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The New Enhanced Agreement

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Introduction

Since 2007, the European Union and Ukraine have been negotiating a new framework agreement to replace the 10 year-old Partnership and Cooperation Agreement whose initial period of implementation is coming to an end.

The new agreement is referred to as the 'New Enhanced Agreement' (NEA) for lack of agreement between the parties on the specific name. It is deemed to go beyond and above the PCA, taking into account the internal evolution of Ukraine, as well as the constitutional developments of the EU, following successive Treaty reforms and enlargements. It is also conceived as an essential tool for achieving the objectives of the European Neighbourhood Policy launched by the EU in 2003.

This paper sheds further light on the likely contents of the agreement, its possible legal bases and thus nature, and the impact of recent developments, e.g. the evolution of the ENP, the Treaty of Lisbon and the start of EU-Russia negotiations.

I - Contents (Comparison with other agreements - see attached table)

1. Objectives

From the EU point of view, the new agreement is envisaged as an important tool to achieve the objectives of the ENP (see Commission policy papers on the ENP). In particular, the new contractual framework aims at fostering peace, stability and prosperity in the neighbouring countries, as an essential contribution to the security of the Union.¹ The ENP in general, and the agreement in particular are intimately linked, and constitute a regional application of the EU Security Strategy.

In this context, the agreement aims at associating Ukraine to the EU CFSP and ESDP (e.g. conflict prevention and crisis management, regional stability, non proliferation of WMD, export controls and disarmament), with a view to fostering convergent positions as regards global affairs, including on combating terrorism. It will also aim at enhancing Ukraine's domestic political and judicial reform, by reference to European and international standards.

¹ Cremona & Hillion (2006).

As envisaged by the ENP, the new contractual links also purport to bring the neighbours in general, and Ukraine in particular, closer to the EU. In economic terms, that closer relationship should take the form of a 'stake in the internal market', whereby Ukraine should ultimately be covered, at least to a certain extent, by the four fundamental freedoms underpinning the internal market.

The overall objective of the new agreement is thus economic integration and political cooperation - if not association, as advocated by Ukraine. Indeed, the Ukrainian authorities look the NEA as a vehicle to achieve its membership aspirations.

2. A comprehensive FTA

Since Ukraine recently acceded to the WTO, negotiations of the trade aspects of the new agreement have now started. A specific paper will explore this essential dimension of the NEA in further detail, as negotiations progress.

In a nutshell, it is envisaged that the NEA will establish a free trade area covering a substantial part of trade in goods and services, with specific derogatory regimes applying to limited sensitive goods and services.

Beyond abolition of tariffs, the FTA foreseen by the NEA is set to promote far reaching 'regulatory convergence' further to underpin the process of liberalisation and to foster market access. This regulatory adaptation entails Ukraine's legal approximation with EU standards in various fields: e.g. technical standards and conformity assessment, sanitary and phyto-sanitary rules, intellectual property rights, trade facilitation, public procurement, and competition. The degree of convergence will determine the degree to which the EU will effectively open its internal market to Ukraine's goods, services and business.

The agreement will also contain provisions governing the movement of persons between parties, be they workers or entrepreneurs. The regime remains to be clarified. Under the PCA, labour provisions foresee that parties have to do their best to ensure equal rights for workers with respect to working conditions, wages and dismissal, falling short of establishing any specific rights for their family (in contrast to what Europe Agreements provided). In this respect, the NEA could improve labour conditions, first by transforming the existing obligation of conduct in an obligation of result, and include additional rights for Ukrainian workers' family. The issue of social security coordination, as well as issues of entry and residence also have to be clarified. This touches upon the Justice and Home Affairs dimension of the agreement (e.g. provisions on visas).

Establishment provisions will have to cover both setting up and operations contrary to what happens under the PCA which artificially distinguishes the two. If the NEA is to bring about better conditions for establishment, it would have to foresee the application of the National Treatment rather than the MFN treatment as presently foreseen in the PCA. Establishment of self employed persons would also need to be envisaged and

regulated by the NEA, contrary to what happens under the PCA. Here again, provisions would be needed to guarantee entry and residence (in line with the case law of the Court on self-employed persons under the EA, e.g. *Jany* judgment).

