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The Association Agreements as a Dynamic Framework: Between Modernization and Integration

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Abstract

The EU has concluded the Association Agreements (AAs) with Georgia, Moldova and Ukraine. These are very ambitious, complex and comprehensive legal treaties. The AAs have a dual purpose: to enable political cooperation and economic integration with the EU and promote modernization of the partner countries. The key instrument in achieving these goals is the ‘export of the *acquis*’: the partner countries have taken on extensive, binding commitments to adopt the vast sways of the *acquis*.

In this paper, however, we argue that the transformative role of the *acquis on its own* have not been tested and hence should not be overstated *ex ante*. In our view, for the AAs to achieve their objectives, it is imperative to recognise this underlying challenge and develop strategies to address the fundamental ‘commitment-capacity gap’ in the partner countries.

Against this backdrop, we investigate to what extent EU’s strategy focuses on the narrowly defined legal approximation versus broader support for strengthening state capacity. In the empirical part of the paper we examine specific measures adopted to close the ‘commitment-capacity’ gap of the partner country. Our analyses indicate that only in the case of Ukraine have some deliberate, pro-active adaptations taken place. The dramatic events of 2014 and Russia’s punitive measures against Ukraine prompted the EU to provide more tailored and flexible assistance to ensure support for institutional reforms, as a precondition for legal approximation. In Moldova, the EU has confronted the fundamental weakness of the state only as a result of the 2014 banking scandal. In Georgia, it seems that the EU is conducting ‘business as usual’, although there is some early evidence that it has started to take into account the developmental needs of the partner country. The limited appreciation of the challenges and resulting adaptations so far has implications in terms of the implementation of the AA and, more importantly, the actual transformative power of the EU in the Eastern neighbourhood.

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Contents

1. Introduction	7
2. Association Agreements: Integration without Membership	8
2.1. <i>The Association Agreements: scale of commitment</i>	9
2.2. <i>The institutional framework</i>	12
2.3. <i>Legal approximation versus modernization</i>	13
3. What Support for Implementation and Modernization? Country analysis	15
3.1 <i>Ukraine</i>	15
3.1.1. <i>Support Group for Ukraine and coordination of European assistance</i>	16
3.1.2. <i>Macro-economic assistance to Ukraine</i>	17
3.1.3. <i>EU assistance and innovation in Ukraine</i>	18
3.1.4. <i>Technical assistance and its limits</i>	20
3.2 <i>Moldova</i>	21
3.2.1. <i>The AA-DCFTA negotiations: ex-ante trade-oriented conditionality (2010-14)</i>	21
3.2.2. <i>Beyond the 'frontrunner' façade: a shift in the implementation context (2014-16)</i>	22
3.2.3. <i>Changing priorities: bringing the political basics back in (since 2016)</i>	23
3.3 <i>Georgia</i>	25
3.3.1. <i>The EU's insistence on deep economic integration</i>	25
3.3.2. <i>Guiding AA implementation: Association Agendas and Association Institutions</i>	27
4. Conclusions	30
5. References	31

1. Introduction

The conclusion of the Association Agreements (AAs) represents a noteworthy upgrade in relations between the European Union (EU) and the three Eastern neighbours, Georgia, Moldova and Ukraine. The AAs were first negotiated with Ukraine (2007-11), followed by Georgia and Moldova (2010-13). They are regarded as a new generation of *integration-oriented* agreements (Van der Loo et al. 2014), in marked contrast to the short and general Partnership and Cooperation Agreements (PCAs), which the EU concluded with most of the post-Soviet states (except the Baltic states) in the 1990s.

The AAs have a dual purpose: to enable political cooperation and economic integration with the EU and to promote the modernization of the state institutions and economies of the partner countries (European Commission 2008: 4). The key instrument in achieving these goals is the ‘export of the *acquis*’, which remains the cornerstone of the EU’s external agenda and its integration-oriented agreements. In particular, the AAs offer the prospect of deep economic integration, which is not just about the elimination of tariffs but, above all, about institutional and regulatory convergence with EU templates, reflecting the centrality of sector-specific, technical international rules to the EU as an international organization and foreign policy actor. The agenda for implementation is huge in terms of sheer scope, depth of required change, and associated costs. The density and precision of these reform templates represents a marked break from the previous list of fairly vague and unspecific frameworks for cooperation between the EU and the Eastern neighbours, including the PCAs and the European Neighbourhood Policy Action Plans (ENP APs) (Dragneva and Wolczuk 2012).

In particular, the Agreements go well beyond simple ‘trade issues’, such as tariffs and quotas, as they seek to exert a profound influence on the way that state institutions and economies of the partner countries function. This is why the AAs carry the promise of a major transformative effect in the eastern neighbourhood (Emerson and Movchan, 2016; Adarov and Havlik 2016). However, the AAs do not offer a membership perspective, which is widely regarded as the strongest leverage at the EU’s disposal to promote change in third countries. At the same time, the AAs are a vehicle for the export of the *acquis* to countries with weaker economic and political systems and rule of law (than other European countries, which also have similar integration-type agreements, such as Norway). The AAs face the challenge of a fundamental ‘commitment-capacity gap’ in the partner countries. Yet, it is widely recognized that strong institutions are not only a necessity for implementing a large sways of the *acquis* but also a key condition for sustainable economic development more broadly.

This paper focuses on the fact that while the AAs offer a template for reforms in order to address known weaknesses of the partner countries, such as weak state institutions, lack of competitiveness and socio-economic mis-development, importing the *acquis* by the partner countries is not only not the solution to these problems, but may actually exacerbate them. This is primarily because it is doubtful whether these countries have the capacity to ensure the effectiveness of the vast and sophisticated corpus of rules they are importing, and it is questionable whether the *acquis* actually helps address the immediate developmental objectives of these countries. The import of the *acquis* clearly aims at integration but its suitability for fast and cost-effective modernization of the state and economy is not so clear-cut. And yet the import of the *acquis* – on the scale even bigger than it has been required of the candidate states – underpins the AAs (Blockmans 2017).

This paper presents the nature of the challenge outlined above, followed by an exploration of whether this challenge is recognized by the EU, and if so, what, if any, mechanisms are used to support the implementation. The paper starts by providing an overview of the Agreements in order to elucidate why they are a major upgrade in the EU's relations with the Eastern neighbours and why they are so difficult to implement. It then explores the EU's approach to supporting and facilitating the implementation process in Ukraine, Moldova and Georgia (especially in comparison to the pre-AA period). In particular, it examines how the EU prioritizes the issue of legal approximation in relation to the more fundamental task of strengthening state institutions by analysing the shifts in the nature and scale of assistance offered to the partner countries.

Our analyses indicate that only limited and not (yet) particularly effective adaptations have taken place, mainly in Ukraine, less so in Moldova and Georgia. We have not observed systematic and pro-active lesson learning from other challenging contexts characterised by a weak state capacity, such as the Western Balkans, even if and when the EU has actually adjusted its strategy to address the weakness of the domestic state institutions in Eastern Partnership (EaP) countries. Our analysis in this paper will inform subsequent EU-STRAT research, which will explore the implementation of the AAs within specific sectors in more detail, as well as the lessons (not) learnt from enlargement.

2. Association Agreements: Integration without Membership

The AAs between the EU and its Eastern partners are described as “the most ambitious agreement the European Union has ever offered to a non-Member State” (Van Rompuy 2013). They cover all aspects of cooperation between the EU and the Eastern partners and aim to establish a form of political association and economic integration. In economic terms, the AAs have two overarching objectives: firstly, to prepare the gradual integration of the partners into the EU internal market through the setting up of a Deep and Comprehensive Free Trade Area (DCFTA), and secondly, to support the partners' efforts to complete the transition to a functioning market economy (Art.1, 2(d), EU-Ukraine AA). Notably, the ambition in respect to the first objective, deep integration, was a response to the need to develop further relations with the Eastern partners, and simultaneously deflect their membership aspirations (Delcour and Wolczuk 2013; Dragneva and Wolczuk 2014).

The EU's key instrument in achieving both objectives is the export of its *acquis*, whereby the partner countries undertake to approximate their legislation to that of the EU. According to the European Commission officials Michaela Dodini and Marco Fantini, the neighbouring countries face a choice of either adopting the EU *acquis* or developing a regulatory framework from scratch. They also argue that the EU model is superior to that of other international actors in terms of the quality and density of its regulation, the comprehensiveness of the reforms it entails, and the degree to which it avoids controversies surrounding the activities of some international institutions (Dodini and Fantini 2006: 517).

Yet, while exporting the *acquis* in the context of trade agreements with third countries has a long pedigree (Lazowski 2008; Cremona 2010), these have tended to be partners with strong domestic institutions and developed market economies, for example the members of the European Economic Area, such as Norway or Switzerland (see Vahl and Grolimund 2006). While eschewing membership of the EU, both Norway and Switzerland have the state capacity to assume membership obligations. So far, these ambitious, integration-

oriented agreements involving the export of the *acquis* to non-member states have been concluded with two categories of states: first, highly developed states in Europe, which for various reasons opted to stay outside of the EU, and, second, with prospective member states to prepare them assuming membership obligations, such as the Europe Agreements with the Central and Eastern European (CEE) countries or the Stabilization and Association Agreements (SAAs) with the Western Balkan countries.

