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The European Neighbourhood Policy:
A Framework for Modernisation?

Marise Cremona and Gabriella Meloni (eds)

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

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Abstract

This Working Paper offers a selection of the papers which were presented during the Workshop on “*The European Neighbourhood Policy – A Framework for Modernisation?*”, which was held on 1-2 December 2006 at the European University Institute of Florence under the auspices of the Academy of European Law. In particular, this Working Paper intends to explore from a trans-disciplinary perspective the objectives and instruments which have been devised in the European Neighbourhood Policy (ENP) and to consider in this light the capacity of the policy to promote a fundamental process of modernisation in the target countries. This is done in the conviction that a reconsideration of the coherence between instruments and objectives of the ENP is particularly urgent and it is likely to affect not only the effectiveness of the policy itself, but also the ability of the EU to create a circle of friends around its borders and, ultimately, its position in the international arena. To achieve this task, we have brought together the viewpoints of lawyers, political scientists and economists as they look at the wide range of questions prompted by the ENP. The first part of this volume is devoted to the analysis of the *Objectives* of the ENP. In this framework, a first paper will scrutinise the expectations from the new policy, then 5 more papers will examine the 3 major articulated objectives of the policy: stability, prosperity and security. The second part of the volume is focused on the *Instruments* of ENP. In particular, 3 papers will focus on legislative approximation and on the analysis of the tools which have been used in order to promote an unprecedented process of Europeanisation which goes far beyond the European continent. The last 2 papers have been devoted to the consideration of bilateralism-multilateralism and to the scrutiny of solutions which can be envisaged legally to develop the partnership with neighbouring countries in the framework of the ENP.

Keywords

European Neighbourhood Policy – Europeanization – Acquis communautaire – Harmonisation – EU-East-Central Europe – Mediterranean – Security/external

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Introduction

Marise Cremona and Gabriella Meloni

The European Neighbourhood Policy (ENP) is a very sophisticated policy which is promoting the use of a wide range of instruments for the realization of a large array of objectives. The EU is, in fact, engaging neighbouring countries by offering an economic incentive (a “stake into the internal market”), using legal tools (bilateral agreements and the adoption of the *acquis communautaire*) and putting in place soft methods of coordination (benchmarking, Action Plans, etc.) which are expected to contribute to the strategic goal of the EU within Europe and its neighbourhood (the creation of a ring of friends and of a zone of stability). However, the capacity to manage such a complexity and to fully capture the interrelations between its components has proved very complicated. In this framework, the expectations deriving from the launch in 2003 of the ENP risk being rapidly displaced by an increasing scepticism about the EU’s “optimistic rhetoric of integration” and by the awareness of its record in declaratory foreign policy.

The possible explanations of this phenomenon are multiple. Uncertainties as to the capacity of the EU to cope with new members and with internal problems of identity and definition are casting doubts on its ability to take on the challenges deriving from neighbouring countries. Latent disappointment has also been boosted by the asymmetry existing between the European Union, widely perceived as absorbed by its domestic preoccupations, and those bordering countries, who urge a better understanding of the nature and future of their partnership with the EU. However, we are persuaded that at the core of the emerging disillusionment there is the difficulty of operationalizing a policy which is multi-disciplinary in nature and of appreciating the inter-connections between its different levels. In this framework, the reconsideration of the objectives pursued by the ENP and, hence, of the instruments ascribed to their achievement seems particularly urgent, as far it is likely to affect not only the effectiveness of the policy itself, but also the ability of the EU to create a circle of friends around its borders and, ultimately, its position in the international arena.

To address these issues, a Workshop on “*The European Neighbourhood Policy – A Framework for Modernisation?*” was held on 1-2 December 2006 at the European University Institute of Florence under the auspices of the Academy of European Law. The Workshop explored from a trans-disciplinary perspective the objectives and instruments which have been devised for the ENP and considered in this light the capacity of the policy to promote a fundamental process of modernisation in the target countries. This Working Paper offers a selection of the papers which were presented during the Workshop with the aim of broadening the debate which is taking place in a

wide number of *fora* and contexts as the ENP continues to evolve and to attract attention and interest from academics and practitioners. As such it represents the “work in progress” of the writers and neither individually nor collectively does it attempt a comprehensive or final statement on the ENP. As was the Workshop itself, it is deliberately inter-disciplinary and we hope that one of its contributions will be to bring together the viewpoints of lawyers, political scientists and economists as they look at the wide range of questions prompted by the ENP.

The structure of this volume follows by large the structure of the Workshop organised at the EUI. In particular, the first part of this publication is devoted to the analysis of the *Objectives* of the ENP. In this framework, the parties’ expectations from the new policy were explored, followed by an examination of the three major articulated objectives of the ENP: stability, prosperity and security.

Expectations. This is a particularly interesting dimension as far as there are sometimes diverging expectations on the content of this policy which emerge not only among the different groups of actors who have contributed to mould the policy as it is now - the EU Commission, the Member States and the neighbouring States - but also among the different actors which constitute each group. In this volume, Roman Petrov has considered in particular the expectations of neighbouring countries. The aim is to answer the following questions: how much do these expectations converge? How are they evolving over time? What compromise is possible?

Stability. The EU has over time played a role as an external anchor to inspire the process of democratisation in neighbouring countries and it has sometimes been used as a reference to inspire processes of political change. Two papers – the first by Nathalie Tocci and the second by Rainer Arnold and Katerina Karpova - will be devoted to the first declared goal of the ENP. In particular, these articles will address the following questions: how much does stability covers also the more ambitious objective of democratisation? What is the role of the concept of Rule of Law in this context? What are the obstacles to democratisation and political change within the neighbours?

Prosperity. The whole system of the ENP hinges on the provision of an economic incentive, but very limited efforts have been dedicated to the definition of what a “stake into the internal market” might mean. Is this, in its present formulation, an effective incentive in order to induce reform in neighbouring countries? What are the main hypotheses and the possible specifications? Is it viable to offer different levels of integration to different countries within the framework of a single policy? What might be the feasibility and the impact on national economies of the eventual creation of a pan-European market? In this volume, a paper by Pierluigi Montalbano will address these issues in the framework of the EU-Med Partnership.

Security. Finally, two papers – the first by Dariusz Milczarek and Alojzj Nowak and the second by Andrzej Harasimowicz - will be devoted to the third declared goal of the policy: security, understood as it is in the ENP in the wider sense of the term. Are stability and prosperity seen as contingent to the overall and primary objective of security? What are the challenges which emerge in the context of the ENP? And what is the strategy ahead?

The second part of this volume explores the *instruments* of the ENP. In particular, legislative approximation, the mix between bilateralism-multilateralism and the capacity to devise new hypotheses on the structure of the relationship will be considered as

crucial tools for the development of a partnership with neighbouring countries able to blur the neat division between member and non member States.

Legislative approximation (Europeanisation). The literature on Europeanisation has been traditionally developed in relation to member countries, but how can the concept of Europeanisation be fine-tuned when dealing with non member countries without incurring into the risk of conceptual overstretching? If the absence of the “carrot” of membership can hinder the effectiveness of any toolkit based on conditionality, does the EU need to find together with neighbouring countries an alternative project able to motivate the partners? To what extent and how are neighbouring countries preparing themselves in order to adapt to EU law and institutions? How are they organising themselves in order to advance the process of legislative approximation? Three papers, by Gabriella Meloni, Elsa Tulmets and Viktor Muravyov, will address these issues both from a legal and from a political science perspective.

Bilateralism-multilateralism in the ENP. A paper by Anna Lytvyniuk will be devoted to issue of bilateralism-multilateralism as an instrument to promote ENP objectives. How does the ENP solve - if it does - the contradiction existing between the promotion of a *differentiated approach* and the recognition that a consistent *regional approach* is an instrument able to promote the creation of an area of security, stability and prosperity in the European Union’s neighbourhood? To what extent can problems be solved on a bilateral basis and to what extent do they need to be tackled on a regional basis?

The structure of the relationship. What kind of framework do we envisage for future relations with neighbouring countries? The “everything but institutions” solution is a catchy slogan, but how to substantiate it? Hard law or soft law? Christophe Hillion will consider the possible arrangements for the relations between the EU and neighbouring States, arguing that any agreement ‘below’ association would not be perceived as an ‘enhanced’ contractual relationship and making a case for the conclusion of an all-encompassing new form of agreement.

Certainly not all the preceding questions were resolved in the Workshop itself; nor can they all be covered in the papers which follow. However these questions form the context for the reflections of the contributors.

Section I

**The ENP's Objectives:
stability, prosperity and security**

1.

Legal and Political Expectations of Neighbouring Countries from the European Neighbourhood Policy

Roman Petrov

Signing of the EU-Ukraine Action Plan on 21 February 2005 marked the start of the new period in bilateral relations between the EU and Ukraine. The Action Plan resulted from the newly launched European Neighbourhood Policy (ENP) towards countries, which share common geographical, economic and political borders with the EU. The Action Plan pursues the objective to enhance Ukraine's partnership with the EU through enabling the access of Ukrainian undertakings to the EU Internal Market and other EU common policies.

Legal scholars and practitioners face the question; does the ENP provide an appropriate development in relations between the EU and neighbours? Do legal and political aims of the ENP respond to expectations of neighbour countries? This article endeavours to find answers to these contemporary questions. The article comprise of two parts. In the first part, I focus on the expectations of the neighbour countries before the emergence of the ENP. In the second part, I speculate whether the expectations of the EU neighbours have been adequately met by the ENP after its launch. In the conclusion I forecast measures which could improve the effectiveness of the ENP.

1.1 The expectations of neighbour countries before the emergence of the ENP

Before the emergence of the ENP the EU did not pursue a unified policy towards its close neighbours. Accession of countries of Central and Eastern Europe was one of the major priorities of the EU external policy before 2003. The EU equipped its "pre-accession" and "accession" policies with stronger conditionality and more stringent monitoring process to ensure that candidate countries implement the entire *acquis communautaire* before obtaining formal EU membership. Consequently, third countries wishing to integrate into the EU accepted the conditionality methodology of the latest EU enlargement as an adequate pattern of the "stick and carrot" EU external policy, which could eventually lead to full EU membership. Furthermore, the relative vagueness of Article 49 of the TEU "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union" and the fact that the absorption capacity was absent from elements of the Copenhagen criteria encouraged the far reaching European aspirations of some third countries.

The “pre-ENP” relations of the EU with neighbour countries were characterised by a clear geographical approach. *In the Mediterranean region*, therefore, the EU engaged the twelve Mediterranean countries¹ into ambitious Barcelona Process, which is a product of the Euro-Mediterranean Partnership, agreed by the EU foreign ministers and twelve Mediterranean partners in Barcelona in November 1995. The ultimate objectives of the Euro-Mediterranean Partnership are enshrined in the Barcelona Declaration.² These objectives aim at the establishment of a zone of peace, prosperity and stability in the Mediterranean region without formal EU membership.³ The ambitious goals of the Euro-Mediterranean Partnership are supplemented by the Barcelona Process, endorsed by the Common Strategy for the Mediterranean Region (adopted by the European Council in Santa Maria da Feira in June 2000). The Barcelona Declaration lays out objectives in three major areas: 1) the political and security; 2) the economic; 3) the social and cultural. Among the specific targets of the Barcelona Declaration are: a) the creation of a zone of peace and stability based on shared fundamental values, particularly the respect for human rights and democracy; b) the construction of a region of shared prosperity through the gradual establishment of a free trade area by the target date of 2010.⁴ These far-reaching objectives circumscribe the tentative boundaries of the *acquis communautaire* to be implemented by the Mediterranean countries.

The Euro-Mediterranean Partnership is implemented bilaterally through the EMAAs negotiated between the EU (EC and its Member States) and the twelve Euro-Mediterranean countries on the basis of Article 310 EC. The EMAAs aim to establish, over a transitional period, free trade in industrial goods and the progressive liberalisation of trade in the agricultural sector; liberalisation of trade in services; cooperation in political, economic, social and cultural matters, and justice and home affairs. Commentators consider the EMAAs ‘a half-way house between Lome and the EU, characterised by political dialogue, security ties, free trade and sectoral cooperation’, with an explicit objective of opening EMAA countries’ markets to intense European competition.⁵

Notwithstanding their common objectives, the EMAAs display explicit differentiation and conditionality of EU foreign policy. Each of the EMAAs shows specific EU policy approaches towards a particular Mediterranean country. Therefore, the scope of the *acquis communautaire* to be adopted by the EMAA countries is not uniform. The EMAAs may be arranged into several groups or “generations”. The EC has concluded “first-generation” association agreements with Turkey, Malta and Cyprus (which are not strictly EMAAs) with the purpose of establishing customs unions. In the end, only the EC-Turkey customs union has come into existence as a “consolation prize” for the delay

¹ Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey, the Palestinian Authority.

² Adopted at the Euro-Mediterranean Conference on 27-28 November 1995.

³ For a comprehensive account of the Barcelona Declaration see F. Hakura, “The Euro-Med Policy: The Implications of the Barcelona Declaration”, 34 CMLRev. 337-366 (1997).

⁴ The Euro-Mediterranean Partnership is accompanied by substantial financial assistance from the EU (principally the MEDA programme) and by European Investment Bank loans. See P. Holden, “The European Community’s MEDA Aid Programme: A Strategic Instrument of Civilian Power?”, 8 EFARev. 347-363 (2003).

⁵ F. Hakura, “The Euro-Med Policy: The Implications of the Barcelona Declaration”, 34 CMLRev. 337-366 (1997). at 352.

of its membership perspectives. Customs unions with Malta and Cyprus (the customs union with Cyprus was partly achieved⁶) were never established, though these countries eventually became full Member States. The EC-Israel EMAA occupies a special niche within the whole Euro-Mediterranean Partnership since it envisages the unprecedented mutual harmonisation of legislation in the course of the liberalisation of economic relations. The remaining EMAAs belong to the next group. Therein the *acquis communautaire* scope suits the comparatively limited objectives of Euro-Mediterranean Partnership which carefully avoids any perspective of EU membership. Therefore this section focuses on the EMAAs with Turkey, Israel, and Tunisia as the most typical examples of the abovementioned generation of EMAA.

“Pre-ENP” EU relations towards *the Western Balkan countries*, instead, were governed by the Stabilisation and Association Process (SAP).⁷ Its main objectives target the enhancement of the Western Balkan countries’ progress in economic and political development; regional trade and cooperation; and cooperation in justice and home affairs.⁸ The SAP supports the countries’ development and preparations for future EU membership by combining three main instruments: 1)SAA; 2) autonomous trade measures and 3) substantial financial assistance. By taking part in the SAP, the Western Balkan countries have agreed to abide to EU conditionality in return for the remote objective of full EU membership.⁹

The SAAs were devised as “a new type of EA”. They are association agreements concluded on the basis of Article 310 EC.¹⁰ Indeed, the SAAs resemble the EAs in their objectives, structure, institutional framework and sectoral cooperation, but avoid any vagueness inherent to the EAs, *inter alia* with regard to the nature and priorities of the approximation process. Experts consider the SAAs an ‘appropriate alternative to the EAs’ or a purpose-tailored association which offers the Western Balkan countries the tentative status of ‘potential candidate country’.¹¹ Regardless of political objectives, the SAAs provide a solid foundation for the implementation of the comprehensive *acquis communautaire* by the Western Balkan countries. The Preambles of the SAA emphasise the commitment of the SAA countries ‘to approximate [their] legislation to that of the Community’ which is one of the preconditions of their integration ‘into the political and economic mainstream of Europe’ and the acquisition of the status of candidate for EU membership. The SAAs are more explicit than the EAs in clarifying the formal criteria

⁶ For detailed account of recent EC-Cyprus trade relations see P. Koutrakos, “Legal Issues of EC-Cyprus Trade Relations”, 52(2) ICLQ 489-498 (2003).

⁷ The following Western Balkan countries take part in the SAP: FYROM, Serbia, Montenegro, Bosnia and Herzegovina, Croatia, Albania.

⁸ The Third Annual European Commission’s Report on the Stabilisation and Association process for South East Europe, COM(2004) 202/2 final.

⁹ Croatia and the FYROM have already filed their formal application for the EU membership and obtained the candidate country status.

¹⁰ At the moment of writing the SAAs have been concluded with the FYROM (COM (2001) 90 final) and Croatia (COM (2001) 371 final). The FYROM and Croatia SAAs entered into force on 3 May 2001 and on 12 December 2001 respectively.

¹¹ D. Phinnemore, “Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?”, 8 EFARev 77-103 (2003), at 78 -80. M. Cremona advocates that the EAs and SAAs are ‘more than trade liberalisation but closer integration with the EC’ in “State Aids Control: Substance and Procedure in the Europe Agreements and the Stabilisation and Association Agreements”, 9 ELJ 265-287 (2003), at 266.

for EU membership by stating that their future application for EU membership shall be considered in accordance with the requirements of the Article 49 TEU, fulfilment of the Copenhagen criteria, and the 'successful implementation of this Agreement, notably regarding regional cooperation'. Remarkably, the requirements of regional cooperation and regional stability compound the key factors for further development and enhancement of the association.

The SAAs are concluded for ten years in the case of the FYROM, and six years for Croatia.¹² The same periods of time are given to the Parties to 'gradually establish a free trade area in accordance ...and in conformity with those of the GATT 1994 and the WTO rules',¹³ and to approximate the SAAs countries' legislation to that of the EU.¹⁴

Finally, in the post USSR area the EC and the EU Member States entered into bilateral agreements with *all former Soviet republics*, except the three Baltic republics. The original EC/USSR Trade Development and Cooperation Agreement (TDCA)¹⁵ was superseded by new bilateral agreements with almost all the former Soviet republics shortly after the Presidents of Russia, Belarus and Ukraine signed an agreement establishing the Commonwealth of Independent States (CIS) and acknowledging the end of the Soviet Union.¹⁶ Until now, the TDCA continues to be the main tool for relations with Belarus and Turkmenistan.¹⁷ Owing to the fact that the CIS was not given a legal personality, the EU decided to enter into bilateral agreements with all former Soviet republics, except the three Baltic republics. Latvia, Estonia and Lithuania were invited to sign free trade agreements and subsequently the EAs. As a consequence they joined the club of candidate countries for accession. Partnership and Cooperation Agreements (PCAs) with Newly Independent States (NIS) were signed in spring 1994 with the Russian Federation, Ukraine, Kazakhstan and the Kyrgyz Republic. Moldova signed the PCA in July 1994 and Belarus in the December of the same year. PCAs with Armenia, Azerbaijan, Georgia were signed in April 1996, and with Uzbekistan that

¹² Articles 5 FYROM and Croatia SAA.

¹³ Article 15 FYROM and Croatia SAAs. Meantime, only Croatia (11/2000), Serbia and Montenegro (04/2003), Albania (09/2000) joined the WTO. Other Western Balkan countries have observer status to the WTO.

¹⁴ Article 1 FYROM and Croatia SAAs.

¹⁵ Council Decision of 26 February 1990 on the conclusion by the European Economic Community of an Agreement between the European Economic Community and the European Atomic Energy Community and the Union of Soviet Socialist Republics on trade and commercial and economic cooperation (O.J. 1990, L 68/1).

¹⁶ The CIS itself was formally established on 21 December 1991 when Presidents of eleven former USSR republics signed the CIS Agreement in Alma-Ata (Kazakhstan).

¹⁷ See M. Maresceau and E. Montaguti, "The relations between the European and Central and Eastern Europe: a legal appraisal", 32 CMLRev. 1327-1367 (1995). M. Mikiyevich, *Mizhnarodno-pravovi aspekty spivrobitnitstva Evropeyskogo Souzy z tretimy krainamy* (Lviv National University Press 2001). Neither the PCA with Belarus nor the Interim Agreement has yet come into force owing to the suspension of bilateral relations between the EU and Belarus. The EU has not recognised the Belarus Constitution of 1994 and decided upon a number of sanctions against Belarus in 1997. With regard to Tajikistan no PCA was proposed due to current instability in this country. The government of Tajikistan did not agree to apply the EU/USSR TDCA either. An Agreement on trade in textiles has been concluded with Tajikistan (Agreement between the European Economic Community and the Republic of Tajikistan on trade in textile (O.J. 1999, L 343/22). The PCA with Turkmenistan was signed in 1998 and is under ratification by the Member States. The Interim Agreement is not yet operational.

June. Nine out of eleven PCAs are currently in force.¹⁸ Certain political considerations inhibit the enactment of the PCAs with Belarus and Turkmenistan (signed in March 1998).¹⁹

The PCAs constitute a separate group of “partnership” agreements among “association”, “cooperation”, “stabilisation” and “development” agreements entered into by the EC.²⁰ As “*ad hoc* political creations”²¹ it is rather puzzling to fit the PCAs into the order of politicised EU external agreements.²² However, the PCAs may be classified as “entry-level” agreements that do not envisage membership, but instead endorse potential interest in the further development mutual cooperation between Parties. Preambles of the PCAs intentionally omit any reference to “the process of European integration” or “the objective of membership in the EU”, as these are provided in the EAs and SAAs.²³ Besides, the PCAs do not consider the establishment of a free trade area with the EC in the same way as the EMAAs. The PCAs are aimed solely at the development of close political relations; the promotion of trade, investment and harmonious economic relations between the Parties; the sustenance of cooperation and the support of efforts by any PCA nation to complete its transition to a market economy.²⁴ The PCAs’ objectives merely pave the way for further political and economic cooperation between the Parties ‘to provide a basis for mutually advantageous economic cooperation; to promote trade and investment harmonious economic relations’. The PCA objectives indirectly underline the transitional character of the agreements which could eventually lead to a new and improved form of cooperation. In this context, the third “generation” EMAAs objectives are more explicit. They promulgate the establishment of a free trade area and unequivocally state that the mutual liberalisation of trade and access to their respective markets is a major objective of the association.²⁵

¹⁸ 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).

¹⁹ For a more comprehensive historical overview of the EU/USSR and NIS relations see M. Maresceau (ed) *Enlarging the European Union: Relations Between the EU and Eastern Europe* (Longman, London 1997) and C. Hillion, “Partnership and Cooperation Agreements between the European Union and the New Independent States of the Ex-Soviet Union”, 3 EFARev. 399-420 (1998).

²⁰ For a concise classification of the EU external agreements see D. McGoldrick, *International Relations Law of the European Union* (Longman, London 1997).

²¹ This expression is used by S. Peers in “EC Frameworks of International Relations: Co-operation, Partnership and Association” in A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000).

²² Steve Peers insists that ‘The Community’s classification of agreements is governed by politics, not law’. *Ibid*, at 175

²³ Preamble of the Hungary EA.

²⁴ Article 1 EC-Ukraine PCA.

²⁵ See the Preambles and Articles 6 EC-Israeli and EC-Tunisia EMAAs.

It could be seen that prior the emergence of the ENP the EU neighbour countries enjoyed asymmetrical relations with the EU ranging from association agreements to partnership and cooperation agreements. Each of these bilateral relations implied different expectations on behalf of third countries – parties to the agreement. On the one hand, the EU has established the accession model based on strong conditionality and monitoring of the *acquis* implementation by candidate and potential candidate countries. On the other hand, the EU launched the Barcelona Process through which it intended to engage Mediterranean countries in close political and economic cooperation without any perspective of the membership. At the same time, the EU kept former USSR republics in the “waiting room” encouraging the latter to accelerate their democratic, political and economic reforms in order to upgrade from the “entry-level” PCA to a new and enhanced level of partnership with a possibility of the full membership in distant future. As a result of this policy, neighbour countries have approached different level of relations with the EU. The Barcelona Process countries signed association agreements with the EU and moved closer to the establishment of a free trade area with the EU. The PCAs have exhausted their potential of “entry-level” agreement for most of the PCA countries. Some of the PCA countries joined the WTO and have been recognized as market economy countries but a minority of the PCA countries remained outside active partnership with the EU due to failure of their internal political and economic reforms. Consequently, those PCA countries which fulfilled major conditions of the PCA called the EU to revisit the framework character of the PCAs and to start a dialog on new and much more enhanced level of cooperation with a perspective of much hoped EU membership.

1.2 Expectations of neighbour countries after the emergence of the ENP

Launch of the ENP in 2003 has not been warmly welcomed by all neighbour countries. “Pro-European” PCA countries (Ukraine, Moldova) became openly disappointed by absence of the membership perspective in the ENP. Russia decided to pull out from the entire ENP initiative and to establish bilateral “Common spaces” project with the EU. Mediterranean countries remained optimistic about a chance to develop stronger tailor made arrangements with the EU on bilateral level. Balkan countries became more comfortable in their membership expectations knowing that there is no competitive dimension of the EU external policy, which might hinder their possible accession into the EU.

In my opinion the reason for such diverse reception of the ENP by neighbour countries is concealed in its very foundations. The ENP is based on several core stones. One is tailor made approach. It means that neighbour countries may develop bilateral relations with the EU to satisfy own national political, economic and legal ambitions. Second is strong conditionality which means that in order to develop further bilateral relations with the EU neighbour countries are expected to follow stringent political conditionality which focuses on implementation of common democratic and rule of law values. The process of effective implementation of common values is to be closely followed by the EU. Monitoring procedure which has been successfully tested during the accession process is applied towards the neighbour countries. Third is absence of the EU membership objective. The ENP equivocally rejects any possibility of the membership

Instead of this the ENP offers to neighbour countries several “carrots”: “stake in the EC internal market”; upgrade of political cooperation; provision of additional financial assistance through the new Neighbourhood Financial Instrument,

The major challenge for the ENP is the fact that the ENP legal and political framework embraces various practices accumulated by the EU from the asymmetrical “pre-ENP” period. For instance, the ENP formalises the EU policy of conditionality borrowed from the latest accession as its major instrument and pre-condition of any progress in bilateral EU-neighbour country relations. While fully acceptable for the EU accession policy this approach could not be easily accepted by some neighbour countries, which are deprived from the perspective of the EU membership while participating in the ENP.

Another reason for problematic reception of the ENP is that it is difficult for some neighbour countries to accept the tailor made approach of the ENP. For example, “pro-European” PCA countries realised that the ENP placed their bilateral relations with the EU behind certain Mediterranean countries, which signed association agreement and moved closer to the establishment of a free trade area with the EU. Despite realistic possibilities and chances to enhance bilateral relations with the EU within the framework of the ENP some “pro-European” neighbour countries realised that their participation in the ENP require much more political and economic responsibility in order to upgrade their relations with the EU than it was in the “pre-ENP” period.

1.3 Case study on the potential scope and objectives of the ENA

The objective of this case study is to scrutinise possible differences in expectations of the EU and of neighbour countries from the future European Neighbourhood Agreements (ENA) between the EU and countries taking part in the ENP. The Commission’s Strategy Paper on the ENP envisages that the ENP comprises two stages: 1) fulfilment of bilateral Action Plans (AP) during the term from three to five years; 2) the negotiation of ENAs “to replace the present generation of bilateral agreements, when Action Plan priorities are met. Progress made in this way will enable the EU and its partners to agree on longer term goals for the further development of relations in the years ahead”.²⁶ For every neighbour country the ENA should have considerable political, economic and legal meaning. On the one hand, the fact of conclusion of the ENA represents an evidence of the successful realisation of the AP, and, therefore, the departure from the first level of the ENP to another more advanced level of cooperation with the EU. On the other hand, throughout the process of negotiating of each ENA both the EU and neighbour countries will endeavour to satisfy their prior expectations. It goes without saying that the further success in achieving objectives of future ENAs will certainly depend on a reasonable compromise and on at least partial satisfaction of expectations of both parties to the agreement. Therefore, we suggest scrutinising possible differences in expectations using the case of the future ENA between the EU and Ukraine. The EU-Ukraine ENA represents the excellent material for our case study from three aspects. First, Ukraine is considered one of key participants for the ENP, which emerged in response to accelerating pro European aspirations of the Ukrainian

²⁶ Communication from the European Commission “European Neighbourhood Policy Strategy Paper”, COM(2004) 373 final.

society. The very first AP the EU drafted with Ukraine and signed it immediately after the sweeping victory of the “Orange” revolution in early 2005. Third, the Commission obtained its first mandate to negotiate the ENA with Ukraine. Therefore, the case study will comprise two parts. In the first part, it will be discussed the scope of the ENA and its objectives in line with the EU policy towards Ukraine. In the second part, it will be endeavoured to foresee the position of the Ukrainian political elite with regard the objectives and scope of the future ENA. In the end, we shall discuss whether the example of the future EU – Ukraine ENA supports our arguments above.

1.4 Objectives and potential scope of the ENA with Ukraine to be proposed by the EU

Hitherto, relevant EU external documents have shed hardly any light on the ENAs’ objectives. The EU Constitutional Treaty contains separate Title VIII “The Union and its Neighbours”. Therein, it is provided that “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.... 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.” This provision, which is unlikely to enter into force in the nearest future due to continuing complications around the future of the EU Constitutional Treaty, shed very little light on the potential legal nature (either agreement on association or partnership or development) of the ENA and its objectives. The only assumption that follows from it is that the future ENA will have a cross-pillar character “founded on the values of the Union”. In our opinion, till the EU Constitutional Treaty enters into force the EU has discretion to choose a legal base for the ENAs within the existing EC primary legislation and level of relations with a third country.

However we argue that, meanwhile, objectives of the future ENAs can be deduced from the general objectives of the ENP, which offers to neighbouring countries the chance to participate in various EU activities through close political, security, economic and cultural co-operation. We deem that the ENAs objectives will not be identical, but will differ to reflect the existing status of relations between the EU and each neighbour country, its needs and capacities, as well as common interests. The ENAs are 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 cooperation; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; 6) Justice and Home Affairs cooperation.²⁷ We speculate that the ENAs will reproduce both general and individually tailor-made objectives of the Action Plans. Thus, the general objectives of the ENAs will focus on close political, security, economic and cultural cooperation with the eventual access of the neighbour countries to the EC internal market. Individual objectives of the ENAs will reflect various

²⁷ Communication from the European Commission “European Neighbourhood Policy Strategy Paper” COM (2004) 373 final.

strategic priorities of the EU towards specific neighbour countries. For instance, we expect that the ENAs with Mediterranean countries will emphasise enhanced regional cooperation with the purpose of ensuring cross-border cooperation, setting up energy networks and infrastructure, and the prevention of local conflicts. On the other hand, the ENAs with the PCA countries will prioritise the promotion of EU democratic values, justice and home affairs cooperation, and anti-corruption and regional security issues, all over a purely economic partnership. This is because the EU would prefer to have the NIS countries as neighbours with properly functioning democratic institutions, and with effective mechanisms for fighting illegal immigration into Europe. The stability and security within neighbouring countries is also important for the EU.

Below we attempt to forecast the objectives and scope of the ENA between the EU and Ukraine. Our approach is based on the presumption that the scope and nature of the objectives of the Ukraine ENA will replicate both the general and individual objectives of the EU-Ukraine Action Plan: 1) political dialogue, promotion of European and international democratic values, rule of law, human rights and fundamental freedoms, ensuring regional and global stability, as well as close cooperation in JHA; 2) social and economic development, encouragement of structural reforms towards a functioning and competitive market economy, limitation of state involvement in the economy and privatisation, liberalisation of services including financial sector, social and human development policies, fiscal management, monetary and exchange policy; 3) the participation in a number of EU programmes (education and training, research and innovation); 4) sectoral cooperation in the fields of energy, transport, environment and information society; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; 6) Justice and Home Affairs cooperation in issues of border management, migration, fight against terrorism, trafficking in human beings, drugs and arms, organised crime, money laundering and financial and economic crimes.

This forecast could be supported by the Council Conclusions “concerning the negotiation of a new enhanced Agreement between the EU and Ukraine” (the Conclusions).²⁸ The Conclusions underline that the future EU-Ukraine ENA will go beyond mere economic agreement like sectoral agreements with Switzerland. Instead, the future EU – Ukraine ENA will pursue clear economic and political objectives: “through this Agreement, the European Union aims to build an increasingly close relationship with Ukraine, aimed at gradual economic integration and deepening of political co-operation”. Political cooperation between the EU and Ukraine is likely to be of cross-pillar character with strong emphasis on security, and human rights issues since the final part of the Conclusions emphasises the objective of the ENP to “consolidate a ring of prosperity, stability and security based on human rights, democracy and the rule of law in the Union’s neighbourhood.”

After clarifying the potential objectives of the Ukrainian ENA, we seek to associate them with specific areas of cooperation, which could be envisaged in the agreement. The objective of political dialogue between the EU and Ukraine will target the establishment of democratic freedoms, the protection of human rights, free press and media in Ukraine. For this purpose, the Preamble of the Ukraine ENA will encourage Ukraine to follow EU values and principles as stated in the EU Constitution. Specific

²⁸ Council Conclusions “concerning the negotiation of a new enhanced Agreement between the EU and Ukraine” from 22 January 2007.

provisions of the Ukraine ENA will call on Ukraine to adhere to recognised international principles and standards (UN Charter, the principles of the Helsinki Final Act and the Charter of Paris, the Council of European and the OSCE documents). It is most likely that Ukrainian commitments to adopt the EU and international human rights and democracy acquis will be underpinned by a conditionality clause warning that the ENA could be terminated if Ukraine or the EU violates these values and principles.

The objective of social and economic cooperation will be the opening of access to Ukraine of the EU internal market. This could potentially envisage the establishment of a free trade area and a mutual recognition regime between the EU and Ukraine. In both cases, these objectives will be supported by conditionality and approximation clauses. The conditionality clause will foresee the access of Ukraine to EU internal market freedoms and the establishment of a free trade area on the progress of legislative and regulatory approximation and on the adherence to EU democratic values and principles. An approximation clause will impose binding commitments on Ukraine similar to those in the latest association agreements (SAAs). Besides, they will envisage specific stages and priorities of the approximation process. For example, the Ukrainian ENA would list priority areas of the EU acquis to be adopted by Ukraine within specific deadlines. One may argue that these priority areas will concern the adoption of the EU competition and state aid acquis, the establishment of the principle of non-discrimination, and the liberalisation of the Ukrainian services market. Upon the successful adoption of the priority EU acquis, Ukraine could be urged to adhere to the dynamic EU acquis within the spheres of future mutual recognition agreements. Since the Ukrainian ENA is unlikely to offer any prospective of EU membership, one may not expect binding commitments to adopt the whole “accession acquis”. Instead, it is most likely that Ukraine will be encouraged to continue the process of voluntary harmonisation within areas of mutual interest.

We expect that Ukraine’s participation in EU-funded programmes will concern areas of education, culture, and science cooperation. This means that Ukraine will be offered access to selected EU-funded programmes (Erasmus Mundus, Socrates), conditional on the observance of EU values and principles. Besides, the Neighbourhood Instrument will envisage the provision of informational, technical, and financial assistance to enable the success of the approximation of law programme in Ukraine, as well as closer cooperation in other areas, such as JHA and cross-border trade. This assistance will focus on the provision of information on the EU acquis, EU institutions, the organisation of training events for Ukrainian officials, and legal advice on the approximation process. Of course, all these types of assistance could be terminated by the EU in case Ukraine’s potential breach of the Union’s values and principles.

Sectoral cooperation will focus on areas of mutual interest to the EU and Ukraine. Taking into consideration the Ukrainian geographic position and the advanced level of industrial development, this will concern cooperation within JHA, control on illegal immigration, transport, energy, information society, environment, innovation, and space. The Provision on the ENA on sectoral cooperation will encourage Ukraine to embark upon the voluntary harmonisation of its legislation with the EU relevant sectoral acquis. Within areas of particular importance, such as environmental protection, competition, state aid, and the control of illegal immigration, the ENA could contain the relevant EU acquis in the annexes (if the ENA targets the creation of a customs union and/or advanced access of Ukrainian undertakings to the EC internal market freedoms).

In case that Ukraine does not manage to join the WTO at the time of ENA negotiations, it shall definitely envisage binding commitments for the Ukraine to adhere to the WTO acquis. For this purpose, the Ukrainian ENA will contain direct references to the relevant provisions of the WTO agreements in areas of customs, the trade in goods and services, the protection of intellectual property, and public procurement. Besides, the fact of joining the WTO must constitute a condition for launching free trade area negotiations between the EU and Ukraine. Otherwise, the ENA could lose its political and economic attractiveness for Ukraine.

The institutional framework within the ENA will also be determined by the objectives of the agreement. The objectives of advanced political dialogue between the EU and Ukraine will justify the existence of the three-pillar institutional framework: Council, Committee, and Parliamentary Committee. It is not likely that the ENA will provide for any degree of informal involvement of Ukraine into the EU decision-making procedure. Instead, it is likely to offer an enhanced exchange of information on the pending EU acquis. In return, Ukraine could commit itself to informing the EU on new laws and regulations which influence the neighbourhood partnership with the EU. We argue that objectives of the ENA will determine whether the EU/Ukraine joint institutions possess the competence to issue binding legal decisions. On the one hand, if the Ukrainian ENA targets mere political and economic partnership aims without precise mutual commitments to enhance the level of cooperation, it is likely that the EU/Ukraine joint institutions will have competence to issue non-binding decisions. On the other hand, if the Ukrainian ENA is to contain a perspective of the upgrade of mutual partnership (a free trade area, mutual recognition regime), the EU/Ukraine joint institutions could be given the power to issue binding decisions that are directly enforceable in Ukraine. This would give a decisive competence to the EU/Ukraine common institutions to undertake the export of the sectoral acquis into the Ukrainian legal system, by analogy with the EU-Turkey Association Council decisions.

1.5 Expectations on objectives and potential scope of the ENA from Ukraine

Ukraine proclaimed its European aspirations shortly after independence in 1991. Subsequently, Ukraine wholeheartedly subordinated its foreign and domestic policy to the objective of integration into international and European political and economic structures and, consequently, full membership of the EU. The general framework of the integration process was set up in the Strategy of Integration of Ukraine into the EU (Strategy of Integration).²⁹ The purpose of this document is to declare Ukrainian ambitions to join the EU as soon as possible. Besides, this document determines the major priorities of the executive power to fulfil the objective of ultimate EU membership.³⁰ Intrinsically, the Strategy of Integration proclaims that “joining the European political, economic and legal area and, subsequently, *acquiring associate*

²⁹ Edict (Ukaz) of the President of Ukraine “On approval of the “Strategy of integration of Ukraine to the European Union”, 11 June 1998, № 615/98.

³⁰ The initial deadline to qualify for full membership in 2007 was recently extended to 2011. The deadline to acquire WTO membership was set at 2003 (Address of the President of Ukraine to the Verkhovna Rada of Ukraine “European Choice. Conceptual foundations of the strategy of economic and social development of Ukraine in 2002 – 2011”, 20 June 2002, № 20-IV).

membership [emphasis added] of the EU constitute the major priority of the Ukrainian foreign policy in the medium term”.³¹ However, numerous political and trade complications in relations between the EU and Ukraine as well as the EU pre-occupation with the accession of the Central and Eastern European countries in the end of 90ies and early 00ies made the objective of the Ukrainian membership in the EU quite uncertain. In 2004 the Parliament of Ukraine (Verkhovna Rada) issued Law of Ukraine “On the All State Programme on the adaptation of Ukrainian legislation to EU laws” (Programme on adaptation),³² which represents a desperate attempt to accelerate the integration of Ukraine into the EU on the eve of the “Orange revolution”. This law envisages the export of the whole “accession acquis” into the legal system of Ukraine, since the objective of this law is the ‘alignment of the Ukrainian legislation with the acquis communautaire taking into consideration criteria specified by the EU towards countries willing to join the EU’. In other words, Ukraine readily agreed to implement the “accession acquis” on a voluntary basis, without any perspective of full EU membership. It should be noted that the EU never indicated that voluntary harmonisation would lead to the immediate recognition of Ukrainian perspectives to join the EU. Nevertheless, the Ukrainian government decided that the harmonisation/adaptation programme would be the most expedient way to step into one of waves of the European enlargement in the region of Eastern Europe.

The 2004/2005 “Orange revolution” gave fresh impetus to long-cherished Ukrainian aspirations to join the EU. New political elite headed by extremely popular opposition leader Viktor Yuschenko encouraged fresh pro-European sentiments among the Ukrainian nation. Emotional victory of Viktor Yuschenko in dramatic presidential race created impressive worldwide wave of sympathy towards Ukraine. Everyone in Ukraine expected that the EU may reconsider its prudent policy towards Ukraine and recognise the Ukraine’s perspective to join the EU sooner or later. However, on January 2005 President of the European Commission Jose-Manuel Barroso clearly stated that there is no perspective for Ukraine to join the EU in the nearest future. Instead, EU officials repeatedly articulated that the fulfilment of the EU-Ukraine Action Plan (AP) must be a priority for EU-Ukraine relations for the immediate future. Consequently, the effective implementation of the AP by Ukraine could lead to the enhancement of the EU-Ukraine relations in political, economic and legal domains.

On February 21st 2005 the AP was signed by the European Commission President Jose-Manuel Barroso and by Ukrainian Prime-Minister and popular “Orange revolution” leader Julia Timoshenko. The signing of the AP was welcomed by political elite in Ukraine though in somewhat skeptical way. It became clear that Ukrainian pro-European prognoses must be reconsidered in line with more pragmatic objectives of the AP. To support that view the EU side reiterated that the AP is the major framework document that shapes the format and the character of the EU-Ukraine relations in the nearest future. In order to enhance these relations Ukraine is expected to acknowledge and to implement the AP. The approximation of Ukrainian legislation to that of the EU constitutes one of the top AP priorities. Successful implementation of the AP could result in “a new enhanced agreement, whose scope will be defined in the light of the

³¹ *Supra* note 29, para 7 of the preamble.

³² Law of the Verkhovna Rada of Ukraine “About the All State Programme of adaptation of Ukrainian legislation to that of the EU”, 18th of March 2004, № 1629-IV.

fulfilment of the objectives of this Action Plan and of the overall evolution of EU – Ukraine relations. The advisability of any new contractual arrangements will be considered in due time”. In one year term Ukraine has achieved considerable progress in the implementation of the AP. The Commission acknowledged “overall progress made on the implementation of the EU-Ukraine Action Plan”, especially in areas of: the democratic election process; foreign policy and security cooperation; respect of human rights and rule of law; market economy reforms and energy cooperation.³³ It goes without saying that the driving force behind the progress in implementation of the AP by Ukraine was almost unanimous political will to move to a new level of bilateral relations with the EU and, consequently, to conclude a new enhanced agreement on association with the EU instead of the expiring and outdated Partnership and Cooperation Agreement (PCA).³⁴

The EU’s vision on objectives and the scope of the future ENA with Ukraine have not coincided with expectations of the latter. The Council Conclusions “concerning the negotiation of a new enhanced Agreement between the EU and Ukraine” omit the most desirable objective of the EU-Ukraine relations, which is anticipated by Ukraine for most the decade. The Council Conclusions do not mention the perspective of the Ukraine’s full EU membership, even in the remote future. Instead, the Council and the Commission merely acknowledge Ukraine’s European aspirations and welcome Ukraine’s European choice. Leaving the door a bit open the Council Conclusions carefully state that “a new enhanced Agreement shall not prejudice any possible future developments in EU – Ukraine relations”. The most important concern for the Ukrainian side could be the fact that the Council Conclusions do not clarify the legal base of the future enhanced agreement. In particular, it is not clear if the future enhanced agreement should be negotiated either under Article 310 EC on association or Article 308 EC on partnership (similar legal base to the PCA). For the Ukrainian side it is essential that the new agreement must represent the actual enhancement in mutual relations, and, therefore, to be negotiated under Article 310 EC on association. During the latest Ukraine - EU *troika* meeting in Kiev in February 2007 the Ukrainian government openly expressed its expectation that “*political association* [emphasis added] and economic integration” of Ukraine to the EU should constitute the major objective of the future enhanced agreement.³⁵

Therefore, taking into consideration the middle and long term objectives of Ukrainian policy towards the EU it is possible to envisage two possible frameworks of the future ENA, which could satisfy expectations of the Ukrainian political elite. In the first case, the future ENA is an association agreement based on Article 310 EC. It is important for Ukraine that this agreement contains a provision stating a remote possibility of the full membership of Ukraine in the EU similar to the EAs and SAAs. The future ENA should envisage the creation of a free trade area and enhanced level of political and economic cooperation between the EU and Ukraine. Within the economic domain it will be important for Ukrainian companies and nationals to obtain easy access to some

³³ Communication from the Commission to the Council and the European Parliament “On Strengthening the European Neighbourhood Policy: ENP Progress Report – Ukraine”, SEC(2006) 1505/2.

