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Legal Basis and Scope of the New EU-Ukraine
Enhanced Agreement. Is there any room for further
speculation?

Roman Petrov

EUROPEAN UNIVERSITY INSTITUTE
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Abstract

The paper conducts a critical analysis of the potential legal basis and scope of the future European Union (EU)-Ukraine enhanced agreement. Accepting that the most probable and most beneficial possibility for Ukraine is to conclude an association agreement with the EU on the basis of Article 310 EC Treaty (EC), it is argued that the objectives of the enhanced co-operation between the EU and Ukraine - as expected and desired by the Ukrainian political élite - could be achieved by a partnership agreement concluded on the basis of Article 181a EC. Furthermore, if the new enhanced EU-Ukraine agreement were concluded as a partnership agreement, it might be better suited for the solving of certain political and legal challenges in contemporary EU-Ukraine relations. First, a new enhanced agreement concluded on the basis of Article 181a EC would not entail unjustified political expectations - on the part of Ukraine - of obtaining the perspective of full EU-membership in the near future. Second, a future EU-Ukraine partnership agreement would be the best option for a “transitional” enhanced agreement before the Treaty of Lisbon enters into force. Third, a future partnership agreement between the EU and Ukraine will not undermine the fundamentals of the evolving strategic partnership between the EU and Russia.

Keywords

European law – direct effect - harmonisation – international agreements - EU-East-Central Europe - enlargement – treaty reform - co-decision procedure - institutions – unanimity- law

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ROMAN PETROV

Max Weber Post-Doctoral Fellow (2007-2008)
European University Institute, Florence, Italy
Jean Monnet Lecturer in EU law at the Donetsk National University (Ukraine).

Contemporary discussion on the legal basis and scope of the new EU-Ukraine Enhanced Agreement

The scope of the future EU-Ukraine enhanced agreement is one of the most debated topics among academics and practitioners. This is because the agreement will be the first among the new generation of the enhanced agreements negotiated by the EU and third countries under the framework of the European Neighbourhood Policy (ENP). Consequently, it will, to a certain extent, serve as a template and a point of reference for other future enhanced agreements to be concluded between the EU and other neighbour countries which participate in the ENP.¹ To date, the most outstanding contribution to the discussion on the potential scope of the EU-Ukraine enhanced agreement has been offered by Prof. C. Hillion of the University of Leiden.² In his work, Hillion provides a comprehensive overview of the possible scope of the future EU-Ukraine enhanced agreement. In particular, he argues that the future EU-Ukraine enhanced agreement will pursue the objectives of setting up a comprehensive and deep free-trade area between the EU and Ukraine, enhanced multi-faceted co-operation (in various fields, such as energy, the environment, and transport and education) with emphasis on cross-pillar dimensions, and it will be a reciprocally-binding document. Most importantly, Hillion argues that the future EU-Ukraine enhanced agreement will be an association agreement based upon Article 310 EC, which is “potentially close although not necessarily exactly

* The paper is based upon the report given at the Conference on the European Neighbourhood Policy and Ukraine at the University of Regensburg (Germany) in June 2007. The author is indebted to Prof. C. Hillion and Prof. M. Cremona for their comments on the earlier draft of this paper.

¹ The Council stated that “certain aspects of which [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future”. Press Release of the General Affairs and External Relations Council meeting on 18 June 2007 (10657/07 (Presse 138)).

² C. Hillion, ‘Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine ‘Enhanced Agreement’, (2007) 12 *EFA Rev*, pp. 169-182.

similar to the Europe Agreements (EA)³ or the Stabilisation and Association Agreements (SAA)⁴ with the Western Balkan countries”. The author draws his conclusions from “the terminology of several ENP documents” and “the inherent logic of the Neighbourhood Policy”. Most importantly, he states that “any agreement below association would not be perceived as an enhanced contractual relationship” for two reasons. First, because of the outdated character of the Partnership and Co-operation Agreements (PCA)⁵ and the “availability” of the association agreement after the Central and Eastern European (CEE) countries had joined the EU in 2005-2007. Second, because of the fact that the southern neighbour countries (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestine Authority (Interim Association Agreement), and Tunisia) have already signed association agreements with the EU. As a result, Hillion comes to the conclusion that “the new EU-Ukraine Treaty will almost inexorably be an association agreement based upon Article 310 EC, [and that] its likely cross-pillar dimension, both in terms of objectives and content, may mean that the Union could become a concluding party to the new agreement, alongside the Community and the Member States”. In his opinion, in order to fulfil the far-reaching objectives of this enhanced co-operation, the new EU-Ukraine enhanced agreement will be characterised by an active and influential framework (common institutions with the competence to issue binding-decisions). At the same time, the author believes that the new EU-Ukraine association agreement will contain a conditionality clause, and will, therefore, require constant monitoring on the part of the EU.

One should conclude that the opinions expressed by Hillion are justified and likely to happen. Moreover, this scenario is both welcomed and desired by the Ukrainian government. Representatives of the Ukrainian government have frequently emphasised that their objective is to negotiate and to sign an agreement which envisages “political association and deep economic integration (a free-trade area)”.⁶ The Parliament of Ukraine (Verkhovna Rada) issued a statement calling the EU to allow the step-by-step perspective for Ukraine to acquire full EU-membership and to grant

³ The EAs concluded with the following CEE countries: Poland (O.J. 1993 L 348/2, in force since 1 February 1994), Hungary (O.J. 1993 L 347/2, in force since 1 February 1994), the Czech Republic (O.J. 1994 L 360/2, in force since 1 February 1995), the Slovak Republic (O.J. 1994 L 359/2, in force since 1 February 1995), Romania (O.J. 1994 L 357/2, in force since 1 February 1995), Bulgaria (O.J. 1994 L 358/3, in force since 1 February 1995), Lithuania (O.J. 1998 L 51/3, in force since 1 January 1998), Latvia (O.J. 1998 L 26/3, in force since 1 January 1998), Estonia (O.J. 1998 L 68/3, in force since 1 January 1998), and Slovenia (O.J. 1999 L 51/3, in force since 1 February 1999).

⁴ At the moment of writing, the SAAs have been concluded with the FYROM (COM (2001) 90 final) and Croatia (COM (2001) 371 final) and Albania (COM (2006) 8164). The FYROM and Croatia SAAs entered into force on 3 May 2001 and on 12 December 2001 respectively. The Albania SAA is not ratified yet. The EU has launched negotiations on new SAA with Bosnia and Herzegovina, Montenegro and Serbia.

⁵ EC-Russia PCA (OJ 1997 L 327), entered in force 1 December 1997; EC-Ukraine PCA (O.J. 1998, L 49), entered in force 1 March 1998; EC-Moldova PCA (O.J. 1998, L 181), entered in force 1 July 1999; EC-Armenia PCA (O.J. 1999, L 239), entered in force 1 July 1999; EC-Azerbaijan PCA (O.J. 1999, L 246), entered in force 1 July 1999; EC- Georgia PCA (O.J. 1999, L 205), entered in force 1 July 1999; EC-Republic of Kazakhstan PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Kyrgyz Republic PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Uzbekistan PCA (O.J. 1999, L 229), entered in force 1 July 1999; EC-Republic of Belarus PCA (COM (95)137 final), signed in 1995, but in 1996 EU-Belarus relations were stalled following political setbacks; EC-Turkmenistan PCA (COM (97) 693 final).

