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EUROPEAN INTEGRATION WITHOUT EU MEMBERSHIP:
MODELS, EXPERIENCES, PERSPECTIVES

Francesco Maiani Roman Petrov Ekaterina Mouliarova (Editors)

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
MAX WEBER PROGRAMME

*European Integration Without EU Membership:
Models, Experiences, Perspectives*

FRANCESCO MAIANI, ROMAN PETROV, EKATERINA MOULIAROVA
(EDITORS)

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Foreword

The Max Weber post-doctoral Programme is a unique programme. In 2007– 2008, there were forty Fellows on the Programme, covering a wide range of research interests within the Social Sciences and Humanities, and representing twenty-three nationalities. Among the different activities of the academic year, the conference on *“European integration without membership: models, experiences, perspectives”* is a good example of Fellows’ initiative and their concern for relevant issues. Encouraged by Professor Marise Cremona of the Law Department of the EUI, three Max Weber Fellows, Francesco Maiani, Roman Petrov and Ekaterina Mouliarova, took the initiative to organize the conference, invite the participants, actively participate in its development and, finally, act as editors of the proceedings which follow. The Max Weber Programme, in collaboration with the Law Department, fully supported their initiative, but the credit is theirs and that of the participants who contributed to the conference.

Since its foundation more than thirty years ago, “European Integration” has been a recurrent theme in the research agenda of the European University Institute – specially within the Law Department. The conference built on this long tradition, but also took from the new perspectives that young post-doctoral Fellows, with different national experiences, can bring to the discussion, a discussion that brings forward new issues, when the EU27 must reassess its relationships with neighbouring countries that form part of the broader European area without aiming at becoming EU members in the years to come. A fruitful discussion on this relevant issue needs academic reflection, as well as practical legal and political experience, it needs understanding of the EU perspective, as well as that of neighbouring countries. It is again to the credit of the organizers that in the panels of the conference all these perspectives were present in open discussion. The proceedings that follow bring together the papers presented in this conference that took place at our beloved Villa La Fonte on May 23-24, 2008.

Ramon Marimon
Director of the Max Weber Programme

Introduction

Francesco Maiani*, Roman Petrov* and Ekaterina Mouliarova*

At the beginning of the 1990s, the concept of “European integration” could still be said to be fairly unambiguous. Nowadays, it has become plural and complex almost to the point of unintelligibility. This is due, of course, to the internal differentiation of EU membership, with several Member States pulling out of key integrative projects such as establishing an area without frontiers, the “Schengen” area, and a common currency. But this is also due to the differentiated extension of key integrative projects to European non-EU countries – Schengen is again a case in point. Such processes of “integration without membership”, the focus of the present publication, are acquiring an ever-growing topicality both in the political arena and in academia. International relations between the EU and its neighbouring countries are crucial for both, and their development through new agreements features prominently on the continent’s political agenda. Over and above this aspect, the dissemination of EU values and standards beyond the Union’s borders raises a whole host of theoretical and methodological questions, unsettling in some cases traditional conceptions of the autonomy and separation of national legal orders.

This publication brings together the papers presented at the *Integration without EU Membership* workshop held in May 2008 at the EUI (Max Weber Programme and Department of Law). It aims to compare different models and experiences of integration between the EU, on the one hand, and those European countries that do not currently have an accession perspective on the other hand. In delimiting the geographical scope of the inquiry, so as to scale it down to manageable proportions, the guiding principles have been to include both the “Eastern” and “Western” neighbours of the EU, and to examine both structured frameworks of cooperation, such as the European Neighbourhood Policy and the European Economic Area, and bilateral relations developing on a more *ad hoc* basis. These principles are reflected in the arrangement of the papers, which consider in turn the positions of Ukraine, Russia, Norway, and Switzerland in European integration – current standing, perspectives for evolution, consequences in terms of the EU-ization of their respective legal orders¹. These subjects are examined from several perspectives. We had the privilege of receiving contributions from leading practitioners and scholars from the countries concerned, from EU high-ranking officials, from prominent specialists in EU external relations law, and from young and talented researchers. We wish to thank them all here for their invaluable insights. We are moreover deeply indebted to Marise Cremona (EUI, Law Department, EUI) for her inspiring advice and encouragement, as well as to Ramon Marimon, Karin Tilmans, Lotte Holm, Alyson Price and Susan Garvin (Max Weber Programme, EUI) for their unflinching support throughout this project.

A word is perhaps needed on the propriety and usefulness of the research concept embodied in this publication. Does it make sense to compare the integration models and experiences of countries as different as Norway, Russia, Switzerland, and Ukraine? Needless to say, this list of four evokes a staggering diversity of political, social, cultural, and economic conditions, and at least as great a diversity of approaches to European integration. Still, we would argue that such diversity only makes comparisons more meaningful. Indeed, while the particularities and idiosyncratic elements of each “model” of integration are fully displayed in the present volume, common themes and preoccupations run through the pages of every contribution: the difficulty in conceptualizing the *finalité* and essence of integration, which is evident in the EU today but which is greatly amplified for non-EU countries; the asymmetries and tradeoffs between integration and autonomy that are inherent in any attempt to participate in European integration from outside; the alteration of deeply seated legal concepts, and

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¹ As for Norway and the EEA, the two contributions published here very much focus on the last issue.

concepts about the law, that are already observable in the most integrated of the non-EU countries concerned.

These issues are not transient or coincidental: they are inextricably bound up with the integration of non-EU countries in the EU project. By publishing this collection, we make no claim to have dealt with them in an exhaustive, still less in a definitive manner. Our ambition is more modest: to highlight the relevance of these themes, to place them more firmly on the scientific agenda, and to provide a stimulating basis for future research and reflection.

Keywords

European Neighbourhood Policy – European Economic Area – Russia – Ukraine – Switzerland – Norway – Acquis Communautaire – Europeanization

The European Neighbourhood Policy as a Framework for Modernization

Marise Cremona*

The theme of this conference is ‘integration without EU membership in Europe’. I have been asked to speak about ‘the European Neighbourhood Policy (ENP) as a framework for modernization’. In thinking therefore of the ENP in this sense as a possible model for integration without membership, two questions come to mind:

- To what extent can integration create a framework for modernization?
- To what extent does the ENP represent, provide an example of, such a framework?

Before we turn to these questions, a couple of words about the ENP¹. The ENP is a policy framework for the EU’s relations with its eastern and southern neighbours: it is intended to cover the so-called Western Newly Independent States (Ukraine, Moldova, Belarus²), the Southern Caucasus (Armenia, Azerbaijan and Georgia) and the Southern Mediterranean (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia). Sixteen states in all, of which only six are European.

1. The ENP is selective in the neighbours it covers: it does not include south-east Europe, nor the European Free Trade Association (EFTA) states, nor Russia; it does include both non-European and European states. Insofar as the ENP represents ‘integration without membership’, this is not solely a consequence of non-eligibility: some of the ENP states are eligible within the terms of Art 49 TEU. Neither is it, though, a case of integration for those states that are eligible but which prefer not to be members, as is the European Economic Area (EEA) or the EU-Swiss relationship. It seems to be a case of a policy towards those neighbouring states that are either not eligible (the Southern Mediterranean) or with whom the EU does not want at present to discuss membership (the eastern neighbours).

2. What is the content of this policy? For such a high profile policy it is perhaps surprising that there is no obvious legal instrument forming the basis for the ENP. If we look for it, we find it in a variety of places.

First, it is based on existing relationship, including treaties, with the partner states, the Euro-Mediterranean Partnership and Euro-Med Association agreements (EMAs) on the one hand and the Partnership and Cooperation Agreements (PCAs) on the other, supplemented by the Generalized System of Preferences (GSP) in the latter case. It is intended to build upon these and not replace them, although in the case of the PCAs, some are coming to a natural end and replacements are being negotiated which will reflect the objectives of the ENP (to which we will return).

Second, these agreements are supplemented by instruments specific to the ENP, including:

- Commission papers
- Council and European Council Conclusions
- Letters, speeches
- Action Plans
- The European Neighbourhood and Partnership Instrument (ENPI), a new financial instrument replacing Technical Aid to the Commonwealth of Independent States (TACIS) and Mesures d'accompagnement (MEDA)³.

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¹ See further M Cremona, ‘The European Neighbourhood Policy: More than a Partnership?’ in M Cremona (ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008. Parts of this paper are drawn from this chapter.

² The ENP does not at present operate with respect to Belarus.

³ Regulation 1638/2006/EC laying down general provisions establishing a European Neighbourhood and Partnership Instrument OJ 2006 L 310/1.

It is noticeable that the ‘hard’ obligations of the bilateral agreements are strengthened in order to develop this more ambitious and far-reaching policy by ‘soft’ (in the sense of non-binding) instruments such as the Action Plans, target-setting and monitoring. In due course this will change somewhat as new ‘hard’ law instruments are adopted: the ENPI has already replaced TACIS MEDA, we will see new agreements replacing the PCAs which are nearing the end of their life, and a number of specific agreements are being concluded such as visa facilitation and readmission agreements. However the soft law framework, identifying the objectives of the policy and pulling together the diverse elements into an ‘ENP’, will remain and is a characteristic of this multi-pillar policy. It is notable, for example, that the ENPI Regulation includes a number of soft law instruments within its definition of the ‘policy framework’ for the programming of Community assistance:

The partnership and cooperation agreements, the association agreements and other existing or future agreements which establish a relationship with partner countries, and the relevant Commission communications and Council conclusions laying down guidelines for European Union policy towards these countries, shall provide an overall policy framework for the programming of assistance under this Regulation. Jointly agreed action plans or other equivalent documents shall provide a key point of reference for setting assistance priorities.⁴

No legal base is needed for Council Conclusions or Commission strategy papers, and thus they are able without legal difficulty to include all the different elements of the policy, drawing together instruments from all three pillars. So, the ENP includes a wide range of instruments, bilateral agreements and contacts, both formal and informal. And alongside dedicated instruments such as the Action Plans and the ENPI, the ENP can be facilitated by the use of instruments that are not specific to ENP, such as sectoral agreements, visa policy, the Aeneas Regulation⁵ or the Stability Instrument⁶.

Modernization as an objective of the ENP

Three words – stability, security and prosperity – are constantly repeated as the key ENP objectives. Recently, for example, the European Council referred to the ENP ‘as a means to strengthen cooperation with its neighbours and expand prosperity, stability and security beyond the borders of the European Union’⁷, and the Council spoke of ‘the crucial importance of the ENP to consolidate a ring of prosperity, stability and security based on human rights, democracy and the rule of law in the EU’s neighbourhood’⁸. Our focus here is on modernization and thus primarily on stability and prosperity, but the ENP is notable for the way in which these aims are placed in the context of security. The Solana-Patten letter of August 2002 which launched the debate on a neighbourhood policy, for example, in seeking to identify the Union’s objectives, argued, ‘There are a number of overriding objectives for our neighbourhood policy: stability, prosperity, shared values and the rule of law along our borders are all fundamental for our own security.’⁹ Security, then, is the underlying rationale of the ENP.¹⁰

The security dimension of the ENP – and the breadth of the notion of security in this context – is brought out by the European Security Strategy adopted by the European Council in December 2003:

It is in the European interest that countries on our borders are well-governed. Neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies

⁴ Regulation 1638/2006/EC, Art.3.

⁵ Regulation 491/2004/EC on financial and technical assistance in the area of migration and asylum OJ 2004 L 80/1; this Regulation has been repealed and replaced as from 1 January 2007 by Regulation 1905/2006/EC establishing a financial instrument for development cooperation, OJ 2006 L 378/41; financial and technical assistance to the ENP States in the field of migration and asylum will now fall under the ENPI Regulation.

⁶ Regulation 1717/2006/EC establishing an instrument for stability OJ 2006 L 327/1.

⁷ European Council Conclusions, 16 June 2006, para 57.

⁸ Council Conclusions 18 June 2007.

⁹ Solana-Patten letter, para 3

¹⁰ See further, M. Cremona and C. Hillion, “*L’Union fait la force? Potential and Limitations of the European Neighbourhood Policy as an Integrated EU Foreign and Security Policy*” EUI Working Paper LAW No.2006/39, pp.3-8.

or exploding population growth on its borders all pose problems for Europe. The reunification of Europe and the integration of acceding states will increase our security but they also bring Europe closer to troubled areas. Our task is to promote a ring of well governed countries to the East of the European Union and on the borders of the Mediterranean with whom we can enjoy close and cooperative relations.¹¹

The security objective depends on achieving stability and prosperity: the emphasis is on promoting stability both within and between the neighbouring states, and economic and social development leading to increased prosperity with a view to increasing security on the EU's borders¹². As expressed by one commentator, 'The ENP reaffirms the European conviction that democracy and economic reform are essential if the deeper roots of insecurity are to be resolved effectively.'¹³

Stability is closely linked to democratisation, political reform and good governance. The first of the Copenhagen criteria refers to the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. An identical reference to the stability of institutions is used as the first priority of the ENP Action Plan for Ukraine¹⁴. This implies that stability is a pre-condition for democracy, but there is also a sense in which both internal and regional stability and security are seen as the fruit of political modernization and democratization. The first paragraph of the Ukraine Action Plan, for example, states 'The European Union and Ukraine are determined to enhance their relations and to promote stability, security and well-being.' Stability here refers clearly not only to the stability of Ukraine's political institutions, but to stability on a national and regional level; the link with security is clear. This element of the ENP triad of objectives thus clearly reinforces the political dimension of the policy, but stability also has other dimensions, including economic. Some idea of the different contexts in which stability can appear emerges from the EU's Common Strategy on Ukraine, adopted in 1999¹⁵. Stability is here used in the context of domestic political stability, economic stability, regional stability and international stability.

Prosperity as an ENP objective is clearly connected with economic reform, the successful transition to a market economy, and economic integration. Increased prosperity is in the EU's interests: it increases stability and reduces the 'push' factors behind illegal migration, and it helps to provide a receptive market for EU products and services. There are two interconnected dimensions to EU policy here. First is the development of the market economy in the ENP partners, including improvements in the investment climate, modernization of regulatory frameworks such as tax, financial services and company law, the opening up of the economy and accession to the WTO, and anti-corruption initiatives. In February 2008, the Council Conclusions on the ENP emphasised this aspect:

The ENP has already proven to be an important tool for promoting reform in the ENP countries. The EU reiterates its willingness and determination to continue to assist its neighbours in sectoral reform and modernisation, in line with the ENP Action Plans, as an important step towards prosperity and stability in our neighbourhood, based on human rights, democracy and the rule of law.¹⁶

The second dimension is participation in EU economic integration: a free trade area, possible extension of the other freedoms (although the movement of people is currently discussed only in terms of visa regimes) implying a 'stake in the internal market', legal approximation, participation in policies and programmes. The precise nature and degree of this integration is not specified in any detail, and will mean different things to the different partners. Ukraine, for example, does not yet have

¹¹ European Security Strategy, 'A Secure Europe in a Better World', p.7-8.

¹² E. Landaburu, "From Neighbourhood to Integration Policy: Are there concrete alternatives to enlargement?" CEPS Working Document No.95, March 2006.

¹³ R. Dannreuther, "Developing the Alternative to Enlargement: The European Neighbourhood Policy" (2006) 11 *European Foreign Affairs Rev.* 183 at 201.

¹⁴ Further on Action Plans, see below. For the Ukraine Action Plan see: http://ec.europa.eu/world/enp/pdf/action_plans/ukraine_enp_ap_final_en.pdf

¹⁵ European Council Common Strategy on Ukraine, 1999/877/CFSP, 11 December 1999, OJ 1999 L 331/1. This Common Strategy expired in December 2004 and was not renewed, its place being taken by the ENP Action Plan.

¹⁶ Conclusion of GAER Council, 18 February 2008, para 5.

a Free Trade Agreement (FTA) with the EC, so that is an initial priority, following World Trade Organization (WTO) accession. The southern Mediterranean states have FTAs but are interested in extending their scope into sensitive agricultural sectors. All are interested in liberalising the movement of people. We will look a little more closely at what this integration might mean in the final section.

The two 'economic' dimensions to the ENP (market economy reform and participation in European integration) are connected in that the EU sees the latter as a mechanism for achieving the former. Let us take this point a bit further.

Integration as a basis for modernization

Integration is not of itself an EU objective for the ENP. The EU's objectives are security, stability and prosperity, and integration is a means to achieve that objective in two ways.

First, in the sense of being the reward offered in return for meeting conditions that the EU thinks will be conducive to its own security and that of the region generally.

Second, in general terms the EU sees regional integration as facilitating economic and political development. This is as true of its development policy as the ENP. It is a methodology that has worked for the EU Member States and, in its view, will work for others too. Thus integration is a methodology for achieving its ENP objectives – economic and political modernization and thereby security – rather than an objective in its own right.

The link is demonstrated in a rhetorical question posed by a Commission official:

[H]ow we can support transition, as a goal in its own right, perhaps the most important goal of all ... How can we use our soft power, our transformative power, our gravitational influence, to leverage the reforms we would like to see in our neighbourhood? ... The answer is through the European Neighbourhood Policy (ENP), our newest foreign policy tool.¹⁷

This account uses the concept of the EU as a normative power, its ability to attract and influence others to adopt its values and policies¹⁸. We can note the way in which this view of ENP objectives emphasises the EU's own perspective and the ENP as a way of achieving EU goals; there seems to be little by way of discussion of the neighbours' own objectives. The EU operates its policy on the basis that the neighbours share its objectives as well as its values.

To a large extent these generalised objectives (security, stability, prosperity) may be shared; however when one tries to pin them down into more specific goals, it may not be so easy to define shared objectives. And as Meloni has pointed out, priorities between them may well differ: the neighbours may wish to give more weight to prosperity, or stability, for example, while as we have seen there is evidence that the EU sees security as the policy's underlying rationale¹⁹. Although for the ENP partners too, integration with the EU is designed ultimately to lead to economic development and stability, in some cases integration may also be seen as a goal in its own right, or as a step towards eventual membership. An emphasis on the former (economic development) invites a more critical approach to specific integration demands, the test being the extent to which they will in fact contribute to (for example) economic growth. An emphasis on the latter (membership) values the overall integrative process over an immediate balance of advantage and is perhaps more prepared to accept a longer-term perspective.

¹⁷ E. Landaburu, "From Neighbourhood to Integration Policy: Are there concrete alternatives to enlargement?" CEPS Working Document No.95, March 2006.

¹⁸ On the EU as a normative power, see I. Manners, "Normative Power Europe: A Contradiction in Terms?" (2002) 40 *Journal of Common Market Studies* 235; H. Sjurseth "The EU as a 'normative' power: how can this be?" (2006) 13 *Journal of European Public Policy* 235. On the concept of normative power specifically in the context of the ENP, concluding that the ENP does not in fact provide convincing evidence of the EU's normative power, see E. Johansson-Nogués, "The (Non-) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor?" (2007) 7 *European Political Economy Rev.* 181.

¹⁹ G. Meloni, "Is the Same Toolkit Used during Enlargement Still Applicable to the Countries of the New Neighbourhood? A Problem of Mismatching Between Objectives and Instruments" in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation?* EUI Working Papers, LAW 2007/21, 97 at 101.

The ENP as an integration project?

The EU may see the ENP as a framework for modernization; it may also argue that integration can facilitate modernization; but is the ENP really a model of integration? And what kind of integration are we talking about, how wide is its extent and how deep is it?

The initial rhetoric behind the ENP was full of integration, with both a political and an economic dimension. In his 2002 speech Prodi developed the idea of 'sharing everything' (except institutions) including as its centre-piece 'a common market embracing the EU and its partners', together with common approaches to common threats (illegal migration, crime, terrorism, environmental threats), and to regional conflict. Thus, integration implies not only economic integration (a free trade area or common market) but also cooperation within foreign and security policy (CFSP) and Justice and Home Affairs (JHA) policy fields. He argues, 'If a country has reached this level, it has come as close to the EU as it is possible to be without being a member.'²⁰

In the early stages of the ENP, the form that enhanced economic integration would take was expressed in terms of a 'stake in the internal market' with a specific reference to the four freedoms²¹. The Council Conclusions of 13 June 2003 refer to:

Perspectives for participating progressively in the EU's Internal Market and its regulatory structures, including those pertaining to sustainable development (health, consumer and environmental protection), based on legislative approximation' and 'Preferential trading relations and further market opening in accordance with WTO principles.

Despite this rhetoric it is hard to find concrete progress towards integration since 2003. The level of integration in the current PCAs is not very high. The EMAs are FTAs with provisions relating to the protection of migrant workers and they are embedded in the Barcelona Process which envisages a Euro-Mediterranean FTA by 2010, but progress has been slow. These agreements provide the institutional basis for the ENP.

Nevertheless it is clear that integration is still on the agenda. The Council in its Conclusions of February 2008 said that 'Deepened economic integration must remain an essential building block of our relations with our neighbours.' What signs are there of instruments with a distinctive focus on integration?

1. The Action Plans certainly set targets for economic, political and legal reform – modernization. They do not link this to integration, but might be seen as concerned with achieving the pre-conditions for integration.

2. The EU has concluded a number of agreements with the neighbouring states within the framework of the ENP. I would not see Readmission Agreements as specifically concerned with integration but Visa Facilitation agreements could be seen as supportive of what are called 'people-to-people contacts'. And Ukraine has concluded agreements designed to facilitate its participation – and has participated – in EU European Security and Defence Policy (ESDP) missions²².

3. Integration into the Common Foreign and Security Policy (CFSP): the eastern ENP partners have

²⁰ Prodi, "A Wider Europe – A Proximity Policy as the key to stability", speech to the Sixth ECSA-World Conference, Brussels, 5-6 December 2002, SPEECH/02/619.

²¹ [The ENP partners] "should be offered the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms)." Commission Communication, "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours", 11 March 2003, COM(2003)104, p.4

²² Council Decision 2005/495/CFSP concerning the conclusion of the 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 L 182/28. The agreement sets out the general conditions for Ukrainian participation in civilian and military crisis management operations. Council Decision 2005/481/CFSP concerning the conclusion of the Agreement between the EU and Ukraine on security procedures for the exchange of classified information, OJ 2005 L 172/83.

already been invited, on a case by case basis, to align themselves with EU declarations, demarches and CFSP Common Positions: Ukraine since February 2005, Moldova since June 2005, Armenia, Azerbaijan and Georgia since June 2007. The Council has said that “A similar possibility should be pursued for the EU's Mediterranean partners”²³. The Action Plans already contain references to alignment with EU-supported international initiatives on WMD and disarmament. Ukraine provides an illustration of the way in which operational involvement in the EU's crisis management and conflict prevention missions may be facilitated by means of specific agreements.

4. Proposals for neighbour countries' participation in programmes and agencies. One way in which the institutional dimension of integration can be built into the ENP – and one which is drawn from pre-accession experience – is the decision to involve ENP partners in a number of EU programmes and to contemplate their participation in certain agencies²⁴. As the Commission points out, such participation may both serve to promote the objectives of the agencies themselves as well as supporting and encouraging domestic reform agendas and convergence with EU standards and norms.

Past experience with non-member countries has shown that participation in Community programmes can have very positive effects. At the policy and regulatory levels, such participation has promoted the development and adoption of strategies in a range of policy areas relevant to reform and transition. It has encouraged partner countries to adopt new models of consultation and involvement of the private sector. It has allowed increased access by third country policymakers to specialised networks and exposed them to practical aspects of EU policymaking. In some cases, it has led to the establishment of new institutions, in others to the strengthening of the administrative capacity and legal authority of existing ones. It has been instrumental in the transfer of best practices. Finally, such participation has also provided the European Union with greater visibility in third countries.²⁵

A certain level of multilateral institutional participation may thus emerge as more ENP partners are included in the agencies and programmes. In both cases a formal international agreement is necessary. Participation in agencies requires an agreement between the ENP partner and the agency itself. Arrangements for participation in programmes is envisaged through the negotiation of an additional Protocol to each existing PCA or EMA setting out the general principle and modalities for such participation, with the detailed arrangements for participation in specific programmes as the subject of programme-specific memoranda of understanding with the ENP partners²⁶. These initiatives are certainly a good basis for developing a sense of involvement – and actual practice – in pre-existing EU institutional structures.

5. The ENPI Regulation was adopted in December 2006²⁷, and affirms in its Preamble that ‘Promotion of political, economic and social reforms across the neighbourhood is an important objective of Community assistance.’ The ENPI replaces existing financial instruments (TACIS and MEDA) for the ENP regions and Russia for the period 2007-2013. It will operate alongside two other general financial instruments, one for pre-accession (to include the Western Balkans)²⁸ and one for development²⁹, as

²³ GAER Council Conclusions, 18 June 2007.

²⁴ Commission Communication on the general approach to enable ENP partner countries to participate in Community agencies and Community programmes, COM (2006) 724, 4 Dec 2006. The approach proposed here by the Commission was approved by the Council in its GAER Conclusions on 5 March 2007.

²⁵ *Ibid.* p.4.

²⁶ *Ibid.* p.8. On 18 June 2007 the Council agreed a mandate for the Commission to negotiate Protocols to the relevant PCAs and EMAs which would establish general principles for participation by the partner States in Community programmes.

²⁷ Regulation 1638/2006/EC laying down general provisions establishing a European Neighbourhood and Partnership Instrument OJ 2006 L 310/1.

²⁸ Council Regulation 1085/2006/EC of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) OJ 2006 L 210/82.

²⁹ Regulation 1905/2006/EC establishing a financial instrument for development cooperation, OJ 2006 L 378/41.

well as specific instruments on democracy and human rights³⁰ and stability³¹. Article 2 defines the overall scope of the programme:

Community assistance under the Neighbourhood and Partnership Instrument shall promote enhanced cooperation and progressive economic integration between the European Union and the partner countries and, in particular, the implementation of partnership and cooperation agreements, association agreements or other existing and future agreements.

The emphasis on both integration and on the implementation of agreements is notable; the ENPI is thus closely tied to existing and future legal commitments on both sides as well as to Action Plan priorities. The Regulation then goes on to establish a long list of objectives, including: political dialogue and reform; legislative and regulatory approximation; capacity building; promotion of the rule of law, good governance and human rights; sustainable development; poverty reduction; the development of civil society; the development of a market economy; cooperation in sectoral domains such as energy, transport and telecommunications; border management; fighting terrorism and organised crime; migration and asylum policies.

From the perspective of integration as an ENP objective, an important feature of the ENPI is the inclusion among its objectives of cross-border cooperation, including that between EU Member States and neighbours. Prior to the introduction of the ENPI the position was fragmented with INTERREG (Structural Funds) covering cross-border and transnational cooperation among Member States and operations within neighbouring states covered by TACIS or MEDA. Between 2004-2006 (after the launch of the ENP but before ENPI) there was an attempt to coordinate existing programmes through the introduction of Neighbourhood Programmes (single projects operating on both sides of the border). The ENPI formalises this position, the rationale being not only administrative efficiency but also support for the overall ENP objective of avoiding the creation of new dividing lines:

It is important to foster cooperation both at the European Union external border and among partner countries, especially those among them that are geographically close to each other. In order to avoid the creation of new dividing lines, it is particularly important to remove obstacles to effective cross-border cooperation along the external borders of the European Union. Cross-border cooperation should contribute to integrated and sustainable regional development between neighbouring border regions and harmonious territorial integration across the Community and with neighbouring countries. This aim can best be achieved by combining external policy objectives with environmentally sustainable economic and social cohesion.³²

Programmes may thus be country or multi-country (one or more ENP states), cross-border (between one or more ENP partners and one or more Member States and involving a shared part of the EU's external border), or trans-regional (between one or more ENP partner and one or more Member State and addressing common challenges, taking place anywhere in the territory of participating states). The Commission is also given the power, when drawing up action programmes, to decide to include as potential participants non-ENP countries eligible under other Community external assistance instruments (such as the pre-accession or development cooperation instruments) in order to take account of the regional or cross-border nature of a programme³³.

The ENPI thus represents an innovative attempt to encourage coherence in assistance programming and to support the rhetoric of cross-border cooperation with facilitative instruments. It will be interesting to see whether these cross-border and trans-regional priorities coexist well with the bilateral priorities of the individual Action Plans.

6. New Deep Free Trade Agreements (DFTAs). Since the early stages of the ENP, references to the

³⁰ Regulation 1889/2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide OJ 2006 L 386/1.

³¹ Regulation 1717/2006/EC establishing an instrument for stability OJ 2006 L 327/1.

³² Regulation 1638/2006/EC, Preamble, paras 14-15.

³³ Regulation 1638/2006/EC, Art. 27.

internal market and the four freedoms have been replaced by more general references to 'deeper economic integration'. According to the Commission, 'Deeper economic integration with our ENP partners will be central to the success and credibility of the policy.'³⁴ In its 18 February 2008 Conclusions the Council said that 'Deepened economic integration must remain an essential building block of our relations with our neighbours.'

What is deep integration? 'Deep integration' indicates integration that goes substantially beyond a classic free trade area but it does not necessarily imply an extension of the full internal market *acquis* or the four freedoms to the ENP partners; rather, it offers a degree of flexibility in the level of integration offered in different sectors. The Commission sees it as going beyond free trade in goods and services to include 'beyond the border' regulatory issues, such as consumer and environmental protection, technical standards, competition policy, intellectual property rights, company law and financial services. The degree of deep economic integration possible is also dependant on the partners' other integration commitments. For example, the Commonwealth of Independent States (CIS) Single Economic Space project between Russia, Belarus, Kazakhstan and Ukraine involves the goal of a customs union; were Ukraine to go down this road, it could not envisage a separate FTA with the EU. Attempts to converge on European standards might also be affected by alternative standards (such as Russian). Conversely, were economic integration with the EU to encompass a customs union³⁵, that would preclude the partners' participation in other regional free trade agreements.

The formal basis for deeper economic integration will take the form of enhanced bilateral agreements with the EU, which the Commission refers to as 'deep and comprehensive FTA' agreements³⁶, now abbreviated as DFTAs, or simply as 'New Enhanced Agreements'. What legal form will these new agreements take? Under the Treaty of Lisbon a specific legal base would be introduced into the Treaty on European Union (TEU) for neighbourhood agreements³⁷, but (some of) these agreements are likely to be negotiated before the Treaty of Lisbon enters into force. Existing possibilities include a cooperation agreement under Article 181a EC but this would not be seen as great step forward from the existing PCAs, and the Mediterranean states already have Association Agreements. An alternative would therefore be an Association Agreement under Article 310 EC³⁸.

These existing legal bases are all found in the EC Treaty and would not therefore in themselves cover the second and third pillar (JHA and CFSP) aspects of the agreement. These CFSP and JHA provisions are likely to be of a framework nature with specific initiatives dealt with under separate agreements, as happens already. There are three possibilities here: (i) a standard mixed agreement with the Member States' participation addressing the second and third pillar dimensions; (ii) a mixed pillar agreement, using Articles 24 and 38 TEU as well as Article 310 EC; (iii) separate agreements based on Article 310 EC (or perhaps Article 181a EC) and Articles 24 & 38 TEU respectively. Of these, the second would be the most innovative and would allow the EU to claim that these agreements offer a new step forward in levels of integration. However although the mixed pillar model has been used for a sectoral agreement (the EU/EC Agreement with Switzerland on the Schengen *acquis*³⁹) and its use proposed for a framework agreement on partnership and cooperation with Thailand, it was eventually decided to use the traditional mixed agreement formula for the latter. An inter-pillar agreement raises issues of compliance with Article 47 TEU to ensure that the exercise of second pillar powers does not 'encroach' upon first pillar competence⁴⁰.

³⁴ Commission Communication on Strengthening the ENP, COM (2006) 726, p.4.

³⁵ As is the case for Turkey, but which has not been suggested – and is not a likely scenario – for the ENP partners.

³⁶ Commission Communication on Strengthening the ENP, COM (2006) 726, p. 4.

³⁷ A new Article 8 to be added to the TEU under the Treaty of Lisbon; formerly Article I-57(1) of the Constitutional Treaty.

³⁸ On this see further C Hillion, 'Mapping out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU-Ukraine "Enhanced Agreement"' (2007) 12 EFA Rev 169.

³⁹ Signed on behalf of the EC by Council Decision 2004/860/EC OJ 2004 L 370/78, and on behalf of the EU by Council Decision 2004/849/EC OJ 2004 L 368/26.

⁴⁰ C-176/03 *Commission v Council (Environmental Penalties)* [2005] ECR I-7879; C-91/05 *Commission v Council (SALW)*, judgment 20 May 2008. On mixed pillar agreements see further C. Hillion and R.A. Wessel, "Restraining External Competences of EU Member States under CFSP" in M. Cremona and B. de Witte (eds), *EU Foreign Relations Law - Constitutional Fundamentals*, Oxford: Hart Publishing, 2008.

These bilateral instruments will allow for differentiation between partners in terms of the speed of the integration process, but the Commission argues that all the ENP partners should have 'the same perspective' in terms of regulatory convergence and market access, thus supporting the cohesion of the ENP framework and more specifically allowing for the possibility that what is at present a series of bilateral agreements might in due course evolve into a Neighbourhood Economic Community⁴¹. For the PCA states, the immediate goal would be to move towards a free trade agreement. The negotiating mandate for such an agreement with Ukraine, to replace the existing PCA, has been agreed and its likely scope provides an indication of the shape a new 'neighbourhood' agreement might take: the Council has said that 'certain aspects of [the agreement with Ukraine] could serve as a model for other ENP partners in the future'⁴². Although the EU is ready to negotiate a FTA with Ukraine (and Russia) following WTO membership⁴³, it is not yet ready to do so with Moldova or the southern Caucasus partners⁴⁴, which are likely to remain with enhanced autonomous trade preferences for a while yet⁴⁵.

The Mediterranean partners, as we have seen, already have free trade agreements with the EU, so any new agreements with these partners would be likely to offer enhanced integration by way of further liberalisation of the agriculture and fisheries sectors, services, establishment and capital movements, and stronger commitments towards regulatory convergence in key sectors (financial services, transport, telecommunications), and fields of economic governance (taxation, company law, competition, state aids). The Council has indicated the areas of priority for the EU: 'The scope of existing free trade agreements with ENP partners should be deepened where possible. ... The Council emphasises the importance of concluding agreements with the ENP partner countries of the Mediterranean region on the liberalisation of services, trade in agricultural products and the right of establishment.'⁴⁶ In some areas the *acquis* could be effectively extended to the neighbouring states (e.g. aviation, energy) via sectoral agreements connected to the overall agreement.

It is notable that despite the early references to the four freedoms already mentioned, discussion of the movement of people in EU documents on the ENP is framed in terms of migration policy rather than economic integration. Unsurprisingly perhaps, no concrete proposals have been made to establish free movement of persons as a goal of the ENP. Instead the focus is on visa facilitation, readmission, cooperation on border management and illegal immigration. The EU seeks to negotiate readmission agreements side by side with visa facilitation agreements (the latter with an emphasis on facilitating short-term travel)⁴⁷. Dialogue on migration issues takes place within the framework of the ENP Action Plans. In June 2007 it was agreed that the Global Approach to Migration should be extended to the eastern and south-eastern neighbours⁴⁸. This will entail enhanced cooperation between Member States, dialogue with neighbouring states, inter alia on visa issues, the possibility of mobility partnerships, information and cooperation on legal migration, and cooperation involving FRONTEX

⁴¹ Commission Communication on Strengthening the ENP, COM (2006) 726, p.5. See further Commission non-paper on ENP – A Path Towards Further Economic Integration, available on http://ec.europa.eu/world/enp/strengthening_en.htm

⁴² GAER Council Conclusions, 18 June 2007. Negotiations with Ukraine were launched in February 2007, see GAER Council Conclusions of 22 January 2007. See further M. Emerson (ed.), *The Prospect of Deep Free Trade between the EU and Ukraine* (CEPS 2006); C. Hillion, "Mapping out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'" (2007) 12 *European Foreign Affairs Rev* 169; C. Hillion, "A New Framework for the relations between the Union and its East European Neighbours" in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation?* EUI Working Papers, LAW 2007/21..

⁴³ Once Ukraine becomes a member of the WTO the existing trade provisions in the PCA will add little.

⁴⁴ In February 2008 the Council said that 'As for the possible start of negotiations on DFTAs with Georgia and Armenia, the Council will decide on the basis of the Commission's recommendations that will include, inter alia, the results of the ongoing feasibility studies.'

⁴⁵ These states come within the EU's Generalised System of Preferences; see Council Regulation 980/2005/EC applying a scheme of generalised tariff preferences, OJ L 169/1.

⁴⁶ Council Conclusions, 18 February 2008.

⁴⁷ Visa facilitation and readmission agreements have been concluded with Ukraine and Moldova and are being negotiated with Morocco. The first common visa application centre was established in Chisinau, Moldova in April 2007; see IP 07/561/25 April 2007.