³⁴ The EU-Ukraine PCA expires in 2008.

³⁵ Interview of the Acting Foreign Minister of Ukraine Vladimir Ogryzko on February 2d 2007 www.liga.kiev.ua, last visited 20th February 2007.

freedoms of the EC internal market, especially the freedom of establishment. In the second case, the future ENA could omit so irritating for the EU reference to the possible Ukraine's membership in the EU. However, on the expense of absence of the future membership reference the substantive part of the agreement should provide deeper level of economic integration of Ukraine into the EC internal market. Of course, it should be concluded as agreement on association based on Article 310 EC. Further, the future enhanced agreement should foresee the establishment of a free trade area with the minimum list exemptions and derogations, and access of Ukrainian nationals and companies to freedoms of the EC internal market (movement and establishment). Possible analogy for this type of relations could be either the EEA Agreement between the EU and EFTA Member States or the EAs. In return for deep political and economic integration with the EU Ukraine would accept strong conditionality, binding approximation of laws clause and even binding commitments to adhere to the homogeneity type relations with the EU. In both cases, the new enhanced agreement between Ukraine and the EU should exceed objectives and scope of association agreements already concluded by the EU with Mediterranean countries – parties to the ENP (for example, agreements with Tunisia, Morocco, and Israel). Failure to achieve these objectives (association agreement, deep free trade area, level of cooperation higher than between the EU and Mediterranean countries – parties to the ENP could be regarded as a failure to fulfil far reaching pro European objectives by the ruling “post – Orange revolution” political elite.

To conclude, we can set out a number of considerations which stem out of the case study above. First, our case study indicates that expectations of the EU and Ukraine on objectives and the scope of the future ENA are not similar. The EU mandate on the future ENA purposefully omits any references to the possibility for Ukraine to obtain the full EU membership even in the remote future. Furthermore, the EU mandate is not clear whether the future ENA with Ukraine will be concluded as an association agreement or a partnership agreement. Second, the EU intention to support “political and economic reforms, aimed at further strengthening democracy, stability and prosperity in the country” indicate the application of the conditionality policy with regard to Ukraine in the future ENA. It could be believed that in opinion of the EU the future ENA with Ukraine could be another “transitional” agreement aimed at encouraging democratic and market reforms in Ukraine, establishing a free trade area under stringent application of the conditionality clause. Third, after achieving considerable successes in the implementation of the AP the Ukrainian political elite believes that the future ENA should represent a completely new and enhanced level of bilateral relations with the EU, which, for sure, must be more advanced than existing association arrangements between the EU and some Mediterranean countries – participants to the ENP. In other words, the Ukrainian foreign policy towards the EU accepts the policy of conditionality, further pro-European democratic and market reforms, deeper cooperation with the EU in areas of security and justice as an intrinsic element of bilateral relations with the EU, which will eventually lead to the accession process.

1.6 Conclusion

In conclusion it could be argued that the EU asymmetrical external policy towards neighbour countries in the “pre-ENP” period with strong emphasis on the accession process as a model for the “stick” and “carrot” approach caused major discrepancies in perceiving the ENP by some neighbour countries today. The very foundations of the ENP could create misunderstanding and certain false expectations between the neighbour countries. The conditionality policy borrowed from the “accession process” does not correspond to the tailor made approach and relatively weak political and economic “carrots” offered by the ENP. Future enhanced ENAs provide an excellent chance for both the EU and neighbour countries to overcome these discrepancies.

Conducting a case study on the objectives and scope of the future ENA between the EU and Ukraine we noted a considerable impact of the accession policy on the expectations of the parties to this agreement. On the one hand, the EU considers appropriate to employ various elements of the “pre-accession process” in the future ENA (conditionality clause, three-pillar cooperation, voluntary harmonisation of legislation). On the other hand, the Ukrainian political elite considers the application of various elements of the “pre-accession process” as indispensable condition for turning the future ENA to a full fledged road map of the accession of Ukraine into the EU. Our study is also useful in highlighting possible compromises, which could be found in the course of the future ENA negotiation process between the EU and Ukraine. For example, certain objectives, like a free trade area and liberalisation of mutual markets of the future ENA indisputably suit interests of the both parties, and, therefore, will certainly appear in the text of the future ENA. It would seem logical therefore to conclude with the statement that the forthcoming process of negotiations of the future ENAs will represent a new stage in the realisation of the entire ENP and will lay down new fundamentals of the EU external policy towards third countries, which are not likely to join the EU in the nearest future.

2.

Can the EU Promote Democracy and Human Rights Through the ENP? The Case for Refocusing on the Rule of Law

Nathalie Tocci

2.1 Introduction

The European Neighbourhood Policy (ENP) in theory represents an important step forward in placing democracy and human rights at the forefront of the EU's foreign policy priorities. This is clear when comparing and contrasting the ENP's aims to previous initiatives, including the partnership and cooperation agreements (PCA) with the eastern neighbours and the Euro-Mediterranean Partnership (EMP) and association agreements with the southern neighbours. A greater specification of human rights and democratic standards together with the institutionalization and operationalization of joint ownership entrust the ENP with greater potential to promote democracy and human rights within its neighbours. Yet delving deeper into the Policy's aims, mechanisms and procedures suggests not only that its democracy and human rights ambitions are not fully met, but also that these ambitions arguably cannot be met by a policy of its kind. It is thus suggested that the Union may be best advised to set its democracy and democratization rhetoric aside, while paying greater substantive attention to another of its milieu goals: the promotion of the rule of law.

2.2 Promoting democracy and human rights through the ENP: the potential

From the outset, the ENP placed a visibly higher emphasis on democracy and human rights compared to its predecessor policies both to the east and to the south. This was due to two principal factors related to the south and the east respectively. Vis-à-vis the south, the approaching tenth anniversary of the 1995 Barcelona Declaration – which was aimed at supporting peace, democracy, human rights, dialogue, cooperation and development – made EU actors appreciate that the logic underpinning the EMP was proving faulty. The expectation that higher growth rates and economic development would automatically and endogenously spark political reform and democratization was manifestly not being met as pointed out by the successive UNDP Arab Human Development Reports (UNDP 2002, 2003, 2005 and 2006). In countries such as Tunisia, economic modernization was taking place, yet so was a strengthening of authoritarian rule. In countries such as Egypt, Morocco or Jordan, stagnant economic development coexisted alongside with a restructuring of authoritarianism and persisting violations of human rights and fundamental freedoms (Cavatorta and Volpi 2006; Pioppi and Guazzone 2004). Adding to this, the ENP was borne out of a geopolitical

context in which mounting security threats triggered by the 11 September 2001 attacks in New York and Washington and then followed by the subsequent attacks in Madrid in 2004 and London in 2005 induced policy-making quarters in Europe to delve deeper into the interconnectedness between acute security threats and the wider political, economic and social contexts from which these derive (Joffe 2007). Hence, at the level of policy debate as well as in official documents and declarations, growing attention has been paid to the links between deficient democracies, human rights violations, escalating conflicts, international law violations, ill-governance and unequal development on the one hand, and security threats such as terrorism, weapons proliferation, organized crime and illegal migration on the other. The attempt to uncover the 'root causes' of security threats was made explicit in the EU's 2003 Security Strategy, as well as in the documents founding the basis of the ENP in 2002-4 (European Council 2003, Commission 2003 and 2004a).

With respect to the eastern neighbourhood, EU actors and in particular member states such as Germany, Sweden, the United Kingdom as well as the Commission felt the growing urge to capitalize on the success of the enlargement in inducing the democratic transformation of Central and Eastern Europe (Comelli, Greco and Tocci 2007). Enlargement has often been cited as one of the EU's most salient foreign policy success (Smith 1998, Shimmelfennig and Sedelmeier 2005). This is because of its effectiveness in inducing the democratization and modernization of formerly communist countries in the political, institutional, economic and social spheres (Sedelmeier 2006). In this context, several EU actors undertook the challenge to resolve a fundamental conundrum besieging European foreign policy, i.e., the fact that the EU could not enlarge indefinitely, yet at the same time it wished to apply, *mutatis mutandis*, the lessons of enlargement to its neighbourhood (Wallace 2003; Smith 2005). In particular it wished to make use of the logics of conditionality and social learning successfully applied to the CEECs to encourage democracy, human rights and economic reform and development in its neighbours further afield (Kelley 2006).

Indeed, the ENP's policy outputs have placed greater and more explicit emphasis on democracy and human rights compared to previous initiatives towards the neighbouring south and east. In the context of the EMP, the Barcelona Declaration solemnly declared the parties' commitment to international law, the UN Charter, the Universal Declaration of Human Rights (UDHR), democracy and the rule of law. In addition, article 2 of the Euro-Med association agreements defined democratic principles and human rights established under the UDHR as 'essential elements' of the agreements, which could justify their suspension if the violation of these essential elements constituted a material breach (article 79). Likewise, article 2 of the PCAs defined democracy, international law, human rights and market economy as essential elements, also allowing for the possibility of suspension in the event of a violation of these essential elements. Yet the Union has never made use of these articles to exert conditionality on the democracy and human rights fronts in its southern and eastern neighbours.

By contrast, the ENP's documents and the ensuing Action Plans agreed with five eastern and seven southern neighbours as of March 2007 highlighted the country-specific democracy and human rights reform priorities there. This has been truer for some neighbours than for others. In neighbours such as Ukraine, Georgia, Moldova and the Palestinian Authority, the Action Plans specified detailed reform priorities in the areas of institutions and governance, elections and electoral laws, human rights and

fundamental freedoms, and the development of civil society. In the case of the Action Plan with the Palestinian Authority, one of the primary declared purposes of the ENP was precisely that of promoting political and economic reform (Commission 2004b, 1). Following the agreement on the Action Plans, the Union also established specific human rights sub-committees to benchmark and monitor progress in democracy and human rights in several of its neighbours. In other words, the ENP seemed to indicate a qualitatively different degree of EU attention to democracy and human rights. It mentioned explicitly reforms in the constitutional, electoral, judicial, governance and civil society domains where the EU and the neighbours should seek to further reform. It also established the necessary institutional mechanisms to monitor and benchmark progress in these domains.

In addition, particularly since 2004 the ENP has placed much emphasis on the idea of 'joint ownership'. The notion of joint ownership and partnership has been part of the EU lexicon for many years. As the names suggest, it was a strong rhetorical component of both the multilateral Euro-Mediterranean *Partnership* to the south and the bilateral *Partnership* and Cooperation Agreements with the east. Yet more so than in these previous initiatives, the ENP embedded the notion of partnership both in the rhetoric and in policy practice. At the declaratory level, the ENP explicitly considered development and reform as the 'sovereign responsibility' of the neighbours (Commission 2006, 4), believing the EU should not 'impose' but should 'support the region's own reforms' (Ferrero Waldner, 2007, 4). At the level of policy procedure, the notion of partnership was entrenched in the process culminating in the publication of the Action Plans. The Action Plans were in fact the product of negotiations between the Commission and the neighbouring countries, where both parties selected and agreed upon the democracy and human rights priorities (amongst other areas) requiring change, reform and support. This stood in contrast to the Commission's Progress Reports and the Accession Partnerships in the context of enlargement. Although the ENP Action Plans and Country Reports were visibly modelled on the Accession Partnerships and the Progress Reports (Tulmerts 2006), in the case of enlargement, the EU alone monitors, benchmarks, judges and recommends reforms within the candidate countries.

The idea of partnership could in principle be a value-added to the EU's democracy and human rights strategies. This is in view of the oft-repeated argument that political change must be home-grown and cannot be imposed from the outside. More specifically, the colonial legacy of several member states in the southern Mediterranean has discredited the Union's legitimacy in 'imposing' reforms from outside. Doing so would be perceived especially in the south as a revival of the European '*mission civilisatrice*', which proclaimed the virtues of free trade, Christianity and science that would bring peace, order, and civilization to the rest of the world. Avoiding these historical normative traps, the ENP Action Plans carefully selected those reform priorities identified by the neighbours themselves. Hence, Jordan's Action Plan mentioned the reforms in governance, the judiciary and the public sector pinpointed by the regime; Moldova's Action Plan espoused Chisinau's 'National Human Rights Action Plan'; and Morocco's Action Plan approved the reforms in the fields of decentralization, modernization of the prison system, and family law set forth by the Monarchy. Beyond agreement with ruling officials, the ENP also sought the involvement of civil society and the private sector. In the case of Georgia for example, many NGOs took an active interest in the ENP, feeding their input and suggestions

regarding the democracy, human rights and conflict resolution priorities in official negotiations over the Action Plan.¹ The civil society focus of the ENP was strengthened further in the Commission's 2006 Communication, which aimed at enhancing people-to-people contacts especially in the fields of education, research and culture (Commission 2006). The ENP would thus spur and support the political reforms which resonated within the official circles, the private sectors and the civil societies of the neighbouring countries themselves.

2.3 ENP, democracy and human rights: the limits

These arguments praising the ENP's potential, in one form or other, have been part of the ENP's official discourse (Commission 2003, 2004a, 2006). In relation to these arguments, there has also been a burgeoning academic and policy literature on the ENP (Emerson 2002 and 2004; Tocci 2004; Dannreuther 2004; Smith 2005; Emerson Noutcheva and Popescu 2007). Much of this literature has criticized the evolution of the Policy, while praising its potential. Yet a closer look at the Policy suggests not only that the ENP's democracy and human rights rhetorical aspirations are well above its potential, but also that the ENP *cannot* engender meaningful change in these areas.

A notion that underlies the ENP's emphasis on partnership is the idea of shared values. This is the assumption that the EU and its neighbours in principle share the same commitment to the values of democracy, human rights, the rule of law and international law. The implication of this premise is that the serious deficiencies in the neighbourhood in the areas of democracy and human rights are primarily rooted in problems of capability and implementation, rather than of intent and ideology. The Union does acknowledge that implementation of these shared values in the neighbourhood is all but secured. Indeed one of the principal aims of the Policy is precisely that of supporting the commitment in practice to the common values of democracy, human rights, the rule of law and good governance. This commitment in practice is to be strengthened primarily through political support, economic aid and technical assistance, including the new governance facility within the European Neighbourhood and Partnership Instrument (ENPI), setting aside funds destined to those countries that demonstrate commitment in furthering political reforms.

When delving deeper into the reasons why the implementation of these shared values is rarely met, the Commission has introduced an implicit distinction between 'willing' and 'hesitant' neighbours. It has argued that it would help those neighbours who are 'willing' to reform to do so faster, better and at a lower cost to their citizens; while at the same time providing greater incentives for those countries that are still 'hesitant' to engage in deep and comprehensive political reform (Commission 2006, 1-2). The Commission has thus categorized its neighbours in a manner that cuts across the typical eastern versus southern divide, basing itself on the difference between willing and hesitant countries when it comes to the substantive commitment to shared political values. In the former category, the neighbours are 'willing' to see a strong EU involvement in supporting their internal political transformation towards democracy and the greater respect for human rights and the rule of law. In the latter category, the

¹ Interview with Open Society Institute representative, Tbilisi, April 2006.

neighbours are 'hesitant' to allow the EU to spur democratic and human rights reforms by interfering in their sovereign competencies. However, in both cases the Union has not questioned the neighbours' general commitment to these values in principle. Yet as argued below, while the absence of this questioning does not hinder in principle the ENP's potential vis-à-vis the willing neighbours, it lies at the heart of why the ENP is likely to fail in promoting democracy and human rights in hesitant partners.

2.4 The contradictions in the ENP's democracy and human rights promotion within 'willing neighbours'

The willing neighbours include countries such as Georgia, Lebanon, Moldova, Palestine and Ukraine. These are all countries which have openly and officially called for a deeper and more structured EU involvement in the fields of governance and political reform. In these cases, the ENP's democracy and human rights aspirations could be met in principle. Yet the operationalization of the Policy towards these countries demonstrates how this potential has been watered down considerably. This has been for three main reasons, two of which relate to the insufficient incentives or 'carrots' offered by the ENP, and the third relates to the nature and scale of the democracy and human rights problems faced by these countries.

With the exception of Palestine and Lebanon, the willing countries (Georgia, Moldova and Ukraine) are also those with a declared aspiration to join the Union. Yet the political message sent by the ENP is precisely that of exclusion, explaining the lukewarm support the ENP received in these willing neighbours and the EU's ensuing difficulty in promoting political reform there (Smith 2005). In its early days, the architects of the ENP appreciated the importance of fudging the question of EU inclusion versus exclusion. In 2002, former Commission President Prodi stated that the neighbourhood policy would not start with the promise of membership but would not exclude eventual membership either (Prodi 2002). Yet over the course of 2003-6, in view of the EU's internal crisis over the failed Constitutional Treaty and the rampant 'enlargement fatigue' within several 'old' member states, EU actors became increasingly explicit in ruling out any accession prospects for the neighbours. The ENP was in fact presented precisely as a substitute for membership (Emerson 2004). This generated major disincentives in countries such as Moldova and Ukraine. No matter how valuable the ENP instruments and incentives were, to the extent that they were offered and perceived as second-class substitutes to full membership, they were not appreciated by these neighbours. This generated strong feelings of alienation from the EU and from its appropriated 'political values', dramatically reducing the EU's prospects to encourage democracy and human rights through the second-class ENP.

The case of Ukraine is an interesting example in this respect. The orange revolution in 2004-5 is often depicted as one of the first successes of the nascent ENP in promoting the political transformation of the neighbourhood towards greater democracy and respect for human rights. Yet delving deeper into the evolution of the regime change in Ukraine and the role played by the EU in it, the ENP acted more as an obstacle than as a promoter of change. When Javier Solana stepped into the crisis in November 2004, the ENP was reportedly not used as an argument and incentive to persuade the parties to

rerun for elections in December that year.² Although the ENP Action Plan was agreed with the Kuchma regime earlier in 2004 and was held back in view of the electoral irregularities in the country, this use of negative conditionality was hardly the trigger for the electoral break-through in December. On the contrary, during the run-up to the December elections, Prodi infamously declared that the Ukraine had as much of chance of joining the EU as New Zealand did, weakening the pro-European/pro-Western front led by Victor Yushchenko (Barysch and Grant 2004).

Aware of this major disincentive effect, by late 2006 the Commission both distanced itself from any parallels drawn between enlargement and the ENP, and it reverted back to the 'constructive ambiguity' over the membership question which characterized the early years of the ENP. The Commission (2006, 2) thus stated that while 'distinct from the enlargement process', the ENP would evolve 'without prejudging how their (i.e., the neighbours') relationship with the EU may develop in the future, in accordance with Treaty provisions'. In a non-committal way, the Commission thus left the door open to those European neighbours which could apply for membership under article 49 of the Treaty of the EU.

Turning to willing neighbours that are either not interested in joining the Union (Palestine and Lebanon) or that, while aspiring to membership, view the ENP as a potentially valuable step towards closer EU integration (Georgia), the ENP's stalled potential to promote democracy and human rights is due to the insufficient incentives on offer. In principle, the ENP includes measures which are long-run and structural, and which are distinctively more valuable than those offered under previous EU initiatives. These instruments should be bolstered further if the Commission's 2006 proposals are accepted. These benefits would include enhanced bilateral agreements (allowing for 'deep free trade' between the EU and neighbouring countries); a multilateral free trade 'neighbourhood economic community'; multilateral cooperation on energy and transport; bilateral visa facilitation for categories of travellers; an enhanced EU role in regional cooperation schemes such as the Black Sea Economic Cooperation; an enhanced ENPI with a budget of €11.2bn in 2007-13, and the activation of the European Investment Fund (EIF) with a grant-making budget of €12.4bn (2007-13) in collaboration with the lending facilities of the international financial institutions active in these regions. These enhanced benefits should help realize the ENP's potential to spearhead reforms in the democracy and human rights domains.

Yet the most valuable trade and visa aspects of this 'ENP Plus' are directed primarily at Ukraine and Moldova, rather than at the South Caucasus and the Arab Mediterranean. The 'governance facility' component in the ENPI is meagre, standing at €300m in 2007-13 for the eastern and southern neighbourhoods combined. Finally, when it comes to the Palestinian Authority these wide-ranging benefits in the fields of trade, visa policy, and people-to-people exchanges not contemplated because of the non-state, non-sovereign and conflict-ridden Palestinian context. Moreover, following the election of Hamas in January 2006, the ENP towards Palestine has been essentially frozen, eliminating all prospects for the Policy to spur democratic and human rights reforms in the occupied territories.

² Interview with Council official, January 2005, Brussels.

Finally and related to this last point, the political and economic problems encountered within the willing neighbours are such that the ENP can at most work at the margins of the monumental transformation endeavours present on the ground. Within the willing neighbours, some countries are marred by conflict and do not exercise full sovereign control over their territory (Lebanon, Moldova, Georgia and Palestine), others have undergone recent regime changes and revolutions (Georgia and Ukraine), and some are still far off from establishing an independent state, let alone a democratic and human rights abiding one (Palestine). Hence even if the Commission's proposals for an enhanced ENP were adopted, operationalized and implemented across the eastern and southern neighbourhoods, these may well remain below the level of support and engagement necessary for the EU to meaningfully contribute to democratization and the promotion of human rights in its problematic neighbourhood.

2.5 The contradictions in the ENP's democracy and human rights promotion within 'hesitant neighbours'

The ENP's low potential to support democracy and human rights within willing neighbours dissipates entirely when turning to the hesitant ones. This far more numerous group of countries includes Algeria, Armenia, Azerbaijan, Belarus, Egypt, Israel, Jordan, Libya, Morocco, Russia, Syria and Tunisia. Here, the Union's unquestioned belief in the theoretical sharing of values, including democracy and human rights, is far more doubtful. Indeed the 'hesitation' of these neighbours may not simply be due to their reluctance to allow the Union to meddle in their internal affairs. Far more seriously, their hesitation may well be due to the strong internal disincentives in these countries to pursue wide-ranging political reforms.

Hence, if this fundamental assumption about shared political values does not hold, then the entire design of the ENP's democracy and human rights dimension towards hesitant countries collapses. If values are not shared, and if political shortcomings are the product of existing incentive structures and not of deficient capabilities, then how can the ENP, which is based on partnerships with existing regimes, affect democracy and human rights in these countries? If democratization and human rights call for a redistribution of powers, the legal and institutional installation and protection of rights and the enhancement of political participation, it is unclear how EU relations with states, whose nature and modus operandi often negate these developments, can meaningfully promote these values. At most, EU (and US) policies can and have inspired formal changes in the political set-up of these countries. Yet these changes, approved and implemented by existing regimes, far from being the first steps towards a genuine process of democratization, have acted as the necessary means to re-legitimize existing structures and practices in the light of changing regional and international contexts (Guazzone and Pioppi 2004, Schlumberger 2006).

Alongside the questionable commitment to democracy and human rights of the neighbouring regimes, is the extent to which the EU itself prioritises these values. The EU's aims in the neighbourhood can be labelled as milieu and possession goals (Wolfers 1962). Milieu goals aim at transforming the environment by promoting peace, democracy, human rights, the rule of law, international law and sustainable development in the neighbourhood. By contrast, possession goals aim at protecting and

advancing narrower EU (and member state) interests in the neighbourhood such as commercial relations, migration and border management or energy security. An ironclad distinction between milieu and possession goals cannot be made. The advancement of allegedly milieu goals may underlie the pursuit of narrower possession objectives. Imposing sanctions or waging war in the name of democracy and human rights can cover aims such as protecting energy security. Engaging in the neighbourhood may be viewed as an attempt to engender hegemonic control. This is in fact a widespread Russian view of the EU's Neighbourhood Policy. Moreover, milieu and possession goals may well be compatible if not mutually reinforcing in the long-term. Indeed the Union's management of migration flows, its fight against organized crime and terrorism and its securing of reliable energy supplies all depend on the rule-bound transformation of its neighbourhood.

Yet milieu and possession goals may instead compete or appear to compete in the short to medium term, in specific contexts and at particular points in time. In the short-run, the destabilization that comes with an effective pursuit of transformationist milieu goals may hinder the pursuit of possession goals. An EU supported democratic revolution in a formerly authoritarian state may well be accompanied by instability and chaos, that may reduce the short-run prospects of controlling the legal flow of migrants or the fight against organized crime. Entrenching human rights in a neighbouring country constrains the free hand of regimes to curb crime and terrorism through human rights abuses such as torture. Encouraging free and fair elections in a neighbouring state may lead to the rise to power of a government whose policy contrasts with the EU's commercial interests or its energy demands. In other words, while in principle and intuitively a democratic and human rights environment in the neighbourhood is also one that serves the Union's more narrowly defined interests, in specific cases and at specific points in time this may not always hold true or be perceived as such by EU actors.

Even more seriously, the means employed to pursue milieu versus possession goals may well contrast, rendering the concomitant pursuit of these two sets of objectives incompatible. This is primarily because possession goals rely upon close cooperation with third states, whose authoritarian nature often represents the primary obstacle to a democratic and rights-based transformation of the neighbouring milieu. Hence irrespective of the complementarity or contrast between milieu and possession goals in and of themselves, while the former rests on the logic and means of conditional engagement in order to induce transformation, the latter relies on the means of cooperation with status quo actors in order to secure EU interests. The tension this gives rise to renders the pursuit of these two sets of goals incompatible. As put by Gillespie and Youngs in relation to the southern Mediterranean: 'it becomes difficult to develop a democracy promotion strategy that does not conflict with efforts that require consent and collaboration in other areas' (Gillespie and Youngs 2002, 6). In other words, if cooperation is the necessary route to pursue EU possession goals, yet cooperation should also act as the conditional incentive to induce political transformation in the neighbourhood, then the inherent credibility of EU policies aimed at democracy and human rights dramatically reduces.

What emerges is thus a fundamental contradiction inherent in the EU's goals on the one hand to 'promote a ring of well-governed countries to the East of the EU and on the borders of the Mediterranean', and on the other hand to enjoy 'close and cooperative relations' with these countries (European Council 2003). The same contradiction lay at

the heart of the EMP, which aimed to create an 'area of dialogue, exchange and cooperation', which would also 'require a strengthening of democracy and human rights' (Euro-Mediterranean Conference 1995). If close and cooperative relations are instrumental to the fulfillment of the Union's possession goals, they cannot also act as the means to induce progress in democracy and human rights in the neighbourhood. Unsurprisingly, the EMP manifestly failed at supporting the EU's milieu goals in the southern neighbourhood.

Worst still, in the current geopolitical environment and in light of this potential contradiction in the pursuit of milieu and possession goals, the problem for the ENP exacerbates given that, if faced with a choice, EU actors often prioritise possession over milieu goals. This is true both for the east and for the south. In both neighbourhoods, the securitization of possession goals such as energy, migration, borders, terrorism and organized crime in the 21st century have come to trump the pursuit of more diffuse and long-term aims such as democracy and human rights.

In addition, the Union seems to be increasingly dependent upon several of its neighbours, well aware that cooperation with these countries is necessary to fulfil many of its possession objectives. For example, in the energy realm alone, EU dependence on its neighbours is manifestly on the rise, as EU demand is rising, northern European supplies declining, while Gulf supplies are being directed increasingly towards the east. Indeed, EU oil dependence is set to rise from 52% to 85% and gas dependence from 36% to 63% by 2030. This entails not only a growing EU need to establish close and cooperative relations with its neighbours, but also a strengthening relational power of those neighbouring states, which do not always share the EU's values of democracy and human rights. Pursuing milieu goals through the use of conditional engagement would in fact require the EU to extricate itself from relations of dependence with its neighbours, particularly if the domains of dependence are precisely those which are viewed by EU elites and publics as vital to the Union's security interests.

It is within this context of shifting EU priorities that over the course of the ENP's evolution the Union has placed decreasing levels of attention to the logic of political conditionality aimed at democracy and human rights. It has instead paid greater attention to cooperation with its neighbours aimed at jointly tackling problems of migration and border management (e.g., through the focus on readmission agreements), securing reliable energy supplies (e.g., through energy and transport networks), or the fight against organized crime and terrorism (e.g., through intelligence sharing). This shift has been fudged through the discourse of 'shared values' and 'joint ownership'. Indeed while Prodi (2002) initially spoke of specifying 'Copenhagen proximity criteria' to engage in serious political conditionality towards the neighbourhood, by the time the Action Plans were drawn up, most reform priorities and benchmarks in the areas of democracy and human rights were either vaguely mentioned or omitted altogether. In most cases, the Action Plans limit themselves to calling open-endedly for the 'freedom of the press', 'the involvement of political parties' or 'the development of civil society', without defining clearly specific reforms, benchmarks and timelines for implementation (del Sarto 2006). The Action Plans also fail to mention key problems such as widespread torture in Tunisia, the lack of separation of powers in most southern Mediterranean neighbours or the human rights situation of the Palestinian minority in Israel. Furthermore, the vague political priorities which are mentioned in the Action Plans are unconnected to the delivery of the EU benefits on offer, voiding the ENP of its

potential to induce democracy and human rights through the use of political conditionality.

To illustrate the arguments raised above, it may be useful to contrast the ENP with the enlargement policy, which was instead notoriously successful in inducing the political and economic transformation of the candidate countries. Beyond the different local contexts and points of departure of different countries (in economic, political and social terms), the contradiction between milieu and possession goals was far more diluted in the case of enlargement. First, the Copenhagen criteria applied to the candidate countries became a prime source of identification for the EU itself. It is in fact interesting to note that with the (notable) exception of minority rights, the Copenhagen political criteria amount to the very same values pinpointed in the Treaty of the EU (article 6(1)) to define the political identity of the Union itself (de Witte 2002). As such, it became imperative for EU actors that the candidates expected to enter the Union would align themselves to the fledging political identity which the EU had chosen for itself. Second and linked to this, in the case of enlargement, the EU's possession and milieu goals were largely interdependent. This was because the Union – intent in welcoming the CEECs into its fold – could not afford to incorporate undemocratic and illiberal regimes which would acquire a say in the internal evolution of the Union itself. As such, the EU's conditions were far more specific and binding, the incentives were stronger and conditionality was more credible. Third, in the case of enlargement, the EU did not ground its policies on the notions of partnership and shared values. The name of the game was precisely that of aiding the candidates to internalize, adopt and implement the EU's values (and make these their own), as well as its rules and regulations. This allowed the EU to play an effective transformative role through conditionality (Grabbe 2005). As such, the ENP, which is modelled on a precedent whose incentives and objectives are so fundamentally different, is most likely to fail in the pursuit of milieu goals such as the promotion of democracy and human rights.

The ENP's preference for the pursuit of possession goals through cooperation has induced EU actors to refocus their attention to democracy and human rights by exploring a second channel of EU influence: the logic of social learning (Checkel 2001). The logic of learning (as opposed to that of conditionality) hinges on close, cooperative and comprehensive contacts between EU actors and key stakeholders in neighbouring countries. These contacts engender an uncoerced process of change within the neighbours through exposure to different norms and codes of action. If successful, change inspired by social learning is far deeper and long-lasting, in so far as it rests on a genuine transformation of values, interests and identities, rather than on a time-contingent recalculation of the costs and benefits underpinning policy choices when faced with external incentives. Hence, the Commission's proposals to align neighbouring countries to CFSP declarations, to allow the neighbours' participation in ESDP operations, to explore means to associate the neighbours to several EU agencies and institutions, to strengthen inter-parliamentary cooperation, to deepen EU diplomatic presence in the neighbourhood, and to develop educational, youth, cultural and civil society exchanges. Yet notwithstanding these efforts at deepening the neighbours' exposure to the EU's normative framework, the degree of contact these initiatives will give rise to is likely to remain far below what would be necessary to induce democracy and human rights through social learning (Tocci 2007).

2.6 A way forward: the rule of law

If the Union is committed to fostering political change beyond its current and future borders, a way forward could be to redirect its normative ambitions. This does not entail reversing to quick-fix solutions, such as the promotion and support of anti-systemic opposition political elites within neighbouring countries, which the EU views as more compatible with its ideology and values. Real change must necessarily come bottom-up and from within. All the EU can do, and it would indeed be a momentous contribution if constant and consistent effort was exerted in this direction, would be to create a conducive rule-bound context for political change beyond its borders. This would entail refocusing on the promotion of the rule of law.

Focussing on the rule of law would require the entrenchment of Community and international law in the bilateral relations the EU establishes with its neighbours. The EU is already well placed to do this given that, as opposed to state actors, most of its foreign policies are articulated and carried out through contractual relations with third states. Contractual relations, of which the European Neighbourhood Agreements (or the Enhanced Agreements) may become the deepest and most comprehensive expression, are well versed to allow the EU to mainstream and refocus its attention on the rule of law. This is because these contractual ties cut across pillars, delving into a wide variety of policy areas and affecting a wide range of institutions, laws and administrative structures and procedures within neighbouring countries.

In the context of contractual relations, the rule of law would thus act both as the means through which the Union pursues its external relations, and the milieu goal that it could reasonably promote through rule-bound cooperation. Avoiding the tension between the pursuit of milieu versus possession goals in fact, the channel of influence through which the Union could promote the rule of law would be neither conditionality nor social learning. A third mechanism through which EU contractual relations could influence the rule of law is the passive enforcement of EU rules (or 'rule application') (Olsen 2002). Passive enforcement entails pursuing cooperation only when the rules governing a contractual agreement are respected by all parties. Rather than altering incentives by changing the recipient's cost-benefit calculus through conditionality, passive enforcement hinges on a system of rule-bound cooperation. Within this framework, contractual obligations constitute the necessary rules which make mutually beneficial cooperation possible. In other words, the rule of law would be both the objective and the means through which this objective is pursued. For passive enforcement to work there must be a clear set of legally defined and definable rules embedded in EU contracts. Moreover, these rules must be viewed by the third party as a necessary price that comes with EU engagement. When this occurs, a far more subtle process of change is activated compared to that of conditionality. The cost initially attributed by the third party to the respect of the rule may reduce or disappear through the experience of respecting the rule (i.e., experimental learning).

Particularly in view of the EU's reluctance to engage in political conditionality towards the neighbourhood and the difficulty to induce change through social learning beyond the sphere of enlargement, passive enforcement can engender the rule of law within and between neighbouring countries. While not amounting to democracy and the respect for human rights per se, the establishment, respect and consolidation of the rule of law

would act as the necessary baseline and prerequisite for home grown democracy to emerge and flourish from inside within the Union's trouble-ridden neighbourhood.

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3.

The ENP and the Promotion of the Rule of Law in Neighbouring Countries: the Case of Ukraine

Rainer Arnold and Kateryna Karpova

3.1 The concept of rule of law. Diversity of concepts: a common core of elements

3.1.1 If the Rule of Law is to be promoted in international relations, especially in the European area, it is important to know, which notion of Rule of Law.

Rule of Law is not a totally uniform concept throughout Europe and can differ in national and supranational law¹. Each of these legal orders has developed its own Rule of Law concept but it seems that RL core elements are in common. The process of constitutional law convergence in Europe seems to be most significant in Rule of Law and fundamental rights, both linked together in a modern perspective.

Within the New Neighbourhood Policy a Europe-wide accepted Rule of Law concept must be the basis of EU external activities which can be found only by a comparative view. It seems not conform to the aim of stabilizing the political order if the EU would unilaterally impose an own Rule of Law concept on the neighbour states which would considerably differ from that developed in the internal order of the states concerned. Nor would it be possible to rely on a purely internally orientated concept of the neighbour country. It seems that a sufficient legitimacy to make a certain concept obligatory for the partner countries can only be found in a Rule of Law concept which is, in its core elements, accepted throughout Europe and thus corresponds to European constitutional principles.

The method to find out the contents and the singular elements of this concept must be similar to that applied by the Court of Justice when formulating fundamental rights²: a comparative view is the first step followed by a critical approach; the different solutions developed in the singular member states as well as on the supranational level should be examined under their ability to satisfy the finalities of EU external policy.

What the Luxembourg Court has elaborated with a view to the internal EU/EC legal order as a supranational Rule of Law concept in application of this method³ can be transferred to the EU external relations sphere. It is helpful in this context that the

¹ See Rainer Arnold, *Rechtsstaat und Normenkontrolle in Europa*, Festschrift für Bodo Börner, Jürgen Baur, Peter-Christian Müller-Graff, Manfred Zuleeg (eds.), 1992, pp. 7-28.

² ECJ 11/70, *Internationale Handelsgesellschaft*, Rep. 1970, 1125/3

³ See Manfred Zuleeg, *Die Europäische Gemeinschaft als Rechtsgemeinschaft*, *Neue Juristische Wochenschrift (NJW)* 1994, pp. 545

national concepts of Rule of Law are largely converging, even including that of Great Britain where the range of this concept is, for historical reasons, more limited in comparison with that of the continent.⁴

3.1.2 Core elements of Rule of Law in modern European Constitutional Law (which comprises national constitutions, EC/EU basic primary law and the ECHR) are: security of law, legality of executive action, constitutionality of legislation, primacy of constitutional law, often assured by constitutional jurisdiction, value orientation in form of fundamental rights.

Rule of Law refers predominantly to internal law but requires also the observance of external rules of international and supranational law. Besides that it seems legitimate to introduce Rule of Law also on the international level. This concept is no longer of purely internal importance but has become a principle also in interstate relations.

It is well known that Fundamental and Human Rights have got an external dimension with the international governance safeguarding the individual rights. This former internal matter has been internationalized because a particular need for the protection of human beings by the community of nations has turned out to be decisive for these rights. Values have been recognized as basic elements also in international law. This is expression of a change of legal thinking in this area. State voluntarism is no longer the highest criterion for the international order; an objective public order of an international dimension is about to appear. Fundamental Rights are even regarded as *ius cogens*.⁵ The same can be said about Rule of Law which is also value-orientated and has similar functions as Fundamental and Human Rights. The international community takes over a guarantee for the observance of Fundamental Rights as well as of Rule of Law.

Traditionally, Rule of Law has been considered a concept valid in internal law. Conformity of executive and judicial action with legislation as well as conformity of legislation with the constitution is seen as the core function of this principle.

With the growing internationalization of the state Rule of Law has also adopted an international dimension: as it has already been stated, observance of law means today obedience to internal as well as to international law.

Rule of Law as a concept valid also on the international level comprehends in particular the basic principle of *pacta sunt servanda* which constitutes a sort of international "Grundnorm". The observance of treaties but also of customary law and of general principles is a normative duty under international law. Though the normative system of state and international community is differently structured, the first mainly vertical, the second mainly horizontal, Rule of Law has obtained its place also in the horizontal system.

A different question is the promotion of Rule of Law by international treaties. That an international treaty is a possible instrument to oblige another state to observe Rule of Law in its internal order means to establish the obligation for the *internal* observance of

⁴ See Geoffrey Marshall, *The Constitution: Its Theory and Interpretation*, in *The British Constitution in the Twentieth Century*, Vernon Bogdanor (ed.), 2003, pp. 56-59.

⁵ See Jochen Abr. Frowein, *Jus cogens*, in: *Encyclopedia of Public International Law*, Rudolf Bernhardt (dir.), Vol 3, 1997, pp. 65-69

this principle by instruments of international law. Thus, the two aspects explained above are of importance in our context.

3.2 The core elements more in detail

3.2.1 Security of Law means on the one hand that laws (legislation) must be clear, without vagueness so that they can be clearly recognised and followed by the individual, on the other hand that a position legally obtained must be certain, in principle not revocable (except under conditions established by legislation). Security of Law has an *objective* and a *subjective* dimension.

The objective dimension refers to the stability of a legal order as a framework for society: fulfilling a function of creating and maintaining order by normative means, by establishing rules for state and individual behaviors and by determining its limits. Guaranteeing an efficient protection of the individual by jurisdiction includes- as an objective element of Rule of Law- to lay down time limits for the access to courts, to limit the possibilities for appeal, to establish procedural rules, to ensure by this "law peace" (Rechtsfrieden).

Controversies have to be sufficiently treated by judges, independent arbiters applying law, but must be subject, within an appropriate time, to a final decision realizing as far as possible justice. Security of Law means also that the normative order set up for giving justice must be efficient and needs to be limited in time in an appropriate way.

The subjective dimension of Security of Law as an element of Rule of Law assures the confidence an individual must have in law: if the individual obtains a legal position according to existing law, he/she must have the security to rely upon it. This is a very decisive element of law and is reinforced by fundamental rights. Grounds for revocation must be formally determined by legislation.

But legislation permitting to revoke legally obtained positions must be in conformity with the Constitution: this means the interest of the individual must be reconciled with the interest of the public.

The prohibition of retroactivity of law also results from the principle of security of law in its objective and subjective dimension. If a law imposing a duty on a person having restrictive effects on the individual's sphere, would be declared valid for a past period, this would be not conform with the confidence in the legal order required by Rule of Law. Therefore such retroactivity is normally excluded. A strict prohibition is recognized in the field of penal law and also in other areas where individual positions are affected.

A legislative effect diminishing for the future an individual right established in the past can be allowed if a strict outweighing of individual and public interests gives preference to the later.

Thus, the prohibition of genuine retroactive effects of legislation is a Europe-wide recognized principle.⁶

⁶ See Droit constitutionnel, dir. Louis Favoreu, 8th ed., 2005, pp. 857-858

It is evident that Security of Law is an important stabilizing factor, in particular with importance for transformation systems.

3.2.2 Legality means conformity to law as expressed in legislation. This element, historically a first step in the development of Rule of Law, is the very basis of a Rechtsstaat submitting the executive to Parliament, to the will of the people as sovereign formulated by its representatives.

In the historical development of Rule of Law the first important step was to submit the executive - in former times the prerogative of the monarch - to Parliament, what was a victory of the people over the crown. The "formal" concept of Rule of Law, based on legality of the executive, is characterized by Rousseau's dictum: "la loi est l'expression de la volonté générale". The concepts of Sovereignty of Parliament (in England⁷ and, to some extent, in France) is a specific, maybe too far reaching consequence of this concept.

By abstract laws created by Parliament, arbitrariness of the executive is, to an important extent, avoided. The principle of democracy is here linked with Rule of Law.

Legality requires an efficient judicial system controlling administrative matters, in form of administrative courts (introduced in many of the new democracies) or by civil law courts applying specific procedural rules. In Central and Eastern Europe a modern tendency is visible in conformity with the process of Rule of Law: the establishment of administrative tribunals for settling controversies with the executive.

This function is no longer mainly in the hands of civil courts which would be not in grade to be aware of the rapidly growing body of specific administrative law. With increasing state activity in highly technical areas as environmental law, biotechnology, consumer protection (which is in part of administrative nature) administrative law is of increasing importance. This promotes the idea of own administrative tribunals. The Ukraine has introduced administrative jurisdiction in 2005 while a minor number of states (e.g. Hungary, Slovak Republic) are following the traditional pattern of civil court jurisdiction in administrative matters, on the basis of specific rules of their civil procedure law⁸.

Of course, an overall development of the judicial system is indispensable for Rule of Law. Reform of justice is a keyword in the context of this principle.

3.2.3. Rule of Law in its modern approach comprises the constitutionality of legislation which reflects the primacy of the Constitution over whatever public power. Sovereignty of Parliament is replaced by Sovereignty of Law in its basic form, the Constitution. It is true what the Conseil constitutionnel says: La loi n'exprime la volonté générale que dans le respect de la Constitution (1985)⁹. The intrinsic connection between Rule of Law and Democracy becomes evident also in this aspect.

Supremacy of the Constitution is a characteristic of the modern Rule of Law concept which developed after the 2nd World War. It is a value-based concept which is linked to

⁷ See A.W. Bradley, The Sovereignty of Parliament, in *The Changing Constitution*, Jeffrey Jowell / Dawn Oliver (eds.), 4th ed. 2000, pp. 23 – 58.

⁸ See Bernd Wieser / Armin Stolz, *Vergleichendes Verwaltungsrecht in Ostmitteleuropa*, 2004.