⁶ See interview of the Prime-Minister Viktor Yanukovich on 08.02.2007, at: www.liga.kiev.ua, 20 April 2008.

considerable access for Ukrainian undertakings and nationals to the European Internal Market. Furthermore, the Verkhovna Rada called for the new enhanced agreement with the EU to be an “ambitious document” which will allow EU-Ukraine relations to be transformed from a partnership to a “political association and deep economic integration....in line with the contractual practice the EU has applied towards the CEE countries”.⁷

At the same time, one must emphasise that neither the EU institutions nor the top EU officials have ever publicly confirmed that the future EU-Ukraine enhanced agreement will be negotiated as an association agreement based upon Article 310 EC. For example, the Commissioner for External Relations and European Neighbourhood Policy, Benita Ferrero-Waldner, has never referred to the future EU-Ukraine agreement as an association agreement, but did explicitly mention, in the context of the future agreement, that “we can build strong relations, strong partnership [emphasis added] with our Ukrainian partners”.⁸ Following meetings with representatives of the EU (J. Solana, the EU High Representative for Common Foreign and Security Policy (CFSP)), the Ukrainian President, V. Yuschenko, has somehow placated pro-association aspirations in Ukraine, and stated that it is “not the title of the future enhanced agreement that matters, but its substance”.⁹ Soon after, this formula was echoed by other Ukrainian governmental officials, including the Ukrainian Minister of Foreign Affairs. At the XI EU-Ukraine Summit on 14 September 2007, the parties “reiterated their vision of the agreement as an innovative and ambitious document which goes beyond the established framework of co-operation and opens a new stage in EU-Ukraine relations”, without explicitly referring to the future agreement as an association agreement.¹⁰

Therefore, accepting that the objectives and the scope of the new EU-Ukraine enhanced agreement proposed by Hillion offer the most likely scenario and the best options which comply with the objectives of the Ukrainian policy towards the EU, one can wonder if there are any other options for the legal base of the new EU-Ukraine enhanced agreement other than an association agreement based upon Article 310 EC? In other words, may the substance desired by the EU and Ukraine from the new enhanced agreement be achieved by other forms of agreement than an association agreement?

Overview of the EU-Ukraine contractual relations

Before answering the major questions of this paper, it is necessary to give an overview of the legal and political foundations of today’s bilateral co-operation between the EU and Ukraine. Hitherto, the apex of the legal framework which governs EU-Ukraine relations is occupied by the PCA. This agreement was signed by the EC and its Member States and Ukraine on 16 of June 1994, and entered into force on 1 March 1998.¹¹ As an international agreement between the EC Member States on the one side, and Ukraine on

⁷ Postanovlenie (Statement) of the Verkhovna Rada No 684-V “About the launching of negotiations between Ukraine and the EU on new fundamental agreement” on 22.02.07.

⁸ Statement at the meeting with the Minister of Foreign Affairs of Ukraine A. Yatsenyk on 26 March 26 2007 in Brussels, at: www.liga.kiev.ua, 20 April 2008.

⁹ Statement at the meeting of President V. Yuschenko with J. Solana on 8 March 2007 in Brussels, at: www.liga.kiev.ua, 20 April 2008.

¹⁰ Joint Statement of the XI EU-Ukraine Summit, 12927/07 (Presse 199).

¹¹ The similar PCAs were signed with Armenia, Azerbaijan, Belarus (did not enter into force), Georgia, Kazakhstan, Kyrgystan, Russia, Uzbekistan, Turkmenistan (have not entered into force yet).

the other, the PCA is a binding document and constitutes an integral part of both the EC and Member States legal systems.¹² In the Ukrainian legal system, the PCA, which is a ratified international agreement, has a binding effect and consequently enjoys priority over any conflicting national legislation, though it does not override the Constitution of Ukraine. Thus, in cases of conflict, the Ukrainian constitutional provision either prevails or has to be amended.¹³

Within the system of EU external agreements, the PCAs, which were concluded with almost all former Soviet republics (the Newly Independent States (NIS)),¹⁴ constitute a separate group of “partnership” agreements among “association”, “co-operation”, “stabilisation” and “development” agreements entered into by the EC.¹⁵ The EC-Ukraine PCA, as other PCAs, could be classified as an “entry-level” agreement that does not envisage membership, but endorses the potential interest in developing further mutual co-operation between the parties. The PCAs are mixed agreements based upon Articles 133 and 308 of the EC Treaty, along with Articles 44(2), 47(2), 57(2), 71, 80 EC Treaty. The EC exclusive competence covers PCA provisions on trade in goods and services including the cross-border supply of services. A number of specific bilateral agreements are concluded on the basis of exclusive EC competence.¹⁶ However, the PCAs do go beyond the EC framework and have a clear EU cross-pillar dimension. This means that the institutional framework of the PCAs does inter-penetrate with the remaining EU’s pillars: CFSP, and Justice and Home Affairs (JHA).¹⁷

In general, the PCAs are the external EU agreements which are mainly aimed at the establishment of a political dialogue, the facilitation of economic relations between the NIS countries and the EU Member States, the promotion of democratic reforms in Ukraine, the protection of human rights, and the establishment of a legal order that guarantees the rule of law. The preambles of the PCAs intentionally omit any reference to “the process of European integration” or “the objective of membership in the EU” as this is provided in the EU association agreements.¹⁸ The PCAs are aimed solely at the development of close political relations, the promotion of trade, investment and harmonious economic relations between the parties, and at sustaining mutually advantageous co-operation and support of a PCA country’s efforts to complete its transition into a market economy.¹⁹ Thus, the PCAs could be seen as a quite successful formula in the external EU policy. For the time-being, it certainly serves its purpose as a reliable legal instrument in sustaining long-term relations with the NIS countries, while

¹² For the acknowledgement by the ECJ of international agreements as a part of the EC legal system, see Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, para 13.

¹³ Article 9 of the Ukrainian Constitution provides that “international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine”.

¹⁴ *Supra* note 5.

¹⁵ For a concise classification of the EC external agreements, see D. McGoldrick, *International Relations Law of the European Union*, (London, Longman, 1997), pp. 116-137.

¹⁶ For example, agreements with the Ukraine on trade in certain steel and textile products (O.J. 2007, L 178; O.J. 2007, L17).

¹⁷ C. Hillion, ‘Institutional Aspects of the Partnership Between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine’, (2000) 37 *CML Rev.*, pp. 1211-1235.

¹⁸ For example, the Preamble of the EU-Hungary EA.