⁴⁸ Commission Communication on "Applying the Global Approach to migration to the Eastern and South-Eastern regions neighbouring the European Union" COM(2007) 247, 16 May 2007; GAER Council Conclusions on extending and enhancing the Global Approach to migration, 18 June 2007.

(European Agency for the Management of Operational Cooperation at the External Borders) on integrated border management systems, and the establishment of a 'regional Black Sea Cooperation Platform' including Member states and other Black Sea littoral states, EU agencies, and regional organisations such as the Black Sea Economic Cooperation (BSEC), with a view to enhancing information exchange and monitoring⁴⁹. The emphasis then is on migration control and although reference is made to promoting legal migration opportunities and 'people-to-people exchanges' there is no discussion of enhanced access to labour markets. A number of the existing EMAs contain commitments on the legal position of legally resident migrant workers, including provisions on social security and non-discrimination in relation to conditions of employment. Although it is possible that a perspective of deep integration might envisage a standardisation of such provisions across all enhanced ENP agreements in terms (for example) of the Europe Agreement model, at present it does not appear that the Commission's aim of granting the 'same perspective' for economic integration to all ENP states extends to the social integration of migrant workers.

Alongside migration policy, the agreement for 'deep integration' will extend cooperation further into Justice and Home Affairs issues, including cooperation relating to organised crime and international terrorism, anti-corruption (closely connected with promotion of the rule of law), and cooperation on modernisation of the judicial and criminal justice systems. An agreement between Europol and Ukraine is envisaged. Ultimately the extension of aspects of the JHA *acquis* such as the European Arrest Warrant might be considered.

The political dimension of deep integration is reflected in an increased emphasis on cooperation in relation to the CFSP and security and defence policies. In terms of contractual commitments, this will build upon the provisions already in the PCAs and EMAs on political dialogue, together with stronger references to the ENP aims of cooperation in the field of regional security.

Underpinning both economic and political aspects of integration is the notion of shared values. In bilateral agreements these are given expression through 'essential elements' clauses. Alongside the key values (democracy, the rule of law, good governance and respect for human rights) and principles (market economy, free trade, sustainable development and poverty reduction) a new enhanced agreement may well include a reference to shared commitments in relation to a number of what the EU has called its 'essential concerns': the fight against terrorism, non-proliferation of weapons of mass destruction and efforts towards the peaceful resolution of regional conflicts as well as cooperation in justice and home affairs matters⁵⁰.

The common thread running through all these different aspects of 'deep integration' is the concept of convergence with EU norms and values, including the promotion by the EU of existing international norms. The export by the EU of (parts of) the *acquis* to the partner states has been categorised by Lavenex as a form of external governance⁵¹. The EU attempts to spread its own concepts of governance, not only economic governance but also in fields such as environmental protection, external border controls and the rule of law. The methodologies it uses to do this may combine specific commitments in bilateral agreements, more general clauses on legal approximation, extensions of the *acquis* in specific sectors through bilateral or multilateral agreements, the use of non-binding instruments such as Action Plans, conditionality, technical assistance for capacity-building and training, and both formal and informal dialogue. In different ways they all contribute to the conception of the 'soft power' or 'transformational diplomacy' of the EU, a power of persuasion rather than coercion, of which it is argued the ENP is a prime example in current EU external policy⁵². Commissioner Ferrero-Waldner, for example has spoken of using 'our soft power' to leverage reform:

⁴⁹ See Annex on priority actions to GAER Council Conclusions on extending and enhancing the Global Approach to migration, 18 June 2007, Council doc no. 10746/07.

⁵⁰ GAER Council conclusions on European Neighbourhood Policy - 14 June 2004.

⁵¹ S. Lavenex, "EU External Governance in Wider Europe", (2004) 11 (4) *Journal of European Public Policy*, 680, arguing that "the EU's move towards external governance is conditioned by the resurgence of its fundamental identity as a 'security community'".

⁵² On soft power see for example E. Tulmets, "Is a Soft Method of Coordination Best Adapted to the Context of the EU's Neighbourhood?" in M. Cremona & G. Meloni (eds.) *The European Neighbourhood Policy: A Framework for Modernisation?* EUI Working Papers, LAW 2007/21. On transformational diplomacy see R. Dannreuther, "Developing the Alternative to Enlargement: The European Neighbourhood Policy" (2006) 11 *European Foreign Affairs Rev.* 183.

‘the European Neighbourhood Policy is about helping our neighbours towards their own prosperity, security and stability, not by imposing reforms, but by supporting and encouraging reformers.’⁵³ While based on co-option (joint ownership), this exercise of soft power is clearly recognised as serving the EU’s own interests (its interest in its own security, stability and prosperity). It is nevertheless also increasingly recognised that those interests are to an ever greater extent bound up with those of its neighbours, and the process of deepening integration will enhance that interdependence. Integration will thus provide a mechanism for furthering the EU’s interests (its ENP goals), and will also lead to a convergence, not only of regulatory norms but also of interests.

Conclusion

The ENP also represents a genuine attempt to bridge the gap between Members and non-Members. Certainly it is not entirely successful in this respect, but it is worth making the experiment, in emphasising that the EU does not see itself as an exclusionary club whose privileges are reserved for Members only, but rather an enterprise in which others can also participate. Innovations in this respect include the ability to finance cross-border and cross-regional projects under the ENPI and the proposal to open up certain agencies and programmes to ENP partners. The increased willingness to expand policies such as energy and transport to non-Members (while clearly in the interests of the EU itself) is important and could be extended; why not consider ENP participation in the European Defence Agency, for example?

The emphasis within the ENP on adoption of the *acquis*, the use of pre-accession methodology and the possibility of ENP partners’ participation in agencies and programmes leads to increased contact between officials in Brussels, the Member States and neighbouring countries, resulting in increased levels of understanding, realism and trust building. In this way, the instruments of the ENP might well contribute to shifting perceptions on each side: what it means to join the Union, on the one hand, and a greater readiness to see these countries as potential candidates on the other. As Lynch has said “The only way to blur EC membership is by creating real proximity, based on daily engagement and constant presence”⁵⁴. Against this background more could be done to identify specific projects of genuinely common interest, including multilateral projects, to build on the idea of joint ownership as a genuinely innovative form of ‘integration without membership’.

⁵³ B. Ferrero-Waldner, “The European Neighbourhood Policy: The EU’s Newest Foreign Policy Instrument” (2006) 11 *European Foreign Affairs Rev.* 139 at 139 and 140.

⁵⁴ D. Lynch, “The New Eastern Dimension of the Enlarged EU” in *Partners and Neighbours: A CFSP for a Wider Europe*, Chaillot Papers No.64, Institute for Security Studies, 2003, 34 at 58.

The Hybrid Legal Nature of the European Neighbourhood Policy

Bart Van Vooren*

Introduction

Conceived in 2003 as the wider-Europe policy, and later re-branded to the European Neighbourhood Policy (ENP) to better capture its long term goal, the ENP has from its inception exemplified a peculiarly ‘hybrid’ legal nature in having largely been developed and substantiated on the basis of a wide range of ‘soft law’ documents, while building on the Association Agreements and Partnership & Cooperation Agreements (AA & PCA). Although the conclusion of such contractual relations is a prerequisite for establishing ENP relations, in the now sixth year of its development it cannot be denied that the central points of reference for this policy are not those underlying legal commitments, but rather a large set of policy documents which substantially transform the agreements on which they are based: the ENP Action Plans (AP’s).

This paper argues that the preference for a variety of ‘normative but non-legally binding documents’ – e.g. soft law – can be explained not only by the ENP’s accession legacy and concomitant methodology, but also by the broader practical and substantial benefits linked to soft instruments in an EU law and international law context. The paper thus has a dual purpose: Firstly, through an applied analysis of the emerging understanding of soft law in the EU it seeks to explain the range of procedural and substantial reasons which led the Union to opt for this soft core of the ENP. Secondly, against that background, the paper shows that those benefits are neither imagined nor theoretical, but can in fact be perceived in the Action Plans’ Justice and Home Affairs sections. The paper concludes that, while soft instruments come with clearly perceptible benefits, their usefulness for the ENP is not unlimited.

The Hybrid Legal Nature of the ENP

Article 249 of the EC Treaty (TEC) lists five instruments through which the Community institutions shall ‘carry out their task’, two of which are so-called soft-law instruments: recommendations and opinions, which ‘shall have no binding force’. It has become however patently clear that in most if not all of the Union’s internal and external policies, a wide variety of non-legally binding documents have been employed quite imaginatively to further the involved actors’ policy interests. In the European Neighbourhood Policy these include but are not limited to: Commission Communications, Conclusions from the European Council and the Council of Ministers, non-papers, strategy papers, Action Plans, Memoranda of Understanding, Progress reports, etc. That these documents have ‘some normative power’ is most visibly acknowledged in Article 3 of the Regulation establishing the European Neighbourhood and Partnership Instrument (ENPI), which outlines the ‘policy framework’ within which external assistance will be given¹:

Article 3

Policy framework

1. The **partnership and cooperation agreements, the association agreements** and other existing or **future** agreements which establish a relationship with partner countries, and the relevant **Commission communications** and **Council conclusions** laying down guidelines for European Union policy towards these countries, shall provide an overall policy framework for the programming of Community assistance under **this Regulation**. Jointly agreed **action plans or other equivalent documents** shall provide a key point of reference for setting Community assistance priorities.[...] [emphasis added]

This article thus very much confirms the hybrid legal nature of the ENP, in that it is a policy where

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¹ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument 9.11.2006 O.J. L 310/1

legislative and non-legislative instruments, as well as non-contractual and contractual agreements all figure side-by-side, constituting the Neighbourhood policy.

The conceptualization, use and usefulness of 'soft law' in the European Union is still a contested phenomenon, and some argue that '*soft law without legal effect is not law, and soft law with legal effect is hard law*'.² Given the heterogeneous nature of the notion and the ongoing debate on a wide range of difficulties that flow from it, for the consideration of the documents 'constitutive' of the ENP, I shall employ a functional approach to soft instruments, i.e. by simply considering what are the benefits or drawbacks of the absence of 'legal binding force' in the ENP context. Thus, far from entering into legal theoretical debates on what makes law 'law', one can define legal effect as a broad umbrella concept encompassing both 'inherent legal force' attributed to Community instruments and international agreements through Articles 249 and 300(7) TEC which bring with it durability and responsibility for contraventions, among other things; but also indirect legal effects through the application of legal methods and principles: the binding nature of unilateral declarations, legal certainty, legitimate expectations, etc.³ Additionally, *legal* effect needs to be distinguished from the *factual* effects of an instrument, which implies that compliance with that (soft law) act is achieved voluntarily, or at least, is not imposed by law.

In working her way through a set of definitions compiled over the past two decades⁴, Senden has proposed the following definition of soft legal instruments: '*Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*'⁵

To take as a starting point the Commission's 2003 'Wider Europe Communication', it is undeniable that this definition may apply to many if not all of the ENP's constitutive soft instruments. That Communication, together with the 2002 Solana-Patten Joint Letter, are generally considered the cradle of the ENP and were certainly intended 'to produce practical effects' in that they: "*proposed that the EU should aim to develop a zone of prosperity and a friendly neighbourhood – a 'ring of friends' - with whom the EU enjoys close, peaceful and co-operative relations.*"⁶ The Communication of December 2006 on 'strengthening the ENP' confirms this when it stated that: "*The central argument of this Communication is that the ENP is indispensable and has already proven its worth – and that it is no less indispensable that the EU build upon this by strengthening its commitment to the ENP. The Communication therefore contains a series of proposals to substantially improve the impact of the policy.*"⁷

It must be noted that Senden focuses her study on soft instruments unilaterally adopted by the Commission and the Council, thus excluding instruments and methods that depend to a large extent on direct involvement of outside actors; such as for example those employed in social regulation or fiscal policy coordination⁸. In parallel with this distinction, this paper thus equally adopts an initial division of soft documents in the context of the ENP which arguably require a different conceptual approach: On the one hand there are the Communications, Conclusions, progress reports and other documents which are the result of a wholly EU-internal policy formation process. On the other hand there are the Action Plans, which are – supposedly – the result of a process involving the Union and the partner countries *jointly*. Although this division does not hold perfectly from the perspective of ENP policy

² On soft law see among others: F. Snyder, *Soft Law and Institutional Practice in the European Community*, In S. Martin (ed.), *The Construction of Europe - Essays in Honour of Emile Noel*, (London 1994), pp. 197-226.; J. Klabbers, "Informal Instruments before the European Court of Justice" (1994) 31 *Common Market Law Review* 997-1023.; D. Shelton (ed.), *Commitment and Compliance - The Role of Non-Binding Norms in the international legal system*, (Oxford, New York 2000), p. 560.; J. Scott & D. Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" (2002) *European Law Journal* 1-18.; Finally, this very comprehensive study on soft law in the EC is highly recommended, and many of her analyses have proved useful starting points for a consideration of soft law in EU External Relations: L. Senden, *Soft Law in European Community Law*, (Oxford 2005), p. 565. (109 – from which this quote was taken.).

³ Snyder, *o.c.*, (1996), 89.; Senden, *o.c.* (2004), 236.

⁴ See references in notes 3 and 11.

⁵ Senden, *o.c.*, 112.

⁶ Wider Europe COM, 4. [emphasis removed from original].

⁷ COM, strengthening the ENP, December 2006, 2.

⁸ P. C. David M. Trubek, Mark Nance, "'Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity" (2005) No. 2/05 NYU Jean Monnet Working Paper www.jeanmonnetprogram.org.

formulation (for example NGO's have been requested to participate in formulating the progress reports), it is a useful distinction from the perspective of considering the relevant instruments' soft legal function. In a speech entitled 'a hard look at soft power', Commissioner Ferrero-Waldner captured the essence of the Neighbourhood Policy as follows:

Throughout that region we are leveraging the EU's attractive power to deepen our relations and encourage our neighbours in their path towards economic and political reform. We do that by offering deeper political and economic relations with us to those who make the most progress in reforms.⁹

In studying this methodology employed by the ENP, Tulmets has provided useful insights into the soft policy discourse of the ENP based on the Union's enlargement experience¹⁰. She convincingly argues that the soft method of coordination in the ENP is a way to manage relations with third states where the leverage of accession is absent, and as a way of attracting the third countries into following the EU's norms and values¹¹. In that sense, the ENP is methodologically reminiscent of the Open Method of Coordination, a kind of 'new governance' based on iterative benchmarking, voluntary compliance and mutual learning¹². Nevertheless, soft law and soft power are not identical concepts, and in seeking to appreciate the role of 'legal binding force' in that soft process, one must conceptually distinguish the 'EU-inwardly focused documents' such as Commission Communications, from the 'EU-outwardly focused documents', such as the Action Plans. This division is not linked to their unilateral or bilateral way of inception/adoption, i.e. the process through which they come into existence; but flows from the functional approach to soft law; e.g., the role of these instruments as having a pre-law; a post-law; or a para-law function¹³:

The *pre-law* function is considered to denominate 'preparatory and informative instruments', and according to Senden: "within this category fall in particular Green Papers, White Papers, action programmes and informative communications." As regards their purpose, "these instruments are adopted with a view to preparing further Community law and policy and/or providing information on Community action."¹⁴ In the ENP context, the 2002 Solana-Patten joint letter on wider Europe can surely be said to fulfill this function, in that it analysed the need for further action and laid out some of the options and suggestions for the future in that respect. It is notable then that in comparison with the more common instrument of the 'Green Papers', and to a lesser extent the 'White Papers'; this 'Joint letter' format is a variety of soft-law quite appropriate for setting the stage for what the ENP would become: a policy that seeks to overcome institutional or legal-substantial EU-*internal* dividing lines for the purpose of avoiding new *external* dividing lines in the Neighbourhood¹⁵.

Instruments which largely encompass the *post-law* function 'aim at providing guidance as to the interpretation and application of existing Community law'¹⁶, such as for example the Commission Communications on how it shall implement competition and state aid rules (The 1962 'Christmas Communications' *et. al.*). This category shall not be further considered in this context.

⁹ Benita Ferrero-Waldner European Commissioner for External Relations and European Neighbourhood Policy 'The European Union and the world: a hard look at soft power', Columbia University, New York, 24 September 2007

¹⁰ E. Tulmets, "Is a soft method of coordination best adapted to the context of the EU's neighbourhood?" in G. Meloni & M. Cremona (ed.), *The European Neighbourhood Policy: A Framework for Modernisation?*, (2007).

¹¹ *Idem*, 122.

¹² Neil Walker, EU Constitutionalism and New Governance, in: G. de Búrca & J. Scott (ed.), *Law and new Governance in the EU and the US*, (Oxford & Portland 2006), p. 434. Tulmets, soft methods, 121.

¹³ This classification is seen to emerge from a range of scholarship including but not limited to: G. Borchardt and K. Wellens, 'Soft Law in European Community Law', *ELRev.* 14 (1989) 5, p. 267; F. Snyder, *o.c.*, 197.; L. Senden, *o.c.*, 119-122. The account of the three categories in this paper is based on that of F. Snyder and L. Senden.

¹⁴ L. Senden, "Soft Law, Self-Regulation and Co-Regulation in European Law - Where do they Meet?" (2005) 9 *Electronic Journal of Comparative Law*, 23.; Senden, *o.c.*, 119. (Note that in her final evaluation, Senden concludes that Green papers and other preparatory and informative instruments cannot be considered 'soft law' in that they cannot be said to constitute rules of conduct as laid down in her definition. See Senden, *o.c.*, 219-220.)

¹⁵ Other joint letters/reports include the one by Javier Solana and Olli Rehn on the state of preparations of the future EU and international presence in Kosovo; or the Solana/Waldner paper on International Security and Climate change of March 2008.

¹⁶ Senden, *o.c.*, 120.

A final category is the soft law instruments fulfilling a *para-law* function, which ‘aim at establishing or giving further effect to Community objectives and policy or related policy areas’, or stated differently, they seek to ‘steer or guide action in some way or another’. Senden subdivides this category into formal and non-formal steering instruments, which can thus encompass both political declarations and conclusions, (non-formal) as well as instruments encompassing much firmer commitments such as establishing ‘closer cooperation or even harmonization between the Member States’ (formal)¹⁷. While evidently the previous two categories also seek to ‘guide action’, the crucial factor distinguishing *para-law* from *pre – or post-law* is that the former category ‘is not necessarily linked to the existing legal framework’, while the latter categories are¹⁸. Consequently, independently from an existing legal framework, steering instruments may lay down new rules and may not be solely linked to an application or explanation of existing hard-law, but in fact entail an addition to its contents.

While Joint Letters, Green Papers, Communications fit rather well in this trifurcated categorization, especially pre-law, this is less true for the ENP Action Plans which exhibit characteristics attributed to all three categories. In essence, these instruments can be defined as jointly agreed and commonly owned soft legal documents which are relatively specific, time-bound and action oriented, reflecting the different ambitions and capacities of the ENP partner country, while seeking to promote regulatory convergence with EU legislation and standards.

Indeed, they could be linked to the pre-law function in preparing the priorities and future commitments for relations with that partner country; as well as the post law function, given that a treaty framework is a prerequisite to their negotiation. However, the para-law function best fits the nature of the action plan, given that it substantially advances and re-defines the contractual relations with the third country, much like the Accession Partnerships have done for the Europe Agreements. The latter instruments had the purpose of “setting out in a single framework the priority areas for further work identified” by the Commission in working towards the accession of the respective applicant country, a definition which very much fits the Action Plans’ purpose, aside from the accession objective¹⁹.

To conclude and summarize, in seeking to uncover the preferences for the soft legal nature of a given instrument in the ENP, one must uncover the legislative function they emulate, and on that basis analyze the benefits and drawbacks that accompany the choice for a non-legally binding document. As regards the ENP Action Plans, one could argue that their soft-legal function is simply explained because it is in line with the accession methodology, although such would be arguably an overly constrained observation. Indeed, it is argued that the preference for soft legal Action Plans rather than binding agreements can be explained from the purpose of overcoming legal procedural and substantial hurdles flowing from the multilevel framework underpinning EU external relations. Stated differently, aside from being at the heart of a soft-conditional approach, a core benefit of the Action Plans’ non-binding nature lies in their ability to overcome EU-internal legal constraints, thus allowing the EU institutions and the Member States to focus on achieving policy objectives coherently, paying little attention to potential competence disputes.

Rationales for Soft-Law in the ENP

Pre-Accession Methodology

The core of legal binding force can be said to lie in ensuring compliance by the actors targeted by the legal rule, through deterring non-compliance as well as through incurring responsibility and the subsequent possibility of reparations for incurred injuries²⁰. It is incontestable that this is hardly compatible with the ENP policy discourse based on partnership, joint ownership and the Union being a

¹⁷ Senden, *o.c.*, 156.

¹⁸ *Idem*, 157.

¹⁹ Quote taken from note 39 in Inglis, CMLRev 2003, 1184.

²⁰ D. Shelton (ed.), *commitment and Compliance - The Role of Non-Binding Norms in the international legal system*, (Oxford, New York 2000), 9.

‘pole of attraction’ in the Neighbourhood²¹. In seeking to achieve the ENP’s objectives, that of ‘Europeanisation’, the Union thus employs a set of soft methods which have been categorized respectively as the conditionality model, the social learning model, the lesson drawing model, and the model learning model²². In essence, these are models of ‘compliance with ENP objectives’, e.g. the transfer of EU or international rules into the 3rd country domestic legal orders for the purpose of ‘stability, security and prosperity’, not through legal compliance but through the potential loss of benefits or gain of financial and other benefits; or simply because compliance is considered valuable because of efficiency or for other reasons. On this issue, Tulmets writes: “Interviews at the Commission revealed that persuasion through negotiation in committees or in forums as well as shaming through annual reports were considered more efficient ways to shape relations with third states than the traditional (negative) conditionality. ... The mutually agreed Action Plans (a sort of political contract) should represent a way to answer criticism about the asymmetry of economic agreements (AAS, PCAs) as well as about the unilateral character of conditionality”²³. Consequently, the soft approach and instruments deployed by the ENP are commensurate with the substantive rationale of directly or indirectly encouraging the implementation of the *acquis* in third country legal orders²⁴.

Para-Legal Function

From a functional perspective, the absence of legal binding force brings with it five – real or perceived – procedural and substantial benefits:

1. Avoiding cumbersome procedures in adoption of the instrument. – The ENP Action Plans are of an all-encompassing nature in the policy areas they cover, so that all these issues would have to be included in a single binding instrument. The Union, the Community, as well as the Member States would surely have to be parties to the legal instrument concluded, raising a plethora of questions of a legal procedural and substantial kind: who shall negotiate a cross-pillar mixed agreement; which procedure shall be followed in its adoption; where does responsibility for its breach lie;...²⁵. Aside from the fact that such an ambitious instrument has been projected only as a medium to long term objective, and that the exact legal nature of a New Enhanced Agreement/Neighbourhood Agreement has been subject to much speculation, less ambitious (sectoral) instruments might still have to involve the Member States and/or the parliament for ratification. A less grand solution might lie in the adoption of Association Council Decisions, although such excludes the Partnership and cooperation councils which have no power to adopt such legally binding instruments to flesh out the contractual agreement.

Given this procedural unattractiveness which hardly seems commensurate with the ENP’s methodology, Action Plans are on the Union side adopted as GAER Council Decisions on the position to be taken in the Association – or Partnership and Cooperation Councils, following the conclusion of joint ‘consultations’ conducted by the Commission²⁶. Subsequently, the Action Plans were adopted within the relevant AA or PCA council as non-binding recommendations; or via a written procedure if a meeting was not going to take place soon enough²⁷.

²¹ E. Tulmets, "Can the Discourse on 'Soft Power' Help the EU to Bridge its Capability-Expectations Gap?" (2007) 7 *European Political Economy Review* 195-226.

²² G. Meloni, *Wider Europe: the influence of the EU on neighbouring countries: the case of Russia and Ukraine*, EUI PhD Thesis, (Florence 2007), p. 338.

²³ E. Tulmets, 2007, *o.c.*, 207

²⁴ See further on this topic: R. Petrov, "Exporting the Acquis Communautaire into the Legal Systems of Third Countries" (2008) 13 *European Foreign Affairs Review* 33-52.

²⁵ C. Hillion, "Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine 'Enhanced Agreement'" (2007) 12 *European Foreign Affairs Review* 169-182.

²⁶ Note that the idea of ‘conducting consultations’ is a point strongly emphasized by the Commission, as opposed to conducting ‘negotiations’, a technical but not insignificant distinction. (Electronic Communication with DG Relex, February 2006).

²⁷ Such as for example Recommendation No. 1/2005 of the EU-Ukraine Cooperation Council of 21/02/2005 on the implementation of the EU/Ukraine Action Plan. See Proposal for a Council Decision on the position to be adopted by the Communities and its Member States within the Cooperation Council established by the [PCA], with regard to the adoption of

2. *Negotiating a binding treaty may be too burdensome from a practical perspective.* – For the management of the ENP, the Commission indeed has limited human and other resources at its disposal, and the prolonged and difficult process of negotiating new and deeper contractual agreements, and the potential benefits of legally binding commitments were considered to be of insufficient added-value in the face of the costs of such negotiations²⁸.

3. *A new treaty might not be considered desirable as of yet.* – This certainly emerges from all Commission Communications as well as the action plans themselves²⁹, the latter stating that “in light of the fulfilment of the objectives of this Action Plan and of the overall evolution of [EU–3rd country relations], consideration will be given to the possibility of a new contractual relationship”. Linked to this, one might also consider that a negotiated outcome might simply not be reached at all through a legally binding agreement, or reflect a lowest common denominator³⁰. A simple but politically significant example is the fact that the Ukrainian Action Plan states that the EU “acknowledges Ukraine’s European aspirations” and that it “welcomes Ukraine’s European choice”. While such a statement in the Action Plan says nothing on the Union’s commitment, its inclusion in the New Enhanced Agreement with Ukraine has been subject to contention even before negotiations were opened in early 2007.

4. *Durability v. Flexibility of the Instrument.* – It could be argued that Action Plans allow sufficient flexibility in responding to changing political and economic events and/or ambitions; whereas legally binding commitments are said to benefit from ‘durability’. However, the flexibility argument holds only to a limited extent, as is evidenced by the 2008 progress reports in relation to the Ukraine, Moldovan and Israeli Action Plans. The Action Plans were supposed to run for initial periods of three years, with the possibility of being amended on the basis of joint agreement ‘to reflect progress in addressing the priorities’³¹. In those three cases, where arguably such amendment would seem in place given the Commission’s evaluation of them as having made ‘significant advances’; nevertheless their duration was simply ‘extended’ “for pragmatic reasons”, while cooperation “continues on their basis” and a review is underway so as to ‘deepen them substantially’³². As is clear from the ongoing negotiations with Ukraine, the upgrade in relations with that country will happen not through a revised Action Plan, but through a ‘new enhanced agreement’; and in sectoral policy areas this upgrade equally happens through binding agreements such as for example in the field of civil aviation where negotiations are under way with Ukraine and Israel. Consequently, at this point in time, Action Plans are not as regularly updated as they could have been.

5. *Avoiding that the Instrument becomes part of the Community legal order* – Should an instrument be adopted as an actual agreement or a decision of the Association Council, its provisions have the potential of becoming part of the Community legal order with concomitant legal effects³³. In the *Sevince* case, the Court of Justice has accorded direct effect to a standstill clause on new restrictions on access to the employment of workers legally resident and employed in the territory of the contracting States; while in the *Simutenkov* case the ECJ accorded direct effect to a non-discrimination clause contained in the PCA with Russia, as it had done earlier in relation to

(Contd.) _____

a Recommendation on the implementation of the EU-Ukraine Action Plan, Brussels, 9.12.2004, COM(2004)791 or for that of Morocco see on the same date COM(2004) 788 final. All are available at: http://ec.europa.eu/world/enp/documents_en.htm.

²⁸ Source on file with author.

²⁹ For example: COM, *Wider Europe*, 2003, 16-17. (In general, on the feasibility of new contractual links following implementation of the Action Plans); COM, *Strengthening the ENP*, 2006, 4. (on the implementation of the action plan preparing the conclusion of an FTA with Ukraine).

³⁰ Hartmut, 501.

³¹ Language broadly employed by all Action Plans, with some small exceptions.

³² Communication from the Commission to the Parliament and the Council, *Implementation of the European Neighbourhood Policy in 2007*, Brussels, 3 April 2008, COM(2008) 164, 3.

³³ Case C- 192/89 *Sevince* [1990] ECR I-3461 (Decision of Association Council); Case C-265/03, *Igor Simutenkov v. Ministerio de Educacion y Cultura, Real Federacion Espanola de Fútbol*, [2005] ECR I-2579.

Association Agreements³⁴. However this point is not so pertinent in relation to the Action Plans, as their terms can hardly be considered 'clear, precise and unconditional'. As regards 'indirect legal effects', it is equally unlikely that these documents could be used as interpretational aids in such cases as *Simutenkov*³⁵, although this flows from the content and purpose of the action plans as programming political priorities, rather than their soft law nature which would carry that potential.

Consequently, the ENP action plans are at the apex of 'para-law' which aims 'to establish or give further effect to Community objectives and policy or related policy areas', without the drawbacks of legal binding force. To sum up, the ENP Action Plans 1) have required 'less intensive' negotiations in comparison with broad-ranging treaty instruments; 2) were more substantial and precise due to their 'mere political nature'; 3) could be more easily replaced or complemented by other documents³⁶; 4) do not require ratification and are more easily adopted; 5) and have no direct bearing on the EC legal order.

As hinted at in the previous two sections, documents with these characteristics should be ideal in overcoming the EU-internal competence divide. Indeed, in the context of EU External Relations Law much attention is given to, and energy invested in, questions of competence: their existence, nature, delineation, relationship, etc. The third and final section tests quantitatively whether soft law not hindered by procedural and other drawbacks, does indeed manage to reflect an integrated and coherent single voice in the neighbourhood, regardless of underlying competence questions.

Surmounting Competences Altogether in the Action Plans' JHA Sections

Assumption & Methodology in analysing the ENP Action Plans

The goal of this section is to analyse whether the parcelled competences underlying the Union's external action is seen to be reflected in the ENP Action Plans or not. The approach followed in doing so is a textual comparison and quantification of all the Justice and Home affairs sections of all twelve ENP Action plans, a policy area which substantially reflects Union, Community as well as Member State action. On the basis of this comparison, it is questioned whether initiatives falling within Member State competences, or which explicitly require Member State action rather than Community action, are more broadly or blandly worded in contrast with the formulations of other initiatives in the JHA field. Stated differently: is the 'strength' of an initiative represented in the Action Plans much less, equal, or more; depending on whether it is linked to the Member States', rather than the EC's competences? The answer to this question thus seeks to clarify whether soft law documents are indeed helpful and effective in overcoming the fragmented nature of the Union's external relations constitution.

Methodologically, quantifying the Action Plans is evidently a challenging task, and gauging the 'strength' is potentially an entirely subjective exercise. So as to address this critique a dual criterion was used: in the **first** instance, the 'starting value' would be set on the basis of an *evaluation of the verb or introductory words used in the initiatives*, on the 1 to 5 scale. This includes such statements as 'develop cooperation; strengthen; implement; accede to; explore possibilities of; take decisive steps to; approximate'. However, such is insufficient to come to a conclusive valuation of the initiatives, given the complexity of some formulations, their brevity or length, or diverse ways of structuring certain sections. Hence, so as to set the final value, a second criterion was applied, namely the *actual content of the proposed measure* (as opposed to focusing on the chosen verb of a sentence.) Some examples serve to illustrate this approach:

- First example; 'identify conditions' would be valued as weak (2/5), but given that they concern conditions 'for participation in EU programmes' and in the (Israel) Action plan this initiative is firmly linked to 'approximation where required by the relevant programme', that would lead to a 'strong' evaluation of 4/5.

³⁴ Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*. [1987] ECR I- 03719.

³⁵ See Casenote on *Simutenkov* by C. Hillion, CMLRev 2008, 815-833.

³⁶ In the field of energy for example the Commission has concluded complementary Memoranda of Understanding with Ukraine and Azerbaijan.

- Second example: "Develop the cooperation between Egypt and EU on readmission, including negotiating readmission agreements between the parties, building on Article 69 of the Association Agreement, taking into account the human dimension, socioeconomic aspects and accompanying measures." In all initiatives 'develop cooperation' has consistently been valued as average with 3/5, with the final outcome then to be decided by the second part of the criterion. In this case, the specific reference to readmission agreements is present in all action plans thus making it the norm rather than the exception. Additionally, combined with the inclusion of a reference to the underlying Association Agreement and the human dimension, the value remained at 3 as a well balanced 'averagely' strong initiative.

This approach has two immediate potential weaknesses: Firstly, the subjectivity of such an exercise, and secondly, the potential irrelevance of linguistic differences. However, so as to alleviate both concerns, the 'exercise' of valuation and calculating has been conducted twice, and so as to assuage the problem of linguistics, it must be noted that the graph is based on around 550 initiatives across 12 Action Plans. It is thus submitted that with such a rather large amount of separate initiatives, minor linguistic irrelevancies will have been removed in favour of the broader trend that emerges.

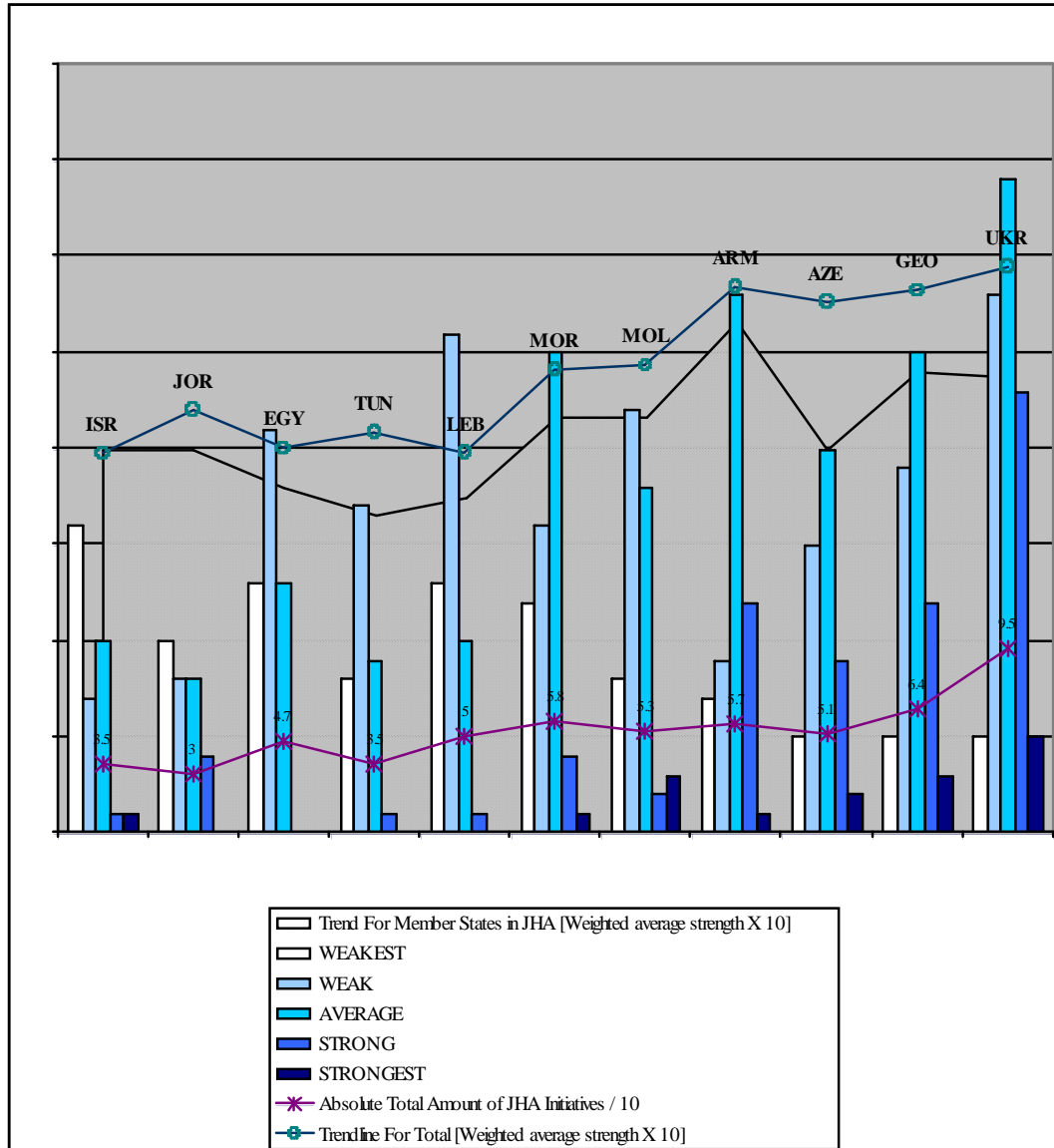
Some final remarks need to address the criterion by which initiatives that require Member State action, Community action, or both can be distinguished; arguably the weakest element in this quantitative assessment. For the purpose of clarity, the inquiry into the representation of the need for Member State action has been based on the basis of JHA initiatives including the keyword 'Member State'. Some examples taken from police and judicial cooperation and human trafficking sections to illustrate the kind of initiatives that such a comparison incorporates:

- *Ukraine & Moldova, in relation to Migration*: "Promote exchange of information between [3rd country] and EU Member States"
- *Lebanon*: "Develop cooperation between Lebanon and EU Member States' counter-terrorism and law enforcement agencies."
- *Israel*: "Exchange of technical, operational and strategic information between the EU, EU Member States and 3rd country law enforcement, including extradition and mutual legal assistance."

