraine is very difficult, and it is judged best to allow some stability in the process. The main directives were consolidated in a recast in 2012, but without major changes in substance. However there have been some significant technical changes in the regulatory regime, separating responsibility for infrastructure from operational management (i.e. an 'unbundling' provision). The Commission would see no problem if Ukraine chose unilaterally to take on new EU legislation.

With regard to International Maritime Transport, the EU-Moldova Association Council adopted Decision 2/2019 updating Annex XXVIII-D on Rules applicable to international maritime transport. These new annexes update several listed EU acts and include several new implementing Commission Decisions which specify and implement the legislation included in the annex.

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<sup>49</sup> Implementing Decision 676/2002/EC on a regulatory framework for radio spectrum policy.

<sup>50</sup> Directive (EU) 2018/1972.



### 3.10 Energy

The EU *acquis* in the energy sector has substantially evolved since the negotiation and signature of the AAs, as have Ukraine and Moldova's obligations arising from its membership of the Energy Community Treaty. In July 2019 the EU-Ukraine Association Council adopted an important decision (Decision 1/2019) to update Annex XXVII of the EU-Ukraine AA on energy cooperation. This decision is remarkable for several reasons.

*First*, this decision goes slightly beyond a mere technical updating of the EU *acquis* included in the annex, incorporating new elements of EU energy-related legislation which were initially not covered by the agreement. As noted above, from a strict legal point of view the Association Council's (or Committee's) competence to do so is rather limited, as the agreements specify that these institutions can only amend the annexes to catch up with relevant EU legislative developments. However, it appears that the new annex incorporates new pieces of energy legislation which were initially not covered by the agreement. The preamble of the Decision of the Association Council justifies this approach by stressing that the AA aims to "intensify their cooperation on energy matters, including through gradual approximation in the energy sector" and to "increasing market integration and regulatory approximation towards key elements of the EU *acquis*". The preamble also states that "the Association Council has the power to take decisions for the purpose of attaining the objectives of the Agreement". The Decision includes (i) a list of "EU *acquis* that Ukraine committed to implement within the framework of the Energy Community Treaty" (in the area of gas, electricity, renewable energy sources, oil, energy infrastructure and energy efficiency), and (ii) a list of "EU *acquis* to be implemented by Ukraine, beyond Ukraine's obligations within the Energy Community Treaty", including more than 10 directives and implementing acts relating to gas, energy efficiency and nuclear issues.<sup>51</sup>

However, the annex (in particular those under the heading "EU *acquis* to be implemented by Ukraine, beyond Ukraine's obligations within the Energy Community Treaty") now includes several pieces of legislation which were initially not included in the annex, but which indeed contribute to the broader objective of the agreement of Ukraine's integration into the EU energy market.<sup>52</sup> In electricity and gas sectors, this concerns new EU laws on network codes<sup>53</sup>, methodologies of calculating the TSO charges and publishing

<sup>51</sup> For example, Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;

Regulation (EC) No 714/2009 on cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003; Directive 2009/73/EC on the internal market in natural gas and repealing Directive 2003/55/EC;

Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005;

Directive 2012/27/EU on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC;

Directive 2010/31/EU on the energy performance of buildings.

<sup>52</sup> See for example Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks;

Directive 94/22/EC on prospection, exploration and production of hydrocarbons;

Regulation (EU) No 244/2012 of 16 January 2012 supplementing Directive 2010/31/EU I on the energy performance of buildings;

Directive 2009/125/EC on ecodesign requirements for energy-related products

<sup>53</sup> See for example Regulation (EU) No 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks.

data and statistics on electricity and gas markets and prices. The new methodologies of calculating the TSO charges and publication of data and statistics present upgrades of a technical nature and aim at enhancing integrity and transparency. The new laws on network codes go beyond technicalities and bring major modifications related to connectivity and efficient functioning of electricity and gas markets. New EU laws are also introduced in the nuclear sector, extending the initial obligations of Ukraine in the supervision and safe management of radioactive waste and the nuclear installations.