3. A comprehensive list of cooperation

The EU aims at integrating Ukraine in the different markets and networks, such as energy and transport. It is not unlikely that the agreement could prepare Ukraine's ultimate accession to the Energy Community Treaty presently covering the EC and the Western Balkans, or indeed the presently negotiated Transport Community Treaty, involving the same parties. At the same time, the Ukrainian authorities will have to determine whether it is in their interest and those of their industry to adapt to EU standards in these areas.

The sectoral cooperation policies aim at fostering approximation of Ukraine towards EU and international standards. The Agreement should notably cover the following areas:

- transport,
- environment,
- cooperation on industrial and enterprise policy,
- company law,
- banking, insurance and other financial services,
- information society,
- information technology and telecommunications,
- tourism,
- agriculture and rural development,
- fisheries and maritime governance,
- mining,
- cooperation in science and technology,
- space cooperation,
- consumer protection,
- social cooperation,
- health,
- education, training and youth,
- cooperation in the cultural and audio-visual field,
- civil society cooperation,
- cross-border and regional level cooperation

Cooperation should particularly aim at helping the development of Ukraine's administrative and institutional capacity that will be needed to implement the agreement.

The NEA aims at going beyond the usual list of areas of economic cooperation also to cover cooperation on Freedom, Security and Justice, beyond the current action plan on Justice and Home Affairs, as well as cooperation in the fields of Foreign and Security and Defence Policies. In that the NEA would codify and strengthen existing cooperation which in practice already occurred in those areas.

In the particular sphere of JHA, the agreement will most likely contain provisions on visas; possibly articulating steps for the parties ultimately to establish a visa free area thereby fostering people to people contacts – in line notably with the Polish Swedish Paper on Eastern Partnership.

4. A strengthened institutional framework

The PCA sets up an institutional framework composed of a cooperation council, committees (including a parliamentary committee) and sub-committees. This framework is spearheaded by yearly meetings at presidential level ('summits'), deemed to provide guidance in the development of the Partnership. It is unlikely that this overall architecture will be very different in the new dispensation.

In contrast to the PCA however, the NEA's Council is most likely to be endowed with a decision-making power. In other words, this body would be able to take binding decisions where the agreement so provides (e.g. on labour, FTA+), thereby allowing the parties to elaborate the legal regime underpinning their relationship, deepen their reciprocal commitments, and thus strengthen the association of Ukraine with EU activities, in line with the objectives of the ENP.

This institutional framework will have an important role not only in the various areas of cooperation envisaged by the NEA, it will also provide a framework for the development and strengthening of the political dialogue, the monitoring of Ukraine's implementation and compliance with its commitments, as well as the resolution of possible disputes concerning the implementation of the agreement.

II - Legal basis and nature of the New Agreement

The discussions on the legal basis of the agreement are on-going. The clarification on this point depends on political considerations regarding the *finalité* of the agreement. The September Summit meeting under French Presidency may provide some indication through the possible adoption of a joint EU Ukraine political declaration. Those discussions could also be coloured by the (possible) entry into force of the Treaty of Lisbon.

1. Under existing EU treaties

Several legal bases can be envisaged under the existing treaties for the EU to conclude the agreement, depending on the nature of the post-PCA relationship that the Member States are willing to establish with Ukraine.

For reasons exposed in a previous paper, Article 310 EC appears to be the most plausible substantive legal basis of the future NEA, with Article 300(3) EC as the procedural legal basis. There appears to be a growing support for this position among the Member States.

In case the EU Member States fail to agree to go as far as concluding an association agreement with Ukraine, Article 181A EC could provide an alternative legal basis. This provision was introduced in the EC Treaty by the Treaty of Nice, and aims at providing a specific legal basis for partnership and cooperation agreements with non-developing countries. While this legal basis may provide the lowest common denominator, it would arguably undermine the EU general discourse on enhancing its relationship with Ukraine, which indeed underpins the ENP.

Articles 24 alone or combined with 38 TEU could be used for the *EU* to conclude the agreement, alongside the Community and its Member States, given the non-EC dimensions of the NEA. In particular, Article 24 TEU entitles the EU to conclude international agreements in the fields of CFSP and ESDP (so called 'second pillar' of the EU), while Article 38 TEU provides a substantive legal basis for agreements dealing with police and judicial cooperation in criminal matters ('third pillar').