¹⁹ Article 1 of the EU-Ukraine PCA.

holding them at a controllable distance from closer access to the European Internal Market.²⁰

The evolution of the relations between the EU and the NIS countries implies the emergence of the new tools of the EU external policy initiatives which directly influence the pace of the economic, legal and political reforms in the NIS countries: 1) Common Strategies (CS);²¹ and 2) the ENP. In contrast to the more or less homogeneous PCAs, the CSs clearly differentiated the EU's policy towards certain NIS countries, in accordance with geopolitical and geographic factors, economic progress, and further engagement in cross-border co-operation. Moreover, the CSs provided revisited and refined guidelines of mutual co-operation, including the approximation efforts between EU and NIS countries. Up to now, the European Council has endorsed only three CSs with Russia,²² Ukraine,²³ and the Mediterranean,²⁴ which share a common border with the EU. The CS towards Russia have focused mainly on consolidating democracy, the rule of law and public institutions, as well as on strengthening stability and security in Europe. In response to Ukraine's reiterated diplomatic calls for a new framework agreement, the CS merely acknowledges and welcomes Ukraine's European aspirations, and establishes its major objective of working with Ukraine in order to facilitate its further rapprochement with the EU.²⁵ The CS towards Ukraine prioritised the support for the democratic and economic transition in Ukraine, including the progressive approximation of national legislation,²⁶ and foresaw the possibility of studying the circumstances of the establishment of a free-trade area between Ukraine and the EU.²⁷

Responding to the growing demand to reconsider and to enhance the different external policies towards the neighbour countries, the European Commission initiated - in 2003 - the "Wider Europe-Neighbourhood" policy towards third countries which

²⁰ For the comparative overview and scrutiny of the PCAs, see R. Petrov, 'The Partnership and Cooperation Agreements with the Newly Independent States', in: A. Ott & K. Inglis (eds), *European Enlargement Handbook*, (The Hague, Asser Press, 2002), pp. 175-194. See also V. Muravyov, *Pravovi zasady reguluvania ekonomichikh vidnosyn Evropeiskogo Souzy z tretimy krainamy (teoria I praktika)* (Kiev, Akademy Press 2002).

²¹ Articles 13, 14 and 15 TEU. European Council Common Strategy towards Russia (O.J. 1999 L157/1). European Council Common Strategy towards Ukraine (O.J. 1999 L331/1). For more information on the procedure of adoption of the CSs and the historical background, see C. Hillion, 'Institutional Aspects of the Partnership Between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine', (2000) 37 *CML Rev.*, pp. 1211-1235. Pursuant to Article 13 of the TEU the European Council may 'decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common'. The CSs are implemented via the application of common actions and common positions.

²² The European Council meeting in Cologne in June 1999 adopted the CS towards Russia. See point 78, Presidency Conclusions, Cologne European Council (O.J. 1999 L157/1). The CS towards Russia is terminated.

²³ The CS towards Ukraine was adopted at the Helsinki European Council in December 1999. See point 56, Presidency Conclusions, Helsinki European Council (O.J. 1999 L331/1). The CSs were adopted for duration of four years with the possibility of being prolonged, reviewed and if necessary adapted by the European Council.

²⁴ CS of 19 June 2000 on the Mediterranean region (O.J. 2000 L183/5).

²⁵ Article 6 of the CS towards Ukraine.

²⁶ It is stressed in Article 20 of the CS towards Ukraine that approximation should take place in such areas as: competition policy, standards and certification, intellectual property rights, data protection, customs procedures and environment.

²⁷ Article 61 of the CS towards Ukraine.

share an immediate post-enlargement border with the EU.²⁸ The ENP was launched as an “umbrella” policy with a strong degree of differentiation, covering a “ring of [immediate] neighbours”, which included the Southern Mediterranean countries (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority) and “Western” PCA countries (Ukraine, Belarus and Moldova). From the very beginning, the ENP has proven itself to be a dynamic EU external policy without clear geographical limits. Due to the extremely important energy and security value of the Caucasus region, the ENP has been expanded to Georgia, Armenia and Azerbaijan,²⁹ while two major immediate EU neighbours, the Russian Federation and Belarus, are currently excluded from the scope of the ENP.³⁰

The underlying ENP objective is to open up certain sectors of the European Internal Market for the neighbour countries and to enhance political dialogue between the parties in return for substantive political, economic, and legal reforms and the implementation of shared or common values.³¹ The objectives of the ENP are to be met through the implementation of a set of priorities in tailor-made jointly-agreed Action Plans within the key areas of political dialogue, economic reform, trade, and co-operation on justice and home affairs. All Action Plans emphasise the need for the neighbour countries to adhere to shared common values as a pre-condition for further enhancement of bilateral relations with the EU. The Action Plans illustrate in greater detail the way ahead over the next three to five years. The next stage of the ENP offers new enhanced co-operation in the form of European Neighbourhood Agreements to replace the present generation of bilateral agreements when the Action Plan priorities are met.

Quite crucially, the ENP does not offer a substantively new institutional framework for effective bilateral co-operation between the EU and the neighbour countries. Instead, the ENP is based upon already existing contractual relations between the parties (Euro-Mediterranean Association Agreements (EMAAAs) and PCAs). Institutional arrangements within the EMAAAs and PCAs are not of equal value. EMAAAs (concluded with all the countries of the Barcelona Process³² with the current exception of Syria) envisage the functioning of the Association Council and the Association Committee, which are authorised to issue binding-decisions pertaining to the functioning of the agreement. The institutional framework of the PCAs comprise the Co-operation Council and Parliamentary Committee, which can only issue non-binding recommendations. Therefore, while decisions adopted by the EMAAAs Association

²⁸ Communication from the Commission to the Council and the European Parliament ‘Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’ (COM(2003) 104 final).

²⁹ ENP Action Plans with Armenia, Georgia and Azerbaijan were signed on 14 November 2006.

³⁰ The Russian Federation has opted for a strategic partnership with the EU through the four common spaces initiative. Defined at the St. Petersburg Summit in May 2003 as four ‘common spaces’: a common economic space; a common space of freedom, security and justice; a space of co-operation in the field of external security; as well as a space of research and education, including cultural aspects. At the Moscow Summit in May 2005, the EU and Russia adopted a single package of Road Maps directed at the practical realisation of the common spaces project. Belarus, while being a formal participant of the ENP, is not yet part of the ENP due to the prolonged political isolation of the “authoritarian and anti-democratic” Lukashenko regime put in place by the EU and other European organisations.

³¹ The terms “common” and “shared” values in the ENP documents are applied interchangeably and thus may be considered to be synonymous.

³² Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority.

Councils may constitute part of the EC legal order,³³ recommendations issued by the Co-operation Councils of the PCAs do not. Furthermore, neither EMAAs nor PCAs provide an informal level of consultations between the EU and the neighbour countries' experts, in contrast to those envisaged with the EU's other neighbours, who benefit from more developed relationships under the EEA Agreement,³⁴ from the European Communities-Swiss sectoral agreements and from the decisions adopted within the framework of the European Communities-Turkey Customs Union.³⁵

“Joint ownership” forms one of the key characteristics of the ENP: the idea is that the parties elaborate the framework of their co-operation through jointly-agreed Action Plans.³⁶ It is argued here that the ENP belongs to a new generation of EU external policies which, despite their rhetorical reference to “shared values”, in actual fact pursue the objective of promoting and protecting the EU's own values. In fact, neither the EU development agreements (Cotonou), nor the Barcelona Declaration, nor the partnership and co-operation agreements acknowledge the objective of exporting the EU's common values so explicitly. In the context of the ENP, the EU institutions acknowledge that common or shared values should be understood as the “the EU's fundamental values and objectives”.³⁷ In other words, common values in the context of the ENP do not, in practice, mean jointly shared values between the neighbour country and the EU Member States, but rather that the EU's own fundamental values and objectives, enshrined in the EU founding treaties and reflected in the ENP Strategy Paper, should be adopted by the neighbour countries.³⁸

The notion of common values in the ENP is, in fact, underpinned by strong conditionality. It is explicitly stated that “the level of ambition of the EU's relationships with its neighbours will take into account the extent to which these values [emphasis added] are effectively shared”.³⁹ Any progress in relations between the EU and a neighbour country is conditional on the “degree of commitment to common values, as well as [...the] will and capacity [of the neighbour country] to implement agreed priorities”. Conditionality is visible through country reports and monitoring procedures directed at the way in which the ENP countries implement the “EU fundamental values”. The country reports, modelled on the accession country reports, enable the Commission to scrutinise the progress made by the neighbour countries in achieving the objectives of their individual Action Plans.⁴⁰ During the comparatively short history of the ENP, these reports testify to the fact that the neighbour countries have achieved

³³ For example, Case 12/86 *Meryem Demirel v Stadt Schwabisch Gmund*, [1987] ECR 3719.