The Eastern partners are neither highly developed nor do they have a membership perspective (or are likely to obtain one in the foreseeable future). The justification of exporting such large swaths of the *acquis* is its modernizing role. For example, in July 2013 Catherine Ashton, High Representative of the Union for Foreign Affairs and Security Policy, and Stefan Füle, Commissioner for Enlargement and European Neighbourhood Policy, noted that the completion of the negotiations of the EU-Armenia AA represents a significant achievement for both parties which will allow them to “drive forward together a programme of comprehensive modernization and reform based upon shared values, political association and economic integration” (EUFOA 2013). From the EU perspective, the modernizing role of the AAs is not clearly defined but only broadly articulated and appears to pertain both to democracy and socio-economic development. In particular, ‘deep’ economic integration is regarded as highly conducive to, and indeed, equated with, modernization (see below).

This means that, notwithstanding the apparent parallels with previous exports of the *acquis*, the AAs with the Eastern partner countries represent a unique process: there is no precedent for promoting the *acquis* as a template for development and modernization without a concurrent offer of a membership perspective, let alone in countries lacking the capacity to implement the complex, wide-ranging and sophisticated corpus of EU rules.

The next section will, therefore, analyse the content of the AAs in order to determine what the countries have committed themselves to. This will be followed by an overview of the institutions involved in overseeing the implementation of the AAs, and then a diagnosis of incongruence between legal approximation and modernization that needs to be addressed in the process of implementation of the AAs.

2.1. The Association Agreements: scale of commitment

In designing the AAs, the EU developed a large number of innovative features. Those innovative features and the fundamental legal issues, such as the constitutional ramifications underpinning their domestic effectiveness, are explored elsewhere (Dragneva 2017; Van der Loo 2016). This paper is particularly interested in the extent to which the AAs *aggravate* or *alleviate* the challenge of exporting the single market and sectoral *acquis* to partner countries, which are also required to modernize. We start by examining the nature and scope of the partners’ commitment, particularly with regard to legislative approximation.

In signing the AAs, the partners have made an unprecedented, far-reaching commitment to a wholesale adoption of the EU’s *acquis*. Legal approximation is the bedrock of the DCFTA which specifically defines the key chapters on Technical Barriers to Trade (TBT), Sanitary and Phyto-Sanitary Measures (SPS), Customs and Trade Facilitation, Establishment and Services, Public Procurement, and Competition. It also underpins the commitments under Title

V 'Economic and Sector Cooperation' of the EU-Ukraine AA, including a wide-range of areas, such as transport, science, and the environment.¹

In fulfilling their obligation, the partners need to adopt specifically predetermined EU legislation. For most chapters, this legislation is included in Annexes to the Agreement, and is subject to strict deadlines for implementation. In other areas, specific legislation is not listed, but left to the partners to determine subsequently. For example, in relation to SPS and TBT, the AAs provide only a number of priority areas of the EU *acquis* on the basis of which the countries have to develop their own strategy for implementation. Such selectivity offers greater scope for adjustment in areas of difficult and costly implementation, such as food safety. Similarly, in some sectors there are no specific deadlines, with extensive latitude regarding the time of implementation. In public procurement, for example, implementation is prioritized by distinguishing five progressive phases of legislative approximation and implementation (Annex XXI, EU-Ukraine AA).

For sure, such variations allow for some selectivity in scope and time for implementation. Yet, they do not change the fundamental principle that the *acquis* is to be imported. Arguably, in terms of scope and specificity, the AAs exceed what is required under the SAAs with the Western Balkans, where the import of the *acquis* is justified by a membership perspective. Furthermore, any flexibilities are to be exercised within the institutional process set up by the Agreement, which puts the EU in a strong position. In SPS, for example, the partner countries' comprehensive strategy for implementation is subject to the approval of the relevant sub-committee, thereby requiring the agreement of approval from the EU's side. Indeed, the result is noteworthy: in February 2016, Ukraine adopted a Comprehensive Strategy for SPS, which entails the adoption of 255 EU directives and regulations until 2021. Georgia and Moldova have taken on similar commitments (Wolczuk 2017b).

It is notable that partner states are required to approximate to the *acquis* in force at the time of signing the AAs (the pre-signature *acquis*), and to new and amended future legislation. The Association Council, as the main association body, has been granted the power to update or amend the Annexes to the Agreement, taking into account the evolution of EU law (see below). Given the binding nature of the Association Council's decisions, this means that it can develop the scope of integration without modifying the AA itself. Indeed, it was something seen as underpinning the longevity of the Association regime and was demanded by the Ukrainian side (Wolczuk 2004; Dragneva and Wolczuk 2014). However, this general provision is not an obligation. While the Association Council can be a forum for exchange of information on future legislation (Art. 463.2, EU-Ukraine AA), it needs to be stressed that there is *no* binding requirement for the continuous tracking, notification or incorporation of new or amended legislation.

Nevertheless, to complicate things, some chapters add their own enhanced procedure with specific duties to notify new legislation, add it to the list, and transpose it into domestic legislation. In the area of services, for example, Ukraine must take on any modification of the corresponding EU law – its ability to decline this is highly limited. From the EU's point of view, a dynamic obligation for approximation matters because of the need for continued legal uniformity particularly in areas where internal market access is granted (Lazowski 2008). Services

¹ For the sake of brevity, this section of the paper focuses on the EU-Ukraine AA. Although there are some interesting differences between the three AAs, they do not alter the overarching argument developed in this paper. While this section provides references to the specific parts of the EU-Ukraine Agreement to illustrate the points, the essential issues analysed in this section apply to all three AAs and all three partner countries. For a comparative analysis of the three AAs, see Van der Loo 2016.

are one example of such a chapter. Yet, its strictness in comparative terms is notable (Van der Loo 2016), even though relatively few types of services are included in the EU-Ukraine agreement (Emerson and Movchan, 2016).

The strictness of the commitment to legislative approximation is particularly evident in that it is embedded in a developed system of disciplines, inspired by the enlargement template. Domestic implementation is thus subject to extensive monitoring (Art. 475, EU-Ukraine AA). This empowers the Association bodies to use progress reports as well as new forms of assessment, such as 'on-the-spot missions' carried out by EU institutions as well as other actors, including non-governmental bodies, supervisory authorities and independent experts. As part of this process, the Association bodies evaluate the extent to which the partners have implemented their undertakings and can accordingly urge further action or develop the scope of cooperation.

The adoption of all elements of the EU *acquis* is subject to general monitoring. Yet, in certain chapters, namely TBT, SPS, Establishment and Services, and Public Procurement, enhanced market access conditionality applies (Van der Loo et al. 2014). This means that specific rewards are attached to the implementation of legislative approximation. At the same time, the enjoyment of such benefits is conditional on the actual delivery of legislative approximation. The type of reward and conditionality vary from chapter to chapter. In services, for example, Ukraine is required to prepare a detailed roadmap and regularly report on its progress by submitting reports to the European Commission, followed by a transposition table to reflect the exact way in which it corresponds to the *acquis*. Only if the European Commission positively assesses Ukraine's progress, it can propose to the Trade Committee that access to the EU's internal market is granted.

Crucially, this enhanced conditionality framework is unprecedented relative to other trade agreements in that market access is tied to the country's track record in legislative approximation rather than to the country's mere commitment to it (Van der Loo 2016: 212f). Thus, while generous in promising the potential reward, the EU has been keen to ensure that the functioning of the internal market as a whole is not disturbed as a result of it. As Dodini and Fantini (2006) point out, this is justified by the EU's need to ensure that the single market is not hollowed out by the states that are actually not ready to respect its rules. This is one of the most visible demonstrations of the fact that, given the level of development of the partner countries, domestic reform is treated as a precondition for integration.

At the same time, paradoxically, the effectiveness of the reward can be compromised by the strong asymmetric features of the market conditionality framework. If a positive assessment of the partners' progress is made, the decision to open the internal market is taken by joint recommendations of the Association bodies by consensus. Yet, in the event of a failure to agree, there is little that the partner country can do because such disputes are excluded from the scope of the dispute resolution process set up under the DCFTA (Chapter 14 of Title IV Trade and Trade-Related Matters, EU-Ukraine AA). Thus, a refusal by the EU to grant further access, which may or may not depend on Ukraine's actual implementation record (e.g. it could reflect internal considerations or sensitivities within the EU),² and any difficulties on the part of the EU would not be deemed to be a breach of the EU's undertaking that can be challenged by Ukraine.

² This was the case with the EU's delay in granting visa liberalization to Ukraine, despite Ukraine complying with all the conditions. Georgia was subject to similar delays.

This asymmetry between the EU and the partner countries makes the credibility of the offer of access to the internal market highly uncertain. This is particularly problematic given that the standard for implementing the approximation commitment is not necessarily clear. As it has been noted, the AAs refer to ‘alignment with’, ‘achieving conformity with’, ‘incorporating into the legislation of’ and other legal terms to convey the nature of the partners’ obligation, thus, potentially contributing to differences in interpretation and standards of assessment (Van der Loo 2016: 320f). Difficulties can arise also from the fact that the approximation extends well beyond reform of laws on the books. It requires not only engaging in deep institutional reforms but also creates discretion when it comes to assessing them. In services, for example, Ukraine needs to ensure effective “administrative capacity to enforce’ this legislation and ‘provide a satisfactory track record of sector-specific surveillance and investigation, prosecutions, and administrative and judicial treatment of violations” (Appendix XVII-6, EU-Ukraine AA).