The new annex introduces two new sections for the commitments on 'energy infrastructure' and 'renewable energies'. These two new sections commit Ukraine to the EU rules on the use of renewable energies, the promotion of cleaner transport and the approximation guidelines on the priority corridors for the trans-European energy infrastructure. In energy efficiency, the decision goes beyond a mere technical updating by including number of implementing regulations, such as those related to energy labelling<sup>54</sup> and eco-design requirements<sup>55</sup> for energy-related products. In addition, the legislative approximation commitments are further specified by including more implementing regulations, such as those related to eco-design requirements for energy-related products.

A *second* remarkable feature of this annex is that it establishes, "with the aim of strengthening the monitoring of approximation of EU energy sector acquis in Ukraine's domestic law and achieving a lasting modernisation of Ukraine's energy sector", very detailed and far-reaching provisions relating to "effective implementation", "consultation" and "reporting". For example, Ukraine is not allowed to adopt any act included in this new annex before the European Commission has assessed the compatibility of the proposed act with the relevant EU acquis and where the European Commission has concluded that the proposed act is incompatible with the said EU acquis. The agreement specifies that, in order to ensure effective implementation, Regulations regarding a network code in electricity or gas sectors "shall be made part of the internal legal order of Ukraine without changes to the structure and text of the Regulation other than translation, unless such changes are indicated as necessary by the European Commission". The Commission may also consult the Energy Community Secretariat or organize expert missions. It is clear that by including such details procedures the EU wants to ensure that the approximation efforts are properly implemented and enforced.

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<sup>54</sup> Regulation (EU) No 1060/2010; Regulation (EU) No 65/2014; Regulation (EU) No 626/2011; Regulation (EU) No 874/2012; Regulation (EU) No 1059/2010; Regulation (EU) No 392/2012; Regulation (EU) No 1061/2010; Regulation (EU) No 665/2013; Regulation (EU) No 812/2013, Regulation (EU) No 811/2013 and Regulation (EU) 2015/1186; Regulation (EU) No 1062/2010; Regulation (EU) No 1254/2014; Regulation (EU) 2015/1094; Regulation (EU) 2015/1187.

<sup>55</sup> Regulation (EU) 2016/2282; Regulation (EU) 2016/2281; Regulation (EU) 2015/1189; Regulation (EU) 2015/1188; Regulation (EU) 2015/1185; Regulation (EU) 2015/1095; Regulation (EU) No 1253/2014; Regulation (EU) No 548/2014; Regulation (EU) No 66/2014; Regulation (EU) No 813/2013; Regulation (EU) No 814/2013; Regulation (EU) No 666/2013; Regulation (EU) No 617/2013; Regulation (EU) No 932/2012; Regulation (EU) No 622/2012 and Regulation (EC) No 641/2009; Regulation (EU) No 547/2012; Regulation (EU) No 206/2012 and Regulation (EU) No 327/2011; Regulation (EU) No 1016/2010 and Regulation (EU) No 1015/2010; Regulation (EU) 2015/1428, Regulation (EC) No 245/2009, Regulation (EU) No 1194/2012; Regulation (EC) No 244/2009; Regulation (EC) No 859/2009; Regulation (EU) No 347/2010; Regulation (EC) No 643/2009; Regulation (EC) No 642/2009; Regulation (EU) No 4/2014 and Regulation (EC) No 640/2009; Regulation (EC) No 278/2009; Regulation (EC) No 107/2009; Regulation (EC) No 1275/2008; Directive 92/42/EEC; Regulation (EC) No 643/2009.

So far there are no updates planned in the Energy annexes of the Georgian and Moldovan AAs.

### 3.11 Environment and Climate

The EU laws on environment included in the three AAs have been amended and updated significantly, but have not yet led to decisions to update the annexes. The updates cover all the areas from the environmental governance, air pollution, water quality and the marine environment to the waste management, natural habitats, industrial pollution, chemical management and the climate change.

EU environmental governance is updated by the directive on the environmental impact assessments (EIAs). The directive takes into account the threats and challenges that have emerged since the original rules have been put in place.<sup>56</sup> The amendments in the directive are introduced in the spirits of “smarter regulation” and aim at simplifying environmental assessment procedures and reduction of administrative burdens.