⁹ 85-197 DC considérant 27, text in *Recueil de jurisprudence constitutionnelle 1959-1993, décisions réunies par Louis Favoreu*, 1994, pp. 238, 241.

the supreme value, the dignity of man. Modern constitutions in Central and Eastern Europe have expressly referred to this value indicating by this an advanced form of legal thinking¹⁰. But even if human dignity is not expressly mentioned in a constitution, it is implicitly present as a very basis for the anthropocentric character of modern European constitutionalism. Fundamental rights take their ideological origin from this value and constitute a «comprehensive value order» as the German Constitutional Court formulated.

Supremacy of the Constitution means that all public power has to protect the values as expressed in fundamental rights. Also the legislator is submitted to the observance of the Constitution and has to act in an individual-related orientation.

By the fact that a Constitution (normally) has been legitimated by the people consenting to it in a referendum, it is a basic democratic document. People identifies by this with values and the fundamental orientation of anthropocentrism¹¹. Constitutionalism makes fundamental rights efficient, and restricts the possibilities to limit them. The principle of proportionality and the guarantee of the very essence of a fundamental right are essential mechanisms of modern constitutional thinking¹². Rule of Law takes these constitutional requirements up and transfers them into the sphere of administrative law which is the branch of law in closest relation to the individual.

3.2.4. Legislation controlled by a court, especially a constitutional court, in its constitutionality is the highest form of RL, “un perfectionnement de l’Etat de droit” (Turpin). Constitutional Courts in new democracies are of highest importance for the development of RL, factors of stability preventing unresisted political dynamism.

Most of the Central and Eastern Europe countries have created constitutional courts as own tribunals, according to the so-called Austrian - European model¹³. The nucleus of their competences is the control of legislation, an instrument of great importance in the transformation process. But even in systems where supreme ordinary courts have taken over this function (as in Estonia), this control is efficient. It is a growing tendency in European Constitutional Law to introduce or extend constitutional jurisdiction. It becomes evident that the conformity of laws with the Constitution is considered as being the most important question. Thus, Rule of Law can be realized by constitutional courts.

But nevertheless it must also be stated that constitutional court control is, if Acts of Parliament are declared void, intervening into the sphere of the legislator, what can be a problem under the principle of separation of power. Political process can be entrenched by a too far-reaching judicial activism. But the prevailing idea in contemporary constitutionalism is the preference given to the safeguard function of these courts.

¹⁰ See Rainer Arnold, *Constitutional Developments in Central and Eastern Europe as a Contribution to Emerging European Constitutional Law*, Essays in Honour of Georg Ress, 2005, PP. 389 - 397

¹¹ For this term see Rainer Arnold, *Profili di giurisdizione costituzionale comparata. I sistemi tedesco, austriaco e francese*, 1990, 157 pp., pp. 1-3.

¹² See Rainer Arnold, *Le principe de l’Etat de droit dans les nouvelles Constitutions de l’Europe centrale et orientale*, Hommage à Rolv Ryssdal, 2000

¹³ See Georg Brunner, *Die neue Verfassungsgerichtsbarkeit in Osteuropa*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1993, pp.819-866.

3.3 Rule of law in EU external relations, especially in the context of ENP (Ukraine)

3.3.1 Normative approach

Promoting Rule of Law is a normatively established objective in EC primary law for the internal as well as external field of action. Art. 6.1 EU Treaty includes Rule of Law among the common values of EU and member states. Art. 11 EU Treaty declares enhancing Rule of Law as an objective of Common Foreign Policy. The instruments of European Neighbourhood Policy clearly refer to Rule of Law which shall be promoted by dialogue and cooperation. Thus Rule of Law is a basic normative orientation for the totality of EC/EU actions.

The observance of Rule of Law embodied in an international treaty as an obligation for the Ukraine as a treaty partner, will help to reinforce this principle which is already existent in the Ukrainian constitutional order:

Art.1 of the Ukrainian Constitution expresses that the Ukraine is a state based on Rule of Law.

Art.6 lays down the basic element of the formal Rule of Law that is the priority of legal acts over administrative action but adds, what is characteristic for a value-orientated concept of Rule of Law, that the legislator is submitted to the Constitution.

Art.8 expresses, in conformity to this, the principle of Sovereignty of Law. The Constitution is regarded as having the supreme legal force.

The international dimension of Rule of Law can be seen in the fact that international treaties are part of the internal legal order (Art.9).

Separation of powers is laid down in Art.6. Efficient protection of the individual by tribunals is guaranteed by Art.55.

The values can be found in chapter II of the Constitution where a comprehensive catalogue of fundamental rights is foreseen.

The control of the legislation is exercised by the Constitutional Court (Chapter XII).

In summary it can be said that all elements of Rule of Law which can be considered as common in Europe are expressed by this Constitution. The Ukraine is thus in conformity with the common values as expressed by Art.6.1 EU Treaty.

International obligations to observe Rule of Law do therefore not imply the necessity of Constitutional reform but will strengthen this idea in state and society.

3.3.2. Functional approach

a) Aspect of functional efficiency

Rule of Law has an important stabilizing effect. Law observance has an effect that creates and maintains order. This promotes legal as well as political security and, to some extent, economic growth. Promoting Rule of Law means to better fulfil the European Neighbourhood Policy objectives.

b) Aspect of value indivisibility

Basic values are conceptual foundations of a legal order with an impact on the political actions. They indicate a quality of behaviour and that cannot be limited to certain fields of applicability but must be extended to the totality of fields of action both internal and external.

c) Dynamic character of values

Rule of Law as a value is not static but characterised by an inherent dynamism to promote it even in the relations with third states. This includes even to create incentives for third states to conform to Rule of Law by their own will.

d) Aspect of conceptual coherence

Substantial solutions in internal EU matters have to be in conformity with Rule of Law. For reasons of coherence in concepts, solutions in external matters must correspond to Rule of Law as well.

4.

The European Neighbourhood Policy: Towards a New EU-MED Partnership?

Pierluigi Montalbano

4.1 The Eu-Med Partnership: Objectives and Achievements

By launching the EU-Med Partnership in 1995, the EU has set the ambitious aim of integrating 15 highly industrialized countries with 12 Mediterranean intermediate revenue primary resource based countries. The main economic target of the Barcelona Declaration (November, 27-28 1995) was the creation by 2010 of an EU-MED Free Trade Area (FTA), by means of a set of Bilateral Association Agreements signed between EU and 12 Mediterranean Partners (MPs)¹. The hoped for EU-MED FTA will include 40 countries and about 800 million consumers², becoming one of the most important North-South trade bloc in the world.

The liberalization process envisaged by the EU-MED FTA consists of the total removal of tariff barriers on industrial goods over a period of 15 years and a gradual liberalization of agricultural products and services. Both liberalizations are to be implemented in accordance with WTO multilateral rules. Liberalization of manufacturing products has been thought as asymmetric: all EU tariffs for industrial products originating from MPs will be eliminated while Mediterranean countries undergo a gradual and differentiated reduction of duties over 12 years. Concerning agriculture, the agreements stipulate reductions in duties and equivalent measures only for a limited number of products listed in the annexes and protocols. The aim is to consolidate and in some cases improve the existing access on a preferential basis, with provisions for review at some time after the agreement has come into force. In this case, there is not agreement on a specific timetable of liberalization. Finally, regarding the services' sector, the agreements contain a confirmation of the commitments already undertook under the General Agreement on Trade in Services (GATS) for those MPs that are also WTO members.

¹ Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey and Palestinian Authority. (i.e. 11 out of 12 MPs with which EEC signed in the Sixties the Cooperation Agreement).

² Including the EU-EFTA Agreement and the separate EU-Switzerland Agreement.

The Association Agreements also establish that imported goods must comply with standards, regulations and certification procedures, and that the validity of the agreements is linked to other correlated measures such as the protection of intellectual property rights, workers' rights, environment issues, etc. Even if they are lacking details on how to comply in most of these areas, they are supposed to foster the reduction of Non Tariff Barriers (NTBs) by means of harmonization or mutual recognition of standards and regulations.

Ten years after the launch of the Barcelona Process a number of goals have been achieved. Every Mediterranean country is currently involved in the EU-Med Partnership, except Syria, included the Palestinian Authority holding an Interim Euro-Mediterranean Association Agreement (Fig. 1). These agreements, that collectively replace the previous generation of cooperation agreements signed in the 1970s, cover a large variety of economic, social, cultural and financial co-operation themes and constitute the foundation for the development of free trade in the Mediterranean region.

Fig.4.1 Euro-Mediterranean Association Agreements

Med Country	Status	Date signed	Entry into Force
Algeria	Signed	April 2002	Septembre 2005
Egypt	Signed	June 2001	June 2004
Israel	Signed	Nov 1995	June 2000
Jordan	Signed	Nov 1997	May 2002
Lebanon	Signed	June 2002	April 2006 *
Morocco	Signed	Feb 1996	March 2000
Palestinian Authority	Signed	Feb 1997	July 1997 (Interim Agreement)
Syria	Initialled (Oct. 04)		
Tunisia	Signed	July 1995	March 1998
Turkey	January 1996 (Customs Union)	Customs Union	Customs Union

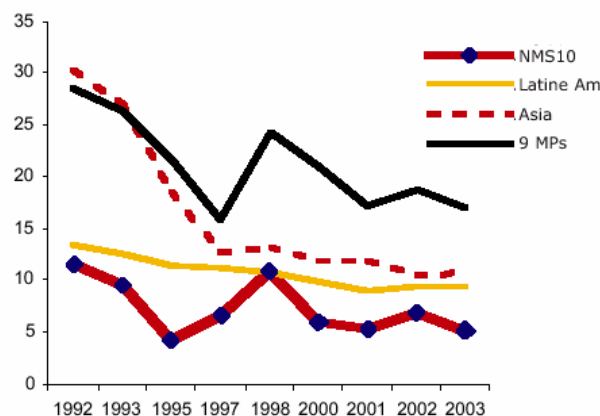
** An Interim Agreement on trade and trade-related provisions, signed in July 2002 and in force since March 2003, governed trade relations beforehand.*

Association Agreements provide for trade liberalisation of manufactured goods with free access for MPs' exports and gradual tariff dismantling over transitional period for EU exports. Indeed, from 1995 till date, MPs, even though at a different speed, have registered a dramatic decrease of industrial goods tariffs' barriers (about -11%). MPs'

tariffs still remain higher on average (17%) in comparison with the new acceding countries of Central and Eastern Europe (5,2%); Latin American Countries (9,5%) and Asian Developing Countries (10,8%) (Fig. 2). However, if we do take into account the weighted average instead of the simple average, MPs overall level of protections does not differ sensibly from that of the other groups of countries. In the case of Mediterranean countries, in fact, the differences between simple and weighted averages are the highest in the world. It means that tariff levels are still too high on certain products and/or sectors and at the same time extremely low in others. Moreover, apart from Israel, and to a lesser degree Egypt, Mediterranean countries hardly apply non-“ad valorem” customs duty (Femise, 2005).

The 42 members of the PanEuroMed system have also adopted a “PanEuroMed Protocol on cumulation of origin”³. It allows economic operators to cumulate processing made in different countries of the region and thus obtain preferential treatment. More precisely, products which have obtained originating status in one of the 42 countries may be added to products originating in any other one of the 42 without losing their originating status within the Pan-Euro-Med zone. The conclusion of South-South FTAs among the Mediterranean partners with the same origin protocol will allow them to effectively benefit from this facility.

Fig. 4.2 Comparison in the evolution of the simple average of MFN customs duty on industrial goods between the main regions



Source: Femise, 2005

³ The system of Pan-Euro-Med cumulation of origin is an extension of the previous system of Pan-European cumulation. It operates between the EC and the Member States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland) and Turkey and countries which signed the Barcelona Declaration, namely Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Syria, Tunisia and the Palestinian Authority of the West Bank and Gaza Strip

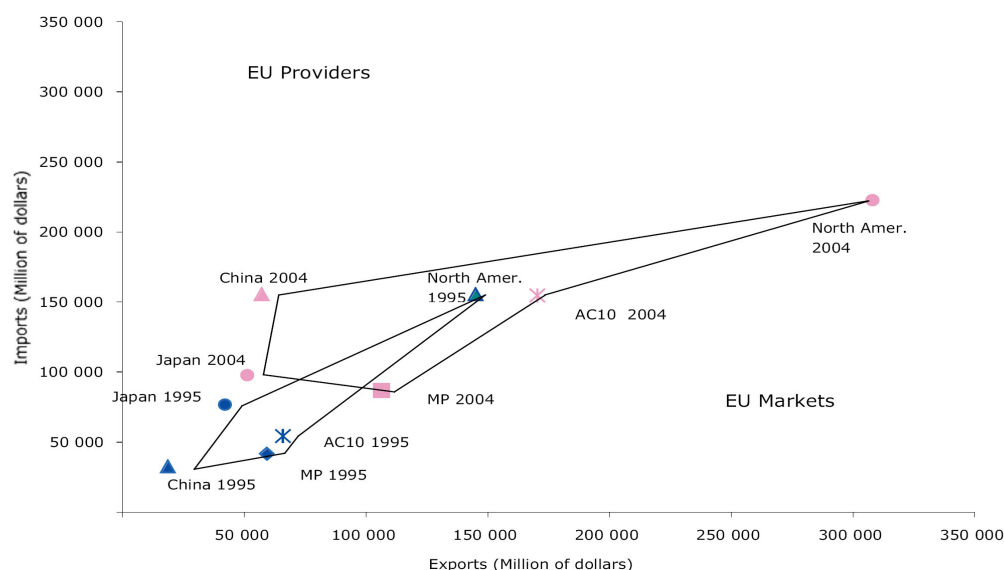
Liberalization of trade in agriculture is largely achieved as well. More than 80% of agricultural products imported from the Mediterranean countries enter the EU market duty free or at reduced rates. Reciprocally, one third of the EU exports of agricultural products benefit from preferential treatment in the Mediterranean countries. Liberalisation of trade in services and investment, including the right of establishment, is also part of the Association Agreements' key objectives. The Istanbul Framework Protocol, endorsed in July 2004, has defined the core principles of services liberalization, including a regional Most Favored Nations (MFN) clause able to ensure the consistency and coherence of the bilateral agreements.

The Barcelona process goes well beyond trade integration, including a real political project of co-development and shared prosperity supported by technical assistance, financial transfers and actions of sub-national bilateral co-operations. In line with the priorities agreed upon at the Barcelona Summit, the European Commission has also launched several initiatives of deepening trade liberalization; regulatory convergence; strengthening legal framework. With the aim to support the implementation of all the regional aspects of the Association Agreements, EU has transferred funds for a total amount of nearly €8.8 billion to MPs under the MEDA Program (1995-2006).

Notwithstanding the above achievements, feelings about the actual effects of the Mediterranean partnership are mixed. The overall trade position of MPs shows a global deficit of 51 billion dollars (65 billion dollars in non petroleum trade) while current EU-MED trade relationship remains weak and asymmetric. EU accounts for about 70% of MPs trade deficit in manufactured goods and almost 30% of the global deficit (Femise, 2006). Moreover, notwithstanding the launch of the EU-MED partnership, EU-MED trade relations have worsened in relative terms. In the period 1995-2004, while EU trade flows have widened with China and North America (see geometrical figure in fig. 3), the relative performance of MPs remains steady. As a result, the gap between MPs and New Acceding Countries of Central and Eastern Europe (AC10) on trade relations with EU has widened.

In addition to bilateral trade enforcement through the Association Agreements, the Barcelona Process has fostered also a process of regional (South-South) integration among the Mediterranean countries. The Arab-Mediterranean Free Trade Agreement, known as the Agadir Agreement, foresees the creation of an integrated market between Egypt, Jordan, Morocco and Tunisia. Besides the Agadir Agreement, Israel and Jordan have signed a FTA, Morocco and Tunisia have signed bilateral agreements with Turkey, and negotiations are underway between other Mediterranean countries to establish similar agreements with Turkey. However, till date, intraregional trade remains well below 10% of the MPs' total trade, the lowest in the world for any region of this size. Policymakers are conscious that South-South integration between the Mediterranean countries remains an essential complement to the EU-Med Association Agreements and a key factor to attract foreign direct investments and stimulate industrial and commercial competitiveness.

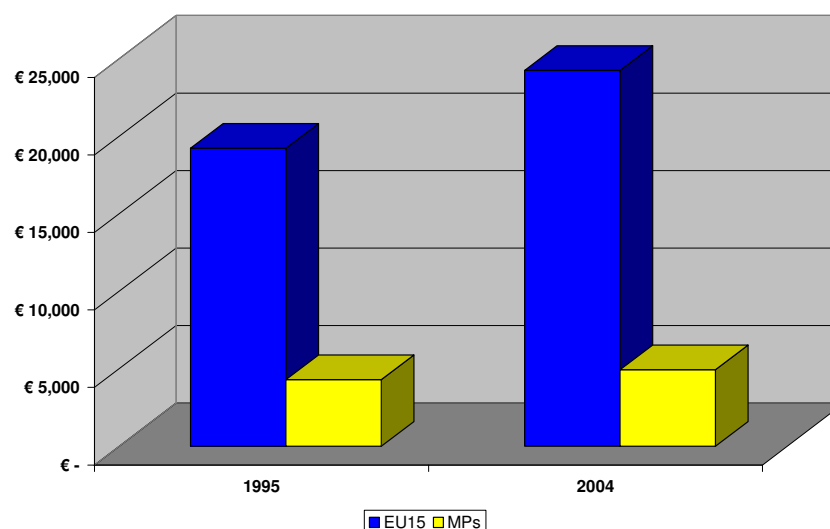
Fig. 4.3 EU-15 Trade evolution with its main partners (1995-2004, millions US\$)



Source: Femise, 2006

Also from a macroeconomic point of view, the gap between the North and South of the Mediterranean region remains wide (Fig. 4). Average per capita income (measured in PPP, constant value 2000, international dollars) of MPs (€ 4.937) is 4 times lower than that of EU-15 (€ 24.242) and the gap has surprisingly widened from 1995 till date.

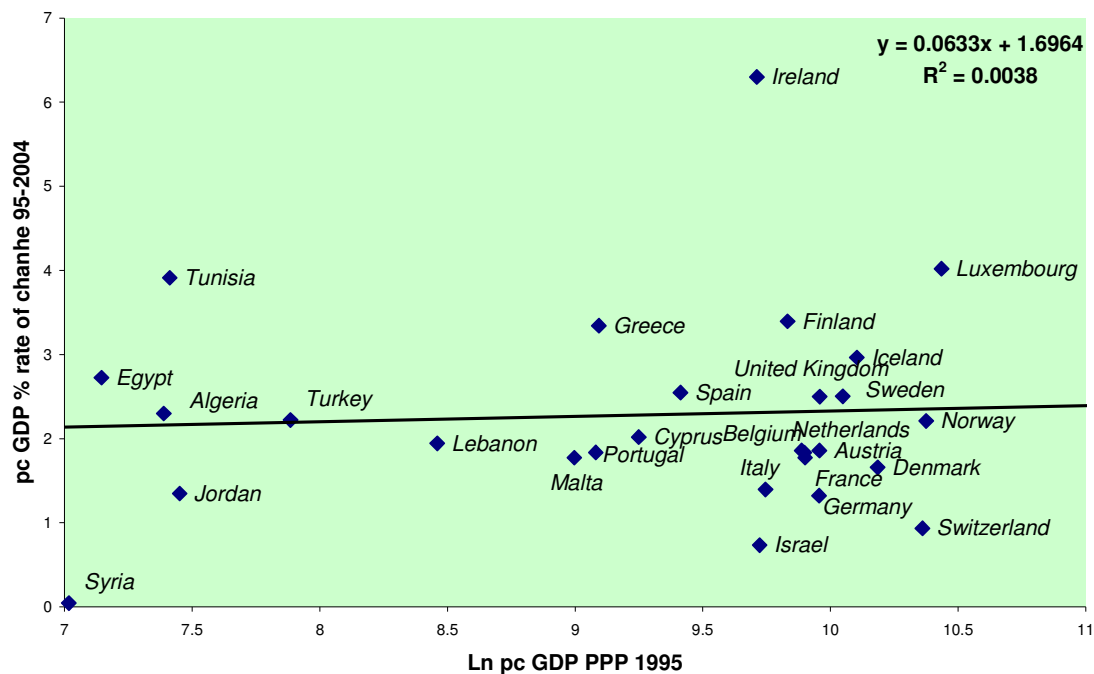
Fig.4.4 GDP per capita, PPP (constant 2000 international \$): A comparison between Eu-15 and MPs



Source: Author's elaboration on WDI (2006)

Indeed, there is no sign of income convergence within the EU-MED area, not even Barro e Sala-i-Martin (1995) hypothesis of β convergence⁴ (Fig. 5). The empirical test for Barro e Sala-i-Martin (1995) hypothesis of β convergence in the context of the EU-MED partnership is based on the assumption of a negative relationship, on average, between the level of income of partner countries and its relative rate of change for the period 1995-2004. In other words, richer countries are supposed to grow less than poorer ones⁵. However, as Fig. 5 clearly shows this assumption has not been verified in the case of EU-MED partnership, where there is no sign of a linear correlation between the relative level of income and growth performance of the partner's countries. For a substantive group of MPs a low level of income in 1995 has been associated to a very slow growth performance for the entire period (Egypt, Algeria, Jordan and Turkey).

Fig. 4.5 β convergence: an empirical test within the EU-MED Partnership (1995-2004)



Source: Author's elaboration on WDI (2006)

Of course, the figure shows significant differences in growth performance and prospects in many countries in the region. However, the situation is worrying on average. Fortunately, the region as a whole is supposed to keep growing more rapidly than the world economy in the next future. Indeed, the current conjuncture brings the chance of a significantly improved economic performance over the medium and longer term.

⁴ This hypothesis is based on the standard model of growth and implies that each country in the long run converges to a steady state.

⁵ Of course, it does not imply any reduction of income variance among countries during time.

However, this implies a strong ability of policymakers, particularly in the oil exporters' countries, to take fully advantage of the positive trend as well as of their surpluses.

4.2 What EU-MED partnership after ENP?

As underlined, the European Neighbourhood Policy (ENP) will complement the EU-MED partnership with the aim to consolidate and not substituting it. ENP introduces also an additional objective for MPs: the prospect of "a stake in the internal market" as well as further integration and liberalization with EU member countries in order to promote the free movement of people, goods, services and capitals. The novelty of the new policy consists in the goal to achieve a *deep integration* with EU neighbours, by moving from simply "negative integration" (i.e. total removal of trade obstacles) towards a process of "positive integration" (the creation of new instruments and institutions able to achieve common objectives)⁶. It implies the introduction of specific elements of the European legal framework by means of bilateral negotiations.

Undoubtedly, ENP represents a major breakthrough in the nature of EU-MED economic and political partnership. Thanks to ENP, the *acquis communautaire* becomes the tool to create a Pan-European partnership without the cost of a membership. Moreover, with the new European Neighbourhood and Partnership Instrument (ENPI), EU will transfer 12 billions EURO for financing assistance to MPs for the period 2007-2013.

Some scholars argue ENP could in principle correct a number of deficiencies of the Euro-Mediterranean Partnership and help to get the original EuroMed partnership objective of contributing to social and economic stability of the Mediterranean area. Others support the view that ENP can help to replicate the new EU member states' transition successes for the EU-MED partnership, by overcoming current limits of the EU-MED partnership and fostering the creation of a PanEuropean Common Market. On the other hand, some analysts underline the fact that the neighbourhood countries are poorer and more heterogeneous with respect of the new member states to follow the same path (Milcher, 2007). Others argue that ENP is unlikely to be seen as a fully satisfactory substitute for EU membership. It has been rather seen as a way to spoil MPs chances for EU accession (Del Sarto, Schumacher, 2005).

Moreover, one should also take into account the strong reservations on the part of some EU member states towards the idea of extending the entire EU *acquis* to the southern MPs as well as their fears that the new EU-MED FTA will imply a loss of EU competitiveness in a number of sectors (such as agriculture, textiles, services, etc.). Conversely, one should consider the trade off for MPs between the costs of aligning legislation and rules with EU *acquis* and the gains linked to a simple status of partner. Indeed, ENP starts out with a conspicuous imbalance between the obligations and commitments of the two sides and therefore lacks of credibility (Emerson, 2004). Another trade off for MPs is currently in place between the call for a deep integration in the framework of the European regional partnership and the effects of undertaking a

⁶ The term "*deep integration*" designs an economic integration process that goes beyond tariff barriers to include competition policy; FDI and service regulations, environmental and labor standards, government procurement, etc.

process of multilateral trade liberalization. The latter could imply same benefits, without the cost of trade diversion effects.

In spite of the above caveats, the expectations for the new policy effects in the Mediterranean area are very broad. The main results envisaged are: an increase in trade share (EU exports may profit from reduction of high MPs tariffs and the strong raise of trade in services); an increase in factor movement (indeed, capital movements seem to be strictly linked to macro stability and labor movement will probably be delayed because of the strong reservations made by a number of EU member States); an increased intra-industry specialization with an improved efficiency and higher gains from trade; a catching-up effect, cycle synchronization and policy anchor.

Generally speaking, policymakers are expecting that EU-MED FTA, together with the other two pillars of the Barcelona Declaration (the political and cultural ones), will provide a large impulse to the economic and political stability of the EU MED area. The creation of a better environment for trade and economic relations is supposed to foster trade volumes between MPs and EU member states as well as to contribute to the decrease of MPs socio-economic vulnerability by reducing uncertainty for the future, risks of negative external shocks and macroeconomic instability.

The aim of the present work is to test empirically the feasibility of the above expectations. More specifically, I will present firstly a gravity analysis of the patterns of trade in the EU-MED area to test the actual dimension of unexploited trade as well as the level of trade potentials after the ENP and the EU-MED FTA will take place. Secondly, I will analyze the relative degree of macroeconomic instability in the region by checking the patterns of volatility of per capita consumption in the EU-MED partner countries.

4.3 Gravity “projections”

A gravity analysis of the panel data of the patterns of trade within the EU-MED area in the period 1995-2004 has been carried out to reach the first task. The estimated parameters from the gravity model have been used firstly to compute the gap between actual and “normal” trade (i.e trade values predicted by the gravity equation) in the context of the EU-MED partnership and, secondly, to predict the potential variations of bilateral EU-MED trade flows induced by ENP.

This exercise follows the same path of other empirical works presented by Wang and Winters (1991), Collins and Rodrik (1991), Baldwin (1994), Montalbano (2003) to estimate the potential trade patterns within the European common market after the enlargement towards CEECs and by Ferragina et al. (2005) with a more specific focus on the EU-MED partnership.

Starting from Isaac Newton’s law of gravity, the so called “trade gravity model” permits to estimate countries’ bilateral trade potentials using a reduced form which comprises supply and demand factors (linked to countries’ dimensions and incomes proxied by total GDP and per capita GDP)⁷ as well as trade resistance (geographical distance, as a

⁷ The well known phenomenon that bigger countries trade more than smaller ones is captured by the coefficient associated to the total GDP while the “income effects” (i.e richer countries trade more than

proxy of transport costs and “home biased” or “cultural unfamiliarity”) and trade preference factors (preferential trade agreements, common language and borders, etc.) (De Benedictis and Vicarelli, 2005). Thanks to its robust theoretical foundations⁸ based on the seminal works of Helpman and Krugman (1985); Bergstrand (1985) and Deardorff (1997), the gravity model has been traditionally used for the task of predicting the trade enhancing effect of countries’ integration. Thus, this model permits to estimate trade potentials using its estimated parameters as a benchmark of “natural” trade relations. The difference between the observed and predicted trade flows represents the unexhausted trade potential of the actual level of partner countries’ integration.

By the present gravity exercise, I deal with two main objectives: to get a measure of the magnitude of the actual unexploited trade in the context of the EU-MED partnership as well as give useful insights about the likely evolution of the potential trade within EU-MED partners’ countries after ENP and the EU-FTA came into force. A number of empirical estimations on EU-MED trade potentials have been already carried out by a number of scholars (see, for instance, Buigues and Martinez-Mongay, 2000; Ferragina et. al., 2005). However, while the above empirical works normally rely on “out-of-sample” trade potential estimates – i.e. parameters for highly integrated countries have been applied to project ‘natural’ trade relations between these benchmark countries and countries starting to integrate – this empirical exercise proposes “in-sample” trade potential estimates – i.e. countries at the beginning of the integration process are directly included in the regression analysis. Hence, while the previous empirical exercises rely on the strong assumption that trade integration patterns are homogeneous and obtain potential bilateral trade patterns of the less integrated countries using the same parameters of the more integrated ones, in this empirical exercise I obtained the actual values of the parameters of the EU-MED partnership and inferred that the residuals of the estimated equation represent the difference between “natural” and actual EU-MED trade relations. -i therefore disregard the possible specification problems of the selected estimation technique⁹, by relying on the theoretical foundations of the applied gravity model reduced form as already discussed by several other studies (Evenett and Keller, 2002; Anderson and van Wincoop, 2003; Feenstra, 2004).

To this aim, I estimated the following gravity equation:

$$x_{ij} = \alpha + \beta_1 gdp_{it} + \beta_2 gdppc_{it} + \beta_3 gdp_{jt} + \beta_4 gdppc_{jt} + \beta_5 dist_{ij} + \beta_6 cb_{ij} + \beta_7 cl_{ij} + \beta_8 ec_{ij} + \varepsilon_{ijt}$$

poorer ones) is captured by the coefficient associated to per capita GDP. An equivalent formulation of the gravity equation is to consider the variable of total Population instead of per capita GDP. In this latter case, the coefficient associated to the population shows normally a negative sign.

⁸ Gravity model theoretical foundations have been derived both from the classical Heckscher-Ohlin theory of comparative advantage and from the new trade theories based on imperfect competition models. For a deeper analysis of the theoretical foundations of the gravity equation, see Montalbano (2004);

⁹ This strategy has been severely criticised by Egger (2002), who makes the potentially destructive remark that any large systematic difference between the observed and the in-sample predicted trade flows only indicates problems of misspecification in the econometric model. For a deeper analysis of this issue see also De Benedictis and Vicarelli (2005).

where x_{ij} represents exports from country “i” towards country “j”; gdp_i , gdp_j , $gdppc_i$ e $gdppc_j$ represent, respectively, total and per capita GDPs of the export country “i” and the import country “j”; $dist_{ij}$ represents the geographical distance between the main economic centers of country “i” and “j”. cb_{ij} , cl_{ij} and ec_{ij} are all dummy variables able to “catch” preferential trade linked, respectively, to the existence of a common border, language and the preferential trade granted by the membership in the European common market. All variables are in natural logs, except for the dummies. Dummy variables take a value of 1 in the presence of the related phenomena and 0 otherwise. Hence, the estimated gravity equation is a log-log equation characterized by the very interesting property that the estimated parameters can be interpreted as elasticities. The constant term of the gravity equation represents the impact of the world income on bilateral trade within the sample and permits to catch the effects of the increasing of the overall phenomenon of globalization in time and spatial comparisons¹⁰.

The present gravity regression pools together data on bilateral trade flows for 10 MPs (Algeria, Egypt, Jordan, Israel, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey); 15 EU Member States (Austria, Belgium-Luxembourg, Denmark, France, Germany, Italy, Netherlands, Sweden, Finland, Greece, Ireland, Portugal, Spain, United Kingdom), Norway, Iceland and Switzerland. To bring the most information possible to bear at once, I pooled data across the cross-section and time-series dimensions for the entire period of the EU-MED partnership (1995-2004¹¹). The derived “potential trade” has been then compared to actual trade volumes to assess the dimension of unexploited trade within the Euro-Mediterranean Trade Partnership.

Bilateral trade flows and GDPs values have been taken in current US dollars in PPP (Purchasing Power Parity) to avoid distortions on the comparison of incomes induced by large temporary swings in the nominal exchange rate (Frankel, 1997)¹². The use of current figures of the monetary variables does not have any incidence on the model estimates, apart on the constant terms, thanks to the use of the log-log regression (i.e. price indexes enter linearly into the regression). Geographical distance has been measured, like in several previous studies, “as the crow flies”, using great circle distances¹³ among capital cities. A huge amount of literature has presented alternative measures of geographical distance in gravity estimates, especially with reference to the actual limit of the standard measures of taking into account of bilateral trade among provinces in different countries (Leamer, 1997; Wolf, 1997; Head and Mayer, 1998;). However, literature converges on the feasibility of this methodology if a variable for “common border” is also included to correct the likely underestimation of geographical distance.

¹⁰ Generally speaking, the gravity estimates show a lower degree of openness than expected (see Frankel, 1997)

¹¹ Data for 2005 are not available yet.

¹² Sources are for bilateral trade flows IMF, Direction of Trade Statistics database and for GDPs World Bank, World Development indicators.

¹³ The great-circle distance is the shortest distance between any two points on the surface of a sphere measured along a path on the surface of the sphere. Because spherical geometry is rather different from ordinary Euclidean geometry, the equations for distance take on a different form. In non-Euclidean geometry, straight lines are replaced with geodesics. Geodesics on the sphere are the great circles (circles on the sphere whose centers are coincident with the center of the sphere). Because the Earth is approximately spherical, the equations for great-circle distance are important for finding the shortest distance between points on the surface of the Earth, and so have important applications in navigation.

In accordance with the gravity approach, export flows were expected to be positively influenced by: the size and the demand of the home and the host market (proxied by total and per capita GDPs); geographical and cultural closeness (proxied by the presence of a land border or a common language) and the presence of regional agreements. On the other hand, they were expected to be negatively correlated with the geographical distance of the host's market, a proxy of trade costs, home bias and "cultural unfamiliarity".

Indeed, in the preferred specification¹⁴, all the variables show the expected sign and are highly significant (see table 1).

Table 4.1 - Gravity model estimates of EU-MED trade (1995-2004)

Dependent variable: Ln BILATERAL EXPORTS [lnxij]	
Explanatory variables	
LnGDP _{country i} [lngdpi]	0.7715 (9.91)***
Ln per-capita GDP _i [lngdpci]	0.2183 (1.71)*
LnGDP _{country j} [lngdpj]	0.7187 (53.06)***
Ln per-capita GDP _j [lngdppcj]	0.3909 (17.61)***
Ln Geographical distance [lndistij]	-0.9148 (27.53)***
Common border [cbij]	0.3082 (4.42)***
Common language [cli]	0.6904 (13.72)***
European Community [ec]	0.4536 (11.46)***
Constant	-11.8521 (12.38)***
F-test	[0.0000]
R ²	0.87
Hausman test	26.54***
N. of obs	4489
N. of groups	27

Notes: Figures in parenthesis () are absolute t-ratios; figures in brackets [] are p-values. * indicates that a coefficient is significant at the 10% level; ** significant at the 5% level; *** significant at the 1% level.

¹⁴ Because of the presence of time invariant dummies and the use of a limited sample of countries within the Pan-European Common Market (EU15 and MPs) I choose a random effects model. From an econometric point of view, the Hausman test rejects the null hypothesis of similarity in this case between fixed and random effect coefficients, arguing the presence of a systematic difference between the two. However, as Baltagi (2001) clearly states, this result does not imply necessarily the adoption of a fixed effect model without testing the validity of this restriction on the parameters.

The estimated coefficients for total and per capita GDPs are both positive. It indicates that, though trade increases with a country's size, this increase is less than proportionately (holding constant per capita GDP) and that richer countries trade more than poorer ones. Moreover, the sum of the coefficient is closer to 1. This means that holding constant for population, trade between a pair of countries is proportionate to the product of their GDPs.

The estimated coefficient for geographical distance is -0.91. It means that an increase of 1% of the geographical distance between partner countries is supposed to reduce bilateral trade almost proportionally. As above underlined, the value of this coefficient has to be analyzed in conjunction with the estimated "common border" effect. Dummy for common border shows that countries that share a common border are estimated to engage in 36% more trade than to otherwise similar countries (1,36 is the exponential value of 0,30)¹⁵. Very relevant is also the dummy for common language. Countries that share a common legacy are supposed to nearly double their bilateral trade flows (1,99 is the exponential value of 0,69). Finally, consistently with previous analyses (Baldwin, 1994; Frankel, 1997; Fidrmuc and Fidrmuc 2000) the dummy for European Common Market membership is also significant and relevant ($\exp(0.45)=1.57$).

Consistently with our first objective of testing the actual dimension of unexploited trade, I thus used the estimated coefficients to calculate an in-sample trade potential index (i.e. the ratio between the actual trade and potential trade or, in other words, trade estimated as normal) for EU-15 and MPs for the period 1995-2004. A ratio of one suggests that actual trade equals potential trade. The lower is the ratio, the higher the gap to be filled and therefore the measure of unexploited trade in the context of the EU-MED partnership.

Fig. 6 shows the performance of this trade potential index for the main MPs as well as their trends over time to give an idea of the path followed by each single country to catch up its potential level. As shown by the figure, the gap between trade potential and actual trade is, generally speaking, high for the majority of MPs (the dimension of unexploited trade is large). The phenomenon of unexploited trade is widespread and particularly relevant in the case of Jordan, Lebanon, Egypt, Algeria, Morocco. Partially relevant in the case of Syria and Tunisia. Less relevant in the case of Turkey and Israel

To test the level of trade potentials after the ENP and the EU-MED FTA will take place, I measured the influence of changes in the explanatory variables on bilateral trade flows predictions for 2013. More specifically, I calculated the likely level of GDP and per capita GDP in 2013 assuming, consistently with currently available annual growth rates projections (EC, 2007), a 5,5% annual growth rate for MPs and 2,5% for EU-15, and assuming zero population growth for EU-15 and 2% for MPs. To take into consideration the effect of deep integration granted by ENP and the effects of the new EU-MED FTA I also extended the effect of trade preferences granted by the full participation at the European Common Market ("ec" dummy) to all the MPs.

Table 2 shows the projected annual growth rates of exports for each country towards all its counterparts for the period 2007-2013 (i.e the same period envisaged by the ENPI to carry out its planned activities). Also in the optimistic view of a full participation of

¹⁵ Because trade is specified in logarithmic form, the way to interpret the coefficient on a dummy variable is to take the exponent.

MPs in the European Common Market the projected growth rates are not very high on average. However, it seems that the main improvements have to be expected in the case of South-South integration. Most of MPs shows projected annual rates of growth of nearly 2% in their bilateral exports. At the same time, the projections underline that there is more room left for EU exports towards MPs than the opposite. Actually, the low level of income growth of EU member States reduces MPs' benefits from trade integration within the Pan European Common Market. Moreover, the very slow pace of exports' growth would limit the speed of converge of MPs to their potential trade volume, leaving the level of unexploited trade of the Mediterranean area particularly high also in the next future.