³⁴ Art 99(1) EEA Agreement provides: “[the Commission] *shall informally* (emphasis added) seek advice from the EFTA experts in the same way as it seeks advice from the EC Member States for the elaboration of its proposals’.

³⁵ See eg Decision 1/95 EC-Turkey Association Council (O.J. 1996 L 35/1), Decision 1/96 EC-Turkey Customs Cooperation Committee (O.J. 1996 L 200/14), and Decision 2/97 EC-Turkey Association Council (O.J. 1997 L 191/1).

³⁶ European Neighbourhood Policy Strategy Paper (COM(2004) 373 final) 8.

³⁷ *Ibid.*

³⁸ Communication from the Commission to the Council and the European Parliament ‘Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’. (COM(2003) 104 final) 5.

³⁹ *Ibid.*

⁴⁰ Commission Staff Working Document Accompanying the Communication from the Commission to the Council and the European Parliament ‘On Strengthening the European Neighbourhood Policy: Overall Assessment’ (COM(2006) 726 final).

considerable success in implementing the EU's common values.⁴¹ There is little doubt that the application of the conditionality policy has played a fairly important role in achieving these results. Nevertheless, the Commission has also been eager to highlight areas in which the neighbour countries are required to accelerate the pace of their reforms.⁴²

It must be admitted that the ENP provides an excellent playing-field for the promotion of the EU's common values to third countries. Several factors favour such a proposition. First and foremost, despite the publicly proclaimed joint-ownership of the ENP by the EU and the neighbour countries, the ENP remains a policy of an asymmetrical nature which imposes unequal mutual commitments on both parties. Unlike the previous enlargement process of the EU eastwards, the ENP does not envisage the possibility of full or even associate EU membership for neighbour countries in return for their fulfilling the objectives of the ENP and adopting the EU's common values. Nevertheless, the neighbour countries are required to implement a significant portion of the *acquis communautaire* and to launch ambitious political, legal and economic reforms under a "pre-accession" type of monitoring process carried out by EU institutions. In other words, the ENP offers the neighbour countries several relatively undefined "carrots": a stake in the EC internal market, an upgrade in political co-operation, and the provision for additional financial assistance through the new Neighbourhood Financial Instrument. Furthermore, the ENP, as it is promoted by the EU, is an external policy of a temporary nature. The neighbourhood countries that successfully adopt the EU's common values are promised the opportunity to access an enhanced (though yet undefined) level of relations, the provision of a new enhanced agreement, a free-trade area, and a visa facilitation regime.

Association agreement versus partnership agreement. What is the difference?

Before discussing whether a future EU-Ukraine agreement could be concluded on another legal base than that of Article 310 EC, it would be rational to clarify the meaning of "an association" and "a partnership" under EU law. It appears that neither EU legal sources nor academics can provide clear answers to this issue. Article 310 EC states that: "The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure." One of the few explicit guidelines on the scope of association in EU external relations comes from the European Court of Justice (ECJ) in its *Demirel* judgment, wherein it is stated that an association agreement implies: "creating special privileged links with a non-member country which must, at

⁴¹ For instance, in the case of Ukraine the Commission acknowledged that parliamentary elections in March 2006 and September 2007 had been conducted in free and democratic manner, and considerable progress had been made towards consolidating respect for human rights and the rule of law. The Commission praised Ukrainian, Moldovan, and Jordan achievements in the fight against corruption and judiciary reform and progress in economic and social reforms in Tunisia. The Morocco Country Report stated that Morocco has implemented important reforms in most of the main areas of the Action Plan (liberalisation of the audiovisual sector, lifting reservations to some human rights international conventions, financial sector, transport, and environment).

⁴² In the case of Moldova, "the implementation of reforms needs to be given greater attention, including areas which have shown good legislative progress". In the case of Tunisia, the Commission underlined "slow progress on freedom of association and expression and on implementing the programme for modernising the justice system".

least to a certain extent, take part in the Community system.”⁴³ However, in the opinion of S. Peers,⁴⁴ not all association agreements based upon Article 310 EC contain reciprocal rights and obligations and offer third countries participation in the EC system. Reciprocal obligations in the EU association agreements can be set aside for various political reasons. He argues that “a particular association agreement might even contain fewer integration obligations than a partnership or co-operation agreement”.⁴⁵ This view can be explained by the fact that, initially, the use of Article 310 EC (ex 238 European Economic Community Treaty (EEC)) was considered only as an alternative to the use of Article 133 EC (ex 113 EEC) as a basis for external agreements between the European Economic Community and third countries. In the early years of European integration, there was some uncertainty over alternative legal bases for external agreements between the European Economic Community and third countries which went beyond trade relations. Only after some time had elapsed was Article 308 EC used alongside Article 133 EC, and its implied powers were invented later, too.

In the past two decades, the European Communities have concluded quite a few association agreements on the basis of Article 310 EC, with far-reaching integration objectives which might lead to eventual EU membership (EAs with CEE countries, SAAs with the Western Balkan countries). These agreements contain specific reciprocal obligations in line with requirement of the Demirel judgement. For example, they include the EU commitment to ensure access of third country nationals to its Internal Market and to provide financial assistance for certain political and legal reforms. In return, third countries accept specific obligations such as the voluntary harmonisation of national legislation with that of the EU and the implementation of specified international conventions. Article 310 EC will not disappear after the possible entry into force of the Treaty of Lisbon. It will be transferred without changes to Title V “International Agreements” as Article 217 of the Treaty on the Functioning of the EU (the new title will replace the title of the EC Treaty). Thus, it is likely that the EU will continue to conclude association agreements with third countries in order to pursue the specific objectives of the external EU policies, which range from preparing a third country for EU membership to the enhancement of bilateral political and economic relations.

The meaning of a “partnership” under EU law is not clear, either. In the meantime, partnership agreements can be concluded on the basis of Article 181a EC, which was added to the EC Treaty by the Treaty of Nice. The objective of Article 181a EC is to provide a legal basis for the European Communities to carry out “economic, financial and technical co-operation measures [emphasis added] with third countries... [which] shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms”. In theory, Article 181a EC could be used as a legal basis by the EU institutions for the issuing of legal acts relating to the exercise of the external EC policies other than those of accession, association and development. However, in

⁴³ Case 12/86 *Meryem Demirel v Stadt Schwabisch Gmund* [1987] ECR 3719 at para. 7.

⁴⁴ S. Peers, ‘EC frameworks of international relations: co-operation, partnership, association’ in: A. Dashwood & C. Hillion (eds), *The General Law of EC External Relations*, (London, Sweet & Maxwell, 2000) pp. 160-178. at 175.