The EU rules on the air pollution are updated with the directives on the atmospheric pollutants that amend and repeal the old directives.<sup>57</sup> The new directive covers five air pollutants and sets emission reductions commitments per pollutant for each EU country to be attained by 2020 and 2030. The emission reduction commitments for each pollutant that will apply each year from 2020 to 2029 are the same as those which the EU countries were already committed to under the revised Gothenburg protocol and the stricter reductions will be applied from 2030 onwards. The EU also put in place another new directive<sup>58</sup> to reduce the sulphur content of certain liquid fuels. The new directive sets the maximum permitted sulphur content of heavy fuel oil, gas oil, marine gas oil and marine diesel oil.

The changes concerning water quality refer to the quality of water intended for the human consumption.<sup>59</sup> The changes in the directive on the marine environment set indicative list of the elements for the preparation of marine strategies.<sup>60</sup>

The rest of amendments are of technical nature and refer to the laws on the waste management that have been amended several times from 2008 to 2018,<sup>61</sup> the conservation of natural habitats and wild flora and fauna,<sup>62</sup> the health certificates for imports of certain

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<sup>56</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment was amended by Directive 2014/52/EU, that was supposed to be transposed in the laws of the member states by May 2017.

<sup>57</sup> Directive (EU) 2016/2284 amends Directive 2003/35/EC and repeals Directive 2001/81/EC on the reduction of the emissions of certain atmospheric pollutants.

<sup>58</sup> Directive (EU) 2016/802 that repeals Directive 1999/32/EC.

<sup>59</sup> Directive (EU) 2015/1787 amends Directive 98/83/EC and Directive 98/83/EC on the quality of water intended for human consumption.

<sup>60</sup> Directive (EU) 2017/845 amends Directive 2008/56/EC on the marine environmental policy.

<sup>61</sup> Directive 2008/98/EC and Directive 1999/31/EC.

<sup>62</sup> Amendments refer to Directive 92/43/EC.

animals,<sup>63</sup> industrial pollution, industrial hazards,<sup>64</sup> the chemical management<sup>65</sup> and the EU fertilising products.<sup>66</sup>

The EU laws on the climate change are upgraded by reducing emissions of fluorinated greenhouse gases (F-gases) by 2030<sup>67</sup> and by cutting substances that deplete the ozone layer.<sup>68</sup> The new regulation (Regulation (EU) No 517/2014 ) sets an overall yearly limit on the climate impact of F-gases and obliges the Commission to report on the effects of the regulation by 31 December 2022.

Further major changes are expected in the EU's policy on the environment and the climate change in the framework of the Commission's proposition on the Green New Deal post-2020, with the very ambitious goal to make Europe the first climate-neutral continent by 2050.

Talks between the EU and Ukraine on updating the AA annexes on environment are in and advanced stage, but there remain several outstanding issues.<sup>69</sup> At the sixth EU-Ukraine Association Council Ukraine initiated a dialogue on the development of a common roadmap within the framework of the European Green Deal.<sup>70</sup>

Georgia has launched formal discussions with the EU on updating the annexes on environment and there are major changes expected in line with the EU's new environment and climate policies.

### 3.12 Consumer protection

The AAs' annexes include a long list of EU legislation related to product safety, marketing, contract law, unfair contract terms, doorstep selling, financial services, consumer credit, redress and consumer protection cooperation.

Several important legislative developments have taken place the last decade at EU level in the area of consumer protection which are relevant for the AAs.

The Commission adopted in April 2018 its "New Deal for Consumers" initiative aimed at strengthening enforcement of EU consumer law in light of a growing risk of EU-wide infringements and at modernising EU consumer protection rules in view of market developments. Following these proposals, the Directive on better enforcement and modernisation of EU consumer protection was adopted in November 2019. This directive

<sup>63</sup> Regulation 96/82/EC was repealed by Regulation (EU) 2018/659.

<sup>64</sup> Regulation (EC) No 689/2008 is repealed by Regulation (EU) No 649/2012 on the export and import of hazardous chemicals and its further amendments in 2014, 2015, 2018 and 2019.

<sup>65</sup> Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures was amended several times from 2011 to 2019.

<sup>66</sup> Directive 2006/21/EC is amended by Regulations (EC) No 1069/2009 and Regulation (EU) 2019/1009, and Regulation (EC) No 2003/2003 is repealed.