Fig. 4.6 – In sample trade potential index for selected MPs (1995-2004)

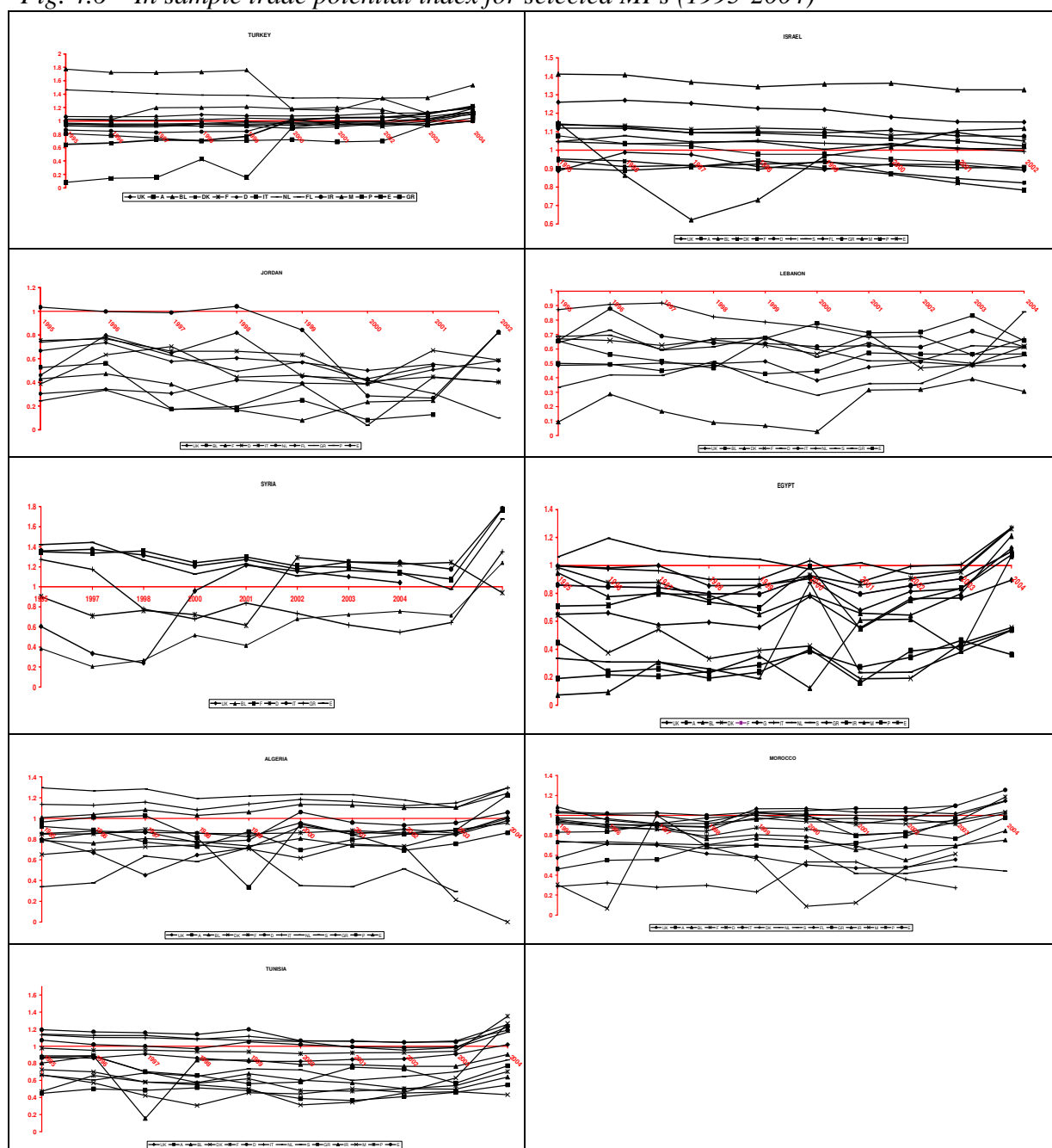


Table 4.2 – Projected export annual growth rates for the period 2007-2013

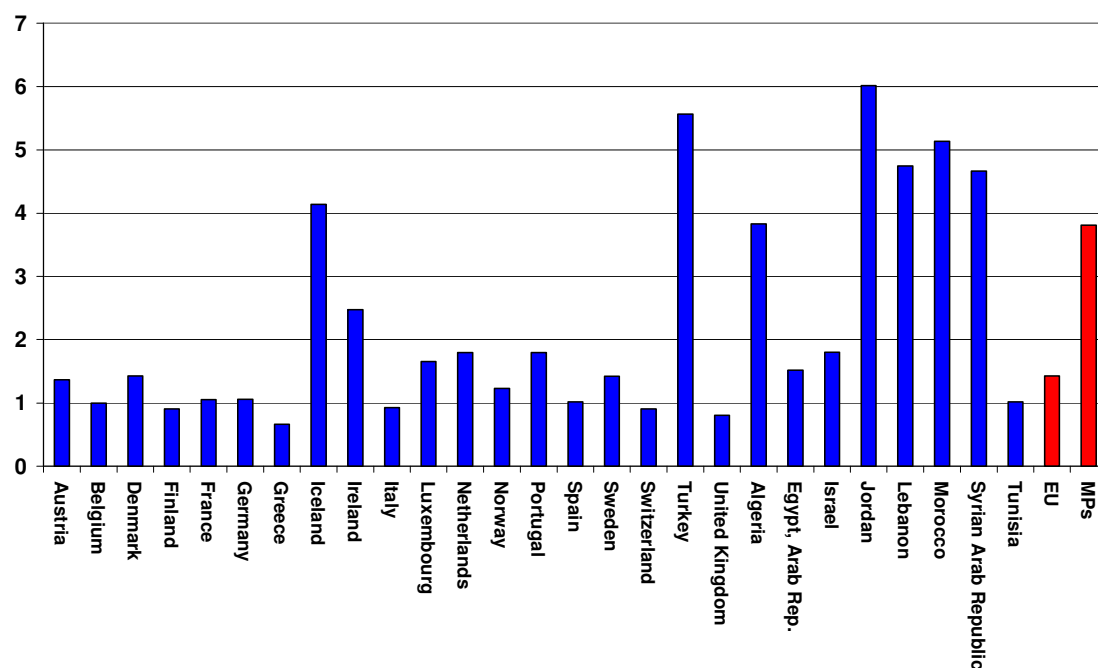
COUNTRIES	PROJECTED EXPORT GROWTH RATES 2013																		
	United Kingdom	Austria	Belg/Lux	Denmark	France	Germany	Italy	Netherlands	Norway	Sweden	Switzerland	Finland	Greece	Iceland	Ireland	Malta	Portugal	Spain	Turkey
United Kingdom		1.7	1.9	1.7	2.0	2.0	1.9	1.9	1.6	1.7	1.6	1.6	1.6	1.4	2.0	1.4	1.6	1.8	2.0
Austria	1.7		1.6	1.5	1.7	2.1	1.8	1.6	1.3	1.5	1.7	1.5	1.4	1.1	1.5	1.0	1.4	1.6	1.8
Belg/Lux	1.9	1.6		1.6	2.1	1.8	1.7	2.0	1.4	1.6	1.7	1.5	1.4	1.2	1.5	1.0	1.4	1.6	1.8
Denmark	1.7	1.5	1.6		1.7	1.9	1.6	1.6	1.4	1.6	1.4	1.5	1.4	1.1	1.5	1.0	1.4	1.6	1.8
France	2.0	1.7	2.1	1.7		2.0	1.9	1.9	1.5	1.7	1.9	1.6	1.6	1.4	1.7	1.2	1.6	1.8	2.0
Germany	2.0	2.1	1.9	1.9	2.0		1.9	1.9	1.6	1.8	1.9	1.7	1.6	1.4	1.7	1.3	1.6	1.8	2.0
Italy	1.9	1.8	1.7	1.7	1.9	1.9		1.8	1.5	1.7	1.9	1.6	1.6	1.3	1.6	1.3	1.7	1.8	2.0
Netherlands	1.9	1.6	1.9	1.6	1.8	1.9	1.7		1.4	1.6	1.5	1.5	1.5	1.2	1.6	1.1	1.5	1.7	1.8
Norway	1.6	1.4	1.5	1.4	1.6	1.6	1.5	1.4		1.4	1.4	1.3	1.2	1.0	1.3	0.8	1.2	1.4	1.6
Sweden	1.7	1.5	1.5	1.6	1.7	1.8	1.7	1.6	1.5		1.4	1.6	1.4	1.2	1.5	1.0	1.4	1.6	1.8
Switzerland	1.6	1.5	1.5	1.4	1.9	1.9	1.8	1.5	1.4	1.4		1.3	1.3	1.0	1.3	0.9	1.3	1.3	1.6
Finland	1.6	1.5	1.5	1.5	1.6	1.7	1.6	1.5	1.4	1.6	1.3		1.3	1.1	1.4	0.9	1.3	1.5	1.7
Greece	1.6	1.5	1.4	1.4	1.6	1.6	1.6	1.5	1.2	1.4	1.3	1.3		1.0	1.3	1.0	1.4	1.5	1.9
Iceland	1.3	1.0	1.1	1.1	1.3	1.3	1.2	1.2	1.0	1.1	1.0	1.1	1.0		1.1	0.6	1.0	1.2	1.4
Ireland	2.0	1.4	1.5	1.5	1.7	1.7	1.6	1.6	1.3	1.5	1.3	1.4	1.3	1.1		1.2	1.3	1.6	1.7
Malta	1.4	1.0	1.0	1.0	1.2	1.2	1.3	1.1	0.8	1.0	0.9	0.9	1.0	0.6	1.2		1.0	1.1	1.3
Portugal	1.6	1.4	1.4	1.4	1.6	1.6	1.7	1.5	1.2	1.4	1.3	1.3	1.4	1.0	1.3	1.0	-	1.6	1.7
Spain	1.8	1.6	1.7	1.6	1.8	1.8	1.8	1.7	1.4	1.6	1.5	1.5	1.5	1.2	1.6	1.2	1.6		1.9
Turkey	2.0	1.9	1.8	1.8	2.0	2.1	2.0	1.9	1.6	1.8	1.7	1.8	1.9	1.5	1.8	1.4	1.7	1.9	
Israel	1.9	1.7	1.8	1.7	1.9	1.9	1.9	1.7	1.5	1.7	1.5	1.6	1.7	1.3	1.6	1.4	1.7	1.8	2.2
Jordan	1.8	1.3	1.5	1.3	1.6	1.6	1.6	1.5	-	-	1.2	1.3	1.4	-	1.5	-	1.4	1.5	1.9
Lebanon	1.8	-	1.7	1.4	1.8	1.7	1.6	1.5	1.2	1.5	1.5	1.3	1.5	-	1.6	1.3	1.4	1.5	1.8
Syria	1.6	1.4	1.4	1.4	1.6	1.6	1.6	1.6	1.3	1.4	1.3	1.4	1.4	-	1.3	-	1.3	1.5	2.1
Egypt	2.0	1.6	1.6	1.5	1.7	1.8	1.8	1.6	1.4	1.6	1.4	1.5	1.6	1.4	1.7	1.4	1.5	1.7	1.9
Algeria	1.9	1.7	1.9	1.7	2.1	1.9	1.9	1.7	1.4	1.6	1.8	1.7	1.6	-	1.6	1.4	1.7	1.8	1.9
Morocco	1.7	1.5	1.8	1.5	2.0	1.7	1.7	1.6	1.3	1.5	1.6	1.4	1.5	1.3	1.5	1.1	1.5	1.7	1.8
Tunisia	1.7	1.5	1.7	1.5	1.9	1.7	1.8	1.6	1.3	1.5	1.6	1.4	1.5	1.2	1.4	1.2	1.6	1.6	1.8

Source: Author's elaboration based on the estimated coefficients from the gravity equation presented in table 1

4.4 Patterns of macrovolatility within the EU-MED partnership

As figure 7 shows, between 1995 and 2004, MPs experienced a higher degree of per capita consumption volatility compared to EU member States. This means that EU-MED partnership fails to attain its objective of reducing the degree of vulnerability of MPs. They, despite a moderate growth of GDP, reveal, generally speaking, a low ability to maintain a stable path of consumption and, thus, a lower level of socio-economic well-being. Among MPs, Turkey, Algeria, Jordan, Lebanon, Morocco and Syria are characterized by the highest degree of volatility.

Fig. 4.7 – Per capita consumption volatility in the EU-MED area (1995-2004)



Source: Author's elaboration on WDI (2006)

The literature on volatility represents actually the most important achievements on the role of covariate risks and macro shocks at the macro level. Concerning the effects of volatility on long term growth, while most of the literature on the effects of volatility suggests a positive relation between volatility and average growth, there is, in fact, growing evidence which suggests a negative link in the case of the developing countries. The main explanation here is that particularly high or low volatility – “extreme volatility” - could be considered, especially in developing context at the beginning of the process of economic liberalization, as a proxy of greater uncertainty that, in turn, lowers investments in physical and human capital, thereby reducing long-term growth (Ramey and Ramey 1995; Martin and Rogers 1997; Talvi and Vegh 2000; Easterly, Islam and Stiglitz 2001; Pallage and Robe 2003; Hnatkovska and Loayza 2004). The theoretical underpinnings for a negative effect of uncertainty on economic growth operate through conditions of risk aversion, aversion to bad outcomes, lumpiness, and irreversibility associated with the investment process. Under these

conditions, uncertainty is likely to lead firms to under-invest or to invest in the “wrong” projects (see Bertola and Caballero 1994). Some structural country characteristics are bound to worsen the impact of volatility and uncertainty on economic growth, such as a poor level of financial development, deficient rule of law, and procyclical fiscal policy, which usually accompanies large public indebtedness (see Caballero 2000). Moreover, empirical investigations increasingly show that those impacts are reinforced by incomplete markets, sovereign risk, divisive politics, inefficient taxation and weak financial market institutions – factors that affect particularly developing countries (Aizenman and Pinto, 2004).

Concerning the determinants of volatility, a number of authors underline the potential impact on volatility of external shocks linked to trade liberalization (Prasad and Gable 1997; Wolf, 2004; Hnatkovska and Loayza, 2004; Kose, 2002; Kose and Yi, 2003). In particular, in the case of emerging countries, they argue that an increasing trade interrelation among economies not only increases inequalities but could also cause an increased risk “hazard” (i.e. the combination of exogenous risk exposure and the endogenous characteristics of the unit of analysis) which, in turn, could be heading towards a path of underdevelopment. Hence, if markets are not working well, an increasing integration among economies, particularly among the least developed ones (which are characterized by weak infrastructures and fragile institutions), contributes to an environment more susceptible to negative externalities at the macro level (Dercon, 2001).

World Bank’s Handbook on macro volatility underlines as well that, empirically, a higher volatility of the terms of trade appears to be linked to a higher volatility of consumption growth (Agénor, McDermott, and Prasad 2000). In fact, while, generally speaking, greater openness allows better insulation against domestic demand shocks, trade openness accompanied by greater specialization, it may also lead to greater exposure to sectoral shocks, and enhance exposure to external demand and supply shocks. Openness also enhances the role of the real exchange rate, which in turn can act both as a stabilizing element and as a source of additional input volatility. The link between generic measures of openness and output volatility, in contrast, is less settled. While Assaf Razin and Andrew Rose (1994), looking at a nearly comprehensive sample, detect no robust effect, other studies have found a positive link between openness and output volatility.

Regarding specifically the European Common Market, recent studies (Montalbano et al. (2006) pointed out that the occurrence of external negative covariate shocks associated with trade liberalization implied long term negative effects on aggregate welfare of the CEECs, even in a context of long term growth. As Fig. 7 clearly shows it would be not surprisingly to get a similar result also in the case of MPs.

4.5 Conclusions

The present work aims at testing empirically the feasibility of the following expectations about ENP’s role: fostering trade volumes between MPs and EU member States and decreasing MPs’ vulnerability and macroeconomic instability of the region.

Gravity estimations show the existence of a large amount of unexploited trade in the context of the EU-MED partnership, especially in the case of MPs, and the slow pace of exports' growth performance driven by ENP and EU-MED FTA project. These results are linked to "optimistic" assumptions about the MPs GDP growth performances and trade integration (we simulated a full MPs' integration within the Pan-European Common Market and no "trade diversion" effect towards CEECs)¹⁶. In addition, we do not take into account the additional effect of "trade diversion" linked to the fact that European regional integration is a second best of a wider process of multilateral integration. Actually, EU could not be considered the most efficient supplier in the world.

Moreover, notwithstanding the EU-MED partnership, during the last decade MPs showed a low ability to maintain a stable path of consumption and, thus, their level of socio-economic well-being. This is a very worrying signal. MPs seem do not have adequate tools and mechanisms able to mitigate and/or cope with the higher degree of openness induced by the EU-MED liberalization process. They will remain more exposed to the occurrence of the external negative covariate shocks, associated with trade liberalization, with a strong probability of long term negative effects in aggregate welfare, even in a context of positive growth.

Starting from the above results, we can conclude that the new partnership strategy, even though fundamental to enlarge the benefits of European integration towards its neighbors, does not seem to be a sufficient condition to improve trade performance within the EU-MED partnership or, in any case, to reduce their degree of vulnerability facing a more open economic environment. The risk is twofold: to overstretch the new policy's assignments, reducing its actual ability to attain its main goals and, at the same time, to underestimate the role of a number of key issues and collateral policies which remain fundamental for the success of the EU-MED integration process, such as the role of regional South-South integration and the adoption of early warning mechanisms and preventive policies to reduce the probability of negative shocks induced by trade liberalization.

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¹⁶ Indeed, a number of empirical works show the existence of a trade diversion effect in the Mediterranean caused by CEECs (see also Ferragina et, al, 2005).

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5.

Eastern Dimension of the ENP – a New Challenge for the European Union. The Case of Ukraine

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The European Neighbourhood Policy (ENP), in development for several years now, should be seen as one of complex and innovative efforts undertaken so far in the history of the European Communities' external relations. This, quite naturally, exposes it to a great deal of controversy, manifested, among other things, in a vast diversity of opinions thereupon. Indeed, the ENP has been evaluated in most different ways, from very critical in which it is seen as an ineffective project meaning hardly more than a means of propaganda, to statements going as far as saying this is the EU's only foreign policy that really works properly.

Leaving this controversy aside, it should be pointed out that the European Neighbourhood Policy has featured, as the European Union's field of activity, characteristics somewhat similar to the EU's foreign policy as the whole. As such, it is subject to the same conditions as the EU's general activities in international arena. In order to evaluate it, then, one has to consider a set of conditions in which the entire European Union's foreign policy operates.

Another point that must not be overlooked is where the European Neighbourhood Policy originates from. It has been developed on the basis of tradition and expertise of international regional policies that have been run by the European Communities for several decades now, towards such regions as the Mediterranean or Central and Eastern Europe. In relation to the latter one, the ENP has been created basing upon an analysis of achievements of the so-called Eastern policy, developed and applied by the Communities and its Member States for basically the whole post-war period.

Witnessing the above, it seems well justified to place the ENP within the entire scope of operation of the EU's foreign policy, which, in itself, has accounted for a genuine area of the EU's activities. Then, it seems worthwhile to illustrate genetic relationships between the European Neighbourhood Policy and the EC/EU's Eastern policy, since, considering their respective specific natures, it is not always possible to draw a clear dividing line between them.

5.1 The essence of the EU's foreign policy

The notion of foreign policy has been applied, in principle, to describe actions of basic actors of international relations, namely – States. Foreign policy has been the principal tool to formulate objectives and assumptions, as well as to implement actions in the area of broadly understood relations of a State with the outside world. It is through their foreign policies (rightly regarded as one of fundamental attributes of sovereignty) that individual States build their positions and play their roles in international relations.

Has the European Union got its own foreign policy? With respect to such a unique entity as the EU, the issue is, on the one hand, similar as in the case of a classic State. On the other hand, however, it is more complex. Having to regulate the area of their relations with the outside world, the European Communities developed from their very beginning quite a sophisticated institutional and legal system, under many respects similar to respective national systems. This is one of reasons why the EC/EU may be treated in a similar way as national actors of international relations and – consequently – to have their own Community foreign policy as well.

However, the European Union is not a national structure. One of consequences thereof is that it has no single comprehensive centre to manage the entire area of relations with other actors of international relations. Another consequence is that scopes of competence of its institutions and bodies responsible for that area are limited. Existence of national, sovereign centres of power in the field of foreign policy in the EU Member States accounts for another important factor in this respect, especially as we consider that such centres often tend to compete both with one another and with the EU bodies. This, in turn, encourages critics to deny the real existence of the EU's foreign policy.

Despite all this controversy it seems obvious – and is indeed further confirmed as one observes political practice – that the European Union nevertheless has got an area of its relations with the outside world firmly in place. This area, carefully organised in terms of its organisational, institutional and legal structure, if considered in a single State, could traditionally be called foreign policy (Milczarek D., 2005).

Regarding this category, a number of problems is experienced. In fact, any attempt at its thorough analysis – either theoretically or empirically – brings forth many further serious issues. This difficulty stems from a striking ambiguity of the matter, which is very peculiar, yet extremely vague at the same time. In practice this means that the area of the EU's relations with the outside world has no precise border lines, either regarding its contents or its principal actors. In other words, it encompasses various issues and various structures. Moreover, no catalogue of clearly defined features or mechanisms of action can be specified for it. This vagueness becomes worse still as we consider a sheer chaos of possible interpretations regarding terminology, manifested in using most different names, such as “the EC/EU foreign policy”, “foreign policy of the EC/EU”, “European foreign policy” or “EC/EU external relations”.

In spite of this sort of dimness, the area described as a sphere of the European Union's relations with the outside world includes, in general, relations concerning two

fundamental fields: one of economic nature and another of political and military nature.¹ The former includes mainly (if not only) the Common Trade Policy, supplemented with development and human aid, whilst the latter relates to the Common Foreign and Security Policy (CFSP), supplemented with the European Security and Defence Policy (ESDP), constituting the so-called EU's second pillar (Milczarek D., 2005b).

Roots of this division are not uniform, either. Of course, it largely stems from traditional distinguishing into two levels of policy run by actors of international relations, namely, *high politics* and *low politics*, which has been quite traditional and well-rooted both in practice and in theory in that area. The upper level was understood as including proper foreign policy applied by States, in most cases identified with using traditional diplomatic and military instruments, while the lower one would rather include "down-to-earth" fields, such as foreign trade and economic relations.

An additional difficulty experienced in the case of the European Communities is whether it is right to attribute a power to run foreign policy in a narrow sense of the word to that organisation, considering that - according to many experts and practitioners - such a competence can only be enjoyed by States. The European Union, while indeed not being an independent international subject in a strict legal meaning, nevertheless has a unique status. Clearly, a national actor of international relations it is not, but it is equally obvious that it has both potential and attributes to run its own foreign policy. This is best illustrated by the very fact of existence of the EU's second pillar, even as flawed or inefficient as it is.

Division into areas of external economic relations on the one hand and political and military relations on the other hand has also been determined by the fact that both areas differ in terms of their underlying philosophy: in economic matters it is mainly the Community-level bodies and institutions that enjoy competences, while in foreign and security policy it is Member States that have the final say.

Despite this visible inner incongruity, both areas should be treated jointly, as one common and mostly, if not entirely, coherent sphere of the EU activity, which is quite different, after all, in its subject matter from other spheres, such as processes of internal economic integration. Yet, what is really important in that context, is to be aware that a so-defined European Union's foreign policy really is a sort of a conglomerate. It includes elements of both policies applied upon the Community level and also of national foreign policies. This relates to both its principal components, since in both cases we have to deal with joint action of the Community level and centres of national authority. What remains different is only the volume of such action: the role of the Community bodies is much larger with respect to economic external relations, while the subject matter of the EU second pillar in principle remains the area of national policies.

On the one hand, it is quite clear that the EU foreign policy failed to replace foreign policies run by individual Member States. Moreover, so far the EU has developed no institutional system that would really be common and consistent and could effectively represent that organisation and its Member States in relation with the rest of the world. Another indisputable fact is that, as far as the EU foreign policy is concerned, we are

¹ Of course, it is also possible to extend the problem by adding other issues: social, cultural, ecologic and so on, however, such an interpretation would only further complicate the analysis of the problem. Besides, different aspects of these matters are in fact included in the two basic categories.

really witnessing a domination of Member States, which implement the CFSP mainly by means of intergovernmental collaboration.

On the other hand, it doesn't seem justified to entirely accept concepts in which an absolute domination of States is emphasised and according to which the European Union's foreign policy is little more than a sum of its Member States' national policies, at best coordinated at the EU level. Instead, it seems more apt to assume that the EU's foreign policy plays a role of combining and securing common interests of its Member States within – as put in the Maastricht Treaty – “*the ever closer Union*”.

Due to all these reasons, both the EC/EU Eastern policy and the European Neighbourhood Policy developed on its basis, have been derivatives of the whole EU foreign policy, taking advantage of its strengths and suffering from all its weaknesses. It seems that the ENP could well be analysed using the “Capability-Expectations Gap” concept, formulated as early as over a dozen years ago by Christopher Hill (Hill Ch., 1993, 1998). The concept was based upon the statement that, while in fact the Communities from their very beginning attempted to act jointly in international matters, it was not earlier than by establishing its Common Foreign and Security Policy in Maastricht that the European Union finally vastly increased expectations as regards development of collective and effective diplomacy. (Such expectations being expressed both by the EU itself and by its foreign partners.) Unfortunately, those expectations proved much larger than actual capabilities of institutions, instruments and means the EU could apply. Even more importantly, no resolute political will was revealed to make a proper use of all such instruments as were in place.

This sort of diagnosis may also relate to assumptions and implementation of the European Neighbourhood Policy. It seems that expectations the European Union and its partners have expressed regarding the ENP effectiveness are quite serious; however, they not always seem to be fully aware of different limitations this policy has. One of its fundamental weaknesses is discussed later on; here it should suffice to remind the above-mentioned deficit in the form of a relatively weak consistence of the whole EU's foreign policy, which directly affects the effectiveness of the European Neighbourhood Policy.

It should be remembered that the ENP has been run at two different levels: that of the EU and that of its Member States. This means that both intents and specific actions of the Community institutions are confronted with preferences and national policies of the EU's individual Member States. In many cases this leads to conflicts of interests or clashes, which, according to an extreme scenario, might result in the whole EU's policy being paralysed. The lack of any consistent policy on the part of the EU regarding the conflict in the former Yugoslavia was a good example thereof, this having resulted, among other things, from disagreements between France and Germany. Differing attitudes of various Member States towards the “orange revolution” in Ukraine provide another example. The EC/EU's Eastern policy, being a fundament for the ENP, obviously has to evolve in the setting of similar conditions and limitations.

5.2 The evolution of the EU's Eastern policy

Maintenance of proper relations with their Eastern neighbours has always been one of the key priorities for the European Communities' foreign policy. In fact, the matter has been important on both levels: the Community and the Member States' level alike, as evidenced by a large number of projects and initiatives, addressed – throughout the post-war period – first to the Communist block, including the Soviet Union and its Central- and Eastern-European allies. As examples, the Communities' involvement in the process of détente initiated by the activities of the Conference on Security and Cooperation in Europe or policies of individual Western European countries, including, in particular, those of the leaders of the integration processes, namely France and Germany, can be mentioned. The former country has advocated development of all-European collaboration above block-wise divisions since the period of General de Gaulle rule (under the slogan of "Europe from the Atlantic to Ural"). West Germany, instead, developed their own, very intensive *Ostpolitik*. This is how the category of Eastern policy became a solid element of both the European Communities' and their individual Member States' foreign policies.

The status of the Eastern Europe within this policy became even more important in effect of the "Autumn of Nations" at the turn of nineteen eighties and nineties. It was at that time that the European Communities had to face new challenges stemming from general transformations occurring in international relations. This mainly regarded a radical shift in the balance of power in Europe as a result of the fall of the Communist system in the East of the continent. The importance of the fact was enormous, not only for countries of the region, but for the whole Europe as well, as it opened up quite new opportunities of development of democracy and of nation's right to self-determination. Beneficial examples thereof can be found in victories of democracy in most post-communist countries and in reunification of Germany, however, we witnessed an appalling negative consequence as well – in the form of an outburst of a civil war in former Yugoslavia.

In order to meet such new challenges, the Communities extended their legal and organisational formula by establishing, in 1992, the European Union to strengthen the area of European integration processes at an international arena. But this was just one step. They also undertook efforts to define the model of their future relations with new democracies, arising on the ruins of the former communist system. Ties contracted with countries of the Vysehrad Group (Poland, Hungary, Czech Republic and Slovakia) were relatively strongest and further consolidated by the fact that member countries of the Group actively promoted integration among each other under the Central European Free Trade Agreement (CEFTA), established in 1993.

For Central European countries binding close ties with Western European integration structures of Western Europe – which has been, along the USA, the principal mainstay of democracy and of social and economic progress in modern world – provided an invaluable opportunity or even an indispensable condition of strengthening their economic and political status in Europe. Moreover, this enabled them to consolidate patterns of democratic State of law and of principles of liberal market economy, both of which were only at earliest stages of rebirth there.

For the newly-established European Union, on the other hand, definition of a new formula of relations with the Central and Eastern Europe countries became one of the foreign policy's priorities. By tying a closer collaboration with those countries the EU mainly aimed to achieve its strategic goal, namely that of ensuring peace and security in its direct neighbourhood and of minimising a potential risk of political, economic and social destabilisation in the region. The EU used a number of various instruments to shape its new Eastern policy, such as trade liberalisation, economic and financial collaboration or development of political relations.

At the same time, for Central European countries rapprochement with the Community structures became an important element of the process of preparation for their association with the EU and then of obtaining, by some of them, a status of the EU Member States. The Communities on their part, to meet such aspirations half-way, concluded with Central and Eastern European countries association agreements known as the Europe Agreements. One important difference between them and any previous agreements was that they included political issues (under the so-called political dialogue), rather than concern economic matters only. The process of approximation of economic, political and social life in the candidate countries to the Community standards, quite difficult and taking well over a decade, was concluded successfully: as many as eight of them became official Member States of the European Union in 2004 and two other ones joined them at the beginning of 2007.

The EU Eastern enlargement also became an important turning point in development of the EC/EU Eastern policy. While previously the policy – even if focused upon the associated and candidate countries – in fact covered the whole Central and Eastern Europe region and all its countries, after 2004 it was clearly divided into two paths.

On the one hand, it covered the so-called European Union's Eastern dimension (following the pattern of its Northern or Mediterranean dimensions) and, in consequence, began to concern a specific group of the EU Member States, separated according to specific geographic, political, economic, social, cultural and other characteristics. On the other hand, the EU's Eastern policy has still covered the remaining Eastern European countries, which at present either would not or cannot aspire to become the EU Member States (which mainly relates to the Russian Federation, Ukraine and Belarus).

These two paths, components of the EU's Eastern policy, should be clearly distinguished, because at present they are quite different, both as regards their proponents and their contents. Interestingly, new EU Member States, while naturally being an object of the new policy (*i.e.* actions undertaken by other partners are addressed to them), at the same time are authors of that policy, as well, mainly in relation to their Eastern neighbours. This means that, following their accession to the European Union, ten Central and Eastern Europe countries ceased to be the principal object of the Eastern policy. Instead, they joined the remaining Member States as countries developing and implementing that policy.

In effect of its Eastern enlargement, the European Union faced new challenges, both in the area of further promotion of its own integration processes and in that of absorbing previous achievements and potentials of new Member States in order to be able to take full advantage of benefits stemming therefrom (Milczarek D., 2006). The task, while very ambitious, is very difficult, too. In particular, it is necessary to carry on efforts

aiming at prompt and complete inclusion of new Member States into structures of the EU integration. This was rendered much easier thanks to the EU's policy in the pre-accession period – no matter whether it was called “Eastern policy”, “aid policy”, “pre-accession strategy” or any other. At present, in conditions of membership, such policy should advance with at least equal intensity or, ideally, with even greater dynamism. Considering the scale and importance of all sorts of the EU aid provided (mainly under the Structural Funds) to new Member States, its activities in this area should still be described as – specific as it may be, but undeniably true and valid – Eastern policy towards its own Member States. This takes place, at best, within what is called the EU's Eastern dimension, *i.e.* in conditions of intra-Community co-operation.

The proper European Union's Eastern policy, on the other hand, has mainly been run, at present, in relation to third countries. Following the initial stage of binding ties in the form of an association with most of the USSR's former Central European allies and, subsequently, adopting them as Member States or not only the EU, but of NATO as well, the EU's relations with the remainder of countries of the region became very differentiated. Contrary to any superficial generalisations, it is quite difficult to find any common denominator in this respect, especially as we not only consider Russia, Ukraine and Belarus, but also include other countries, such as Moldova, in the Caucasus region Georgia and Armenia, and in Central Asia – Kazakhstan, Uzbekistan, Tajikistan, *etc.* Moreover, positions and interests of the EU as the whole, and of its individual Member States in particular, are very different depending on particular cases. This is quite evident as one analyses factors that affect the final shape of the Eastern policy, one of which, notably, is an evolution of the power balance in the very core of the European Union.

As mentioned above, certain Member States, especially France and West Germany, have always played more active role in developing and running the EC/EU's Eastern policy. It should be emphasised that, in relation to an area of that policy which concerned relations with Russia (and previously with the USSR) their attitudes were largely similar or even identical – both were and in fact still are advocates of maintaining as warm and close ties with Russia as possible, in appreciation of the fact that while it used to be an ideological and military enemy at the Cold War era, it nevertheless has always been regarded as an important political and economic partner, as well. No wonder then that for quite a long time, relations with Russia dominated the European Union's and its Member States' Eastern policy. This changed only when the issue of accession the former communist countries from Central Europe as the EU's new Member States became one of the priorities of that policy.

Considering that matter one has to remember what often tends to be overlooked: that originally the European Union did not intend to invite countries of that region to become its Member States at all. That idea had to ripen for a long time before it found acceptance – the fact that explains all sorts of hesitations and inconsistencies in the EU's attitude. In debates held to consider that subject attempts were made to decide upon the proper order of action: should the existing integration ties be consolidated first, or is it better to start with enlarging the EU area (the choice between deepening and widening). What finally prevailed was a pragmatic attitude combining both options, as it became evident that they were in fact dialectically correlated: the enlargement would make institutional reforms necessary anyway, since without them it would simply not be possible.

Therefore, the concept of the enlargement Eastwards neither was nor is universally and unconditionally approved in the EU. Beside various international and political factors, there are serious differences in individual Member States' fundamental, strategic political and economic interests that play an important role in this respect.

From that perspective, there may be two informal blocks distinguished in the EU: on the one hand, we have the "Eastern block" led by Germany, clearly advocating the enlargement in hope of shifting the EU's "centre of balance" further East, in which they perceive an opportunity to strengthen their position (which has already been dominant anyway). On the other hand, the "Southern block" formed under leadership of France which is much less inclined towards the Eastern enlargement than Germany - unsurprisingly - due to the same reasons, but seen in an opposite way (as a scenario they sum up to is little interesting from French perspective). Beside, the Southern block countries naturally have their much more specific and important interests in the Mediterranean region.

All these factors make the EU's Eastern policy – both in relation to third countries and to its present Member States – rather inconsistent and vague. This mainly results from clashing interests of its principal actors – both in relations between the European Union as the whole and its individual Member States and in those among particular Member States, especially the most powerful ones. Historically this was manifested, for example, by emergence of individual French and German "Eastern policies" and, most recently, by the fact that both countries maintain special relationships with Russia – traditionally the central object of interest of the Community Eastern policy.

As mentioned above, the recent EU enlargement by the adoption of Central and Eastern European countries brought important modifications to that policy. This way, it was divided into two separate, if closely inter-related, currents, covering relations with some of the new Member States as well as with countries traditionally addressed in the Eastern policy, which now became partners under the ENP. It should be underlined that controversies in the EU regarding potential continuation of the enlargement process directly affect and will affect both the present and future shape of the European Neighbourhood Policy which really becomes a hostage of a wider play of interests within the entire EU's foreign policy.

5.3 Quo vadis ENP?

Of course, a set of the above-outlined conditions determining the process of developing and implementing the European Neighbourhood Policy fails to form a complete list of the most important issues. The present concise paper cannot really reach beyond a number of key questions, such as an evaluation of how effective that policy occurs for the EU itself from the point of view of achievement of assumed tasks and objectives, or identification of conditions that should be met in order to improve such effectiveness.

There is no doubt the assumptions the ENP is based upon are very noble and, at the same time, politically and economically attractive. Its principal objective is to build a zone of political stability combined with balanced and sustainable economic and social development around the borders of the European Union. This is assumed to ensure the optimum conditions for smooth development upon an international arena to the EU and

its partners alike. In order for that policy to be implemented, a comprehensive range of measures were developed, not only economic, but political and social as well, to be used by the EU and its Member States under various types of aid schemes.

However, final efficacy of all those efforts depends on more than just the quality of projects, preparation of appropriate actions or amounts of resources involved. Instead, it seems that the principal problem behind the ENP is its very serious limitation, which results more from the very essence of that policy than it does from any weaknesses of its concept. The problem in question is the lack of the most important impulse to stimulate the EU's partners to contract close ties and collaboration under the European Neighbourhood Policy – namely: the lack of real prospects of getting their full membership in the European Union. This assumption was at the very base of the policy idea in the first place: out of definition, it isn't meant to pave the way for membership, it is just going to build a network of close links with neighbouring countries or regions.

Of course, one may rightly argue that the EU membership is neither necessary nor indispensable condition of development for any European country, including those situated at peripheries of the continent. Without any doubt, there have been many countries outside the European Union recording good or excellent economic and social results – and we are not only referring to wealthy ones such as Norway or Switzerland (neither included in the ENP), but to some Mediterranean countries, such as Israel, as well. Moreover, some ENP beneficiaries have been quite hesitant about binding too close ties with the European Union due to their various inner circumstances – this even holds true in relation to countries that officially wish to become the EU Member States, such as Turkey or Ukraine. Finally, it is obvious that neither a mere presence within the EU integration structures can be an automatic guarantee of success, nor staying aside causes a country to necessarily lose its development opportunities.

Nonetheless, as proven by both political and economic practice, prospects for becoming a European Union Member State acts as a very strong impulse that stimulates candidate countries to undertake serious efforts in the area of introducing reforms in the broadest scope and in most areas of economic, social and political life. Officially, such efforts aim at achieving harmonisation with the EU standards, but after all they bring an important contribution to general development of such countries, in particular as regards making up for their underdevelopment when compared to Western Europe.

The case of Poland provides a good example of this. From the very beginning of the systemic transformation in this country, Polish authorities and society agreed it was necessary to achieve a strategic goal of Poland's accession to the European Union. This enabled the country to undertake an enormous efforts to adapt all the areas of life to required standards, even despite the fact that the EU membership was not guaranteed at all. (One has to remember that the Europe Agreement Poland signed with the European Communities in 1991 stipulated for no automatic accession). In effect Poland, such as other candidate countries, managed to meet strict membership criteria and in 2004 was actually adopted as the EU Member State, but – and this should be emphasised – the process of thorough reform and modernisation of the country's economy, legal system, political and administrative structures and so on would have been beneficial anyway (Nowak A.Z., 2002; 2006, 2007).

Accordingly, prospects for achieving the EU membership may, on the one hand, act as an impulse stimulating systemic transformation, but – on the other hand – the lack of

such a prospect can undermine processes of general development in countries-beneficiaries of the European Neighbourhood Policy. That, in turn, due to a resulting non-compliance to requirements regarding political and economic stabilisation, might seriously weaken the effectiveness of the policy. This is a real paradox, considering that the lack of prospect for the full EU membership has been the fundamental assumption of the ENP.

This leaves us with a complex, but very important question: what next with the European Neighbourhood Policy? Of course, there is no single, easy answer to that question and since the objective of this paper is to indicate difficult problems, rather than offering simplified ways out, we are only going to list some general conditions that determine the future of the ENP.

Most importantly, it seems necessary to define in a more transparent and resolute way general political and strategic perspective, not only for the ENP as such, but more broadly for the entire foreign policy of the European Union. There are evident signs suggesting that both political class and societies of the “old Fifteen” are weary with the recent round of enlargement and ill-disposed to consider any further inclusions to the EM membership. This, however, is not going to prevent the European Union from having to answer a couple of fundamental questions sooner or later, such as: what the EU is after all and what is it meant to become in the future? Is it just a group of countries tied with economic integration, with loose political links among each other? Or is it meant to bound towards closer political union, basing upon the ever-stronger Economic and Monetary Union?

The importance of such questions is further emphasised by such facts as the failure (by now, at least) of the Constitutional Treaty. While, naturally, failing to solve all those problems, at least this Treaty was a step in the right direction, towards better clarification of some of them. However, as it occurred, citizens of some EU Member States, having no “political compass” to show them the direction the European Union was bound, preferred to opt for a conservative solution and to avoid the risk of giving a new impulse to European integration. Admittedly, such a clear vision is certainly needed: an alternative idea of the European Union as wholly functionalistic organism, developing along purely pragmatic lines and only through solving subsequent problems, according to a “spill-over” effect, neither seems sufficient nor – more importantly – efficient enough.

Just as important in the context of the ENP future are questions about where are the borders of united Europe, or Europe in general? What does it mean to be a European? Provisions of the EU Treaty stipulate for any European country a possibility to obtain the EU membership, but which criteria have to be met? Are Russia or specially Turkey (which has already been associated with the EU and has a status of a country-candidate for the membership) European countries? Which are the boundaries of Europe in geographic, political or cultural sense?

Quite naturally, one has to be aware these questions are very sensitive politically or ideologically. (For example, for some religious fundamentalists the identity of Europe stems, in the first rank or even exclusively, from the influence of Christianity.) In consequence, what we have to deal with here is neither any objective truth nor undeniable facts. Nevertheless, some attempts have to be made at the very least to answer such questions, because otherwise we are going to face real and serious barriers,

including in developing the European Neighbourhood Policy. After all, how can one resolve upon any specific action in relation to Turkey or Ukraine, unless criteria of what is “European” are set at first or political and cultural borders of the united Europe are marked? Should these countries be left for good in “European waiting room” within the ENP, or should a vision – perhaps difficult and ambitious, but ultimately viable – of gaining full EU membership be offered thereto?

While, as mentioned above, we are not going to give any easy solutions regarding the future development of the European Neighbourhood Policy, some options may nonetheless be suggested. Above all, it seems necessary to render the principles that regulate that policy more flexible. In particular, a provision should be made allowing for offering to certain, selected ENP beneficiaries of the EU membership prospect. Another obvious necessity is that of intensifying the debate on the fundamental, strategic objectives of both the whole set of integration processes within the European Union and the EU foreign policy, since that debate should be able to resolve the dilemmas of the European Neighbourhood Policy, too.

5.4 ENP and Ukraine – initial results

Having thus commented rather critically about the loose and imprecise concept of the European Neighbourhood Policy – or, essentially, about its holistic nature – it seems fair now to emphasise some of its achievements in promoting democracy, market economy and political and economic stabilisation. This is true, among other countries, in relation to Ukraine, firmly supported in this respect by the European Union. As an evidence that the European Union treats its relations with Ukraine as one of its priorities we could mention the signing of a document entitled the Common Strategy (1999) which, beside Ukraine, was only signed with Russia (Adamczyk A., 2006). Moreover, in February 2005 the Action Plan, signed at the end of the previous year, went into force, providing, on the one hand, for a sort of agenda of the EU’s co-operation with Ukraine and, on the other hand, a strategy for the European Neighbourhood Policy implementation.

The Plan assumed, among other things:

- The EU assistance in the process of economic and legal reforms in order to enable Ukraine to access the single market;
- Participation of Ukraine in a number of the EU programmes in the areas of education, research or environment protection;
- Co-operation in the areas of border control management, migration, fighting of organised crime, of financial and economic crime and of money laundering;
- Improvement of cooperation in the areas of transport, energy and know-how;
- Improvement of cooperation in fighting terrorism and counteracting proliferation of weapons of mass destruction as well as in solving regional conflicts.

Provisions included in the Action Plan are very general. Whilst they enable either party to implement them, at least partially, with considerable ease, at the same time they are much less obliging. Simply put, this document as little more than a list of good intents.

As eclectic as it is, its assessment can hardly be anything else than positive and in fact, it has mostly been evaluated favourably, especially by the EU experts, who rated the initial dozen months of its implementation rather positively. It has to be added, yet, that prospects for economic and political stabilisation in Ukraine – which was, after all, the key objective of the European Neighbourhood Policy – cannot be assessed optimistically.

In general, in any assessments of implementation of the European Neighbourhood Policy in relation to Ukraine it is indicated that, in effect of the entry into force of the Action Plan, a dialogue has been intensified between Ukraine and the European Union at all levels of authorities and on that of societies. This should make it easier to specify the EU's expectations from Ukraine and the other way round, in perspective of potential Ukraine's accession into the European Union.

The EU report evaluating Ukraine in 2006 underlines, above anything else, political stabilisation achieved in the effect of democratic elections held in March that year. The report emphasises a considerable progress in the area of enactment of fundamental rights, protection of human right, protection of rights of prisoners and refugees, changes in regulations concerning freedom of speech, extension of rights of minorities, freedom of operation and independence of media, *etc.* Also, Ukrainian trade unions gain freedom of activity (this being a necessary condition for the country to access to the International Labour Organization). In short, at the beginning of 2007 Ukraine is relatively well advanced in building the rule of law.

What also seems of note is an increase of a role Ukraine plays in an international arena, including, in particular, in its region. This especially relates to Ukraine's relations with Moldova and Belarus. Ukraine becomes an important link in the European security system in that area, participating, for example, in control of cross-border movement of persons and goods, fighting the trafficking of people, drugs and arms. But this is not all - Ukraine also emerges as a valid element of the EU foreign policy, including in its broad context. It has been actively involved in a number of international peace-keeping missions, such as that in Bosnia-Herzegovina. In December 2005 Ukraine ratified the Ottawa Convention on the Prohibition of the Use Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction. This then formed the basis for EU assistance to Ukraine for the elimination of landmines and old ammunition.

In 2006 Ukraine may also boast a significant progress in stabilisation of its economy, althout it still remains highly vulnerable to external shocks. The considerable surplus in the current account (10.5% of the GDP in 2004), boosted by buoyant steel exports, turned into deficit in 2006 as import prices of energy increased, while the world market for steel tightened. With the negative term-of-trade shock, combined with sluggish investment demand in an uncertain policy environment, Ukraine experienced a hard landing in 2005. Its real GDP growth declined sharply to 2.6%, against 12.1% in 2004. In 2006, however economic situation improved, with the growth of GDP at the range of 6.5%. The years 2006-2005 brought effective control of inflation that amounted to 8.7% in 2006 and 8.1% in 2005, respectively. While the inflation rate is still relatively high compared to an average EU level, for Ukraine it has been quite an attainment to finally bring it down to a single-digit number. The National Bank of Ukraine, however, does not have a clear operational mandate to pursue price stability and provisions ensuring its independence still need to be strengthened. A broad understanding on moving towards

inflation-targeting in the medium-term is emerging and a Memorandum of Understanding between NBU and Government, setting out respective roles and responsibilities, is under discussion.

After pre-election fiscal loosening in 2004, fiscal conservatism has returned, keeping the general government deficit at no more than 3.5% of the GDP. This has been achieved through rapidly increases of tax revenues, which have risen from 29% in 2004 to 36% in 2006 (ENP Progress Report Ukraine, 2006). A monetary policy framework is based on maintaining a *de facto* pegged nominal exchange rate for the hryvnia against the US dollar.

In general, an analysis of the above-quoted data regarding Ukraine's macroeconomic situation in the years 2005-2006 prompts one to admit that the country made a significant step towards stabilisation of its economy. Moreover, institutional transformations taking place in Ukraine, leading to gradual introduction of market economy, are noteworthy, as well. Most important in this respect is the establishment of a double-level banking system basing upon central bank along with commercial banks. Measures were also taken to create domestic capital market, the principal task of which would be to value financial assets on the one hand, while a stock exchange established in this context would be meant to become a source of capital needed for essential further investments in the country. So far, however, effects in this field are not impressive, as the level of capitalisation of the Ukrainian Capital Market is less than 7.5%.

While the above evaluation of Ukraine's achievements over the recent couple of years is rather positive, unfortunately not all of the country's vital problems have been solved yet. In fact, it doesn't take an expert to tell that, so far, the most serious problem is the lack of any clear and precise strategy for the country's development. The task is all but easy, of course, as we consider that the country is in practice into two parts, one of which, Eastern Ukraine, explicitly proclaims itself against the integration with the European Union and in favour of closer collaboration with Russia. Another part, Western Ukraine, markedly and unconditionally declares itself for closer co-operation and relative close integration with the European Union.

Therefore, resolving upon a strategy for Ukraine's development, while indispensable, certainly brings a number of objective problems with itself. Also, opponents of Ukraine's accession into the European Union at any time soon – including those in the EU – take strong arguments from the ambiguous attitudes to that issue within that country. The lack of strategy is interpreted as the country's immaturity to the processes of integration. Accordingly, suggestions are made to postpone any decisions regarding potential enlargement.

Certainly, there have been many reasons for the lack of specified strategy for Ukraine's approximation for integration with the European Union. Deficit of experience in running foreign policy, resulting from non-existence of independent State, undeniably was one of such reasons. However, there is no doubt that another important reason is a kind of disillusion with policies of the West, including the European Union, towards Ukraine, in particular in the period following "the orange revolution". Such a disillusion seems to have stemmed from excessive expectations of Ukrainian society as regards economic policy – namely, vast foreign investments were expected in this respect – and as regards foreign policy, as well: what Ukraine expected in this case was to get the

EU's clear position concerning regional problems and emigration policy, including the opening of the EU borders for citizens of that country.