While a focus on the keyword 'Member State' has a certain inevitable level of imprecision due to differentiation in the action plans, it does eliminate the assessment of what would be a 'competence specific' initiative, an exercise which would be both highly subjective and difficult to complete in a rather blurred and intertwined policy area. Aside from this benefit, the approach does hold due to the specificity of the JHA sections in the Action Plans. Indeed, given the specific nature of these initiatives, and the fact that Justice and Home Affairs encompasses both the Member States, the Community, as well as third pillar initiatives, it is notable that the Action Plans regularly point to the 'EU Member States' as their international counterpart, or the EU, or the EC, or a combination of these; whereas in such areas that would undoubtedly require action of the Community, and the EC alone, such is largely absent. (compare for example with trade-related matters)

Keeping in mind these methodological caveats, it is submitted that the graph below is significantly representative for the presence of Member State action in the Justice and Home Affairs field, and thus useful to draw conclusions on whether their explicit presence has any real impact on policy formation in the context of the soft law Action Plans of the ENP.

Evaluation of the Justice & Home Affairs Initiatives in the ENP Action Plans



Source: Own analysis and calculation on basis of ENP Action Plans, excluding the Palestinian Authority³⁷

In general the trend emerging from this graph can be captured as follows: the Eastern axis of the ENP countries has been most willing to accept a larger amount of strongly formulated and concrete commitments in JHA; while the Mediterranean countries have committed to less and more weakly phrased statements in this field. Evidently, this is more valid for some countries than others as for example Ukraine and Israel can be found at the apex of each axis, with all the other countries somewhere in between.

More specifically, the white bars for each country represent the absolute amount of the ‘weakest formulations’ in the JHA sections as a whole, while the darkest represent the absolute amount of strongest JHA initiatives. As is apparent, the white bars decrease when moving from Israel to Ukraine on the graph, and the reverse is true for the darkest bars. The ‘area chart’ in the

³⁷ The Ukrainian Action Plan is separate from the main action plan, and therefore required some elimination. I.e. initiatives which figure in other sections of the action plans, such as human rights, in the 10 other action plans have been omitted so as to not skew the picture. (for this graph, the updated 2nd version of 2007 has been used.)

background of the graph, as well as the top 'line chart' is what the current argument focuses on, as they are the respective weighted representations of all five 'strength'-bars for each country, both for 1) the JHA sections as a whole, [line chart] and 2) the initiatives on JHA including only the Member States. [area chart].

While it is beyond the scope of this contribution to fully substantiate the South-East differentiation in the Action Plans, suffice it to accept at this point that the line chart and the area chart represent this trend in the JHA context. What is however important in respect to the present argument is that both trends are similarly and evenly represented when focusing on all JHA initiatives; or when focusing on initiatives that incorporate Member State action. While there is a small progressively increasing difference in their respective strengths, the difference ranges from non-existent to only of limited importance: on the explained 'strength-scale' from 1-5, the Israeli trends are exactly identical with regard to specific or all JHA initiatives. When continuing along the next seven countries, Jordan, Egypt, Tunisia, Lebanon, Morocco, Moldova and Armenia, the difference in strength between initiatives mentioning the Member States, and the JHA action plans more broadly, is only 0.25 out of 5, or 5 percent. Only for the final three action plans does the difference go to around 10 per cent. To conclude then, the representation which does not zoom in on any specific JHA issues, but simply all initiatives in this field, and where differentiation might thus be influenced equally by negotiations or internal preferences as well as competence issues, has a clear trend of differentiation along geographical lines; while tables which focus solely on the Member States are deviating only to a limited extent from the overall trend. Consequently, it can thus be concluded that, by elimination, other factors than competence issues are what cause this trend to emerge, and that the explicit linkage with the Member States' competences does not substantially cause a deviation in the policy initiatives' trends which emerge from the Action Plans, given that the specific evolution is in step with the broader evolution.

In the context of this paper, this implies the following: the soft legal Action Plans do not substantially reflect the EU internal competence divide that might underlie them; and this despite the fact that their implementation requires action on the part of the Member States, the Union and/or the Community. This graph has thus served to show that from an EU-inwardly focused perspective on the ENP as a 'single policy framework' seeking to overcome conflicts of competence has been broadly effective at the level of the ENP Action Plans, and thus supports from this perspective the preference for soft law in the Neighbourhood Policy.

Conclusion

This paper has sought to present an initial and incomplete attempt at conceptually approaching the role of soft-law in the ENP, and one can but conclude that soft legal documents come with a number of benefits, but that these are not limitless.

With the soft method of coordination at the heart of the policy, the ENP does not seem to require 'legal binding force' in its toolbox towards presenting a 'pole of attraction' to the neighbours. As has been pointed out, the ENP effectively builds on the deployment of soft-law instruments and political and economic conditionality, and any shortcomings in this regard lie not in the sphere of 'compliance through law' but rather in a range of political incongruencies. Nevertheless, the success of the soft method must not only be located in seeking to reflect the 'jointly owned process' of the ENP, which is partially an illusion; but equally in overcoming the internal legal constraints of the Union itself, thus allowing the relevant actors within the Union to focus on having their external policy interests furthered, rather than their internal legal ones. However, as the ENP progresses, the need for the Union to address its own internal institutional and constitutional limitations only grows, as the usefulness of soft law in overcoming them is not infinite.

While the soft method allows for the ENP to function as an 'umbrella-policy' encompassing a wide range of initiatives regardless of the competent actor on the EU side; legally binding commitments instigated by the finality of the ENP would inevitably re-import this legal fragmentation of the Union's external relations into the policy, and consequently imply that each policy area, regardless of the single 'ENP-brand', will answer to its own policy dynamic: CFSP cooperation might occur through ad-hoc alignment or through a treaty organising conditions for cooperation in crisis

management³⁸; fiscal reform might occur through references to soft coordination within the Union; judicial and police reform through participation in relevant agencies or exchanges with the Member States; readmission of illegal migrants might be agreed informally between the Member States and third countries, or at the level of the Community through a binding agreement; and so on.

Subsequently, it seems that macroscopically, the 'Neighbourhood Integration model' is bound to resemble a legal quilt now and in the future, and this due to the essence that is the EU. Soft instruments might be well-suited to accommodate conditionality as well as the cross-pillar nature of this policy; the lack of (internal agreement on –) long-term strategic vision of what the ENP is actually meant to do; as well as the fragmented nature of the Union legal framework, inevitably leads to – if not Accession – a tangle of binding agreements, declarations, action plans, memoranda of understanding, etc.; centred around the current and future contractual agreements, but nonetheless defined principally by the reciprocal political will on the depth of the relationship. With the continuing focus on EU institutional issues following the Irish rejection of the Lisbon Treaty; the ENP is unlikely to become anything other than that.

³⁸ See Council Decision 2005/495/CFSP of 13 June 2005 concerning the conclusion of an Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations OJ L182 13/07/2005.

The Impact of the EU Acquis and Values on the Internal Legal Order of Ukraine

Viktor Muraviov*

Introduction

The impact of the European Union (EU) *acquis* and values on the legal order of Ukraine is connected with the problem of the starting point of integration. In theory, the first stage of integration is the creation of a Free Trade Area (FTA).¹ In terms of the impact, the situation is ambiguous, for if we consider the provisions of the Europe Agreements on association with Central and Eastern European countries (EA) and the Partnership and Cooperation Agreement (PCA) with Ukraine², the difference in obligations between them is not substantial, except for the creation of a FTA and association status for countries having a EA with the EC. On the other hand, when investigating the impact of the EU *acquis* and values on the legal order of Ukraine we have to remember that this impact depends to a large extent on the existence in Ukraine of the legal bases for it, so the problem has both external and internal dimensions. In other words we may speak about the direct and indirect impact of the EU *acquis* and values on the legal order of Ukraine.

The Direct impact of EU law on the internal legal order of Ukraine

The direct impact results from the provisions of EU law that have become part of the legal order of Ukraine. The major legal instruments involved are the PCA, the harmonization of legislation, and European Court of Justice (ECJ) practice.

There are two major routes — through the conclusion of the PCA — for EU primary and secondary law to penetrate Ukraine's legal order: the incorporation of the provisions of EU law into the PCA; and references by the PCA to provisions of EU primary and secondary law.

In this regard, association agreements and agreements on trade and co-operation may appear to be different from partnership and co-operation agreements, firstly in that the former reproduce a somewhat greater number of provisions of EU primary and secondary law, and secondly, the association or co-operation bodies created on the basis of their provisions are empowered to adopt binding acts containing the provisions of primary EU law and references to secondary EC legislation. As far as the reproduction of the prescriptions laid down in the Treaty establishing the EC is concerned, some founding Treaty provisions intended to ensure the major freedoms of the common market have been included in the PCA with Ukraine. For instance, Article 20 of the PCA reproduces Article 30 of the EC Treaty (exceptions to prohibitions or quantitative restrictions on imports between Member States); Art. 32 partially reproduces provisions of art. 50 (provisions of services); Article 41.1 actually reproduces some provisions and refers to the others of Article 46.1 (lawful restrictions on the realization of the rights of establishment); Article 46.3 almost entirely reproduces the provisions of Article 58.1 (application by the Member States of their tax laws which distinguish between taxpayers who are not in the same situation with regard to their place of residence and the place where their capital is invested); Article 48.3 reproduces the provisions of Article 56.2 (abolition of all restrictions on the free movement of capital between Member States and third countries); and Article 48.6 contains the provisions of Article 59 (the right of a Member State to take protective measures in order to alleviate difficulties in the functioning of economic and monetary union). Nevertheless, the PCA does not contain any references to the provisions of EC economic legislation in many other sectors of the internal market. Furthermore, the acts adopted by the cooperation bodies do not envisage the

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¹ See Appleyard D., Field A. *International Economics*, Irwin, Boston, 1992, pp. 434-439.

² O.J. 1998, L 49.

incorporation of acts of EU institutions into the internal legal order of Ukraine by way of transposition or references to EU rules therein. Similar approaches have also been applied in all the other EAs.

In our view, this relatively rare occurrence of references to EU law rules in the PCA or the acts of cooperation bodies may be explained by the fact that European integration is being extended within the European Union to Ukraine with taking into consideration the transitional character of its economy. The Ukrainian national economy needs to gradually adapt to the legal regulation mechanisms of the European Union. Therefore, the body of the EC's *acquis communautaire* must be accepted by Ukraine in order to create the preconditions for its further integration into the EU.

In this connection, the question arises of the extent to which the EU legal order is capable of influencing that of Ukraine. Inasmuch as some of the PCA provisions may be interpreted as meeting the requirements of direct effect, whether it is possible to implement these provisions judicially remains questionable. The provisions concerned mainly apply to entrepreneurial activity and investment, and expressly define the rights and duties of natural and legal persons with respect to the right of employment (Article 24), the non-discrimination of enterprises, including those which render services in Ukraine through their commercial representatives (Articles 30.2, 43), the right of enterprises to employ key personnel (Article 35), and the right to access the market of international maritime transport and shipment on a commercial basis (Article 39). However, the response to the question largely depends on Ukrainian judicial practice.

On the other hand, the PCA does include provisions that open opportunities for natural and legal persons to apply to national courts to defend their rights under the Agreement. In particular, Article 93 reads: "Within the scope of this Agreement, each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination in relation to its own nationals to the competent courts or administrative organs of the Parties to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property." In spite of the fact that as a result of the EU representative PCA drafters' caution, the Article does not expressly refer to the possibility of defending the rights under the Agreement in national courts, one should not underestimate the recognized importance of the judicial protection of natural and legal persons' rights.

Thus, the incorporation of the PCA in the internal legal order of Ukraine only provides opportunities for the national courts to apply those provisions of the Agreement that do not require the adoption of any subsequent measure for their implementation. moreover, such opportunities may not actually be taken unless the necessary mechanisms or judicial practice exist.

Indirect impact of EU law on the internal legal order of Ukraine

As for the indirect impact of the EU *acquis* and values on the legal order of Ukraine, this is realized through bringing into the Ukrainian legal order the norms creating the legal bases for the direct impact of the *acquis*. I mean the possible changes in the Constitution, the adoption of special legislation aimed at moving the process of European integration ahead, and the creation of relevant institutional mechanisms.

The Constitution of Ukraine includes Art. 9, which provides that effective international treaties agreed to be binding by the Verkhovna Rada of Ukraine (Parliament) constitute part of national legislation.³ Under this provision, the rules of international treaties ratified by the Rada acquire the status of internal legal rules. At the same time, the Constitution actually says nothing about the supremacy of international legal rules over rules of national law, nor about the procedure for applying the provisions of international law within the legal order of Ukraine.

The status of international treaties in national legislation is confirmed by the law "On International Treaties of Ukraine" of 2004. Moreover, in contrast to the Constitution, the Law on international treaties expressly formulates the primacy of international law over internal laws: "1. International Treaties of Ukraine, concluded and properly ratified, shall constitute an integral part of the national legislation of Ukraine and shall be applied pursuant to the procedure envisaged for norms of national legislation. 2. Where a Ukrainian international treaty whose conclusion was effected in the

³ The Constitution of Ukraine of 1996, Holos Ukrainy, 1996, #128.

form of law provides for rules other than those envisaged by the legislation of Ukraine, the rules of the international treaty shall apply”.

However, neither the Constitution nor the Law on international treaties cover international agreements which do not require ratification by the Verkhovna Rada.

A similar situation exists with regard to international customary law. Art. 18 of the Constitution mentions the generally recognized principles of international law as the bases for Ukraine’s foreign political activity. At the same time, this article does not expressly refer to their priority over domestic legislation. It also says nothing about the inclusion of such principles in the internal legal order of Ukraine. Ukraine’s legislation does not contain any provision that stipulates the operation of the norms of international customary law within the internal legal order.

Moreover, neither the Constitution nor any other legislative act refer at all to the acts of international organizations, whereas the importance of the legal regulation of international cooperation is continuously growing.

The fulfilment by Ukraine of its international obligations might be efficiently ensured through the direct application of international legal rules by the national judicial authorities. In favour of this, it might be argued in particular that Ukraine’s European choice indicates the necessity of considering the existent practice in the Member States of the European Union and the key role of their national courts in protecting the rights granted by EC legal rules. The recognition of the primacy of EU law over national laws of the Member States, as well as the recognition of its direct effect within the national legal orders of these countries, implies the requirement to take measures that would ensure as far as possible the efficient operation of its rules. Furthermore, it should be noted that the direct-effect principle also extends to international treaties. In particular it applies to international agreements concluded by the EC with non-Member States where the text of the agreement, its goal, and character imply that its provisions contain express and clear obligations whose implementation or operation does not require the adoption of any additional legal act⁴.

As for judicial practice in Ukraine, it should be noted that, prior to the conclusion of the PCA, Ukraine had already adopted legislative acts that envisaged the application of international agreements by the national courts. In particular, Article 6 of the law of Ukraine “On Foreign Economic Activity”⁵ of 1991 provided that a foreign economic agreement may be found null and void by courts or arbitration if it does not meet the requirements of the laws and international treaties of Ukraine. The possibility of courts applying rules of international law is also implied by Article 9 of the Constitution of Ukraine. Some Ukrainian laws also refer in their articles to the possibility of the application by national courts of the provisions of international agreements, international customary law and even acts of international organizations (the Law on Militia,⁶ the Law on Postal service⁷ etc.). However, the mechanism for this application has not been created so far.

Furthermore, when deciding on the possibility of Ukrainian national courts applying the provisions of international treaties, including the PCA, it is necessary, we believe, to take into consideration the need to ascertain which provisions of international treaties might be directly applicable by the courts. That is to say, it is necessary to identify requirements concerning the provisions of international treaties for it to be possible to see whether they qualify for direct effect within the internal legal order.

The legal preconditions for the integration of Ukraine into the EU may not be created without establishing the means Ukraine should use to implement its international obligations. Until now, Ukrainian doctrine and practice have proceeded from the assumption that rules of international law give rise to rights and obligations primarily for states, whereas it is the rules of national law which regulate the behaviour of natural and legal persons. This means that rules of international law cannot be effective within the internal legal order unless they have been transformed into internal law. Such a transformation is considered as a means for the implementation of international law, with state laws adopting domestic normative acts: acts of ratification and promulgation of international treaties,

⁴ Case 12/86, Demirel [1987] ECR 3719 para.14.

⁵ Vedomosti Verkhovnoi Rady URSR, 1991, #289, Art. 377

⁶ Vedomosti Verkhovnoi Rady URSR, 1991, #4, Art. 20

⁷ Uriadovyi Kurier, 2001, October 31.

administrative resolutions, directives etc. That is, the concept is based on the idea that the transformation includes all the other means of implementation (reference, reception etc.). This reflects a dualistic approach to the correlation between international and national laws.⁸

Thus, the national legislation of Ukraine stipulates the possibility of the application of the provisions of international law by the national authorities and courts. However, the legal mechanism for this has not been created so far. On the other hand, the dualistic approach to the relationship between international and national laws inherited from former soviet practice does not allow the direct application of the rules of international law in the internal legal order. It may mean that the process of finding the optimal solution to how international treaties and the acts of international organizations should operate within the internal legal order is still going on in Ukraine. Various solutions proposed by national legislation require further improvement and, possibly, universalisation.⁹

All the above is fully applicable to the effect of the provisions of EU law in the Ukrainian internal legal order. The further integration of Ukraine into the EU will necessarily require the introduction of the provisions in its internal legislation creating the preconditions for the internal operation of primary and secondary EU legislation. The main emphasis should be placed on the mechanism for applying the rules of international and EU law within the internal legal order.

Harmonization of Ukrainian legislation with EU laws

The harmonization of Ukrainian legislation with EU law is one of the essential preconditions for deepening Ukraine's cooperation with the EU and its Member States. It creates the prerequisites for moving on to the next stages of integration, including the obtainment of EU membership in the foreseeable future.

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

In relations between the EU and Ukraine, one may speak about two stages of harmonization: voluntary and organized. Voluntary harmonization 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 the absence of any specific commitments by either party in this area. Moreover, the steps which Ukraine took were not coordinated with the EC and had a unilateral nature.

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 and was replaced by the PCA in May 1998. The Agreement laid the foundation for organized harmonization and provided for harmonization 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 basis for the process of harmonization of Ukrainian legislation with Community law, but also ensured the diversified character of this process. It should be noted that the PCA pays special attention to the harmonization of existing and future Ukrainian legislation with Community law, viewing this as an important condition for the strengthening of economic links between the two parties (Article 51(1)).

The harmonization provisions of the PCA and the EU-Ukraine Action Plan of 2005 have a framework character and their implementation depends on the adoption of legislation and the creation of the necessary institutional mechanisms.

In relations between the EU and Ukraine, the compatibility of Ukrainian legislation with EU law can be achieved at various levels (that of international obligations or that of EU obligations). At each of these levels, harmonization is implemented by various means (accession to international

⁸ See Muraviov V. Legal Foundations for Implementing Provisions of EU Law within the Legal Order of Ukraine, *Ukrainian Law Review*, 2002, Issue 1(6), p. 7.

⁹ See Muraviov. V. *op. cit.*

treaties, making national laws consistent with legal acts of EU institutions, or the recognition by Ukraine of the national standards of EU Member States).

The PCA specifies the main spheres in which harmonization is supposed to be achieved by means of undertaking relevant international obligations regarding particular international relations. These include intellectual property, energy, environmental protection, and the prevention of money laundering. However, harmonization by acceding to international instruments that set international standards in particular spheres is generally insufficient. As a rule, additional legal measures also need to be undertaken in the form of national laws implementing the 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 common harmonization method which Ukraine and the EU rely upon in their relations. The legal basis for such harmonization is established in the PCA (Articles 50, 51, 60, 63, 68, 71, 75, 76, 77), the Action Plan, and Ukrainian legislation. The spheres involved include the protection of intellectual property rights, customs, company law, banking, company accounting, taxes, labour protection, financial services, competition rules, public procurement, the protection of health and life of humans, animals and plants, the environment, technical rules and standards, nuclear energy, transport, industry, and agriculture.

It should be noted that the EU-Ukraine Action Plan sets out a number of harmonization priorities and adds some new areas. It requires Ukraine to implement international standards on juvenile justice, and the prevention of the financing of terrorism; international and European standards in the spheres of labour relations, technical rules and standards, company law, and financial control; and European standards on the assessment of the conformity of industrial products, the licensing of imports, sanitary and phytosanitary rules, the protection of intellectual property rights, public procurement, and statistics.

Almost all the provisions of the PCA and the Action Plan constitute so-called “soft law”; in other words they express intentions rather than explicit obligations. This in fact makes the whole harmonization process dependent on whether the parties maintain interest in its success, adding a political colouring to the process. It is important to note in this regard that the PCA specifies no timeframe for harmonization. The only exception is the protection of intellectual property rights, which Ukraine must have implemented within five years of 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 on harmonization measures. This is to include the exchange of experts, advance information on relevant EU legislation, the organization of seminars, training activities, help in the translation of Community legislation in the relevant sectors, and the development of necessary documents. The provisions on the assistance of harmonization do not specify any timeframe for their implementation, which to some extent affects their implementation by the Community.

A major problem faced by Ukraine in the process of harmonizing its legislation with EU law may be that of the latter’s both objective and subjective character. In the course of the process, Ukraine has to take into account that this is not a reciprocal process as it does not involve any reciprocal steps by both parties to make their legislation compatible with each other, but only requires Ukraine to change its legislation in accord with Community law. Ukraine has in fact no influence on the EU law-making process and acts only as a point of destination for the EU legal precepts.

There is, however, much ambiguity as to the exact meaning of the EU law with which Ukrainian legislation needs to be harmonized. Only the ECJ may interpret EU acts, and as a result they can acquire a somewhat different meaning. However, a country that is harmonizing its legislation with Community law is not able to constantly follow all the changes and take them into account by timely amending its legislation. Moreover, Community institutions are not obliged to inform Ukraine of amendments to Community law. All this may result in a situation where national norms may appear inconsistent with EU rules, which can lower the efficiency of the implementation of Community law in Ukraine’s national legal order. The ultimate goal of harmonization, which is the creation of similar legal conditions on both sides regulated by basic and harmonized norms, might not be achieved.

Moreover, it must be remembered that Community acts are applied in a certain legal environment and are a part of the EU legal system. Ukraine may not always be able to comprehend all their legal subtleties.

Ukrainian national legislation has set up organizational and legal mechanisms for the process of harmonization in the country. The legal basis for these activities consists of the “National Programme for the Approximation of Ukrainian Legislation to the Legislation of the European Union”¹⁰ of 2004 (National Programme), the Resolution of the Cabinet of Ministers “Some Issues on the Adaptation of Ukrainian legislation to that of the European Union”¹¹ of 2004, and the acts of implementation of the EU-Ukraine Action Plan adopted every year. The National Programme provides a list of the sources of the *acquis communautaire*. Apart from EU primary and secondary law, it also includes the ECJ decisions.

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 executive bodies, the Coordination Council for the Adaptation of the Legislation of Ukraine to that of the EU, and the European Integration Committee of the Verkhovna Rada.

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

The existing legal framework does not regulate or specify the competence of the European Integration Committee in the Parliament. The compliance of draft laws with the *acquis communautaire* is ensured as far as is reasonable and possible up to the moment of their first reading only. There is no mechanism for analysing the extent of the compliance of draft laws with the *acquis communautaire* at the second and third reading. Furthermore, there is no mechanism which would prevent the adoption of a law by Parliament if it conflicted with EU legislation.

The European Integration Committee’s secretariat has just 10 members, and so it is assisted by a Council of Experts. Unfortunately, however, the Council of Experts does not work well and this diminishes the quality of the scrutiny given to new acts. Evaluation of the progress achieved, as well as the identification of institutional and administrative problems impeding successful implementation are crucial factors for the enhancement of future harmonization, but there is no unified mechanism for monitoring the implementation of harmonized legislation.

The Ministry of Justice is the only institution responsible for the legal scrutiny of the compliance of draft legislation with the *acquis communautaire*. It is in charge of translating the *acquis communautaire* acts for the purpose of harmonization. According to the procedure laid down in 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 for translations to be done during the year on the basis of proposals from the line ministries and the other central bodies of the executive. Unfortunately, the procedure for planning translation limits the possibilities of any ad hoc adjustments which might be needed given the dynamics of *acquis* development, or an urgent need for the preparation and drafting of a law not listed.

As for the approach to the harmonization process, that of Ukraine is at present mainly evolutionary, focusing on the meaning and intent of the EU norms with which Ukrainian legislation is to be aligned. This 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 the *acquis communautaire*. However, in the areas where there is no extensive national legislation a revolutionary approach would be more appropriate. This would be justified by an urgent need to precipitate the speed of the process of harmonization by providing for the direct transposition of the EU norms and the removal of pre-

¹⁰ Uriadoviy Kurier, 2004, March 20.

¹¹ Official Visnik Ukrainy, 2004, #42, P.35.

existing Ukrainian acts. In such a case more competence should be given to the executive bodies to adopt normative acts, as was done in Poland, Hungary, the Baltic states, Bulgaria and some other countries.¹²

One of the most controversial questions is the scale of harmonization, the proportion of Ukrainian legislation which is harmonized with EU legislation. At present, it is not easy to find any reliable information in this area. The latest publication on this topic is titled “The Survey of the State of the Harmonization of the Legislation of Ukraine with the *acquis communautaire*”¹³ issued by the Ministry of Justice of Ukraine in 2007. It contains around five hundred and fifty pages and covers 16 areas mentioned in Article 51 of the PCA. Each part of the survey has the same structure and includes 5 subsections. The first of these consists of a table containing a list of the latest European and Ukrainian legislation in a particular area. The table is followed by another subsection referring to the EC legal acts mentioned in the table and assessing with which articles of those acts Ukrainian legislation conforms, without mentioning the Ukrainian acts concerned. For instance, Regulation 2913/92: art. 1 – in conformity; art. 3 – partially in conformity etc. As a consequence we can only guess which acts of Ukrainian legislation are harmonized with this particular Regulation.

In the next subsection, some, but not all, acts of Ukrainian legislation are selected from the table and assessments of their conformity with some of the acts of European law mentioned in the table are given. Following this there is a kind of assessment of the present harmonization situation in each area. The grading system is: rather high, average, low. Of the 16 areas covered by the survey only one is assessed as rather high (Banking law), one as low (Public procurement), and all the others as average. At the end of each part there are some recommendations, all of which are of general character, have no addressee and define no priorities.

In 2003 the then Deputy Minister of Justice stated that around 4 percent of Ukrainian legislation was harmonized with European law. At what level are we now? Unfortunately, the survey does not give us any answer to this important question. Thus, although the harmonization of Ukrainian legislation with the *acquis communautaire* remains one of the most powerful aspects of the impact of EU law on the internal legal order of the country, no complete information is available as to the progress made. In my opinion only an independent monitoring system is able to clarify the situation.

Possible impact of ECJ rulings on the internal legal order of Ukraine

The ECJ interprets international agreements within the context of the Community. That is, exclusively in the light of the relevant provisions of EU law, and it may not even consider the international legal space within which the agreement will be in force. In this connection, it should be noted that the ECJ has very rarely referred in its rulings to the generally recognized interpretation rules laid down in Article 31 of the 1969 Vienna Convention on the Law of Treaties.¹⁴ In particular, when interpreting an international agreement within the context of the Community, the ECJ has repeatedly noted that the EC Treaty creates a new and unique legal order, although the Treaty itself was concluded in the form of an international agreement. The founding Treaty is the constitutional charter of the Community, which is based on the rule-of-law principle. Member States have restricted their own sovereign rights, giving community law primacy over their domestic law, and a great number of its provisions have direct effect.

For these reasons, the ECJ emphasizes that the interpretation and application of the EC Treaty and the similar provisions of an international agreement should be based on various approaches, methods and concepts so as to take into account the character of each of these agreements and their special objectives. Thus, the ECJ has found that various groups of international agreements to which the Community is party set forth objectives that are different from and narrower than those of the Community. In contrast to the EC Treaty, such international agreements only provide for the parties' rights and obligations and do not ensure the delegation of sovereign powers to intergovernmental institutions established on the basis of the

¹² See Muraviov V. Legal Approximation: Evidence from Ukraine “The European Neighbourhood Policy: A Framework for Modernisation?”/ Marise Cremona and Gabriella Meloni (eds)/EUI Working Paper Law. - #2007/21, pp. 129 – 135.

¹³ The Survey of the State of the Harmonization of the Legislation of Ukraine with the *acquis communautaire*, Professional, Kyiv, 2007, 544 p.

¹⁴ Case C-208/90, Emmott [1991] ECR I—4269.

agreements. This is above all true for agreements on free trade areas and co-operation agreements.¹⁵ A similar situation also exists with regard to association agreements. However, to the extent to which these agreements aim to prepare the associated country for EU membership, they are closer to the EC Treaty than ordinary agreements on free trade and co-operation. Consideration also needs to be given to the functions performed by the respective provisions and the extent to which they agree with the functions of similar formulations in the EC Treaty.¹⁶

In general, in the ECJ view the interpretation of EC Treaty provisions may not be applied by analogy to the provisions of other international agreements, even if similar formulations are used in both agreements.¹⁷ As the ECJ has repeatedly noted, the use of the same terminology is not a sufficient ground for the application of EC case law to the provisions of an international agreement.¹⁸ This approach of the ECJ to the interpretation of EC agreements should be borne in mind, since the EC's international agreements on trade, partnership, co-operation, and association with third countries reflect to some extent the formulations of EU primary and secondary law. Therefore, the interpretation of the provisions of one of these agreements may be of importance in determining the content of other international agreements.¹⁹

As regards the concept of the direct effect of the EC's international agreements within the legal order of the EU and the legal orders of the third-country parties to these agreements (Ukraine in our case), it should be noted that the ECJ has, in its practice, reviewed its preliminary conclusions and found that there is no need to defend the interdependence between the direct effect that the international agreement has within the legal order of the Community and that of the country concerned. At the same time, the Court emphasizes the importance of a balance of interests, or mutual benefit. Step by step, the ECJ has come to the conclusion that international agreements with non-member States may have a direct effect within the legal order of the EC. This is so even if it creates a more favourable regime for subjects of third countries' national law within the territory of the EU than for subjects of EU law in third countries which have not recognized the direct effect of the provisions of the international agreement in their territory. For this purpose, the ECJ has proceeded from the concept of a common approach within the Community.²⁰ In determining whether any particular provision of an international agreement is of direct-effect character, the ECJ has applied the same criteria as it uses for EU law rules.

In the Court's view, the decisions of Association Councils should meet the same requirements as those set for the purpose of determining the direct effect of the provisions of the EC's international agreements.²¹

It should be noted that the Court's practice of determining whether EU law rules have direct effect is of great significance, since EU law contains a considerable body of legislative acts (regulations and directives) to be implemented in respect of international agreements. It is generally believed that if the provisions of these acts of Community secondary legislation have direct effect, this removes the necessity of finding out whether the international agreement which the provisions implement has direct effect by itself. However, the issue of an international agreement's direct effect becomes especially relevant if no implementing act has been adopted.

It is noteworthy that only in a few cases has the ECJ found that the provisions of association agreements, and the Association Councils' directly-connected decisions aiming to implement them, have direct effect.²² Furthermore, the Court has not denied that this approach may also be applied to free trade area agreements. Some time ago the ECJ recognized that even the provisions of the

¹⁵ Case 270/80, Polydor [1982] ECR 329.

¹⁶ Case 17/81, Pabst [1982] ECR 1331.

¹⁷ Case C-312 – 91, *Metalsa Srl v. Italy* [1993] ECR I – 3751.

¹⁸ Case 270/80, Polydor [1982] ECR 329; Case C-208/90, *Emmott* [1991] ECR I—4269.

¹⁹ See Macleod J., Henry J., Hyett S. *The External Relations of the European Communities*, Oxford 1996, p. 432; McGoldrick D. *International Relations Law of the European Union*, L. 1997, 249 p.

²⁰ See Muraviov V. *Special Aspects of the European Community Treaty-Making Practice*, *Ukrainian Law Review*, 2004, Issue 9(14), p. 27.

²¹ Case C-192/89, *Sevince* [1990] ECR I – 3461.

²² Case 181/73, *Haegeman v. Belgium* [1974] ECR 449; Case 43/75, *Defrenne v. SABENA* [1976] ECR 455.

partnership and cooperation agreements may have direct effect.²³ As far as the PCA with Ukraine is concerned, it has not received any application so far as to the conformity of its provisions with the requirements for direct effect. However, this may happen in the near future.

It is notable that the ECJ's conclusions regarding the direct effect of international agreements and the decisions of the Association Councils were based on one of the general principles of international law concerning the bona fide application of the provisions of each agreement — this principle is laid down in Article 26 of the Vienna Convention on the Law of Treaties. As the ECJ noted, in the absence of special provisions on implementation in the agreement itself, international law does not provide the necessary legal means for implementing the parties' obligations to a full extent. As a result, each party decides individually. Accordingly, the situation where the legal system of one of the parties to an agreement recognizes its direct effect whereas that of the other party does not is merely a reflection of the independent approaches to which each party to the agreement resorts in implementation. Such a situation is not in itself a sufficient indication of an absence of reciprocity in implementing the agreement. In particular, if the agreement aims to promote the economic development of one of the parties, the absence of a balance of obligations may be built into the agreement's very character.²⁴ Similarly in the ECJ view, it may be that where the parties have established a special institutional mechanism for consultations and negotiations on the implementation of an international agreement, this does not necessarily mean the exclusion of the possibility of the document's provisions having direct effect.²⁵

Programme-like provisions of an international agreement can hardly meet the standard requirements set in regard to rules for direct effect. However, the ECJ does not consider that this need prevent an Association Council's decisions specifically aimed at implementing programme-like provisions of an agreement from having direct effect. Furthermore, a failure to make the Association Council's decision public may not be regarded as a ground for depriving natural or legal persons of the rights which such a decision confers upon them.²⁶ Finally, the presence of provisions envisaging the power to apply relevant safeguards —authorizing the parties to derogate from certain provisions of the agreement — is not in itself sufficient to exclude the possibility of recognizing that these provisions have direct effect.²⁷ This suggests that the ECJ's conclusions are based on the approach that neither the character nor the structure of an agreement establishing a free trade area prevent its provisions from having direct effect in the Community legal system.

The direct effect of the Association Council's decisions may not be changed on the ground that the rights of natural or legal persons should be provided for in provisions of Member States' domestic legislation. The ECJ has noted that the provisions of the Association Council's decisions are purely intended to elucidate the Member States' obligations regarding the taking of those administrative measures which may become necessary for the implementation of these provisions, without entrusting the Member States with powers to impose requirements or restrictions regarding the application of clear and unconditional powers conferred by the Association Council's decisions.

Another important question associated with the direct effect of the EC's international agreements is whether this direct effect is horizontal or vertical. It should be noted that the founding Treaties of European integration organisations contain many provisions which may concurrently have horizontal or vertical direct effect. This has been recognized in spite of the fact that their addressees are states. This argument may also be used in interpreting other international agreements to which the Community is party. However, the ECJ case law on this issue is insignificant. To some extent, the recognition of the vertical and/or horizontal direct effect of international agreements depends on which acts of the EC's secondary legislation are applied for implementation. Commonly, regulations have concurrently horizontal and/or vertical direct effect. The ECJ considers that secondary legislation

²³ Case C-265/03, *Simultenkov* [2005] ECR I – 2579.

²⁴ *Defrenne v. SABENA* [1976] ECR 455.

²⁵ Case 104/81, *Kupferberg* [1982] ECR 3641.

²⁶ Case C-192/89, *Sevince* [1990] ECR I – 3461.