<sup>67</sup> Regulation (EU) No 517/2014 repeals Regulation (EC) No 842/2006.

<sup>68</sup> Regulation (EC) No 1005/2009.

<sup>69</sup> Annex XXX and XXXI.

<sup>70</sup> <https://3dcftas.eu/news/news/6th-eu-ukraine-association-council-results> .

amended several directives included in the AAs such as the unfair commercial practices directive 2005/29/EC, the consumer rights directive 2011/83/EU, the unfair contract terms directive 93/13/EEC and the price indication directive 98/6/EC. It was proposed together with a proposal on representative actions for the protection of the collective interests of consumers (which still needs to be approved by the Council and Parliament). This new directive provides for, inter alia, enhanced harmonisation of rules on penalties, a right to individual remedies for consumers when they are harmed by unfair commercial practices, more transparency for consumers in online marketplaces and the protection of consumers in respect of 'free' digital services, namely digital services for which consumers do not pay money but provide personal data, such as: cloud storage, social media and email accounts.

In addition, in order to protect consumers better in the context of online shopping, the Commission issued a Notice in 2017 on the market surveillance of products sold online to help public authorities with their work.<sup>71</sup> In the area of financial services, the European Commission is also preparing a proposal to modernise Directive 2002/65/EC on distance marketing of financial services (which protects consumers when they sign a contract with a retail financial services provider at a distance and which is also included in the AAs).

In 2017 the EU also replaced Regulation (EC) No 2006/2004 (listed in the AAs) by Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws. It aims to protect consumers against cross-border infringements to EU consumer law by modernising the cooperation of the relevant national authorities in the EU and EEA countries among themselves and with the European Commission, for example by imposing requirements for the single liaison offices in each Member States and by providing rules for mutual assistance. This Directive can provide a framework for cooperation with the 3 DCFTA countries as well.

So far the EU is only holding discussions with Moldova on updating the annexes on Consumer Protection.

### 3.13 Company law, corporate governance, accounting and auditing

The three AAs include a rather substantial list of EU acquis in the area of company law, corporate governance and auditing which the countries "undertake" to approximate. Since the negotiation and signature of the AAs several important legislative developments have occurred in this area which are relevant for the associated countries.

For example, the EU has adopted in 2017 Directive (EU) 2017/1132 relating to certain aspects of company law. This Directive codifies a series of previous directives on certain aspects of EU company law included in the AAs.<sup>72</sup> The directive lays down measures in order to have equivalent safeguards required by EU countries for the protection of the interests of their shareholders and third parties; in respect of establishing public limited liability

<sup>71</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2017.250.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.250.01.0001.01.ENG)

<sup>72</sup> For example Council Directive 82/891/EEC concerning the division of PLCs and Council Directive 89/666 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State.

companies and maintaining and modifying their capital; disclosure requirements for public and private limited liability companies; and mergers and divisions of public limited liability. This directive requires companies with limited liability to disclose basic information and documents relating to, for example, their instruments of constitution and statutes, annual accounts and other rules for the management of the company.

The AAs also include Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies. This Directive was amended by Directive 2017/828 which facilitates the interaction between companies and their shareholders and adds transparency of institutional investors. In addition, Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market was amended in 2013 by Directive 2013/50/EU which aims at reducing the administrative burden for SMEs.

In the area of accounting and auditing the AAs have undertaken to harmonise their legislation with Council Directive 78/660/EEC on the annual accounts of certain types of companies and Council Directive 83/349/EEC on consolidated accounts. These two directives have been replaced by Directive 2013/34/EU, which simplifies and reduces the administrative burdens for firms and is intended to facilitate greater EU cross-border comparability of accounts.

Other legislation in this area that was recently adopted in the EU and which could be relevant for the DCFTA countries are Directive 2019/1151 of 20 June 2019 which covers provisions on the use of digital tools and processes in company law and Directive (EU) 2019/2121 of 27 November 2019 which lays down new rules on cross-border conversions and divisions and amends the rules on cross-border mergers. These directives enable and encourage companies to use digital tools in company law, while providing strong safeguards against fraud and to protect stakeholders.