While all the above-mentioned expectations clearly had some justification, their fulfilment – as illustrated by experience of other countries, including Poland – was rather impracticable, due to many objective and subjective reasons, as usual. Objective reasons include problems occurring in the European Union itself, such as its relatively low rate of economic growth, delays in implementation of the Lisbon Strategy, high unemployment, relatively low competitiveness of the EU economy, problems with absorption of new Member States, with development of security policy in the field of energy, both in Europe and globally as well as many other issues.

If the interest the European Union manifests in the ENP concept prepared at an earlier time seems insufficient, this has also been caused by problems concerning consolidation of the EU's identity, and in particular problems related to enactment of the European Constitution and development of common foreign policy towards such countries as Iraqi, Russia or Turkey. Subjective factors, in turn, seem to include above-mentioned holistic nature of the European Neighbourhood Policy.

Therefore, in relation to Ukraine we have to deal with an especially delicate case, also due to Russia's sensitivity to the European Union's relations with countries of the former Soviet block. This is the more important in the present day, when two competing centres of power may be distinguished in Ukraine: the group of the Prime Minister Yanukovych, very resolute about the need to maintain a proper balance between Ukraine's relations with Russia and with the European Union, as well as the group of the President Yushchenko, stressing the need for Ukraine to follow the path towards the West in a more determined way. This objective fact is quite comfortable for the European Union as it releases it from being obliged to specify precise perspectives and a rate of Kiev's integration with the unifying Europe.

This was particularly evident early in March 2007, during another round of Ukraine's negotiation with Brussels regarding a new agreement concerning the country's European aspirations. The EU Commissioner for External Relations Benita Ferrero-Waldner took advantage of that opportunity to make a reservation that the agreement concluded not only did not promise the EU membership to Ukraine, but also must not be mistaken for an agreement on the country's association with the European Union (*i.e.* that it was nothing like Europe Agreements). No even specific name has been given to that agreement yet (calling in that agreement on association would be a misunderstanding – the EU diplomats say). At the same time, Brussels explicitly states that such “a deepened agreement” with Ukraine is going to be a part of the European Neighbourhood Policy. Commissioner Benita Ferrero-Waldner declared also that, assuming political will and readiness of both parties – Ukraine and the European Union – there is nothing to preclude any further steps to be taken in the future.

In practice, what is much more important for Ukraine than such a general declaration, is the European Commission's decision on “substantial increase of financial support for the reforms process” in that country. In the years 2007-2010 Ukraine will receive EUR 494 million. Since 1991 the EU “transferred” EUR 2 thousand millions to Ukraine, including EUR 212 million over two last years. Nevertheless, one has to remember that despite an increase of the level of funds for Ukraine, Mediterranean countries are still going to be more privileged than the EU's Eastern neighbours: between 2007-2010

eight Southern countries are going to receive a total of EUR 2,665 million, including, for example, Egypt: 558 million, Algeria: 220 million, Tunisia: 300 million and Morocco: 654 million.

Therefore, from the point of view of Ukraine's political forces favouring integration with Europe, the implementation of the European Neighbourhood Policy is neither a simple nor easy task. It requires determination from both sides: on the part of the European Union and on that of the EU's neighbours to which it is addressed.

A special role in this respect should be played by Poland, as already manifested at the time of "the orange revolution". Warsaw still assists Kiev with its own experience in the process of transformation of post-communist economy. Unfortunately, so far, in spite of efforts in this field, Poland (supported by the United Kingdom, Sweden and Hungary), failed to win the case of specifying a precise European perspective for Ukraine. All in all, this is a clear sign that the role of the European Neighbourhood Policy, as potentially important element of a comprehensive strategy of the European Union's foreign policy, should be much bigger than it has been so far.

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6.

European Neighbourhood Policy, 2004-2006: the Growing Need for a Strategy

Andrzej Harasimowicz

The European Union's decision to extend the area of democratic stability and freedom around Europe of 25, (ring of friends) was a promising signal of growing identity and a readiness to act outside its own, newly enlarged, territory. The European Neighbourhood Policy (ENP) is great and needed plan: had it not been existed, it should be invented! However, after 2 years in operation, the initial hopes seem bleakly while the concerns are growing.¹ The coincidence between the Enlargement of 1 May 2004 and the ENP, launched 12 days later, was carefully planned to send the message that policy of enlargement will be replaced by the good neighbourhood policy. This policy change was, from the beginning, disputed by some new member states which preferred to keep the membership perspective open for those ENP's partner countries (5-6 countries among 16) which have *vocation europeenne*, as Poland did in case of Ukraine.² In turn, the south-western member countries prefer the Mediterranean focus for the ENP and see it as a sort of extension and continuation of the Barcelona process. This difference of approach was never seriously debated in the EU and the existing division may hamper the progress of the ENP as a strategy. Another important assumption of the ENP which was, without debate, taken for granted, is that:

“This privileged relationship with neighbours will build on mutual commitment to common values principally within the fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development”³

¹ A. Harasimowicz, The European Neighbourhood Policy of the EU after Enlargement 2004: Empire with a Human Face?, in: W. Sadurski, J. Ziller and K. Żurek (ed.), *Apres Enlargement: Legal and Political Responses in Central and Eastern Europe*, European University Institute, R. Schuman Centre for Advanced Studies, Florence 2006, p. 339-349

² P. Buras and K. Pomorska, The Eastern Focus of Polish Policy towards the ENP, *Centre for Eastern Studies*, Warsaw 2006, p.34: “Drawing Ukraine closer to the Union and granting Kiev the prospect of EU membership is part of the Polish *raison d'état* (...) Consequently, as long as the ENP does not address this crucial issue of Polish foreign policy it is not likely that Poland will fullheartedly share its objectives or priorities...”

³ European Neighbourhood Policy: Strategy Paper, Communication from the Commission, COM (2004) 373 final, Brussels, 12.5.2004, p. 3.

The alleged existence of “mutual commitments to common values” is risky point of departure and this hypothesis was never proved. The good experiences imported into the ENP from Central Europe’s accession process and 2004 enlargement can hardly give the rationale for above assumption. Many arguments might be used to show that the experiences of 2004 enlargement cannot be the base for the ENP (membership perspective, common attitude on Europeanization, democratization and modernization, common threats’ perception, cultural and religion proximity, positive historical links).

Europe, embracing present 25 members of the EU, has have turbulent relations with the regions covered by the ENP now. Their warrior empires conquered and kept for centuries vast lands of Spain, Balkans, Greece and Russia, approached southern Poland, Bohemia, Hungary and suburbs of Vienna in 1683. In turn, the whole area of Northern Africa and Middle East was in XIX-XX centuries subordinated to European colonial rules, often harsh and they are still present in peoples’ memories. Also, the present situation in European neighbourhood is far from stable:

“The EU is surrounded by an arc of instability, running from Belarus in the north east, down through Ukraine and Moldova, into the Western Balkans, across the Black Sea to the Caucasus, down into the Middle East and westward into North Africa”⁴

In fact, this is the most turbulent region on the globe where directly meet three world’s religions and strategic interests of the EU, United States and Russia, as well as Turkey and Iran. The political systems in the EU’s neighbourhood are composed of regime types ranging from new but weak democracies to regimes with authoritarian features and limited political participation. The relations, always uneasy, have been worsened further after terrorist attacks of 11 September 2001 and “war on terrorism” declared by the USA. Numerous tensions and claims concentrate around basic values, such as freedom, human rights, open society, religion. The general socio-political frame for these tensions was build since ages on the mirror contrasting threats’ perceptions, where both sides has been watching each other with the fear, mistrust and little understanding. Today, both sides seem dissatisfied and frustrated. The partners do not know or understand each other well, and disrespect too often: Christians feel endangered, while Muslims feel offended.⁵

According to Arab Human Development Report prepared by the United Nations Development Program, there are three basic deficits in Arab countries: 1/ a freedom deficit in political and civil liberties; 2/ a knowledge deficit in terms of education and access to information; 3/ a gender deficit (women’s empowerment). These deficits,

⁴ C. Grant, Europe’s Blurred Boundaries. Rethinking Enlargement and Neighbourhood Policy, CER, London 2006, p.49).

⁵ T. Garton Ash, Islam in Europe, *The New York Review of the Books*, vol.53, no 15, Oct.5 2006), opines that “Europe’s difficulties with its Muslims are also the subject of hysterical oversimplification (...) As an inhabitant of Eurabia, I must insist on a few elementary distinctions. For a start, are we talking about Islam, Muslims, Islamists, Arabs, immigrants, darker-skinned people, or terrorists? These are seven different things. (...) In the relationship with Islam as a religion, it makes sense to encourage those versions of Islam that are compatible with the fundamentals of a modern, liberal, and democratic Europe. (...) Islamic reformers such as Tariq Ramadan (...) insists that Islam, properly interpreted, need not conflict with a democratic Europe. Where the Eurabianists imply that “more Muslim Europeans means more terrorists,” Ramadan suggests that the more Muslim Europeans there are, the less likely they are to become terrorists (...) that you can be both a good Muslim and a good European.”

combined with world's lowest growth *per capita* (except Sub-Saharan Africa), until eliminated, will block the structural reforms, which must go far beyond the economic realm and must encompass the social and political sphere as well. Thus, the ground for the ENP's implementation is highly unstable. That mix of politico-social deficits and mutual poor understanding, makes the ENP a challenge of strategic importance and this is why the ENP's both, the success or failure, might become a real test for EU's external relations, its stability and viability.

After two years since its launching in May 2004, things go rather badly in the vast regions covered by the ENP. According to the Commissioner responsible for the ENP, Benita Ferrero-Waldner, this policy:

“...is facing a delicate mixture of relative slow economic growth and entrenched poverty, coupled with strong population growth and an instable political environment”. One cannot speak on real progress and “the region has been losing market share in global trade and investment flows”, and nobody knows “how to turn this vicious circle into a virtuous one?”⁶

The same applies, in her opinion, to Southern Caucasus:

“Generally however, the last weeks and months have shown worrying trends in the South Caucasus. Three negative strands are coming together, the combination of which is, frankly, alarming. First, we have seen little or no progress towards settling any of the frozen conflicts - Abkhazia, Nagorno-Karabakh, South Ossetia. All parties have failed to deliver on their responsibility to find a solution. Second, defence expenditure in the region is going through the roof. Quite apart from the negative message this sends for resolving the conflicts, this cannot be good policy-making in a region where human development indicators are a matter of deep concern. How can governments justify spiralling defence spending when their countries are in desperate need of investment in education, health and small businesses? Third, increasingly inflammatory rhetoric, as we have seen over the past months, is shaping public opinion in a counterproductive direction. There is a serious danger of the rhetoric lowering the threshold for war”⁷

Other European Union's institutions: the European Parliament, the Committee of the Regions, and the Economic and Social Committee (ECOSOC), while generally supporting the idea, expressed also critical opinions on the progress of the ENP and its main shortcomings: bureaucratic instead of wide scale political action, weak cooperation with other players and among partner countries, too weak incentives, neglecting social dialogue and the role of the small and medium size enterprises...

The European Parliament emphasizes the need to establish an effective monitoring mechanism and a readiness to restrict or suspend aid and even to cancel agreements with countries which violate international and European standards of respect for human rights and democracy, and calls on the European Commission to operate a vigorous policy of support for democratic forces in those neighbour countries, in particular by ensuring access to independent media and information.⁸

⁶ Benita Ferrero-Waldner, The German World Bank Forum in Hamburg, 2 June 2006.

⁷ Benita Ferrero-Waldner, *Political reform and sustainable development in the South Caucasus: the EU's approach*, “Caspian Outlook 2008” Bled Strategic Forum, Bled, Slovenia, 28 August 2006

⁸ European Parliament resolution on the ENP, Strasbourg, 19.01.2006, based on Tannock Report on ENP, 7.12.2005.

The ECOSOC is concerned at no real role for the social dialogue in the ENP. Unfortunately, none of the documents examined (Commission documents and Action Plans), apart from a few vague hints at the need for consultation with certain social actors, envisages the explicit and substantial involvement of consultative bodies, the social partners or civil society organisations in the implementation of the policies covered by this report.⁹

The ECOSOC expresses the doubts whether the bureaucratic approach taken in the ENP can guarantee the success:

“Euro-Mediterranean partnership and the ENP presuppose stability, peace, shared values and the development of dialogue. None of these objectives can be achieved in a stable way solely through the action of institutions or administrations.”

While the European Parliament took global approach, the Committee of the Regions goes ‘locally’ and “*stresses the importance that local and regional governments has to play in this process and is concerned at the absence of any substantive mention and defined role for local and regional governments within the policy*”.¹⁰

The threats to the ENP are twofold, and come from 1. its own internal weaknesses, and from 2. the politico-social deficits in the partner countries.

Of course, the ENP is still in her infancy and too young to be guilty for all evils but, nevertheless, that gives some indication of its present real ability to influence the course of events, to stabilize the situation or to promote peace in the region.

The ENP aims at democratization and, consequently, Europeanization, but it still remains to be seen whether European concept of democracy is applicable in the target area. Through its new ‘neighbourhood policy’ idea, the EU sets out in principle to extend its gravitational field in favour of democracy and human rights, but without the incentive of accession perspectives it seems most uncertain whether this can work. This reluctance to extend further the perspectives for EU enlargement is driven by concern that the EU itself would become ungovernable, which would in turn destroy the magnetism of its field of gravity.¹¹

For the most of Muslim partner countries ‘democratization’ means ‘Europeanization’ which is symbol of un-welcomed ‘westernization’ or tolerated ‘modernization’. Eastern European Orthodox and Caucasus old nations feel Europeans. Armenia and Georgia are the oldest Christian states. The partner countries are clearly different one from another in terms of culture and religion, in a way they perceive democracy and “Europe”. Some of them (6) have *vocation europeenne*, some are democratic or quasi-democratic or authoritarian, some would welcome westernization, some exclude it. The diversity of ENP’s area, is denied by no one. So, is one single frame of “European Neighbourhood Policy”, most suitable one for such different pictures? There was no serious debate on the reasons for and the degree of differentiation:

⁹ European Economic and Social Committee, REX/202, The role of consultative bodies and socio-occupational organisations in implementing the Association Agreements and in the context of the European Neighbourhood Policy, Brussels, 16 September 2005.

¹⁰ Opinion of the Committee of the Regions, 14.04.2005, on the Communication from the Commission: ENP-Strategy Paper.

¹¹ M. Emerson and G. Noutcheva, *Europeanisation as a Gravity Model of Democratisation*, CEPS Working Document, no 214, November 2004, p- 22.

“...that can be heard in the Brussels institutions that the member states have been worried about the way the ENP was developing, because the Commission was taking too much into its own hands. The EU’s new neighbourhood policy is a somewhat ambiguous attempt to set in motion the Europeanisation of its partner states. The idea of Europeanisation fits well the current political objectives of Ukraine. For the Arab states of the Mediterranean, one may aim at notions of a Euro- Mediterranean identity, which already has some resonance in countries such as Morocco or Tunisia. The EU’s power to influence its neighbours is clearly strongest for those European states that have membership aspirations, even when this is not reciprocated for the time being by the EU. It is less obvious whether the same logic can work in the much weaker setting of close neighbourly relations, and this lies at the heart of the case.”¹²

The success of democratization and modernization policy of the European Union in case of Central Europe in the 1990s, can hardly be repeated in case of present neighbourhood policy. There was a feeling of community and general trust on both sides, geared and fuelled by membership perspective for Central European countries. All ENP’s partners (Israel is different case) do not return to democracy, as the countries of Central Europe, despite all deficiencies, did. They neither know nor practice democracy and the ruling elites have no great appetite and respect for it. There was a cross-regional cooperation in ECE along non disputed borders (The Visegrad Group, The Stability Pact for Europe etc.) – what is not the case with the countries covered by ENP presently: many hot and frozen conflicts flowing from disputed borders, ethnic and religious tensions. In the result, mistrust and tensions prevail among partner countries themselves and among the UE and its neighbours. Those differences are regrettably real and firmly based on different cultural, social, economic, and political structures of both partners. This raises the question of policy’s differentiation and the universal applicability of Western model of democracy and modernization. Not only President G. W. Bush methods of democracy promotion by force, but also European soft power promotion concepts, are being questioned by the American and European experts:

“...the problem of jihadist terrorism will not be solved by bringing modernization and democracy to the Middle East. The Bush administration’s view that terrorism is driven by a lack of democracy overlooks the fact that so many terrorists were radicalized in democratic European countries. It is highly naive to think that radical Islamists hate the West out of ignorance of what the West is. Modernization and democracy are good things in their own right, but in the Muslim world they are likely to increase rather than dampen the terrorist problem in the short run.”¹³

There are many reasons to think that present political elites in most ENP’s partner countries do not share fully our interest in democratization and modernization of their countries along European concepts (Europeanisation), and see them as a potential threats for their regimes. Until both sides will not work on similar assumptions concerning the implementation of binding agreements with the goodwill and all due efforts, according to their spirit and letter, respect the independent judiciary and the separation of powers, and the separation of state from religion, the results of political

¹² M. Emerson, S. Aydin, G. Noutcheva et al., *The Reluctant Debutante: The EU as a Promoter of Democracy in its Neighbourhood*, CEPS Working Document, no. 223, July 2005, p. 5.

¹³ Fukuyama, Identity, Immigration, and Liberal Democracy, *Journal of Democracy*, April 2006, vol.17, no2, p.11; similar views, see: TGA and C. Grant):

dialogue will be limited.¹⁴ This is real problem because the need of cooperation is obvious. At the same time, the ENP cooperating with the present regimes, may find itself in a position of the supporter of façade democracy in the neighbouring regions. Also, one may argue that technocratic approach may lead to a superficial Europeanisation, with actions taken by partner countries sufficient for the Commission to make ticks on its checklist of formal requirements.¹⁵

Lack of political parties and solid institutions makes the situation in the post-Soviet and Muslim/Arab world comparable, despite all differences in the façade's ornamentation:

"In both the eastern and the southern neighbourhood of the EU, a type of party has emerged, the 'party of power' characterised by its dependence on the state, the absence of ideology and the linkage with specific sectoral groups. Examples of such parties can be found in Ukraine during the reign of President Kuchma and in present-day Egypt. The ideological weakness of parties of power and their dependence on the state is both a symptom and a cause of the failure of democratic consolidation. Because they prevent the emergence of a multi-party system based on competing ideological-programmatic currents, these parties and their legacies should be seen as an important stumbling block in the transition towards and consolidation of democracy. (...) Western policy-makers should support the formations of such parties. Equally, parties should be encouraged to translate ideological precepts into coherent policy positions, so as to achieve in the long run the shift in loyalties from clientelistic practices to programmatic principles."¹⁶

To pursue the democratic reforms in practice will not be easy because the lack of coherence, may be seen not only in the target regions but also within the EU itself. This makes the EU's official neighbourhood policy a subject to ambiguous interpretations - at least, by the majority of member states - that claims it is a foreign policy, and various partner states that view it as a pre-accession strategy:

The EU also reveals fairly profound divergences and ambiguity of priorities in relation to democracy promotion. These divergences are different, however, from those found in the US (hard power realists versus soft power diplomats). The individual member states of the EU are naturally inclined to give priority to neighbours that they are closest to geographically. This dictum also often relates to historical experiences that resonate in the foreign policy reflexes of national capitals. Thus France, Spain and Italy always put the Mediterranean high on the agenda; Germany, the Baltic and Central European states

¹⁴ R. Cooper, *The Breaking of Nations. Order and Chaos in the Twenty-First Century*, London 2004, p. 178: "But after the tyrant has fallen, the problems begin (...) behind every well-functioning democracy lie not just constitutions and institutions but a series of unwritten rules: that the army does not seize power, that the courts are politically neutral, that the losers in elections do not take to the hills, that certain levels of social justice will be preserved, that some balance among different communities will be preserved, that those in power will govern (up to a point) for the good of the country and will keep personal enrichment within bounds. (...) The difficulty is that these sorts of understandings cannot be exported, imposed or taught, even by the most benevolent foreign friend."

¹⁵ M. Emerson, *Democratisation in the European Neighbourhood*, CEPS, Brussels 2006: "... democratisation has to be seen first and foremost as a home-grown process. The gravitational forces of influence and incentives emanating from the European Union, pulling these states into democracy, are themselves important (...), but still ones that have to take second place behind the domestic driving forces for political reform."

¹⁶ M. Resende and H. Kraetzschmar, *Parties of Power as Roadblocks to Democracy: The Case of Ukraine and Egypt*, in: M. Emerson (ed.), *Democracy in the European Neighbourhood*, CEPS, Brussels, June 2005, p.154.

are most interested in their northern neighbours, while the UK still looks across the Atlantic. Nevertheless, these obvious interests flowing from geographical, historical and cultural proximities provide no simple indicator of whether the member states in question will be harder or softer, or more or less vigorous in democracy promotion in various areas of the neighbourhood. The historical colour of these close relationships has to be brought into play. Former colonial powers tend to be hesitant to intervene politically in their former colonies, as in the case of France and Spain in the Maghreb. The legacy of World War II makes Germany very reluctant to see the EU take a strong position towards Israel over issues of international law, and this may also partly explain a rather soft line towards Putin's dedemocratising Russia. On the other hand, the Baltic and Central European states, having been occupied by the Soviet Union, reveal the opposite logic, with a much greater inclination to make points of political principle towards Russia.¹⁷

As of now, the balance of obligations in relation to incentives is too heavy for the policy to achieve strategic leverage in the sense of Europeanisation and transformation of the target states. The lack of membership perspective and EU high demands of political, economic and social nature, which are, after all, politically sensitive and risky for the parties of power in the target countries, make the ENP partners' much less attracted by European *weapons of mass attraction*. The experience gained since 2004 shows that the stick and carrot policy (explicit political conditionality) works much less efficiently in countries ruled by the parties of power. The carrot is definitely too small while the stick is, practically not envisaged, but the price for avoiding its own rules may be high for the ENP:

In practice, the EU has never punished miscreants: one or another member-state has always found a reason for wanting to excuse the guilty government. The neighbourhood policy is supposed to get round this problem by introducing the concept of 'positive conditionality': neighbours that perform well will gain access to extra money and benefits from the EU.¹⁸

In the end of 2006, the signs of the European Neighbourhood Policy's own weaknesses are numerous:

1. weakness of strategy,
2. lack of political will,
3. overall strict bureaucratic rules,
4. insufficient human and financial resources,
5. inter-institutional tensions¹⁹,
6. no incentives for cross-regional cooperation and for SME,

¹⁷ M. Emmerson et al., *Reluctant Debutante*..., op. cit., p. 6.

¹⁸ C. Grant, *Europe's Blurred Boundaries. Rethinking the enlargement and neighbourhood policy*, CEPR, London 2006, p. 53.

¹⁹ The first five weaknesses quoted from: K. Raik, *Promoting Democracy through Civil Society: How to Step up the Eastern Neighbourhood*, CEPS – Open Society Seminar on "EU Support for Civil Society in Eastern Neighbourhood", 28 March 2006.

7. poor information coverage (both, within the EU and ENP area),
8. lack of differentiation (“all eggs in one basket”),
9. no role for the US and other important partners,
10. national diplomacies of member states’ not involved.

The cumulative effect of the above weaknesses, combined with the politico-social deficits in the target countries, makes:

“...that the European Union has decided to continue with its traditional policy towards this area. Such a policy is limited to achieving partial political reform, rather than a genuine democratic transition. This statement is based, in particular, on the fact that the Commission has not translated into political priorities the necessity to respect the principle of the separation of powers, to increase parliament powers, to strengthen the role of political parties, to guarantee judicial independence and legal accountability, and to guarantee the equal implementation of human rights. Thus (...) it does not seem possible to affirm that the European Union is moving towards a new and more successful strategy for democratization in the Southern Mediterranean. The EU approach to democracy and human rights in this region seems to continue to be very cautious and it is not possible to assess whether it will be credible...”²⁰

The European Union needs the United States - as well as Russia, Turkey, Iran and China - to make the ENP a long-perspective success. One may be very critical on the US’ present approach to the use of force in promotion of democracy, but it was a history, geography and global economy which made the US an important player in the region covered by the ENP, on a scale often greater than that of EU. To ignore or neglect the role of US in ENP area is an ostrich’ policy of eyes’ closing not to see the embarrassing problem. However, the ENP ignores the US presence and influence in the regions of ENP. It remains unclear why ENP does not follow EU Strategy: *Secure Europe in a Better World*, which stresses the inescapable need for “*working with partners*” and pointing out that: *there are few if any problems we can deal with on our own*”:

“The transatlantic relationship is irreplaceable. Acting together, the European Union and the United States can be a formidable force for good in the world. Our aim should be an effective and balanced partnership with the USA. This is an additional reason for the EU to build up further its capabilities and increase its coherence”²¹

While ENP stresses “important role for Russia”, and rightly so, sees no role for the US and this is evident weakness of this strategy. Thus, the neighbourhood policy has no basic link with EU Strategy on which ENP is politically grounded. The interests of the United States in the regions covered by the ENP, are no secret. Leading American strategists and politicians, from Henry Kissinger to Zbigniew Brzezinski, lost no occasion to point, that:

²⁰ E.Baracani, From the EMP to the ENP: A new European pressure for democratization?", *Journal of Contemporary European Research (J CER)*, Volume 1, Issue 2, November 2005, pp. 54-67, (<http://www.jcer.net/Baracani.pdf>).

²¹ A Secure Europe In a Better World. European Security Strategy, adopted at the European Council, Brussels, 12 December 2003.

“The Middle East lies at the crossroads of three continents. Because of the area’s strategic importance (...) for the US a diplomatic role in the Middle East is not a preference but a matter of vital interest: - because of our historical and moral commitment to the survival and security of Israel; - because of our important concerns in the Arab world, an area of more than 150 million people (300 million in 2006 – A.H.) and the site of the world’s largest oil reserves; - because perpetual crisis in the M. East would severely strain our relations with our most important allies in Europe and Japan”²²

The same applies to Northern Africa, Southern Caucasus and Ukraine in the beginning of the twenty first century. Zbigniew Brzezinski, 30 years after Kissinger’s remarks, identifies an arc of global instability in the southern and eastern belt of Europe, almost exactly matching the area covered by the ENP, stressing that: “*Ultimately, America can look to only one genuine partner in coping with the Global Balkans: Europe*”. While he insists that Middle East is strategically vital to America, he argues strongly that the American-European rivalry in the region would be destructive for both, adding that:

“Somewhat the same considerations apply to the volatile region of the Caucasus. Formerly under exclusive Russian imperial control, it now includes three independent but insecure states (Georgia, Armenia, and Azerbaijan)... The region (...) has also been the traditional focus of power rivalries among Russia, Turkey, and Iran”, which presently block the free world’s initiatives: “Yet without some active external involvement, the internal social, political, ethnic, and religious conflicts of the Caucasus will not only continue to fester but are likely to erupt into periodic violence...”²³

Most European thinkers and practitioners are of similar opinion, arguing for more US’ presence in the EU’s vital security area:

“The problem for the Middle East and Africa has been not too much America but too little (...) To sustain a long-term commitment in difficult areas such as Africa and the Middle East the widest possible coalition will be needed: a global coalition for security and democracy”²⁴

Who is more interested and better prepared to initiate the process of global neighbourhood if not Europe? The transatlantic cooperation could become the most solid fundament and the essential part of this *voisinage mondiale*. The ENP seems to be the best suited policy of the EU to work with the US. This lack of coordination and the policy of “not seeing the US” promises no success but clashes on many fields and will weaken the ENP’s potential in many sectors: 1/ security (terrorism, non-proliferation regimes, organized crime), 2/ energy and environment, 3/ visa and immigration policies and procedures, 4/ political dialogue, 5/ assistance and financial/technical support, 6/ trade regimes, 6/ culture, education, information, technology. Of course, the EU-US cooperation will need power-sharing, what may be difficult, as we know from the past, but also may create a “*formidable force for good*” when it is founded on the cooperation. Also, there are many arguments that the European Neighbourhood Policy might offer better chances of success if it is implemented in a way which combine - at least, do not contradict - the parallel efforts and resources of the EU and United States:

²² H. A. Kissinger, *American Foreign Policy* (3rd ed.), New York 1977, p. 284.

²³ Z. Brzezinski, *The Choice. The Global Domination or Global Leadership*, New York 2004, pp. 66, 91, 98-9.

²⁴ R. Cooper, *The Breaking of Nations*, Atlantic Books, London 2004, p. 186.

- more resources in terms of human, finance, material, military, and policing power;
- more trade and investments;
- assistance better targeted;
- parallel programming and monitoring (“think globally, act locally”).

From American perspective, there is a room and the need for EU-US cooperation in the wider Black Sea region and Greater Middle East, which in today’s world begin *“to look like a core component of West’s strategic hinterland”*:

“Today, all too many people see Russia as a reason for the West not to engage in the wider Black Sea region — for fear that engagement will generate new tensions with Moscow. The opposite may actually be the case. The long-term goals of the West are to support the democratization of the Russian state and to encourage Moscow to shed its age-old zero-sum approach to geopolitics. A policy that essentially cedes the Black Sea to Russian influence is likely to retard both. The anchoring and integration of the countries of the Black Sea to the West is likely to enhance both.(...) Once again, the West faces the dilemma that a strategy aimed at further extending stability will in all likelihood be seen by many Russians as hostile. And once again, the West will have to reject such thinking and instead be prepared to defend its own integrationist logic”.²⁵

Despite the fact, that neither the United States nor the EU have made this region a priority nor have they identified strategic objectives there, and the Euro-Atlantic cooperation in the area is weak, the Black Sea region needs to be at the forefront of the Euro-Atlantic agenda. The energy supplies also calls for EU-US cooperation:

“The wider Black Sea region straddles and indeed dominates the entire Euro-Asian energy corridor from trans-Ukrainian oil and gas pipelines running to the markets in Europe’s north to the Baku-Tbilisi-Ceyhan pipeline running to the Mediterranean. A new Euro-Atlantic strategy geared towards anchoring and stabilizing the region can potentially bring the vast energy reserves of the Caspian Basin and Central Asia to European markets on multiple, secure, and environmentally safe routes. Not only will these energy supplies secure the prosperity of a politically independent Europe for decades to come, but the construction and maintenance of these routes will provide an important economic stimulus to the economies that were left behind in the revolution of 1989”.²⁶

Some experts go even further and see the role for NATO in solving numerous frozen conflicts which undermine the stability of the region:

“Much as NATO responded to the changed geopolitical circumstances of the Visegrad and Vilnius states, it must develop a comprehensive Black Sea strategy that complements the political objectives of the European Union. (...) North America and Europe, working through the OSCE and the United Nations, must step up and make a concerted effort to resolve the frozen conflicts that continue to plague the region, thereby setting the stage for the withdrawal of Russian troops who have remained since the end of the Cold War. Persistent conflict and occupying forces are childhood cancers in relation to the development of peaceful and prosperous regions. In place of economic development, a frozen conflict will substitute criminal enterprise and trafficking. In place of a shared regional approach

²⁵ R. Asmus, B. P. Jackson, *The Black Sea and the Frontiers of Freedom*, Policy Review, Hoover Institution

²⁶ R. Asmus..., op. cit.

to security cooperation, Russian military bases have only fostered the proliferation of arms, a climate of intimidation, and protection rackets. (...) it is time to make the resolution of the frozen conflicts from Transdnistria to Nagorno-Karabakh a top priority of our diplomacy with Moscow. Such steps can help contribute to a new dynamic of reform in the region. To be sure, the impetus for reform and change must come from within these countries, but the West can both assist in that process and help create a foreign policy environment that reinforces such trends”²⁷

For any foreign or external policy to reach the level of strategy, the connection between the democracy, development and security, must be clearly made and promoted. Yet, the security sector reform in the vast region so unstable as the south-eastern belt of Europe is almost untouched in the ENP, while UE Strategy is very clear on this point:

“Security is a precondition of development. Conflict not only destroys infrastructure, including social infrastructure; it also encourages criminality, deters investment and makes normal economic activity impossible. A number of countries and regions are caught in a cycle of conflict, insecurity and poverty”.

Although - *the Action Plans in the context of the ENP include some requirements that can be linked to democratic governance of the security sector*” - generally, the promotion of democracy in the ENP is not linked to security sector reform. Probably, this inconsistency resulted from the fact that in the ENP area “*the EU is confronted with the question of how to promote democracy and security sector governance with partners that are reluctant or unwilling to reform*”.²⁸

Yet, the need for efficiency in the promotion of security sector governance in this inflammable region, calls for EU – US (NATO?) cooperation. The Euro-Atlantic dimension of the ENP seems unavoidable, to make the ENP a strategy. Until now, the security sector reform in the region is a victim of both:

- the EU gradualist and low-key approach to political reform and democratization in the context of security;
- weak EU-US cooperation resulting from their diverging threat perceptions and related policies, mainly in the context of counter-fighting the terrorism.

The above mixture makes the ENP more placebo than a strategy. The ENP has failed to become a real promoter of cooperative security, what resulted in “*an implicit agreement to keep political reform and security sector governance issues off the common agenda*”. But avoiding to tackle these sensitive issues will also have the price to be paid:

“the EU has been de facto supporting precisely the status quo regimes that play a part in putting the region at risk by undermining civil and political rights, and human and social development (...)...the endurance of more or less authoritarian

²⁷ R. Asmus, *The Black Sea region...* see also: G. Harpaz, *The Obstacles and Challenges that Lie ahead for a Successful Implementation of the ENP as a Social Engineering and Peace-Promotion Instrument*, The Israeli Association for the Study of European Integration, Working Paper 2/2004, Hebrew University, Jerusalem, p. 31: “The EU, relying on soft power instruments, and the United States, relying more on coercive instruments, must learn to act together in order to bring peace in the Middle East.”

²⁸ H. Hanggi and F. Tanner, *Promoting Security Sector Governance In the EU’s Neighbourhood*, Chaillot Paper no.80, EU Institute for Security Studies, Paris, July 2005, p. 71, 76-9, 80.

regimes has created a vicious circle whereby the democratic deficit breeds fundamentalism and fundamentalism provides the justification for authoritarianism.”

And again, the need for US - UE cooperation in the form of “...*concerted effort by all actors involved*”, is recommended:

“American traditional leverage in the Middle East, accompanied by EU’s relations with the countries in the region which have suffered less from the “war against terror”, could together provide a strong stimulus for change”²⁹

The EU, in its Eastern and Southern neighbourhood, should develop an approach that positions security sector governance in the broad framework of development cooperation, democracy and human rights promotion as well as conflict prevention, crisis management and peace-building.³⁰ The good message is that European Commission starts to acknowledge the important role of the security sector reform for the peaceful stabilization of the ENP regions. Although Commissioner B. Ferrero-Waldner admitted that “*The European Neighbourhood Policy is not in itself a conflict prevention or settlement mechanism*”, she concluded, however, that:

“Resolving or at least de-escalating the conflicts must be the first priority, but their sustainable resolution is largely dependent on deepening and anchoring democratic and economic reform throughout society. ENP tackles the underlying issues which enable conflicts to fester: bad governance, underdevelopment and insecurity. But only if society as a whole participates in this transformation process will the region begin to prosper”³¹

These are promising remarks from European Commission and they open strategic perspective for its beloved child: the ENP is on European Union’s security and it cannot succeed without having conflict solving mechanism. It should start from good diplomacy and might develop further as a process of national and regional reconciliation. The peace making in today’s world is more social than military phenomenon in nature, which involves and engages people, opens the perspective of justice, stability and prosperity. And here is the ground for Action Plans. There is no other way round and this is basic experience of European integration in its relation to peace and external activity.

Russia’s important role in the implementation of the ENP deserves openness and attention. Again, we may be very critical on the quality of “order oriented” democracy in Russia and her past or neo-imperial sentiments, but this is a history and geography which makes Russian Federation an important player in the wider Black Sea region, including the littoral states of the Black Sea, Moldova, and the Southern Caucasus countries of Armenia, Azerbaijan, and Georgia (that borders with Chechnya!). Russia has the potential to undermine the implementation of the ENP in this region, at the same time being herself vulnerable to serious threats related to ethnic and religious prejudices combined with the weakness and brutality of the parties of power. Russia’s relations

²⁹ Rosa Balfour, Rethinking the Euro-Mediterranean political and security dialogue, *Occasional Papers* 52, Paris, EU Institute for Security Studies, May 2004, p. 31-2.

³⁰ H. Hanggi and F. Tanner, op. cit., p. 83

³¹ Benita Ferrero-Waldner, *Political reform and sustainable development in the South Caucasus: the EU’s approach*, “Caspian Outlook 2008” Bled Strategic Forum, Bled, Slovenia, 28 August 2006.

with Turkey and Iran, two another strategic players in the region, will keep much impact on the ENP. The Russian expert observes with the calm rationale:

“Russia regards the ENP as too condescending – in so far as the EU has tried to apply it or Russia itself – and as too competitive with its own perceived interests in the common neighborhood.(...) For Russia to take an interest in neighboring countries is not only natural but imperative. Just as it is for the EU.(...) The EU needs to engage more constructively with its eastern neighborhood. And Russia has to develop a more enlightened view of its ‘national interest’ in countries such as Ukraine and Belarus, and in ‘frozen’ conflicts Moldova and Georgia (...) namely Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh”³²

EU-Russia cooperation will not be easy but, author concluded, “*it also offers them an opportunity for reflection and learning from past mistakes.*” Russia, most probably, confronts the same dictum that Brzezinski formulated earlier for US: “*Ultimately, America can look to only one genuine partner in coping with the Global Balkans: Europe*”. Good cooperation will pose a challenge for both sides. Highly centralized and uniform Russian Federation presently confronts the deficit of wish and capacity to cooperate along ENP lines. For the European Union, a challenge comes from the different historical and geographical perspectives presently dividing 27 member states of the EU, on how to define the political and legal frame for the partnership with Russia. On both sides, the soft and hard security issues and energy supplies, will remain in the centre of relationship. For this reason, the value and the credibility of European - Russian partnership will be tested best in the process of ENP’s implementation.

Conclusions

European Neighbourhood Policy, after two years in operation, in the end of 2006, remains to suffer from the lack of vision and inadequate resources. The greatest potential method of the ENP: horizontal, multifaceted approach characteristic for the External Relations of the European Union, combining Common Foreign and Security (Defence) Policy, development policies, trade, assistance and conditionality etc., was not fully explored. The strategy level has not been reached, and the ENP’s numerous invocations to the EU Strategy, *Secure Europe in a Better World*, remain verbal. The United States are consequently ignored as a potential partner. The “important” role for Russia is not clear and member states diverge on this point. Democracy promotion is weak and ambiguous, if not opportunistic, and not related to political reforms. The security sector reform is neglected practically by EU’s low-key approach and the lack of political will. The ENP has no conflict-solving capacity. The plans and incentives for the cross-regional cooperation remain of secondary importance. The national diplomacies of member states are not involved in the ENP activities. The information coverage is poor. The issue of differentiation between the partner countries needs urgent decision from the member states. Present, single politico-geographical frame seems too

³² D. Trenin, *Russia, the EU and the common neighbourhood*, Centre for European Reform essays, September 2005 (www.cer.org.uk).

narrow for sixteen target countries so different in all terms, belonging to three civilizations.

Yet, at the same time, European Neighbourhood Policy brought new and worthy initiatives. First of all, the European Union has developed coordinated and systematic efforts to know our southern and eastern neighbours better. Thus, the learning process, equally important for both sides, has been started. The regular formal contacts, mainly between authorities, have been established, and the political dialogue was initiated on the European Union's level. Many new instruments of technical and financial assistance have been developed and offered to the neighbours. The cultural and academic exchanges are being supported by the ENP.

The values promoted by the ENP cannot flourish without democratic reforms in most partner countries. This unspeakable truth is, probably, the prime source of ambiguity of the ENP. The European Neighbourhood Policy is not politically neutral – contrary, it is committed to democracy and freedom. Hence, the need for the ENP to spread the wings of strategy. The ENP will need creative thinking and inventive forms of activity to meet the planned goals. It will need the courage and patience, empathy, more determination and resources. The diplomatic corps of the member states should be more involved. The ENP is a global policy played in the area which is pivotal for transatlantic security. Hence, the need for reliable partners. Ultimately, for the EU looking for allies, the most genuine partner, remain United States of America.³³ Russia will stay both, obvious and enigmatic partner for the ENP. Turkey and Iran are strategic partners of the EU/ENP, designated to these roles by geography and demography, by history and religious allegiances. They have more leverages in Caucasus and Middle East than the European Union has.

A neighbourhood is the oldest element of any external action and people's security: we will never stop to deal with our neighbours. The neighbourhood policy is sort of action that, once started, never ends, and cannot be stopped. To make the world around us more friendly and democratic, stable and prosperous, remains perpetual and important goal of the European Union in its neighbourhood policy.

³³ See footnote no 23

Section II
The ENP's Instruments:
the Europeanisation of neighbouring countries

7.

Is the Same Toolkit Used during Enlargement Still Applicable to the Countries of the New Neighbourhood? A Problem of Mismatching between Objectives and Instruments

Gabriella Meloni

7.1 Introduction

This Paper will show that a clear definition of the objectives to pursue in the ENP is an important pre-condition for the choice of the most appropriate instruments to apply. To do that, it will first of all highlight the different expectations existing among both EU's Member States and neighbouring countries on the ultimate goals of the policy. Then, it will look at the three main objectives which recur in the policy discourse on the ENP, stressing that there should be a particular coherence in their realisation without whom the whole structure of the policy risks losing its credibility. Finally, it will describe the main instruments at hand in the new neighbourhood and consider their capacity to produce the desired outcome. The case of Russia and Ukraine will be mentioned here to show that, if legal approximation is one of the main tools promoted in the ENP in order to induce neighbouring countries into the EU's constellation, this process is rather scattered when it takes place under "the shadow of enlargement" and it is surprisingly more consistent when it derives from a process of real deliberation of domestic actors.

7.2 Diverging expectations on ENP's objectives

The reticence of the EU to clear out both the intermediate and the final goals of the relation with neighbouring countries may be interpreted in several ways. On the one hand, it is obviously the result of internal problems connected with the difficulty of digesting the last wave of enlargement and with the dramatic stop over imposed by the missed approval of the "Treaty establishing a Constitution for Europe". On the other hand, it may also be interpreted as the result of a political choice to engage neighbouring countries in a dialogue aimed at including them into the EU's "ring of friends" without a serious willingness to make important commitments in the short term. This situation is encouraging different and sometimes diverging expectations on the final aim of the ENP both among member states and among partner countries.

Among member states, there is a particularly relevant divide between old and new EU's members. If the formers are generally more cautious with neighbouring countries, the

latter are more sensitive to the arguments of those Post-Soviet countries which are geographically and historically very close to the greatest part of them. In particular, if old members are more concerned with the absorption capacity of the Union and are afraid of taking further commitments they may not be able to face, new entrants are more optimistic about that and plead for a more decisive stand towards border countries. These are countries which are generally very interested in promoting cross border cooperation with neighbours and in re-establishing closer relations with countries with whom they were previously much more integrated. Poland, in particular, is very active in the promotion of an interpretation of the ENP as a kind of pre-association agreement and it is vigorously lobbying for the accession of a country with which it has very strong links: Ukraine.

Among neighbouring countries, a particular distinction exists between Southern Mediterranean and Eastern European neighbours. As a matter of fact, the formers have already established in the framework of the Barcelona process the conditions for the creation in 2010 of a Free Trade Area and they do not have any declared ambition to integrate further into EU's institutions. Moreover, they continue to be more or less covertly afraid of diluting the specificity of their status in the framework of ENP and of losing the position acquired in recent years to the advantage of Eastern European countries. As a result, they tend very much to interpret this policy as the systematisation of the previous agreements, with the introduction of some novelties which can be useful in terms of coordination, but they are very diffident towards any change which may diminish the spirit of the partnership underpinning the Euro-Med relations since the Barcelona declaration (Cremona, Hillion 2007).