2.2. *The institutional framework*

The AAs introduce a common institutional framework representing a significant upgrade of the system of the PCAs. The decision-making bodies under this framework are the Association Council, Association Committee, and its sub-committees.³ The EU-Ukraine AA also formalizes the Summit meetings at the highest level of political decision-making. They take place once a year with the purpose of providing “overall guidance for the implementation” of the Agreements and as ‘an opportunity to discuss any bilateral or international issues of mutual interest’ (Art. 460.1, EU-Ukraine AA). The AAs also set up two consultative bodies, the Parliamentary Association Committee and a Civil Society Platform, which can make recommendations to the Association Council.

The Association Council and Committee are intergovernmental in nature.⁴ In terms of their powers, however, these bodies exhibit important supranational elements. The Association Council is endowed with extensive powers in relation to supervising and monitoring the implementation of the AA. These powers are not limited to the scope of the AAs: the Council can “examine any major issues arising within the framework of this Agreement and any other bilateral or international issues of mutual interest.” (Art. 461.3, EU-Ukraine AA). The Association Committee is the junior decision-making body (‘workhouse’), assisting the Association Council in its work. The Association Committee can work in various configurations, such as the Trade Committee with regard to the DCFTA part of the Agreement.

Among the most significant powers of the Association Council are those related to legislative approximation. The Association Council is a forum for the exchange of information on legislative acts under preparation and in force for both parties, including implementation. It monitors the progress made under the Agreement and is the body with the competence to decide on progress. This is particularly relevant for the DCFTA chapter, where the promised access to the EU internal market is largely conditional on implementing the legislative approximation commitments by the partners. Crucially, the Association Council also “may update or amend the Annexes to this Agreement [...] taking into account the evolution of the EU law and applicable standards set out in international

³ Arts. 460-470 EU-Ukraine AA, Arts. 400-410 EU-Georgia AA, Arts. 433-443 EU-Moldova AA.

⁴ The Association Council meets at ministerial level and is composed of members of the Council of the EU and Commission and members of the government of the partner country. The Association Committee meets at the level of senior civil servants.

instruments deemed relevant by the Parties” (Art. 463.3, EU-Ukraine AA). The far-reaching nature of these powers is exemplified by the fact that the decisions of the Association Council and the Association Committee are binding on the parties (Art. 463.1 and 465.3, EU-Ukraine AA). This power allows the parties to develop their mutual relationship and scope of integration without the need to adopt a new international agreement. It ensures the durability of the legal framework (Dragneva and Wolczuk 2014). As will be argued below, the association bodies begin to play an important role in shaping the implementation of the AAs, especially in the case of Georgia.

2.3. Legal approximation versus modernization

All the extensive and detailed commitments embedded in the AAs chart an extensive agenda for domestic legal and institutional reform to be implemented by partner countries, all of which are characterised by limited capacity and a lack of resources. In comparative terms, the nature and scope of the *acquis* to be transposed into the countries’ national legislation is dependent on the intended level of integration between the EU and non-member states. But, crucially, in the case of the Eastern partners, it also aims to alleviate their domestic weaknesses, such as weak institutions and rule of law.

Integration is indelibly intertwined with modernisation:

“The Agreement amounts to a charter for Ukraine’s modernisation through alignment on EU norms, which generally correspond to best international practice. Ukraine does not have to ‘re-invent the wheel’ in many technically complex areas, where the choice of regulations and standards that differ from tested international practice would be highly costly and inefficient. Still, this normative alignment is far more than a technical matter, and it goes to the heart of the urgent task of establishing sound, corruption-free governance” (Emerson and Movchan 2016: 2).

This ambitious, dual functionality requires foresight on both parties about the ‘best fit’ in terms of required reforms as well as the intended *finalité* of relations. The need for such comprehensive foresight also stems from the fact that the *acquis* is not a static body of law and that its nature and scope can vary depending on the aim of its application (Petrov 2007: 2). It can be concluded that many of the features of the AAs expose limited foresight.

First, what is required by the partner countries is unprecedented not just in terms of its sheer volume and scope, but also in terms of the variations of each partner’s obligations across chapters, the number of procedures involved and the complex disciplines attached to them. While the AAs provide some flexibilities across chapters, we actually argue that the differences between the chapters add to the complexity of the regime and the difficulty in its implementation.

Second, the scope and strictness of the legislative undertaking is greatest in areas where integration in the internal market will follow. Yet, the need for approximation under the AAs extends beyond such areas. In effect, the partner countries are required to take on an entire system of foreign law and regulation beyond the planned trade integration. In comparative terms, extensive regulatory harmonization with a major trade partner can be beneficial, especially if the volume of trade with such a partner is high. Yet, from the Eastern partners point of

view that is not necessarily the case. While the EU represented 54 % of Moldova's total trade in 2016, the corresponding figures are 28 % and 40 % for Georgia and Ukraine respectively.⁵ Thus, the partner countries need to engage in an implementation effort and face considerable costs related to accessing the EU market, while they also deal with the actual and potential impact on trade with the rest of the world (including Russia's punitive economic measures).

Third, the EU reproduces (and in fact enhances) the reliance on strict approximation with the EU *acquis* as a means for modernization. The assumption of the developmental, modernizing potential of the EU *acquis* was developed during enlargement and turned into the cornerstone of the ENP (Dodini and Fantini 2006; Gutu 2006; CEPS 2011; Maniokas 2014). However, at first the EU relied on general, vague references to the *acquis* in the ENP AP (Dragneva and Wolczuk 2012). And it was an actual persistent demand from Ukraine which prompted the EU to move away from a vague and flexible approach to 'modernization through law' as a more binding, detailed and non-selective approach in the AA. There is no doubt that the EU's power of attraction in providing a modernizing agenda (particularly in contrast with the Russia-led integration initiatives) was a strong driver in Ukraine's relations with the EU (Dragneva and Wolczuk 2015). Similarly, it needs to be acknowledged that the strictness of the disciplines to achieve it was not only the result of the EU's desire to safeguard its internal market: in the case of Ukraine, high-level civil servants in charge of the negotiations demanded a framework that would actually impose a system of external constraints on a vacillating political elite (Langbein and Wolczuk 2012; Dragneva and Wolczuk 2015).

Yet, the premise that the wholesale adoption of the *acquis* would deliver on this promise seems overtly optimistic. As Van der Loo points out, it is questionable, for example, whether in relation to the financial services, the "EU's sophisticated post-financial crisis legislation is the right medicine for Ukraine's serious financial and economic crisis" (2016: 268). In a similar vein, the usefulness of the provisions on State Aid for the transformation of the economy was questioned during enlargement.⁶ At times, integration is at odds with modernization. As was pointed out in the enlargement debate, the *acquis* was never designed with a developmental agenda in mind. It is a result of long years of negotiations between the EU member states over externalities of cross border cooperation, above all of trade, from shallow to deep integration (Majone 1996, 2014; Egan 2001; Hix 2005). It was used successfully as a template for reform in the Eastern enlargement, but it was just one element of the EU conditionality towards the CEE countries. The enlargement was driven by a broader set of conditions for accession, based on the Copenhagen criteria, as well as extensive, varied assistance, careful screening and monitoring as well as political pressure. Critically, it is the promise of membership that has the strongest impact on actual change (Börzel and Schimmelfennig 2016). Moreover, some transformational effects of the EU's accession seem to be overstated (Mungiu-Pippidi 2014). Finally, the success of the CEE countries' accession to the EU is also ascribed to the specific circumstances of these countries during transition, namely an overwhelming coalition for reform comprising substantial elites groups, enjoying the support of population at large (Dimitrova 2015).

⁵ Figures obtained from the DG Trade statistics for the partner countries (e.g. <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine> accessed on 5 September 2017).

⁶ It is a far-reaching and highly intrusive obligation which limits the sovereignty of the country with regard to economic and tax policy. It is also highly politically sensitive as it strikes at the core of rent extraction practices which prevail in the partner countries. And yet the partner countries agree to implement the system of monitoring and recovering State Aid for the sake of security access to the single market.

Against this backdrop, the transformative role of the *acquis on its own* has not been tested and hence should not be overstated *ex ante*. Therefore, we argue that for the AAs to achieve their objectives it is imperative to recognize this underlying challenge and develop strategies to address the fundamental ‘commitment-capacity gap’ in the partner countries. Against this backdrop, we investigate in this paper to what extent the EU’s strategy focuses on the narrowly defined legal approximation versus broader support for strengthening state capacity. It is important to move beyond the rhetorical statements, that is the official documents and statements of the EU as they have routinely referred to issues such as state capacity, corruption and the rule of law since the inception of the ENP in early 2000s. In this paper we focus on specific measures adopted to close the ‘commitment-capacity’ gap of the partner countries. Certainly, given the ‘dynamic’ nature of the AA, some adaptations could be expected through the work of the association bodies. Yet, there has been a limited time to allow observations, especially in the case of Ukraine.⁷ Therefore, the empirical section focuses on the instances of adaptations taken to promote institutional modernization rather than merely legal approximation as evident in the EU’s strategy towards the three countries. These adaptations include the decisions of the association bodies, where relevant, as well as on complementary instruments, such as the Association Agendas,⁸ which list the agreed reform priorities for the partner countries as well as the changing priorities and delivery of assistance.