While these legal bases could be added to the EC legal bases (e.g. Article 310 + 300 EC), as legal foundation of the agreements, the recent case law of the Court of Justice suggests that such 'cross-pillar legal bases' are incompatible with EU law (*ECOWAS* judgment). In other words, the use of Article 24 and 38 TEU as legal bases of the NEA is possible if the agreement is concluded on the basis of a first Council decision on the basis of Article 24/38 TEU on behalf of the EU, and of a second decision by the Council based on Article 310 + 300 EC on behalf of the Community (as done in the case of the Schengen Association agreement with Switzerland).

2. Impact of the Lisbon Treaty

A more detailed analysis of the impact of the Lisbon Treaty on the EU-Ukraine relationship could be the subject of another paper, if that Treaty is eventually ratified. Suffice at this stage to flag up a couple of innovations which may colour the negotiations and conclusion of the NEA.

Article 8 of the Treaty on European Union as amended by Lisbon, provides a specific legal basis for the Union to conclude neighbourhood agreement, one may wonder whether the EU may refer to it for the conclusion of the NEA.

One could indeed imagine a combination of the association legal basis (in the amended Treaty: Article 217 of the Treaty on the Functioning of the European Union). On the other hand, the EU might want to be cautious in using Article 8 TEU.² For if this article was used for the first time as a basis for the agreement with Ukraine, and if the

² Article 8 TEU reads as follows: (1) The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation. (2) For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

latter was at some later point granted a membership prospect, this could be a dangerous precedent for the EU which in the meantime may have used the same combination in relation to the Meds.

The new Treaty would entail a revised Common Commercial Policy. A first innovation would be the inclusion of Foreign Direct Investment within the remit of the CCP and thus part of the exclusive competence of the Union. It means that the Union would be in charge, on its own, of negotiating that aspect of the NEA. The precise definition of FDI in this context is not entirely clear however, and could lead to some bickering between the Commission and the Member States/Council.

The other innovation regarding the CCP is the new role of the European Parliament. While presently the EP has no formal role in the CCP, it would in the post-Lisbon framework have to be consulted. In the context of the NEA negotiations, it means that the EP's role could be strengthened.

III – Externalities

1. The connection between the evolution of the ENP and the NEA

The initial ENP Action Plan (AP) adopted in 2005 has been rolled over for a year. The EU and Ukraine have also agreed on additional points, added to the list of the initial AP priorities for implementing the PCA.

The AP will most likely be replaced by an equivalent instrument for the period between the end of the AP and the entry into force of the NEA. Indeed, the specific system of monitoring that was set up in the context of the ENP (AP, progress reports, conditionality) is likely to be maintained albeit under a different name in the context of the NEA. The purpose of this system is for the EU to assess but also foster Ukraine's implementation of its NEA commitments, possibly articulated in the form of short, medium, long priorities, that would be listed in additional instruments (similar to European Partnerships with the WB). In this context, the new institutions established by the agreement will also play a significant role - as do the PCA's - particularly at the level of sectorial sub-committees. Working parties and dialogues have mushroomed for the purpose of monitoring PCA and AP implementation.

The EU interest in maintaining a strong monitoring mechanism partly stems from an EU concern about Ukraine's problems of implementation and compliance with its obligations. In this context, the Ukrainian authorities may find it useful to get support from SIDA, as it does in the field of environmental protection (this may need some elaboration)

2. The start of negotiations of a new agreement between the EU and Russia

The negotiations of a new agreement between the EU and the Russian Federation

have recently begun. It is difficult to predict at this stage whether, and if so the extent to which, this process may colour the negotiations of the NEA with Ukraine. Though the general context was different then, it could be recalled that the negotiations of the PCA between the EC and Russia had a significant impact on those with Ukraine. For instance, the so-called evolutionary clause included in the PCAs - whereby the parties undertook to discuss the feasibility of an FTA – was included in the PCA with Ukraine after Russia had managed to convince the EC to include such a clause in the agreement with Russia.