²⁷ Case 104/81, *Kupferberg* [1982] ECR 3641.

which serves as a means to implement international agreements should be interpreted as consistently as possible with the provisions of the agreements concerned.²⁸

Of importance for determining whether the provisions of international agreements concluded between the Community and other subjects of international law have direct effect is the ECJ legal policy. This is seen from the controversial character of the ECJ rulings concerning the interpretation of the EC's primary and secondary law rules on the provisions of international agreements; from the uncertain ECJ conclusions to the effect that the meaning of certain provisions of international agreements should not necessarily be determined by analogous provisions of the founding Treaty of the EC or of EC secondary legislation; and from cases where similar provisions of EC international agreements are interpreted differently.²⁹ The issues which the Court has had to deal with in this connection relate to the consistency and effectiveness of agreements, institutional structures, dispute resolution mechanisms, mechanisms for providing uniform interpretation, the unconditional character of the obligations under international agreements, and the reciprocity principle. In our opinion, the main explanation for the Court's contradictory approaches to interpreting international agreements seems to be its intention to protect the EC's and the Member States' interests in their relations with other subjects of international law, which is likely to give rise to conflicts between the EC and the third-country parties to the agreements concerned.

For Ukraine the ECJ decisions are used as a reference to EU legal practice concerning the interpretation of EU law.

Conclusions

The EU *acquis* started affecting the internal legal order of Ukraine before the beginning of the first stage of integration, the creation of the FTA. The major legal instruments of this impact are the conclusion of the PCA with Ukraine, the harmonization of Ukrainian legislation with that of the EU, and ECJ practice. Each of these plays its own specific role in the process of the implementation of EU law in Ukraine. The incorporation of the PCA into the internal legal order of Ukraine only provides opportunities for the national courts to apply those provisions of the Agreement that do not require the adoption of any subsequent measure for their implementation. However, such opportunities may not be actually used unless there exist the respective mechanisms or judicial practice. The harmonization of Ukrainian legislation with that of the EU remains the most powerful legal instrument for the expansion of the *acquis* into the internal legal order of Ukraine. Reference to ECJ decisions which form part of the *acquis communautaire* supplements the process of harmonization. One should nevertheless bear in mind that the expansion of the *acquis* into the internal legal order of Ukraine does not result in the EU legal order, which exists in parallel with that of Ukraine, having priority over it. The EU *acquis* is becoming an integral part of the legal order of Ukraine and the issue of correlation between the two legal orders does not arise.

²⁸ Cases C-163, 165 & 250/94, *Sanz de Lera* [1995] ECR I – 4821.

²⁹ McGoldrick D. *International Relations Law of the European Union*, (London, Longman). 1997, pp. 132-135.

The New EU-Ukraine Enhanced Agreement *versus* the EU-Ukraine Partnership and Cooperation Agreement: Transitional Path or Final Destination?

Roman Petrov*

Introduction

Ukraine is awaiting a new enhanced agreement with the EU. Formal negotiations started in 2007 and are expected to be completed in one or two years. The future Enhanced Agreement between the EU and Ukraine is of significant importance for both parties. As a result, its scope and objectives have become one of the most hotly debated topics among academics and practitioners in the field of EU external relations law. This is because the agreement will be the first among a new generation of external agreements to be negotiated by the EU and third countries under the framework of the European Neighbourhood Policy (ENP). Consequently, it will, to a certain extent, serve as a template and a point of reference for other future enhanced agreements to be concluded between the EU and other neighbouring countries which participate in the ENP.¹ Therefore, the new agreement with Ukraine (ENA) will be a model to follow for at least fourteen other ENP countries in line. At present in Ukraine the future ENA occupies the top position on the contemporary national political agenda. There is more or less complete agreement among political elites in the country that the ENA will be one of the major factors which influence, and consequently determine, the direction and pace of political reforms in the immediate future. In contrast to the issue of Ukraine's membership of NATO, the idea of joining the EU is shared and supported by the majority of Ukrainians.²

However, there are evident internal and external divergences in the perception of the scope and objectives of the future ENA. Internally, the President of Ukraine and the government do not hide their ambitious aspirations to negotiate an ENA which will eventually if not ensure, at least significantly accelerate Ukrainian progress towards full EU membership. On many occasions President Yuschenko has stated that in 2008 – 2009 a new association agreement can be negotiated with the objective of leading Ukraine towards full EU membership and considerable political and economic integration with the EU.³ In his opinion, Ukraine must be admitted to the EU because of its location on the European continent and because of the readiness and desire of the whole Ukrainian nation to adopt and to share European common values. The Ukrainian Minister of Foreign Affairs has gone further and expressed his dissatisfaction with the form and objectives of the ENP, stating that Ukraine is ready for a new, more enhanced form of cooperation with the EU which might lead to EU membership.⁴ The Ukrainian government does not hide its expectations that the future ENA should pursue the objectives of political association and close economic integration with the EU, with the future prospect of full EU membership for Ukraine.⁵

However, the pro-European aspirations of the Ukrainian political elite are frequently dampened by a more sober approach from Brussels. In January 2008 the Commission President J. Barroso stated that Ukraine must achieve a higher level of internal political stability before establishing closer relations with the EU.⁶ Commissioners have from time to time mentioned in their

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

² Recent polls show that about 58% of Ukrainians support Ukrainian membership of the EU while almost 60% of Ukrainians oppose membership of NATO. See the report from April 24th 2008 at <www.liga.net>, last visited December 10th 2008.

³ Interview with President Yuschenko, April 7th and June 25th 2008 at <www.liga.net>, last visited December 10th 2008.

⁴ Interview with the Ukrainian Foreign Minister Volodymyr Ogrzyzko. See the report from February 18th 2008 at <www.liga.net>, last visited August 10th 2008.

⁵ Report on President Yuschenko, July 10th 2008 at the "Yalta European Strategy" Forum at <www.yes-ukraine.org>, last visited December 10th 2008.

⁶ EU wants 'political stability' in Ukraine before closer ties, by E. Vucheva, 29.01.08, available at <www.euobserver.com>, last visited December 10th 2008.

public speeches that Ukraine has no chance of joining the EU in the short term.⁷ Even long-standing friends of Ukraine in the European Parliament enthusiastically propose establishing joint cohabitation, but not a marriage between the EU and Ukraine.⁸

These divergences in the perception of the objectives of the future EU-Ukraine ENA suggest that the parties involved will employ their best tools and strategies to achieve a compromise which could suit both of them. The Ukrainian side will push hard to negotiate a deal of a transitional nature with a clear prospect of full EU membership in the foreseeable future. The EU side will do its best to achieve a long-term contractual arrangement which will serve as an appropriate template for other neighbouring countries and offers adequate rewards to ensure Ukraine's abidance with the EU conditionality policy.

Objectives and scope of the new enhanced agreement

The objectives and scope of the future EU-Ukraine ENA have become a topic of popular debate by politicians and experts in Ukraine and abroad. Since the formal negotiating directives of neither party are open to the public, the whole debate is a highly speculative exercise. Nevertheless, it is possible to deduce the potential objectives and scope of the future agreement from the parties' binding and soft law, political statements, and contemporary EU external policy towards neighbouring countries.

The scope of the objectives of the future ENA as seen from Ukraine can be guessed from the non-binding Statement of the Verkhovna Rada "About the initiation of negotiations between Ukraine and the EU on the new fundamental agreement", which was issued on February 22nd 2007.⁹ This Statement welcomes the resolution of the European Parliament issued on April 7th 2006 instructing the European Commission to launch negotiations on a new association agreement between Ukraine and the EU.¹⁰ In particular, the Verkhovna Rada called on the EU to direct the negotiations towards the following objectives: 1) to acknowledge the possibility of full EU membership for Ukraine; 2) to negotiate a new agreement in line with the existing agreements between the EU and the countries of Central and Eastern Europe; 3) to specify timetables for every stage of integration between the EU and Ukraine in the political, economic, energy, security, legal and humanitarian spheres; 4) to ensure that the new ENA will contain provisions which are directly effective in the EU legal order; 5) to conclude the new ENA for a specific duration; 6) to ensure the long-term objectives of the ENA target full Ukrainian EU membership and its medium term objectives ensure sufficient access to the EC Internal Market. The Ukrainian side thus aspires to negotiate an association agreement with the clear objective of EU membership and Ukrainian access to the EC Internal Market which resembles either the Europe Agreements (EA)¹¹ or the Stabilisation and Association Agreements (SAA)¹² with the Western Balkan countries.

⁷ For example, External Relations and ENP Commissioner Benita Ferrero-Waldner stated on July 15th 2008 that "At the moment Ukraine has no prospect of full EU membership. Ukraine wants to negotiate an association agreement with a clear prospect of full EU membership. Only the Enlargement Strategy envisages such an option. Ukraine is not covered by the Enlargement Strategy." at <www.liga.net>, last visited December 10th 2008.

⁸ See interview with Mr. Adrian Severin (Chair of the Parliamentary Cooperation Committee "EU-Ukraine"), February 28th 2008 at <www.podrobnosti.com.ua>, last visited December 10th 2008.

⁹ Postanovlenie (Statement) of the Verkhovna Rada № 684-V "About the launching of negotiations between Ukraine and the EU on a new fundamental agreement", 22.02.07.

¹⁰ Resolution (P6_TA-PROV(2006)0138) on Elections in Ukraine states at para 10 that the European Parliament "notes that the current Partnership and Cooperation Agreement between the European Communities and Ukraine expires in 2008, and calls on the Commission to begin to negotiate an *Association Agreement* [emphasis added]". This position of the European Parliament was reiterated in Resolution (A6-0217/2007) of July 9th 2007, where it stated that "the negotiations should lead to the conclusion of an *association agreement* [emphasis added] that contributes efficiently and credibly to the European prospects for Ukraine and opens the corresponding process".

¹¹ EAs have been concluded with the following CEE countries: Poland (O.J. 1993 L 348/2, in force since 1st February 1994), Hungary (O.J. 1993 L 347/2, in force since 1st February 1994), the Czech Republic (O.J. 1994 L 360/2, in force since 1st February 1995), the Slovak Republic (O.J. 1994 L 359/2, in force since 1st February 1995), Romania (O.J. 1994 L 357/2, in force since 1st February 1995), Bulgaria (O.J. 1994 L 358/3, in force since 1st February 1995), Lithuania (O.J. 1998 L 51/3, in force since 1st January 1998), Latvia (O.J. 1998 L 26/3, in force since 1st January 1998), Estonia (O.J. 1998 L 68/3, in force since 1st January 1998), and Slovenia (O.J. 1999 L 51/3, in force since 1st February 1999).

¹² At the moment of writing, SAAs have been concluded with the FYROM (COM (2001) 90 final) and Croatia (COM (2001) 371 final) and Albania (COM (2006) 8164). The FYROM and Croatia SAAs entered into force on 3rd May 2001 and 12th

The EU institutions have been very careful to avoid any premature public discussion about the objectives and scope of the future EU-Ukraine ENA. It is only the European Parliament which has openly supported the Ukrainian aspirations and asked for the future ENA to be concluded as an association agreement with the objective of EU membership.¹³ Until recently, other EU institutions (with more decision-making power in this field) preferred to keep a meaningful silence on this important aspect of EU external policy.

Even within the academic community there was no uniform position on the future EU-Ukraine ENA. To date, the most outstanding contribution to the academic discussion on the agreement has been offered by Prof. C. Hillion of the University of Leiden, who has provided a comprehensive overview of its possible scope.¹⁴ In particular, he has argued that the future EU-Ukraine enhanced agreement will pursue the objectives of setting up a comprehensive and deep free-trade area between the EU and Ukraine, enhanced multi-faceted co-operation (in various fields, such as energy, the environment, transport and education) with emphasis on cross-pillar dimensions, and it will be a reciprocally-binding document. At the same time, the author believes that it will contain a conditionality clause, and will, therefore, require constant monitoring on the part of the EU. Most importantly, Hillion argues that the future enhanced agreement will be an association agreement based upon Article 310 EC, which is “potentially close although not necessarily exactly similar to the EAs or the SAAs with the Western Balkan countries”. The author drew his conclusions from “the terminology of several ENP documents” and “the inherent logic of the Neighbourhood Policy”. Most importantly, he states that “any agreement below association would not be perceived as an enhanced contractual relationship”.

However, there was a view that the scope and legal basis of the new EU-Ukraine ENA could differ from the generally expected association agreement based upon Article 310 EC.¹⁵ Two considerations were relevant to this opinion. The first consideration was of a legal nature. From the legal point of view, the objectives of an association agreement based upon Article 310 EC would not automatically imply that Ukraine would be given a legal commitment on the part of the EU regarding future membership. Furthermore, the objectives of EU-Ukraine short-term and medium-term co-operation could be achieved either by an association or by a partnership agreement. The second consideration was of political nature. On the one hand, the EU is likely to be in favour of an enhanced agreement in line with the neighbourhood clause (Article 8 TEU as amended by the Lisbon Treaty) and Article 212 Treaty on the Functioning of the European Union (TFEU), which provides better procedural arrangements for a third country than Article 217 TFEU (all decisions by the Council related to the conclusion of a partnership agreement can be taken by a qualified majority, while the conclusion of an association agreement would require unanimity). On the other, a “privileged” association agreement between the EU and Ukraine might be in contradiction with the objectives of the evolving EU-Russia strategic partnership. On many occasions the Russian government has explicitly stated that it would not welcome closer EU rapprochement with former Soviet countries which hinders regional integration in the post-Soviet area.¹⁶

Notwithstanding the thorny issue of the legal basis of the new EU-Ukraine ENA, there is more or less uniform consensus on the objectives and scope of the neighbourhood agreements, and the EU-Ukraine ENA in particular. The objectives of the neighbourhood agreements can be deduced from the general objectives of the ENP, which offers neighbouring countries the chance of participating in various EU activities through close co-operation in the political, security, economic and cultural fields.

(Contd.)

December 2001 respectively. The Albania SAA is not yet ratified. The EU has launched negotiations on new SAAs with Bosnia and Herzegovina, Montenegro and Serbia.

¹³ Resolution of the European Parliament (A6-0217/2007) of July 9th 2007.

¹⁴ C. Hillion, ‘Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU-Ukraine ‘Enhanced Agreement’’, (2007) 12 *EFA Rev.*, pp. 169-182.

¹⁵ R. Petrov, ‘Scope of the new EU-Ukraine enhanced agreement. Is there any room for further speculation?’ (2008) *Max Weber Programme Working Papers* (2008/17).

¹⁶ See Russia’s Middle Term Strategy towards the EU (2000-2010), available at <http://www.delrus.ec.europa.eu/en/p_245.htm>, last visited December 10th 2008. Also see S. Kashkin, P. Kalinichenko, “‘Problem 2007’ in relations between Russia and the European Union and its legal solutions”, (2005) 3 *Journal of Foreign and Comparative Law*, p.64.

In accordance with the logic of the ENP, the future ENAs' objectives will not be identical, but will differ in order to reflect the existing status of relations between the EU and each neighbouring country, its needs and capacities, and common interests. The ENAs will be preceded by jointly-agreed tailor-made Action Plans, which cover a number of key areas specific to each neighbouring country as provided by the ENP: 1) political dialogue; 2) economic and social development policy; 3) participation in a number of EU programmes (education and training, research and innovation); 4) sectoral cooperation; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; and 6) Justice and Home Affairs co-operation.¹⁷ It is likely that ENAs will reproduce both the general and individually tailor-made objectives of the relevant bilateral Action Plans. Thus, the general objectives of the ENAs could focus on close co-operation in the political, security, economic and cultural fields, with the eventual access of the neighbouring countries to the EC Internal Market. The individual objectives would reflect the various strategic priorities of the EU towards specific neighbouring countries. It is suggested that the new EU-Ukraine ENA will be either an association or a partnership agreement based upon various articles of the EU founding treaties with cross-pillar dimensions.

It is not to be excluded that the new EU-Ukraine partnership agreement will have a new ambitious title emphasising its enhanced character in order to satisfy the expectations of the Ukrainian political elite. For example, it could be called an "enhanced neighbourhood agreement" or "strategic partnership agreement" in order to emphasise its difference from the Partnership and Cooperation Agreement (PCA)¹⁸ and to underline a new level of political and economic co-operation between the parties without any immediate prospect of full EU membership.

Recently the EU decided to unveil some of its plans concerning the scope and legal basis of the future EU-Ukraine enhanced agreement. At the EU-Ukraine Summit in Paris on September 9th 2008 the Parties agreed that the future EU-Ukraine agreement will be "an Association Agreement" (based on Article 310 EC) which envisages reciprocal rights and obligations (implying the competence of common institutions to issue binding decisions).¹⁹ Among the most ambitious objectives of the new agreement will be the establishment of a comprehensive free trade area and the long-term prospect of a visa-free regime between the EU and Ukraine in return for the "large-scale regulatory approximation of Ukraine to EU standards" and enhancement of mutual cooperation in the areas of "justice, liberty and security, including migrant issues". Nevertheless, the EU fails to recognise EU membership prospects for Ukraine even in the long-term future. Instead, the Parties "acknowledge EU aspirations of Ukraine and welcome its European choice". However there are many issues of the EU-Ukraine enhanced agreement which still remain open. Among them: what will be the depth of the political dialogue between the EU and Ukraine?; how far will the Ukrainian undertakings be allowed to access the EC Internal Market?; will Ukraine be allowed to enter the EU-funded programmes? These questions will remain open until the very end of the negotiation process.

Once the new enhanced agreement is concluded, what is next?

The future EU-Ukraine ENA will serve as a fundamental pillar of the further rapprochement between the EU and Ukraine in the short and medium terms. However, one may be tempted to ask what will happen after the new agreement enters into force? In other words, will the new EU-Ukraine ENA be able to play a more significant role in EU-Ukraine relations than the outgoing PCA? This question is justified by the ambiguous legacy which the PCAs leave behind after their expiry, or their termination in the near future.

¹⁷ Communication from the European Commission "European Neighbourhood Policy Strategy Paper", COM (2004) 373 final.

¹⁸ EU-Ukraine PCA (O.J. 1998, L 49) entered in force on 1st March 1998. See V. Muravyov, 'Polozhenia Ugody pro partnerstvo ta spivrobotnitsvo, yaki reguluyt sferu pidpriemstva ta investitsiy (pitania implementasii)', 2 (1998) *Ukrainskiy Pravoviy Chasopys* 31-35.

¹⁹ EU-Ukraine Summit on September 9th 2008 in Paris "Joint Declaration on the EU-Ukraine Association Agreement", available at: <http://www.ue2008.fr/PFUE/lang/en/accueil/PFUE-09_2008/PFUE-09.09.2008/sommet_union_europeeneukraine>, last visited December 10th 2008.

On the one hand, the PCAs have indeed been frequently blamed for being “outdated” and “ineffective” contractual arrangements between the EU and the PCA countries.²⁰ To some extent these concerns are justified. The PCAs were designed as framework EU external agreements. However, in reality, they covered very limited areas of cooperation: the political and economic. They were mainly aimed at the establishment of a political dialogue, the facilitation of economic relations between the NIS countries and the EU Member States, the promotion of democratic reforms in the former Soviet countries, human rights protection, and the establishment of a legal order that guarantees the rule of law. Their preambles intentionally omit any reference to “the process of European integration” or “the objective of membership of the EU” as provided in the EU association agreements²¹, but aim solely at the development of close political relations, the promotion of trade, investment and harmonious economic relations between the parties, and at sustaining mutually advantageous co-operation and support of a PCA country’s efforts to complete its transition into a market economy.²² Thus, the PCAs served their purpose as reliable legal instruments in sustaining long-term relations with the PCA countries, while holding them at a controllable distance from closer access to the EC Internal Market.²³ Furthermore, the liberalisation of trade in goods and services is restricted, and ‘sensitive sectors’ are beyond the PCAs’ scope. Few PCA provisions could potentially be regarded as having direct effect in the EC legal order. Unlike the extensive ECJ practice with regard to the direct effect of the provisions of some external EU agreements (like the EEA Agreement, the Ankara Agreement, and the Europe Agreement), the ECJ record on interpreting the provisions of the PCAs is quite modest. It is limited to only one case in which it states that the provisions on non-discrimination treatment in labour conditions in the EU-Russia PCA could be regarded as directly effective.²⁴

On the other hand, one must agree that the PCAs appeared as an innovative breakthrough in EU external contractual practice in the 1990s. It was an interesting experiment in the field of EU external policy to set up a contractual relations framework with former Soviet countries and to thereby accelerate democratic and market economy reforms. Their structure and objectives were evidently inspired by the EAs. Nevertheless, as purely ‘transitional’ agreements, the PCAs aimed to bring the PCA countries to the gateway of the world market economy. Importantly, the PCA countries were given the chance to build a solid institutional framework for political dialogue with the EU. Application of MFN treatment and the GSP regime significantly liberalised mutual trade in goods. Furthermore, companies from the PCA countries could rely on non-discriminatory treatment should they want to establish themselves in the EU. The WTO rules became applicable to trade relations between the Parties and further areas of co-operation were generously provided for.

Therefore, considering both the positive and negative characteristics of the PCAs it would be more correct to conclude that they have proved to be quite effective and successful EU external framework agreements. In the end, most of their objectives have been achieved. Some PCA countries have joined the WTO (Moldova, Georgia, Ukraine, and Kyrgyz Republic), obtained “market economy” status (Russia and Ukraine) and successfully contributed to many EU policies. However, the general dissatisfaction with the PCAs can be explained firstly by the fact that most of them have become outdated and therefore do not reflect the reality of the present political and economic environment in the EU’s relations with its neighbouring countries, and secondly because they do not reflect current expectations of the bilateral relations between the EU and countries concerned.

It is not to be ruled out that the future EU-Ukraine ENA may follow a similar path and become outdated in very short period of time. This might happen for the same reasons as for the PCAs: a) dissatisfaction of the parties with the scope and objectives of the agreement; b) the gradual extension

²⁰ For example see Y. Borko, *Evropeiskomy Soyzy i Rossii neobkhodimo Sograsnenie o strategicheskoy partnerstve* (Moscow: Probel 2000).

²¹ For example, the Preamble of the EU-Hungary EA.

²² Article 1 of the EU-Ukraine PCA.

²³ For a comparative overview and scrutiny of the PCAs, see R. Petrov, ‘The Partnership and Cooperation Agreements with the Newly Independent States’, in: A. Ott & K. Inglis (eds), *European Enlargement Handbook*, (The Hague, Asser Press, 2002) pp. 175-194.

²⁴ Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-2579.

of the parties' cooperation beyond the scope and objectives of the agreement. One may predict that as soon as the new EU-Ukraine ENA is signed and ratified, either of the parties could press for the revision of its elements or the conclusion of another updated and more enhanced agreement as soon as possible. It is therefore important to focus on the short and medium term benefits and challenges the new neighbourhood agreement could bring to the parties, in particular to Ukraine.

In the field of political dialogue, the new EU-Ukraine ENA will be distinguished by an enhanced institutional framework with the right to issue binding decisions at the level of Cooperation/Association Council and the possibility of the informal participation of experts from both parties in taking decisions related to the operation of the agreement and free trade area in particular. In this case, the binding decisions of the Cooperation/Association Council could have a significant impact on the legal system of Ukraine. It will be one of the first cases in which the decisions of common institutions set up under the framework of an international agreement could be directly effective in the legal system of Ukraine. The Ukrainian Constitution grants acts of international law which have been duly ratified by the Verkhovna Rada priority over national law (apart from the Constitution itself).²⁵ Therefore, decisions of the Cooperation/Association Council might have priority over Ukrainian primary and secondary laws, which implies a significant impact on the legal system of Ukraine, especially in the fields of protection of foreign investors, non-discrimination, and the application of market economy principles. It is not impossible that the Constitutional Court of Ukraine will be asked to rule on the constitutionality of some of the decisions of the Cooperation/Association Council if they do not comply with the Ukrainian Constitution.

In the field of economic and social development policy, Ukraine will be expected to embark upon the regulatory approximation of national legislation to that of the EU in the fields of employment, social policy, and health/consumer protection. There are many fields of Ukrainian law which have already been aligned with international and EU standards. If provisions of the new EU-Ukraine ENA contain binding approximation commitments in the fields of economic and social policies, it will imply that the Ukrainian courts may refer in their judgements to the EU acquis as an authoritative source of law.

Some of the most problematic issues to be considered are equal access to jobs by Ukrainian and third country nationals, safety at work, the rights of the disabled and anti-discrimination laws. The participation of Ukraine in EU-funded programmes will accelerate new domestic reforms in fields like research and education. At present Ukrainian nationals have very limited access to EU-funded research and education programmes. Thus, Ukraine could be asked to financially contribute to many of these programmes as other non-EU Member States do. The participation of Ukrainian nationals in EU funded programmes will initiate considerable reforms in the field of research and higher education (university autonomy, higher education funding, and transparency) in order to improve the international competitiveness of Ukrainian universities and scholars.

In the fields of Justice and Home Affairs co-operation, Ukraine will be expected to align its legislation to that of international and EU standards in the fields of the fight against organised crime, human trafficking, the fight against drugs and terrorism, and in other issues such as asylum and immigration. Cooperation in these fields would require not only professional cooperation between Ukrainian and EU institutions like Europol, Frontex and Eurojust, but also the more active participation of Ukrainian experts and judges in projects such as the judicial network in civil, commercial and criminal matters. Such cooperation would imply not only legislative measures but also a high level of efficiency in the implementation and enforcement of law and professional network cooperation.

Finally, in the field of opening markets in accordance with the principles of the WTO and convergence with EU standards, Ukraine will be expected to ensure better access of foreign investors to national goods, services and capital markets without any discrimination, which undoubtedly will

²⁵ Article 9 of the Ukrainian Constitution provides that "international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine".

imply more pressure on Ukrainian courts to consider claims in this area in line with the WTO and EU *acquis*.

Concluding remarks

To conclude, we have set out a number of considerations which lead us to believe that the outgoing PCAs and the incoming ENAs will have several similar characteristics. The new agreements are likely to also be framework agreements of a cross-pillar nature, entailing considerable legal and regulatory reforms in the neighbouring countries before they can obtain better access to the EU Internal Market. Like the PCAs, the new ENAs risk becoming outdated in a very short period of time. Two factors may justify this judgement. The first is the broad framework character of the future ENAs. Constitutional reforms in the EU are not completed, and could continue even after the Lisbon Treaty enters into force. It is possible that the EU will occupy new areas of competence not covered by the EU founding treaties up to now. Thus, sooner or later the EU will face the necessity of revising the scope of framework agreements with third countries in order to align them with its own competences. The second factor is a possible dissatisfaction of the parties with the objectives and scope of these agreements. On the one hand, the EU side will be pressed to offer at least a paragraph concerning the long-term European prospects of the neighbouring countries which they can rely on in their integration aspirations. On the other hand, it is most likely that the future ENAs will avoid any of the specific enlargement formulas inherent in the EAs and SAAs, thereby causing some degree of dissatisfaction both to the EU and its neighbours.

However, the ENAs will be highly valued for their short term impact on the neighbouring countries. In particular they may have significant impact on the legal systems of the parties. This will concern the impact on neighbouring countries' judiciaries, which will have to take account of binding decisions issued by common institutions as a new source of national law. Furthermore, the ENAs will accelerate considerable domestic reforms in the fields of legal and regulatory harmonisation in the neighbouring countries. Therefore, we conclude with the suggestion that the future EU-Ukraine ENA, and indeed all other future ENAs, will not be the final destination of EU policy towards neighbouring countries, but is likely to serve as a transitional path on the road of closer rapprochement between the enlarged EU and its neighbouring environment.

EU and Russia in Search of Strategic Partnership

Nikolay Kaveshnikov* and Olga Potemkina♦

The relationship between Russia and the European Union is a relationship between the Russian Federation, a major European state, which considers and defines itself as part of the European continent and the European Union which is a community of European states.

Dmitry Medvedev

Interview to Reuters, June 25, 2008

Introduction

The evaluation of contemporary EU-Russia relations reveals a very controversial picture. From the formal viewpoint the relationship is on the rise. Cooperation develops both on the state level and between business communities. The trade demonstrates high rate of growth. In 2007 the EU-Russia trade turnover reached \$284 bln. (\$230 bln. in 2006). More than 50% of Russia's external trade turnover accounts for the EU. Russia holds the third place (after the USA and China) for the export to the EU (export volume in 2007 - \$197 bln.) and the fourth place among the consumers of the EU goods (the EU import to Russia was \$87 bln. in 2007). Russia is the first in supplying natural gas to the EU and the second in oil export.¹ The investment attractiveness of Russia's economy has increased, which is demonstrated by many successful Initial Public Offerings (IPO) of Russian companies. And vice versa – Russian enterprises expand investments into foreign assets. In 2007 foreign investments in Russia increased up to \$120, 9 bln. including \$27, 8 bln. of foreign direct investments. Russia invested abroad \$74,6 bln. in 2007; most of these investments were short-term credits, that's why Russian accumulated investments abroad made up only \$32,0 bln. at the end of 2007.²

Even in the energy field, which has been the subject of wide speculation, practical cooperation goes on quite successfully: new long-term contracts are signed for gas delivery, new infrastructure projects are being implemented. Fifteen dialogues have been launched on the base of the road maps on four EU-Russia Common Spaces.

As a whole scientific and technical cooperation is advancing, although it's potential is still far from being exploited in full. Russia close engagement with the 7th Framework programme is being discussed. Harmonization of educational standards moves up at a high speed, joint programmes are fulfilled and exchange of students and teachers grows up. Tourism and the level of communications between people have increased tremendously. This trend will continue in future.

From the other hand, for the recent years the disputable and often conflict issues have occupied a disproportionately high share both in the official bi-lateral agenda and in the public discourse. Among them there are “democracy collapse” in Russia; national minority rights in the Baltic states; independence of Kosovo; rivalry on the CIS space; a number of the negative episodes such as the murder of Politkovskaya and Litvinenko; transfer of the monument to the Russian soldiers in Tallinn etc. And there is a principled contradiction in the sphere of Russia and the EU's relations as supplier and consumer of energy resources.

There is an impression that many European and Russian mass media have been engaged in distributing negative information about each other. Harsh declarations are more and more often heard

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¹ Ministry of Foreign Affairs of the Russian Federation, at:

<http://www.mid.ru/ns-dos.nsf/162979df2beb9880432569e70041fd1e/f5640df6878bd7ea43256d9600340a64?OpenDocument>, last visited 20 May 2008.

² Database of Russian Statistical Agency (Rosstat), at:

http://www.gks.ru/wps/portal/!ut/p.cmd/cs/.ce/7_0_A/.s/7_0_37N/_th/J_0_CH/.s.7_0_A/7_0_FL/.s.7_0_A/7_0_37N

from the officials. As Yuriy Borko noticed sceptically: “It is perplexing that as soon as the partners proceed from long-term projects to daily urgent tasks, which demand immediate answer, an embrace is replaced by a fighting stance”³. Predominance of negative topics threatens with the erosion of political trust and has already entailed the significant deterioration of Russia’s image in the EU’s public opinion and the EU’s image in Russia.

In this rather uneasy situation the twenty-first EU-Russia summit in the Western Siberian town of Khanty-Mansiisk on 26 and 27 June launched negotiations on the new EU-Russia Strategic Partnership Agreement which will replace the existing Partnership and Cooperation Agreement (PCA). The results of presidential elections in Russia became clear, and the continuing period of “constitutional uncertainty” in the EU does not seem to prevent the partners from negotiating their future relations. The first round is taking place on 4 July in Brussels. Hence, the time-out, which the EU and Russia have taken some time ago, is over as well. Now, when the partners are ready to start negotiations, they can do it. However, they will hardly succeed in completing their important task as long as contradictions are brought to the foreground and overshadow achievements. One can hardly hope that Russia and the European Union will rapidly and effectively find the mutually advantageous decision on the new Treaty. The discrepancies concerning the substance of the document are very high. In their turn, disagreements emerge from the mismatch of goals and the perceptions of the character of relations. Thus the issue of the new format of EU-Russia relations remains open.

The Goals, Which Have Not Been Defined

The key factor, which has until now complicated EU-Russia relations, is the absence of clearly defined goals. Or the partners declare their aims while being fully aware that they can never be achieved. In any case, there is an obvious lack of either common vision of the future relations or the agreed strategic goals. In this situation only very dense and developed network of micro-level contacts (business, civil society) as well as the high level of mutual trust can ensure stable partnership. However, this network between Russia and the EU is not strong enough yet, and the tradition of trustful relations is still too weak. As a result any quite insignificant complication is able to damage the whole system of bi-lateral relations and reduce it to selective cooperation against the background of political confrontation/rivalry. This very trend has been very obviously observed at the moment. Boris Frumkin is quite correct to outline: “Until now the development of industrial and trade relations has been provided mainly by the interested groups of business community with no sufficient support and sometimes facing sabotage from the part of Russian and European (the EU and national) bureaucracy”⁴.

In 2003-2004 the European Union realized the failure of its strategy for transforming Russia into a “normal” state, but proved quite unable to develop any other new approach. The former policy of “promoting democratic and market reforms in Russia” has been still mechanically continued, which means spreading to Russia *acquis communautaire* rather than just universal democratic and market principles. It is clear that Russia’s involvement in forming the *acquis* norms has never been supposed. Actually, the EU has strived to construct its relations with Russia on the basis of the European Neighbourhood Policy (ENP), although does not formally rank Russia to the countries with the “neighbour” status.

From her side, Russia has definitely demonstrated disagreement with being listed in 2003 among the ENP states. However, the refusal to follow the conditionality principle (or benchmarks) was not firmly claimed. On the contrary, the Russian political elite has entered into discussion by declaring that Russia shares values, but adheres to her own “sovereign” approach to democracy. This position has not obviously impressed Brussels too much, and now overcoming “value-conditionality” logic seems more difficult than convincing the EU that Russia will not ratify the Energy Charter Treaty.

³ Yu.Borko. ‘Economic Relations: from Cooperation to the Common Economic Space’, in: Yu.Borko, D.Danilov, *Russia – European Union: the Strategy of Strategic Partnership*, Reports of the Institute of Europe, No 157, (Moscow, IE RAS, 2005), p.39.

⁴ B.Frumkin. ‘EU-Russia Relations: a Year after the EU Eastward Enlargement’, in: *The EU Enlargement” a View from Moscow, Berlin and Warsaw*. Reports of the Institute of Europe, No 172, (Moscow, IE RAS, 2006), p.34.

In Russia the goal of building strategic partnership has been constantly declared. However, neither experts nor the political elite have ever formulated the main points of this partnership. Being too abstract the idea of strategic partnership lacks support from the majority of Russians.

We got used to this expression, but in fact it lost its original meaning. Russia considers many states as her strategic partners. Putin visits any country, and it is declared as a strategic partner, the President of any country comes to Russia – and this country becomes another strategic partner. Even the ‘eternal strategic partners’ have appeared.⁵

The attempt to present four EU-Russia Common Spaces as a goal of Russia’s European policy seems not very successful. These spaces are just the means, but it is still not clear for what sake Russia started implementing the road maps. It should be admitted that in their time the road maps proved to be the necessary measure for preventing from vacuum in EU-Russia political relations. Besides, on the basis of the dialogues, which were designed to develop the road maps provisions, several results might be and were achieved. But only their pragmatic and tactical aspects matter. The road maps were the EU Commission’s rather than Russia’s invention, thus they are very similar to the ENP “Action Plans”. There are no benchmarks in the maps; otherwise there would be no difference at all⁶.

So Russia and the European Union keep on working on the road maps implementation: a series of dialogues has been launched, which resembles the screening process. The agreements are being signed similar to those concluded with the ENP states (visa facilitation and readmission, for example), and the issue of free trade area (FTA) is still on the agenda, although the idea is becoming less and less popular in Russia. The EU keeps on delivering assistance for Russia in the frames of financial programmes. Although the new Strategy Paper on Russia refers to moving from “donor-recipient” relations to co-financing, there is still no real equal financial participation of partners in various projects and initiatives. At the same time Moscow is constantly declaring her desire of equal footing in relations with the EU and expressing disagreement of the attempts to impose unfavourable conditions which question Russia’s independent role in external policy. In the other words, the certain vague and dual position of Russia’s authorities is quite obvious. In reality it is caused by the fact that the economic balance between partners must become the main pre-condition for equal footing. As long as this balance lies upon favourable for Russia energy prices even cooperation on the basis of common interests⁷ with the EU appears unrealizable. Any Russia’s pragmatic proposal, whatever mutually advantageous it would be, is being put by the EU institutions against discussion on human rights and values. For example, while discussing the Agreement on Readmission in the European Parliament, which is more needed by the EU rather than by Russia, the MEPs exposed serious doubts if Russia could be entrusted with the fates of illegal immigrants deported from the EU and if Russia could respect their rights.⁸ Brussels does not understand why Russia is not so eager to follow advices how to build democracy, why she is suspicious towards the EU monitoring and why she does not take criticism into consideration? Besides, as soon as the EU keeps on regarding Russia as the ENP object, it can’t accept Russia’s desire to play her own role on the post-Soviet space and to put forward her own integration plans in the region, which can be hardly correlated with the ENP perspectives.

⁵ *The EU Enlargement a View from Moscow, Berlin and Warsaw*, Reports of the Institute of Europe No 172, P.46.