The EU also adopted new legislation to address corporate governance issues. For example, the EU adopted Directive (EU) 2017/828, which aims to encourage more long-term engagement of shareholders and has adopted specific rules on corporate governance and remuneration that apply to banks and investment firms.<sup>73</sup>

Ukraine and Moldova are holding discussions with the EU on updating the annexes on company law, corporate governance, accounting and auditing. The EEAS is expected to present to Ukraine a proposal on this in the near future.

### 3.14 Employment, social policy, public health

The AAs set comprehensive agendas for the three countries to gradually approximate the EU laws on employment and social policy. Commitments in all three AAs are laid down under three basic headings: labour law, anti-discrimination and gender equality, and health

<sup>73</sup> Rules on corporate governance and remuneration in banks and systemic investment firms can be found in the Capital Requirements Directive (Directive 2013/36/EU as amended by Directive 2019/878/EU) and the Capital Requirements Regulation (Regulation No 575/2013 as amended by Regulation No 2019/876).



and safety at work. In the meantime, the EU introduced new rules on the social dimension of employment and updated existing rules on the health and safety at work. These annexes have not been updated.

The new rules in the social area refer to the directives on the work-life balance for parents and carers,<sup>74</sup> the transparent and predictable working conditions,<sup>75</sup> the equal treatment of the temporary agency workers<sup>76</sup> and the integration of the long-term unemployed into the labour market.<sup>77</sup> Most recently the Council also adopted a recommendation on access to social protection for workers and the self-employed.<sup>78</sup> The amendments in the EU rules on health and safety at work update safety standards for the works related to the use of chemical,<sup>79</sup> physical<sup>80</sup> and biological agents<sup>81</sup> and establish list of indicative occupational exposure limit values.<sup>82</sup>

The new trends in the EU's social policy in employment are also reflected in the third pillar of the Green New Deal, according to which the EU is committed to green investments that are supposed to create high quality and stable jobs. Trainings, a just transition for all workers in high carbon industries and rewards for child and elder care and activities for the regeneration of the natural systems are also promised by the deal.

In terms of public health there are some changes in the EU's legislation on tobacco and communicable diseases. The new rules on tobacco set out stricter rules on the manufacturing, presentation and sale of tobacco.<sup>83</sup> The new EU legislation on communicable diseases updates rules on epidemiological surveillance, monitoring, early warning and combating serious cross-border threats to health and ensures faster and more effective coordination and cooperation between the member states of the EU.<sup>84</sup>

Currently the three AA countries are holding discussions with the EU on the potential updates of the annexes on Employment and Social Policy (including on tobacco). Georgia is close to finalise discussions with the EU on updating its Annex XXXI on public health. Annex XLI of the Ukraine AA on Public Health (including tobacco) was also opened for update, but this has been put on hold.

During the current Covid-19 pandemic, Ukraine has requested to join the Health Security Committee as an observer, which was accepted by the EU on May 13. In practical terms this

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<sup>74</sup> Directive (EU) 2019/1158 repealing Council Directive 2010/18/EU.

<sup>75</sup> Directive (EU) 2019/1152.

<sup>76</sup> Directive 2008/104/EC.

<sup>77</sup> Council recommendation of 15 February 2016 on the integration of the long-term unemployed into the labour market (OJ C 67, 20.2.2016, pp. 1–5).

<sup>78</sup> Council Recommendation of 8 November 2019, 2019/C 387/01.

<sup>79</sup> Council decision 2014/52/EU and Directive 2014/27/EU.

<sup>80</sup> Directive 2013/35/EU.

<sup>81</sup> Directive 2017/2398/EU and Directive 2019/130 /EU amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.

<sup>82</sup> Directive 2017/164 /EU pursuant to Council Directive 98/24/EC, and amending Commission Directives 91/322/EEC, 2000/39/EC .

<sup>83</sup> Directive 2001/37/EC outlines in the AAs of Georgia, Moldova and Ukraine is no longer in force as it is repealed by the newer legal act - Directive 2014/40/EU.

<sup>84</sup> Decision No 1082/2013/EU repealed Decision No 2119/98/EC and the implementing Decision (EU) 2018/945 repealed Decision 2000/96/EC and Decision 2002/253/EC.



implies that Ukraine will participate in exchanges of high-level representatives of the EU Member States, EEA and the World Health Organisation at the Health Security Committee meetings.

