

Enhancing the Prospects of the EU's Deep and Comprehensive Free Trade Areas in the Mediterranean:

Lessons from the Eastern Partnership

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In their March 2015 Consultation paper on the review of the European Neighbourhood Policy (ENP), the European Commission and the High Representative raised the question whether the Deep and Comprehensive Free Trade Areas (DCFTAs) “are the right objective for all or should more tailor-made alternatives be developed, to reflect differing interests and ambitions of some partners?” Such ambitious but complex trade agreements have now finally been signed with Ukraine, Moldova and Georgia, but they are still on the table for several Mediterranean ENP countries. Although these Mediterranean partners have a completely different political, economic and legal relationship with the EU, some important lessons can be drawn from the ‘Eastern DCFTA experience’. In particular, the DCFTA negotiators should avoid overly-ambitious and ill-defined legislative approximation commitments and develop a comprehensive implementation strategy.

In December 2011, the Council adopted negotiating directives for DCFTAs with Jordan, Egypt, Tunisia and Morocco, largely in response to the Arab spring that spread waves of democratic uprisings and protests throughout the Arab world. These four countries were selected because they are all WTO members, parties to the 2004 Agadir Agreement¹ and were perceived – at that time – as having implemented sufficient economic and political reforms, including the bilateral ENP Action Plans. However, negotiations were only launched with Morocco in March 2013, and despite considerable progress on most chapters in the first four negotiation rounds, Morocco insisted on introducing a break in July 2014. Before continuing the trade talks, the Moroccan government wants to assess the results of its own new sectoral impact assessments, which were called for by the Moroccan civil society, fearing negative impacts on key sectors of their economy and the government’s ability to regulate economic and social sectors. With regard to the three other Mediterranean countries,

¹ Named after the Moroccan city where the process to set up the pact was launched in May 2001, the free trade agreement was signed in Rabat in February 2004 and came into force in March 2007.

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DCFTA negotiations are only expected to be launched in the near future with Tunisia (in the autumn this year). Technical preparations are ongoing in Jordan but a DCFTA scenario has become very unlikely for Egypt considering its fragile post-Arab Spring political climate.

The Eastern DCFTAs: A right template for the Mediterranean countries?

The Commission envisages that the 'Mediterranean DCFTAs' will have the same scope and objectives as the 'Eastern DCFTAs' signed by the EU last year with Ukraine, Moldova and Georgia as integral parts of overall Association Agreements. Both groups of trade agreements are developed in the same ENP framework that aims to conclude DCFTAs with all willing neighbouring countries that are able to implement and sustain such agreements. According to the European Commission, these DCFTAs have to go beyond traditional FTAs – which mainly reduce or eliminate tariffs and quotas for trade in goods – by covering substantially all trade in goods and services and including far-reaching provisions on competition, public procurement, intellectual property rights, etc. Moreover, in order to realise the neighbouring countries' gradual "integration into the EU Internal Market", legally binding provisions on legislative and regulatory approximation have to be incorporated. All these elements are indeed included in the Eastern DCFTAs and are now again envisaged by the Commission in the Mediterranean DCFTAs. Moreover, during the first DCFTA negotiations with Ukraine, the Council explicitly stated that certain aspects of the EU-Ukraine DCFTA "can serve as a model for other ENP partners in the future"² and Commission officials confirmed that the negotiating directives for the Mediterranean DCFTAs are very similar to those adopted for the EaP countries.

Nevertheless, there are obvious political and economic differences between the relationships of these two groups of countries with the EU. The Mediterranean partners are not eligible for EU membership and do not have EU accession ambitions. Consequently, they will be less eager to approximate huge chunks of EU *acquis*, as the three Eastern partners have done in their respective DCFTAs. Also the starting point for economic integration is completely different. Whereas the three Eastern countries immediately jumped from limited non-preferential Partnership and Cooperation Agreements to ambitious DCFTAs, the Mediterranean countries already have in place a basic legal framework for trade liberalisation with the EU. The Euro-Mediterranean Association Agreements (EMAAs) gradually established an FTA for trade in industrial goods, and additional sectoral protocols have been concluded on agricultural and fishery products, geographical indications and dispute settlement. Accordingly, contrary to the Eastern DCFTAs, the Moroccan DCFTA will most likely not include chapters on tariff reduction for industrial goods (which have been almost fully liberalised by the EMAA) and agricultural and fisheries products (which are covered by the recent agricultural protocol). Thus, considering these crucial differences, the Eastern DCFTAs are not appropriate templates to be used for the negotiations of the Mediterranean DCFTAs.