⁶ M. Strezhneva, ‘European Neighbourhood Policy and EU-Russia Strategic Partnership: an Attempt for Comparison’, in: V.Fedorov, O.Potemkina, N.Kondratieva N.B (eds.) *Russia and the United Europe: Prospects for Cooperation*. (Moscow, Russkiy souvenir, 2007), pp.51-58.

⁷ The authors of the Report for the Trilateral Commission suggest «practical engagement» as the format for EU-Russia relations, see R.Lyne, S.Talbot, K.Watanabe, *Engaging with Russia: the Next Phase. The Trilateral Commission*. (Washington, Paris, Tokyo, 2006), p.167

⁸ European Parliament Committee on Civil Liberties, Justice and Home Affairs. Report on the proposal for a Council decision concerning the conclusion of the Agreement between the European Community and the Russian Federation on readmission, 6.02.2007.

Strategic Partnership – What Is It?

On the high level strategic partnership was first declared as a goal by President Putin in his speech in Bundestag in 2001:

I am just of the opinion that Europe will reinforce its reputation of a strong and truly independent centre of world politics soundly and for a long time if it succeeds in bringing together its own potential and that of Russia, including its human, territorial and natural resources and its economic, cultural and defense potential.⁹

This idea has not been put into practice, but still it remains popular in the certain circles of elite. For example, in May 2007, a few days before the Samara summit it was Frank-Walter Steinmeier, German foreign minister, who stated: “The European Union needs Russia for overcoming international conflicts, but Russia as well depends upon Europe as before, and this idea should be prevailing for both sides”.¹⁰

In our view, the concept of strategic partnership should be filled with the following content:

- Common values are the basis for the partnership; they should be perceived uniformly and flexibly, with considering the cultural and historical diversity; they should be applied similarly in the partners’ domestic policy and form the basis for the external activities (especially when the partners carry out coordinated actions);
- The goal in policy should be political partnership for the secure, stable and democratic world, which is built upon multipolarity and respect for international law.
- The goal in economy is to increase Russia and the EU’s competitiveness by means of optimal using their advantages on the basis of exchange with assets, as well as creating joint technological chains and advancing towards the establishment of Russia-European transnational corporations, which would be oriented on the EU, Russia and Commonwealth of Independent States’ (CIS) “common markets”.

In their essence these provisions do answer Russia and the EU’s strategic interests, although at the first glance several details might seem unacceptable for politicians both in Russia and the EU. Fixing these (or any other goals) on the bi-lateral level must become the indispensable pre-condition for partnership. It is a very difficult task indeed, and its implementation might require a long period of time as well as significant resources, besides mutual readiness for compromise will be required. No sooner than the partners agree the goals for strategic partnership should they start creating common instruments and institutions, shaping action plans etc. It is clear that practical cooperation in a broad spectrum of fields should be continued in parallel with coordination of goals.

Values As the Basis for Strategic Partnership

There is more similarity than difference in the value systems, both political and cultural, of Russia and the EU. The majority of Russians consider themselves Europeans. Also they consider Russia as a European state although with substantial peculiarity. Respecting human rights, democracy principles and rule of law have been laid in the basis of Russia’s political system. The majority among political elite recognize their significance. By cooperating with the EU and the Council of Europe as well as with the other international organisations and by signing dozens of international conventions and agreements Russia admitted that human rights are not solely her internal matter. So as such the EU activities aimed at promoting democratic trends in Russia must not excite negative reaction; the attempts to formulate the certain minimal standards and monitor them cause ambiguous reaction, but basically they do not run against Russia’s interests. Just three nuances of the EU approach provoke Russia’s justified irritation:

- 1) the attempts to impose Russia the EU’s own perception of values and its own detailed standards;
- 2) the EU’s aspiration to consider itself an example for respecting democracy principles and human rights and the higher authority, which owns the right to evaluate the others;

⁹ V.Putin, Speech in the Bundestag of the Federal Republic of Germany. September 25, 2001, Berlin, at: http://president.kremlin.ru/eng/speeches/2001/09/25/0001_type82912type82914_138535.shtml

¹⁰ “Izvestia”, No 82, 15 May 2007.

- 3) the double standards in the EU political practice.

Common values and human rights could be transformed from the method of political pressure into the functioning partnership instrument in the following way:

- 1) To fix bi-laterally the basic list of common values (it can be found upon the European Convention on Human Rights).¹¹ In future it would be feasible to pass to elaborating common minimal standards in this sphere.
- 2) To agree that while sharing common values the cultural and historical peculiarities must be acknowledged. Unity in diversity – this EU internal principle must become the rule for the external policy.
- 3) To insist upon constructive dialogue on all the facts of infringing human rights and common values both by Russia and the EU Member States and fix clearly the partners' mutual commitments in this sphere. These infringements are neither Russia's nor the EU internal matters. A number of provisions included in the Treaty on European Union (TEU) in 1997 obliges the Member States respecting basic values and introduces the system of sanctions against the countries violating these provisions. These sanctions were already applied against Austria. And lastly, many facts of violation of human and minority rights in the new EU Member States demonstrate that this problem is no more of a theoretical interest only.
- 4) Human rights issues cannot be used as a bargain instrument to achieve the other goals. Thus the dialogue must be initiated on the issues, which cause mutual understandable concerns (for example, immigrants in Russia and the EU Member States, the inadequacy of the system of putting people in the terrorist list etc.).

If the EU insists upon using conditionality principle in the external policy, the mutually accepted decision might be in putting conditionality upon the reciprocal basis – establishing bilateral principles of political conditionality. If the EU wants preserve the possibility of applying sanctions towards Russia for violation of common values, it should be accepted that Russia applies the same sanctions towards the Member States, and these sanctions must not be regarded as a step against the EU as a whole. Human rights issues should not be considered just as the EU's claim to Russia; this is the common problem, although it differs in particular aspects, and the area for joint efforts and activities. EU-Russia permanent consultations on human rights are the main instrument for the dialogue. It still has not yielded any tangible results - previous EU-Russia meetings have often been clouded by mutual accusations of human rights abuses. The main achievement in this sphere is the mere fact that the dialogue is taking place, in the course of which not only problems inside Russia and EU are discussed, but global issues as well, for instance, through the UN Human Rights Council (Russia was elected as a member in May 2006). The idea of reciprocity in respecting human rights was supported by Russian non-governmental organisations (NGOs) in their open letter in July 2005 just after the first round of consultations took place. Human rights activists enlisted a number of issues of mutual concern – migration, terrorism, mass media, electoral rights, independent judicial system. In the other words, the political dialogue about values should be transformed and placed upon reciprocal basis on all stages: formulating of common values, mutual commitments, symmetrical character of mechanisms of negotiation and monitoring.

The Quality of Political Partnership

The European Union's positions on the basic issues of world policy stand closer to Russia's approaches than those of her other main partners. First, the adherence to democratic values and peaceful settlement of conflicts should be mentioned as well as multipolar vision of the world, the UN role, the priority of preventive diplomacy, support of the non-proliferation regime and fight with terrorism. For all that it is also important that both Russia and the EU feel responsibility for the situation throughout the world.

Today the political dialogue is purely declarative in its many aspects. In the best case it leads to formulating common positions on a number of world problems, that does not entail the agreed

¹¹ It might not be included into the text of the treaty. Probably the political declaration would be the best option, especially because this list might be enlarged or précised in future.

actions of partners. Besides, even in case it results in taking mutual commitments, they often remain unfulfilled.

From the EU side the low quality of partnership can be explained by the increasing gap between the external policy positions of the Member States (mainly the discrepancy between the “old” and “new” Europe) and the intensified practice of adopting external policy decisions on the base of the “lowest common denominator”. This, combined with a strongly ideological component in foreign policy, engenders the exclusive approach towards Russia. Some technical peculiarities also impede EU ability to develop relations with Russia, notably cross-pillar nature of the EU foreign policy that complicates coordination of CFSP, external relations and external trade; pending CFSP construction because of failure of the EU Constitution; vague distribution of competence between the EU and Member States.

From the side of Russia there are fears to lose the opportunity of “laissez-faire” and of carrying out multi-vector foreign policy. There are concerns that acceptance of the value concept as the basis for external policy would threaten Russia’s relations with some of her traditional partners. Russia perceives the current reality of external policy as the zero-sum game, and thinks that many EU activities are aimed at decreasing Russia’s role in the regions of her historical influence. These perceptions are often justified.

The development of political cooperation depends mainly upon the partners’ ability to agree their strategies in the CIS region, which belongs to the sphere of Russia’s special interests and at the same time is becoming more and more significant for the European Union. Nowadays the post-Soviet space has turned into the area of rivalry between Russia and the EU. Russia justly regards the region as the sphere of her special interests and tries by all means not to admit the other actors to play on this field. The EU, while constantly stressing the need for the agreed policy, perceives it as just its own unilateral actions and is sincerely amazed at Russia’s refusals to join them (for example, ENP in general or the Black Sea Synergy). Basically, the situation on the CIS space looks like *Zugzwang*: neither Russia, nor the EU is able to implement their own strategies, but they block each other’s efforts quite successfully. Transition from the strategy of concurrence to that of cooperation is the extremely difficult task, which will demand serious compromising from both partners.

Political partnership between Russia and the EU could be based upon the following principles:¹²

- Real partners’ equality, which pre-supposes common shaping of political positions and further joint activities for their practical implementation. It seems unfounded making references to the fact that the EU political positions have already emerged from the complicated compromise and thus can’t be changed. If the EU aspires to political partnership, it should start considering the partner’s positions.
- Common values as the basis for the external policy. Russia should reconsider her cautious approach towards value-oriented foreign policy, and the EU, from its side, needs to weaken the value aspect of external activities. For example, Russia’s policy in Belarus should be based not just upon interests (especially because their realization is often complicated by the very substance of Belarus’ political regime), but also upon unbiased and clear evaluation of the political situation in Belarus. The EU, in its turn, should review the obviously ineffective strategy of Belarus isolation.
- The comprehensive approach to political partnership implies, first, the principal willingness to discuss and carry out the agreed external policy in all spheres, when feasible. Second, it means execution of the agreed positions by means of the whole tool kit – diplomatic, political, economic and military-political one, that will allow using the strongest sides of both partners.
- Shared responsibility, which should not be understood as dividing the spheres of influence. It is supposed that on the basis of the agreed positions and with the account of the partners’ mutual interests and their resources, one of them takes the leadership in one or other practical actions.

¹² D.Danilov, ‘Current situation and Prospects for Russia-EU Cooperation in the External Security Sphere’, in: Yu.Borko, D.Danilov, *Russia – European Union: the Strategy of Strategic Partnership*, (Moscow, IE RAS, 2005), pp. 7-35.

- Accepting that the partners' positions might differ in the certain, but at the same time rather significant issues of external policy. For example, the EU's specific interests in the Mediterranean and Russia's specific interests in the Central Asia and in relations with China. It is necessary to learn how to live with these differences and avoid tying together various external aspects. The objectively different partners' interests in several spheres should not block their agreed actions in the other fields.

The intensive discussion for finding common strategic goals and partners' interests should become the first step to building political partnership. On this basis it would become possible to start elaborating the agreed positions in a number of external policy issues, and further on working out joint action plans. The military-technical cooperation can become the element, which is able to significantly increase trust in partners' relations.

The task of constructing political partnership seems realistic regardless its difficulty, and in the light of the feasible alternatives it looks necessary. In the middle-term perspective Russia in the absence of political partnership with the European Union will face the growth of isolationist trends, which will inevitably decrease her role in the world (even the functions of a balance between East and West, which is strongly supported by some Russian experts, can be fulfilled by Russia only if she would have trustful relations with both). In the absence of political partnership with Russia the EU will not have chances to become the real world pole of influence and will be doomed to the secondary role on the world arena. And, finally, the task of ensuring stability in the region of Eurasia/Greater Europe can not be fulfilled without political partnership between Russia and the European Union.

Economic Integration

Russia's strategic goals in the sphere of economic policy are diversification of economy and export; transition from the resource-oriented development to innovation; decreasing resource intensity of GDP; completing the process of inclusion into world system of division of labour and gradually becoming one of the key actors shaping rules of world economic system. Thereupon Russia is interested in the EU as the source of technologies and investments as well as potential partner in forming principles of the world economic system. In addition, intensive and constructive economic cooperation must become a basis for political partnership and might soften probable contradictions in the certain issues (the latter situation one can observe in the USA-China relations).

In economic sphere the EU aspires to increase competitiveness on the base of innovative development and decrease in labour costs (Lisbon strategy); to develop new markets for sale of industrial production; to ensure energy security.

The potential effectiveness of EU-Russia economic cooperation (integration) is determined by mutual complementary of the partners' resources. Among Russia's concurrent advantages there are relatively cheap and qualified labour force; natural resources, including recreation capacities and the "ecologic" agriculture potential; the developed fundamental science and still preserved scientific and technical resource; Russia's transit position, which opens access to the Asia Pacific; the large and already solvent national market as well as the access to the CIS markets. The European Union possesses the competitive advantages as well: capital stocks; high technologies and the mechanisms for transforming scientific and technological developments into economically effective technologies; experience and know-how in the sphere of management; energy saving technologies and economic mechanisms for stimulating energy saving; high level of influence upon the global economic rules. Joining EU-Russia resources is able to provide the breakthrough in increasing global competitiveness of the partners' economics. To achieve this it is necessary:

- To continue the work for lifting trade barriers: facilitating administrative and custom procedures, harmonizing certification rules etc;
- To study possibilities for technologic integration (establishing technologic chains) in some sectors with a key task to minimize costs of production.
- To spread the exchange of assets (which has always been Russia's main idea) to the whole sphere of economy. Here the key task is fair sharing of responsibility and profits.

- To shape the task for the perspective: this is the establishment of Russian-European trans-national corporations, which can be competitive in a global scope. They will base upon aggregated internal demand of the EU, Russia and CIS markets.
- From the ad hoc scientific and technical cooperation (by means of engaging in a number of joint research projects) to advance to synchronizing the strategies of scientific and technical developments, and perhaps to elaborating common framework programmes. In the strategic perspective the scientific and technical cooperation is much more important for the partners than that in the field of energy.

Economic cooperation can and must be denser than political one; it must possess the character of integration. Otherwise there will be no chance to achieve the defined goal. In view of this the harmonization of legislation is inevitable, and it can be implemented in three forms. First, in the form of mutual recognition of standards (certification etc); it is preferable for Russia, but still is not always feasible because of the EU position. Second, by means of harmonization of standards and normative/regulative rules as well as business practices. Naturally, it is realizable only in the form of adapting Russia's legislation to *acquis communautaire* (the EU will never agree to changing *acquis* either for Russia or for any other state, neither will any outsider be admitted to developing *acquis*). In essence, Russia might benefit from creative and selective incorporation of *acquis* into national legislation not only in the light of the relations with the European Union, but for the sake of the internal economic development (why to reinvent a bicycle?). However, it should be done very carefully basing upon the detailed analysis of Russia's interests and in a voluntarily way, with no fixation in advance of any commitments of legislative adaptation. Third, EU and Russia can initiate harmonization of standards and rules in the framework of multilateral organizations like the World Trade Organisation (WTO). Or why don't to think about a multilateral investment regime that is urgently necessary; countries of G8 and other global economic majors may contribute to its development.

After Russia's joining the WTO the preferential regime between Russia and the EU will lose its privileged character. It is the economic integration on the basis of the analysed positions, which will allow establishing EU-Russia economic partnership on a new level. The partners should not head for any particular form of economic integration; the form will arise from their interests and goals. One can suppose that EU-Russia economic integration will stand a chance to be implemented in the form of FTA "plus-minus", i.e. with exclusions in some sectors and more integrated regimes in the other ones.

The Treaty on Strategic Partnership

The legal base of EU-Russia relations was established in the form of the Partnership and Cooperation Agreement (PCA) in 1992-1994, when Russia was rather different. Nowadays qualitative changes have occurred in Russia. The legal basis was formed for the quite new business management, which in fact corresponds to the international requirements and standards. Russia's economy is advancing. Russian business and capital has achieved the level, which allows it becoming an active participant of the investment processes in Europe. Ideally, to break the conditionality logic of Brussels Russia needs the new basic Treaty, updating the current legal framework. The endless annual prolongation of the existing PCA might cause regular uncertainty every time as the moment for extension is coming. Besides, discussion on the new Treaty gives an opportunity to raise all the controversial issues in the relations. The new treaty must become more holistic document, which would go beyond the WTO frames and provide for the deeper, more advanced and more fundamental basis for EU-Russia relations. However, even after negotiation start, there exist no reasons to believe that they could be completed in the short time and the result would suit both sides. This is not just a new treaty needed at any price, but the *sui generis* document, quite different from any agreements, which the EU has until now concluded with the third countries. This creates a challenge for both: the EU possesses no experience in elaborating the comprehensive agreements on the equitable basis with its partners: either with the USA, or with Switzerland or Japan. Russia demonstrates strong feeling for such agreement, which naturally demands new responsibilities and obligations as well as clear formulations different from those of the association agreements and PCAs. In our view, this 'creative challenge' must be encouraged and welcomed: let's remember that in its time the PCA with Russia has

become a new type of agreement followed with the identical ones, thus introducing a new type of legal basis for the EU relations with the third countries.

However, now it is already clear that in certain directions Russia and the EU have initially demonstrated different approaches to the priorities for cooperation, as well the balance of interests.

First, the new Treaty is supposed to include provisions on common values as the basis for partnership. The principles of such inclusion are expected to be discussed in the negotiations about the new Treaty. In the other words, will the human rights clause be included and in what way?

The first option supposes excluding everything that could be interpreted as political conditionality, which would allow the European Union conditioning Russia's internal developments by putting the whole system of relationship in dependence of the evaluation of Russia's achievements in her domestic reforms. If the political conditionality is preserved in its current interpretation, it threatens to become the instrument for bargaining and forcing concessions from Russia, mainly in the field of energy. However, another option seems to have more chances for being accepted: if the conditionality principle or value-based foreign policy is reconsidered – both partners must make decisions whether they answer the requirements of democracy, human rights and common values.

Value-based policy can be effective only in case, when Russia is recognized as an equal actor of partnership, but not the passive object of the EU policy. Thus the answer might be the conditionality clause in the Treaty, which pre-supposes reciprocity¹³. To have conditionality principle working upon reciprocal basis, it is needed clearly formulating the human rights clause so that to avoid ambiguity, and, besides, elaborating procedures and rules for implementation of agreements in this sphere.

Russia demonstrated her interest in human rights issues in the EU Member States by creating the Russian-European Institute for Freedom and Democracy based in Paris. The goal of the new institution was formulated by President Putin at the EU-Russia summit in Marfa in October 2007 as facilitating dialogue between members of the non-governmental structures and experts on issues such as organisation of the electoral process, monitoring of elections, situation with national minorities and migrants in the territory of the EU and Russia, freedom of expression and other vital questions. The new initiative might mean that Russia is going to influence the human rights situation in the Member States and take it into account in the relations with the EU.

Second, the title on energy, which is being highly emphasized by the EU, is certainly very important for both sides. There is no doubt that the discussion on Russia ratifying the Energy Charter Treaty (ECT) should be taken off the agenda. But should the energy issue become the core of the Treaty? Then why not to include the provisions on innovation and technical cooperation, which is very important for Russia, in the core as well? It is worth mentioning that research and high-tech remain among the less prepared parts in the draft Treaty. Yes, there is no doubt that several provisions on energy should be part of the framework document (balance of interests, responsibilities of suppliers and consumers), but the detailed rules on energy cooperation as well as on transport, infrastructure, agriculture, industry etc might become the subject of the special blocks¹⁴.

Third, the title on the free trade area. The consultations on this issue have neither brought visible results. Russia is considering FTA very cautiously, more cautiously than joining WTO bearing in mind that interests of manufacturing industry should be protected. Russian Ministry of Industry and Trade and the respective European Commission General Directorate continue informal consultations

¹³ The PCA contains already the reciprocal conditionality clause. However, it hardly coincides with the certain provisions, for example: "BELIEVING that the full implementation of partnership presupposes the continuation and accomplishment of Russia's political and economic reforms; TAKING ACCOUNT of the Community's willingness to provide technical assistance, as appropriate, for the implementation of economic reform in Russia and for the development of economic cooperation..."(Preamble); and art. 86 "In order to achieve the objectives of this Agreement, in particular Titles VI and VII thereof, and in accordance with Articles 87, 88 and 89 Russia shall benefit from temporary financial assistance from the Community by way of technical assistance in the form of grants to accelerate the economic transformation of Russia".

¹⁴ "The text in general should not be too extended, this is not the Christmas tree, where all the toys should be hang. It should be the document, which carries the signal to the EU and Russia's people as well as to the whole world community: the EU and Russia are indispensable partners". S.Riabkov, Director of the Department of European Cooperation of the RF MFA. The interview to the "Voice of Russia" Radio Station, 25.04.2008, at: <http://www.mid.ru/ns-dos.nsf/162979df2beb9880432569e70041fd1e/432569d800223f34c32574390020f141?OpenDocument>

for the feasible study of concluding a new trade agreement. The consultations are informal, while the formal process can be launched as soon as Russia joins WTO and her rights and commitments in the frame of this organization are fixed in the final shape.

Russia's proposals on the Treaty structure are as following: the legally binding general part setting the framework for cooperation (rather than just the political declaration on strategic partnership), where the mechanism of interaction should be fixed as well as the general principles of cooperation. The Treaty as a framework document by its content and sense should include provisions, laying the foundation for more specific sectoral agreements as well as making references to the already existing and designed ones. The Treaty will fix the consistent goals and the main provisions of the road maps. However, it does not mean that the whole text of the road maps should be transferred to the new document. The economic part must become the most important element of the Treaty. However, it should be formulated in the most general manner – as the majority of the special issues like the trade regime, movement of capital and labour, intellectual property etc. will become the subjects of the special agreements, developed as soon as they 'ripen'. The Treaty can not fix the details of the trade regime in view of its frame character; besides the respective commitments imply Russia's membership in WTO. The issues of security, both external and internal, should be put ahead of the economic part. The new Treaty will be more balanced compared with the former PCA by emphasising the need for the security issues rather than only trade and investments.

It should be stressed that the true strategic partnership is unachievable as long as Russia keeps on accepting financial assistance, even considering its very modest range. The Resolution of the European Parliament on the EU-Russia summit in Samara held in May 2007 reiterates its view "that a robust defence of human rights and democratic values should be a core principle of any EU engagement with Russia" and urges the Commission "to ensure that these values do not have a subsidiary status in the EU-Russia negotiating package and that any financial assistance granted to the Russian authorities takes into consideration the strengthening of democratic standards in that country".¹⁵ The experts' opinion survey carried out by the EU-Russia centre in Brussels showed: the majority of recipients point out the EU's ineffective evaluation of Russia's reforms, which have been supported from TACIS¹⁶, in the other words, the EU is not strict enough in demanding from Russia the results in domestic reforms. And these sentiments could be understood: if Russia keeps on relying on the EU financing the administrative or judicial reforms, whatever small it is, there should be no surprise that the EU tries to influence the process, criticizes its stagnation and expresses dissatisfaction with the outcome of TACIS audit in Russia. So the relations should be changed from 'the EU financial assistance' to 'financial cooperation' not only in rhetoric, but in practice as well.

In this consequence Russia's initiatives seem very comforting for joint financing trans-border projects in the "Northern Dimension" frames as well as the programmes of regional cooperation based on the European Instrument of Neighbourhood and Partnership (ENPI). The latest co-financing was agreed at the Samara summit and concretised in October 2007 at the summit in Mafra (Portugal); first seven transborder projects based on parity and common financing were adopted in June 2008 at the summit in Khanty-Mansiysk. There exist very prospective undertakings like the joint financing the educational and training programme (the European Studies Institute at the Moscow State Institute of International Relations (MGIMO-University of the Ministry of Foreign Affairs). Russia could and should invest as well in educational programmes in the EU states, organize seminars, distribute grants to the students, who wish to study in Russia, and lastly, support non-governmental pro-Russian organizations, i.e. do the same as that the EU and the Member States have successfully implemented. Of course, there is a high probability that the new Treaty would be a rather banal document, another exercise of bureaucrats in hiding the complex reality in vague polite phrases. In this paper we've tried to show that the EU and Russia have real common strategic interests. This is a common challenge: to

¹⁵ European Parliament resolution of 10 May 2007 on the EU-Russia Summit to be held in Samara on 18 May 2007 10.05.2007, Brussels, at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0178+0+DOC+XML+V0//EN>, last visited 20 June 2008.

¹⁶ The EU and Russia: Perspectives on Strategic Partnership. Expert Opinion Survey. A Report by EU-Russia Centre, May 2006.

overcome everyday irritations and to transform common interests into the shared interests and mutual vision of the future.

Updating the EU-Russia Legal Approximation Process: Problems and Dilemmas

Aaron Matta*

Introduction

The EU-Russia relationship today differs greatly from that almost two decades ago when official relations were initiated. The EU has grown into a geopolitical and economic ‘colossus’ after enlarging to 27 member states, and Russia has become a strong sovereign state with a market economy and rapidly growing political and economic influence, regionally and internationally. These changes, together with the urgent need to renew the legal framework on which the relationship is based, bring the question of legal approximation to a crossroads: if the Partnership and Cooperation Agreement (PCA) does not offer any kind of EU membership (even in the hypothetical case of Russia being interested in it) or any concrete type of economic integration (the PCA merely includes a vague mention of the possible establishment of a Free Trade Area), why should Russia embark on any kind of *acquis* adoption? Should the next agreement include legal approximation? And if so, in what way? And ultimately, is legal approximation the best way to bring the partners closer together in order to avoid further misunderstandings? These questions are legitimate and will be on the bargaining table when the next agreement is negotiated, and some will probably remain unsettled for much longer. Regrettably, instead of finding common ground on these issues, one side meticulously complains about the need to observe mutual commitments, while the other rejects paternalistic and ‘benchmarking’ approaches. EU-Russia relations thus increasingly look like an obligatory coexistence, in which one side cannot run away from the other, so to speak. All these issues, while not reverting to the previous ‘cold war’ state of affairs, are increasingly provoking a ‘*boiling peace*’ status in which any political manoeuvre from one side is seen with worrying suspicion by the other. This is so because both actors, besides their conflicting but also interdependent geopolitical, economic and cultural dimensions, have been constantly evolving. As a result, defining common objectives and common values with regard to what it is that they want and expect from one another has become an ‘odyssey’, despite their linked geographical and historical backgrounds.

The aim of this paper is to scrutinise the main causes of misunderstanding and the source of the main EU-Russia relations problem, the ‘where are we going?’ question, especially, ‘are WE going there together?’ The answers to these questions represent a dilemma for EU-Russia relations. Unfortunately, they have often been interpreted or rather misinterpreted by the two sides, creating as a result conflicting views of what each side understands of the other side’s intentions. The problem in question goes back to one of the most ambitious, but at the same time one of the most controversial, provisions of the EU-Russia legal framework - the ‘legal approximation process.’ This process started with the Partnership and Cooperation Agreement,¹ which is the main legal basis of the relationship as it currently stands.

In order to better understand the main constraints and dilemmas between the partners that lead to misunderstandings and frustrations when dealing with each other, I will analyze the EU-Russia legal framework through the prism of legal approximation. I will first define the parties’ common incentives in general and Russia’s specific motives in particular for engaging in such a process (I). I will then evaluate the logic and implications of legal approximation itself (II). Next, the mechanism of conditionality towards Russia and its negative effects on the legal approximation process will be critically appraised (III). Further, I will look into the approximation-without-membership quandary (IV). Finally, in my conclusion I will make some suggestions as to how a future legal framework could overcome the current problems (V).

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¹ The Partnership and Cooperation Agreement was signed on 24 June 1994. In English: OJ 1997 L 327/1, or in Russian: C3 PΦ, 1998. N 16, cr. 1802. This novel type of agreement, like the TCA, is a *mixed agreement*, which includes the involvement of both the Community and the member states on the EU side.

An overview of the EU-Russia Legal Framework from the Approximation perspective

After the collapse of the USSR, the EU (then the EEC) decided to engage with the republics of the Soviet bloc beyond the 'trade and cooperation' relations that already existed under the Trade and Cooperation Agreement (TCA),² elevating them to 'Partnership'³ status. As a result, 'Partnership and Cooperation Agreements' were signed with the Commonwealth of Independent States (CIS), the first of them with Russia in 1994. The PCA is legally based on the EC Treaty⁴ and established separate frameworks of bilateral cooperation as an alternative to membership, while not rejecting this possibility either.⁵ The PCAs' main objective was to transform the Soviet economies into market economies in WTO/GATT terms, which explains why the texts of the agreements coincide almost completely. The objectives of the partnership are defined in the first article of all the PCAs in similar and broad terms, but if we look in detail at the PCA with Russia it becomes clear that its objectives are more elaborate.⁶ This highlights the unique position of Russia in Europe in general, and in the changing geopolitical environment surrounding the EU at the time⁷, and it also distinguishes Russia from the other CIS countries. At the same time, the PCA approach shows the genuine intention of the Community to engage in supporting the Soviet bloc as a whole in its transition from a command economy to a market-based democracy.

Despite this intention to support the transition process, it took more than three years for the PCA with Russia to enter into force since each EU member state had to ratify it. Delays were also caused by harsh criticism from the EU side during the first Chechen war (1994-96). However, despite these impediments, an 'Interim Agreement' on trade-related matters was signed in 1995 and entered into force the following year in order to implement the provisions concerning trade without delay.⁸ It was only in December 1997 that the PCA with Russia entered into force. This agreement can also be described as a *framework agreement*, since it contains provisions for the establishment of an institutionalized dialogue between the parties on political, economic, legal and cultural issues. In general, the PCA provides 'reciprocal rights and obligations, common action and special procedure'. But in more particular issues Russia promised to implement reforms adopting the '*acquis communautaire*' in some specific areas. Here we encounter what in my view represents one of the most controversial provisions of the agreement and the main subject matter of this paper – the unilateral legal obligation on Russia to transform its legislation in accordance with that of the Single Market. The questions that arise in this respect are: What is the rationale for such an undertaking? In other words, why should Russia accept such a unilateral approach? And to what extent must Russia enter into such a process since there is no membership objective?

To answer these questions, we have first to go back to the Russia of the beginning of the 90's when the Agreement was negotiated. In that period, the Russian Federation had inherited all the rights and duties of the USSR but with them also the collapsed political and economic system of the Soviet Union. Russia urgently needed to restore stability in all areas in order to avoid the newly-formed state from crumbling. Moreover, in order to keep the country 'breathing' there was the worrying necessity of creating specific national interests and of finding a state concept, or as some have put it: the

² In 1989 the EEC and the USSR signed a 'Trade and Cooperation Agreement' (TCA), OJ L 68/3.

³ This concept gives a differentiated and higher level to the relations, although the term 'partnership' is not legally defined in the EC Treaty. This fact has been problematic for the creation of common objectives. The Lisbon Treaty, however, does mention that the term is directly based on democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. Art. 10 A (1) of the Treaty of Lisbon, OJ C 306/50.

⁴ Namely articles 44(2), 55, 71, 80(2), 93, 94, 133 and 308 EC.

⁵ There is no reference to EU membership in the PCA, but neither is there a provision impeding that possibility. Additionally, most provisions are closely aligned with the Copenhagen criteria for membership.

⁶ It refers to cooperation as 'mutually advantageous', a peculiarity lacking in the other agreements. This mention of beneficial reciprocity is actually continuous, or rather persistent, in the PCA when stating that the relations are 'founded on the principles of mutual advantage, mutual responsibility and mutual support' in economic, social and cultural cooperation.

⁷ Panos Koutrakos; 'EU International Relations Law'. Hart Publishing, 2006. p. 364.

⁸ This has often been an object of criticism as regards the differentiation by the EU of interests and values. But one could see a similar approach during the Soviet invasion of Afghanistan in 1979, when relations between the EU (then the EEC) and the USSR became minimalistic and even hostile. Besides, this could also be seen as a prolongation of the previous TCA provisions until the PCA was ratified.

‘Russian Self’,⁹ especially after the ‘communist ideals’ had disintegrated together with the Soviet Union. Crucial steps towards this objective were the adoption of the Constitution of the Russian Federation in 1993 and later the Civil Code in 1994. These were vital measures for Russia to obtain internal political stability. As regards external political security, there had been a certain level of regional stability in the former Soviet bloc through the CIS matrix since 1991. Since this was not felt to be enough, and in fear of isolation in light of the scarcity of established contacts with the West following the Cold War, further steps were taken in order to achieve external political stability with the rest of the world. This took place mainly through engagement with different international organizations, such as the North Atlantic Treaty Organisation (NATO), the Organisation for Security and Co-operation in Europe (OSCE), and the Council of Europe.

Once political stability was achieved at least to a minimum degree, Russia concentrated on achieving economic stability.¹⁰ Moscow entered into dialogue with the World Bank, the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD). Additionally, Russia applied for World Trade Organisation (WTO) membership in 1993; to become a member it was, however, required to achieve a stable market economy first. In order to restructure and diversify the Russian economic system, reforms were urgently needed. For the purpose of this transition, different legal models for Russia were studied in detail. The EU model, besides being the best compromise between the Anglo-Saxon and the Continental legal families,¹¹ also interested Russia because of its social economy elements¹², as well as for clear economic reasons of vicinity.¹³ Furthermore, Russia also inherited the TCA from the Soviet Union and with it a trade engagement with the EEC. However, the new landscape in the continent meant a new vision was needed in order to update relations. The parties therefore entered into negotiations on a new type of agreement – the Partnership and Cooperation Agreement.

The PCA with the EU¹⁴ has been the main legal tool for developing the Russian economy, which explains why most of its provisions are related to trade issues and are based on WTO rules.¹⁵ Moreover, the PCA includes the possibility of the creation of a Free Trade Area (FTA) between the Parties in the future. To achieve these difficult aims, Russia needed help and guidance since it lacked the financial resources and the technical expertise to do so on its own. No one offered so much financial and technical assistance to Russia as the EU.¹⁶ These circumstances explain why Russia made the ‘pro-European’¹⁷ choice by signing the PCA in 1994. On this occasion, Boris Yeltsin claimed, “Russia has made a strategic choice in favour of integration into the world community and, in the first instance, with the European Union.”¹⁸ Throughout the 90’s Russia never gave up this long-term idea of closer integration with the EU.

The proposed method for this integration was the approximation of legislation. The rationale for such an approach is indicated in the PCA itself, which mentions that approximation is ‘an important condition for strengthening the economic links’, not only between the parties but with the world economy as well. Therefore, Russia embarked upon a two-headed project; to enter the WTO by

⁹ For more on the debate on the ‘Russian Self’ see Leshoukov, Igor: ‘Russia and Stability in Europe: Myths, Paradigms and Interests’ in Igor Leshoukov et al. (eds.) ‘Forty years of the Rome Treaties: European Integration and Russia’. St. Petersburg 1998 (In Russian).

¹⁰ These two processes did not follow one after the other but evolved in parallel, although political security and stability were a priority at the time.

¹¹ The Russian legal system is close to the Romano-Germanic family.

¹² The Social market economy model of the EU is something Russia identifies itself with due to its Socialist past.

¹³ The EU has always been the most important market for Russia.

¹⁴ The World Bank, the IMF and the OECD also engaged with Russia’s economic Transition.

¹⁵ These provisions include: a common trade framework, lower tariffs and fewer non-tariff barriers to trade, improved market opening and stronger property rights.

¹⁶ TACIS is the largest technical assistance programme to Russia, with total cumulative commitments reaching almost €2,000 million since 1991. It is by far the largest of the NIS. TACIS Programme Annual report from the Commission 1999. Brussels, 20.12.2000. COM(2000) 835 final, p. 30. See at:

http://ec.europa.eu/external_relations/ceeca/tacis/an_report_en.pdf

¹⁷ By using the term ‘Pro-European’, I emphasise that Russia not only made a European choice but also a pro-EU choice.

¹⁸ See Boris Yeltsin’s speech on the occasion of the signing of the PCA in Corfu on 24 June 1994. New York Times article ‘Russia and European Union Sign Accord for Free Trade’ of June 25, 1994.

engaging in legal approximation with the EU in order to transform its economy, while not excluding the lucrative possibility of having access to the Single Market. In other words, if Russian legislation was in line with that of the EU it would therefore be in line also with that of the WTO. Thus, either approach would help develop its economy and integrate it with the rest of the world. While other neighbouring countries engaged in the same approximation process with the EU for the price of membership, Russia engaged in it for WTO membership and potential access to the Single Market.