⁴⁵ *Ibid*, at p. 175. Here, S. Peers refer to the earlier association agreements with Mediterranean countries which were called “co-operation agreements”. The co-operation agreement with Syria is still in force.

practice, Article 181a EC does not explicitly exclude the possibility of co-operation measures covering associated and developing countries. The application of this article by the EU institutions is not frequent. For instance, Article 181a EC is mainly used as a legal basis to issue a variety of legal acts relating to the functioning of the PCAs (changes in the scope of the application of the PCAs caused by the accession of new Member States to the EU, and the provision of financial and technical assistance to neighbour countries).⁴⁶ Furthermore, Article 181a EC is characterised by some degree of procedural flexibility. In contrast to the procedure envisaged in Articles 308 and 310 EC, the co-operation measures adopted under Article 181a EC do not require unanimity in the Council. Article 181a EC provides that the Council - acting by a qualified-majority on a proposal from the Commission and after consulting the European Parliament - can adopt legal acts. The Treaty of Lisbon does not repeal Article 181a EC as a whole, but considerably modifies it. If the Treaty of Lisbon enters into force, Article 181a EC will be renamed as Article 212 of the Treaty on the Functioning of the EU (TFEU). The new version of Article 181a EC makes several important changes to its content, which removes the ambiguities inherent to its recent version. For instance, these changes explicitly distance new Article 212 TFEU from the EU development policy, thereby aiming this legal basis for the EU's acts in the field of external relations with third countries other than association countries and developing countries. First, Article 212 TFEU explicitly states that the co-operation measures can cover only third countries other than developing countries. Second, it clarifies that economic, financial and technical co-operation measures include financial assistance to third countries. Third, Article 212 TFEU emphasises that the co-operation measures should be coherent with the foundations of the external EU action (the EU's development policy and principles and objectives of the external EU action). Fourth, the co-operation measures to be issued under Article 212 TFEU are to be adopted in accordance with the co-decision procedure between the Council and the European Parliament (ordinary legislative procedure in the Lisbon Treaty). Thus, the revised Article 212 TFEU will serve as a legal basis for the EU external agreements and legal acts relating to the partnership and co-operation between the EU and third countries, possibly including neighbouring countries, but definitely excluding association and development agreements.

It is still not clear how the new Article 212 TFEU will be used by the EU institutions after the Treaty of Lisbon enters into force. In fact, the EU will obtain a new legal basis to conclude external agreements with neighbour countries. The Treaty of Lisbon will add a new Article 8 to the TEU, which will provide it with a legal basis to "conclude specific agreements with the [neighbour countries]. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly". Thus, on the one hand, it is quite possible that Article 212 TFEU will serve as a legal basis for partnership agreements with third countries which cannot be considered as geographical/political neighbours of the EU. On the other, it is quite possible that both new Article 8 TEU and Article 212 TFEU may be used as a legal basis for future agreements with neighbouring countries.

⁴⁶ For example, Council and Commission Decision 2007/681/EC, Euroatom concerning the conclusion of the Protocol to the PCA with Moldova on accession of the Republic of Bulgaria and Romania to the EU (O.J. 2007 L281/23). Regulation 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument (O.J. 2006 C321/127).

In the course of negotiating new partnership agreements with the EU, third countries may express concern that Article 181a EC does not envisage partnership agreements containing special privileged links and reciprocal rights as in the association agreements concluded under Article 310 EC. However, there are, in fact, EU external agreements other than association agreements, which are characterised by a deep level of integration reminiscent of association agreements. For instance, in the *Simutenkov* case,⁴⁷ the ECJ drew a parallel between the EU-Russia PCA and the EU-Slovakia association agreement, with regard to the recognition of the PCA provisions as having direct effect on the EU legal order. In this case, the ECJ stated that the different objectives of the EU-Slovakia Association Agreement and the EU-Russia PCA did not preclude either direct effect or a similar interpretation (the same as that given to the EC Treaty itself) of the non-discrimination provision of the PCA. It could be argued that the logic behind the argumentation of the ECJ in the *Simutenkov* case implies that deeper integration (non-discrimination rules, access to the EC Internal Market freedoms) may be part not only of association agreements concluded on the basis of Article 310 EC, but also of partnership agreements concluded on the basis of Article 181a EC. Therefore, theoretically, one may argue that the future EU-Ukraine enhanced partnership agreement, which envisages elements of deep economic, political and legal integration, can be distinguished from the enhanced objectives which are typical of the EU association agreements (close political and economic co-operation, the establishment of a free-trade area, and far-reaching approximation of Ukrainian legislation to that of the EU).

Can the Ukrainian objectives achieved by other means than that of an association agreement?

In the light of accepting the hypothetical possibility of a new EU-Ukraine enhanced agreement being negotiated on a legal basis other than that of an association agreement, we propose to scrutinise whether the objectives of the EU-Ukraine relations within the framework of the ENP and, consequently, the objectives of the new EU-Ukraine enhanced agreement, could be met by another form of an agreement than that of an association agreement? We suggest starting from the analysis of the contemporary objectives of the Ukrainian policy towards the EU, which are highlighted by the Verkhovna Rada in its statement issued on 22 February 2007 concerning the launching of the negotiations on the new fundamental agreement between the EU and Ukraine.⁴⁸

The first and most desired objective of the Ukrainian policy towards the EU is to sign an agreement which envisages at least the potential membership of Ukraine in the EU in the medium- to long-term perspective in line with conditions articulated in Article 49 TEU. In the opinion of the Ukrainian political élite, such an agreement should resemble either the EAs with the CEE countries, or the SAAs with the Western Balkan countries. In the event of the signing of such an agreement, Ukraine would be ready to abide by a strong conditionality policy and actively participate in the cross-pillar co-operation with the EU in return for the remote prospect of full EU-

⁴⁷ Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579.

⁴⁸ *Supra* note 7.

membership. However, neither the recent statements of the top EU politicians⁴⁹ (apart from several Resolutions of the European Parliament), nor the objectives of the ENP, which are “distinct from the possibilities available to European countries under Article 49 of the Treaty on European Union”, envisage even the remote prospect of EU membership for Ukraine.⁵⁰

Clearly, one should admit that, while being distinct from the issue of the EU membership, the ENP “does not prejudge any possible future developments of partner countries’ relationship with the EU”.⁵¹ However, any possible future developments of the neighbour countries’ relations with the EU may not necessarily mean full EU-membership, but may mean either an association or close sectoral co-operation with the EU. Furthermore, even in the event that some neighbour countries are given a “green light” to launch the accession negotiations, their relations will no longer be governed by the ENP, but will be transferred to the fully-fledged accession process adopted in the course of the 2005 and 2007 accessions. For example, the Western Balkan countries which share an immediate border with the EU were omitted from the ENP from the very initial stage of this initiative. Instead, these countries embarked upon an accession-directed policy as “potential candidates” even before some of them had been recognised as “candidate countries”. In this case, in addition to the new enhanced framework agreement, intermediate relations between a candidate country and the EU will be governed by the Accession Partnership, issued by the Council through qualified-majority voting following a proposal from the Commission.⁵² Thereafter, based upon the Accession Partnership and annual Commission Regular Reports on the progress towards accession, and in line with positive latest accession experience, every candidate country will issue a National Programme for Adoption of the Acquis, which sets up a detailed adaptation action plan in accordance with national specifics.