### 3.15 Taxation

The approximation commitments related to taxation are rather limited and no major legal changes occurred at EU level. For example, Ukraine, Moldova and Georgia need to approximate to several elements of the Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (VAT) (e.g. to its provisions on taxable persons and transactions, taxable amounts and exemptions). Only several minor amendments have been made to this directive since the AAs were negotiated, without changing its overall objectives and provisions.

Also other directives listed in the Taxation annexes which (partially) need to be implemented, for example related to the exemption from VAT of goods imported by persons travelling from third countries,<sup>85</sup> excise duties on alcohol,<sup>86</sup> taxation of energy products,<sup>87</sup> general arrangements for excise duty<sup>88</sup> and excise duty applied on tobacco<sup>89</sup> remained largely unchanged at EU level.

One EU act which is not mentioned in the annex but which could be relevant for the DCFTA countries is Regulation (EU) No 904/2010 on administrative cooperation and combating fraud in the field of value added tax. This Regulation sets out procedures allowing EU countries' authorities to work together and share information on value added tax (VAT) and to combat VAT fraud. It thus ensures that VAT is assessed and applied correctly; fraud in VAT is detected and prevented; and VAT revenue is protected. This Regulation can form a basis for cooperation on VAT fraud between the EU and the DCFTA countries.

There are no updates envisaged at present.

### 3.16 Statistics

The AAs envisage that Ukraine, Georgia and Moldova should strengthen their cooperation on statistical issues. The national statistical system should respect the UN Fundamental Principles of Official Statistics, taking into account the EU acquis, in statistics including the European Statistics Code of Practice, in order to harmonise the national statistical system with the European norms and standards. The European Statistics Code of Practice sets the standard for developing, producing and disseminating European statistics.

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<sup>85</sup> Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries.

<sup>86</sup> Council Directive 92/83/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on alcohol and alcoholic beverages.

<sup>87</sup> Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

<sup>88</sup> Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12/EEC.

<sup>89</sup> Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied on manufactured tobacco (codification).

It builds upon a common ESS definition of quality in statistics and targets all relevant areas from the institutional environment, the statistical production processes to European official statistics.

The European Statistics Code of Practice was adopted by the Statistical Programme Committee on 24 February 2005 and was revised by the European Statistical System Committee in September 2011 and November 2017.

Only the Ukraine AA explicitly refers to the acquis in the annually updated Statistical Requirements Compendium, which is considered by the Parties as annexed to this Agreement. The Compendium summarises the key reference information for European statistical production. Eurostat, the statistical office of the European Union, updates the Compendium to take into account new legislation and other developments. While the structure of the versions of the Compendium prior to the 2017 edition generally followed the structure of the European Statistical Programme 2013-2017 and the corresponding Annual Work Programmes of Eurostat, an adapted version of the Classification of Statistical Activities (CSA) was introduced in the 2017 edition, following Eurostat's decision to abolish the modules in the statistical work programme. The main purpose of introducing the CSA was to provide a stable classification of statistical areas and their data requirements, which could easily be transferred to similar processes and purposes and be used for compliance monitoring.

So far only Moldova is holding discussions with the EU on the potential updates of the annexes on Statistics.

### 3.17 Audio-visual policy

A major change in the EU legislation on audiovisual policy is a new AVMSD (Directive (EU) 2018/1808), which strengthens the independence of national regulatory authorities and guarantees free audiovisual media transmission throughout the EU. Moreover, the new directive extends audiovisual rules to video-sharing platforms by imposing certain obligations on commercial communications. Most importantly, AVMSD promotes local European content by obliging audiovisual media service providers to have at least a 30% share of European works in their catalogues.<sup>90</sup> As defined by Article (1) of the Directive, "European works" stand for the works originating in the EU member states or in the European third states that are party to the European Convention on Transfrontier Television of the Council of Europe and fulfil three conditions, ensuring that the works are created and supervised with authors and workers residing in these countries.