3. What Support for Implementation and Modernization? Country analysis

As the analysis so far has indicated, the AA/DCFTAs offer a step change in relations between the EU and the three partner countries. Yet, while they are simply regarded as ready-made templates for modernization, they present a number of challenges to weak state institutions and economies prevailing in the partner countries. Therefore, this section will analyse the country-specific support offered by the EU to the partner countries to explore the extent to which the challenges are recognized and how, if at all, they are addressed.

3.1 Ukraine

Although the three partner countries are often analysed together, Ukraine stands out for three reasons. First, in many respects Ukraine can be regarded as a front-runner, but its starting point in 2014 was different and weaker than in Georgia and Moldova. It was Ukraine that persistently demanded a new, enhanced agreement and the EU agreed to open the negotiations in 2007. However, in contrast to the two other countries, the EU did not apply any particular conditionality prior to opening the negotiations on the AA. This means that Ukraine’s starting point was worse than that of Moldova and Georgia (see below). State institutions were not faced with any demands prior to, and during, the negotiations of the AA, even if familiarity with the *acquis* was higher amongst the experts in Ukraine, owing to long-standing EU assistance to Ukraine.

⁷ This is particularly the case in Ukraine where the ratification of the AA by the EU was delayed twice. First, as a result of the tri-lateral negotiations between the EU, Ukraine and Russia to work out technical solutions to the concerns Russia had regarding the AA and thereby to mitigate Russia’s threats to resort to punitive measures against Ukraine for concluding the AA. The negotiations took place between September 2014 and December 2015 (see Dragneva and Wolczuk 2015). Second, the ratification of the EU-Ukraine AA was hampered by the Dutch referendum in 2016 and only completed in the summer of 2017.

⁸ The Association Agendas were introduced from 2009 onward. They were modelled on the Accession Partnerships offered to CEE countries during their accession process and replaced the ENP APs.

Second, the temporal disjuncture between the negotiations and implementation of the AA is very prominent in Ukraine: negotiations started in 2007 and were completed by the autumn of 2011, yet the Agreement was only provisionally applied from January 2016. Delay in entry into force or provisional application is not uncommon, yet arguably here the discontinuities are greater, especially in the context of internal and external challenges facing Ukraine.

Third, the EU-Ukraine Agreement is one of the most contested international agreements in the world. To punish the country for pursuing closer relations with the EU, Russia has resorted to coercive military and economic actions against Ukraine. Upon concluding the negotiations on the AA in 2011, its signing was postponed due to the EU's concern over selective justice in Ukraine in the case of Yulia Tymoshenko. While the EU applied democratic conditionality to Ukraine, Russia conducted a concerted campaign during Yanukovich's presidency (2010-14) to attract Ukraine to its own Eurasian project, which was premised on dissuading Ukraine from concluding the AA with the EU. With Ukraine sliding into recession in late 2013, Yanukovich was enticed by a financial package and low energy prices from Russia and, as a result, failed to sign the AA with the EU. This U-turn triggered mass protests that evolved into an anti-regime revolt, resulting in the eventual demise of the Yanukovich regime. As Ukraine's new government spurned Russian overtures and proceeded to foster closer ties with the EU, Russia unleashed retaliatory punitive measures, including the annexation of Crimea, a limited war in the Donbass and various economic sanctions (see Dragneva and Wolczuk 2015). These events in turn exposed the weakness of the Ukrainian state and plunged Ukraine into a severe economic crisis during 2014-16.

In recognition of the formidable sacrifices and challenges facing Ukraine, the EU has provided support to Ukraine well beyond that usually offered to 'third countries', its assistance is second only to accession countries. While Ukraine attracted considerable international assistance, the EU has been the biggest donor, committed to providing €11.2 billion during 2014-20.⁹ The EU Delegation in Ukraine is the EU's second largest in the world, after Turkey, with staff consisting of 100 EU officials.

Legal approximation is usually regarded as a technocratic process of legal transposition and yet, as argued above, the implementation of the AA/DCFTA with its large sways of the *acquis* to be approximated rely on strong and effective state institutions. The events of 2014 exposed the fragile nature of the Ukrainian state and economy – it was only too evident that Ukraine was hardly in a position both financially and institutionally to implement the AA (Wolczuk 2014). This challenge was swiftly recognized within the EU institutions in early 2014. Thus, while continuing to rely on technical assistance, the EU has introduced a number of adaptations tailored to Ukraine's circumstances, including the Support Group and macro-financial conditionality.

3.1.1. Support Group for Ukraine and coordination of European assistance

An innovative strand of support was provided by the EU Commission which set up a dedicated group of EU officials in the Support Group for Ukraine (SGU), on the initiative of the President of the European Commission in the spring of 2014. The initiative capitalised on the EU's support for strengthening state institutions in Greece. The SGU consists of officials from the Commission and from EU member states and led by an experienced Commission official, Peter Wagner. The body has become a key EU body for liaising with the Ukrainian authorities. The SGU, with its 35-40 officials, (some of which are actually based in Ukraine) has acted as a

⁹ Interview with an EU official, Kyiv, February 2017.

“catalyst, facilitator and supporter of reforms” (SGU 2016). This self-assessment is largely confirmed by other EU and domestic actors in Ukraine – the SGU is not only a ubiquitous reference point in discussions of EU-Ukraine relations but also a frequent reference point in the analysis of the reform process in Ukraine more broadly.¹⁰ As the Group was created prior to the ratification of the AA and even the DCFTA’s provisional application, which started in January 2016, the SGU has superseded the role of other bodies, such as the sub-committees envisaged by the AA, in day-to-day interactions with the Ukrainian domestic actors. As a result, the joint AA bodies so far have played a lesser role in Ukraine in comparison to Georgia (see below).

The SGU has been central to coordinating the efforts of European donors by becoming a strategic centre – developing local knowledge, utilizing linkages with various parts of the Commission, such as Directorate General (DG) Trade and DG Energy, as well as key institutions in Ukraine to coordinate assistance. In the context of Ukraine, this coordination is a massive task given that (as of early 2017) there are about 260 assistance projects funded by the EU and the member states. As can be expected, in ‘core’ issues related to European integration, the SGU has taken on a pivotal role but it has also developed a much broader mandate with regard to fundamental reforms, such as public administration or even public healthcare.¹¹

Overall, since 2014 the SGU has devised a more agile and tailored strategy for promoting reforms, matching the EU’s ‘supply’ with domestic needs. The success of the Group stems from its position with DG NEAR, which coordinates assistance and a broader support within the EU institutions in Brussels,¹² and which adapted the nature of EU assistance to Ukraine in response to the challenges ‘on the ground’. Assistance has become more systemic and demand-driven in the sense of trying to strengthen Ukraine’s institutional capacity rather than merely facilitate legal approximation. The SGU has been on a steep learning curve with regard to identifying the needs of Ukraine on an ongoing basis. So this adaptation has been particularly effective in diagnosing the actual needs of the partner country and to respond to the local demand. However, in itself the great volume of assistance has not yet translated into better designed and more effective assistance projects (see below).

3.1.2. Macro-economic assistance to Ukraine

Macro-economic assistance (large-scale financial loans) has become a major component of EU’s assistance to Ukraine. However, despite or rather because of its ‘novelty’, the EU has not been using it effectively to promote domestic reforms.

In 2015, the EU offered Ukraine macro-economic assistance of €1.8 billion to ease its urgent external financing constraints, alleviate its balance of payments and budgetary needs and strengthen its foreign exchange reserves (Memorandum 2015). The assistance was to be dispersed in three tranches, subject to fulfilling a number of conditions. Accordingly, the Memorandum of Understanding between the EU and Ukraine includes a list of structural reform policy measures which the Ukrainian government committed itself to implementing to receive the second and third instalments. The measures required to qualify for the second tranche include 12 key aspects of reforms ranging from fiscal governance to public administration, while the third tranche is conditional upon

¹⁰ Author’s interviews with EU and Ukrainian officials, Kyiv, February 2017.

¹¹ Author’s conversation with Peter Wagner, Head of the SGU, London, July 2017.

¹² Within DG NEAR, this more dynamic approach has been supported by the Commissioner Johannes Hahn and deputy Director General, Katarína Mathernová (Author’s interview with EU officials, Kyiv, February 2017).

deepening the reforms in these key areas (Memorandum 2015). With this specific macro-economic conditionality the Memorandum has become a key point of reference and, as such, it supersedes the EU-Ukraine Association Agenda, which was adopted around the same time. As a result, the Association Agenda has become a reference point in domestic reforms in Ukraine.

The first tranche was provided in 2015 but the second was delayed because the Ukrainian government did not implement all the conditions. Indeed, Ukraine irritated the EU by going against the spirit of the Memorandum, which stipulated that Ukraine should refrain from introducing new trade-restricting measures. While already not complying with a number of conditions, Ukraine introduced a wood export ban in clear defiance of the Memorandum.¹³ Despite these developments and in light of the EU's internal financial planning, the EU agreed to release the second tranche in 2017, as otherwise the funds would have to be re-directed to other purposes. The release of this tranche exposed the continuous confidence in the reformist credentials of the Ukrainian leadership amongst EU institutions and officials in Brussels. This unwarranted confidence camouflages the EU's reluctance to use economic conditionality to exert pressure on the Ukrainian government to implement the most essential reforms. The EU relies on positive conditionality and avoids negative conditionality even when confronted with resistance to reforms. Domestic actors criticize the EU for being too lenient on the Ukrainian government (Wolczuk 2017a). Some commentators claim that macro-economic assistance, which fails to exert pressure on the Ukrainian government through conditionality, is actually harmful to Ukraine (Panchenko and Sydorenko 2017).