Among Eastern European neighbours, Ukraine has a very clear pro-European orientation and has repeatedly expressed its willingness to be included into EU's institutions, but the position of the other NIS (New Independent States) and of the Caucasus countries is more blurred. As a matter of fact, the relation existing with the Lukashenko's government in Belarus and the frozen conflicts in Moldova and in the Caucasus make it very difficult to foresee the development of the situation in this region. Moreover, this is an area where the Russian Federation is still playing a very important role and where this country may heavily influence the progress of the relationship with the EU. This region is likely to become an important test case for the capacity of the two main European neighbours - namely the EU and Russia - to cooperate and to give real content to their declared strategic partnership. If they will succeed in finding an agreement, this area could in the longer term open new perspectives for a new form of integration of the European continent. If not, the countries of this region may be kept in between two competing spheres of influence, in a very unpleasant situation which risk putting in danger any perspective of further development.

In this situation, it's not possible to say how much expectations on the final objectives of ENP may converge, if they will ever. Unlike what happened during the enlargement process, there is no common agreed objective applying to all partner States. Rather to the contrary, each of them seems to promote a very different interpretation of the content and of the future of the policy. The elections for the European Parliament in 2009 are likely to be a key turning point for the definition of EU's ambitions in the new neighbourhood, if they will be accompanied by the re-launch of the Treaty on the Constitution and if the ENPI will provide the expected results. A clear definition of the

nature of the relationship to establish with bordering countries is particularly urgent and the EU should keep in mind that a too delayed answer on the terms of the agreement risks being dangerous for the whole building of the policy. In this view, 2009 is an important date not only in order to make the point of the situation with the Constitutional Treaty, but also to elaborate a more definite position of what the EU intends to do in the new neighbourhood

7.3 Stability, prosperity and security: defining the objectives

In the policy discourse on the ENP, three main objectives recur more frequently: stability, prosperity and security (Prodi, 2002; EC, 2003a).¹ Of the three, stability seems to be the most well defined. Yet, there is still a lot of conceptual ambiguity in its definition. In particular, it's not clear if the achievement of this particular goal implies only some sort of generic liberalisation and reform or if it includes also the promotion of processes of democratisation of target countries (Del Sarto, 2006). The analysis of the National Action Plans (NAPs), which have been concluded thus far, has highlighted that the approach of the EU is not always coherent. The necessity to respect Human Rights is always mentioned in text of the agreements- with the outstanding exception of Jordan- but there is a "manifest inconsistency" concerning the definition of the key elements which should be taken into consideration when it comes to the promotion of democracy (ibid., 2006). As a matter of fact, the Commission has not translated into political priorities the necessity to respect the principle of the separation of powers, to increase Parliament powers, to strengthen the role of political parties and to guarantee judicial independence and legal accountability (Baracani, 2005).

Nonetheless, the European Union has proved to be an important anchor to inspire the reform of neighbouring countries and it has sometimes been used as a reference to support processes of deep political change. It has been argued that there is a linkage between democratisation and the EU which can be captured by a 'gravity model of democratisation'. According to this view, the depth and pace of democratisation in European countries can be explained by their proximity to Europe and by the intensity of their integration with the EU (Emerson, Noutcheva, 2004; Milcher, 2006). Despite all conceptual incoherence, the European Union is, thus, *per se* a stable reference for any country in the new neighbourhood willing to engage into a process of stabilization and, possibly, democratisation.

The other two objectives are much more problematic. In particular, there are three main flaws which hinder the credibility of the agenda behind the second declared goal of the ENP: prosperity. The whole system of the ENP hinges on the provision of an economic incentive- a "stake into the internal market"- which is supposed not only to increase the prosperity of partner countries, but also to give them a proper motivation to engage in an expensive process of legislative approximation. However, yet not enough efforts have been dedicated to the definition of what a "stake into the internal market" might

¹ The communication of the European Commission of December 2006 on "Strengthening the European Neighbourhood Policy" reformulated slightly differently these objectives, saying that the premise of the ENP is that the EU has a vital interest in seeing 1. "greater economic development", 2. "stability" and 3. "better governance" (EC, 2006), but there is not big difference in content.

mean. The NAPs are designed so as to provide a series of rewards to neighbours essentially in terms of a preferential access to the single market. However, the offer from an economic point of view does not go further than an FTA + (Free Trade Area plus) or, as it has been in the Communication of December 2006 on “Strengthening the ENP”, a “deep and comprehensive Free Trade Area” (EC, 2006: 4). That would be a case of negative integration, which *per se* would not necessarily require much of an effort in terms of legislative approximation, at least not on the scale pleaded by the ENP (Meloni, 2007a and 2007b). As a matter of fact, the creation of a FTA + would require what in literature (Tinbergen 1954; Scharpf 1999) has been called a “negative choice”, which implies the abolishment of norms and regulations which contrast with the establishment of a “single level playing field” for economic activities (market-making measures).² That would include also “behind the border issues”, but it is arguable the establishment of a single level playing field would necessary include all the measures mentioned by the Communication of December 2006.³ Doing that and adopting the core chapters of the *acquis communautaire*, neighbouring countries would instead make also a “positive” choice, engaging in the re-regulation of the market and in the institutional re-adaptation of their domestic system to a specific European model (market-shaping measures).⁴ In a nutshell, the economic incentive thus far offered by the Union is not enough in order to justify *per se* the engagement in a far reaching process of legislative approximation. The whole building of the ENP, which is based on the exchange between the integration of neighbouring countries into the EU’s internal market and their commitment to adopt part of the *acquis communautaire*, would in this view lack its main underpinning.⁵

Secondly, the difficulties which have emerged in the framework of the Barcellona process may also cast doubt on the feasibility of a similar project on a more extended scale. A number of EU Member States have already expressed their concern about the creation in 2010 of a FTA with Southern Mediterranean countries, because of the risk of

² Traditionally, economic theory defines 4 different steps of integration depending on the depth of the process at stake and on the quality of the links between the parties: 1. Free Trade Area; 2. Customs Union; 3. Common Market; 4 Economic and (eventually) Monetary Union. Up to Tinbergen, the first three moves can be interpreted as examples of “negative integration” as far as they aim at the realization of the four freedoms, while the fourth step- which beyond that provides the conditions for the introduction of common policies in different economic sectors - is a case of “positive integration” (Tinbergen 1954).

³ The Communication included in that list: technical norms and standards, sanitary and phytosanitary rules, competition policy, enterprise competitiveness, innovation and industrial policy, research cooperation, intellectual property rights, trade facilitation customs measures and administrative capacity in the area of rules of origin, good governance in the tax area, company law, public procurement and financial services.

⁴ If negative integration has a deregulatory or “market-making” nature, positive integration is “market-shaping” because it tries to intervene in the economy and it involves a broader institutional adaptation to a specific European model at the domestic level (Scharpf 1999: 45).

⁵ Adopting the core chapter of the *acquis*, neighbouring countries would take a political, rather than a purely economic decision (for further explanation, Meloni 2007a and 2007b). In this context, the EU should formulate better its offer, not only elucidating the economic benefits which may derive from the adoption of the *acquis communautaire*, but also making clear how far it is ready to go in the relation with border countries. As a matter of fact, if the EU is asking to neighbours to engage in a process which has a not irrelevant political meaning, it should also be ready to give them a comparable reward which, in this perspective, should relate not only to the economic, but also to the political sphere (Meloni, 2007a).

loosing their market shares in a number of sensitive sectors. One may, thus, question why the EU should extend the offer to other countries, considering that most of the Member States are particularly vulnerable for those goods which play a large role in the commodity composition of exports coming from Eastern European neighbours (Milcher, 2006).⁶ Moreover, the debate on the impact on national economies of the eventual creation of a Pan-European Market is still at the beginning and there is no univocal lesson to draw from the existing literature. As a result, Member States are sometimes still uncertain on the position to adopt in this respect and it's not clear at which conditions they may renounce to defend national production. (ibid., 2006).

Thirdly, the EU is offering different levels of integration to partner countries depending on the progress achieved in terms of reform in the agreed sectors, but it is reasonable to ask how to arrange the whole without harming the unity of the internal market. Different authors have warned about the risks of what has been called the "spaghetti bowl" phenomenon (Bhagwati, Greenaway, and Panagariya, 1998). In this view, the systemic effect of numerous and criss-crossing preferential trade agreements and tariff rates is to generate a world of preferences which increases transaction costs and facilitates protectionism. "In the guise of freeing trade, preferential trade agreements have managed to recreate the preferences-ridden world of the 1930s as surely as protectionism did at the time. Irony, indeed!" (ibid., 1998: 1139). This situation concerns not only ENP countries. As a matter of fact, the EU started discussing with the Russian Federation about the creation of a Common European Economic Space (CEES) already in 2002. The Summit which took place in Moscow in May 2005 adopted a Road Map which defined the steps to take in view of its establishment, but there is no mention on how to integrate this Space in the context of a perspective Pan-European Market.

The last, but definitely not the least objective of the ENP is security. It has been argued that the main interest underpinning the Union's engagement in the new neighbourhood is its concern with security. "The security dimension of the ENP is not merely an incidental component, [but] it is fundamental to the policy as a whole" (Cremona, Hillion, 2006: 4). In this view, security is linked to stability and prosperity, but these are not objectives in their own right. They are rather designed to lead through political and economic development to security. As a matter of fact, the latter is to be achieved not only through the development of the military and civilian dimensions of the emerging security and defence policy, but also through traditional first-pillar instruments such as trade policy, technical assistance programmes and conditionality (ibid. 2006). In this framework, security has to be conceived in a broad way as a cross-pillar policy, which creates a potentially more coherent EU external action through the integration of the three poles of decision-making of the Union: the Member States, the Community pillar and the EU pillars (ibid. 2006). This is a far-reaching approach to the ENP which reflects the EU's view of the policy. However, stability and prosperity are undoubtedly an objective in itself for bordering countries. If security is the most important goal for the Union, stability and prosperity are a priority for neighbours whose achievement may then ensure a more secure neighbourhood for the EU. A too emphasised accent on security not only reflects an EU-centred approach to the ENP, but risks downplaying the importance of the other two objectives which need to be recognised as equal priorities also by the Union.

⁶ Most of all, agricultural goods, textiles, chemicals and steel.

As a matter of fact, if stability is to be seen only an instrument to achieve an overarching security goal, there may be the temptation to interpret this objective in a reductive way, leaving out democratisation because that would not be necessarily required in order to guarantee the security of the EU. However, democratisation is a very important element if neighbouring countries are to be further integrated, even without thinking at full membership. At the same time, if the prosperity of neighbouring countries is not an objective in itself for the Union, there may be the temptation to keep neighbours in the EU's constellation without taking, at least in the short or medium term, more specific and demanding engagements. In a nutshell, if the stability and the prosperity of neighbouring countries are to be intended only as a device to achieve an overarching security goal, the EU may not be coherent in the achievement of the two other poles of the described triad and it may prove instrumental in its behaviour. As a result, this strategy may lose credibility over time and it may, thus, not be sustainable.

If security has to be intended in the broad sense described above, the capacity to define a sound perspective for the integration of neighbouring countries into the European constellation is conceptually inseparable from the aim of ensuring the long term safety of the European continent. At the same time, the capacity to promote a more ambitious programme of democratisation of neighbouring countries is a precondition for their fully fledged integration into the EU's constellation. This has not necessarily to do with membership, but most probably with the capacity to give content to a "share everything, but institutions" project – using the words of the former President of the EU Commission, Romano Prodi – and with the willingness to engage into a complex exercise aimed at finding new solutions for the governance of the European continent (Meloni, 2007a). A particular coherence in the realisation of the three objectives of this triad is, thus, particularly important and it would allow to bridge the incommensurable "otherness" of countries which, at present, do not have any perspective of entering into the European Union.

7.4 Combining instruments with objectives

If stability, prosperity and security are the main goals pursued by the ENP, legislative approximation is the instrument *par excellence* to achieve these objectives. The underlying conviction is that if a country has reached an open and integrated market functioning at pan-European level on the basis of compatible or harmonised rules, "it has come as close to the Union as it can be without being a member" and it will enjoy a new status of "disenfranchised membership" (Kruse, 2003). Neighbours will obtain in functional terms the same results they would achieve being Union's members, ensuring the expansion of the European space of democracy, prosperity and security. In this way, the ENP represents an attempt to project EU's values and norms to the new neighbourhood, promoting an unprecedented example of policy export which potentially involves not only remaining candidates to enlargement, but also bordering countries in a wide process of Europeanisation spreading well beyond the European continent (Meloni, 2006).

A specific literature has been developed in order to detect the underlying mechanisms of this process. In this framework, Europeanisation has been defined as "a process of influence deriving from European decisions and impacting member states' policies and

political and administrative structures” which may extend from “a subtle and incremental re-orientation of national policy-making to substantial changes where European policies *crowd out* their national counterparts and modify patterns of political and administrative behaviour” (Héritier, 2001).⁷ The literature of Europeanisation has originally focused on member countries, but it has been remarked that a restriction of the analysis of “the impact of Europe” (Caporaso, 1996; Schmidt, 2001) only in relation to Member States would be like “sampling on the dependent variable” (Kruse, 2003: 22). This is why many authors have not only analysed those Central and Eastern European Countries which are now fully-fledged member states (Schimmelfennig, Sedelmeir, 2002a and 2005a), but have also envisaged the possibility to consider Third countries as a case of Europeanisation (Ladrech, 1994; Sciarini, Listhaug 1997; Radaelli, 2000b; Church, 2000; Archer, 2001; Schimmelfennig et al., 2002b; Kruse, 2003). However, this focus is not yet at the core of the bulk of the literature in this field and a lot of fieldwork has to be done in this direction.

Different explanatory models- which specify different mechanisms of Europeanization and the conditions under which they result in different degrees, forms and levels of rule adoption- have been advanced in literature. Schimmelfennig, Sedelmeier (2002a) have defined four different models of Europeanisation: on the one hand, the conditionality and the lesson drawing model - which follow a “logic of consequentialism” (March and Olsen, 1998) on the basis of a cost-benefit approach⁸ - and, on the other hand, the social and the model learning schemes - which follow a “logic of appropriateness” (ibid., 1998) underlining the importance of processes of persuasion and socialisation as possible mechanisms of Europeanisation.⁹ According to the conditionality model, the EU sets its rules as conditions that the recipients have to fulfill in order to receive rewards. By contrast, the lesson-drawing model relies on a voluntary transfer based on a cost-benefit calculation which, by definition, doesn’t include direct rewards from the EU, but only expected benefits deriving from the adoption of a set of rules which is considered to be more efficient (Schimmelfennig, Sedelmeier, 2002a). On the other hand, the social- and the model-learning schemes assume that actors are motivated by internalized, socially constructed identities, values and norms (March, Olsen 1989). The difference between them crucially depends on the fact that, while the social learning model assumes that recipients are prone to adopt a rule because they are convinced it is

⁷ Another option has been proposed by Radaelli (2000b) who, drawing upon Ladrech (1994), argues that the concept of Europeanization refers to “Processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies.”

⁸ Along “logic of consequentialism” (March and Olsen, 1998), the misfit between European and domestic processes, policies and institutions is an emerging political opportunity structure which offers some actors additional resources to exert influence in the domestic domain. This logic of action implies a cost-benefit approach in which institutions have an impact “by altering the expectations an actor has about the actions that others are likely to take in response to or simultaneously with his own action” (Hall and Taylor, 1996: 939).

⁹ Following the “logic of appropriateness” (March and Olsen, 1998), European policies, norms and the collective understandings attached to them exert adaptational pressures on domestic-level processes, because they do not resonate well with domestic norms and collective understandings. In this perspective, “change agents” or “norm entrepreneurs” mobilize in the domestic context and persuade others to redefine their identities (Börzel and Risse, 2000).

more appropriate to them as it is part of the bulk of EU's values and norms, the model learning scheme depends more on the perceived legitimacy of the proposed legislation *per se*.¹⁰

Following a "logic of consequentialism", neighbouring countries may be, thus, induced to adopt some core chapters of the *acquis communautaire* because of the rewards which the EU attaches to it (conditionality model) or because they may consider these rules as useful in order to solve some internal problems (lesson drawing model). On the other hand, following a "logic of appropriateness", they may be persuaded to engage into legislative approximation because they are convinced the proposed rules are good either *per se* (model learning model) or because they are EU's norms (social learning model). EU's authorities designed the ENP with a view at exerting influence on the parties not only through bargaining about conditions and rewards, but also through the promotion of a patient strategy based on learning. So, if, on the one hand, the new policy has offered to neighbouring countries institutional ties, technical and financial assistance and, finally, a stake into the internal market in exchange of legal approximation, on the other hand it has promoted mechanisms of soft institutional coordination aimed at setting in motion a process of socialisation of the parties (Meloni, 2007b; Tulmets, 2006). The ENP has, thus, tried to induce partner countries to adopt EU's values and norms both along a logic of consequentialism and along a logic of appropriateness, following the indications of a large bulk of the literature which suggests the possibility to complement them and to explain the dynamics of the EU impact as a developmental relation between instrumental action and norm conforming behaviour (March and Olsen, 1998).¹¹

However, even if the ENP includes all these devices, conditionality is still by far the main tool to promote legislative approximation, while those instruments of soft coordination, which are expected to persuade the partners of the "appropriateness" of the solutions provided, play only a residual role. As a result, the EU Commission often falls short of promoting more thick processes of interaction which may lead to a genuine deliberation of partner countries. The ENP has been presented by EU institutions as a tailor-made process where the involvement not only of public authorities, but also of the representatives of the main social and economic groups of the partner countries in the definition of the objectives to pursue is crucial:

"Joint ownership of the process, based on the awareness of shared values and common interests, is essential. The EU does not seek to impose priorities or conditions on its partners. The Action Plans depend, for their success, on the clear

¹⁰ For further comments on how to adapt these models to Third countries, see Meloni, 2007b.

¹¹ This synthetic model, put forward by March and Olsen, posits that actors enter into new relationships with a view to maximize their own utility, but over time develop identities shaped by shared norms and values as a result of accumulated experience (March and Olsen, 1998: 13). This model is, thus, dismissing the "either/or" conceptualization of social reality, which reflects the age-old controversy between radical variants of both rationalism and constructivism and adopts a new trend in political science that favors a "both/and" conceptualization of social reality (Jachtenfuchs, 2002: 654). In this way, it moves beyond the post-modern constructivist stream, which harshly criticizes materialism and rationalism positing that it is ultimately a specific kind of shared knowledge that defines and thereby creates the world "we think we see and in which we think we act" (Ashley, 1987). Equal distance is kept from the neo-liberal wing of rationalism, which gives a limited role to ideas treating them as calculated instruments that help rational actors to pursue their exogenously given preferences (Keohane, 1984).

recognition of mutual interests in addressing a set of priority issues. There can be no question of asking partners to accept a pre-determined set of priorities. These will be defined by common consent and will thus vary from country to country.”

ENP Strategy Paper, COM(2004) 373 final, 12 May: 8

In this view, co-ownership allows to avoid the risk of “exporting mechanically an alleged European model of development” and “to find solutions effectively tailored to the situation of each country”. The communication “Strengthening the European Neighbourhood Policy” of December 2006 has enumerated among the main strengths of the policy “joint ownership”, stating that the operational tools of the policy – the NAPs – are fully negotiated and mutually agreed at political level. “It is not an imposition by either side, but an agreed agenda for common work”, (EC, 2006: 3). However, the Cassina Report on “The role of consultative bodies and socio-occupational organisations in implementing the Association Agreements and in the context of the European Neighbourhood Policy”, which was presented at the European Economic and Social Committee in September 2005, recognised a very different situation. As a matter of fact, it acknowledged that in the NAPs, which should be the instrument *par excellence* of the involvement of local partners, “most of the contents are very similar (at some points even *too* similar)”, hinting at the presence of a blueprint proposed by EU’s authorities to all countries and accepted without much discussion. Moreover:

“None of the documents examined (Commission documents and Action Plans), apart from a few vague hints at the need for consultation with certain social actors, envisages the explicit and substantial involvement of consultative bodies, the social partners or civil society organisations in the implementation of the policies covered by this report”

European Economic and Social Committee, 2005: 4¹²

So, even if the ENP recognises the importance of the promotion of a participatory approach and of co-ownership as a powerful instrument in order to build a shared programme of internal reform, thoughts need to be given at the way in which it intends to implement this principle.

In a nutshell, the ENP continues to rely on pre-accession techniques where the offer of membership justified the request formulated by the EU’s authorities to meet certain conditions and where the use of soft methods of coordination played only a residual role. The success obtained during enlargement with conditionality made it think that the same approach could work also with neighbouring countries and that the same combination of conditionality and socialization strategies already used with candidate countries could be applied to the new neighbourhood. A lot has been written on the similarities between enlargement and the ENP. Enlargement has undoubtedly contributed to both the reasons and the instruments for dealing with neighbouring countries (Delcour, 2006 and 2007; Cremona, Hillion, 2006; Kelley, 2006; Tulmets,

¹² The Cassina Report goes on saying: “The fact that the economic, social and socio-occupational actors have been excluded – apart from an exception which proves the rule - from the preparation of the NAP is a cause for much concern. The only references to involvement of certain categories of social organisations relate in a highly generic and inadequate way to the implementation of the plans themselves (involvement of consumers and of environmental NGOs)”.

2006).¹³ However, can the same instruments used during enlargement work under the new conditions?

It has been argued that the ENP is still essentially a “unilateral policy aimed at changing the Union’s environment”, where the policy-maker establishes the conditions and the rewards which are connected to their fulfilment (Cremona, Hillion 2006).¹⁴ However, uncertainty as to the ultimate goal of the partnership is seriously hindering the effectiveness of any toolkit based on conditionality. If, during enlargement, EU’s and candidate countries shared a common objective to pursue, in the ENP there are still a lot of divergences in the definition of the final goals of the relationship. So, if candidate countries co-owned a project and accepted to engage in a system where rewards were strictly connected with the capacity to meet certain conditions, the new neighbours find themselves in a very different position. The Communication of December 2006 on “Strengthening the European Neighbourhood Policy” recognised that the policy should “provide more incentives” and that the main problem of the policy is that:

“An important part of the incentives of the ENP– for instance in terms of market access and integration and other economic benefits – will only bear fruit later. This creates a real difficulty for partner countries in building the necessary domestic support for reform”

EC, 2006: 3

This is certainly true, but this is so for every system of incentives. The problem is not *only* that incentives are insufficient or remote in time, but that at the moment the project behind the whole ENP still reflects the uncertainties of the EU itself and the divergences existing between different parties. This ambiguity is justified with the necessity to “tailor” Union’s support “to the needs and aspirations of partners” (EC, 2006: 4), but the result is that the terms of the relationship have still to be bargained on a bilateral basis and that the existence of an overarching goal valid for all the neighbours is still arguable. The Communication of December 2006 took into consideration this problem.¹⁵ However, it states that:

¹³ It has been argued that, in the ENP, there was a case of “mechanical borrowing” from enlargement, with a strong path dependency and with a mechanism of policy lock-in in the formulation of the new policy (Kelley 2006). The fact that the most of the staff which was working in DG Enlargement was relocated into the new Wider Europe Task Force has been indicated as the evidence, from an institutional point of view, of the transfer from one policy setting to the other (ibid., 2006). Moreover, it has been highlighted that enlargement corresponded in time with the formulation of the new policy (Delcour, 2007) and that the urgency to find solutions for the new neighbourhood was a key factor in the formulation of the policy, thus compelling EU’s institutions to draw on previous experiences to build the ENP (Delcour 2006). Four different levels of transfer have been highlighted: discourse (with the replication of the discourse on conditionality); principles (with the inclusion of the principles of differentiation and decentralisation); policy modes (with the borrowing of a benchmarked approach); tools (with the introduction of assistance tools created for the enlargement policy, such as TAIEX and Twinning) (Tulmets, 2006).

¹⁴ In this view, the use of the word ‘policy’ to describe the ENP would emphasize this aspect, as far as “a policy is driven by the policy-maker” (Cremona, Hillion 2006: 21).

¹⁵ “*This may in the first instance largely remain a bilateral approach, bilaterally between the EU and each partner, in order to take account of the great differences between partner countries’ situations. It will allow the most advanced countries to move faster without being held back by others*” (EC, 2006: 5)

“The concept is fully consistent with a longer-term vision of an economic community emerging between the EU and its ENP partners”

EC, 2006: 5

Since the Communication refers essentially to the creation of “deep and comprehensive FTAs” when speaking about the emerging economic community, one may conclude that this is all the “vision” is about. However, it is arguable whether the creation of deep and comprehensive FTAs with neighbours may replace membership as a “vision” able to support the use of the stick and carrot system. In this framework, incentives are sometimes seen as instruments to impose EU’s objectives, rather than components of a common shared project for the future of the European continent.

At the same time, the coercive element which is implicit in the use of conditionality seriously undermines the ability of the EU to promote learning processes among neighbouring countries. As a matter of fact, the often unilateral definition of a series of conditions which neighbouring countries have to fulfil in order to receive certain rewards hampers the possibility to support a serious process of persuasion of the appropriateness of the solutions provided. As it has been noted, “it is hard to reconcile true joint ownership with the unequal relationship implied by conditionality” (Cremona, Hillion, 2006: 22). In this context, the mix between conditionality and socialisation strategies has to be reconsidered. As a matter of fact, if, during enlargement, conditionality has been the most effective instrument in order to induce legislative approximation, the weakness of the available set of incentives, in the absence of a common overarching goal in the relationship with neighbouring countries, would rather suggest to bet on alternative tools of Europeanisation and to accept that it is better to promote a slow, but co-owned process of convergence between the parties.

7.5 Conclusions

Of the three main goals which recur in the policy discourse on the ENP, stability and prosperity are the two main objectives pursued by our neighbours which do coincide with the EU’s major interest, that is ensuring the security of the European continent:

“Development and reform in our partner countries is primarily in their own interest, and it is their sovereign responsibility. But it is also in the interest of the EU to support partners in these efforts” EC, 2006: 4

However, if the stability and the prosperity of bordering countries are to be intended only as a device to achieve an overarching security goal, the EU may not be coherent in the achievement of all the objectives of the described triad and it may prove instrumental in its behaviour. At the moment, the ENP seems to address the neighbourhood essentially by “oscillating between the two end of the integration-security spectrum” (Tassinari 2005: 1). However, the capacity to define a more ambitious “longer-term vision of an economic community emerging between the EU and its ENP partners” (EC, 2006: 5) would give more credibility to the policy and would ensure neighbours that the ENP is really about “sharing everything but institutions”. The perspective creation of “deep and comprehensive FTAs” in “the medium term and for some ENP countries even in the long term” (ibid., 2006: 5) will hardly replace membership as an overarching goal, able to support the development of

the relationship with neighbouring countries and to represent a long term “vision” for the future of the European continent.

A sound definition of the main goals of the policy is a precondition for the selection of the most effective instruments to apply in the new neighbourhood. The ENP has borrowed from enlargement the same combination of conditionality and socialization strategies already used with candidate countries. In this framework, conditionality is still by far the main tool to promote legislative approximation, while those instruments of soft coordination, which are expected to persuade the partners of the “appropriateness” of the solutions provided, play only a residual role. However, uncertainty as to the ultimate goal of the partnership is seriously hindering the effectiveness of any toolkit based on conditionality, while the coercive element which is implicit in the use of such an instrument seriously undermines the ability of the EU to promote learning processes among neighbouring countries.

Enlargement has undoubtedly contributed to both the reasons and the instruments for dealing with neighbouring countries. However, the “shadow of enlargement” is hampering the capacity to elaborate an independent “vision” for the countries of the new neighbourhood, looming over the ENP whose objectives and instruments have to be carefully reconsidered in the new context. As Tinbergen (1954) has underlined in the field of economic policy, objectives and instruments should be considered jointly and inside each specific framework. In particular, he argued, any instrument should be assigned to the objective on which it produces the most direct effect, while the use of too many tools for the fulfilment of one single task (over-determination) risks being counterproductive. The same proves true in the framework of the ENP. Even without supporting an “either/ or” approach¹⁶, the capacity to define which instrument produces the most important effect on the desired objective will prove crucial in order to ensure an enhanced effectiveness of the policy. This is a principle which is commonly accepted when designing different recipes in the field of economic policy. In this view, the problem is not to choose either conditionality or socialisation strategies, but to understand if the former or the latter prove more efficient to the achievement of each particular goal and to mix them consequently, without following by inertia the blueprint of enlargement.

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¹⁶ See note 11.

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8.

Is a Soft Method of Coordination Best Adapted to the Context of the EU's Neighbourhood?

Elsa Tulmets

8.1 Introduction*

Although the European Neighbourhood Policy (ENP) has been attracting increased attention in academic literature, works about the origins of policy design and the methods used to implement the European Neighbourhood Policy remain scarce. While the European Neighbourhood Policy (ENP), created in 2003-04, originally offered an innovative framework for cooperation between the EU and surrounding TACIS (Newly Independent States) countries, (and later on with MEDA (Mediterranean) countries and the countries of the South Caucasus) there is evidence that the final format adopted for this policy is not entirely new.¹ Interviews conducted at the Commission (DG Enlargement, DG Relex, EuropeAid) between 2003 and 2006, official documents, and secondary literature all show that policy ideas and instruments designed for enlargement have inspired both the policy design and instruments of the ENP (e.g. Tulmets, 2005b; see also: Del Sarto, Schumacher, 2005; Kelley, 2006).

This contribution argues that the experience of enlargement sets the grounds for the creation of a soft method of coordination in the EU's external relations. This "new" method promotes both the EU's norms and benchmarks, and it is based on the principles of differentiation, partnership and ownership. However, its main purpose is to strengthen bilateral relations on a negotiated basis and rely on the political engagement of third states to introduce internal reforms following the EU model. Proposed by the Commission and adopted by the Council, it combines itself with the classical, conditional approach and justifies the newly coined term "soft power", which is often used in the EU foreign policy discourses. While looking at the initial propositions which originally came from the political field, one can see that they served a more modest purpose. They aimed at developing an Eastern dimension, for the EU's external relations that was based on the experience of sub-regional cooperation, like the Northern Dimension, the Euro-Mediterranean Partnership, the European Free Trade Association (EFTA) or the European Economic Agreement (EEA) rather than of bilateral relations. Do bilateral and flexible methods proposed by the Commission contradict or rather complement these initial propositions? Do they hamper or reinforce

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¹ The countries concerned by the ENP are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia, and Ukraine.

conditionality in the EU's external relations? Is it best adapted to the context of our neighbourhood?

This article will present the initial propositions of the European policy towards its neighbours by primarily using a sub-regional approach. Then it will cover the Commission's proposition for a strategy, which was finally adapted by the Council, on the basis of the reinforcement of bilateral and flexible relations. In the third and fourth sections, this article will show how this "new" method, inspired by the experience of enlargement, is setting the grounds for a policy discourse on soft power, as well as present some unavoidable shortcomings and limitations as far as the ENP is concerned.

8.2 The debate on « Wider Europe »: the initial propositions based on a sub-regional approach

In the political and academic debates, discussions about the EU policy towards its neighbours first referred to its Eastern neighbours. In 1997, when the perspective of accession was finally accepted for the Eastern and Southern candidates, and the negotiations were open in 1998 with the first accession countries, the question of managing the Eastern border of the EU (especially with Belarus, Ukraine and Moldova) came to the agenda. When the Commission required "good neighbourly relations" as a further condition for accession some politicians began thinking about the implications of enlargement and the perspective of a "Wider Europe". This was already beginning to occur in the Commission's documents, which evaluated the progress of candidates (accession partnership, progress reports) and in the speeches of political leaders from some candidate countries like Poland. During the negotiations on the perspective of enlargement, some concerns were raised at the political level. These concerns dealt with incorporating the new neighbours and with the security issues at the borders of the enlarged EU. The issue gained momentum at the summit in Copenhagen in 2002, when accession negotiations ended with ten candidate countries. More were added in 2003 with the Rose Revolution in Georgia and with an increasing political attention towards Belarus and Ukraine (even before the Orange Revolution). When looking at the first propositions made between 2001 and 2003 (at the EU's Wider Europe) which came from the United-Kingdom, Sweden, Poland and Germany, these were mainly referred to a sub-regional perspective. They proposed the idea of having an "Eastern dimension", in the EU's external relations, based on prior experience with the Northern Dimension, the Euro-Mediterranean Partnership or even the EEA². The proposed method was one of interactive cooperation between member, candidate and non-candidate countries.

Countries like France, Spain and Italy however, insisted on focusing again on the South after the Eastern enlargement. They felt it necessary to re-launch the Euro-Mediterranean Partnership which, in its current sub-regional form, was experiencing some difficulties. In 2003, in response to the Council, the Commission came up with a proposition entitled "Wider Europe – Neighbourhood". This included the countries

² Common letter of Chris Patten/Anna Lindh of 2001, Jack Straw's Letter to the Spanish presidency, speeches from Polish ex-Foreign Minister, Cimoszewicz, Polish strategies on Wider Europe, and German-Polish strategies on ENP.

bordering the new enlarged EU in the East, South-East and South. In 2004, the policy was officially adopted as the “European Neighbourhood Policy” (ENP).

From the opening of accession negotiations in 1998 to the launching of the European Neighbourhood Policy (ENP) in 2003-04, the new member states from Eastern Europe – at that time still candidates – played a major role in influencing the European agenda. They are still very active in promoting closer cooperation with the ENP countries in the East. Thus, most of them supported the Finnish initiative of 2006 to enlarge the Northern Dimension to Belarus and the German strategy of the ENP Plus, which was proposed for the EU presidency in 2007 (Duleba, 2007)³. Among the new member states, four groups of countries emerged. First, the speeches and propositions of Polish politicians added to the support of British and Swedish calls for a “Wider Europe” policy and to the early propositions of the Finnish and German governments to enhance the Northern and Eastern dimensions of the EU’s foreign relations. They were showing their concern for the absence of an EU policy in Eastern Europe. Second, the Baltic States were also pro-active in moving the Eastern and the Southern-Caucasus into the European agenda. Third, the Visegrád countries were also motivated, but not as equally engaged or coordinated on this issue. Fourth, and more recently, Romania has stated its support for closer cooperation with Moldova and, together with Bulgaria, the development of the Black Sea Cooperation, which the Commission took into account in its communication in December 2006 (EC, 2006)⁴.

To sum up, the original propositions of a policy towards EU’s neighbours was largely linked to the idea of reinforcing sub-regional cooperation, especially through the creation of an “Eastern dimension”. Later on the Black Sea Cooperation was created to complement the already existing “Northern Dimension” and the “Barcelona Process”. Among the new member states, Poland was particularly engaged in redefining the EU’s relations with its Eastern neighbours⁵ before the enlargement. In his speech inaugurating Poland’s EU accession negotiations in 1998, Bronisław Geremek called for the creation of an “Eastern Dimension” in line with the ideas developed by Jerzy Giedroyc in the Parisian emigration review, “Kultura”. This was taken over and developed by the government, which issued a non-paper on the “Eastern Dimension” in 2003, as well as by the Minister of Foreign Affairs W. Cimoszewicz, who made some speeches on the topic (Cimoszewicz, 2003a,b). The Polish position was based on three main ideas:

- 1) It asked for an Eastern policy similar to the Northern Dimension, advocated in 1997 by Finland, and the Euro-Mediterranean Partnership, created in 1995 during the Spanish EU presidency. It also asked for “clear incentives” from the EU in exchange for political reforms in the neighbour countries.
- 2) It argued that relations with the Eastern neighbours should be differentiated so that bilateral relations could be developed and the national strategies of each country could be taken into consideration. The policy should be constructed around three pillars: A

³ On ENP Plus: “Berlin entwickelt neue Nachbarschaftspolitik. Sorge vor sicherheitspolitischem Vakuum im Gebiet zwischen Europäischer Union und Russland“, *Frankfurter Allgemeine Zeitung*, 3 July 2006; “New Policy on Russia splits German leaders”, *Herald Tribune*, 7-8 Oct. 2006.

⁴ More on this: Tulmets, 2007a; Kratochvil, Tulmets, 2007.

⁵ For a detailed analysis: Batory Foundation (2005); Buras, Pomorska (2006); Natorski (2007).

community pillar, a governmental pillar (including the bilateral policies of the member states) and a non-governmental pillar.

3) Finally, the policy should pursue its aim to enable countries like Ukraine, Moldova and potentially Belarus to join the EU if they had the will and the capacity to fulfil the accession criteria. Russia was excluded from the proposition as “it does not aspire to membership” (Cimoszewicz, 2004).

However, in the end the idea of an “Eastern Dimension” in the EU’s external relations was not taken over at the EU level, but, as it will be explained later, many elements of the Polish proposition have inspired the first communications of the Commission on an EU policy towards the neighbour countries.

8.3 The Commissions role in proposing a method that draws on the experience of the EU Eastern enlargement

In 2003, the Task Force “Wider Europe”, composed of civil servants from the DG Enlargement and DG Relex, was created to deal with the EU’s relations towards its Eastern neighbours. In 2004, when the ENP was officially launched with the larger aim of integrating both East and South, the personnel working in the Task Force from the DG Enlargement were moved to DG Relex (Interviews DG Enlargement, 2003-2004, and DG Relex, 2006). This restructuring partly explains why the original policy ideas and instruments of the ENP were adapted from the experience of enlargement (Tulmets, 2005b; Del Sarto, Schumacher, 2005; Kelley, 2006). One may speak of policy transfer and more precisely of policy adaptation, which Richard Rose defines as occurring “when a program in effect elsewhere is the starting point for the design of a new program allowing for differences in institutions, culture, and historical specifics. Adaptation rejects copying every detail of a program; instead, it uses particular measure as a guide to what can be done” (Rose, 1993: 31).

This adaptation from enlargement to the the neighbourhood policy took place at four main levels:

- *the discourse on common values, which replicates accession conditions;*
- *the concepts of partnership, differentiation, participation, and deconcentration/ decentralisation, which complement the notion of conditionality;*
- *the toolbox of assistance policy, which is complemented by instruments like cross-border cooperation, Twinning, TAIEX, and cooperation programmes;*
- *a new method based on a benchmarked approach, which was introduced to enhance bilateral negotiations and relations.*

These four points may be considered new elements brought by the ENP, which have added to the EU’s existing relations with its neighbours, such as the regional policies like the Euro-Mediterranean Partnership (Barcelona Process) or the Northern Dimension.

8.3.1 A discourse on common values

The similarities between the ENP's common values and the accession conditions are particularly striking. Neighbouring countries have to respect "commitments to shared values" relatively similar to the EU's accession criteria:

"... that is respect for human rights, including minority rights, the rule of law, good governance, the promotion of good neighbourly relations, and the principles of a market economy and sustainable development as well as to certain key foreign policy goals"

EC, 2004a

The policy discourse on the ENP is now clearly constructed around three main issues – security, stability, and prosperity (Prodi, 2002; EC, 2003a) – which are then defined in more details in the separate action plans, i.e. the internal market, cooperation in justice and home affairs, sustainable development, or foreign policy (EC, 2004b).

8.3.2 Concepts complementary to conditionality: differentiation, partnership, deconcentration / decentralisation, participation

In its communication of 2003, the Commission insisted that the ENP adopt a specific philosophy to complement already existing policies in its neighbourhood, namely "a differentiated, progressive and benchmarked approach" (EC, 2003a: 15). The Commission proposed that benchmarks "should be developed in close cooperation with the partner countries themselves, in order to ensure national ownership and commitment" (EC, 2003a: 16), thus counter-balancing the unilateral approach of conditionality. In this context, benchmarks "offer greater predictability and certainty for the partner country than the traditional 'conditionality'" (ibid., 2003a). During the last EU enlargement, conditionality was clearly defined and used to frame the accession process and negotiations (Smith, 1998; Schimmelfennig, Sedelmeier, 2004). After the Summit of Essen in 1994, *negative conditionality* (suspension of advantages when reforms are not conducted) was complemented by *positive conditionality*: The more a country introduced reforms, the more assistance it was awarded to conduct them. A debate particularly gained momentum when the Commission noticed that negative and positive conditionality worked only on a case by case basis. Although negative conditionality was seemingly effective in condemning the authoritarian Slovak government of Vladimír Mečiar in 1997, the Commission realised that Hungary and Poland, although being the best pupils of enlargement, were not using the whole annual PHARE budget that was allocated to them (Interviews, DG Enlargement, April 2003, March 2004). The main reason identified was the lack of administrative capacity and political will, as well as the poor involvement of civil society in shaping the reforms. The debate became particularly salient when both the European Court of Auditors and the European Parliament accused the Commission of managing the PHARE programme in an overly centralised and non transparent manner. After 1997, the asymmetrical and unilateral character of EU relations with its candidates was replaced with the concepts of partnership, differentiation, participation, and deconcentration / decentralisation, which were devised in order to complement the notion of conditionality.

When looking at the European Neighbourhood Policy, the same concepts can be found in addition to classical negative and positive conditionality. The principle of

differentiation consists in strengthening existing relations through a commitment to shared values on the basis of a “jointly agreed” Action plan. It stems from contractual arrangements between the EU and each country. While Morocco and Ukraine were among the first countries to sign such an Action plan, some countries like Algeria still has not started negotiations. Thus, differentiation is understood as being “tailor-made to reflect the existing state of relations with each country, its needs and capacities as well as common interests” (European Commission, 2004a).

The notions of *partnership* and of *decentralisation / deconcentration* were introduced into both the enlargement strategy and the TACIS and MEDA programmes almost simultaneously. The notion of partnership addressed the criticism that programme management was too centralised by the the Commission’s headquarters was in Brussels. This led to a policy of de-concentration (reinforcement of the delegations of the Commission) and of decentralisation (growing responsibility of third states’ institutions) in the framework of accession negotiations (1998–2002) and international cooperation (2001). This experience served as a basis for the design of the ENP philosophy in 2003–2004, mainly through officials of DG Enlargement who were later appointed to DG Relex and EuropeAid⁶. Nevertheless, the notion of decentralisation has been shaped differently in the ENP: while the Association agreements (AA) with the Mediterranean countries allow greater responsibility for implementation, the Partnership and Cooperation Agreements (PCA) with the TACIS countries still limit the role of third states in the management of EU projects⁷.

The idea of *participation* is closely linked to the concept of partnership and decentralisation. The involvement of actors from the civil society to generate reforms is seen as central for effective ownership, internalisation, and respect of the norms and values promoted by the EU abroad. Participation is also seen as a mean of increasing sectoral integration by opening internal cooperation programmes to persons from the third countries, especially in the fields of education, research, and culture. It also supports “people to people” cooperation projects. Nevertheless, although it constitutes as a crucial element of the new approach and was accepted by the Council at the beginning of 2007, this element is still weak in the ENP. The rather conservative EU visa policy also contradicts measures towards more participation.

8.3.3 The European Neighbourhood and Partnership Instrument (ENPI)

In 2003, the Commission proposed the launch of a specific assistance policy instrument called, “the European Neighbourhood and Partnership Instrument (ENPI) for the financial perspective of 2007–2013” (EC, 2003b). The ENPI is to replace the TACIS and MEDA programmes, as well as the European Initiative for Democracy and Human Rights (EIDHR). It also applies to Russia, which is not officially part of the ENP (Interview, DG Relex, February 2006). The aim of the ENPI is, as in the pre-accession strategy, to support the harmonisation with EU laws. Therefore, a budget of €12 billion was agreed upon for the period of 2007–2013 to support reforms in the ENP countries.

⁶ Interviews with officials of DG Enlargement, Brussels, March–April 2003, and members of the Task Force on Neighbourhood Policy, Brussels, June 2004.

⁷ Interviews, DG Relex, Brussels, April 2006.