To conclude, one can summarize the main reasons for Russian engagement with the West in general by identifying five of its primary incentives, of which the last three in particular are directly related to the legal approximation process with the EU. Firstly, Russia was in need of political and economic security and stability. Secondly, there was fear of isolation and the lack of defined national interests or a state concept. Thirdly, Russia had to develop its economy in order to enter the world market through the WTO regime. Fourthly, it needed financial resources and technical expertise to carry out reforms. And finally, Russia was aiming at potential access to the Single Market in the long term.¹⁹ Now that we have identified the main rationales for EU-Russia engagement, let us examine the legal approximation features of the engagement itself.

The Legal Approximation Process in context

Article 55(1) of the PCA on legal cooperation states that; *'The parties recognize that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.'* As stated in this article, in order to strengthen economic links between the parties an important requirement for Russia is to engage in a unilateral process of legal approximation. Nowhere in the agreement is it envisaged, however, that the EU should do the same with respect to Russian legislation. The EU obligations are restricted to the provision of assistance in this process.²⁰ It is difficult to imagine that the EU would revise the *acquis* so as to converge with the transforming Russian legal system. Furthermore, the next phrase of this paragraph includes two nuances: *'endeavour to ensure'* and secondly, *'its legislation be gradually made compatible'*. While the first provides for a voluntary and non-obligatory approximation of legislation, the second one declares that the legislations must be compatible but not identical. Consequently, the process of legal approximation can be described as a voluntary 'political' choice of bringing Russian legislation into tune with EU legislation in the spheres of law mentioned in the Article. Even if not successful, Russia may well not be liable for not fulfilling the PCA obligations. The use of the term 'legal cooperation' in the title of the article seems more consistent in this sense.

The legal approximation process became more controversial after the 2001 EU-Russia Summit when, in parallel with the WTO tough accession negotiations and in the framework of the PCA, the parties launched the Common European Economic Space (CEES). This term first appeared in the 1999 Common Strategy,²¹ which was the first document to acknowledge Russia's relationship with the EU as a 'strategic partner'. The CEES concept is a long-term objective aimed at creating an integrated market between Russia and the EU based on the 'progressive approximation of legislation' from the Russian side 'in accordance with EU rules and procedures'. As a response to this tight approach, Russia elaborated its 'Medium-Term Strategy',²² clarifying that 'accession to' or 'association with' the EU were off the Russian agenda for the term of the strategy until 2010. With this new agenda Russia

¹⁹ Moreover, the preamble to the PCA explicitly states the main reasons for the parties to engage in these legal relations. Primarily they are 'to promote the prosperity and stability of the region' and for the 'implementation of economic reform in Russia for the development of economic cooperation' through the 'development of trade and investment in particular' 'which are essential to economic restructuring and technological modernization'.

²⁰ Other provisions of the PCA also deal with legal approximation, for example art. 53 (4) regarding competition rules. These however only refer to technical assistance from the 'party with experience', in this case the EU. In this sense the EU is merely restricted to assistance. Moreover, these provisions do not give any additional obligations to Russia to adopt the *acquis*.

²¹ OJ L 157/1. 24.6.1999. p.5

²² See unofficial translation in English at:

http://ec.europa.eu/external_relations/russia/russian_medium_term_strategy/

shifted away from the 'pro-European' choice to a 'Pan-European' one; a move that for the EU is still difficult to digest.

In 2002, the former Foreign Minister of the Russian Federation Igor Ivanov stated that 'Europe was more a moral world outlook guidance, than an institutional concept.'²³ By the same token, Chris Patten's speech the same year used softer terms, such as 'coherence' between the respective legislative standards.²⁴ Also the final report of the High Level Group for the creation of a 'Common European Economic Space' (CEES)²⁵ speaks of '*regulatory convergence*', but does not specify in which direction the CEES concept should evolve. Soon, the sides started to feel increasingly frustrated with one another's positions and could not find common ground to construct a future common neighbourhood in light of the EU 2004 enlargement and the forthcoming PCA expiration in 2007.²⁶ As a consequence, this hybrid integration model²⁷ slowly evolved into the Common Economic Space²⁸ in 2005, one of the four Common Spaces (the Common Economic Space; the Common Space on External Security; the Common Space on Freedom and Justice; and the Common Space on Culture, Science and Education).²⁹ These Common Spaces and their 'Road Maps'³⁰ were created in an attempt to update the relationship while Russia rejected the European Neighbourhood Policy (ENP).³¹ Not surprisingly, the Road Maps have been criticized for being merely a long list of political good intentions closely associated with those of the ENP. The '*ambiguous*' and '*fuzzy*'³² Common Spaces and their Road Maps cannot hold relations together on their own since they lack any legal binding power or clear objectives. Moreover, these documents show some ambiguity towards the legal approximation approach of the PCA. The Road Map for the Common Economic Space, while using terms like 'harmonised and compatible standards',³³ does not evoke any sort of catalogue with precise norms or standards in contrast to the documents which elaborate the ENP, and *a fortiori* the instruments of 'pre-accession'.³⁴ Therefore, we can see a shift in the approach to legal approximation in later policy documents and official statements towards much weaker language. In this sense, reference to concepts like 'convergence', 'coherence' or even 'moral guidance' is made in order to avoid discontent and create more mutual consensus. On the one hand, the language used refrains from making any connection between approximation and EU standards, thereby avoiding the impression

²³ Igor Ivanov (2002). Ne podavajas na ulovki Brusselija (Yield no trick of Brussels). Nezavisimaja Gazeta, 7 October 2002.

²⁴ See speech at: http://ec.europa.eu/external_relations/news/patten/sp02_235.htm

²⁵ Final Report of the High Level Group on the Common European Economic Space to the EU-Russia Summit on 6 November 2003 (Annex II), Rome, Italy, November 6, 2003. See at: <http://www.ln.mid.ru/ns-dos.nsf/162979df2beb9880432569e70041fd1e/ebea2dd03cd3c50a43256de1003a1f74?OpenDocument>

²⁶ By the end of 2007 after 10 years of existence the PCA was supposed to come to an end if the parties desired to terminate it or if a new agreement was negotiated. If neither of these events took place, which was the case, the Agreement would be automatically prolonged each following year maintaining its present form and content (Art. 106 of the PCA).

²⁷ The CEES is a combination of different levels of integration when compared to the traditional forms. It seems to incorporate some elements of a Free Trade Area, while excluding a Customs Union. At the same time it has some features of a Single Market and through legal approximation it also includes some elements of an Economic Union. But in the end it does not fulfil the criteria of any existing form of economic integration.

²⁸ It should be noted that the term 'European' was dropped from the title.

²⁹ Agreed at the St Petersburg Summit in May 2003. See more at: http://ec.europa.eu/external_relations/russia/summit_11_04/m04_268.htm

³⁰ Signed in Moscow in May 2005. See at:

http://ec.europa.eu/external_relations/russia/summit_05_05/index.htm

³¹ The European Neighbourhood Policy (ENP) was developed in 2004, aiming to simplify EU external approaches by putting all neighbouring countries under the same policy umbrella. See more at: http://ec.europa.eu/world/enp/policy_en.htm

³² Michel Emerson has called the Common Spaces 'the proliferation of the fuzzy' and 'another exercise in a reasonably courteous management ambiguity' ... 'lacking strategic guidance, policy instruments or precise definitions, the road maps do not really tell us where the relationship is going; the roadmaps to where? ...' "in terms of practicality, when at times of negotiations the parties have to be quarrelling about the way to implement the road maps to implement the common spaces to implement the PCA, it appears to be a laborious effort." Michel Emerson, EU-Russia, 'Four Common Spaces and the Proliferation of the Fuzzy', CEPS Policy Brief, No 71, Mat 2005, p.3. By the same token, Andrei Makarychev has described the language of the Common Spaces as 'the EU discursive strategy of uncertainty.' Andrei S. Makarychev, 'The four Spaces and the four freedoms: An exercise in semantic deconstruction of the EU discourse', Nizhny Novgorod Linguistic University Working Paper Series, No. 1-2, p.31.

³³ See at: http://www.delrus.ec.europa.eu/en/images/pText_pict/494/road%20maps.pdf

³⁴ Michael Emerson. Four Common Spaces and the Proliferation of the Fuzzy. 2005, CEPS.

that the Union is imposing its norms on Russia.³⁵ On the other hand, this approach also allowed Russia, to the Union's discontent, to 'cherry pick' EU legislation. It is clear that in the end it is up to Russia to decide whether or not to accept the EU's persuasions to embark on the legal approximation process.

Ironically, looking at this question from another angle, not only is it difficult for the EU to impose the EU *acquis* on Russia in the legal areas listed in article 55(2)³⁶ of the PCA, but it is also far from straightforward for the EU to prove that Russia has not 'endeavoured to ensure' that its legislation is 'gradually compatible with that of the Community' in the strict sense of legal approximation. This is especially the case because Russia has undergone several reforms in these areas, choosing the EU regulation model for its effectiveness, yet in reality striving for compatibility with the WTO regime.³⁷ So, if there is no direct legal obligation, or the other way around, if Russia 'promised to promise' to adopt the *acquis* in the areas specified in article 55 in the 'accession sense', why has the EU used the 'stick and the carrot' with Russia in similar ways as with the EU candidate states?

Now that the logics and implications of legal approximation have been analyzed, I will proceed to examine the main problems and dilemmas that hamper the progress of relations in the following sections: the use of conditionality and the integration without membership quandary respectively.

Conditionality as a constraint for approximation

As has been explained, the European Union engaged in reformative relations with the CIS countries in a 'missionary' way in order to develop 'security and stability in the European Continent'. In addition to this approach, which includes as its main component a soft mode of persuasion through political dialogue, the EU has also developed a specific instrument to ensure that partner countries truly engage in approximation processes by imposing coercive mechanisms, better known as 'conditionality'. In contrast to the missionary approach, this instrument is frequently perceived as aggressive 'neo-colonialism', with the EU exercising pressure on the recipient country to adopt its rules and standards. Further, the use of conditionality with Russia fuels the endless value-gap debate, generating as a result different obstacles to approximation, from misunderstandings to the loss of trust. One might wonder however, whether there actually is a value-gap between the EU and Russia, at least at the institutional level. In the PCA,³⁸ both sides commit themselves to follow the principles of the UN and the OSCE to which they were already committed before.³⁹ In addition, the Common Strategy declared the aim of applying the principles of the Council of Europe and the European Court of

³⁵ C. Prusianen. 'The Ambiguity of the CEES: a Strength or a Weakness?' RECEP 2004.

³⁶ 'The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, protection of health and life of humans, animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulation, transport.'

³⁷ Many reforms in line with EU rules have taken place in Russia in the fields mentioned in article 55(2) of the PCA, some examples are: Tax Law with the adoption of the Tax Code in 1998 (with the Amendments and Additions of March 30, July 9, 1999, January 2, 2000, December 29, 2000, May 30, August 6, 7, 8, November 27, 29, December 28, 29, 30, 31, 2001, May 29, July 24, 25, December 24, 27, 31, 2002, May 6, 22, 28, June 6, 23, 30, July 7, November 11, December 8, 23, 2003). Moreover, Customs Law with the adoption of the Customs Code in 2004 and amended the year after. Additionally, in the fields of Company law (with the Federal Laws 'on Joint Stock Companies', No.208-FZ, December 26 1995 and 'on limited liability Companies', No. 14-FZ, February 8 1998) and Competition law (with the Federal Law 'on the Defence of Competition', No. 135-FZ, July 26 2006), among others.

³⁸ See Preamble and General Principles (Art. 2) of the PCA.

³⁹ Russia proclaimed itself a democratic and law governed state (Art.1 Constitution of the Russian Federation of 1993), and has explicitly embraced the universal human rights principles (Article 17(1) of the Constitution declares: "The basic rights and liberties in conformity with the commonly recognized principles and norms of international law shall be recognized and guaranteed in the Russian Federation and under this Constitution"). The Russian Federation took full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations, including the non-economic basic rights embraced in the International Covenant on Civil and Political Rights (ICCPR) and the social economic rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Human Rights (ECHR), of which Russia has been a member since 1998.⁴⁰ This shows that Russia and the EU have common standards as regards 'European' values, and more importantly, common legal bases for their protection.⁴¹

These legal commitments have, however, shown themselves to be insufficient as an incentive for reform. The PCA, therefore, also includes a specific direct legal basis in case the principles are not applied. This legal basis is the so called "human rights clause" - or the 'conditionality' principle that constitutes an essential element of the agreement - whereby if there is any material breach of the agreement each of the parties can unilaterally suspend the implementation of the PCA.⁴² The use of this clause derived from the need of the EC, in its early trade agreements, to find a solution to the problem where a government of a partner country gravely violates human rights.⁴³ The EU borrowed this concept from the IMF's vast experience in dealing with economies in transition and used it for the first time in 1992 in the agreements with the Baltic States, Albania and Bulgaria; it has since become the EU's standard conditionality clause.⁴⁴

When including this clause, the EU restrained itself from imposing its standards. According to the 1991 Resolution of the Council and the Member States meeting in the Council on human rights, democracy and development,⁴⁵ 'active promotion... of a European model of democracy' is left out of the Union's external policies, offering to third countries instead the opportunity to 'benefit from its experience'. It is up to the 'developing countries to choose the forms of political democracy best suited to their social and cultural structures'.⁴⁶ Nevertheless the EU maintained the possibility of using conditionality in cases of grave and constant human rights violations or serious interruptions of democratic processes. On the one hand, the clause can have an intimidating effect since it threatens the suspension or termination of the agreement if the essential element is not fulfilled. The EU's approach to conditionality is not to use it but to benefit from its threatening effect: 'having the stick but not using it'.⁴⁷ This 'conditionality effect' also applies in particular to the period of time between the signing and ratification of an agreement. On the other hand, the clause can be used as a punitive measure in the case that the provisions of the PCA are suspended or the agreement itself is terminated due to serious human rights violation. The EU therefore uses persuasive as well as coercive methods in its relations with third countries. One could say that the EU employs first the 'positive approach' or

⁴⁰ At the time the PCA was signed, Russia was still not a member of the Council of Europe. On 5 May 1998, Russia ratified the European Convention on Human Rights as well as the Protocols to the Convention Nos. 1, 2, 4, 7 and 11, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Charter of Local Self-Government.

⁴¹ In addition, Russia has also ratified the European Convention on Extradition and its protocols and the European Convention on Mutual Assistance in Criminal Matters (on 10 December 1999), as well as the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (on 28 May 2001); moreover, Russia has also ratified the European Framework Convention for the Protection of National Minorities and the General Agreement on Privileges and Immunities of the Council of Europe and its additional protocols.

⁴² These provisions are included in almost all EU agreements with third countries. The conditionality clause in the PCA consists of the essential element clause, the non-compliance or suspension clause (Article 107 of the PCA) and the Joint Declaration. This Joint Declaration was appended to the PCA (in relation to Articles 2 and 107) and contains essential element clauses, in which the Parties agree to consider the essential elements of the agreement as 'cases of special urgency'. This allows immediate suspension or termination without the involvement of the Cooperation Council.

⁴³ Since the Vienna Convention on the Law of Treaties (of 1980) does not provide for the automatic termination or suspension of treaties on the basis of human rights violations, so the EC had no means to apply this sanction against such a state. Under the Vienna Convention a treaty can be terminated or suspended if the treaty so provides and in the case of 'material breaches' of the treaty (Art. 60) such as 'the violation of a provision essential to the accomplishment of the object or purpose of the treaty' (Art. 60(b)). By adding the human rights clause as an essential element in the treaty the EC could, as a last resort, suspend or terminate agreements. See also Crawford, G. (2002), 'Evaluating European Union Promotion of Human Rights, Democracy and Good Governance: Towards a Participatory Approach,' *Journal of International Development*, Vol. 14, pp. 911-926.

⁴⁴ The elements of the standard clause are generally outlined in the Commission's Communication 'On the respect of human rights and democratic principles in relations with third countries', COM(1995) 216.

⁴⁵ See at: http://ec.europa.eu/external_relations/human_rights/doc/cr28_11_91_en.htm.

⁴⁶ See also Communication to the Council and the Parliament the Commission, March 1991. SEC(91) 61 final, Brussels, 25 March 1991. See at: <http://aei.pitt.edu/2937/01/031.pdf>

⁴⁷ Riedel Eibe & Martin Will. 'Human Rights Clauses in External Agreements of the EC.' In: Philip Alston (ed.): *The EU and Human Rights*. Oxford University Press, 1999. p.739.

dialogue, and only when there is, according to European standards (the Council of Europe standards), grave violations of human rights does it use the 'negative approach' or conditionality. This negative approach can also be seen as a defence mechanism, used in order to protect its own interests in that particular country. Nevertheless, one cannot deny that the 'conditionality effect' can be used as a political muscle, at least in theory.

The question remains, however, whether the EU's 'stick' is to be used with countries not aiming at accession, such as Russia, and in particular in relation to the legal approximation process. The main source of misunderstanding here resides in the differentiation between the positive and the negative approaches. Any EU criticism on human rights through political dialogue is perceived in Russia as part of the conditionality approach, whereas it is meant as part of the positive approach by the Union. There is a similar problematic in the legal approximation process when Russia seems to reject any proposal for costly but necessary reforms elaborated in advance by the EU, perceiving this as part of 'conditionalism'. As mentioned in the Human Rights 1991 Resolution, the EU offers 'its experience', which explains the scheme described above. Not surprisingly, this approach irritates the now resuscitating Russian superpower, leading as a result to the lack of needed reforms guided by the legal approximation principles.

Until today, the Union has used direct conditionality towards Russia specifically affecting the legal approximation process only on two occasions. The first was the postponement of the ratification of the PCA for several years due to EU criticisms on human rights violations committed by Russia during the first Chechen war. Although this does not represent clear-cut conditionality *per se*, especially since the PCA was not yet in force, this action follows the same logic of the 'conditionality effect' as mentioned above. As a result, the legal approximation process was delayed for three more years. The second occasion was when the European Council adopted sanctions against Russia in December 1999 in reaction to the latter's military operations during the second Chechen war and the deteriorating humanitarian situation in Chechnya, which escalated after September that year.⁴⁸ The Council directed the Union to commence the preparation of sanctions against Russia. One of the sanctions was the transfer of some funds from the Technical Assistance to the Commonwealth of Independent States (TACIS) programme to humanitarian assistance and reducing the TACIS budget for the year 2000 to a reduced number of priority areas.⁴⁹ There was therefore, a reduction and in some areas a suspension of the legal approximation assistance. This does not mean that the process stopped as such, since it is up to the Russian side to develop it, but significant help to do so was redirected for humanitarian assistance in Chechnya through the Humanitarian Aid Department of the EU (ECHO).

It is worth mentioning that during the existence of the now deceased TACIS, Russia received an average of EUR 130 million annually for the implementation of the programmes. The significant quantity of assistance received since the beginning of TACIS in 1991 has considerably facilitated the transformation of the country. Even after rejecting the European Neighbourhood Policy Russia still receives technical and financial aid through the ENPI (the ENP financial instrument). Securing the continuation of that aid has no doubt been more important to Russia than worries about the connection with the ENP.⁵⁰

To sum up, when engaging with third countries, the EU has developed two mechanisms in order to protect and promote human rights: on the one hand political dialogue which includes criticism, and on the other conditionality which consists of the suspension or even the termination of agreements. Whereas the EU prefers to use the first method, it does not exclude the second in extreme situations: the Declaration on Chechnya is the evidence that the EU uses conditionality beyond the

⁴⁸ The European Council did not question the right of Russia to preserve its territorial integrity nor its right to fight against terrorism. However the fight against terrorism cannot, under any circumstances, warrant the destruction of cities, nor that they be emptied of their inhabitants, nor that a whole population be considered as terrorist. See Presidency Conclusions, Helsinki European Council 10 and 11 December 1999, Annex II Declaration on Chechnya of December 10, 1999. Press Release: Brussels (11-12-1999) - Nr: 00300/99.

⁴⁹ The priority areas were reduced to: human rights, the rule of law, support for civil society and nuclear safety. Furthermore, the other two sanctions were reviewing the implementation of the EU Strategy on Russia and suspending some provisions of the Partnership and Co-operation Agreement (PCA) between the EU and Russia and applying its trade provisions strictly.

⁵⁰ Steven Blockmans: 'EU-Russia Relations through the Prism of the European Neighbourhood and Partnership Instrument.' *European Foreign Affairs Review* 13; 167-187, 2008. p. 178.

accession scheme under grave violations of human rights.⁵¹ The mechanism of conditionality, however, has not always proven to be effective. As far as legal approximation is concerned, the EU directly hampered first the setup and then the progress of the process on two occasions. First, it postponed the ratification of the PCA and later suspended TACIS assistance, despite the fact that the legal approximation process had little to do with the Chechen conflict. This shows that EU-Russia relations are deeply intertwined. It should also be noted that conditionality and political dialogue are PCA instruments designed for use by both sides. Therefore the EU is under the same conditions as Russia and should accept any criticism or proposals in this area from the Russian side, such as the initiative to create a human rights centre in the territory of the Union to monitor human rights issues in the member countries, as odd as this may sound to officials in the Commission.⁵² In the end a balance must exist between the EU's need to tell Russia to behave according to European standards (especially since the EU is giving significant financial and technical aid), and Russia's claims for equal rights as a partner and its freedom from EU conditionality influence due to the absence of accession objectives. This brings us to the question of the long-term objectives in EU-Russia relations.

The 'Approximation without Integration' Dilemma

There is a haunting dilemma in the legal approximation process from which not only Russia but also other neighbouring countries cannot escape when making the 'pro-European' choice. The existing tension behind the legal approximation process logic, whether with accession prospective or not, is that most of the countries that have embarked on this process cannot obtain the 'carrot' they hoped for – which is access to the Single Market. It is understood that greater approximation with EU laws leads to greater access to the internal market. It seems, though, that the EU has spent, at least for the time being, its so called 'integration capacity'.⁵³ In other words, there is a limit to accessing the Single Market irrespective of the level of approximation. If Russia approximates its legislation to achieve the EU standards, it will get greater access to the internal market. As a consequence, Russia will have more demands and will need influence in the decision-making process of the Single Market. This process takes place within the Union's institutions, where Russia has no voice. This was the main reason why some EEA/EFTA countries (Austria, Finland, Lichtenstein and Sweden) joined the Union in the 90s.

One can see, therefore, a shift in EU integration policies in this respect. Due to the 'integration capacity,' the EU is now pursuing relations based on its own model by increasing *approximation* yet decreasing *integration*. Clear examples of this are the ENP with neighbouring countries and the Common Spaces with Russia, both misleading illusions of accession or association. In this light, if the ENP was 'pouring old wine in new bottles' in terms of accession objectives, the Common Spaces was 'pouring old wine in Vodka bottles' in terms of association. For some countries aiming at accession, such as Ukraine or Turkey, even the highest level of approximation does not necessarily lead to the much-desired membership. In the case of Russia, there is a clear inconsistency between these two contradictory processes of increased approximation and decreased integration, since membership is not an option. Therefore, for the Russians the vodka tastes like wine and for the EU the wine taste like vodka. In the former case the country loses hope of gaining the 'promised carrot' while in the latter the country loses its 'taste' for the process due to incongruity. Consequently, this dilemma is increasingly creating a 'ring of discomfort' around the EU rather than a 'ring of friends'.

The Common Spaces aim at increasing approximation in Russia without matching the level of access, especially access to EU institutions. At the same time, Russia is not interested in any kind of integration in which it would relinquish some of its sovereign powers to the EU without having a vote in it. This mismatch resides in the fact that the current process of approximation is categorically 'EU-centric'. There are several 'EU-centric' models of relations with the EU dealing with accession and

⁵¹ The long list of cases at the ECHR on Chechnya serve as a corroboration of this.

⁵² At the Mafra Summit of 2007 Putin called for setting up a joint 'Russian-European Institute for Freedom and Democracy' to monitor human rights and democracy in the EU.

⁵³ The term was first used in the 'Communication from the Commission to the European Parliament and the Council' of 8 November 2006. See at:

http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/com_649_strategy_paper_en.pdf

approximation questions. The main ones are: Accession, European Economic Area (EEA) and Association, but all include a certain loss of sovereignty. Since Russia is not interested in any of these, as stated in the Middle Term Strategy (see above), there are few solutions left. There is only one 'non-EU-centric' model of relations based on reciprocal recognition - the EU-US type of relation. Russia would desire this model, but the EU rejects the idea because Russia is still not a member of the WTO, in addition to a conceptual value gap. There are, therefore, three main directions in which one could see this relationship moving forward in the long-term. The first would be towards association and later perhaps even accession. For this purpose there should be a change in Russian policy towards the EU after the Medium-Term Strategy, which expires in two years, as well as a renewed 'integration capacity' from the EU side. The second direction would be towards an EU-US reciprocity model. In this scenario the integration process would stop when Russia has developed either EU or US standards, since the Union would not be willing to accept Russian standards as they stand now, in addition to the lack of WTO membership. And finally, there is a last scenario, which would demand a radical change in the 'EU-centric' integration policies, by creating a 'Pan-European Integration' beyond the EU, generating a new interregional integration process that could theoretically include the EEA and the EFTA countries, as well as the Single Economic Space (SES)⁵⁴ and Eurasian Economic Community (EurAsEC).⁵⁵ This would be a true Europe without dividing lines and beyond, but this is quite far from becoming a reality. Which one of these directions the relationship will take is still an open question that depends on the economic capacity and political choices of the parties. Not finding an answer to this question presents the main dilemma in EU-Russia relations. It should be noted that none of these models can be realised as long as there is an EU-centric logic of integration on the one hand, and Russia wants a stake in the Single Market without giving away any sovereignty powers on the other. Similarly, if these attitudes do not change, the legal approximation process will become stuck between association and accession, without being either, and thus perpetuating the dilemma for decades to come. In the end, in the EU-Russia battle for sovereignty against economic integration, one of the two sides will give in to the other's economic force since there is no stable form of reconciliation, at least for the time being.

Concluding Remarks: implications for the Next Legal Framework

Russia made the 'pro-European' choice by signing the Partnership and Cooperation Agreement with the EU in order to develop its economy and to integrate it into the world through the WTO regime. To achieve these goals, the EU offered Russia much needed financial resources and technical expertise to carry out the necessary reforms in exchange for using the Union's legal system as a model. This could potentially give Russia access to the Single Market in the long term. This process represented Russia's political commitment, of a legally binding nature, to '*endeavour to ensure that its legislation will be gradually made compatible to that of the Community*'. But such ambiguous wording meant that neither could Russia pull out of its commitment nor could it be forced to implement it. Additionally, while the Union emphasised that it was not imposing its standards, Russia implied that accession or association were not on the agenda. This situation led to misunderstandings and frustrations between the parties concerning the legal approximation objectives. With the Common Spaces and their Road Maps the partners hoped for the revival of the legal approximation process, but since the Spaces lacked any clear objective as to how to develop the relationship further, the process gradually started to lose the force with which it commenced. One of the main reasons for this was the use of conditionality by the Union. This principle, despite being a useful instrument for candidate states, has proven to be ineffective when applied to Russia. Additionally, given the 'EU-centric' nature of this engagement and taking into account the consumed 'integration capacity' of the Union after the 2004 enlargement, the process became even more

⁵⁴ The Single Economic Space (SES) was created in September 2003. The SES is a customs union which includes Belarus, Kazakhstan, Russia and Ukraine. Nonetheless, during the signing of the agreement Ukraine introduced a provision saying that the SES must adhere to the Ukrainian constitution and its strategic goal to integrate with the European Union.

⁵⁵ The Eurasian Economic Community (EurAsEC or EAEC) was created in October 2000. Its members include Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan.

complex, in particular due to the lack of Russian membership objectives and in addition to conflicting views on the common neighbourhood.

If we are to revive this stagnating – if not dying – process, a radical change is necessary. The next agreement, which will soon be negotiated, by including the necessary updates and changes would be the mechanism best suited for this purpose. First, the legal approximation approach needs to be transformed into something more suited to the present type of relations where Russia is not a weak crumbling state but a modernizing strong superpower. As regards the legal approximation clause, there are two main paths for setting Russia as an equal partner to the Union:⁵⁶ the first would be to completely remove the approximation clause from the agreement leaving Russia to decide by itself the most suitable legal model; and the second, to leave this provision but with a different formula, similar for example to the one included in the Euro-Med Agreement with Israel, where “*the parties shall use their best endeavours to approximate their respective legislations in order to facilitate the implementation of this Agreement.*”⁵⁷ This formula, in contrast to the previous one in article 55, includes the Union in the ‘*endeavour*’. Although this wording suggests approximation on both sides, one should not expect the EU to introduce any changes in its legislation. Nevertheless, either approach seems realistic since Russia will not feel pressured by the EU and will eventually make the necessary logical moves or ‘cherry pick’ towards approximation – possibly inspired by the need to create a FTA with its proximate biggest economic partner or by the inevitability of having legislation compliant with WTO rules in order to incorporate its economy into the rest of the world.

The new agreement should also tackle the existing contradiction in the use of conditionality towards non-candidate states such as Russia. To resolve this issue, a balance must exist between the EU’s use of conditionality and Russia’s approximation objectives. It is just as difficult to imagine conditionality disappearing from the Union’s human rights protection and promotion landscape as it is to imagine Russia fancying EU accession in the near future. The ENPI should serve as a mechanism of ‘co-ownership’ of the ‘strategic partnership’ rather than one-sided financial and technical assistance. This would be more demanding from the Russian side. Further, in order to give the human rights clause a comprehensible meaning in the context of the legal approximation process and to make it easier for Russia to bear the positive as well as the negative approaches, it should continue to be accessible to both sides and linked to a long-term commitment on the EU side as well.

Legal approximation is an instrument that can lead both parties closer together only if the direction of the process is fixed towards a common goal. Initially, the partners’ objectives were similar, but with time they have slowly started to drift apart. The PCA was created to stabilise Russia and introduce its economy into that of the rest of the world. These tasks have been more or less accomplished by now. The new circumstances in Russia and the forthcoming WTO accession serve as a proof of this, although there is still much left to be done. This is why new common tasks have to be proposed in the new legal framework in order to give the legal approximation process an innovative meaning. There are, however, only three ways to achieve this, since reconciling full sovereignty powers with association objectives is not feasible. First, there is the creation of some sort of Common Economic Space in the sense of the EEA following the EU-centric logic; secondly, there is a ‘de-centred’ type of integration; and thirdly, there is a ‘neutral’ EU-US type of relations based on mutual recognition. In order to make any of these paths a reality, more trust between the parties is necessary. Regaining this trust requires giving the partnership a ‘co-ownership’ status in which both sides feel that they can make a change. Whether an ‘EU-centric association’, a ‘neutral relationship EU-US style’, or a ‘Pan-European Integration scheme’ is to become the way forward, the sides first have to

⁵⁶ These two directions are more or less represented by two leading but opposed academic positions in Russia. On the one hand there is Nadezhda Arbatova, Yuri Borko, Sergei Kashkin, Paul Kalinichenko, and Mark Entin, who propose an “Advanced Partnership Agreement,” based on the Common Spaces, with association objectives and gradual approximation with the EU *acquis*. See: “Russia-EU Quandary 2007”, *Russia in Global Affairs* 4, no. 2 (2006): 100-10. On the other hand, and closer to the Kremlin’s position, another group of experts with a more critical view towards the legal approximation process propose a “Declaration of Strategic Alliance” with “Selective Integration” on agreed common interests, with only sectoral agreements requiring ratification by parliament. See Timofei Bordachev, “Toward a Strategic Alliance,” *Russia in Global Affairs* 4, no. 2 (2006): 112-23.

⁵⁷ See article 55 of the Euro-Mediterranean Agreement establishing an association with Israel. Lebanon also has such a clause (Art.49).

acknowledge that in order to create a stable European continent a common approach is needed that considers both sides as equal, and the modernisation of the legal approximation process in the next agreement is the best way to achieve this.

Problems and Perspectives on Modernizing the Legal Background to the EU-Russia Strategic Partnership

Paul Kalinichenko*

What is the EU-Russia Strategic Partnership?

As is widely known, culturally and historically Russia belongs to the European cultural-civilizational type, forming a common cultural-civilizational system with the other countries of Europe. Although the Russian Federation is not a member of the European Union, Russia is an integral part of Europe. The economies of the European countries and Russia are interdependent and complementary. The European Union is Russia's main trade partner and Russia occupies a significant external position in the EU economy, and the principal position in the important area of energy supply. Europe's political and legal traditions are also at the basis of Russian reality.

Relations between Russia and the European Community have passed all the way from a state of "useless indifference" through "partnership and cooperation" to the modern "strategic partnership" - a high level - over the last two decades. There is no doubt that this is a great practical achievement. Nevertheless, there is a paradox in the sense that the term "strategic partnership" is not legally defined. It is not clear what type of legal regulation should cover these relations in the future.

As a form of relationship between Russia and the EU, the partnership is legally defined by the objectives and principles of the Partnership and Cooperation Agreement between Russia and the EU 1994 (PCA)¹. Analyzing the relations established by the PCA, Russian lawyer E. Kovalkova stresses that the "obligations of the Parties to follow the values and principles on which the modern development of civilized society is based are set in the foundations of the partnership"².

The Treaty of Lisbon made an important step towards legalizing the term "partnership" with third countries in its Article 10A (1). A partnership should be created on the basis of the main external principles of the EU, and on common values. This is important for relations with Russia, because the "strategic partnership" is a partnership of this type, and the EU approach is thus definitively formalized for this form of external relations.

Etymologically, the term "strategic partnership" means that the Parties consider the relations of partnership prior, synchronizing common actions. Practically for Russia, they are real prior relations, predestined by its inevitable economic dependency on the European market. For the EU, however, there is a doubt concerning the prior nature of the relations. European law sets other privileged forms of relations with third countries, in particular "association" and "neighbourhood". On the other hand, it is no secret that the PCA resembles other European Agreements on Association, Euro-Mediterranean Agreements on Association, and the most modern agreements of the type, Agreements on Stabilization and Association.

Is it possible to consider the partnership, or the strategic partnership, a "*quasi-association*" or "*quasi-neighbourhood*"? This is not only a theoretical question, but a practical one concerning relations between the EU and the East-European countries within the framework of the European neighbourhood policy, in particular concerning relations with Ukraine. Concluding the new agreement between the EU and the Ukraine, both of the Parties had a problem: they were ready to give their relations a privileged status, but without the formal creation of an association between them³. An analogous problem arises in relations between the EU and Russia. The Parties are not ready to create an association politically, but they are ready for the privileged relations of an integrational nature,

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¹ The Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, on one side, and the Russian Federation, on the other, was concluded on 24 June 1994 on Korfu (OJ 1997 L 327/1; SZ RF, 1998, N 16, st. 1802).

² E. Kovalkova, About Principles of Partnership and Cooperation (example of the relations between Russia and the European Union) // Russian Legal Journal. Yekaterinburg. 2005. № 3. P. 61. (in Russian).

³ C. Hillion, Mapping-Out the New Contractual Relations between the European Union and its Neighbours: Learning from the EU-Ukraine 'Enhance Agreement' // European Foreign Affairs Review (2007) 12. P. 174.

including closer integration in the economic sphere, inter alia, through the creation of a free trade area and the liberalization of establishment, the trade in services and the movement of capital.

The "strategic partnership" is characterized by the aims and objectives in the Joint Statements of the Russia-EU Summits⁴. In this context it means relations of partnership, complemented by the purposes of regional security and the practical objective of building the Four Common Spaces between Russia and the EU. However, these practical steps by the Parties do not allow us to define the strategy of cooperation over regional security matters or the schedules for the creation of the Four Common Spaces. There is no strong legal basis for these steps.

Furthermore, the term "strategic partnership" is also used for the relations between the EU and other third countries, e.g. the Republic of South Africa, India and China⁵, but they cannot be compared with EU-Russia relations. These relations have different legal bases. The EU and South Africa signed an Agreement on Trade, Development and Cooperation in 1999⁶. There are no modern agreements of a basic nature between the EU and India, or between the EU and China⁷.

Strategic partnership *acquis*

The development of the relations between Russia and the EU was accompanied by the development of their legal grounds. The present day relationship of strategic partnership is based on three blocks of norms. In my opinion, they can be considered a *strategic partnership acquis*. In this context the "strategic partnership acquis" means all the norms which cover any aspect of relations between Russia and the European Union. By its legal nature, the strategic partnership acquis is a part of the *cooperation acquis*, which is forming on the borders of the *acquis communautaire*, containing the provisions of the EU's agreements with third countries⁸. These legal achievements could be considered a form of external dimension of the *acquis communautaire*⁹. The First block consists of the norms of the Partnership and Cooperation Agreement between Russia and the EU (PCA) and of specific agreements made on the basis of the PCA as strict grounds of the relationship. The Second block consists of "roadmaps" on the Four Common Spaces and other soft law. By nature, they are norms of programmes and declarations, which do not have obligatory legal effect but define practical measures and actions within the framework of current relations between the Parties. The Third block includes norms of Russian legislation, and the EU rules concerning the relations between the Parties.