For the moment none of the three AAs are updated with the new AVMSD. The AAs still include the old outdated directive on audiovisual media services which is amended by the new AVMSD. Moreover, the annex of the EU-Moldova AA is the most outdated and include a directive prior to the old AVMSD (Directive 2007/65/EC), to be adopted within two years

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<sup>90</sup> For more detailed information see <https://eur-lex.europa.eu/browse/summaries.html>.

after the entry into force of the Agreement. Moldova initiated the transposition of the old 2010 AVMSD, but it was cancelled due to the budget austerity measures applied in 2015.

For the time being there are no updates planned for these annexes of the Georgian and Ukrainian AAs.

### 3.18. Education, Training, Youth

The EU's education and research policies beyond 2020 depends on the new multiannual financial framework (MFF) to be adopted by the end of 2020 at the latest. Based on the proposition of the new Commission both Erasmus+ and Horizon will be carried out post-2020. Erasmus+ is expected to have a few new dimensions related to the Eastern Partnership countries. First, it will focus on the promotion of a dialogue between the youth; second, it will promote engagement of marginalised youth in the civil society initiatives and labour market; and third, it will set up new mobility programmes for public servants to visit the EU institutions and to bring the EU know-how back to their countries.

The successor of Horizon 2020 will be carried out as 'Horizon Europe' and according to the proposal of the Commission there will be changes in the fees of participation as well as in the number of associated countries. In particular, the participation fee will not be proportional to GDP any more but instead will be based on the principle 'pay as you go'. This implies that the participation fee will be determined based on the contributions and benefits of associated countries in the previous year. The contributions and benefits will be closely monitored and will be re-established in every two years. Although this plan has to be approved along with the new MFF and the new EU regulation on Horizon Europe, both to be adopted by the end of 2020.

Another development in the EU policies on research and development is a new geographical dimension of the new Horizon Europe. Unlike Horizon 2020, Horizon Europe will bring on board all the third countries which express their interest in participation, irrespective of their geographic neighbourhood with the EU. For instance, Canada, Japan, Australia, South Africa and New Zealand are considered to be partly associated with Horizon Europe from 2021. The partial association implies association with the selected pillars of Horizon Europe without participating in the European Research Council and several EU programmes. Including new third countries in Horizon Europe will expand the research cooperation and positive externalities related to a larger scale research and development. However for the three AA countries this will translate into tougher competition for available funds. Thus, developing a strong research infrastructure will be the key for the three states to benefit from Horizon Europe.

In terms of formal updating of the annexes, the AAs include only a limited number of EU acts. The Georgia and Moldova AAs include Decision No 2241/2004/EC and all three AAs include several recommendations. Decision No 2241/2004/EC established a single Community framework for the transparency of qualifications and competences (Europass) but is no longer in force as it is repealed by the new Decision (EU) 2018/646 in line with the

'The New Skills Agenda for Europe'. This new EU legal act is in line with the EU's legislation on the personal data protection and is designed to help individuals make better career choices by improving visibility and comparability of their skills.

There are currently no plans to update these annexed.

### 3.19 Financial Cooperation, with anti-fraud provisions

The AAs include also a chapter on financial cooperation, including anti-fraud provisions. These chapters provide basic rules and procedures for the EU's financial assistance to the AA countries and aim to prevent fraud, corruption and other illegal activities. The corresponding annexes include anti-fraud and control provisions and exchange of information and cooperation procedures (including with the European Anti-Fraud Office). The AA countries also undertake to approximate to several EU acts, such as the EU Convention of 26 July 1995 on the protection of the European Communities' financial interests. However, this Convention was repealed by Directive (EU) 2017/1371 of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.

The EU and the AA countries are preparing the updates of this annex. For example, in the case of Ukraine the EEAS is waiting for a reply on the proposed update.

## 4. Conclusions

Considering that the AAs and DCFTAs are already for several years in place (and have been negotiated almost a decade ago), most of the legislation annexed to the AAs became outdated. It is clear from this overview that the procedures to update the AAs' annexes have not been used to the fullest extent (Table 7). Whereas several DCFTA chapters have already been updated (e.g. TBT, Public Procurement, Customs) (Table 2), other important chapters, in particular the chapters on services and establishment (postal and courier services, financial services, telecommunication services and international maritime transport) still require a comprehensive update. However, this should not be a technical copy-paste exercise as for each new EU act it has to be analysed (and negotiated) which elements are relevant and useful for the service sectors in Ukraine, Moldova and Georgia, and should therefore be taken on board in the agreements (including realistic implementation periods).