Therefore, in our opinion, even in the event that the EU signs an association agreement with Ukraine, this agreement will not contain the long cherished membership objective and will not resemble either EAs or SAAs, but will be similar to the association agreements that the EU concluded with the other neighbour countries participating in the Barcelona Process.⁵³ In other words, the limited objectives of the ENP do not automatically imply the prospect of EU membership for Ukraine in the event of an association agreement being concluded between the EU and Ukraine.

The second objective of the Ukrainian policy towards the EU is to achieve deep economic integration with the EU through the setting up of a free-trade area and through gaining better access to the European Internal Market for Ukrainian nationals and undertakings. Even acknowledging that an association agreement is the most appropriate contractual framework to achieve these objectives, we may still look for

⁴⁹ The Commissioner in External Relations and ENP Benita Ferrero-Waldner stated on 14 June that the issue of the EU membership for Ukraine could be discussed, but only in the distant future. See at: www.liga.kiev.ua, 20 April 2008.

⁵⁰ Communication from the Commission to the Council and the European Parliament, ‘European Neighbourhood Policy – Strategy Paper’, COM(2004) 373.

⁵¹ General Affairs and External Relations 2809 Council meeting on 18 June 2007, 1065/07 (Presse 138), at p. 9.

⁵² Regulation 622/98 (O.J. L 85, 1998).

⁵³ It is named after Barcelona Declaration, which was adopted at the Euro-Mediterranean Conference on 27-28 November 1995. For a comprehensive account of the Barcelona Declaration, see F. Hakura, ‘The Euro-Med Policy: The Implications of the Barcelona Declaration’, (1997) 34 *CML Rev.* pp. 337-366.

other options already devised by the external EU policy. The overview of the external EU agreements displays various agreements which have pursued far-reaching economic integration objectives without being concluded under Article 310 EC. Good examples include the prior accession Agreements for the formation of a free-trade area between the European Economic Community and Portugal⁵⁴ (which entered in force on 1 January 1973) and Spain⁵⁵ (which entered in force on 1 October 1970). These agreements were based upon Articles 113, 114 and 228 EEC, and omitted any references to the association between the European Economic Community and these countries. The objective of setting up a free-trade area could be achieved through a development agreement. For example, the EU-Mexico Economic Partnership, Political Co-ordination and Co-operation Agreement known as a “Global Agreement”, which was signed on 8 December 1997 in Brussels and entered into force on 1 October 2000,⁵⁶ was concluded upon the basis of Article 133 EC and envisaged the objective of establishing a free-trade area. The Global Agreement pursues three major objectives: political dialogue; the reinforcement of bilateral co-operation; and the liberalisation of trade and services between the parties. The Global Agreement is based upon Articles 44(2), 47, 55, 57(2), 71, 80(2), and 133 EC in conjunction with the second sentence of Article 300(2) EC and the second subparagraph of Article 300(3) EC.⁵⁷ The Global Agreement sets out the target of establishing the European Communities-Mexico free-trade area in goods and services, with the subsequent opening of national procurement, capital and financial markets. Moreover, it emphasises the adherence of the parties to a regime of fair competition and to internationally recognised standards of intellectual property rights.⁵⁸ In addition to its strong economic dimension, the Global Agreement is characterised by its democratic/human rights and political dimensions. The Preamble of the Global Agreement underlines the parties’ “full commitment” to democratic principles and fundamental human rights, to principles of the international rule of law and to good governance.⁵⁹ The objective of the free-trade area between Mexico and the EU was achieved through the decision of the EU-Mexico Joint Council, which is empowered to issue binding-decisions. Similar to the Global Agreement, the future enhanced EU-Ukraine agreement may be an agreement with “special institutional arrangements”. This means that common institutions could be vested with powers to issue binding decisions which enable the establishment of a free-trade area between the parties. Therefore, the objective of establishing a free-trade area between the EU and Ukraine could be achieved not exclusively through an association agreement, but also through another agreement concluded in line with other legal bases than that of Article 310 EC. Even if such an agreement does not itself establish a free-trade area, it must envisage a competence of common institutions to issue binding decisions which would enable the creation of a free-trade area.

⁵⁴ O.J. 1972 L301.

⁵⁵ O.J. 1970 L182.

⁵⁶ O.J. 2000 L276. F

⁵⁷ It requires “other agreements establishing a specific institutional framework by organising co-operation procedures, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the procedure referred to in Article 251 shall be concluded after the assent of the European Parliament has been obtained”.

⁵⁸ Article 12 of the EC-Mexico TDCA.

⁵⁹ The Preamble to the Global Agreement refer to the Universal Declaration of Human Rights, the UN Charter; 1994 San Paulo EU Ministerial Declaration.

The third objective of the new EU-Ukraine enhanced agreement desired by the Verkhovna Rada is to ensure the direct effect of the provisions of this agreement in the EU legal order, and, consequently, to envisage the access of Ukrainian undertakings and nationals to the European Internal Market freedoms. In this case, it could be argued that the contractual format of the EU-Ukraine co-operation within the framework of the PCA is not exhausted yet. As we know from the ECJ decision in the *Simutenkov* case,⁶⁰ the nature and objectives of the EU-Russia PCA did not hamper the direct effect of its provisions in the EU legal order. In the opinion of the ECJ, the principle of non-discrimination in Article 23 (1) of the EU-Russia PCA has direct effect in the EU legal order. The ECJ explicitly stated that “the fact that [PCA] is thus limited to establishing a partnership between the parties, without providing for an association or future accession of the Russian Federation to the Communities, is not such as to prevent certain of its provisions from having direct effect”.⁶¹ In the *Simutenkov* case, the ECJ acknowledged the direct effect only of the provisions of the EU-Russia PCA. There were no rulings by the ECJ on recognising the provisions of the EU-Ukraine PCA as having direct effect. However, one may argue that some provisions of the EU-Ukraine PCA are capable of having direct effect because they are sufficiently clear and precise to be directly effective, and are not subject, in terms of implementation and effect, to the adoption of any subsequent measures.⁶² For instance, these include provisions on most favoured nation treatment of companies and the rights of a “key personnel” or “intra-corporate transferees”, and regarding the movement of capital.⁶³

Even if the ECJ does not recognise the direct effect of provisions of the EU-Ukraine PCA, the provisions of the future EU-Ukraine “enhanced” partnership agreement should have direct effect in the EU legal order in two cases. First, it is possible if these provisions are modelled on the equivalent provisions of the EU-Russia PCA which have already been recognised by the ECJ - in the *Simutenkov* case - as having direct effect. Second, the objectives of the future EU-Ukraine “enhanced” partnership agreement are likely to be identical to the objectives of the EU association agreements with third countries. With regard to this argument, the ECJ has compared the objectives of the Russia PCA and the Slovakia EA, and stated that the objective of the PCA to bring about “the gradual integration between Russia and a wider area of co-operation in Europe” does not preclude the direct effect of its provisions on the EU legal order. Therefore, one can argue that the access of the neighbour countries’ nationals and undertakings and the possibility for them to rely on the directly effective provisions of future enhanced agreements depends on the objectives of the future agreement, and the substance and scope of its provisions. Consequently, from the legal point of view, the new partnership agreement may go further than recent PCAs and offer better access for Ukrainian undertakings and nationals to the European Internal Market through the

⁶⁰ *Supra* note 47.