At least four instruments of the pre-accession strategy have been integrated into the ENPI:

a) *Cross-Border Cooperation (CBC) (security and border management)*. As the ENP seeks to prevent “new dividing lines” in Europe after the last EU enlargement, a specific focus is given on Cross-Border Cooperation and intra-regional cooperation. Cross border projects between member states and neighbour countries are mainly geared towards promoting sustainable economic, social, and environmental development in border regions of the EU. The ENPI is designed to simplify procedures and be more efficient than previous experience in the framework of the PHARE and TACIS Cross-Border Cooperation (CBC) projects. Difficulties in clarifying procedures on the EU's side and the lack of administrative capacities at the local level have already added some delay in the launching of the first projects.

b) *Twinning (mid-term projects to improve institutional capacities, good governance and the rule of law)*. Twinning is an instrument that was introduced in 1997 in the enlargement policy to support capacity-building in candidate countries and institutional transfers through emulation, imitation and socialisation (Tulmets, 2005a). Twinning was later adopted in the CARDS, TACIS and MEDA programmes and is now part of the ENPI. Its primary aim is to make available the expertise of member state practitioners in foreign administrations on a specific issue – administrative and judicial capacities – where the EU has almost no *acquis* (promotion of good or best practices). So far Twinning was introduced in Jordan, Morocco, Lebanon, Tunisia, Egypt, Ukraine, and in the countries of the Southern Caucasus. Due to the political character of some projects, their implementation in neighbour countries depends mainly on the political will of the governments to accept them. In the ENP, Twinning projects cover the sectoral priorities mentioned in the Action Plans and thus provide advice in the fields of internal market, justice and home affairs, energy, transport, communication, environment, research and innovation, as well as social policies. For the time being, Twinning has been encountering difficulties in its implementation due to bureaucratic procedures, weak administration in almost all neighbour countries, a high turnover of civil servants, and a lack of resources (Königová, Tomalová, Tulmets, 2006).

3) *TAIEX (short-term projects to improve institutional capacities, good governance and the rule of law)*. In June 2006, the Commission accepted the inclusion of TAIEX into the ENPI, in order to complement Twinning. The Technical Assistance Information Exchange Office (TAIEX) was created in 1995 to assist candidate countries in adopting and implementing the chapters of the *acquis* most directly connected with the integration into the European Internal Market. It did so by providing information from a database on the *acquis* and sending independent experts for short-term missions to the candidate countries. Since one of the aims of the ENP is to offer neighbour countries “a stake in the EU's internal market” (EC, 2003a), DG AidCo introduced TAIEX in its unit that deals with Twinning on the model of the Institution-Building Unit of the DG Enlargement. In the ENP, TAIEX is conceived as an instrument which also allows for the preparation of Twinning projects (Königová, Tomalová, Tulmets, 2006).

4) *Participation in EU programmes (people-to-people cooperation)*. The ENPI also intends to increase “people to people” activities and dialogue between civilisations through the building of sectoral networks and the participation of neighbouring countries in EU programmes and areas like education, training and youth, health,

research, environment, as well as cultural and audio-visual programmes (EC, 2003a, 2004a). The experience of including citizens from non-member states in EU programmes was gained from the Mediterranean cooperation (e.g. Anna Lindh Foundation), the Northern dimension, and especially enlargement. Enlargement brought a larger opening of EU programmes to non-member countries. The ENPI includes opening programmes like YOUTH, Tempus, and Erasmus Mundus and other opportunities for participation, which are identified in the Action Plans (EC, 2004a: 20). The Commission's proposition to enhance direct contacts between people was accepted by the Council at the beginning of 2007, but the rather strict visa policy currently in place in the EU member states still contradicts this initiative. If high expectations in this field cannot be met, the EU will have to manage the frustrations of some neighbours attracted by a sometimes too promising ENP.

The ENPI also expects the EU to play a growing role in conflict prevention/resolution and crisis management in its neighbourhood. For the time being, crisis prevention is dealt in the framework of CFSP/ESDP missions, like the ESDP mission on border management between Ukraine and Moldova, and complemented by institution-building projects lead by the Commission.

However, various specialists and analysts are sceptical about the EU's capacity to implement such costly instruments with the budget adopted for the period of 2007-2013, as the apparently comfortable amount of €12 billion must be split among sixteen countries, plus Russia, for a period of seven years.

8.3.4 A soft method of coordination based on a benchmarked approach

In the ENP, one can notice that the Commission adopted a similar method as introduced in the enlargement strategy in 1997 ("Agenda 2000"). The country reports resemble the "Avis" of the Commission on the candidate states. The Action plans negotiated by the Commission and accepted by the Council present many similarities with the Accession partnerships. The *acquis* and the use of a benchmarked approach are employed to pressure and monitor, like during enlargement; regular evaluations are done for each country on the basis of their political agreements with the EU (Tulmets, 2005b). The whole is negotiated, debated, and agreed upon in the framework of already existing institutions, also created in the framework of the Association Agreements (AA for Southern neighbours) and the Partnership and Cooperation Agreements (PCA for Eastern neighbours): The committees and sub-committees of the AA and PCA.

This specific benchmarked and flexible method represents the added value of the ENP in policy terms compared to already existing policies towards the EU's neighbours (e.g. the Northern Dimension and the Euro-Mediterranean Partnership). It was introduced to manage and control the ENP as an overarching "umbrella" policy, which covers the following instruments: a) Association agreements (AA) or Partnership and association agreements (PCA), which the Commission proposes to replace by the European Neighbourhood Agreements; b) political dialogue in various forms and forums; c) TACIS, MEDA, and other assistance programmes, which have been replaced in 2007 by the European Neighbourhood and Partnership Instrument (ENPI); d) Lists of EU sectoral *acquis* or guides for legislative convergence (e.g. EC, 2003c); e) Civilian resources mobilised for ESDP missions. In relying on already existing instruments, this new overarching method of policy coordination aims at better defining the bilateral

“tailor-made” partnership between the EU and each partner. It also aims to control implementation.

Like in enlargement, this method is complementary to the EU's classical conditionality approach: While enhancing coordination between the member states on the policy to follow, it aims at socialising neighbouring countries to the EU's norms, values, and standards by pointing out their political responsibilities through the process of “naming and shaming” with reports and peer pressure processes. In this sense, the method presents many similarities with the open method of coordination (OMC), which was adopted in the EU for employment and social policies between 1997 and 2001 (Tulmets, 2003, 2005a,b). Adapted to the context of enlargement and neighbourhood, the method does not take the same shape as the OMC, but follows the same purpose: To reach cognitive convergence between the various actors (member states and third states) through socialisation and persuasion. This is especially true in fields where the EU has no *acquis*, i.e. no model to propose, thus no leverage and means for pressure (e.g. human rights).

Fig. 8.1 Incremental adaptation of a soft method of coordination in the ENP

OMC (Employment strategy, Luxemburg, 1997)	Enlargement policy (« Agenda 2000 », 1997)	Neighbourhood policy (Communication of the Commission, 2003)
(a) European objectives	Accession criteria	Commitment to common values
(b) National Action Plans	Avis on accession Accession Partnerships National Plan for the Adoption of the <i>Acquis</i> (NPAA), Action Plan for administrative and judiciary capacities	Country reports of the Commission (jointly agreed) Action plans Development plans of ENP countries
(c) Annual or bi-annual policy cycles	Negotiation cycles, Programming of assistance	Negotiation cycles of Action plans (3 years), Programming of assistance (TACIS, MEDA and after 2007, ENPI)
(d) Benchmarks / exchange of good or best practices	Benchmarks in the NPAA, TAIEX and Twinning contracts	Benchmarks in the Actions plans, TAIEX and Twinning contracts
(e) Participation, consultation of social partners	Consultation of social partners at the national level and participation at the Commission level	Participation at the national level and at the Commission level, “people to people” cooperation
(f) Indicators when <i>Acquis</i> is not precise	<i>Acquis</i> lists of the Commission DGs, Twinning contracts	<i>Acquis</i> lists of the Commission DGs, Twinning contracts
(g) Commission's Progress Reports	Regular Reports of the Commission	Report of the Commission to the Council

Sources: Own compilation from: European Council on Employment (1997), European Council at Luxemburg (1997), European Commission (2003a).

Interestingly, this method also develops bilateral relations on the model of the “Regatta principle”, a model that was accepted during the last phase of enlargement. In 1997, the EU member states agreed to open negotiations with only six candidates, out of twelve and thus favoured the logic of “Group accession”. In 1999, the member states finally agreed that the “Regatta principle” (the first countries to meet the accession criteria come in) would be more efficient and accepted to open negotiations with all candidate countries. This was also almost at the same time that Turkey was granted the candidate status. The “Regatta principle” was adapted to the ENP for one main reason: It allows the Commission a better control of the way in which common values are respected and reforms are introduced in neighbour countries, without making using unpopular negative conditionality. Although the idea of a “multilateral ‘Eastern Dimension’” in the EU’s external relations was not taken over at the EU level, some elements of the Polish propositions have inspired the ENP strategy. They are mainly based on the experience of accession from new member states into the EU. They include, for example, the idea of a “tailor-made” country strategy, the suggestion to improve cross-border cooperation and the suggestion to adapt the Twinning instrument to the context of neighbourhood.

However, the “Regatta principle” also generates a politicisation of bilateral relations between the EU and its neighbours, which generates a policy with “variable geometry” (Tulmets, 2006). Member states use this bilateral approach in a political way to support some neighbour countries in their attempt to get closer to the EU and even to support them as candidates. Poland for example worked hard, in cooperation with Germany, to shape the EU’s agenda on Ukraine both before and after the Orange revolution of 2004 (Auswärtiges Amt/Ministerstwo Spraw Zagranicznych, 2003; Gromadzki *et al.*, 2005). This brought to the adoption, during the February 2005 Council meeting, of a “10 points” paper defining the relations between the EU and Ukraine, even if it fell short of Polish expectations. As a matter of fact, additional issues were presented during the joint visit of the Polish and German foreign ministers, Rotfeld and Fischer, in Kiev in March 2005 to enhance the EU-Ukrainian relations (Buras, Pomorska, 2006 : 41). They include, for example: visa-facilitation for Ukrainian citizens, talks on a free trade area between the EU and Ukraine, a scholarship programme for Ukrainian students in the EU, a training programme for Ukrainian officials in Brussels and the concept of a European University in Lviv. As Poland supports Ukrainian accession into the EU, most of the Polish initiatives that were adopted towards Ukraine go far beyond the Action Plan negotiated in the framework of the ENP. Some of them have been taken over at the EU level: for example, Ukraine was granted the status of a free market economy under the British EU presidency at the end of 2005⁸.

The fact that candidate countries, now members of the EU, have started to promote their experience of accession abroad and to support some potential candidates has also inspired a new discourse at the EU level. Since 2003, enlargement has been considered

⁸ Before and after enlargement, other countries like Lithuania and Estonia were also pro-active towards enhanced cooperation with EU’s Eastern neighbours. Lithuanian and Estonian politicians for example insisted on the necessity for the EU to support processes of democratisation in Belarus and Ukraine, as well as in the South Caucasus after the Rose revolution in Georgia. Another well-known example is Romania, which is a fervent supporter of closer cooperation with Moldova as a potential candidate for accession in the EU.

the “most successful foreign policy of the EU” (EC, 2003a). This is also thanks to the specific flexible method developed throughout the 1990s, which allowed for the creation of a European “soft power” approach.

8.4 A method that sets the grounds for a discourse on EU “soft power”

As it has been remarked, for the Commission, the fifth enlargement represents the EU’s “most successful foreign policy” (EC, 2003a). The Neighbourhood policy offers a chance to prove that the EU has the capacity to establish stability and security at its borders and to face the expectations in its neighbourhood. Official speeches on enlargement and the ENP clearly insist on the EU’s ability to: promote its norms and cultural values, to generate attraction through persuasion and to mobilise its internal resources and policies to reach compliance (e.g. Ferrero-Waldner, 2006; Landaburu, 2006). One recognises there elements of the definition Joseph Nye gives of the “soft power”, a notion he developed while having the US in mind (Nye, 1990). The wording used in the Commission’s proposals gives priority to EU’s attractiveness for third states. As the Neighbourhood policy cannot rely on the powerful leverage of accession, it has to hinge on its coherence, on its ability to mobilise its capacities and to respect the jointly agreed commitments. For the Commission, the soft method of coordination is a way to manage such relations with third states (through benchmarks, monitoring in committees, evaluations) and thus to set the grounds for a discourse on the EU’s “soft power”. What comes out of the official speeches formulated at the Commission’s level is that third states should be attracted by the EU: They should logically accept to follow EU’s norms and to introduce reforms correspondingly.

As a matter of fact, the new policy discourse on “soft power” hints at the EU’s difficulties in solving its “capability-expectations gap”⁹. Given the weakness of the EU’s military capacities and the negative experiences with economic sanctions (Wilde d’Estmael, 1998), the EU is reluctant to use coercive means. It prefers to employ “soft” measures embodied by a normative discourse on values and by the enhancement of economic and cultural cooperation complemented by a thorough assistance policy (more on this: Delcour, Tulmets, 2007, Tulmets, 2007b). As the literature shows, since the establishment of the Maastricht treaty, the EU is still unclear as to the role it is able to endorse in the international arena. Ian Manners (2002) has argued that, with the introduction of conditionality and a discourse on human rights, the EU has added a “normative power” to its “civilian power”, already defined in the 1970s by François Duchêne (1973). Some authors have interpreted the launching of a Common Foreign and Security Policy (CFSP) in 1992, and the European Security and Defence Policy (ESDP) in 1999, as the end of the EU’s civilian power (Smith, 2000; Zielonka, 2002). Others have argued that the use of the military force does not preclude the abandonment of civilian means, as civil-military actions have shown (Stavridis, 2001)¹⁰. However, the European Security Strategy of 2003 clearly highlights the EU’s preference

⁹ Christopher Hill defines the capability-expectations gap as the discrepancy between, on the one hand, the EU’s resources, instruments, and ability to agree; and on the other hand, increasing expectations of third countries vis-à-vis the EU (Hill, 1993).

¹⁰ For a further discussion of these concepts, see Sijursen (2006), Johansson-Nogués (2007), Tulmets (2007b).

for civilian means in the framework of ESDP missions (Solana, 2003), as the Rule of law mission in Georgia and the ESDP mission on border management in Moldova have shown (Helly, 2007).

8.5. Shortcomings of the method in the EU's neighbourhood

In general, the flexible method identified above has encountered many difficulties and poses various challenges as adapted in the context of ENP.

1) First, it relies on the logic that derives from enlargement, which is originally aimed at including third states entirely, and not partly, into the EU's internal and external policies. One cannot expect the same commitment from associate or partner countries as from candidate countries. Commission officials would argue that this is why differentiation was introduced, to respect the rhythm of each country in the introduction of reforms. This argument nevertheless, does not hold true for the criticism that Action Plans, although negotiated, often include provisions which are more advantageous for the EU. Therefore, many analysts conceive these documents as asymmetrical and favouring the EU.

2) Due to the negative experience with sub-regional approaches in enlargement and in the Euro-Mediterranean Partnership, the method adopted in the ENP mainly builds on bilateral relations. Action Plans tend to forget the role of sub-regional considerations (cooperation and conflicts between neighbours). Thus, the EU has neglected the necessity to link both approaches in EU external relations (although an attempt to remedy this shortcoming was made during the Finnish and German EU presidency). However, the soft method of coordination does not solve the dilemma of sub-regional versus bilateral relations with the EU.

3) Although the EU is making recourse to negotiated norms and to a soft method of coordination ("soft power"), the asymmetrical and conditional approach (which one can understand as EU's "hard power") still remains. In practice, the soft method enhances the conditional approach in the ENP, and since the Commission often defines the negotiation agenda in advance, benchmarks are not always defined or participation remains limited. Therefore, the concepts of differentiation, partnership and ownership reveal contradictions in practice and lack of credibility among the EU's neighbour countries. In absence of any "hard" military power, the capacity of the EU to prevent conflict or to solve crisis is also under question.

4) The creation of an "umbrella" or "over-arching policy" using a similar, yet differentiated method for very heterogeneous regions is at the origin of diverse interpretations, which some authors have qualified as a "clash of interpretations" (Kratochvíl, 2006). The policy's aims are still not clear and can be interpreted as an alternative to enlargement, a pre-accession strategy, a new Euro-Mediterranean policy or a way for the EU to extend its influence abroad (ibid., 2006). From the beginning, the policy has lacked coherence due to the fact that such different sub-regional spaces were included within a single policy framework. One may wonder whether the creation of an "Eastern dimension" in the EU's external relations would not have been a more low-profiled but efficient approach than a new over-arching policy that includes many heterogeneous neighbours. It is not sure that propositions like the German ENP Plus

strategy, which aims at enhancing cooperation with Eastern neighbours, might solve the issue.

5) Finally, as a result of this “patchwork policy”, which reinforces bilateral relations in combination with already existing sub-regional approaches, a “policy with variable geometry” is slowly formed (Tulmets, 2006), which reflects a variety of expectations among neighbour countries is formed. Ukraine and Moldova conceive this as an opportunity to become closer to the EU and as a chance to someday be accepted as potential candidate countries. Morocco or Tunisia also perceive this as an opportunity, if not to integrate into the EU politically¹¹, at least culturally and economically (growing access to EU's internal market). However, countries like Algeria or those from the Middle-East take this cooperation less seriously (Del Sarto, Schumacher, 2005). Yet, in its current stage of internal integration and development of its foreign policy, it seems that the EU has no better offer to make.

8.6 Conclusion

The experience of the fifth enlargement of the European Union has clearly inspired policy ideas and instruments of the European Neighbourhood Policy. The European Commission played a crucial role in defining the scope of the ENP's policy ideas, concepts, and assistance tools, which justify the use of a soft method of coordination in the EU's external relations for the enhancement of bilateral relations with third countries. This contradicts the first policy propositions on “Wider Europe”, which aimed at developing a sub-regional “Eastern dimension” in the EU's external relations. As a result, the method adopted complements and, in many cases, strengthens the conditional approach while neglecting the sub-regional dimension of the EU's neighbourhood. It also builds the ground for a new policy discourse on “soft power”, which hints at the EU's difficulties in solving its capability-expectations gap. This also shows the complexity deriving from the of adaptation of solutions which have been created in a context to another very different one.

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9.

Legal Approximation: Evidence from Ukraine

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The harmonization of Ukrainian legislation with the EU law is one of essential preconditions for deepening Ukraine's cooperation with European Union and its Member States. The European Neighbourhood Policy is aimed at opening to Ukraine prospects of many of the benefits previously associated only with membership, such as a stake in the internal market, involvement in EU programmes etc. The harmonization creates prerequisites for moving to the next stages of integration, including in the foreseeable future the obtainment of EU membership by Ukraine.

The 1994 Partnership and Cooperation Agreement between the EC and its Member States, and Ukraine (PCA) as well as other instruments that set the legal framework for the cooperation between the EU and Ukraine have created appropriate preconditions for the harmonization of Ukrainian legislation with Community law.

The harmonization provided for in the PCA, the EU-Ukraine Action Plan and other instruments regulating the cooperation between Ukraine and the EU have both similarities and distinctions if compared with the harmonization at Community level as well as between the EU and third countries. A common feature of these processes is a general goal consisting in the creation of a unified legal environment for market relations. At the same time, the harmonization within the framework of cooperation between Ukraine and the EU is also aimed at the creation of favorable conditions for access of Ukrainian producers and services providers to the EC common market as well as markets of the countries that accept the Community standards.

On the other hand, the harmonization of Ukrainian legislation with Community law sets the foundation for bringing the legal environment of closer to that existing in EU Member States, thus encouraging the business community of EU Member States to work actively in Ukraine. Their presence is supposed to contribute to Ukraine's economic development and bring foreign investments to its economy.

Therefore, the harmonization objectively accelerates the integration of Ukraine with the European Union. That is why the harmonization of Ukraine's legislation with Community law is of special interest to this country.

In the relations between the EU and Ukraine one may speak about two stages of harmonization: voluntary and organized.

As to the voluntary harmonization, it started before the entry into force of the PCA. In particular, certain efforts to bring Ukrainian legislation closer to Community law were made in the spheres of competition, labour and social relations. That stage was

characterized by absence of any specific commitments of both parties in this area. Moreover, the steps taken by Ukraine to harmonize its legislation with Community law were not coordinated with the EC and had a unilateral nature.

It should be noted, however, that the process was not absolutely spontaneous. Ukraine had an opportunity to use appropriate acts of Community institutions and analyse the experience of other countries that harmonized their national laws with Community law. In particular, the White paper approved by the European Commission in 1995 described the harmonization priorities for countries of Central and Eastern Europe. Certainly, the list of priority-harmonization spheres could not by itself give an essential impetus to the process. First of all, it was also necessary to take into account that the harmonization could only be started upon the availability of at least some of EU documents translated in the Ukrainian language. However the amount of pages in the acts specified by the White paper as being of top-priority run to about 10.000 and raised a significant technical obstacle to the voluntary harmonization started in Ukraine.

The Temporary Agreement on Trade and Issues Related to Trade Between Ukraine and the EC signed on 1 June 1995 in Brussels was the first instrument to set the legal foundation for the harmonization of Ukrainian legislation with Community law before the entry into force of the PCA. The Temporary Agreement entered into force on 1 February 1996. It was replaced by the PCA in May 1998.

The Temporary Agreement laid the foundation for the organized harmonization. The Agreement provided for harmonization of Ukrainian legislation with Community law in the spheres of competition (Article 17) and the protection of intellectual property rights (Article 18, Annex III).

The entry into force of the PCA provided not only a broad legal bases for the process of harmonization of Ukrainian legislation with Community law but also ensured a diversified character of this process.

It should be noted that the PCA gives special attention to the harmonization of the existing and future Ukrainian legislation with Community law, viewing the harmonization as an important condition for the strengthening of economic links between the two parties (Article 51(1)).

The PCA does not provide a definition for harmonization. The Agreement itself uses terms traditional for Community law, such as “approximation” (Articles 51,60,76), “adaptation”(Articles 53,77), “establishing equivalent standards”(Articles 68) etc. This could mean that, like agreements establishing European Communities, this Agreement uses different words to describe the same process – legal harmonization. The main purpose of this process is to create similar legal conditions for Ukrainian and EU cooperating entities. Provisions of Article 51 (2) of the PCA also seem to imply this as they encourage the “approximation of laws”.

The fact that the PCA uses different terms for the description of the same process could not but heat up the discussion among the Ukrainian academic and practising legal community on what are the differences between their meaning and the preferred use. These disputes seemed to be an objective result prompted by the fact, that as N. Malysheva puts it, “neither the international legal theory nor the contemporary legal practice paid serious attention, up to quite recent time, to the theory of harmonization as well as to basic definitions and approaches, although the applied aspect of the

harmonization are among the most topical and widely studied in the foreign legal theory, particularly in the contemporary Community law”.

The majority of Ukrainian lawyers, who studied this issue, prefer to use the term “harmonization”.

In the “Dictionary of terms and notions of International and European law”, published by the Institute of Legislation at the *Verkhovna Rada* in 2005, harmonization is considered as a general notion meaning the process of making legislation of the member states and non member countries compatible with the requirements of the EU on the bases of legal acts of EU institutions. Harmonization is carried out in various forms, such as adaptation of legislation , implementation, standardization etc.

However, the official documents often use the term “adaptation” of Ukrainian legislation with EU legislation. In accordance with the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union, adopted in 2004, the adaptation consists in the approximation of Ukrainian legislation to the *acquis communautaire*.

On the other hand, the EU-Ukraine Action Plan speaks directly about “harmonization” of legislation.

The practical experience of the EU shows that the different terms used in Community law and agreements between the EC and third countries essentially describe the same process of making national laws compatible with the law if the EC. I believe that the term “harmonization” describes most adequately the ultimate goal of this process: consistency of national norms so that they would offer similar legal conditions for main actors on the market.

It is necessary to note that the harmonization of Ukrainian legislation with the Community law has a narrower objective than the reform of the Ukrainian legal system although it may be used for its progressive development.

The harmonization provisions of the PCA and the EU-Ukraine Action Plan have a framework character and their implementation depends on the adoption of legislation and the creation of necessary institutional mechanisms.

In relations between the EU and Ukraine the compatibility of Ukrainian legislation with EU law can be achieved at various levels (level of international obligations, level of EU obligations). At each of these levels the harmonization is implemented by various means (accession to international treaties, making national laws consistent with legal acts of EU institutions, recognition by Ukraine of national standards of EU Member States).

The PCA specifies the main spheres in which the harmonization is supposed to be achieved by means of undertaking relevant international obligations regarding particular international relations. These include intellectual property, energy, environmental protection, prevention of money laundering etc. The harmonization by acceding to international instruments that set international standards in particular spheres is generally not all-sufficient. As a rule it requires additional legal measures to be undertaken in the form of national laws adopted with the aim of implementing provisions of international agreements to which Ukraine has become a party.

The adoption of national laws and regulations compatible with Community law has become a more common harmonization method on which Ukraine and the EU rely upon in their relations. The legal bases for such harmonization is established in the PCA (Articles 50, 51, 60, 63, 68, 71, 75, 76, 77), the Action Plan, Ukrainian legislation. The spheres of such harmonization include the protection of intellectual property rights, customs, company law, banking, company accounting, taxes, labour protection, financial services, competition rules, public procurement, protection of health and life of humans, animals and plants, the environment, technical rules and standards, nuclear energy, transport, industry, agriculture etc.

It should be noted that the EU-Ukraine Action Plan set out the number of priorities in harmonization and adds some new areas.

The Action Plan requires from Ukraine to implement international standards on juvenile justice, prevention of the financing of terrorism; international and European standards in the sphere of labour relations, technical rules and standards, company law, financial control; European standards on the assessment of conformity of industrial products, licensing of imports, sanitary and phito-sanitary rules, protection of intellectual property rights, public procurement, statistics.

Almost all provisions of the PCA and the Action Plan constitute the so-called “soft law”, in other words, they express intentions rather than explicit obligations. This in fact makes all the harmonization process dependent on whether the parties could get interest in its success and adds a political colouring to their actions.

It is important to note in this regard that the PCA specifies no time frame for harmonization. The only exception is the protection of intellectual property rights, which must have been implemented by Ukraine within five years following the entry into force of the Agreement. On the other hand the Action plan gives Ukraine three years for implementing its provisions on harmonization.

The PCA provides that the EU should give technical assistance to harmonization measures. Such assistance is to include the exchange of experts, advance information on relevant EU legislation, organization of seminars, training activities, aid of translation of Community legislation in the respective sectors, development of necessary documents. The provisions on the assistance to the harmonization do not specify any time frame for their implementation. This affects to some extent the implementing measures taken by the Community.

The major problems dealt by Ukraine in the process of harmonization of its legislation with the EU law may be of objective and subjective character.

In the course of the harmonization of legislation, Ukraine should take into account that this is not reciprocal process as it does not involve any reciprocal steps of both parties to make their legal compatible with each other while requiring only Ukraine to change its legislation so as to harmonize it with Community law. Ukraine in fact has no influence on the law-making process within the EU and plays only the role of a point of destination for the EU legal precepts.

There is much ambiguity as to the clarification of exact meaning of the EU law, with which Ukrainian legislation needs to be harmonized. In fact, only the ECJ may interpret these acts. Owing to its interpretation, the acts may acquire somewhat different meaning. However, a country that harmonizes its legislation with Community law is not

able to constantly follow all the changes and timely take them into account by amending its legislation. At the same time, Community institutions are not obliged to inform Ukraine of amendments in Community law. So, all this may result in a situation where national norms may appear inconsistent with EU rules, which would lower the efficiency of the implementation of Community law in Ukraine's national legal order. Therefore, the ultimate goal of the harmonization, which consists in the creation of similar legal conditions for the entities regulated by the basic and harmonized norms, might not be achieved.

On the other hand, it should be taken into account in the course of the harmonization of Ukrainian legislation with that of the EU that the acts of Community institutions operate in a certain legal environment and are a part of the EU legal system. Ukraine may not always be able to comprehend all the legal subtleties of EU legal acts.

The other problems of harmonization are of Ukrainian origin.

In Ukraine particular attention is paid to the creation of the legal mechanism for governing the process of harmonization on the national level. Such mechanism includes screening, measures of control, assessment of the effect, identification of priorities etc. The legal bases for these activities constitute the National Programme for Approximation of Ukrainian Legislation to Legislation of the European Union of 2004, the Resolution of the Cabinet of Ministers "Some issues of Adaptation of Ukrainian legislation to that of the European Union of 2004, the EU-Ukraine Action Plan of 2005.

The institutions which are involved in the process of harmonization include the Verkhovna Rada, the Cabinet of Ministers, the Ministry of Justice, the Ministries and other central bodies of the executive power, the Coordination Council for the Adaptation of legislation of Ukraine to that of the EU, the European Integration Committee of the Verkhovna Rada.

The National Programme establishes a procedure of cooperation between the legislative and the executive power in the area of harmonization of legislation. Each draft law registered in the Parliament should within seven days be submitted to the European Integration Committee for determining if it belongs to the area governed by the EC law. If the Committee decides positively, the draft is sent to the Ministry of Justice where it should be subjected to a legal expertise on its compliance with *acquis communautaire*. After such an expertise the draft with the comments from the Ministry of Justice comes back to the Parliament.

However, this mechanism does not work efficiently.

The existing legal framework does not regulate and specify the competence of the European Integration Committee in the Parliament. Compliance of draft laws with *acquis communautaire* is insured to the extent reasonable and possible up to the moment of consideration of the draft in the first reading only. There is no mechanism for analysis of compliance of draft laws with *acquis communautaire* at the second and the third reading in the Parliament. And there is no mechanism, which would prevent adoption of a law by the Parliament, which would contradict EU legislation.

The Council of experts at the European Integration Committee, which is supposed to render assistance to the Committee's Secretariat, given the limited personnel capacities of the Secretariat – 10 members, does not work. This diminishes the quality of expertise.

Evaluation of the achieved progress, as well as identification of institutional and administrative problems impeding the successful implementation are crucial factors for enhancement of future harmonization. However, there is no unified mechanism for monitoring of implementation of harmonized legislation.

The Ministry of Justice as the only institution responsible for the legal expertise of draft legislation as regards its compliance with *acquis communautaire* is overburdened and requires considerable resources.

The Ministry of Justice is in charge of translation of the *acquis communautaire* acts for the harmonization of legislation. According to this procedure, based on the Order of June 2005 “On Approval of the Procedure of Translation of *acquis communautaire* Acts into Ukrainian”, the Department of Legislation Approximation prepares a tentative plan of translations to be done during a year on the basis of proposals from the line ministries and other central bodies of the executive power. The procedure for planning translation is cumbersome and limits possibilities for any ad hoc practice, which might be needed given the dynamics of the Acquis development or the urgent need for the preparation and drafting of a law not listed.

The quality of translation of *acquis communautaire* in Ukrainian is another big problem.

And the last but not the least observation. As to the approaches to the harmonization process, now Ukraine uses mainly the evolutionary one, focusing on the meaning and intent of the EU norms with which Ukrainian legislation is to be aligned. Such approach may be justified by the fact that the national legal system in general has extensive legislation that is codified in the majority of areas relevant to *acquis communautaire*. However, in the areas where there is no extensive national legislation the revolutionary approach is appropriate. It may be justified by an urgent need to precipitate the speed of the process of harmonization by providing for direct transposition of the EU norms and removing preexisting Ukrainian legal acts. In such a case more competence is supposed to be given to the executive bodies in adopting normative acts, as it was done in Poland, Hungary, the Baltic states, Bulgaria and some other countries.

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10.

Is Bilateralism a Solution? The Case of Ukraine

Anna Lytvyniuk

10.1 Introduction

The 5th of March, 2007 marks the official start of the negotiations on the European Neighbourhood Agreement with Ukraine to replace the existing and expiring in 2008 Partnership and Cooperation Agreement¹. This new Enhanced Agreement shall become the further legal and political basis for the EU-Ukraine relations. Commissioner Ferrero-Waldner stated on this occasion:

“Ukraine has made remarkable progress in democratic and economic reform since the Orange Revolution. The negotiations of the new agreement will bring Ukraine and the EU yet another step closer together. The negotiations of a free trade area will deepen our economic integration, while further political cooperation will advance areas such as democracy, human rights and the rule of law. Ukraine is also a key energy partner for the EU, and the new agreement will help us to go further in ensuring energy security, improving energy safety, and environmental standards, and progress towards integration of our electricity and gas markets”²

In these several sentences articulated by the Commissioner Ferrero-Waldner on March 5th, 2007 lie the very essence of the newly crafted European Neighbourhood Policy with its ambiguity and uncertainty that fosters the academic and policy-makers’ debate across the EU and beyond³. The nascent cause of such a contention on the European Neighbourhood Policy (ENP) lies in the broader question of the EU as a regional actor and more boldly—world actor. If agreed with the many scholars and fell back on the concept of ‘presence’ or ‘actorness’⁴ EU is recognized to have its ‘capacity to act’. EU demonstrates such ‘capacity to act’ in the many areas such as trade, promotion of regional integration, development cooperation, democracy and good governance, human

¹ “EU-Ukraine start negotiations on new Enhanced Agreement” 03/05/2007, see press release at http://ec.europa.eu/comm/external_relations/ukraine/intro/index.htm

² Ibid. Emphasis added.

³ See for example, M. Cremona, Ch. Hillion, “*L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*”, EUI Working Papers, Law No. 2006/39.

⁴ C. Bretherton, J. Vogler, “*Europe as a Global Actor*”, Routledge, London [1999], 5.

rights, security⁵ etc. EU foreign policy takes different forms according to the different classification of the international law subjects it deals with. B. Hettne and F. Söderbaum name four such different forms:

“...enlargement in the core area of Europe; stabilization in the so-called neighbourhood area; bilateralism with great powers; and interregionalism with respect to other organized regions. During the last decade interregional cooperation in particular has become an important component of EU foreign policy and external relations”⁶

The present article will reflect on the legal and political understanding of the Commissioner Ferrero-Walder's ‘yet another step closer together’, ‘economic integration’, ‘political cooperation’ and ‘key energy partner for the EU’ with reference to Ukraine and in the light of such conceptual dilemmas within the ENP as soft imperialism/civilian power, joint ownership/conditionality/differentiation, bilateralism/multilateralism/ interregionalism. It will be shown that bilateralism is the most appropriate form of the EU—Ukraine relationship within the ENP. It will be suggested that for the EU to obtain its recognition as a world actor it needs first most to prove its regional leadership, in particular, in its competition with Russia for the NIS region. This could be achieved through identifying Ukraine as the EU key strategic partner, promoting Ukraine's regional leadership, enhancing bilateral relations with Ukraine within the ENP with possible establishment of joint institutions with the legally binding decision making capabilities. Thus, bilateralism is the major precondition of the further multilateralism and interregionalism within the NIS geography of the ENP.

10.2 ENP within the EU model of external relations

European Union is a unique entity to have emerged in the system of international relations and international law. It is a union of 27 European states that functions through its own created system of law which regulates the relationship among the 27 member states through the well-thought system of checks and balances, division of competences and commitment to the Union values and aims. ‘Supranationality’ is a key legal concept when referring to the EU legal order.

The classical doctrine of international law recognizes such main subjects of international law: states, international organizations, nation striving for their independence. European Union due to its existence and ability to conclude international agreements is *de facto* subject of international law albeit not a state or international organization in the conventional understanding of those.

It is up to the EU to decide on its constitutional level the question of the EU legal personality. At the moment EU acts on the world arena as the European Community, the EU and EU member states separately or collectively.

⁵ EU's ‘actorness’ in the area of security in the world context is yet to be seen. See on this question R. Whitman, “Road Map for a Route March? (De-)civilianizing through the EU's Security Strategy” *European Foreign Affairs Rev.* 11 [2006], 6—15.

⁶ Emphasis added. B. Hettne, F. Söderbaum, “Civilian Power or Soft Imperialism? The EU as a Global Actor and the Role of Interregionalism”, *European Foreign Affairs Rev.* 10 [2005], 535.

The model of the EU external relations is unique. In exercising its foreign policy EU suggests a model of civilian power, the non-military, mostly economic, means to achieve the Union goals. Many authors believe that the future of international relations, especially in the post-Cold War world, lies within the 'soft power' as opposed to military power:

"Arguments were rehearsed about a change in the structure and substance of international relations that suggested a changing landscape in which civilian forms of power were more appropriate and the EU now more internationally significant"⁷

EU is still striving to come up with the nature of its own model of external relations, its place as a regional actor and even world actor. B.Hettne and F. Söderbaum give the definition of the 'civilian power' and 'soft imperialism' when discussing on the nature of Europe's global power:

"...[Civilian power] implies a foreign policy built on the norms promoted internally within the Union (such as social pluralism, the rule of law, democracy and market economy) and on voluntary dialogue and consensus-building with the counterpart. ...[Soft imperialism] refers to an asymmetric relationship, and the imposition of norms in order to promote the EU's self-interest rather than a genuine (interregional) dialogue as a foundation for sustainable global governance"⁸

Depending on the sphere of interest, EU model may vary from civilian power (environment, development) to soft imperialism (security, trade). Now, as we take a look at the issue areas of the ENP we see that they are various and fall under all the three pillars of the EU. Shall the EU choose between the mechanisms of its either civilian power or soft imperialism models, or combine them? The answer to this question is exactly the difficulty EU is facing now while crafting the tools for the ENP especially in the light of the European Security Strategy⁹ (ESS). ENP is said to be the "regional implementation of the European Security Strategy, thus reflecting the Union's ambition to provide coherence in its relations with the outside world"¹⁰. But whilst providing such coherence with the outside world it is important to keep in mind the multifold nature of 'security' itself:

"It is a long time since security was thought of only in terms of military force. We all know that security is far broader today, that it includes economic, environmental, and social issues. Indeed, non-military threats to security loom much larger in the mind of most people... These non-military security threats are not adequately dealt with by any of our international institutions. ...this is where the European Union must take up the challenge."¹¹

⁷ R. Whitman, "Road Map for a Route March? (De-)civilianizing through the EU's Security Strategy" *European Foreign Affairs Rev.*11 [2006], 5.

⁸ Emphasis added. B.Hettne, F. Söderbaum, "Civilian Power or Soft Imperialism? The EU as a Global Actor and the Role of Interregionalism", *European Foreign Affairs Rev.*10 [2005], 549.

⁹ Adopted by the European Council on 12.12.2003, see at: <http://ue.eu.int/uedocs/cmsUpload/78367.pdf>

¹⁰ M.Cremona, Ch.Hillion, "L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy", *EUI Working Papers, Law No. 2006/39*, 3.

¹¹ M.Cremona, Ch.Hillion, "L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy", *EUI Working Papers, Law No. 2006/39*, 5 (footnote 18 (Javier Solana, "The EU—Russia strategic partnership", speech delivered 13 October 1999, Stockholm.)

Economic, environmental, social and other security issues are the areas for the ENP to deal with. It is unlikely that the model of ‘voluntary dialogue’ is possible on those issues in the EU—ENP country relations as we will see below.

In 2004 the EU has invented a new policy—the European Neighbourhood Policy¹² to regulate its relations with its newly acquired, after the enlargement in 2004 and consequently in 2007, geographical neighbours. As much as the EU emphasizes the principles of ‘joint ownership’ and ‘shared values’ in its ENP which the EU and the ENP countries are allegedly to share, the ENP still remains a ‘policy’—the EU’s public policy which is a challenge of converting certain aspirations into the specifically implemented policy. Moreover, the ENP is an inter-branch policy and an embodiment of the cross-pillar ESS. Thus, the combination of ‘voluntary dialogue’ and ‘imposition of norms’ (or ‘civilian power’ and ‘soft imperialism’) moulds a new concept, that of ‘external governance’.

The notion of external governance is better applicable when talking about the ENP in the context of the EU external policies. By ‘external governance’ we understand “the extension of parts of the Union’s *‘acquis communautaire’* beyond the circle of member states towards their immediate neighbourhood”¹³. As Lavenex points out, ‘external governance’ is a combination of ‘civilian power’ and ‘soft imperialism’:

“External governance combines a foreign policy strategy geared at stabilization and integration with the attempt to bind third countries to the pursuit of internal policy goals and thereby benefit from the latter’s political and material problem-solving resources.”¹⁴

ENP defines the range of countries to fall within this EU policy, the so-called ring of ‘friends’: the North African countries, Middle Eastern EU countries that share the sea coasts and the land border WNIS (Belarus, Moldova, Ukraine).

The ENP is a new policy of the EU which follows the EU’s ‘successful enlargement policy’ and bears a lot of conceptual and technical similarities of the latter¹⁵.

Although already elaborated, the ENP faces a challenge of its correct choice of tools. The major objectives of the ENP are to provide for the security on its new borders and collaborate with its neighbours in the field of security, economy, democratization, environment, energy etc.

The ENP is a result of an attempt to ‘internalize the disturbances rather than to contain them’¹⁶ and is based on the notion of ‘supranational responsibility in purely national

¹² The text of the policy is available at http://ec.europa.eu/world/enp/index_en.htm

¹³ S.Lavenex, “EU External Governance in Wider Europe”, *Journal of European Public Policy* 11:4 August [2004], 681.

¹⁴ *Ibid.*, 694.

¹⁵ More on the similarity of the ENP methodology and that of the enlargement see: M.Cremona, Ch.Hillion, “*L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*”, EUI Working Papers, Law No. 2006/39, 8—18; M. Cremona “*The European Neighbourhood Policy: Legal and Institutional Issues*”, CDDRL Working Papers, No.25, 02.11.2004, 4—5; J.Kelley “*New Wine in Old Wineskins: Promoting Political Reforms through the New European Neighbourhood Policy*”, *JCMS*, Vol.44 No.1 [2006], 30—34; R. Dannreuther “*Developing the Alternative to Enlargement: The European Neighbourhood Policy*”, *European Foreign Affairs Rev.* 11[2006]: 183—201;

affairs',¹⁷ to be exercised by the EU's external governance through expanding its legal framework.

Through its external politics in the form of ENP EU wishes to enhance the European citizens' feeling of European identity as well as to practice its 'soft power' model on its 'neighbourhood',¹⁸.

While crafting the ENP two models have been looked upon: *multilateralism* and *bilateralism*. The latter has been seen as the most appropriate one to deal with the variety of the EU's neighbours.

10.3 ENP: bilateralism vs. multilateralism

The official relations of the EU with the newly independent state, Ukraine, began on December 2, 1991 with the Declaration of EC on Ukraine. Since that time the legal framework of the EU-Ukraine dialogue has been shaped by the Partnership and Cooperation Agreement (PCA)¹⁹ which came into force on March 1, 1998 and gradually by the EU-Ukraine Action Plan—endorsed by the EU-Ukraine Cooperation Council on February 21, 2005²⁰.

Since its independence Ukraine has declared its external policy course towards the EU with the objective of integration. The notion of 'integration' is seen differently by the Ukrainian officials than it is seen by the EU. Whereas for Ukraine 'integration' means Ukraine's membership in the EU, for the EU the concept of 'integration' has transformed from the 'integration as an objective of the EU's enlargement policy towards the ten central-eastern European states'²¹ to the European Neighbourhood Policy's perception of 'integration' as in 'all but institutions'²² or 'a wider Europe'²³ concept.

In 2004 Ukraine has acquired a new geopolitical neighbour in the face of the enlarged EU. This fact had and continues to have tremendous political, economic, social and other implications on both Ukraine and the EU, especially those of the new EU Member States that have geographical borders with Ukraine.

¹⁶ S.Lavenex, "EU External Governance in Wider Europe", *Journal of European Public Policy* 11:4 August [2004], 680.

¹⁷ *Ibid.*, 682.

¹⁸ See on this B.Ferrero-Walder Guest Editorial in *European Foreign Affairs Rev.* 11 [2006] 139—142 "The European Neighbourhood Policy: The EU's Newest Foreign Policy Instrument", 140.

¹⁹ See the text of the PCA at <http://www.delukr.ec.europa.eu/en/Data/pca-eng.pdf>

²⁰ See the chronology of the EU—Ukraine bilateral relations at: <http://www.delukr.ec.europa.eu/page4824.html>

²¹ Poland, Czech Republic, Slovenia, Slovak Republic, Hungary, Latvia, Lithuania, Estonia, Malta, Cyprus.

²² R.Prodi, "A Wider Europe—a proximity policy as the key to stability", speech at the 6th ECSA World Conference, 2002.

²³ Commission Communication to the Council and the European Parliament "Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", 11.03.2003, COM (2003) 104.

On March 30, 2004 the PCA was extended to the ten new EU Member States, and on May 12, 2004 the Strategy Paper on the European Neighbourhood Policy was adopted²⁴.