3.1.3. EU assistance and innovation in Ukraine

The EU increased its assistance to Ukraine in comparison to the preceding period, even though it remains very modest in comparison to the accession countries (see Adarov and Havlik 2016). The scale and effectiveness of the assistance will be explored in this section.

During 1991-2015, the EU's assistance to Ukraine (expressed in commitments) amounted to €12.1 billion. After launching the ENP and following the Orange revolution in Ukraine, the level of assistance went up to between €100-150 million (until 2013). Prior to the signature of the AA/DCFTA with Ukraine, the dominant modes of assistance were budgetary support, Twinning and technical assistance. After the EuroMaidan and the signing of the AA, the EU's assistance through the European Neighbourhood and Partnership Instrument (ENPI) shot up to over €200 million annually.¹⁴

There have been three main innovations in the EU's financial and technical assistance to Ukraine since the signing of the AA in 2014.¹⁵ First, the role and activity of the SGU has been very positive in helping progress with reforms (see above). Members of SGU help the Ukrainian authorities to reach out (informally) to the relevant directorates of the European Commission on the issues related to implementation of the AA/DCFTA. One could expect that have the European Commission more engaged and directly committed to implementing such an important and

¹³ Author's interview with an EU officials, Kyiv, February 2017.

¹⁴ Author's interview with an EU official, Kyiv, June 2017.

¹⁵ Humanitarian aid to internally displaced citizens from occupied territories in Eastern Ukraine is also a novelty worth mentioning but, as such, it is not an innovation directly relevant to the implementation of the AA/DCFTA. The EU has spent €399 million in humanitarian aid since 2014 (Mission of Ukraine to the European Union 2017).

complex agreement as the AA, but such a mediation role from a body with knowledge of the local context is helpful. At the same time, however, there are limits what the SGU can achieve. In terms of technical assistance the SGU has so far stayed at a too general level. It has mainly focused at defining general needs and priorities at a sectoral level, without trying to improve the design of individual projects. As a result, all operational issues, such as specific terms of references, selection of experts, etc. have been looked after by the EU Delegation to Ukraine. So even though the scale of assistance has increased and it is better matched to local needs, the actual method of addressing the needs has not changed. There has been no tangible improvement in the actual design of the projects and well performing, effective projects are still largely accidental and infrequent.

Second, in contrast to Georgia and Moldova, in Ukraine there has been a concerted shift from budgetary assistance in recognition of its limited effectiveness. Budgetary support was initiated in 2008 in Ukraine under the mantra of financing ‘policies and not projects’. During 2008-14, in Ukraine a total of €344 million were disbursed as budgetary support in six areas (energy strategy, energy efficiency, trade, environment, transport and border protection) and €18 million as budget support related technical assistance (Eastern Partnership Civil Society Forum 2014). By and large its conditionality did not work in Ukraine, in contrast to budgetary assistance to Moldova where it could be regarded as more effective due to its bigger dependence on external financing for public expenditures at the time (see the section on Moldova). As of 2017, budgetary support is continued only for a limited number of areas, such as the implementation of the energy strategy, the state building contract, support to small and medium sized enterprises, and civil society.

Third, a number of sectors have undergone a shift from budgetary support to delegated agreements, whereby sizeable, ‘special measures’ financial resource programmes are entrusted to the accredited developmental co-operation agencies from the EU member states. So, at the end of 2015 a €90 million package for decentralization reform (including for improvement of local administrative services) was assigned to Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and Swedish International Development Cooperation Agency (SIDA) (also a minor stake went to the Polish development agency). The main advantage of this approach was to speed up award-allocation procedures, introduce needs-driven flexibility in implementation, the option to combine various support instruments (for example investment, technical assistance and Twinning), and most importantly, allocate the design of the specific assignments to institutions with previous experience in addressing similar policy or reform issues. In mid-2017, the second big programme (€16 million by the Danish International Development Agency, DANIDA) was started for anticorruption policy, and several other programmes (justice, public financial management and public administration) are to be launched in 2017-18 (energy efficiency, regional development and support to business).¹⁶ At the time of writing it is too early to assess to what extent this approach delivers better results.

Third, after long deliberations, the European Commission took steps to finance public administration reform in an innovative, large-scale way and to use types of interventions not used before. After the approval of the Public Administration Reform Strategy by the Government of Ukraine in June 2016, a €90 million budgetary support programme to assist its implementation was announced, and the first €10 million instalment was disbursed (Secretariat of Cabinet of Ministers of Ukraine 2017). Importantly, the EU has agreed for this money to be used to pay higher salaries for up to 2000 ‘reform posts’ in the central government until the reform produces enough savings to pay the improved salaries.

¹⁶ Author’s discussions with EU officials, Kyiv, June 2017.

Notwithstanding the above adaptations, the overall implementation of the AA/DCFTA is mostly assisted through technical assistance projects and Twinning: 18 flagship projects (worth €50 million) are being implemented in 2017.¹⁷ They are important insofar as, owing to weak state administration, they often offer the only capacity to advance legal approximation but also engage in capacity building (for example, in the area of food safety control). Also, some of the projects become important brokers of trust between civil society (or economic actors), government institutions and the donor community, such as, for example, the Office of Business Ombudsman and the Support to Justice Sector Reform in Ukraine.

3.1.4. *Technical assistance and its limits*

However, the majority of these technical assistance projects suffer from known and predictable problems. First, most of the EU's assistance is focused on existing institutions and often even the projects aimed at capacity building struggle because of a lack of 'absorption capacity' in state institutions. Extensive technical assistance targeted at inadequately paid civil service results in a 'brain drain' from public administration and further weakens absorption capacity. Therefore, it could be argued in fact that having too many projects aimed at weak state institutions contributes to the weakening rather than strengthening of this capacity, at least in the short term. Civil servants are hired as local experts with significantly higher remuneration than they get in their civil service posts. It could be argued that there is *too much* simultaneous technical assistance offered in Ukraine, where the government institutions often lack the capacity to absorb and benefit from the assistance offer (due to a lack of staff, resources, competences and so forth).

Second, often technical assistance projects are rarely based on an analysis of what reform measures could actually be most effective within a local context ('best fit'). There is an emphasis in many of these technical assistance and twinning projects on training and learning from 'best practice' without first identifying and addressing preconditions that would enable Ukrainian institutions and civil servants to effectively perform their duties in the first place (adequate salaries, equipment, language competence etc.).

Third, the EU is not effective at 'defending' its investments, because the sustainability is poor. For example, despite the fact that there have been many technical assistance and twinning projects in Ukraine already since the early 2000s, the documents produced by them in most cases have been lost (and are not available in the archives of Ukrainian institutions, or at least are not readily available), so many new projects start from scratch instead of capitalising on previous projects. For the domestic actors, this indicates the weak resolve of the EU to make a tangible and sustainable impact.

Fourth, the EU has not yet seriously addressed the developmental needs of Ukraine, and is not supporting investment in public infrastructure. This is a crucial difference between the associated and accession countries: the latter received a massive support for infrastructural projects during the accession phase. In Ukraine, this would be important not only from the point of view of economic development, but also for generating popular engagement with the EU, especially in Ukraine's Eastern regions. The EU's planned assistance to Eastern Ukraine

¹⁷ According to the data of Ukrainian MFA, in spring 2017, there were almost 200 projects of the EU's technical assistance ongoing in Ukraine with a total value of €262 million. EU officials gave a figure of about 260 projects. These differences indicate the sheer scale of assistance and difficulty even in counting the projects.

still appears to rely on the already established toolkit of technical assistance (for example, on capacity building for administration and businesses, improvement of administrative services) rather than addressing the acute developmental, infrastructure-related challenges facing these regions.

Overall, Ukraine seems to stand out amongst the Eastern partners in having a tailored and flexible support for the implementation of the AA/DCFTA. While the dramatic events of 2014 illustrated the weakness of the state and economy, the EU responded in concerted and innovative ways. Nevertheless, much of the EU's support continues to rely on technical assistance, which is of limited effectiveness given the fundamental lack of capacity within the state apparatus to implement the AA.

3.2 Moldova

Moldova shares many of the problems that plague Ukraine. In recognition of these problems, an evolution of the EU's strategy has been observed but it lacks the proactiveness found in Ukraine.

In the early 2010s, during preparations for the AA/DCFTA negotiations the EU adopted a similar approach in Moldova and Georgia (as well as Armenia), based on lesson learning from the negotiations with Ukraine. The EU resorted to extensive sector-specific conditionality to ensure early compliance with important parts of the *acquis*. However, subsequently the EU's prioritization of trade-related legal approximation weakened in Moldova, in response to major political, economic and financial crises in the country.

3.2.1. The AA-DCFTA negotiations: ex-ante trade-oriented conditionality (2010-14)

As in the case of Georgia, Moldova's negotiations of the AA/DCFTA were crucially shaped by the EU's application of *ex-ante* conditionality on trade-related issues. The EU handed over 'key recommendations' which had to be addressed by Moldova prior to the launch of negotiations for a DCFTA (based upon a fact-finding mission conducted in Moldova in May-June 2010 - a few months after the talks for the AA started). The EU's conditionality was pivotal in structuring the whole DCFTA preparation and negotiation process for two reasons.