**Table 7: Approximation commitments, significance of EU legislative changes, updating progress**

<b>Annex topic</b>	<b>Significance of changes in EU law</b>	<b>Updating decisions so far</b>
1. Trade in goods		MD
2. Customs	Major	MD, (UA), (GE)

3. TBT	Some	MD, GE
4. SPS	Minor since SPS Strategies	GE, MD, UA
5. Public procurement	Major	GE, MD, UA
6. Services and establishment	Major	(MD), (UA), (GE)
7. Financial services	Major	(MD), (GE), (UA)
8. Digital/telecommunications	Major	MD, (UA)
9. Transport (services)	Major	MD, (UA)
10. Energy	Major	UA
11. Environment/climate	Major, under preparation	(GE) (UA)
12. Consumer protection	Major	(MD)
13. Company law	Major	(MD) (UA)
14. Employment, social health, public health	Minor, under preparation	(MD) (UA) (GE)
15. Taxation	Minor, under preparation	
16. Statistics	Minor	(MD)
17. Audio-visual policy	Major	
18. Education, Training, Youth	Some	
19. Financial Cooperation	Major	(UA)

*Where the three states are in brackets (GE), (MD), (UA), this means that updating is being discussed or decisions are being prepared (see also Table 2).*

There are only a few updates regarding chapters under the Titles on Economic and Sectoral Cooperation (e.g. the energy sector in case of Ukraine). The remaining chapters include numerous (outdated) legislative approximation clauses in important areas such as transport, environment, consumer protection, company law, public health, employment and social policy and audio-visuals. Currently, the three AA States are having discussions with the EU at committee-level to prepare updates in most of these areas. Whereas discussions are ongoing for several areas with Ukraine and Moldova, Georgia remains more reluctant to commit to new approximation commitments. Significant changes are expected in the annexes on environment and climate; company law and corporate governance; social policy and public health; and financial cooperation with anti-fraud provisions.

Although some progress has been made to update the AAs (and more updates are being prepared), it is clear that this is still not happening a systematic and structured way, but rather fragmented - chapter by chapter and country by country. At EU level the updating of the agreements could benefit from a more integrated approach (between the different DGs involved, coordinated by the EEAS), incorporating these discussions in a more systematic dialogue with the partner countries (both bilaterally but also jointly).

Overall, all the three Associated States welcome enhancing cooperation in several sectors outlined in the Eastern Partnership (EaP) policy beyond 2020, recently proposed by

the Commission.<sup>91</sup> This includes integration in the Single Euro Payment Area, conclusion of the Common Aviation Area agreements, investments to the human capital and youth, engagement into the EU connectivity projects, integration into the EU's Digital Single Market, mutual recognition agreements, assistance in fighting disease, including COVID-19 and joint countering disinformation, hybrid and cyber threats. However, it will be difficult to parachute all these new areas of cooperation into the AAs. This paper demonstrated that for modifying the annexes to deepen and broaden cooperation or market integration beyond the mere technical exercise of updating the annexes, the joint institutions only have limited formal competences. There is ample flexibility to broaden the scope of EU legislation (and hence cooperation or market integration) for those chapters/annexes which cover a substantial area of legislation as it is easier to justify that these new areas are directly or indirectly linked with initial approximation commitments and objectives (as in the case of energy for the Ukraine AA). However, for those chapters where the approximation commitments are limited and narrowly defined (or are even lacking), it will be more difficult to broaden the scope of the AAs in the name of mere 'updating', even if there is strong political will on both sides. In order to deepen and broaden cooperation in these areas (and to avoid a more burdensome procedure of Treaty revision) the EU and its partner countries will have to rely on other hard law (e.g. sectoral agreements, Memorandums of Understandings) or soft law instruments (e.g. Action Plans or Joint Declarations).

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<sup>91</sup> European Commission, 'Eastern Partnership policy beyond 2020, Reinforcing Resilience - an Eastern Partnership that delivers for all', SWD(2020) 56 final).