² Council Conclusion on Strengthening the ENP, Brussels, 19 June 2007.

Lessons from the Eastern DCFTA experience

Although 'increased differentiation' and 'tailor-made approaches' have become catchphrases in the various ENP communications, it is not excluded that the Commission will nevertheless copy elements of the Eastern DCFTAs in the Mediterranean trade deals. It is therefore crucial to identify the key inconsistencies and challenges related to the Eastern DCFTAs, to avoid their duplication in the Mediterranean agreements.

1. *Keep it real*

It is already clear from the Eastern DCFTAs that these countries have committed themselves – inspired by their EU accession ambitions – to approximate parts of the EU *acquis* in their own corpus of law that will be very difficult to implement. The EU and the Mediterranean countries should more strictly prioritise the scope of EU legislation to which the parties commit themselves, based on a proper ex-ante impact assessment. The Mediterranean countries should be careful not to overburden themselves with EU legislation that will not directly result in additional market access or is not relevant for their economic reforms. Nevertheless, the EU should still use the DCFTAs as instruments to promote its legislation in the area of sustainable development (e.g. environmental protection and social policies), but leave room for flexible adaptations.

2. *Keep it simple*

The hugely complex and comprehensive Eastern DCFTAs are no textbook cases of clear legal drafting. In particular, the various procedures related to legislative approximation lack a consistent approach. For example, in the Ukrainian DCFTA almost every DCFTA chapter has its own procedure for legal approximation. Whereas some chapters include far-reaching procedures to ensure a uniform interpretation and application of the annexed EU *acquis* (e.g. dynamic procedures to update the annexes and an obligation to follow the relevant case-law of the Court of Justice), others do not. Moreover, these Eastern DCFTAs include a mishmash of legal terms that refer to the process of the partners' approximation to the annexed EU *acquis* (e.g. "implementation of", "approximation to", "alignment with" and "incorporation of"). Although it is still to be seen to what extent the Mediterranean partners will commit themselves to parts of the EU *acquis*, clear and consistent definitions of these obligations and more horizontal procedures should be provided.

3. *Develop a comprehensive implementation strategy*

Early experiences in the Eastern Partnership context illustrate that proper DCFTA implementation and enforcement are really only feasible if the fundamental 'systemic' democratic structures and principles are in place (e.g. rule of law, anti-corruption policies and independent judiciary). Therefore, in order to prepare the Mediterranean countries for DCFTA implementation, the EU should not only increase its technical support for economic modernisation under the European Neighbourhood Investment (ENI), e.g. via twinning projects and projects for SMEs, but also its assistance for systemic reforms, e.g. budget support with clear conditionalities. Finally, in order to properly assist the Mediterranean countries with their legislative approximation commitments, the European Commission and the respective EU Delegations should

develop, jointly with the partner countries, detailed implementation strategies. These should go beyond the mere listing of broad priorities or copying and pasting of DCFTA annexes, which has become routine practice in drafting the Association Agendas for the Eastern DCFTAs.

Concluding remarks

Considering the important differences between the EU's eastern and southern neighbours, the EU should avoid path dependency when negotiating the Mediterranean DCFTAs. In particular, the Commission should learn from its Eastern DCFTA experience to avoid the negotiation of overly ambitious and complex Mediterranean DCFTAs. The fact that Commissioner Cecilia Malmström now avoids the DCFTA term for Tunisia, but refers to "negotiations on an ambitious partnership with the EU on trade and investment matters",³ could indicate a shift to a new tailor-made Mediterranean trade policy. This approach should be confirmed in the review of the ENP.

³ Cecilia Malmström (2015), "Tunisia brings good news to Brussels'", blog post, 27 May (https://ec.europa.eu/commission/2014-2019/malmstrom/blog/tunisia-brings-good-news-brussels-1_en).