First block. The EU-Russia Partnership and Cooperation Agreement entered into force on 1 December 1997. It contains a preamble, 112 articles, eleven annexes, four protocols, several joint and unilateral declarations, and statements and exchanges of letters. Partnership and Cooperation Agreements have been concluded by the European Union with all the C.I.S. countries¹⁰. As the contents and texts of these agreements coincide, they may be regarded as "a pattern agreement". The PCA with Russia became the "prototype" for all the other Partnership and Cooperation Agreements with C.I.S. countries, which were based on the experience of the PCA with Russia.

In my opinion, it was incorrect to create a contractual model for the form of the PCA in general. It made no sense to conclude identical agreements with Moldova and with Armenia, with Ukraine and with Uzbekistan; these countries are not similar and have little in common, except that

⁴ See: Joint Statement from 17 May 2001, Joint Statement from 29 May 2002, Joint Statement "300th anniversary of St. Petersburg – celebrating three centuries of common European history and culture" from 31 May 2003, Joint Statement from 6 November 2003. http://ec.europa.eu/external_relations/russia/intro/summit.htm

⁵ See: S. Baroowa, The Emerging Strategic Partnership between India and the EU: A Critical Appraisal. *European Law Journal*, Vol. 13, No. 6, November 2007, P. 732-749; A. Sautenet, The Current Status and Prospects of the 'Strategic Partnership' between the EU and China: Towards the Conclusion of a Partnership and Cooperation Agreement. *European Law Journal*, Vol. 13, No. 6, November 2007, P. 699-731; M.F. Larsen, Trade Negotiations between the EU and South Africa: A Three-Level Game. *Journal of Common Market Studies*, Vol. 45, Issue 4, November 2007, P. 857-881.

⁶ OJ L 311, 04.12.1999

⁷ The legal basis for EU-India relations stems from the Cooperation Agreement on Partnership and Development 1993 (OJ 1994 L 223/24); for EU-China relations – the Agreement on trade and economic cooperation 1985 (OJ 1985 L 250/2).

⁸ Although the term "strategic partnership acquis" is not used in the official documents of the EU, we can find similar categories such as "Barcelona process acquis" or "acquis of the Euro-Mediterranean Partnership" in the relevant documents. European Neighbourhood Strategy Paper, Communication from the Commission, COM (2004) 373 final.

⁹ R. Petrov, The External Dimension of the Acquis Communautaire. EUI Working Papers, MWP 2007/2. P. 7-8.

¹⁰ However, PCAs with Belarus, Tajikistan and Turkmenistan have not entered into force.

they were included in the USSR. This has become obvious after 10 years – the C.I.S. countries have become much more different than before.

The Partnership and Cooperation Agreement between Russia and the EU 1994 has formed a firm foundation for the development of dialogue between the Parties in the political, economic, social and cultural fields and thus is complex in character. On the other hand, it is basic in its nature. It contains general provisions concerning cooperation between the European Union and Russia. It is also a 'framework agreement', because many of its provisions need further development within the framework of special bilateral agreements on separate issues. Some of its articles laid down the necessity of concluding such agreements (for instance, Articles 21–22).

The PCA was made to operate under the conditions when the market economy was forming in Russia and the country was in the process of entering the WTO. Another important factor which underlines the significance of the modern provisions of the PCA is that its final aim was the creation of a free trade area between Russia and the EU (Art. 1, PCA). The well-known Dutch scholar Alfred E. Kellermann notes: "The PCA was designed to bring Russia to the gateway of the world market economy"¹¹. While agreeing with professor Kellermann, I would like to note that the PCA does not say what should be done in order to build the relationship between the Parties after the integration of Russia into the world economy and its entry into the WTO.

The PCA was concluded for 10 years with possible subsequent annual automatic prolongation unless either Party renounces it. Its hard duration, however, expired in 2007. In accordance with Article 15(4) of the Constitution of Russia 1993, the PCA between Russia and the EU forms part of the national legal order. It has direct effect within Russian territory under Article 5(3) of the Federal Law of 15 July 1995 101-Φ3 "On International Treaties of the Russian Federation"¹².

As far as the EU is concerned, the PCA pertains to the category of international agreements of the EU which are concluded together by the Community and the Member States. It is a mixed agreement by its nature. Certain of its provisions have direct effect within the territory of the EU in accordance with the judgment of the European Court of Justice of 12 April 2005 on the *Simutenkov* case¹³. This Judgment gives Russian citizens working legally in Member States the possibility of enforcing their rights, derived from PCA Article 23, to equal treatment before the national courts of the Member States in order to protect their labour rights. For the first time, the European institutions took the side not of the Russian political establishment, but of ordinary Russian citizens. Moreover, it clearly follows from the *Simutenkov* judgment that not only the provisions of Article 23, but also those of some of the other articles of the PCA are to have direct effect¹⁴.

The PCA has both an 'entry-level' and a 'framework' nature¹⁵. Several bilateral agreements have been concluded on its basis. These specific agreements develop its provisions in different spheres of the interaction between Russia and the European Union. This leads to the conclusion that today's system of bilateral agreements between Russia and the European Union is formed on the basis of the PCA objectives¹⁶. The process of conclusion of bilateral agreements between Russia and the European Union on the basis of the PCA will certainly continue. Today, several new agreements in the pharmaceutical, veterinary, and fishing fields are in preparation. In the near future it will be appropriate to conclude agreements on cooperation in the field of the environment, concerning Russian participation in the activities of Eurojust, and on trade in nuclear materials, amongst others.

¹¹ A.E. Kellermann, Impact of the EU enlargement on the Russian Federation // *Police and Law*, № 1(61), 2005. P. 117. (in Russian)

¹² SZ RF, 1995, № 29, st. 2757.

¹³ Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol* [2005] ECR I-5961.

¹⁴ See paragraph 28 of the judgment of the EC Court of 12 April 2005.

¹⁵ R. Petrov, *The Partnership and Co-operation Agreements with the Newly Independent States // Handbook on European Enlargement. A Commentary on the Enlargement Process / Ed. A. Ott, K. Inglis. The Hague. 2002. P. 177.*

¹⁶ There are agreements on trade in textile products (1998), on cooperation in the field of science and technology (2000), on cooperation in nuclear fusion (2001) and nuclear safety (2001), concerning the participation of Russia in the activities of Europol (2003), concerning the participation of Russia in European Policy Mission (2004), on trade in steel products (2005), on the facilitation of the issue of short-stay visas (2006), and on readmission (2006).

Second block. The Russian science professor M. Entin has commented: “The PCA is a flexible legal instrument. Very important changes have been introduced to the PCA, without formally amending it, by the summit decision to streamline political dialogue and launch the work of the Russia–EU Permanent Partnership Council”¹⁷. The most important documents, which were adopted by The Russia–EU Summit on 10 May 2005, are four "roadmaps" on Four Common Spaces¹⁸. These documents reflect the concept of Four Common Spaces and develop the provisions of the PCA in the corresponding spheres. The Roadmaps contain a complex of practical actions for future prospects in the relations between the Parties. However, this complex does not establish fixed periods or timetables for the implementation of these actions and does not envisage clear instruments of control or responsibility for their implementation.

A "Roadmap" is not a legally binding document. It is a political act, an act of *soft law*. Besides, neither the Constituent Treaties of the EU, nor its secondary legislation provide for the Community or the Union to build their relations with third countries on such documents. It is thus an act *sui generis*, depending on the political will of the Parties. Accordingly, "roadmaps" are unable to create a strong legal basis for the development of relations between the Parties within the framework of the four spaces.

Third block. This block covers norms of Russian law and norms of EU law, including case-law of the European Court of Justice, which realize the provisions of agreements and other acts between Russia and the EU and the arrangements concerned. The block also includes the practice of Russian courts on the application of these agreements, in particular the PCA. Among the acts of Russian law are those which were adopted to strengthen the partnership between Russia and the EU, and those for the purpose of approximating Russian legislation to Community rules (for instance, Federal Law of 10th December 2003 N 172-Φ3 "Amending the Law of the Russian Federation on the organization of the insurance business in the Russian Federation")¹⁹. The EU acts include those which establish practical measures, schemes and programmes in relation to Russia, e.g. Council Joint Action 2004/796/CFSP of 22 November 2004 for the support of the physical protection of a nuclear site in the Russian Federation²⁰. Of the case-law of the ECJ, the judgment of 12 April 2005 on the *Simutenkov* case has a principal meaning for the application of the PCA with Russia in the national courts of the Member States. Since 1997 Russian courts have considered more than 10 cases concerning the application of the PCA in the Russian legal order²¹.

Towards the New Treaty

A new treaty needs to replace the central grounding of the legal achievements of the strategic partnership, and to modernize the basic norms of the first block of the strategic partnership *acquis*. The PCA has become old; it does not fully reflect the reality of the modern relations of strategic partnership; it does not take into account the future membership of Russia in the WTO, the changed geography of the EU, or new challenges in the international area.

As mentioned above, the main duration term of the PCA expired in 2007. Independently of this, it is clear that Russia and the European Union at the beginning of the XXI century are quite different partners from those who agreed on partnership and cooperation in 1993 and who signed the PCA in 1994. Firstly, the European Union now includes not 15, but 27 Member States. Moreover, the political and economic potential of the EU has notably increased compared to the beginning of the 1990s. In my opinion, the introduction of the euro has played a significant role in this. Secondly, today's Russia is no longer regarded as "the biggest splinter of the Soviet Empire" with a controlled economy in a state of decay. Modern Russia is recognized as a State with a rising market economy,

¹⁷ M. Entin, Strengthening legal grounds for developing Russian relations with the European Union // Azerbaijani-Russian Journal of International and Comparative Law, No 1(2) 2005. P. 146.

¹⁸ There are "Roadmaps" on a Common Economic Space; a Common Space of Freedom, Security and Justice; a Common Space of External Security; and on a Common Space of Research and Education, including Cultural Aspects.

¹⁹ SZ RF, 2003, N50, st.4858.

²⁰ OJ L 349, 25.11.2004, p. 57.

²¹ See: P. Kalinichenko, Application of the Partnership and Cooperation Agreement between Russia and the EU in Russian courts // Law, Moscow, N 11, 2007, P. 225-234. (in Russian).

which dominates in the EU energy market, the most vulnerable sector of developed countries' economies. Thirdly, the mutual development of "partnership and cooperation" between Russia and the EU has moved this relationship to a new qualitative level of strategic partnership.

The expiry of the initial period of the PCA provides an excellent opportunity to modernize the framework agreement between the EU and Russia, and produce an agreement which will serve as the basic treaty for deepening integration between the Parties. The need to prepare a new treaty has for a long time been discussed in Russian technical literature. It was first proposed in the book "Russia and the European Union: Documents and Materials", which was published in 2003. This book expressed the opinion that it was necessary to amend the PCA, or replace it by a new agreement, reflecting the concept of Four Common Spaces²². Later this idea was dealt with in depth in a book by the Russian researcher Y. Borko "The European Union and Russia Need Agreement on Strategic Partnership"²³. In 2006 Russia initiated negotiations concerning a new basic agreement between Russia and the EU to replace the PCA. In general, this initiative was supported by its European partners. The Parties have already agreed on a working title for the future agreement – the Strategic Partnership Treaty (SPT).

The form of the New Treaty

Concerning the form of the new agreement, it is necessary to note that the SPT will be by nature an 'entry-level' and 'framework' agreement. It will contain general provisions which will constitute a basis for the conclusion of special agreements between the Parties in concrete spheres. The PCA has a similar nature, as mentioned above. However, the SPT must not become only a catalogue of norms which links to future specific agreements, but should be an obligatory legal document providing the background principles of strategic partnership and flexible instruments for their realization on a political level.

The term "framework agreement" can be interpreted as an agreement containing both *lex generalis* norms and norms which require additional instruments for their implementation in practice. The first of these reflects the nature of the existing PCA with Russia; the second is an obstacle to the new agreement having a direct effect. In any case, it would be legally correct to refrain from mentioning its framework nature in the title or text of the SPT. This will allow the definition of the direct effects of the SPT provisions in the Member States and will simplify the application of the SPT in the Russian legal order. Furthermore, the New Agreement should be concluded for an unlimited period of time.

As mentioned above, the PCA is a *mixed agreement*. It covers matters falling under the EU and under the competence of the Member States. It was signed by the Community and its Member States. Undoubtedly, the Commission will be provided with the powers to negotiate and conclude a new mixed agreement with Russia replacing the PCA. Nevertheless, is it necessary to conclude a mixed agreement? Politically, it is simpler for the Parties to conclude a "*non-mixed agreement*" or "*unmixed agreement*". Such an Agreement would be similar to the Agreement between the European Community and Portugal concluded at the beginning of the 1970s²⁴. That agreement was not mixed by its nature and did not require ratifications by the Member States. Similarly, the SPT could be a non-mixed agreement, because of its framework nature. If this were the case, it could be concluded between Russia and the European Union without the participation of the Member States, helping to avoid difficulties with its ratification.

The Agreement on Trade, Development and Cooperation 1999 between the EU and South Africa is another example. It is a forced mixed agreement: the Member States refused to accept it as a pure Community agreement, "even if it was obvious that there was no legal need to conclude the agreement as a mixed agreement"²⁵. Taking into account this experience and the differences in the approaches of the Member States to relations with Russia it is impossible to exclude a similar scenario for the signing of the SPT.

²² Russia and the European Union: Documents and Materials / Ed. Kashkin S.Y. Moscow. 2003. P. 446. (in Russian)

²³ Yu. Borko, The European Union and Russia Need Agreement on Strategic Partnership. Moscow. 2004. P. 6 and elsewhere.

²⁴ OJ L 301, 31.12.1972.

²⁵ R. Leal-Arcas, The European Community and Mixed Agreements // European Foreign Affairs Review, (2001) 6. P. 513.

On the other hand, the situation regarding an agreement of a complex nature is more complicated. The SPT should not only be an economic agreement. Nor should it only provide for the creation of a free trade area plus illuminating energy and investment matters in separate protocols. If an agreement on a classic free trade area can be concluded without the participation of the Member States, an agreement on a free trade area plus basic agreement on the Four Common Spaces will obviously be only possible as a mixed agreement.

Is agreement of a mixed nature enough for the EU-Russia strategic partnership? Russian researchers M. Entin and I. Ivanov have proposed the idea of an EU-Russia agreement covering the competences of the EU and its Member States, as well as an additional or implied competence²⁶. Such a “double-mixed agreement” or “supra-mixed agreement” could consist of elements of enhanced cooperation, as referred to in the Treaty on the European Union 1992. There are no derogations from the ERTA doctrine. The Parties or the Institutions of the Strategic Partnership could be given the legal ability to establish the partnership in new fields, outside of the scope of the SPT, without replacing the agreement.

Practically, the process of preparation of the New Treaty faces other legal difficulties. Russia is still not a member of the WTO. The accession process is going extremely slowly. Nevertheless, there is no doubt that it will occur. It is the date of Russia’s entry which is under question. Until this happens, most of the economic provisions of the PCA are still applicable; this reduces the urgency of the conclusion of the SPT.

In my opinion, this situation may lead to a two-headed, bicephalous approach to the legal basis for the relations between Russia and the EU. This would involve two basic agreements: the basic agreement on relations (the SPT) and a corresponding agreement on the Common Economic Space. It would be rational to conclude the second agreement after Russia’s entry to the WTO. Such an approach will also help the negotiations, because it reflects the dualism of the EU’s external competency, as well as the division between the external political competency of Russia’s Ministry of Foreign Affairs and the external economic competency of its Ministry for Economic Development. It will also aid the entry into force of the agreements.

The content of the New Treaty

The main idea of the new agreement consists of the arrangement of a qualitatively new level of relations between the EU and Russia and in the creation of a strong legal basis for the development of integration between the Parties. For these purposes it is necessary to legally transpose a ‘partnership’ between the EU and Russia into a ‘strategic partnership’ between them. It is important to set the purpose of “gradual integration” in the SPT. Legally, this purpose unites the partnership agreements and agreements on association in accordance with the *Simutenkov* case. This is a very important formula, which puts the PCA on the same level as the privileged agreements of the EU.

The Parties have already proposed certain ideas on the provisions of the new Treaty. The Russian party proposes including general provisions on the Four Spaces, provisions concerning a modernized institutional structure and the mechanisms of strategic partnership, as well as provisions on investment guaranties. The European partners suggest including provisions on human rights and common values, on the creation of a “free trade area plus” between the EU and Russia in the future, as well as provisions on cooperation in the field of energy.

Inside the Four Common Spaces

The SPT could logically contain general provisions on the Four Common Spaces between Russia and the European Union. This step would be a response to the objectives of the strategic partnership. Unlike the roadmaps, the provisions of the SPT should contain schedules for the realization of practical actions, as well as elementary instruments for supervision and liability.

²⁶ See: M. Entin, *Proposals on Basic Sections of the Future New Treaty between Russia and the EU // On the Way to the Treaty on Strategic Partnership between Russia and the European Union*. St. Petersburg. 2007. P. 219 (in Russian); I. Ivanov, *Pragmatic Proposals on Concrete Contents of the Future New Treaty // On the way to the Treaty on Strategic Partnership between Russia and the European Union*. St. Petersburg. 2007. P. 61 (in Russian).

The Common Economic Space – A Free Trade Area Plus. In spite of the fact that the PCA mentions the creation of a free trade area as a long-term objective of the partnership, there are no provisions concerning practical steps for its achievement. The SPT should set an ambitious objective – the creation of a wide European integrated market. It could be possible to achieve this through realization of the practical tasks involved, in particular the task of the creation of a *North-Eurasian Free Trade Area* between Russia and the European Union. The SPT could contain the provisions for the creation of this "free trade area plus", providing for the realization between the Partners of the free movement of goods, services, capital, and workers. This proposal corresponds to the idea of the creation of a Common Economic Space between Russia and the EU. The 2007 research by the Russian business community and by the Russian Ministry for economic development confirmed the essential advantage to Russia's economy that would be gained from the creation of a free trade area. A free trade area between the Parties is possible as is mentioned in the Opinion of the Economic and Social Committee²⁷.

A free trade area is an instrument of economic integration within the framework of the WTO under paragraph 8(b) of Article XXIV GATT. Accordingly, the creation of a free trade area between Russia and the European Union will adequately serve the purposes of Russian access to the WTO and building trade relations with other countries on the basis of its rules and principles.

It is important that a new agreement providing for the creation of such a free trade area should contain mutually acceptable and clear timetables and periods for establishing the free trade area. In the opinion of officials from the Russian Ministry of Economic Development, Russia is ready and can embark on negotiations on creating a free trade area with the EU immediately after its accession to the WTO. Well thought-out and sound progress in creating such a free trade area will on no account run counter to Russia's economic and trade interests, but will promote them.

Such a free trade area should provide for the special rights and duties of the partners, which naturally result from rights and duties in accordance with the WTO rules. Although Russia's membership of the WTO should not be a starting point for the realization of these ideas and must not become the pretext, in my opinion the creation of a free trade area may go in parallel with this process. The economic relations between Russia and the EU require more advanced treatment, different from the treatment established by the WTO rules, a sort of "WTO plus". The mere liberalization of trade is not enough for the needs of a strategic economic partnership. The free movement of goods must be complemented by instruments providing for the straightening and specification of production chains in the context of bilateral economic relations.

The question is only how to arrange this legally. In my opinion, it is necessary to reinforce the freedom of establishment and freedom of movement of capital between Russia and the EU in the provisions of the new Treaty. It is necessary to create a whole system of investment guaranties, providing for shaping production schemes with mixed capital and property. Russian business is interested in provisions concerning investment guaranties in the SPT. Provisions for this are weak in the PCA but they are vital for Russian businesses acting in the territory of the Member States. This will require reinforcement in the realization of the freedom of establishment and freedom of movement of capital between Russia and the EU through the granting of national treatment for certain questions.

The European partners are interested in provisions concerning cooperation in the field of energy. Unfortunately, this matter has been damaged by mutual political intrigues. Legally, it is reasonable to set this block of provisions outside of the main text of the SPT, for instance in a special protocol to the SPT, or in a separate agreement. In any case, such provisions should reflect the modern Energy Dialogue between Russia and the EU, founded on the principles of the Energy Charter Treaty 1994 and complemented by the principle of mutual energy cooperation²⁸.

²⁷ See: Opinion of the Economic and Social Committee on the contribution of civil society to EU-Russia relations (OJ 2005 C 294/33); and previously: Opinion of the Economic and Social Committee on 'EU/Russia strategic partnership; What are the next steps?' (OJ 2002 C 125/39).

²⁸ These principles are those of mutual responsibility for conditions in the energy markets; of the joint benefits gained from jointly sharing energy markets; of security in energy supplies; and of security of demand for energy products.

The Common Space of Freedom, Security and Justice. The creation of the legal background for the Common Space of Freedom, Security and Justice is equally vital. Certain instruments concerning readmission, visa simplification and the participation of Russia in Europol already exist between Russia and the EU. These measures are founded on the basis of special agreements outside the scope of the PCA. There are no general provisions for them in the Basic Agreement.

Currently, both Russia and the European Union have a huge practical interest in the field of the struggle against terrorism, xenophobia and other forms of criminality, along with the development of cooperation between courts and law enforcement bodies. This Space should include the possibility of Russian participation in the activities of EU bodies such as Europol, Eurojust and the Schengen Information System. In connection with this, a fundamental controversial question is the free movement of persons. The PCA does not contain any elementary guarantees on this. Undoubtedly, this is a gap in the PCA which requires urgent filling. It can be filled by the conclusion of a special agreement on the free movement of persons on the basis of the SPT.

In my opinion, the Four Spaces are impossible without the free movement of persons. The first step in this direction should be the establishment of visa-free movement for citizens between Russia and the EU. It cannot be ruled out that for this purpose it may be necessary for Russia to join the Schengen acquis.

The SPT must also provide instruments for legal assistance on civil and commercial matters.

The Common Space of External Security. Approaches to the problem of sovereignty vary significantly today. The nature of modern society, new challenges, new threats, their depth and, most importantly, their interdependence is so extensive that it allows no country, neither the USA, nor Russia, nor the Member States of the EU to continue to navigate alone in this tumultuous globalized world. Similar conditions dictate the need for establishing the Common Space of External Security in the provisions of the SPT. It could include a tripartite dialogue between Russia, the EU and NATO, e.g. on such problems as non-proliferation, and disarmament. In any case, the creation of such a space could become a strong basis for a new security system in Europe, which has not been fully achieved since the end of the Cold War.

The Treaty of Lisbon opens positive prospects for the development and modernization of the legal basis of relations between Russia and the EU in this field. The solidarity clause in Article 188R of the Treaty on Functioning of the EU (TFEU)²⁹ provides for support to a Member State which is attacked by terrorists or is influenced by natural or technogenic catastrophes. An analogous provision can be included in the new Basic Agreement between the EU and Russia. This would represent a spirit of real strategic partnership, and could create the basis for a certain strategic “alliance” between the EU and Russia in search of common answers to the new challenges.

The Common Space of Research and Education, including Cultural Aspects. The development of European consciousness within Russian society is backed by the creation of the Common Space of Research and Education, including Cultural Aspects. This Space envisages joint research projects, the development of European education in Russia, the comparability of Russian educational standards with the Bologna process, and programmes for studying and developing Russian culture along with the cultures and languages of other peoples in the cause of mutual rapprochement. The Treaty of Lisbon enlarges the EU competencies, in particular, extending its powers on sport, civil protection and space. These new policies of the EU offer new possibilities for developing the Common Space of Research and Education, including Cultural Aspects between the EU and Russia, the so called “Fourth Space”.

It is logical to include provisions on this Space in the SPT, taking into account the provisions of the Treaty of Lisbon, and to modernize the structures responsible for the realization of this Space in the near future. This non-political sphere of relations is subject to the minimum of discords between the Parties. The New treaty could represent an appreciable breakthrough in relations on these matters.

²⁹ Article 222 EC in the renumbered version of the Lisbon Treaty.

Outside the Four Common Spaces

Some aspects of the relations between Russia and the EU have a horizontal nature or grow from the Four Spaces. The fundamental ones are common values, social and environmental matters, the approximation of law, and the regional aspects of the partnership. It is necessary to set provisions on human rights and *common values* in the SPT. Although today these are the principles of the strategic partnership, they require new qualitative definition in the Basic Agreement between Russia and the EU. Article 2 of the PCA does not take into account either the fact of Russia's participation in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, nor the provisions of Article 6 of the Treaty on the European Union, nor the Charter of Fundamental Freedoms of the European Union 2000. The SPT will also need to take into account the provisions of the Treaty of Lisbon on partnership with third countries.

The Roadmaps do not pay sufficient attention to *the social sphere* or to *the environment*. However, the provisions of the PCA in these spheres have had practical realization. The provisions of Article 23 of the PCA on labour guarantees for Russian workers were interpreted by the ECJ in the *Simutenkov* case³⁰; Article 24 of the PCA on cooperation in social security has become the basis for bilateral agreements between Russia and the Member States³¹; and the provisions of Article 69 of the PCA established the basis for the bilateral dialogue on the environment between the EU and Russia³². As a whole, the *approximation of legislation* is one of the most efficient means for the creation of comparable conditions for the realization of the free movement of goods, persons, services and capital. This instrument must be included in the provisions of the Strategic Partnership Treaty. This approximation is above all dictated by the globalization of interests in trade, the movement of investments, and the rapid development of legislation in cross-border spheres (transport, communications and networks).

The PCA chose the approximation of legislation as a means of legal integration between Russia and the EU. Article 55 of the PCA is especially devoted to that process, nominating 15 spheres of approximation. The approximation of legislation is an important and effective tool in the partnership between Russia and the EU, aiming to develop it into a stable strategic partnership on the basis of a free trade area. The implementation of the Common Spaces is impossible without the emergence of a common or *Single Legal Space*³³.

When modelling the mechanism of legal approximation and taking specific measures in this field, account should be taken of the fact that Russia is a federal state and areas of legal approximation touch upon all the levels of legislative competence of the Federation and its regions identified in Articles 71-73 of the Constitution of Russia. The basis for the development of cooperation between the EU and the Russian regions needs to be put into the provisions of the SPT. The *Northern Dimension* is a successful example of the efficiency of such an approach. The set of problems arising around Kaliningrad could be the subject of a separate protocol, or a declaration in the shape of a supplement to the new Treaty.

Moreover, it is necessary to include a rule in the new Treaty that all the provisions of the PCA which are not discordant with the new Agreement will remain in force until special agreements on the matters concerned come into force. This would be the clearest and most legally literate way of conserving all these important and viable legal achievements already made in the relations between Russia and the EU.

New institutional scheme for the strategic partnership

The SPT could contain provisions concerning the new organizational structure and institutional mechanism of the strategic partnership, which currently only exist informally or result

³⁰ See paragraph 3 of this paper.

³¹ E.g. the Treaty between Russia and The Kingdom of Spain on cooperation in social security matters 1994.

³² See: Communication from the Commission of 17 December 2001 - EU-Russia environmental cooperation (COM(2001)772 final - Not published in the Official Journal). On successful practical partnership in this field see: Economic Aspects of Environmental Policy in Russia. / Eds. W. Douma. A. Kellermann. Moscow. 2004.

³³ See: Moscow-Bruges White Paper: The Rule of Law and a Single Legal Space for Europe and Post-Soviet States. // The World Rule of Law Movement and Russian Legal Reform. / Eds. F. Neate, H.Nielsen. Moscow. 2007. P. 219.

from acts of soft law. Principally, this concerns the Permanent Partnership Council (PPC) and its structures³⁴, but also the "dialogues" between Russia and the EU on different aspects of their relations need to be legalized. Regarding this proposal, it should be stressed that at present there is a certain deficit of democracy in the activity of the structures of the strategic partnership. The following important points require specification in the SPT:

- a) The principles of transparency and of access to information on the activity of these structures;
- b) The establishment of structures providing for parliamentary representation in relations between Russia and the EU;
- c) The creation of structures providing for civil society in relations between Russia and the EU, in particular representation of the interests of the business community.

It is however necessary to take special account of the creation of the institutional mechanism promoting the approximation of legislation and tracing its results. The Parties could use the experience of the institutional structure between the EU and Turkey within the framework of the customs union and the other spheres, where they have made general and compatible rules of interaction. This could amount to the development of a "small results" practice, as proposed by the Russian researcher A. Chetverikov³⁵. This idea consists of Russian participation in all the EU bodies providing the possibility of the participation of third countries in their activity.

Conclusion

Unfortunately, there are a number of political difficulties in the way of the conclusion of the new Basic Agreement on relations between Russia and the EU. In my opinion, most of the difficulties exist because they are not covered by the basic legal document between the Parties. However, the process of concluding the SPT is very complicated in the absence of a common external approach on the part of the Member States with respect to Russia. Relations between Russia and the European Union have never been simple. They have always been accompanied by different economic and political problems, divergences of interests and lack of mutual trust. Nevertheless, there have been numerous examples of these problems in bilateral relations being solved.

I am sure that the Parties will begin negotiations concerning the new treaty as soon as possible. It is necessary to replace the PCA with a new treaty establishing the legal scope for the strategic partnership. It is certain that the new agreement should reflect a "technological approach", which would support the inheritance of the provisions and practice of the PCA in relations between the Parties. It is necessary to save the existing positive integrational "baggage" and transpose it to relations on a new level. The new treaty may better satisfy the growing scale and spheres of strategic partnership between Russia and the European Union as well as the common interests of the Parties. There is no doubt, however, that modern European Integration without Russia is impossible.

³⁴ The formats of the PPC: the PPC on freedom, security and justice, the PPC on energy, the PPC on transport, the PPC on the environment, the PPC on culture, the PPC on science etc.

³⁵ See: S. Kashkin, P. Kalinichenko, A. Chetverikov, V. Zhbankov. Interconnection between the EU and the Member States in external matters and impact on relations with Russia // *Law and State: theory and practice*. 2008 №4(40). P. 10. (in Russian).

The Impact of EU Values on Third Countries' National Legal Orders: EU Law as a Point of Reference in the Norwegian Legal System

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Norway is not a member of the European Union. In spite of that, European Union (EU) law has, since the early 1990s, had a profound impact on the Norwegian legal system. Norway has ratified several treaties that have also been ratified by the states that are members of the European Union and, in some cases, the European Union. In areas covered by these treaties, EU values and laws have the same impact on Norwegian legal orders as they have on the legal orders of the EU member states. The treaty that has the most profound impact is the Agreement on the European Economic Area signed on 2 May 1992 (the EEA Agreement). But there are also other treaties of importance to the development of Norwegian law.

The EEA Agreement¹

The EEA Agreement entered into force on 1 January 1994, and was originally conceived as an agreement between the then remaining EFTA² member states – Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland – and the member states of the European Communities. Switzerland however never ratified the agreement, and it did not enter into force in relation to Liechtenstein until 1 May 1995. Due to the accession of Austria, Finland and Sweden to the European Union on 1 January 1995, the Agreement now applies to the Member States of the European Union and Iceland, Liechtenstein and Norway. Special enlargement agreements have been entered into whenever the number of member states of the EU has increased.³

The aim of the EEA Agreement is to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with a view to creating a homogeneous European Economic Area (Article 1 (1)) with equal conditions of competition. The effect of the Agreement is to extend the internal market to the EEA EFTA states by providing mechanisms whereby a large part of the EU legal texts⁴ are made applicable within the entire geographic area covered by the Agreement.

Article 1(2) of the Agreement sets out the areas that are covered by the agreement and these are dealt with in further detail in different parts of the treaty. The areas covered by the agreement are:

- free movement of goods (part II of the agreement);
- free movement of persons, services and capital (part III of the agreement);
- competition (part IV of the agreement); and
- cooperation in fields such as research and development, education and social policy (part VI of the agreement).

As mentioned the purpose of the Agreement is to create a common legal area where the EEA laws are identical with those applied within the European Union with respect to the common internal market, and to provide mechanics to make it possible to control that those legal texts are implemented, interpreted and applied in a manner that will assure that they are understood in the same manner in the EU member states and by the EU institutions as in the three EFTA EEA states and the institutions established by the agreement.

The EEA Agreement explicitly states that it does not include:

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¹ The EEA Agreement is complex. My intention here is only to describe certain features of the Agreement, namely those that ensure the impact of EU law on Norwegian legislation. The text of the EEA Agreement is found in The text of the agreement is commented on in EEA Law, A commentary on the EEA Agreement, by Sven Norberg and others, 1993. A standard Norwegian work on the agreement as well as EU law is: EØS-rett by Fredrik Sejersted and others, 2.nd edition, 2004.

² European Free Trade Association.

³ In addition the Agreement was amended as a consequence of the accession to the European Union by Austria, Finland and Sweden. Furthermore references to "the Swiss Confederation" in the text were deleted by an Adjusting Protocol.

⁴ The term legal texts is used here to include conventions as well as regulations, directives and other applicable texts.

- The common trade policy, i.e. the EEA forms a free trade area and not a customs union with common external customs border;
- The common agricultural policy;
- The common fisheries policy;
- The common policy on indirect taxation; and
- The common economic and monetary policy.

There are some fundamental institutional differences between the EEA Agreement and the EU Treaty.⁵

Ratification of the EEA Agreement does not entail transfer of legislative powers from a Contracting Party to institutions of the EEA. No sovereignty was to be transferred through ratification of the agreement.

- The EEA organs, though inspired by the Community system, are unique.
- The dynamic development of the Agreement is provided for through the provisions on the decision-making procedure, including the provisions on the consequences of failure to reach agreement. These provisions differ from the provisions within the Union.
- Furthermore, there is no majority voting. All decisions in the EEA are taken by consensus between the Community and its Member States, on the one hand, and the three EFTA EEA States, on the other.

The Agreement was drafted during the last few years of the 1980s and the beginning of the 1990s. The binding treaties with respect to the common market were then the EEC Treaties.⁶ The main part of the Agreement follows to a large extent the structure of these treaties. In all appropriate areas, the provisions of the EEA Agreement have been worded identically, or as closely as possible, with the corresponding provision of the European Economic Community (EEC) Treaties. Rules that at the time had been subject to extensive interpretation were not reformulated but reproduced in their original wording. Hence the main parts of the Agreement reflect as far as possible the then applicable EEC primary legislative texts.

The protocols are an integral part of the Agreement. They cover many different and specific issues, such as horizontal adaptations, rules of origin, fishing, simplification of border formalities and mutual assistance in customs matters, existing agreements and certain institutional questions. The provisions dealing with institutional questions are generally not based on EEC legal texts.

The *acquis communautaire* (regulations, directives, decisions and certain non-binding instruments adopted by the European Community (EC) institutions) in the areas covered by the Agreement was made part of the Agreement through references in the 22 Annexes to the Agreement. Each annex covers a specific sector of the *acquis*. Protocol 1 On Horizontal Adaptations makes the necessary adaptations of the *acquis* to the EEA legal situation. The annexes constitute a substantial source of law. At the time of entry into force of the Agreement around 1 600 acts of EC secondary legislation were part of the Agreement. In order to fulfil their obligations under the Agreement the EFTA EEA states were obliged to transpose them into binding national legislation upon entry into force of the Agreement.

The main parts of the Agreement establish the foundation in general for a homogeneous and dynamic EEA, together with the Protocols as supplementary basis and the Annexes. In order to secure that the homogeneity of the EEA Agreement is not jeopardized by divergent interpretations, the Agreement provides that its provisions, in their implementation and application, shall be interpreted in conformity with relevant rulings by the European Court of Justice (ECJ), adopted prior to the signature of the Agreement,⁷ with the proviso that this applies without prejudice to future developments of case law, see article 6.

Part VII of the EEA Agreement contains institutional provisions and must be characterized as dynamic and homogeneous. The main purpose of the institutional set up of the EEA Agreement is to allow it to develop simultaneously with Community law in areas covered by the Agreement. The intention was to secure that the result in principle will be the same whether a Community rule or an

⁵ These differences have been there since the very beginning of the EEA regime.

⁶ The EEA Agreement mainly covers the treaty of Rome, but the other treaties are also covered.

⁷ i.e. prior to 2 May 1992.

EEA rule is applied in a case. The principle of homogeneity also applies to developments of EEC/EU secondary legislation adopted after entry into force of the Agreement. Part VII of the Agreement provides for the establishment of the EEA Council, the EEA Joint Committee, the Joint Parliamentary Committee and the EEA Consultative Committee. The first two of these institutions are made up of representatives of the Contracting Parties; while the last two are composed of representatives of the corresponding organs on the two sides.

Part VII of the Agreement also contains provisions on the procedure that is to be followed in order to achieve a parallel development of EC/EU secondary law and EEA secondary law. To some extent the procedure mirrors the corresponding decision-making procedure in the Community; e.g. when new legislation is being prepared the Commission shall not only consult experts from the Member States but also from the EFTA EEA States.