The logic of the ENP is to promote stability, prosperity and good governance along the borders of the EU. The economic and political development and reforms inside the ENP countries will eventually lead to a better security in the EU neighbouring regions. Such political and economic objectives are set out in the Action Plans with each individual ENP country, also with Ukraine. These Action Plans take into consideration the relevant 'country reports' made for each individual ENP country and constitute the further basis of the EU—ENP country bilateral relations *a` la* 'individual accession partnerships'²⁵.

The relations EU—Ukraine have always been of 'bilateral nature'. This means that common political, economic and other objectives have been collectively reached by Ukraine as well as the EU with a help of specific tools (financial assistance, annual reports and monitoring, 'twinning programs' etc). This has proven to incite inside of Ukraine domestic reforms, economic growth and internal and external security. To shift to the form of multilateralism (treating each country of the ENP not separately but in a combination with others, regionally, by means of common forum of discussion and also by regular meetings at many levels and on numerous issues) would have meant a total failure of the ENP.

The reasons for sustaining bilateralism within the ENP are multifold. As said above, the ENP is a specific form, a test-case for the EU model of external governance. This means 'exporting' domestic *acquis communautaire* to the ENP countries. Because the ENP borrowed the many enlargement policy techniques, the country reports as well as screening and monitoring of the *acquis* adoption are easier and more efficiently enforced on the bilateral basis, through, for example, the annual meetings of the PCA Cooperation Council²⁶. Financial assistance and economic incentives, thus, are based on the ENP country's individual progress.

Multilateralism, that is, a model in which the partners (EU and the neighboring countries) meet for regular meetings at many levels and on numerous issues, seemed not to work as means of the EU external relations policy (the past experiences of Göteborg European Council, and even before, the Luxemburg European Conference of 1997 and the Copenhagen European Council Conference of 1993).

Although the neighbors of the EU are grouped into the regions, they are to be 'treated' separately. This is when the Commission talks about the '*differentiation approach*' towards each country in the region. However, when referring to the regions, the ENP regions are to be distinguished clearly from the Western Balkans, which, unlike the former, "have a membership perspective"²⁷.

²⁴ Commission Communication "European Neighbourhood Policy—Strategy Paper", 12.05.2004, COM (2004) 373.

²⁵ M.Cremona, Ch.Hillion, "*L'Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*", EUI Working Papers, Law No. 2006/39, 11.

²⁶ See Art. 85 PCA with Ukraine.

²⁷ Commission's Third Annual Report on the SAP, COM (2004) 202/2 final, 30 March 2004, 5.

Agreeing with M. Cremona, it seems to be not practical to support the ‘global approach’ suggested by W. Wallace, to use the same framework for the ENP, because each country is more likely to progress individually faster in terms of its internal domestic economic, political other reforms, secure internal and external justice than being in the same ‘boat’ with the others and being drawn down by their slow progress and thus fail to benefit from the ENP benefits of shared internal market²⁸.

Whereas the European Commission is clear that the ENP has nothing to do with ‘membership’, and whereas the African countries are, in fact, happy about the ENP, Ukraine has displayed a hint of disappointment with this EU policy and thus the future turn of Ukraine—EU relations. Ukraine has set an ambitious goal of membership in the EU. This goal is of a declarative character by now however. Official Kyiv has repeatedly claimed its wish to join the EU in the future irrespective of Brussel’s diplomatic silence to this question.

The 2004—2005 Presidential Elections in Ukraine have stirred some agitation vis-à-vis Ukraine’s possible future membership in the EU, but it obviously did not go further than Ukraine’s political wishful thinking. Instead, the EU proposed Ukraine the ‘ten points’ of deeper EU-Ukraine cooperation within the framework of the ENP²⁹ (adopted by the General Affairs and External Relations Council on February 21, 2005).

The enlargement policy and the ENP policy suggest different incentives. While the first one suggests the EU membership as an incentive, the latter one talks of the ‘high degree of economic and political integration’ as an incentive. Because the ENP covers a variety of countries which altogether have little, if nothing, in common politically, economically or culturally, and is based on the partnership and ‘joint ownership’ principle, it is highly questionable if Ukraine is motivated enough to undergo deep ‘modernisation’ with the EU membership not being a ‘carrot’.

Ukraine was eager to look forward the negotiations of the new enhanced agreement (ENP agreement) where it planned to negotiate the ‘future member’ clause. The EU negotiating mandate made it clear, however, that there could be no talks on membership. Instead, the ‘carrots’ of free trade area (once Ukraine is a member of the WTO), visa facilitation, strengthened partnership on energy, political dialogue on human rights and other incentives were suggested³⁰.

The European Commission has come to a conclusion that in its relations with Ukraine EU needs to follow the bilateral framework, enhancing it with a layer of multilateralism in such key geostrategical areas for the EU as justice and home affairs, environment, energy and transport³¹.

Thus, the relations EU—Ukraine can be characterized as bilateral with enhanced sector cooperation that does not exclude multilateralism.

²⁸ M.Cremona “*The European Neighbourhood Policy: Legal and Institutional Issues*”, CDDRL Working Papers, No.25, 02.11.2004, 9.

²⁹ January 31, 2005, see at <http://www.delukr.ec.europa.eu/page4824.html>

³⁰ “*Negotiations begin on new agreement*”, Bulletin Quotidien Europe No.9381 08.03.2007, 5.

³¹ On December 4, 2006 Commission send Communication to the European Council and European Parliament “On Strengthening the European Neighbourhood Policy” COM (2006) 726 final. See also “*EU/Neighbourhood Policy*”, Bulletin Quotidien Europe No.9319 02.12.2006, 4.

10.4 ENP: EU-Ukraine sector cooperation and the future models of relations

Three ‘soft security’ fields constitute “the broader geostrategical background of the recent initiatives on ‘wider Europe’: justice and home affairs (JHA), environment and energy policy.”³² These fields are also the targeted areas of Ukraine—EU sector cooperation. It is most likely that the future will witness these areas to belong to the EU legal order, rather than exclusively or partially to the national governmental level of the EU member states. Consequently, the issues “may become a matter of EU external governance if the Union has been granted responsibilities in this area and has the institutional competence to act in external relations.”³³ Already a proposal for a Directive on the protection of the environment through criminal law³⁴ signals the emergence of the so called ‘European criminal law’ and shows the expansion of the competences of the EU to legislate in the fields traditionally retained for the national legal orders³⁵.

The EU—Ukraine cooperation in a sector of justice and home affairs embraces police and judicial cooperation in criminal and civil matters, border controls, the fight against drugs, organized crime and terrorism, as well as asylum and immigration policy³⁶. Provisions on these matters lay within the PCA and the Common Strategy of 11 December 1999 on Ukraine³⁷.

The most recent Communication from the Commission to the Council and the European Parliament “On Strengthening the European Neighbourhood Policy”³⁸ contains “proposals to substantially improve the impact of the policy”³⁹. Among the measures, suggested to facilitate mobility and manage migration, promote people-to-people exchange, strengthen political cooperation, enhance regional cooperation, financial cooperation, it suggests measures for enhanced cooperation in the mobility and migration and regional conflict resolution sectors⁴⁰.

The same Communication along with the Commission Communication “The General Approach to enable ENP partner countries to participate in Community agencies and Community programmes”⁴¹ proposes “to enhance multilateral and bilateral dialogue with ENP partners in key sectors”⁴², possibly conclude “additional multilateral agreements in energy and transport and strengthen the existing ones”⁴³, extend “the EU

³² S.Lavenex, “*EU External Governance in Wider Europe*”, *Journal of European Public Policy* 11:4 August [2004], 681.

³³ *Ibid.*, 687.

³⁴ Brussels, 9.2.2007 COM (2007) 51 final, 2007/0022 (COD). OJ C 180 E of 26.6.2001.

³⁵ See also the Case C-176/03, and the Judgement of the ECJ of 13.09.2005.

³⁶ Title IV TEC and Title VI TEU.

³⁷ OJ EC, 23.12.1999 L 331/1 (1999/877/CFSP).

³⁸ 4.12.2006, COM (2006) 726 final.

³⁹ *Ibid.*, 2.

⁴⁰ *Ibid.*, 3-4.

⁴¹ COM (2006) 724 final of 4.12.2006.

⁴² COM (2006) 726 final of 4.12.2006, 9.

⁴³ *Ibid.*

transport and energy networks to neighbouring countries, as well as interoperability”⁴⁴, provide for the ‘neighbours’ participation “in relevant Community agencies and programs”⁴⁵.

As far as the Ukraine—EU cooperation in the energy sector is concerned the legal basis for which is the Article 61 of the PCA, EU constantly reminds its member states to exercise fully and abide by the Memorandum of Understanding on cooperation in the field of energy between the European Union and Ukraine⁴⁶. EU plans to enhance its cooperation with Ukraine in this sector through admitting Ukraine as a member of the Energy Community⁴⁷.

Environment is also the area of EU—Ukraine sector cooperation. Bilateral relations in this area (Article 63 of the PCA) are most likely to be enhanced by the ‘multilateralism’ when Ukraine is to become part of the European Environment Agency. The convergence of the EU and Ukraine’s environmental policies is also dictated by the fact that EU’s environmental *acquis* has now become the model for the regional and international environmental legislation.

By developing its strong policies in the key sector areas of the EU—Ukrainian cooperation Ukraine through the help of the EU has a strong chance of becoming a regional actor (in the post USSR political geography). When strong bilateral EU—Ukraine cooperation gathers its momentum Ukraine has a strong chance of becoming a leader in the multilateral relations within the ENP. This could result in the two possible further consequences. Firstly, it will become possible for the EU to achieve its desired ‘interregional’ or ‘multilateral’ model of international relations and make a further step forward in its pursuit of becoming an ‘actual’ or ‘real’ global actor. EU model of external governance would prove to work and thus a theory of the new type of international relations would once again be supported.

Secondly, for Ukraine the successful bilateral and sector cooperation with the EU within the ENP would mean its political, economic, ideological and legal proximity with the EU through the former’s full implementation of most of the EU *acquis*. This all would be in line with Ukraine’s enjoyment of the free trade area with the EU, common instruments for security, energy, environment, JHA policies with the possibility of the creation of the common decision making body entitled with a legally binding decision making power. Although the ENP has a clear message of the absence of a prospect of accession to the EU it still has a potential, through its mechanisms similar to those of the enlargement policy, of making some of the ENP partners ‘ready’ to accede to the EU. Such an accession would, actually, be merely ‘formal’.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Signed on 1.12.2005.

⁴⁷ Preamble of the Memorandum of Understanding on cooperation in the field of energy between the European Union and Ukraine.

10.5 Conclusion

This article tried to add to the discussion of the external relations of the EU with a particular focus on the newly crafted European Neighbourhood Policy in the light of the European Security Strategy and on the particular example of Ukraine as the ENP partner. The central thrust of this article has not been to propose or choose from either 'bilateral' or 'multilateral' models of the ENP, but rather to show the interconnection of both and the possible geopolitical aftermath of such an interconnection.

The doctrines and questions of imperialism and civilian power; joint ownership, conditionality and differentiation; bilateralism, multilateralism or interregionalism were once again brought up and examined in the light of the ENP as the EU cross-pillar external policy.

It has been shown that bilateralism is the most appropriate form of the EU—Ukraine relationship within the ENP. It was suggested that for the EU to obtain the recognition as a world actor it needs first most to prove its regional leadership, in particular, in its competition with Russia for the NIS region. Although the idea of Ukraine as the EU key strategic partner and regional leader may for long remain an exercise in futurology, Ukraine's present day urge to concentrate on its sector cooperation with the EU may prompt the possible establishment of joint institutions with the legally binding decision making capabilities. After all, although the ENP remains distinct from the process of EU enlargement, Ukraine's enhanced cooperation with the EU is entirely possible regardless of how its relationship with the EU may develop in the future in the light of Article 49 TEU.

11.

A New Framework for the Relations Between the Union and its East-European Neighbours

Christophe Hillion

A central element of the European Neighbourhood Policy (ENP) is the future establishment of a new type of bilateral agreement between the EU and its ENP partners.¹ In the case of East European neighbours,² this new agreement would replace the existing Partnership and Cooperation Agreements (PCAs).³

The various EU policy papers that articulate the ENP do not spell out in detail what this future agreement could consist of. But, the current negotiations of the ‘enhanced agreement’ with Ukraine are shedding some light on its possible contours,⁴ and on the EU intentions of making it comprehensive, binding and durable.⁵ Against this background, the present paper critically examines the envisaged scope (1), nature (2) and sustainability (3) of the future agreement.

¹ See 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; Communication on the European Neighbourhood Policy – Strategy Paper; COM(2004) 373; Communication from the Commission to the Council and the European Parliament on strengthening the European Neighbourhood Policy, COM(2006) 726. Other ENP primary documents can be found at: http://ec.europa.eu/world/enp/documents_en.htm#5 (last visited 1 June 2007).

² The eastern dimension of the ENP covers Moldova, and Ukraine, as well as Armenia, Azerbaijan and Georgia. It is intended equally to cover Belarus ‘as soon as the country indicates a willingness to move towards true democracy, human rights and rule of law’ (Commissioner Ferrero Waldner, 21/11/2006; IP/06/1593). The policy was also deemed to cover the Russian Federation (COM(2003) 104, p. 4), but the latter has instead favoured a “strategic partnership” with the EU.

³ E.g. PCA between the European Communities and their Member States on the one hand, and Ukraine on the other [OJ 1998, L49]; PCA between the European Communities and their Member States on the one hand, and Moldova on the other [OJ 1998, L181].

⁴ GAERC conclusions, 22 January 2007 [5463/07]. The negotiations formally started on

5 March 2007; see also “Commission proposes negotiating directives for enhanced agreement with Ukraine”, IP/06/1184; 13/09/2006: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1184&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited, 1 June 2007); see “EU-Ukraine start negotiations on new Enhanced Agreement”: <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/275&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 1 June 2007).

⁵ These features were mentioned in the presentation of the agreement by Finnish Secretary of State Markus Lyra, representing the Presidency of the EU, at the Wider Europe Seminar organized by the Sussex European Institute in Kiev (October 2006).

11.1 The scope of the future agreement: widening and deepening the existing partnership?

The new agreement envisaged by the Commission and the Council aims at establishing a ‘deep’ and ‘comprehensive’ Free Trade Area (FTA) between the EU and its ENP partners.⁶

A *comprehensive* FTA entails liberalisation of trade in goods *and* services, in compliance with the relevant GATT and GATS requirements.⁷ This contrasts with the PCA trade regime which, essentially inspired by the Most Favoured Nation principle, only contains, in its most advanced version, a ‘rendez-vous’ clause whereby the parties agreed merely to *discuss* the feasibility of an FTA, without any commitment to establishing it.⁸

A *deep* FTA refers to the important role regulatory approximation would play in the new relationship. Such approximation is set to supplement the abolition of tariffs, entailed by the establishment of a classical FTA, with a reduction of non-tariff (i.e. technical)⁹ barriers by fostering the ENP partners’ adoption of EC standards. The new agreement would thereby consolidate an approximation process already sought under the PCAs¹⁰ and the ENP Action Plans,¹¹ with a view to preparing the grounds for economic integration between the EU and the ENP partners.

If it were to establish such a deep and comprehensive FTA, the new agreement between the EU and its East-European neighbours would bring about considerable widening and deepening of their *trade* relations. However, it should be recalled that the FTA, and a fortiori a deep FTA, will not be put in place overnight. As illustrated by the old Europe Agreements (EAs),¹² additional years will probably be needed after the agreement’s

⁶ COM(2006)726, pp. 4-5. Further on these concepts: see M. EMERSON (ed), *The Prospect of Deep Free Trade between the European Union and Ukraine*, Brussels, Centre for European Policy Studies, 2006.

⁷ See Art. XXIV GATT and Art. V GATS, respectively. Further: P. VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge, Cambridge University Press, 2005, esp. p. 658.

⁸ This ‘rendez-vous clause’ is only included in the PCAs with Moldova, the Russian Federation and Ukraine (see e.g. Art. 4 PCA Ukraine). Further from this author: “Partnership and cooperation agreements between the EU and the NIS of the ex-Soviet Union”, *EFARev*, 1998, p. 399; R. PETROV, “The Partnership and Cooperation Agreements with the Newly Independent States” in A. OTT & K. INGLIS (eds), *Handbook on European Enlargement*, The Hague, Asser Press, 2002, p. 175.

⁹ E.g. technical norms and standards, sanitary and phytosanitary rules, competition policy, enterprise competitiveness, innovation and industrial policy, research cooperation, intellectual property rights, trade facilitation, customs measures and administrative capacity in the area of rules of origin, good governance in the tax area, company law, public procurement and financial services; COM(2006)726; p. 4.

¹⁰ See the provisions on legislative cooperation in the PCAs; e.g. Art. 50 PCA Moldova, and Art. 51 PCA Ukraine. Further: R. PETROV, “Recent Developments in the Adaptation of Ukrainian Legislation to EU Law”, *EFARev*, 2003, p. 125.

¹¹ On Action Plans, see from this author, “‘Thou shalt love thy neighbour’: the draft European Neighbourhood Policy Action Plan between the EU and Ukraine” in A. MAYHEW & N. COPSEY (eds.) *Ukraine and European Neighbourhood Policy*, Brighton, Sussex European Institute, 2005, p. 17.

¹² E.g. Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part [OJ 1993, L348/2].

entry into force for the FTA to be fully operational. Indeed, the economic situation of the partners will influence how quickly such an FTA might be set up.

According to the Commission and the Council, the new agreement should also activate ‘enhanced cooperation’ in various fields, such as energy, environment, transport and education. Moreover, building upon the ENP Action Plans and other existing arrangements,¹³ such enhanced cooperation would cover the whole breadth of EU activities, including CFSP and ESDP cooperation, as well as cooperation in the area of freedom, security and justice.¹⁴ The new agreement would thereby consolidate and codify the comprehensive dimension of existing relations between the Union and its East-European countries,¹⁵ though what the EU precisely means by ‘enhanced cooperation’ remains to be clarified. This enhancement will only be genuine if it is clearly articulated in the language of the new agreement’s provisions.

11.2 An all-encompassing association agreement?

Contrary to the APs, the new agreement between the EU and its East European neighbours is meant to be binding.¹⁶ Yet, neither the Commission nor the Council have hitherto given any indication as to what its precise legal basis could be. One could nonetheless foresee that the ‘enhanced’ or ‘neighbourhood’ agreement take the form of an association agreement based on Article 310 EC, potentially close but not necessarily identical to the EAs. This proposition finds support first, in the terminology of several ENP documents and secondly, in the inherent logic of the policy.

The notion of Association has been defined by the European Court of Justice in the *Demirel* judgment,¹⁷ which states that an ‘association agreement creat[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system’. Echoing this definition, the Commission Strategy

¹³ E.g. Agreement between the European Union and Ukraine establishing a framework for the participation of the Ukraine in the European Union crisis management operations [OJ 2005, L182]; Agreement between the European Union and Ukraine on security procedures for the exchange of classified information [OJ 2005, L172]; Agreement between the European Community and Ukraine on certain aspects of air services [OJ 2006, L211]; Agreement between the European Community and the Government of Ukraine on trade in certain steel products [OJ 2005, L232]; Agreement renewing the Agreement on cooperation in science and technology between the European Community and Ukraine [OJ 2003, L267]. The new agreement will also build upon soft law instruments; e.g. the EU Action Plan on Justice and Home Affairs of 10 December 2001 [OJ 2001, C77/1].

¹⁴ In this regard, see: “Commission proposes negotiating directives for enhanced agreement with Ukraine”, above n 4.

¹⁵ Further: M. CREMONA & C. HILLION, “*L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*”, *EUI Law Working Papers* 2006/39.

¹⁶ Support can be found in the procedure followed by the Commission in launching the discussion with the Council on the future agreement (see: “Commission proposes negotiating directives for enhanced agreement with Ukraine”; above n 4); and by the terminology of COM(2006) 726, esp. p. 4.

¹⁷ Case 12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719. Further on association agreements, see the contributions in M.-F. CHRISTOPHE-TCHAKALOFF (ed), *Le concept d’association dans les accords passés par la Communauté: essai de clarification*, Bruxelles, Bruylant, 1999.

Paper of 2004,¹⁸ as well as the subsequent Council Conclusions endorsing it,¹⁹ explicitly refer to a ‘privileged relationship’ between the EU and its neighbours,²⁰ while the introductory sections of the ENP Action Plans, notably with Ukraine and Moldova, hint at the progressive establishment of *privileged* links. Indeed, the ENP perspective of moving the EU relationship with its neighbours beyond cooperation to a ‘significant measure of economic and political integration’,²¹ and the possibility for neighbouring countries progressively to take part in key aspects of EU policies and programmes,²² including participation in relevant Community and Union agencies,²³ also remind of the formula used by the Court when articulating the concept of association.²⁴

Arguably, any agreement ‘below’ association would not be perceived as an ‘enhanced’ contractual relationship. To begin with, the initial justification for the Union to maintain an alternative arrangement to association (viz. PCAs) vis-à-vis east-European states is no longer there. At the start of the nineties, the EU Member States were not yet determined to enlarge the Union to the Central and Eastern European Countries (CEECs). In this context, the EAs were conceived by some Member States as an *alternative to accession*, as indeed suggested by the preamble of the EAs with Poland and Hungary, and by the Commission’s initial communication on the new type of association.²⁵ Consequently, the EU had to ‘package’ the EA as a special and exclusive breed of association agreement to make it less unpalatable for the CEECs. Including the former Soviet republics in the already widening bundle of EAs²⁶ could have diminished their exclusive character, thereby diluting their political value.²⁷ Indeed, following the Copenhagen European Council of 1993, a direct link was finally established between the EAs and accession, making an EA-like treatment ever more inaccessible for ‘non-CEECs’. Given that all the EA states have become members of the Union, the initial

¹⁸ COM(2004) 373 final, p. 3.

¹⁹ GAERC conclusions, 14 June 2004 [10189/04; Presse 195], p. 11.

²⁰ In the same vein, the ENPI Regulation includes in its Preamble the notion of ‘privileged relationship’ between the EU and its neighbours; while the Resolution of the European Parliament on the European Neighbourhood Policy [P6_TA(2006)0028] talks about ‘privileged relations’.

²¹ COM(2004) 373 final, p. 5; though the Council more cautiously refers to ‘gradual economic integration and deepening of political *cooperation*’ (emphasis added); GAERC conclusions, 22 January 2007; see pt. 2, second indent [5463/07; Presse 7].

²² COM(2004) 373 final, p. 8.

²³ Further in this regard: Communication from the Commission to the Council and to the European Parliament on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes; COM(2006) 724 final.

²⁴ Art. I-57 of the Constitutional Treaty foresees a ‘special relationship’.

²⁵ Commission’s ‘Communication on Association agreements with the Countries of Central and Eastern Europe: a General Outline’; COM(90) 398. Further, e.g. M. MARESCEAU, ‘A legal analysis of the Community’s Association Agreements with central and eastern Europe: general framework, accession objectives and trade liberalisation’ in S. V. KONSTADINIDIS (ed), *The legal regulation of the European Community’s external relations after the completion of the internal market*, Dartmouth Press, 1996, p. 125.

²⁶ EAs were being concluded with Bulgaria, Romania, the Baltic States and eventually Slovenia.

²⁷ It was also felt on the EC side that the post-soviet states (the so-called ‘Newly-Independent States’) should be approached differently from the CEECs, because of their potential re-integration, e.g. in the form of the Commonwealth of Independent States. Further: J. RAUX, ‘Les instruments juridiques de la Communauté avec les Etats de l’Europe de l’Est’, in J. C. GAUTRON (ed), *Les relations Communauté européenne – Europe de l’Est*, Economica, 1991, p. 41.

rationale for not granting Ukraine or Moldova an association agreement has now vanished, thereby making association available.

The second argument which should incite the Union to propose an association agreement to its east-European partners stems from its existing relations with the southern ENP states, namely the Euro-Mediterranean Agreements.²⁸ These agreements *are* association agreements. Unless the Union seeks to dilute the Euro-Mediterranean *acquis*, which would be contrary to the logic of the ENP, it is unlikely that the current relationship is going to be downgraded. In other words, the new EU agreement with the southern neighbours would, at any rate, be an association based on Article 310 EC. Against this background, it would be surprising if the Union was to offer east-European partners an enhanced agreement that does not match the type of relations it has with the southern Mediterranean states. Establishing a less ambitious relationship with East-European countries would undermine the coherence of the ENP. Incidentally, it would also diminish the value of the EU's declared ambition to 'build an increasing close relationship' with Ukraine and Moldova,²⁹ as well as its acknowledgement of the latter's European aspirations.³⁰ Indeed, it could be recalled, particularly for those Member States that remain undecided, if not reluctant to conceive of Ukraine' and Moldova's eligibility for membership to the Union,³¹ that association does not automatically mean accession. After all, Latin American countries have concluded association agreements with the Community.³²

While the new EU agreement with the East-European neighbours should, almost inexorably, take the form of an association agreement based on Article 310 EC, its likely all-inclusive scope, both in terms of objectives and content, may entail that the *Union* becomes a concluding party to the new agreement, alongside the Community and the Member States. This proposition is not contradicted by the Council decision on the negotiating directives, which refers to an 'enhanced agreement between the *European Union* and Ukraine' (emphasis added).³³ Such a cross-pillar framework agreement would be among the first of this kind in the typology of EU external agreements and, arguably, a way symbolically to materialise the EU ambition of going beyond and above the existing relationship.³⁴ Also, it could make the new agreement more

²⁸ See e.g. the Euro-Mediterranean Agreement between the European Communities and their Member States on the one hand, and Morocco on the other [OJEC 2000 L70].

²⁹ GAERC conclusions, 22 January 2007, pt. 2, second indent [5463/07, Presse 7].

³⁰ This European perspective of Ukraine was recognised by the EU notably in the EU Common Strategy on Ukraine [OJ 1999, L331/1]; the EU/Ukraine Action Plan; and in the GAERC conclusions, 22 January 2007, pt. 1 [5463/07; Presse 7]. A similar perspective was recognised in relation to Moldova, as recalled by the EU/Moldova AP.

³¹ *Agence Europe* No 9349, 23 January 2007, p. 5.

³² See e.g. Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part [OJ 2002, L352].

³³ GAERC conclusions, 22 January 2007 [5463/07, Presse 7]. See in this regard: J. RAUX, "Towards a pan-Euro-Mediterranean strategy: association of proximity", in M. MARESCEAU and E. LANNON (eds), *The EU's Enlargement and Mediterranean Strategies*, Basingstoke, Palgrave, 2001, p. 42; J. RAUX, "Association et perspectives partenariales" in M.-F. CHRISTOPHE-TCHAKALOFF, above n 17, at p. 89.

³⁴ Indeed, it would not be the first time that the EU-Ukraine relations would be used as a *laboratory* for testing new formula of EU external relations (e.g. Common Strategies, Partnership and Cooperation

appealing to the East-European states that are keen on developing an ever closer relationship with the Union.

The choice of the legal basis of the new EU agreement with its neighbours will determine procedure for concluding it. In EU external relations, the rule appears to be as follows: the more ambitious the agreement, the more difficult its conclusion. In particular, concluding an association agreement requires a unanimous vote within the Council,³⁵ and the assent of the European Parliament (EP).³⁶ Furthermore, assuming that the new agreement covers most areas of EC external relations, including areas of shared competence (e.g. environment, social policy), it is likely to be mixed. As such, it will have to be concluded by the EC together with its Member States, and will therefore require the ratification by all 27 Member States – if not more by the time of its conclusion. Numerous national interests,³⁷ as well as the concerns of the EP will thus have to be thoroughly considered, particularly during the negotiations.³⁸

Indeed, if it were to establish enhanced cooperation in all EU external policies, as suggested earlier, the new agreement could be concluded, at least theoretically, as ‘a cross-pillar agreement’ by the Community and the Union, on the basis of Articles 300(3) second indent EC, and Article 24 TEU, respectively.³⁹ Choosing this complex legal basis would involve different procedural arrangements. In particular, the provisions relating to EC competence (exclusive and possibly shared) would fall to be negotiated by the Commission (possibly with Member States for areas of shared competence), while parts of the agreement on cooperation in CFSP and PJCCM⁴⁰ matters could be negotiated by the EU Presidency, assisted by the Council’s Secretariat.⁴¹ Even if it were decided, as it is sometimes done in the context of mixed agreements,⁴² to ask the Commission to act as sole negotiator on behalf of the Community and the Member States, but also possibly on behalf of the Union, such a decision would not in any event prejudice the question of the competence of the Community, the Member States or the Union on particular issues. In other words, the EC, the EU, and the Member States, would still have to conclude the draft

Agreements); further from this author, *The European Union and its East-European Neighbours – A laboratory for the organisation of EU external relations*, Oxford, Hart Publishing, 2007, forthcoming.

³⁵ Art. 300(2) EC.

³⁶ Art. 300(3), 2nd subpara., EC.

³⁷ As epitomised by the Polish veto on the start of negotiations of a new post-PCA agreement with Russia.

³⁸ On the complexities of mixed agreements, see e.g. J. HELISKOSKI, *Mixed agreements as a technique for organizing the international relations of the European Community and its Member States*, The Hague, Kluwer Law International, 2001; D. O’KEEFFE & H. SCHERMERS (eds), *Mixed agreements*, Deventer, Kluwer Law, 1983.

³⁹ There have been discussions about cross-pillar agreements in the context of the EU accession to the ASEAN Treaty of Amity and Cooperation (TAC) as suggested by Council doc. 16042/06 of 30 November 2006 entitled ‘Draft Council authorization to the Presidency and the Commission to negotiate the accession to ASEAN Treaty of Amity and Cooperation (TAC) by the EU and EC respectively’ (non public).

⁴⁰ For PJC matters, Art. 38 TEU would have to be added to Art. 24 TEU.

⁴¹ The Council’s adoption of negotiating directives was not clear on the question of who is going to negotiate the Agreement. It merely mentions that negotiations were due to be launched at the “EU-Troika Ukraine Ministerial meeting” of February 2007.

⁴² For instance, for the negotiations of the WTO agreement; see in this regard: Opinion 1/94, WTO [1994] ECR I-5267.

agreement, in relation to their respective fields of competence. Such intricate procedure could lead to some squabbling, notably between the Commission and the Council, as to which parts of the agreement relate to the competence of the EC, the EU, and the Member States, respectively.⁴³

The foregoing suggests that, at least for procedural reasons, the Union may be in a difficult position to offer an ambitious agreement that would match the neighbours' expectations,⁴⁴ not to mention the general objectives of its ENP. Unless pragmatic arrangements are found to ensure a solid and coherent EU position,⁴⁵ a bundle of sectoral agreements could be explored as an alternative to an all-encompassing framework agreement, although this fallback arrangement would need to be spearheaded by an overall institutional framework.

11.3 A durable arrangement?

The Council and the Commission acknowledge that the 'new enhanced agreement shall not prejudice any possible future developments in EU-Ukraine relations'.⁴⁶ Nonetheless, as the ENP is envisaged as a long term policy, the EU favours an agreement that is long-lasting, rather than limited in time and thus opened to early renegotiation.⁴⁷ This requires an agreement adaptable to change, which in turns notably depends on the institutional framework to be set up by the new agreement.

In particular, the vitality of the relationship would be fostered if, in contrast to the PCAs, the agreement were to establish an organ (e.g. an association council)⁴⁸ endowed with a full-fledged decision-making power and clear tasks. In effect, alongside timelines and transition periods, for instance to establish an FTA, association agreements often include enabling clauses, entrusting the association council with the power to elaborate and strengthen the relationship through binding decisions.⁴⁹ The relationship thereby evolves without the parties having to re-negotiate the whole agreement, with all the procedural pitfalls that such process entails.

⁴³ On such EU/EC competence battle, see e.g. Case C-176/03, *Commission v Council (Environmental penalties)* [2005] ECR I-7879, and pending case 91/05, *Commission v Council (ECOWAS)* [OJ 2005, C115/10]. The European Parliament could also get involved in such power politics as it has done in the past, though not entirely successfully: see Cases C-317/04 and 318/04, *Parliament v Council (PNR)*, judgment of 30 May 2006.

⁴⁴ On Ukraine's reactions to the EU current position: see *EUobserver*, 21 January 2007.

⁴⁵ Further: M. PETITE, "Current Legal Issues in the External Relations of the European Union", *EUI Law Working Papers*, 2006/38.

⁴⁶ GAERC conclusions, 22 January 2007, pt. 2, last indent.

⁴⁷ It remains to be seen whether that option would be positively perceived by the ENP partners, particularly the Ukraine, in view of its membership aspirations.

⁴⁸ Such an organ would most likely be supported by other committees (including parliamentary committees) and sectoral sub-committees.

⁴⁹ Thus, the development of the movement of workers between the Community and Turkey, and the establishment of an EC-Turkey customs union have depended significantly on the decisions adopted by the association council established by the Ankara agreement.

It should be recalled that such decision-making power is already conferred upon the association councils established by the Euro-Mediterranean Agreements,⁵⁰ which in itself is an argument in favour of granting a similar power to the future EU-East European organs. Indeed, giving the neighbours the possibility to take part in the development of the *acquis* would contribute to fulfilling the ENP objective of involving them in Community and Union policies,⁵¹ and incidentally give more substance to the ENP ‘joint ownership’ mantra.⁵² The Commission evoked in its legislative and work programme that it would ‘prepare the grounds for a *renewed* institutional arrangement with ... Ukraine’ (emphasis added).⁵³ It however remains to be seen whether such ‘renewal’ entails endowing the new institution with decision-making power.

11.4 Conclusion

This brief paper has sought to shed some light on the possible scope, nature and durability of the contractual framework which should govern the relationship between the EU and its East-European neighbours. Against the background of the current discussions on the future EU–Ukraine treaty, it has been suggested that the existing relationship could be strengthened in various ways. First, the new agreement is deemed to deepen trade relations by establishing an FTA covering both goods and services (comprehensive FTA), and involving a high degree of regulatory approximation (deep FTA). Second, it is meant to enhance and widen cooperation between the parties to the whole spectrum of EU external dimensions, thereby going above and beyond existing arrangements.

It remains to be seen whether this ambitious agenda is matched by the detailed contents of the agreement. Indeed, if the new agreement is to constitute a genuine enhancement of the relationship, as envisaged by the ENP, such improvement will have to be substantiated by its title, institutional framework, and, more importantly, the rights and obligations foreseen by its provisions.

‘Where there’s a will, there’s a way’!

⁵⁰ E.g. Art. 80 EMA Morocco.

⁵¹ Moreover, provided they meet certain conditions, the binding decisions adopted by such a body could be guaranteed before Member States’ jurisdictions thereby also involving citizens in the EU rapprochement with its neighbours. See in this regard, the European Court of Justice’s numerous judgments of the EC-Turkey association council; e.g. Case 192/89, *Sevince* [1990] ECR 3461. Note that direct effect of the rules underpinning the new relationship does not depend on the adoption of additional measures by an organ, such as an association council. As well-established, the provisions of the agreement itself may have direct effect (Case C-63/99, *Głoszczuk* [2001] ECR I-6369; Case C-171/01, *Wählergruppe Gemeinsam* [2003] ECR I-4301, and Case C-265/03, *Simutenkov* [2005] ECR I-2579).

⁵² COM(2004)373, p. 8.

⁵³ Communication from the Commission: “Unlocking Europe’s full potential - Commission Legislative and Work Programme 2006”; COM(2005) 531; p. 10.

12.

Conclusions

Marise Cremona

The papers in this collection, and the discussion in the Workshop at which they were presented in draft form, offer a number of different and contrasting perspectives on the ENP, not only in terms of disciplinary perspective but also in terms of assessment of its objectives and the appropriateness of its instruments. In line with our sense that this is very much an ongoing discussion, what is offered here is not so much a set of final conclusions but rather an attempt to bring together some of the themes that emerged and some provisional conclusions with a view to encouraging further debate.

12.1 Objectives and expectations

We do well to remember that not only are there differing expectations on the part of the EU on the one hand and the neighbours on the other, but that among the EU Member States themselves and the diverse groups of neighbouring States there are differing interests, expectations and priorities for the ENP (see Petrov, Milczarek and Nowak). This diversity on the part of the neighbours underpins and renders unavoidable the EU's stated policy of differentiation within the broad ENP framework; further, it makes it more difficult to speak of an ENP framework that is more than the barest outline, defined largely in negative terms (not an accession policy). Diversity of interests and expectations on the part of the EU Member States makes more difficult the clear articulation of policy objectives and partly explains why we can discern a number of different and not always compatible objectives. On the other hand, it also means that the ENP has the strength of a policy that is seen as fulfilling a variety of different needs. The expectations of the parties themselves (EU, Member States, neighbour states) also need to be set into the context of other important actors in the region, not only Russia but also NATO, the OSCE and the United States (see Harasimowicz).

For these reasons it is not surprising that defining the objectives of the ENP, and relating them to the methodologies and instruments available is a complex exercise. EU objectives, it emerged clearly, are multiple and can be in tension with each other, if not actually contradictory, especially in terms of the methodologies adopted (see for example the discussions by both Tocci and Meloni). For example, strategic, security objectives may be best served by a cooperative or partnership approach, whereas normative objectives may be better served by conditionality-based mechanisms.

A tension may similarly exist between the economic development objectives of the ENP and the issue of accession; it is not clear to what extent measures adopted with a view to accession in fact contribute in the most effective way to economic development. In addition, of course, although accession may be an ultimate objective of some of the

ENP neighbours, it is not a stated EU objective. However the ENP-based rationale (in the absence of an accession rationale) for the neighbours to adopt the EU *acquis* and implement substantial economic reform programmes is not always clear. The neighbour states are likely therefore to develop their reform strategies in the light of their own economic development needs (see the discussion by Montalbano).

These factors all contribute to the ambiguity of EU policy statements in defining – or failing to define with any precision – its own objectives for the ENP. Two further points might be made. First, this ambiguity is linked to a genuine desire on the part of the EU for flexibility, reflecting the different priorities of the different partners. Secondly, however, in discussing what might be the concrete components of the relationship, or what a new agreement might look like – its legal basis, its title, its content – it is all but impossible to get away from the idea of an offer or deal and to move towards a shared definition of a common project (see for example the discussions by Hillion and Petrov).

12.2 Instruments and methodologies

Is it then impossible for the EU to avoid being a hegemon in its integration relationships with third countries (a question posed by one of the Workshop participants)? Different models have been tried with a variety of partners: the European Economic Area, the network of bilateral agreements with Switzerland, the ENP itself with its bilateral emphasis towards the east (see Lytvyniuk) and its more multilateral southern dimension built upon the Barcelona Process (see Montalbano). All these models of relationship are based on the recognition that it is in the nature of the Union legal order to exclude non-Member States from its own decision-making processes. Legal approximation, when applied to third countries, inevitably means adjustment to EU norms and not the mutual reciprocal adjustment characteristic of the EC model (see the discussion of approximation as an ENP instrument by Mouraviov). This does not of course mean that the EU cannot participate in international organisations or arrangements with decision-making powers. It is however difficult for the EU to give third states a seat at its own decision-making table. As far as the ENP is concerned, we may make three points.

First, that cooperative (non-hegemonic) integration is more easily achieved in the fields of EU policy which are less supranational in nature, such as security and defence, or third pillar cooperation in criminal matters. It is easier to incorporate third countries into ESDP missions than to give them full membership of EC agencies. It is not a coincidence that to date more concrete progress has been made in the ENP in second and third pillar cooperation than in first pillar economic cooperation. More generally, it will be important if the ENP is to be seen to deliver results, to focus on specific fields where progress can be made, whether, visa facilitation, border cooperation, energy, air transport, environmental projects, student mobility or arms control (which, in accordance with the principle of differentiation, are likely to be different for different partners).

Second, one way for the EU to export its own standards and norms without engaging in a non-reciprocal imposition of such standards is to make use of international standards and norms, as well as reference to multilateral agreements on issues of common interest. This is already being done in the Action Plans and could be developed further.

Third, common decision-making can be achieved not through absorption into EU structures but through a new joint institutional framework. In addition, institutional mechanisms which allow for regular, even daily, contact between officials will engender trust and alter preconceptions and expectations on both sides. Thus, the institutional basis for the new relationship, especially but not only in the new enhanced agreements, is of great importance. These agreements should contain not only strong concrete provisions but the institutional means to give them a dynamic potential for developing the relationship.

Finally, both Tocci and Arnold / Karpova highlight the importance of the Rule of Law to the ENP, both as a normative objective and as an instrument. The EU is not only engaged in promoting the Rule of Law within third countries - including its neighbours - as a pre-condition for democratic development, but needs to demonstrate that it upholds this principle itself in its own external relationships. Hence the importance of the contractual relationships that are already at the heart of the ENP and will be the core of its evolution (if it does so evolve) into something constructive.

Workshop Programme

The European Neighbourhood Policy: A Framework for Modernisation?

1st – 2nd December 2006

1 December 2006

9.00 **Registration**

9.30 **Workshop Opening**

Wojciech Sadurski, Head of the Law Department, EUI

Marise Cremona, Prof. of European Law, EUI

First Panel “The ENP’s Objectives: the expectations”, Chair: M. Cremona

9.40 Eugeniusz Smolar, “*Divergencies of expectations between ENP’s different actors*”

10.00 Roman Petrov, “*The expectations of the new neighbours*”

10.20 Dariusz Milczarek, “*The ENP as a challenge for the European Union. Experiences of the Eastward Enlargement*”

10.40 **Debate**

11.00 **Coffee Break**

Second Panel “The ENP’s Objectives: democratic stability”, Chair: W. Sadurski

11.20 Rainer Arnold/Kateryna Karpova, “*The ENP and the promotion of the rule of law in neighbouring countries: the case of Ukraine*”

11.40 Nathalie Tocci, “*Democracy and Human Rights in the European Neighbourhood*”

12.00 Raffaella Del Sarto, “*Benchmarking in the field of Human Rights and Democratisation*”

12.20 **Debate**

13.00 **Lunch**

Third Panel “The ENP’s Objectives: economic development (prosperity)”, Chair: P. Montalbano

14.00 Susanne Milcher, “*The economics of the ENP*”

14.20 Alan Mayhew, “*What kind of development? What kind of integration?*”

14.40 Alojzj Nowak “*ENP towards Ukraine. Economic Perspective*”

15.00 **Debate**

15.30 **Coffee Break**

**Fourth Panel “The ENP’s Objectives: the structure of the relationship (security)”,
Chair: Prof A. Nowak**

16.00 Christophe Hillion, *“What kind of framework for the new relationship?”*

16.20 Sandra Lavenex, *“EU external governance in Wider Europe”*

16.40 **Debate**

17.00 **Conclusions**

2 December 2006

09.30 **Registration**

**First Panel “The ENP’s Instruments: legal integration and legal approximation”,
Chair: R. Arnold**

10.00 Viktor Muravyov, *“Legal approximation: evidence from Ukraine”*

10.20 Adam Lazowski, *“Alternatives to membership: other models for
extending the acquis”*

10.40 **Debate**

11.00 **Coffee Break**

**Second Panel “The ENP’s Instruments: the extension of the Europeanisation
toolkit to neighbouring countries”, Chair: S. Lavenex**

11.20 Adrienne Héritier, *“Possible lessons from Europeanization research”*

11.40 Elsa Tulmets, *“Is a soft method of coordination best adapted to the
context of EU’s neighbourhood?”*

12.00 Gabriella Meloni, *“Is the same toolkit used during enlargement still
applicable to Third countries? Evidences from Russia and Ukraine”*

12.20 **Debate**

13.00 *Lunch*

**Third Panel “The ENP’s Objectives: bilateralism and multilateralism”, Chair: A.
Mayhew**

14.00 Anna Lytvyniuk, *“Is bilateralism a solution? The case of Poland and
Ukraine”*

14.20 Pierluigi Montalbano, *“The Pan-European Market: feasibility and
problems”*

14.40 Piotr Kazmierkiewicz *“Rethinking the Concept of the European
Neighbourhood Policy: Differentiation and Conditionality--View from
the New Member States”*

15.00 **Debate**

15.30 **Conclusions**

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