⁶¹ It is clear from the ECJ case law that when an agreement establishes co-operation between the parties, some of the provisions of that agreement may, under the conditions set out in paragraph 21 of the present judgement, directly govern the legal position of individuals (*Kziber* C-18/90 [1991] ECR I-199 paragraph 21, Case C-113/97 *Babchenini* [1998] paragraph 17, ECR I-183, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraphs 34 to 36).

⁶² For more about direct effect of the PCAs provisions, see R. Petrov, “Rights of third country/NIS nationals to pursue economic activity in the EC”, (1999) 4 *EFA Rev.*, pp. 235-253.

⁶³ See, by the same author, “The Partnership and Co-operation Agreements with the Newly Independent States”, in: A. Ott & K. Inglis (eds) *European Enlargement Handbook* (The Hague, Asser Press, 2002), pp. 175-194.

partial right of movement, the national regime for the establishment of Ukrainian undertakings in the EU, the principle of non-discrimination, etc. Clearly, the relevant provisions of a new enhanced EU-Ukraine agreement should be clear and precise in order to be considered as having direct effect as already indicated in the ECJ case law.

The fourth objective of the Ukrainian policy towards the EU is to sign a “transitional” agreement which could lead to a higher degree of co-operation with a short- to medium-term expiry deadline. To meet this objective, the Ukrainian side proposes to sign an association agreement with the prospect of the full EU-membership. Taking the objections and concerns raised above into consideration, it is unlikely that the EU will include any reference to EU membership in the text of the agreement. However, both an association and a new partnership agreement may contain references to the transitional nature of these agreements. In fact, it could be argued that, as a matter of general practice, association agreements which do not envisage EU membership for an associated country are less “transitional” in their nature and tend to establish a long-term format of relations between the EU and a third country (for example, association agreements between the EU and countries of African (South Africa), Asian (South Korea) and South American (Chile) regions).

Does Russia matter?

In conclusion, let us try to generalise and look at the potential scope and legal basis of the new EU-Ukraine enhanced agreement through the prism of some political and legal factors. In other words, let us try to answer the question: “Is the recent political environment favourable to the conclusion of a new enhanced agreement between the EU and Ukraine based upon Article 310 EC? To answer this question, several political factors should be taken into consideration. The first factor is the fact that the EU institutions consider the ENP as a long-running policy in relations with neighbour countries and an alternative to the full EU-membership. The Treaty of Lisbon transfers Article I-57(2) of the Draft EU Constitutional Treaty to the TEU as new Article 8(2), which states that the “Union may conclude specific agreements with the countries concerned [neighbouring countries]. 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.” This means that new enhanced agreements resulting from the ENP relations will constitute a separate group of EU external agreements which are distinguished by “reciprocal rights and obligations” similar to that which is mentioned in Article 310 EC. New Article 8(1) TEU emphasises that “The Union shall develop special relationships with neighbouring countries”. This provision is very much in line with the famous *Demirel* judgment, although it does not envisage a neighbour country participation in the EU system. The Treaty of Lisbon considers association and neighbourhood agreements as agreements concluded on separate legal bases.⁶⁴ While the signing and subsequent ratification of the Treaty of Lisbon is in the pipeline, the EU is in position to apply temporary solutions in order to offer to the neighbour countries a type of contractual relationship which is not

⁶⁴ Article 217 of Treaty on the Functioning of the European Union will provide “The Union may conclude an association agreement with one or more third countries or international organisations in order to establish an association involving reciprocal rights and obligations, common actions and special procedures”.

in contradiction with the logic of the neighbourhood policy towards third countries. We should ask the question as to what will happen if the EU concludes an association agreement with Ukraine before the Treaty of Lisbon comes into force. Will the legitimacy of the entire ENP suffer?

The second political factor is the fact that if the new EU-Ukraine enhanced agreement is signed as an association agreement, it might come into conflict with the objectives of the EU-Russia relations. Despite being outside the ENP, the Russian Federation remains a strategic partner of the EU. From the early 1990s, EU-Russian contractual relations have been the most advanced, in comparison to the other former USSR republics.⁶⁵ For instance, the EU-Russian PCA provided better opportunities for Russian undertakings and nationals to access the EC Internal Market. It contains hard commitments on behalf of the EU to ensure non-discriminatory treatment of legally-established Russian workers in the EU.⁶⁶ Furthermore, the EU-Russian PCA envisages the freedom of temporary movement of Russian nationals in the EU, albeit within a visibly limited scope.⁶⁷ Apparently, the provisions on the supply of services in the EU-Russian PCA are almost identical to the related provisions in the EAs and SAAs.⁶⁸ One of the possibilities that accounts for why Russia refused to participate in the ENP was that it was seeking similar, if not more favourable, arrangements with the EU than other neighbour countries had attained, without undertaking similar commitments in the field of the protection of democratic freedoms and human rights. In the meantime, the major objective of the Russian policy towards the EU has been to develop the four-dimensional common-spaces area with the minimum application of the EU conditionality policy. The EU-Russian PCA is due to expire in 2007 and negotiations on new enhanced agreement are due after the Commission obtains the mandate to begin negotiations on the new agreement with Russia, which could occur after the new agreement with Ukraine has been concluded. It is very likely that Russian negotiators will push for a new agreement which not only equals, but also exceeds the level of economic integration between the EU and Russia in terms of ensuring a comparable level of economic and political integration of Russia and the EU (the establishment of a free-trade area, access of Russian undertakings to the European Internal Market, non-discriminatory treatment of Russian nationals in the EU, and security and criminal police co-operation). The legal basis and scope of the new EU-Russia enhanced agreement remains unclear. After V. Putin came to power in 2000, the Russian government formally ruled out any aspirations of joining the EU. Instead, the Russian government officially prefers to develop bilateral contractual relations with the EU in order to maintain “its freedom to determine and implement its domestic and foreign policies” towards the EU.⁶⁹ The Russian Federation is interested in strategic partnership with the EU with purpose of “solving specific and considerable tasks which are of interest for both parties”.⁷⁰ At the same time, the EU-Russia strategic partnership should pursue the task of “consolidating Russia’s role as a leading power in shaping up a new

⁶⁵ R. Petrov, ‘The Partnership and Cooperation Agreements with the Newly Independent States’, in: A. Ott & K. Inglis (eds) *European Enlargement Handbook*, (The Hague, Asser Press, 2002), pp. 175-194.

⁶⁶ Article 23 of the EU-Russian PCA.

⁶⁷ Article 37 of the EU-Russian PCA.

⁶⁸ For example, see Article 55 of the EU-Hungary EA, and Article 55 of the EU-Macedonia SAA.

⁶⁹ Article 1.1 of the Russia’s Middle Term Strategy towards the EU (2000-2010), at: http://www.delrus.ec.europa.eu/en/p_245.htm, 20 April 2008.