First, EU conditionality set the pace for Moldova's legal approximation with the EU's trade-related standards. On the basis of the key recommendations delivered by the EU in late October 2010, the Moldovan government together with the EU's High-Level Advisory Group prepared an Action Plan detailing the actions to be taken in each policy area, along with a timetable for implementation. Importantly, the Action Plan (approved in mid-December 2010) introduced a policy mechanism, in the form of a quarterly report, to report on the progress achieved in the policy and legal change.

Second, the scope of EU conditionality was in fact massive, requiring wholesale regulatory reforms in the trade area for the DCFTA preparation. Aside from overall administrative coordination (a key recommendation which Moldova addressed by preparing an Action Plan), the EU key recommendations covered a broad range of trade-related sectors, including technical barriers to trade, public procurement, intellectual property rights (IPR), SPS, and competition. Moreover, the EU also formulated additional recommendations in these areas and others (such as trade statistics) with the view to facilitating the DCFTA negotiations.

To the same end, the EU offered increased assistance under the EaP, with a view to building the capacities of those ministries that were identified as key institutions in preparation for the AA/DCFTA. Following the Armenian example, an EU High-Level Policy Advice Mission to the Republic of Moldova (funded by the EU and implemented by United Nations Development Programme) was deployed in 2010 to support the Government in the implementation of the EU integration-related reforms. A number of Twinning and Technical Assistance and Information Exchange instrument (TAIEX) projects focused on Moldova's adoption and enactment of trade-related *acquis*. The overall priorities of EU assistance, however, were broader than just the DCFTA.¹⁸ They included policy areas that were not directly connected to the trade-related *acquis*, such as public administration reform and rural development. These were in line with the programmes of the government of Moldova ('European Integration: Freedom, Democracy, Welfare 2011-2014' and the National Development Strategy 'Moldova 2020') and channelled primarily through budget support (European External Action Service 2014).

Therefore, the EU's *ex-ante* conditionality (combined with the EU's monitoring of progress in the key recommendations and increased capacity-building through TAIEX, Twinning and policy advice) resulted in the clear prioritization of trade-related issues in preparation for the negotiations. It has to be stressed that this approach was fully endorsed by the Moldovan authorities, who set ambitious timeframes for both delivering on the key recommendations and completing the DCFTA negotiations. As a result, the negotiations for a DCFTA were completed within this timeframe, in late June 2013. Therefore, the Association Agenda adopted at the end of June 2014 called on the Moldovan authorities to continue and deepen the reforms in trade-related areas. This is also because the EU-Moldova DCFTA is more ambitious in terms of timetables than the AAs concluded with Ukraine and Georgia,¹⁹ and therefore requires massive reforms from the Moldovan authorities within a short timeframe. For instance, according to Annex XVI of the EU-Moldova AA, the country had to approximate to 20 sectoral directives by 2015, a task which was especially challenging in light of the simultaneous updates of these directives. However, the fact that Moldova is allowed to develop a new schedule in case it fails to implement the initial timetable denotes some degree of flexibility in the AA/DCFTA (Emerson and Cenusă 2016: 54), indicating a critical role of the association bodies.

3.2.2. *Beyond the 'frontrunner' façade: a shift in the implementation context (2014-16)*

Up to 2014, Moldova has been widely regarded as a 'success story' of the EU.²⁰ The financial scandal which erupted in late 2014 drastically altered the context in which the AA/DCFTA was to be implemented. The AA was signed in June 2014 and the DCFTA provisionally came into force in September 2014. A few months later, in the autumn 2014 the 'disappearance' of USD 1 billion (i.e. 15 % of the Moldovan GDP) from Moldovan banks. This caused a major crisis in the country and was a 'wake-up call' for the EU. This is because of two interconnected factors. First, this massive bank fraud involved high-ranking political figures.²¹ Second, the scandal erupted in a context marked by a lack of public trust in political institutions and political leaders. In fact, the scandal only brought to light the deeply entrenched flaws of the Moldovan political system, in particular the capture of administrative and financial resources by incumbent authorities and the clashes between oligarchs for control

¹⁸ As reflected in the Comprehensive Institution Building Programme Framework Document and the 2014-20 Single Support Framework (European External Action Service 2014).

¹⁹ Author's interview, Ministry of Economy, Chişinău, June 2017.

²⁰ Author's interviews and conversations with EU officials, March and July 2015.

²¹ The former Prime Minister Vlad Filat, a key figure of the ruling Alliance for European Integration, was convicted for being involved in siphoning the missing sum from the Moldovan banking system.

over state institutions (Tudoroiu 2015; Kostanyan 2016). The fraud had major implications for the country's domestic politics. It triggered massive rallies in Chişinău organized by a grassroots movement, the 'Dignity and Truth' platform. But it also consolidated the hegemony of Vlad Plahotniuc, the country's major oligarch who succeeded in side-lining his rival Filat and securing key positions for his associates in the new government (Calus 2016). The scandal also facilitated the emergence of the Party of Socialists (PSDM), which favours a rapprochement with Russia, during the November 2014 parliamentary elections.

The scandal also had major (even if not immediate) implications on EU policy vis-à-vis Moldova. Until then, the EU had praised Moldova as the frontrunner of the EaP. In fact, the EU had accepted the Moldovan authorities' narrative about carrying out fast-track reforms that would result in a quicker integration (Kostanyan 2016). It overlooked (even if inadvertently) the fact that the ruling elite's pursuit of its political, business and personal interests overrode the overarching objective of EU integration. Therefore, the EU paid limited attention to the patchy application of EU demands in politically sensitive areas (such as the fight against corruption, the reform of law enforcement agencies and the judiciary) and failed to impose any costs on the ruling elite for non-compliance in these areas. In the first half of the 2010s, the EU only issued 'soft' recommendations in its annual progress reports,²² while continuing to deliver massive financial support to Moldova.²³ As a result, the depletion of trust in Moldovan authorities and institutions has gone hand-in-hand with the erosion of support for EU integration among the general public. In fact, the lack of strong EU pressure on, and perceived proximity with, the ruling elite has negatively affected the EU's image within Moldovan society (Delcour 2017).

Perplexingly, this negative view of the EU persisted in the wake of the bank fraud, as the EU reacted only belatedly, reflecting limited attention and low policy salience of Moldova, especially during the 'Ukraine crisis'. While the EU decided to suspend budget support operations in Moldova in 2015, it was only in early 2016 that the EU took a much firmer stance at the political level, when the Council of Ministers expressed its concerns about the lack of prioritization of "reforms aimed at addressing the politicization of state institutions, systemic corruption, public administration reform aimed inter alia at enhancing the effectiveness of regulatory bodies, transparency and accountability in the management of public finances as well as with regard to policy making" (Council of the EU 2016).

3.2.3. Changing priorities: bringing the political basics back in (since 2016)

The bank fraud led to a drastic change in the EU's prioritization of reforms in Moldova. It resulted in an increased emphasis on political, administrative and judicial reforms while de-centring from trade-related legal approximation. Ultimately, the EU acknowledged that an effective application of the rule of law, as well as transparent and accountable policy-making and administration, were prerequisites for adopting and enforcing the *acquis*. These reforms seemed even more crucial in light of the slow implementation of the priorities included in the 2014 Association agenda (EU-Moldova Civil Society Platform 2016). According to Moldovan civil society, approximately two-thirds of the 1784 measures included in the 2014-16 National Action Plan for the Implementation of the AA were effectively implemented (IPRE 2017). Perhaps unsurprisingly, the conclusions of

²² See e.g. 'Moldova is invited to: intensify the fight against corruption at all levels' (European Commission/High Representative 2014).

²³ The EU allocated €482 million to Moldova under the ENPI. The country ranked first among the Eastern partners in terms of assistance per capita.

the Council of the EU and renewed emphasis on political and administrative reforms also coincided with the European Court of Auditors' harsh assessment of EU assistance in those areas (especially public administration reform, whether channelled through budget support or technical assistance). In fact, the European Commission responded only belatedly when risks associated with budget support (e.g. corruption, which precisely prompted the EU to select public administration reform as a key priority) had actually come to light (European Court of Auditors 2016).

The Moldovan government responded promptly. The conclusions adopted by the Council of Ministers in February 2016 prompted the Moldovan authorities to revise the prioritization of reforms. A 'Priority Action Reform roadmap' complementing existing strategic documents was prepared by the Moldovan government following discussions with the EU at the highest political level. It listed the measures to be adopted by July 2016 to combat corruption, reform public administration as well as the justice sector, enhance the transparency of political parties' financing, ensure an impartial investigation of the cases of fraud and improve the business climate. Interestingly, the acceleration of the AA/DCFTA implementation (in particular the improvement of institutional coordination on legal approximation) was only mentioned as the last priority. However, from the Moldovan side, the focus has been on laws rather than implementation. While a package of laws on integrity and a strategy on public administration reform were adopted, many reform measures have not been implemented (ADEPT et al. 2016; European Commission/High Representative 2017a).

Therefore, the rule of law and good governance are likely to remain top priorities in the forthcoming Association Agenda, especially as these priorities are advocated by the stakeholders consulted by the EU during the revision process (European Commission/High Representative 2017b). This is in recognition that the Moldovan authorities favour quantitative indicators when monitoring the implementation of EU-related commitments (see e.g. Ministry of Foreign Affairs of the Republic of Moldova 2016). Using such indicators easily mask important implementation gaps.

As of 2017, the draft version of the new Association Agenda includes a much broader list of actions (432 in total). These cover both the political and administrative reforms which have been prioritized since 2016 and regulatory convergence related to the DCFTA implementation. The scope of the Association Agenda was subject to disagreements between the EU and Moldova, which explain its delayed adoption. While the Moldovan authorities favoured a concise document focusing on a few priorities, the EU stressed the need for a comprehensive list of priorities in order to avoid selective implementation by Moldova.²⁴ Therefore, the extent to which the Association Agenda will serve as a blueprint in the AA/DCFTA implementation remains to be ascertained. Should it be confirmed in the final version, its wide-ranging scope may suggest that priorities will emerge in response to the difficulties identified during the implementation process.

Interestingly, following the 'wake-up' call, democratization and the rule of law have moved to the top of political agenda in EU-Moldova relations. For example, the pre-conditions set for the delivery of €100 million macro-financial assistance requested by Moldova to the EU prioritize democratization and the rule of law. In particular, the planned changes in the Moldovan electoral system (i.e. the introduction of the mixed system, proposed by the Democratic Party) raised concerns in the European Parliament and triggered its decision to postpone the approval of macro-financial assistance. The compromise text adopted by the European Commission, the Council

²⁴ Author's interviews, Chişinău, June 2017.

and the Parliament underlines that the EU will “pay utmost attention to the consideration by the authorities of the Republic of Moldova of the recommendations of relevant international partners (especially the Venice Commission and the OSCE/ODIHR)” (Council of the EU 2017).

Therefore, the preparation and early implementation of the AA/DCFTA in Moldova offer an illustration of reactive – rather than proactive – adaptation on the part of the EU. In many respects, the EU equated the readiness of the Moldova elites to take on formal legal commitments in the AA with their commitment to implement them. When faced with the ‘commitment-capacity gap’, the EU has adjusted its priorities and assistance instruments primarily by cutting budget support operations. These operations resumed in late 2016 only once the country adopted a first package of reforms and signed an agreement with the International Monetary Fund. However, the shift away from the trade-related *acquis* and a greater focus on fundamental, state-building reforms came only in response to the shock caused by the 2014 bank scandal. This is despite the fact that the rule of law and good governance (now the overarching priorities for Moldova) are a *sine qua non* to the effective adoption and application of the EU trade standards. Yet, as acknowledged by the EU itself, these remain long-term challenges. The flaws noted in Moldova’s reform process are therefore likely to further affect the implementation of the AA/DCFTA.

3.3 Georgia²⁵

In many respects, while the case of Georgia is similar to Moldova, it has seen least adaptation and innovation in the EU’s approach to the implementation of the AA/DCFTA. At the same time, out of the three countries Georgia has been lukewarm about the benefits of such a complex and ambitious agreement.

Negotiations with Georgia and implementation of the AA/DCFTA started much earlier than July 2016, when the Agreement fully entered into force. The EU’s conditionality for opening the DCFTA negotiations with Georgia applied already in 2009. As a result of this conditionality, the substance and scope of the AA were determined during 2009-11. The formal DCFTA negotiations (2012-13) only codified the results achieved at that time.

Georgia was the only EaP country which explicitly questioned the relevance of the AA as a framework for reform and its relevance for the developmental needs of the EaP countries. Yet, the EU required the adoption and implementation of significant *acquis* in areas like SPS and competition, prior to starting the DCFTA negotiations. It meant major policy adjustment, because Georgia’s policy framework during that time was shaped by minimal regulation, which was incompatible with the EU’s policy prescriptions. We will therefore investigate this period in greater detail as it is more important than the actual negotiations.

3.3.1. The EU’s insistence on deep economic integration

In the late 2000s, the Georgian authorities’ resistance to the adoption of EU norms shaped the EU’s approach to the AA/DCFTA. In fact, it substantially contributed to the toughening of the EU’s stance on deep economic integration.

²⁵ This section has benefitted from one of the authors’ direct experience in delivering technical assistance to the Georgian government on matters related to European integration during 2004-2017.

In late 2000s, Georgia offered an illustration of the limited impact of the ENP on domestic policy priorities, when these diverge from the EU's approach. In fact, the Georgian authorities attempted to actively shape the substance of the Georgian-EU ENP AP in line with their preferences. For instance, during the negotiation of the first ENP AP in 2006 Georgia sought to prioritize conflict resolution and to increase the EU's involvement in the conflict. Its inclusion would have been noteworthy had Georgia managed to upload its preferences into the ENP – instead, the failure to achieve it vis-à-vis the European Commission contributed to the perception of the ENP as a somewhat alien policy (European Commission 2006b).

The implementation of the ENP AP revealed the Georgian authorities' distinct inclination to implement only those priorities which coincided with their own preferences. In fact, actions planned under the ENP were not even approved by the government. In essence, the Georgian authorities consistently ignored the ENP AP regarding it as both irrelevant and, most importantly, incompatible with their own priorities, which were centred on the fight against corruption and the deregulation of the economy. Legal approximation (as included in the ENP AP and previously agreed in the PCA) was regarded as a source of excessive, unnecessary regulation.

Georgia's preference for deregulation was a key factor in the country's resistance to deep economic integration. In fact, the government of Georgia opposed the very concept of a DCFTA and favoured a simple free-trade agreement instead. According to the Georgian authorities, a simple free-trade agreement would have offered more favourable conditions for Georgian exports than the Generalized Scheme of Preferences (GSP+) system (which applied to approximately half of Georgian products) by covering a wider range of products. At the same time, it would not have entailed a far-reaching legal approximation process that many in Georgia considered risky for the country's economic performance.

By contrast, in line with the Global Europe Strategy (European Commission 2006a), the EU advocated a broad definition of openness, which would go beyond tariffs and include non-tariff barriers too, such as (IPR, services, investment, public procurement and competition). Even though the European Commission was initially flexible on economic integration with its Eastern neighbours (European Commission 2006c), very soon deep free-trade was not open to debate. The EU's call for deep free-trade was further legitimized by a feasibility study (CASE 2008), which concluded that the major possible gains for Georgia might come not from the tariff reduction, but from the regulatory convergence, which could stabilize environment for investment.²⁶

Georgia's reluctance was instrumental in the EU's use of the AA as a bargaining chip. In the discussions conducted with the Georgian authorities throughout 2008 the EU linked the conclusion of the AA (a major expectation of the Georgian government) to that of a DCFTA. Ultimately, Georgian authorities had little choice but to accommodate the EU's requirements in the wake of the conflict with Russia in August 2008.

As a consequence, the EU also adopted a strict approach to the DCFTA preparations. In 2009, the European Commission issued a detailed list of measures to be implemented by the Georgian government in order to start negotiations on the DCFTA (European Commission 2009). Many of these measures had been already included in the ENP AP and involved the adoption of the EU *acquis*. Key priorities included the adoption and implementation of essential legal acts and the improvement of the coordination and institutional framework in the areas of technical regulations, SPS, competition policy, and IPR protection.

²⁶ The cost of regulatory convergence has not been seriously considered in the EU's strategy towards Georgia.

At first, the Georgian authorities refused to take action in any of these areas. This is because all the EU-demanded measures (apart from IPR) directly contradicted the domestic policy. In line with the Chicago School and its libertarian agenda, the leaders of Georgia consistently refused to regulate competition, arguing that it was not necessary for a small market and could only increase incentives for corruption. In addition, they questioned the EU model of competition, which prescribed enforcement through an independent competition agency. Instead, the government argued in favour of dispute-resolution mechanisms in courts. The regulation of food safety was regarded as too costly and unnecessary as well. Introduction of technical regulations was opposed on the grounds that the government recognized technical regulations of all OECD countries. As a result, between 2009 and 2011, Georgia conducted difficult talks with the EU, especially on competition and food safety.

Yet the EU's strict interpretation of the *acquis* and consistent application of conditionality has not changed – it seems almost as if there was a desire to 'punish' Georgia for its overtly libertarian approach. During the AA negotiations, the European Commission refused to recognize the challenge presented by Georgia, namely to consider the (ir)relevance of the AA/DCFTA for Georgia's developmental needs. Instead, the EU promoted its own standards and norms irrespective of their suitability in the country context in line with the Global Europe Strategy directing its trade policy.²⁷ The Georgian authorities finally agreed to adopt and gradually implement food safety legislation, to substantially amend the Law on Competition and to strengthen the relevant regulatory agencies and inspections.

Power asymmetries explain this shift toward compliance. As a result of *ex-ante* conditionality, the formal DCFTA negotiations were short (between early 2012 and mid-2013), especially as the second part of these talks coincided with the arrival of a new government more willing to accommodate the EU's agenda. The same applies to the remaining AA negotiations. While there were serious disagreements in several chapters, such as financial services, long transitional periods and the willingness of the new government to finish talks quickly enabled a swift completion of the negotiations. In addition, in 2016 Georgia concluded negotiations on membership in the European Energy Community, which was part of the AA obligations despite the unclear cost-benefits of this agreement.

Further adaptation of the AA was supposed to take place through the Association Agendas and the Association Institutions.

3.3.2. Guiding AA implementation: Association Agendas and Association Institutions

The AA/DCFTA entails massive trade-related reforms on the part of Georgia, the Association Agendas, designed to focus efforts and to adapt to the changing needs, only added to this burden by broadening the scope of priorities to be incorporated in the reforms. This was a reaction to the need to address consolidation of power in Georgia, and recurring issues around the rule of law and economic development in 2016-17.

²⁷ This policy has not changed and its most recent reflection is the European Commission paper on globalization advocating worldwide use of the EU standards and norms in areas like food security (see European Commission 2017b).