⁷⁰ *Ibid.*, Article 1.2.

system of interstate political and economic relations in the Commonwealth of Independent States area”.⁷¹

In general, there are several scenarios for the future contractual relations between the EU and Russia when recent political and economic complications in relations between them are taken into consideration: 1) to extend the force of the recent EU-Russia PCA; 2) to amend the recent EU-Russia PCA in order to make changes in the bilateral relations (WTO accession); 3) to conclude a new enhanced partnership or an association agreement; and 4) to conclude bilateral agreements on sectoral co-operation similar to that which exists between the EU and Switzerland. In the opinion of Russian experts, any other way of development (absence of a framework co-operation agreement) would deteriorate EU-Russia relations and would lead to permanent trade and energy wars and to “consequent geopolitical confrontation between the EU and Russia”.⁷²

The Russian attitude towards the ENP is quite ambiguous. Russia does not welcome the EU’s attempts “to hamper the economic integration in the CIS, in particular, through maintaining ‘special relations’ with individual countries of the Commonwealth to the detriment of Russia’s interests”.⁷³ This means that far-reaching contractual agreements between the EU and the neighbour countries could not be welcomed by Russia since these relations will definitely hinder any further integration within the CIS. The recent stalemate in EU-Russia relations will, sooner or later, be eventually solved by the signing of a new bilateral agreement between the EU and Russia. Both parties put high hopes on this document. Former Russian President V. Putin stated that “all positive results of our [EU-Russia] relations must be fixed and developed in new fundamental agreement on strategic partnership Russia-EU”.⁷⁴ There are considerable hopes on the new EU-Russia agreement on the EU side as well. It appears that, in return for Russia’s long-term guarantees of secure energy supplies for Western Europe, the EU is ready to offer a free-trade area perspective for Russia. The European Commission President, José Manuel Barroso, publicly stated that, in the new EU-Russia agreement, “we are proposing [that] Member States give us a mandate for negotiating with Russia a comprehensive agreement that will bring a new quality to our relationship.” In particular, we propose to move towards a free-trade area, to be completed once Russia accedes to the WTO.” Whether Russia will be interested in this proposal remains to be seen. Taking into consideration the reluctance of Russia to enter into any association-relations with the EU or to comply with strong and binding conditionality and human rights clauses, one may predict that the future agreement is most likely to be an enhanced version of the PCA underpinned with the free-trade area. However, this attitude could be changed after the newly-elected President Dmitriy Medvedev comes to power in 2008. It is quite possible that the EU will not be eager to propose an association agreement with Ukraine at the sensitive time of the changing of the ruling élite in Russia in early 2008. It is most likely that the EU will take its time to

⁷¹ *Ibid*, Article 1.8.

⁷² S. Kashkin, & P. Kalinichenko, “Problem 2007” in relations between Russia and the European Union and its legal solutions, (2005) 3 *Journal of Foreign and Comparative Law*, p.64. See, also, M. Entin, ‘Strengthening legal grounds for developing Russian relations with the European Union, (2005) 1 *Azerbaijani-Russian Journal of International and Comparative Law*, pp. 152–154.

⁷³ *Supra note* 69, Article 1.6.

⁷⁴ Address of President V. Putin to the Federal Assembly on 26 March 26 2007, at: <http://kremlin.ru/mainpage.shtml>, 20 April 2008.

observe whether the new Russian government is drastically going to change its policy towards the EU. In this case, a new EU-Ukraine enhanced agreement concluded as an association agreement might contradict the realities of delicate political climate and the evolving nature of the strategic partnership between the EU and Russia. Whether the EU and the Russian Federation will allow it to take place remains to be seen.

Conclusion

To conclude, we have set out a number of considerations which lead us to believe that the scope and legal basis of the new EU-Ukraine enhanced agreement could differ from the generally-expected association agreement based upon Article 310 EC. Two considerations are relevant to this opinion. The first consideration is of a legal nature. From a legal point of view, an association agreement based upon Article 310 EC does not imply that Ukraine could be given a legal commitment on the part of the EU in order to obtain the possibility of joining the EU. Furthermore, the objectives of the EU-Ukraine co-operation in the short-term and medium-term perspective could be achieved either by an association or by a partnership agreement. The second consideration is of political nature. On the one hand, it would be better for the EU to conclude an enhanced agreement which should be in line with the neighbourhood clause (Article 8) in the TEU amended by the Treaty of Lisbon and Article 212 TFEU, which provides better procedural arrangement for a third country than Article 217 TFEU (all decisions by the Council relating to the conclusion of the partnership agreement can be taken by a qualified-majority while the conclusion of the association agreement would require unanimity). On the other, a “privileged” association agreement between the EU and Ukraine might be in contradiction with the objectives of the evolving EU-Russia strategic partnership.

Notwithstanding the thorny issue of the legal basis of the new enhanced agreement, more or less uniform consensus could relate to the objectives and the scope of the neighbourhood agreements, and the EU-Ukraine enhanced agreement in particular. The objectives of the neighbourhood agreements can be deduced from the general objectives of the ENP, which offers neighbouring countries the chance of participating in various EU activities through close co-operation in the political, security, economic and cultural fields. In accordance with logic of the ENP, the future neighbourhood agreements’ objectives will not be identical, but will differ in order to reflect the existing status of the relations between the EU and each neighbour country, its needs and capacities, as well as their common interests. The neighbourhood agreements will be preceded by jointly-agreed tailor-made Action Plans, which cover a number of key areas specific to each neighbouring country as provided by the ENP: 1) political dialogue; 2) economic and social development policy; 3) participation in a number of EU programmes (education and training, research and innovation); 4) sectoral co-operation; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; and 6) Justice and Home Affairs co-operation.⁷⁵ It is likely that neighbourhood agreements will reproduce both general and individually tailor-made objectives of the relevant bilateral Action Plans. Thus, the general objectives of the neighbourhood agreements could focus on close co-operation in

⁷⁵ Communication from the European Commission “European Neighbourhood Policy Strategy Paper”, COM (2004) 373 final.

political, security, economic and cultural fields with the eventual access of the neighbour countries to the European Internal Market. The individual objectives of the neighbourhood agreements would reflect the various strategic priorities of the EU towards specific neighbour countries. It is suggested that the new EU-Ukraine enhanced agreement will be a partnership agreement based upon various articles of the EU founding treaties with cross-pillar dimensions. In our opinion, if signed before the Treaty of Lisbon enters into force, a new enhanced agreement between the EU and Ukraine will be based upon Article 133 EC (trade issues), Articles 57(2), 71, 80(2), 75 and 84(2), 44(2) and 47(2) and 57(2) EC (access to the European Internal Market and mutual liberalisation), Article 181a EC. If signed after the Treaty of Lisbon enters into force, in addition to the above articles, new Article 8 TEU along with Articles 212 and 218 TFEU will constitute a legal basis of the new enhanced agreement between the EU and Ukraine. In this case, the Council will take all the decisions relating to the negotiation and conclusion of the new agreement by a qualified-majority. It is not excluded that a new EU-Ukraine partnership agreement with a new ambitious title which emphasises its enhanced character will satisfy the expectations of the Ukrainian political élite. For example, it could be called an “enhanced neighbourhood agreement” or “association partnership agreement” in order to emphasise its difference from the PCA and in order to underline a new level of political and economic co-operation between the parties without any immediate prospect of full EU-membership. Echoing the opinion that the hierarchy of external EU agreements is governed by politics not law,⁷⁶ we argue that the title of the future enhanced agreement between the EU and Ukraine will reflect the political realities of the EU policy towards Ukraine.

⁷⁶ S. Peers, “EC frameworks of international relations: cooperation, partnership, association”, in: A. Dashwood & C. Hillion (eds), *The General Law of EC External Relations*, (London, Sweet & Maxwell, 2000), pp. 160-178.