The Association Agendas were modelled on the Accession Partnerships offered to CEE countries during their accession process, replacing the ENP APs. Yet both ENP APs and the Association Agendas provide an extensive list of priorities in a broad range of policy areas starting from democracy, rule of law and ending with education, transport and energy. The vagueness of the ENP APs and a lack of clear link with specific rewards were regarded as their major weakness. In addition, both documents are political documents without any legally binding obligations.

The Association Agenda was introduced in Georgia after the signature of the AA in 2014. It was underpinned by a clear rationale to provide guidance during the period from the signature of the AA to its ratification. This justifies the extensive scope of the Agenda. It covers matters regulated by the AA, such as the DCFTA, sectoral priorities, and also broader issues, such as democracy, rule of law and human rights, foreign and security policy, and justice, freedom and security cooperation (European Commission 2014).²⁸

One could have expected a different Agenda after the ratification of the AA, especially in light of the ENP review (European Commission 2015), which announced the EU's intention to better address the countries' needs. However, the EU has not limited the number of priorities as Georgians would have preferred. In fact, the Agenda has become even broader (European Commission 2017a).²⁹ This suggests that the EU does not recognize the extensive burden stemming from the adoption and application of the *acquis* combined with a broader and more fundamental reform agenda focussed on the rule of law, public administration reform, and democracy and human rights. While maintaining the overall structure and scope of the previous Agenda, the new document distinguishes between short term and medium term priorities and breaks down sectoral cooperation into three parts.³⁰

Importantly, the Agenda includes a new section which is called 'key priorities' with a list of 12 priorities. Interestingly, these priorities hardly focus on the AA. They specify broad principles outlined in the AA beyond legal approximation, such as democracy and public administration and represent the adaptation of the EU's stance towards fundamental issues in Georgia, such as democracy, quality of governance and the rule of law. The key priorities are broad in scope and reflect the EU's vision of what constitutes a well-governed state, as reflected in the blueprint promoted during the accession process of CEE countries. This includes the promotion of non-majoritarian institutions, such as judiciary, autonomous and professional public administration, semi-independent agencies in different areas, non-discrimination and small and medium enterprises (Maniokas 2008). Sectoral priorities concern the implementation of various sectoral development strategies.

As pointed above, association institutions can also play a role in streamlining the AA/DCFTA and adjusting it to the country context. Given that substantial provisions of the AA entered into force before ratification in 2014, due to the provisional application of the DCFTA, we analyse decisions of association institutions for this

²⁸ All of these areas are mentioned in the AA, but the obligations are not specific.

²⁹ Our assessment is based on a version of the Agenda available in May 2017. Its adoption was preliminary planned for the beginning of the year, then postponed to March, then postponed again. It is likely that discussion on it will continue until the end of 2017. This also reflects active stance of Georgia and the EU's accommodation to it.

³⁰ It was broken in a) Economic Development and Market Opportunities, b) Connectivity, Energy Efficiency, Environment, Climate Action and Civil Protection, and c) Mobility and People to People.

purpose.³¹ Sub-committees deserve specific attention because they monitor the implementation of AA provisions. Such monitoring can take into account the specificities of the country context and provide guidance on broader developmental issues, as has been the case in CEE and Western Balkan countries.

It is evident that the work of sub-committees has hinged on the role and understanding of specific DGs in the European Commission and Georgian sector-specific authorities. Hence, their formats, style, as well as the level of details covered differ. The protocols of the subcommittees indicate that the EU is taking a stance on development-related issues, as was the case in the CEE and Western Balkan countries.

As in the pre-accession process, the EU seems to encourage strategic planning requiring all kinds of strategies, programmes and plans. It also encourages de-centralization, regional and rural development, as well as education reform and innovation. However, the reasons behind these positions and the benchmarks attached to them are not specified.

Beyond the above adjustments, EU assistance to Georgia has not undergone such a transformation as in Ukraine. In the period of 2014-20 the annual commitments amount to around €100 million, which is an increase from the previous financial perspective, but short of the sums allocated to Moldova in the wake of the signature of the AA. As in Moldova, the assistance is disbursed mainly as budgetary support. Learning the lessons from Moldova, the EU is enforcing rather strict conditionality, and has already refused to disburse certain earmarked funds due to delays in fulfilling conditions.

In sum, during the process of negotiating the AA, the EU disregarded Georgia's development priorities and emphasized the promotion of EU standards as part of a broader EU trade logic. The Georgian government had to accept the EU's demands due to power asymmetry and its security deficit. The new government formed after the parliamentary elections in 2012 embraced the EU agenda and quickly completed the formal negotiations. The very broad Association Agendas of 2014 and 2017 complement the AA by specifying obligations which are not part of the EU core competences, such as democracy, the rule of law and good governance and reflect increasing the EU's concern over these fundamental issues. Thus they address the need for fundamental reforms of state institutions, but do not acknowledge the EU's rule transfer as too extensive and burdensome. Fundamental reforms are layered on top of the detailed *acquis*-based obligations of the AA, even though they actually are essentially pre-requisites. Association institutions, especially sub-committees, do try to address some basic developmental issues, but in a fragmented way and without an explicit logic.

Further research is required to determine the developmental solutions advised by the EU as well as to assess the excessiveness of the burden associated with the AA implementation. Already by 2017, there are signs of delays

³¹ We have looked into the protocols of sub-committees, which took place in 2015-16, namely, (1) the EU-Georgia Association Subcommittee covering Energy, Environment, Climate Action, Transport, & Civil Protection, which took place in 2-3 July 2015, Tbilisi; (2) the EU-Georgia Association Sub-Committee on Employment, Social Policy, Equal Rights and Public Health, which took place on 27 November 2015 in Tbilisi, (3) the EU-Georgia Sub-Committee On science and technology, information society, audio-visual policy, education, training and youth, culture, sport and physical activity, which took place in Brussels on 18 February 2016, and (4) the EU-Georgia Sub-Committee on Economic and Other Sector Cooperation – Cluster V Agriculture and Rural Development, Fisheries and Maritime Governance, Regional Development, Cross-Border and Regional Level Cooperation, which took place in Brussels on 18 March 2016.

in the implementation of a significant part of the provisions of the AA/DCFTA and the Association Agenda, which might worsen if no further incentives are provided by the EU or if the agenda remains as ambitious and wide-ranging as it is at present. One likely scenario is that Georgia, alongside other associated Eastern neighbours, will only pretend to implement the AA, which, with the EU turning a 'blind eye' on such mimicking, would merely lead to the creation of yet another 'Potemkin village' – so familiar in this part of Europe.

4. Conclusions

This paper has served two purposes: first, by analysing the AA, it has problematized the agreements as a ready-made template for modernization; second, it has examined what kind of support for the implementation is provided by the EU in recognition of the profound 'commitment-capacity gap'. By doing so the paper has sought to identify adaptations resulting from the recognition of the mismatch between the supply side (the export of the *acquis*) and the actual capacity and modernization needs of the partner countries.

Our analyses indicate that only in the case of Ukraine have some deliberate, pro-active adaptations taken place. The dramatic events of 2014 and Russia's punitive measures against Ukraine prompted the EU to provide more tailored and flexible assistance to ensure support for institutional reforms, as a precondition for legal approximation. Curiously, however, this greater volume of assistance as well as enhanced flexibility at the macro-level does not necessarily contribute much to ensuring the actual effectiveness of the EU's technical assistance projects. If anything, it seems that *too much* assistance is offered to Ukraine without due synchronization and sequencing of reform measures in general and implementation of the DCFTA in particular. In Moldova, a back-to-basics approach was offered only after the 2014 banking scandal. While the EU provides considerable assistance to Moldova, it is not (yet) fully tuned to the fundamental weaknesses of the Moldovan state institutions. In Georgia, it seems that the EU is conducting 'business as usual', although there is some evidence that it has started to take into account the developmental needs of the partner country. The limited appreciation of the challenges and resulting adaptations has implications in terms of the implementation of the AA and, more importantly, the actual transformative power of the EU.

These findings are somewhat surprising given the EU's extensive experience of supporting reforms in a demanding context, such as in the Western Balkan countries. In particular, the EU has changed its policy in the Western Balkans into focusing on governance capacity as a precondition for implementing the *acquis* (Kmezic 2015, Tomini 2015). While it is actually even more warranted in the EaP countries, our analysis indicates that this has been the case only to a limited extent insofar as priorities have been defined and only with moderate adjustments as far as assistance is concerned, above all in Ukraine. Further research is required to understand, first, the factors accounting for this (so far) modest learning within the EU and, second, the impact of these limitations in the EU's approach to its role in reforming the associated countries.

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The EU and Eastern Partnership Countries An Inside-Out Analysis and Strategic Assessment

Against the background of the war in Ukraine and the rising tensions with Russia, a reassessment of the European Neighborhood Policy has become both more urgent and more challenging. Adopting an inside-out perspective on the challenges of transformation the Eastern Partnership (EaP) countries and the European Union face, the research project EU-STRAT seeks to understand varieties of social orders in EaP countries and to explain the propensity of domestic actors to engage in change. EU-STRAT also investigates how bilateral, regional and global interdependencies shape domestic actors' preferences and scope of action. Featuring an eleven-partner consortium of academic, policy, and management excellence, EU-STRAT creates new and strengthens existing links within and between the academic and the policy world on matters relating to current and future relations with EaP countries.