The decision-making bodies under the Agreement are, as mentioned, the EEA Council and the EEA Joint Committee. In the Agreement the Joint Committee is given the mandate to take the formal decisions on the implementation and operation of the Agreement, including all necessary amendments of the Annexes and most of the Protocols. Decisions must be by consensus between the two sides, each side speaking with one voice. Since no legislative competence has been transferred from the Contracting Parties to any of the EEA organs, the Parliament in each EFTA EEA State has maintained its legislative competence, or, in other words, the right to accept or not to accept a particular amendment of the Annexes or Protocols of the Agreement. Article 102 regulates the consequences of a failure of the Parties to reach agreement on amendments of any of the Annexes. Any EFTA EEA state has the formal right to block the adoption of any new EC measure as part of an annex, as the Agreement requires unanimity. This possibility is often erroneously called the “veto right”, but should be seen as a right of reservation. If the reservation concerns an EC act that clearly falls within the ambit of the Agreement the use of this possibility will constitute a break with the principle of a harmonious, dynamic and uniform development between the EU Member States and the EFTA EEA states. If a solution has not been found within six months, the affected part of the Annex in question shall be “regarded as provisionally suspended, subject to a decision on the contrary of the EEA Joint Committee”.⁸ So far the possibility of reservation has not been tested.

The institutional construction of the Agreement has been described as a two-pillar system. However, in reality it consists of two pillars and a crossbeam, consisting of the joint EEA organs where representatives from the EFTA EEA states and the EU Member States and the EU organs meet. The purpose of the crossbeam is to ensure that the EFTA EEA states follow up on their obligation to take over and implement the *acquis communautaire*.

Chapter 3 of part VII of the Agreement contains provisions on homogeneity, surveillance procedure and settlement of disputes. The purpose of these provisions is to ensure the faithful application of EU values and legislation within the EFTA EEA states. In order to assure homogeneity, the EEA Joint Committee is given the power to keep under constant review the development of case law of the ECJ and of a corresponding court – the EFTA Court – that the EFTA EEA states are obliged to establish under the Agreement. The provisions on surveillance procedure impose upon the EFTA EEA states to establish a Surveillance Authority (ESA) as well. The Agreement mandates ESA to monitor the fulfilment by the EFTA EEA states of their obligations under the Agreement, and gives the EFTA Court the power to decide *inter alia* actions brought by ESA against the EFTA EEA states and appeals against decisions made by ESA in competition cases.

As mentioned earlier the EFTA EEA states undertook the obligation to implement around 1200 EC acts of secondary legislation when ratifying the Agreement. In the years before its entry into force many new EC measures had been adopted, and the lists in the different annexes were immediately amended. The number of EC acts that over the years have been made part of the Agreement is around 6 000,⁹ but often new instruments have replaced older ones.

⁸ Article 102 (5).

⁹ Information from the Norwegian foreign ministry. According to the Internal Market Scoreboard No 21 issued February 2008 by EFTA Surveillance Authority 1672 Internal Market directives were incorporated into the EEA Agreement as of 31 October 2007.

To supplement the EEA Agreement Iceland, Liechtenstein and Norway entered into three additional treaties. The most important is the Agreement Establishing a Surveillance Authority and a Court of Justice between the EFTA States.¹⁰ According to article 5 of this Agreement the most important task of the EFTA Surveillance Authority is to ensure that the EFTA EEA states live up to their different obligations under the EEA Agreement. In certain areas it gives ESA additional powers of control, similar to those that the Commission has.

EFTA Surveillance Authority is expected to control national authorities in the EFTA EEA Member States, not actions by individuals in these states. EFTA Surveillance Authority shall ensure that national authorities in these states transpose the EEA *acquis communautaire* into national legislation in a timely manner and correctly. A decision by the EEA Joint Committee to make a new regulation or a directive part of the Agreement triggers an obligation of the EFTA EEA states to transpose the act into national law. The EEA Agreement is not supranational and hence the EFTA EEA states have to adopt national legislation that gives the EEA *acquis* legal effect as binding national legislation. EFTA Surveillance Authority supervises the transposition of the EEA *acquis* continuously, and is mandated to take necessary steps to ensure compliance. Under the EFTA Surveillance Authority/EFTA Court Agreement the EFTA EEA states have vested EFTA Surveillance Authority with the powers to take whatever action it deems appropriate in response to possible infringements. EFTA Surveillance Authority may refer the case to the EFTA Court, cfr. Article 31 of the EFTA Surveillance Authority/EFTA Court Agreement. This is intended to give the Authority the same powers as the Commission, cfr. Article 226 of the EC Treaty.

The Surveillance Authority has also been given powers to control that the authorities in the EFTA EEA states fulfil their obligations under EEA law, be it under the Agreement or secondary legislation. The Authority may decide to investigate a matter on its own initiative or on the basis of a complaint. Complaints often come from private persons, companies or organisations alleging that they have suffered a loss due to faulty implementation or application of the Agreement. The Agreement prescribes a procedure for the handling of such complaints and infringements, similar to the one found in the EU system.

In three areas where control has been considered important, EFTA Surveillance Authority, as the Commission, has been given supervisory powers beyond its general competence. These areas are: procurement by government organs, government support and competition.

The EFTA Court has three Judges and no Advocate General.

The main areas of competences of the Court fall into two categories: direct action against an EFTA EEA State or against EFTA Surveillance Authority, and requests from the national courts of the EFTA EEA states for advisory opinions regarding the interpretation of EEA law. Both categories have parallels within the EU system. However there are two notable differences in the context of advisory opinions: the courts of the EFTA EEA states are not obliged to request an advisory opinions from the EFTA Court, and, while rulings from the ECJ are binding at least on the requesting court, the opinions by the EFTA Court are explicitly advisory.

The implementation of the EEA Agreement and the EFTA Surveillance Authority/EFTA Court Agreement into Norwegian law

From a Norwegian legal point of view the two Agreements are international treaties and, as Norway by tradition adheres to the dualistic tradition, neither the provisions of these treaties, nor those of the *acquis communautaire* are by themselves directly applicable in Norway, though they are binding on the state. Here there is a clear difference between EU law and EEA law as the doctrine of direct effect does not apply in the EEA context.¹¹ The EFTA court has stated this clearly in its judgement in the case of *Karlsson against Iceland*.¹² The majority of justices of the Norwegian Supreme Court took the same position in a plenary judgement in the case known as *Finanger I*, see *Norsk Retstidende* 2000

¹⁰ Signed in Oporto on 2 May 1992. The EFTA Surveillance Authority/EFTA Court Agreement entered into force on the same day as the EEA Agreement.

¹¹ This is an important exception from the rule found in article 6 of the EEA Agreement.

¹² REC 2002 page 248 case – E-4/01.

page 1811 at page 1831. The Norwegian government had misinterpreted a directive when transposing it to Norwegian law. The majority held that it had to follow the text as adopted by the Norwegian parliament. In that case there was an advisory opinion from the EFTA court on the proper interpretation of the directive in question.¹³

In a follow up case, *Finanger II*, *Norsk Retstidende* 2005 page 1365, the Norwegian government was held liable for the loss incurred due to the erroneous transposition of the directive. The Norwegian Supreme court also heard this case in plenary. A minority of the justices found that the government was not liable due to excusable erroneous interpretation of the provisions of the directive.

Traditionally Norwegian courts and authorities apply the principle of presumption of treaty conform interpretation when requested to interpret Norwegian legislation that is based on an international treaty that Norway is bound by. However, this principle has to be set aside when the Norwegian legislator in connection with the adoption of the Norwegian legislation, has expressed its opinion on the interpretation of the actual provision.

Article 7 of the EEA Agreement regulates the transposition into national law of the Agreement itself and the acts referred to in the Annexes. In order to fulfil this obligation Norway adopted a statute on the implementation in Norwegian law of the main part of the EEA Agreement.¹⁴ Paragraph 1 of this statute makes the main part of the Agreement Norwegian law, and according to paragraph 2 all statutory provisions that purport to fulfil Norway's obligations according to the Agreement shall in case of conflict have supremacy. Paragraph 5 of the statute allows Norwegian authorities to give EFTA Surveillance Authority and the EFTA court confidential information in certain cases.

Regulations are made part of Norwegian internal legal order through incorporation without any change, neither with regard to form nor context that could jeopardize the homogeneous application. It follows from Article 7, sub-paragraph (b) that Norway has a choice with respect to both form and method for the implementation of directives and other legal texts. The implementation of these types of EC measures may, as is the case within the Member States of the Union, be made in accordance with the preferred national technique, as long as the content of the *acquis* is preserved. However, the level of details in these instruments very often narrows the choice of form and method for the implementation. In addition EFTA Surveillance Authority oversees that the transposition is carried out in a manner that provides for full implementation of the directive in question. Very often the choices available to the legislative drafter with regard to the manner of transposition is rather limited.

Interpretation of statutory and other provisions that are part of the EEA Agreement has to be in harmony with similar rules in other EEA States (including Member States of the Union). Hence judgements from the EFTA Court, as well as those coming from the European Court of Justice have to be studied. Under Article 6 of the EEA Agreement, rulings by the ECJ that were made prior to the entry into force of the Agreement were made part of the Agreement. But it is fair to say that the jurisprudence of the two Courts has by and large has developed in harmony. The national courts in Norway adhere to judgements pronounced by the ECJ after the entry into force of the agreement in the same manner as those to which Article 6 apply.

As mentioned previously Norway has basically considered the agreement an international law treaty, and it was with some amazement that Norway found that the doctrine of state liability in the case of faulty implementation of a directive also applied within the EEA, see the judgement of the EFTA Court in the case *Sveinbjörnsdóttir*¹⁵ against Iceland. The topic had not been dealt with in the Agreement and opinions in Norwegian legal theory had differed on whether such liability could also apply under the EEA Agreement, but had agreed that the basic one was of whether the Agreement was a treaty or it had supranational traits. In its decision the EFTA Court used a supranational argumentation, underlining the mechanics of the EEA Agreement to ensure harmonious interpretation,

¹³ REC 1999 page 119, case – E 1/99 *Storebrand Skadeforsikring AS v Finanger*. The minority in the *Finanger I* case wanted in reality to give the directive horizontal direct application, but the majority did not follow this. The minority set the wording of the Norwegian statutory text aside, on the basis of section 2 of the statute of 27 November 1992 nr. 109 on the implementation in Norwegian law of the main parts of the EEA Agreement.

¹⁴ Statute of 27 November 1992 nr. 109.

¹⁵ See REC 1998 page 95, paragraphs 59 and 60.

the principle of loyalty and the rights that are conferred on the individual in the EEA through the Agreement.^{16 17}

In an analysis of the EEA Agreement, professor Henry Schermers stated in 1992¹⁸ in a comment on the opinion by the ECJ on the EEA Agreement¹⁹:

In theory it seems impossible to build an association under which the associate members are bound by the same rules as the Member States and have the same influence in the decision-making process without being bound by the obligations of the EEC Treaty. With the necessary amount of goodwill and pragmatism it may, however, be possible to come close to this result. The EEA Agreement goes far in making this possible.

Through good will and a pragmatic attitude shown on both sides this prophecy has turned out to be a rather accurate description of the way that the EEA Agreement has functioned so far. A dynamic and uniform interpretation has been achieved under the two systems to the extent that they are parallel.

The impact of EU law and values on the Norwegian legal order

Under the EEA Agreement EU law and values have had an extensive impact on the Norwegian legal system in areas covered by the agreement, but also in areas that clearly fall outside the scope of the agreement. EC measures have been transposed as Norwegian statutory rules and presented to the Norwegian public as such. In areas that are covered by treaty obligations the powers of the legislators to adopt different rules based on values other than those found in the EEA Agreement or the *acquis communautaire*, is almost non-existent or seriously curtailed as the legislator may only change the rules when there has been a change in the transposed EU text, or Norway has withdrawn from the Agreement, cfr Article 127.^{20 21}

The surveillance mechanics that have been established in accordance with the EEA Agreement and the EFTA Surveillance Authority/EFTA Court Agreement also ensure that there is no departure from the rules that are part of the EEA Agreement, neither in the transposition of the *acquis communautaire* nor in its application.

Norwegian courts have to apply the law as adopted by the Parliament or the administration when empowered to give regulations. When interpreting the rules that have an EEA background, however, the judges have to utilize the same methods as those applied by the EFTA Court and the ECJ, and not the methods of interpretation that are otherwise used by Norwegian lawyers. Most of the *acquis communautaire* has been transposed to Norwegian legal texts. This approach makes it difficult for a Norwegian lawyer to determine whether the provisions in question originate from the transposed *acquis*. This is particularly the case when the transposed *acquis* has been placed in a statute or regulation that also contains provisions that have a “national” origin.

There are notable differences in the manner in which legal texts are prepared and drafted in Norway and in Brussels, and the method of interpretation utilized in Norway in connection with an “ordinary” statutory provision differs from the one used in Brussels and, principally by the courts in Luxembourg, when interpreting EU law.

In Norway very often a committee is given the task to elaborate draft proposals for new legislation or changes in existing legislation. The proposals together with an explanatory memorandum are sent to interested parties for their comments. The government then makes a proposal to the Storting (Parliament) for a new statute. In the explanatory text accompanying the proposed

¹⁶ Norway tried in a later case to raise the issue in order to achieve a reversal of the opinion of the Court, cfr. Karlsson against Iceland, REC 2002 page 248, see especially paragraphs 29-30 where the court states that the Agreement even though it is not directly applicable, may form the basis for liability.

¹⁷ As mentioned previously the Norwegian Supreme Court in the Finanger II case found the government liable in a case where a faulty transposition had resulted in loss.

¹⁸ See Schermers in *Common Market Law Review* 1992, page 992.

¹⁹ Opinion 1/91.

²⁰ An intended withdrawal has to be notified in writing with at least twelve months’ notice.

²¹ Another possibility is to change the text to assure that it is in accordance with the text of the directive transposed.

statute, the ministry will as a rule expound on the purpose of the proposals. Very often the parliamentary committee that performs a preliminary reading of the proposal, and on the basis of this makes its proposal to the Storting, will give its interpretation of the proposed texts – or of the texts that they will propose instead. Norwegian legal texts are traditionally worded in a rather general manner and the preparatory works play an important role as a background for the interpretation of the adopted legal texts. The purpose of a statute is only occasionally expressed in the provisions of the statute itself and Norwegian legislative drafting does not utilize the concept of preambles.²²

In connection with the transposition of the *acquis* the Norwegian domestic legislative process is often curtailed. Very often the appropriate Ministry drafts a memorandum and elaborates the necessary statutory provisions. Even though this is sent on a hearing to interested bodies, the fact that the policy has been established through the *acquis* means that most of the comments will relate to the actual wording of the Norwegian provisions. In this context it should be mentioned that the wording used by the EU in the *acquis communautaire* generally speaking is more detailed than is the tradition of Norwegian legislative drafting. In addition, EC legislative measures are often fragmented in the way that they only deal with some of the issues, which may make it difficult for the Norwegian legislative drafter – or Norwegian lawyers – to understand their impact in full. Furthermore Norwegian legal provisions that transpose the *acquis communautaire* have to be interpreted in light of the preamble of the relevant EC measures as well as the fundamental principles of the four freedoms as the well as the rules established through the jurisprudence of the EFTA court and especially the ECJ. The necessity to adopt new – transposed – legislation within the time limits established for the entry into force of an EC measure, may also make the legislative process more hasty than it would otherwise have been, and the result may not always be as well thought through as usual.

Norwegian judges have had to accustom themselves to the use of the Vienna principles on treaty interpretation after the inclusion of the European Convention on Human Rights and the UN covenants on human rights as Norwegian law²³. However, the fact that EEA legal texts, with the exception of regulations, very often have been transposed into ordinary Norwegian legal language, and that the provisions of a statute may only partially be based on an EEA text, causes special difficulties. Often the lawyers representing the parties as well as the judges may have difficulties in perceiving the different origins of an applicable law in a given case. The extensively purposive method of interpretation used by the Luxembourg courts also tends to create difficulties. On the other hand as Norwegian legislation by tradition is generally worded, the Norwegian courts – especially the Supreme Court – have customarily interpreted legal texts in a dynamic way. But this method of interpretation has become somewhat more difficult as the legislation transposing the *acquis communautaire* as a rule is much more detailed.

Evaluation of the Norwegian experience

The issue of EU membership is politically difficult in Norway. So far there have been two referenda on the question of membership, in 1972 and 1994, and the majority of those voting, have twice voted no. The present coalition government had to adopt a platform that moots the issue until the next general election in September 2009. Under the Norwegian Constitution a vote in favour of membership requires a majority of 3/4 of the members of the Storting (parliament), and 2/3 of its member must be present, *cfr.* paragraph 93.²⁴

From a trade point of view the EEA Agreement is important to Norway as its main trading partners are to be found in states that are members of the European Union. The fact that the Union now has 27 members in Europe also makes it desirable that Norway in many areas has laws and regulations similar to those to be found in the majority of other European states.

On the other hand the EEA Agreement is undemocratic as it does not allow for participation by the EFTA EEA states in the decision-making process in relation to EC measures that are made part

²² In the case of regulations adopted in accordance with enabling statutes, the administration often elaborates the first draft, but it is then submitted for comments to the interested parties.

²³ Statute of 21 May 1999 nr. 39 on the strengthening of the position of human rights in Norwegian law.

²⁴ Another issue is whether this paragraph enables Norway to join the European Union at all. But in the end this is mainly a question of political will, even if the legal basis may be dubious.

of the EEA Agreement.²⁵ The agreement contains a possibility to “veto” the inclusion of an EC measure in the EEA Agreement, but if that possibility is used the EU side may suspend the application of the affected part of the annex. The EFTA EEA states have thus far not yet used this possibility, and it is therefore an open question how the EU side will react. There are however now two directives that certain sectors of the Norwegian society very strongly argue should be “vetoed”.²⁶ The government has not taken a position yet, and it is unknown to what extent there have been consultations on the issue with Iceland and Liechtenstein. This is necessary, as the EFTA EEA states must speak with one voice.

Another difficulty is caused by the fact that the EEA Agreement was drafted on the basis of the EEC treaties. The Agreement has not been revised in accordance with the revisions of the treaty basis for what is now the European Union, i.e. the Maastricht agreement, the treaty of Amsterdam and the treaty of Nice. One difficulty of a practical nature is the renumbering of the articles through the treaty of Amsterdam. This causes difficulties when studying the decisions by the ECJ as the references in the EEA Agreement are to the old numbering. A more important difficulty is the shift of emphasis of the work within the Union. The EEA Agreement deals with those matters that are covered by the first pillar.

If – or when – a constitutional treaty were to be adopted by the EU Member States, the difficulties caused to the upholding of the EEA Agreement may prove insurmountable. Already the changes in the wording of several provisions that have taken place as a result of the changes in the constitutional foundations of the European Union create serious difficulties in maintaining the harmonious development and interpretation of the two systems. One example here is the changes in the provisions on free movement of capital after the adoption of the EEA Agreement. The interpretation of these within the EU may be influenced by the rules on an economic and monetary union. Another is the impact that the rules on EU citizenship may have on the interpretation of the provisions on free movement of persons. As mentioned the mechanics established by the EEA Agreement ensure a dynamic development of secondary legislative texts, but as there is no similar procedure in relation to the agreement, it may disintegrate and create an increasing gap between the two systems. To what extent this will endanger the harmonious and dynamic interpretation of the EEA Agreement remains to be seen. One option is to interpret the provisions of the agreement in light of the new rules, but this is difficult, as the EFTA-EEA countries are not bound in any way by these new texts. The EFTA Court that has had to address the issue a couple of times, has been reluctant to accept that the new formulations found in the EU Treaty have a binding effect in the EEA Agreement connection. But on the other hand the Court has chosen to interpret the obligations under the agreement in the light of the new-formulated EU texts.

Impact of EU law and values on the Norwegian legal order in other areas than those covered by the EEA Agreement

As the EEA Agreement only covers those areas that belong to the first pillar of cooperation, Norway has found it desirable also to make arrangements for extensive cooperation with the European Union within the third pillar. Most important in this context is the Agreement concluded by the Council of the European Union and Iceland and Norway concerning their association with the implementation, application and development of the Schengen acquis of 18 May 1999.²⁷ The agreement is structured differently from the EEA Agreement, as it does not create any new special institutions for the participation by Norway and Iceland. Instead it opens for partial participation by representatives from these two states in relevant EU organs. However, the obligation to assure a harmonious and dynamic interpretation and administration of the provisions of the acquis is as strong under this agreement as under the EEA Agreement. The Schengen Agreement contains the possibility

²⁵ As previously mentioned the Agreement provides for the participation by experts in the preparatory process, but after that all influence has to be exerted through lobbying either of EU member states or of EU organs.

²⁶ The Services directive, and the directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks.

²⁷ Under the Treaty of Amsterdam the Schengen *acquis* is an integral part of EU law, partly based on Articles 61-69 in the Treaty of Rome and partly in the third pillar.

for the EU to cancel the treaty on short notice, if Iceland and Norway do not fulfil their obligations. Even though the arrangements under the agreement are quite complicated, it functions according to its purpose. Naturally this treaty has its impact on Norwegian legislative possibilities in the areas covered by it.

In addition to the Agreement concerning the Schengen acquis Norway has entered into several traditional treaties with the EU in the third pillar area.

Concluding remarks

EU law and values have over the last twenty years had an increasingly strong influence in Norway in spite of the fact that there exists a strong resistance to the European Union in the country. It is a paradox that Norway has declined membership several times because that would diminish its sovereignty, while at the same time it has accepted international law arrangements under which the Norwegian government and legislators have virtually no possibility of influencing the policy adopted by the EU Member States and the EU measures that are adopted to fulfil these policies.

It is questionable to what extent the EU side will be willing to revise the EEA Amendment to bring it in line with a possible new Reform Treaty. If such amendments are not carried out, however, the EEA project may disintegrate rapidly.²⁸

²⁸ One reason to uphold the present arrangement is the fact that the three EFTA EEA states, and especially Norway, make substantial contributions to the EU Cohesion fund. The sum agreed for the five year period starting May 1 2004 was 1167 million euros, 600 million Euros from all three EEA EFTA states and 567 million Euros as a bilateral Norwegian contribution. In connection with the enlargement including Bulgaria and Romania the amount for the duration of the current EEA and Norwegian financial mechanisms was increased by 139 million Euros.

The EEA and Norway: A Case of Constitutional Pluralism

Tor-Inge Harbo*

Introduction

The principle of direct effect has, together with the principle of supremacy, been perceived as *the* feature underpinning the constitutional character of the European treaties. Some have even gone so far as to claim that the EC treaties, because of these two features, are to be perceived as more of a constitution than an international treaty, a point of view that could clearly be contested. For, the idea of constitutionalism, at least in the thick sense, clearly entails other qualities than the EC polity and legal order can display for the time being. One could even claim that one cannot take the claim of constitutionalism seriously without referring to a fully-fledged European federal state legitimated at least by a pluralist notion of demos. The rhetorical overstretch became visible for some first in the wake of the German Maastricht judgement and a less ambitious, and notably more realistic approach, was launched. This approach has also been referred to as constitutional pluralism, which basically suggests that the EC basic legal document still has many qualities that can be best categorised as classical international law. Constitutional pluralism implies settling for a permanent equilibrium between a constitution and treaty¹ – a *new* heterarchical rather than hierarchical *legal order* – with all the implications that would have, most prominently, on the relationship between the EU and the member states, including the relationship between the national courts and the ECJ.

The ambition of this paper is to discuss possible constitutional features of the European Economic Area (EEA) agreement, more precisely, the reception of the principle of direct effect by the Norwegian Supreme Court. It will be argued that the reason why the Court has not taken on the principle of direct effect is not first of all due to the different legal regimes of respectively the EEA and the EU. The reluctance to take on the principle of direct effect must be found elsewhere, namely in the Norwegian pragmatic concept of law, which in turn has bearing upon the institutional design of the constitution as well as the protection of rights. In the following I will first give an introduction to the EEA agreement with specific reference to the principle of direct effect. Thereafter, I will assess the Norwegian Supreme Court's reluctant approach to the principle and indicate possible conceptual explanations based on a theoretical and empirical elaboration.

The reception of the EEA agreement in Norway

The rationale

The EEA agreement was created with the purpose of extending the single European market into the European Free Trade Association (EFTA) countries without the EFTA countries having to become members of the EU. Thus, the EEA agreement differs from the EU-treaties on many aspects, the main underlying premise for this discrepancy being the fact that the EEA is an intergovernmental cooperation, constructed as a regular agreement under international law, whereas the EC law is not – at least not any longer. Because although the original treaties which found the basis of the Community clearly also could be characterised as treaties of regular or classical international law, it is broadly recognised that there has been a development of this legal basis, which implies a departure from this classical approach of international law.² This process, which has been referred to as constitutionalisation of the EC treaties, has been facilitated by an activist European Court of Justice, which has spelt out the principles of supremacy³ and direct effect⁴ requiring that they must be read into the founding treaties of the Community.

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¹ Note the parallel perception of the EU polity as a federation (Bund) as an equilibrium between a confederation and a federal state.

² In case 26/62 [1963] ECR I *Van Gend en Loos* the ECJ refers to a “new legal order”.

³ Case 6/64 [1964] ECR 585, *Costa v. ENEL*.

The very rationality of the EEA treaty was thus that this supranational approach should not be copied, if it was the EFTA countries might as well become fully fledged members of the Community. The EEA agreement was an intergovernmental treaty in which the notions of state sovereignty and the dualistic approach⁵ to international law was not to be altered as a consequence of accession to the treaty, or at least this was the intention. However, already in section 2 of the act implementing the EEA agreement into Norwegian legislation the principle of supremacy is recognised for the main parts of the EEA agreement. What is important is *how* and by whom the principle of supremacy is stated. In the case of Norway, then, the supremacy clause is laid down in the implementation act passed by the Norwegian legislator. In the case of the EC, an activist Court created the principle of supremacy through its jurisprudence,⁶ although one clearly could argue that the principle of supremacy was somehow enshrined in the founding treaties, and thus not really a result of judicial activism. Regarding the supremacy of EEA law the Norwegian Parliament made this decision through the implementation act; thus, it could be argued that the principle of sovereignty and dualism has not been infringed with in the latter case.

There are indications that a constitutionalisation of the EEA-treaty might also be in progress.⁷ According to the EFTA court, the EEA Agreement is not merely a regional treaty under international law. The Court stated in *Sveinbjørnsdóttir*, echoing the ECJ in *Van Gend en Loos*⁸ that the EEA Agreement is an “international treaty *sui generis* which contains a distinct legal order of its own”. It is “less far-reaching than under the EC Treaty, but the scope and the objective of the EEA Agreement goes beyond what is common for an agreement under public international law”.⁹

The dynamic nature of the EEA agreement

The jurisdiction of the EFTA court is defined in the second paragraph of article 31 of the Surveillance and Court Agreement (SCA), which states that if a state concerned does not comply with a reasoned opinion of the ESA, the latter may bring the matter before the EFTA court, and in art. 32 of SCA, that the EFTA court shall have jurisdiction in actions concerning the settlement of disputes between two or more EFTA states regarding the interpretation of application of the EEA agreement, the Agreement on a Standing Committee of the EFTA states or the Surveillance and Court Agreement itself. Art. 35 SCA states that the EFTA court shall have unlimited jurisdiction in regard to penalties imposed by ESA and articles 36 and 37 of SCA. Furthermore, the EFTA court shall have jurisdiction in actions brought by an EFTA state, or any naturalised or legal person, against a decision of the ESA or a failure on the part of the Surveillance Authority to act in infringement of its obligations under the Agreement. In such matters as described here, the Contracting States follows a ruling to take the necessary measures to comply with the judgements of the EFTA court, i.e. there is a legal obligation for the EFTA states to follow the EFTA court rulings. If an action taken by an EFTA state, which triggered the decision of the Surveillance Authority, is found by the Court to be in accordance with the EEA treaty, the decision by the Authority shall be declared void.

Reaching further than the obligations under the EEA agreement, art 34 SCA states that the EFTA court shall have jurisdiction to give advisory opinions on the interpretation of the EEA agreement. This procedure is modelled after article 234 EC where the ECJ has jurisdiction to give preliminary

(Contd.) _____

⁴ The most well-known cases regarding direct effect of EC law is case 26/62 [1963] ECR 1 (*Van Gend en Loos*) regarding the direct effect of treaty provisions and case 41/74 [1974] ECR 1337 (*Van Duyn v. Home Office*) regarding the direct effect of directives.

⁵ The core of the dualist principle has constitutional status in Norway. This follows from section 1 of the Constitution, which states the independence of the nation state, and several articles that endow the legislative power to the Parliament. This entails that if all international law shall be directly effective in Norwegian law, one would have to change the constitution, e.g. Torkel Opsahl, “Noen sider av problemet om overgang til et ”monistisk” system i Norge”, *NOU 1972*: 16 p. 99-112.

⁶ *Costa v. ENEL*, op. cit

⁷ Baudenbacher C. (2003) “Facets of an EEA Constitutional Order” in Colneric, et al (eds.), *Une communauté de Droit, Festschrift fuer Gil Carlos Rodríguez Iglesias*, Berlin, Berliner Wissenschafts Verlag, p. 343-59.

⁸ 26/62 [1963] ECR 1.

⁹ Case E-9/97 *Eral Maria Sveinbjørnsdóttir v The Government of Iceland* (1998) EFTA Ct Rep 97. In this case the EFTA court established the doctrine of state liability for non-implemented directives in EEA law with reference to the homogeneity objective of the EEA agreement but also, as quoted above, the *sui generis* character of the agreement, which reaches further than International law, but not as far as EU law. The parallel ECJ decision is case C-6, 9/90 *Francovich and Others v Italy*.

rulings concerning the interpretation of Community law upon requests by the Member States' courts. The main difference between the two procedures is that the ECJ ruling in this case is binding for the member states, whereas the EFTA courts decision is not binding on the EFTA states. Nevertheless, the Norwegian Supreme Court in *Finanger I* has held that the advisory opinion of the EFTA court must be perceived as a particularly weighty argument to be considered by the Supreme Court. This clearly follows from the reasoning behind the erection of the court in the first place, namely to secure a homogeneous interpretation and application of the EEA agreement. In addition the Court pointed to the fact that the EFTA court had particular knowledge of the area and therefore had special authority in the case.¹⁰ However the Supreme Court at the same time made it clear that the EFTA court is not provided with the exclusive right to interpret the EEA agreement in relation to the EFTA states. The Norwegian Supreme Court regards itself both formally competent and substantially qualified to interpret provisions of EEA law. In the *Finanger I* case the Court thus stated that the national courts do not only have a privilege, but also a duty to assess independently the EEA agreement. However, it could be claimed that the Supreme Court has set the requirements to diverge from the opinion of the EFTA court so strictly that in practice there is not much room for manoeuvring. In a more recent judgement the Court stated, with reference to *Finanger I*, that it would take a lot for the Supreme Court to depart from the EFTA Court's understanding of the EEA provisions, especially in cases where Community law/ EEA law is both specialised and developed.¹¹

The status of ECJ case law as precedents and part of the *acquis communautaire* is reflected also in the EEA agreement art. 6 which states that the provisions of the agreement, in so far as they are identical in substance to corresponding rules of the EC treaty, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the ECJ given prior to the date of signature of the agreement. ECJ case law subsequent to this date is not binding on the courts of the contracting parties. However, this does not limit the EFTA court, or for that matter, the Norwegian Supreme Court from referring to ECJ case law of a later date. The distinction in art 6 EEA between cases before and after the signatory date of the EEA agreement is blurred since the Supreme Court clearly has also to take into consideration later decisions by the ECJ in order to fulfil the overall requirement of the EEA-agreement, namely legal homogeneity.

The principle of direct effect

The principle of direct effect is perceived as an important constitutional feature of EC law since it gives the EC treaty provisions, and also directives, direct applicability for individuals. The acceptance of the principle implies that the state is circumvented together with the principle of sovereignty and dualism. Norwegian citizens are directly bound by the EEA treaty provisions since the provisions are implemented into Norwegian law. The same is the case for the *acquis communautaire* – regulations and directives – that is made part of the agreement. However, directives that are merely taken on by the EEA Committee are only binding on the Norwegian state and directives that have not yet been decided upon by the Committee are neither binding for the EEA states nor their citizens. Nevertheless, whether a directive does have direct effect for EEA citizens of Norway was discussed thoroughly by the Norwegian Supreme Court in the *Finanger I* case. The case concerned whether a passenger in a car, Ms. Finanger, should receive full compensation from the insurance company for the injury she had suffered in a car accident. According to Norwegian law, the compensation from the insurance company was to be reduced since Ms Finanger knew or must have known that the driver was intoxicated by alcohol. The directive did not make this distinction, which meant that Ms. Finanger

¹⁰ Rt. 2000: 1811 – *Finanger I*. 'Uttalelsen fra EFTA-domstolen er rådgivende... Dette innebærer at Høyesterett har myndighet og plikt til selvstendig å ta stilling til hvorvidt og i hvilken grad uttalelsen skal legges til grunn for Høyesteretts avgjørelse. Men jeg finner samtidig at uttalelsen må tillegges vesentlig vekt. Dette følger etter min mening allerede av den omstendighet at EFTA-statene i samsvar med EØS-avtalen artikkel 108 nr. 2 ved inngåelsen av ODA-avtalen har funnet grunn til å opprette denne domstolen, blant annet for å nå frem til og å opprettholde en lik fortolkning og anvendelse av EØS-avtalen. Også reelle grunner taler for dette. Rettskildebruken innen EØS-retten kan avvike fra den nasjonale. Dette gjør at EFTA-domstolen med sin særlige kunnskap bør kunne uttale seg med betydelig autoritet' (p. 1820).

¹¹ Rt. 2004: 1474 – *Paranova*. "Etter min mening skal det meget til for at Høyesterett skal fravike det domstolen uttaler om forståelsen av de EØS-rettslige bestemmelsene... særlig på et område... hvor EU/EØS-retten er spesialisert og utviklet" (avsnitt 67).

would receive full compensation in the concrete case if the relevant directive on Motor Vehicle Insurance had been implemented correctly, and alternatively, if the directive was given direct effect. A large dissenting minority of the Supreme Court was of the opinion that the relevant Motor Vehicle Insurance Directive should be given direct effect, meaning that it would clearly prevail over national law. This despite the fact that direct effect in this case concerned a directive that regulated a relationship between two private parties – an insurance company and a person insured by this company. The question was thus whether the directive should be given horizontal direct effect and not vertical, the former not even recognised in EC law. The majority found, however, that the directive should not be given (horizontal) direct effect since this would obviously be in breach of the intergovernmental character of the EEA agreement and thus, in effect, passed the ball over to the legislator.

In the subsequent *Finanger II*¹² the Supreme Court awarded Ms Finanger state liability with the reasoning that the Norwegian State had not implemented the same Motor Vehicle Insurance Directive correctly. Awarding Ms. Finanger state liability in this case has been perceived as a large step in the direction of accepting the principle of direct effect, if not formally, at least in effect, since there is a link in EC law between the principle of direct effect and state liability.¹³ The question could be raised of what the Norwegian Supreme Court would do in a case where vertical direct effect of a directive was claimed by one party. Would the Court also in that case pass the ball over to the legislator, or would it, assuming that state liability would be granted to the party anyway, with reference to *Finanger II*, give the directive direct effect (provided of course that the directive fulfilled the criteria for having direct effect)?¹⁴ Granting a directive direct effect would be more than a matter of efficiency. Surely it would in many cases be a great advantage for the party involved to be granted the right according to the directive rather than compensation through declaring state liability for failure to implement the act.

Constitutional and legal conceptual implications and explanation

The different approaches in regard to the principle of direct effect, as described above, can clearly be explained by a reference to the different legal basis of the two treaties. But this constitutes, in my opinion, only part of the explanation. For, although the founding rationality of the EEA agreement was to create an intergovernmental alternative to the Community (this rationality being highlighted through the reluctance of the Norwegian Supreme Court to take on the principle of direct effect) there is, on the other hand, no provision in the treaty actually hindering the EFTA state courts from embracing the principle. There is, more concretely, no provision in the EEA agreement that states that the EFTA state courts are not to grant direct effect to directives, which have been accepted by the EEA committee but not yet implemented by the respective national parliaments. The homogeneity clause would on the contrary endorse such an idea. The reason for the reluctance of the Norwegian Supreme Court to take on the principle of direct effect must thus be found elsewhere. The obvious answer is the claim of sovereignty, which is the other leading idea of the EEA agreement, as noted above. The idea of sovereignty is often linked to the idea of parliamentary sovereignty, meaning here that the Norwegian parliament is the only legitimate authority that can make decisions regarding Norwegian citizens' rights and duties. However, one can question whether this idea of parliamentary sovereignty amounts to more than a formal requirement all the time there is a strong overarching

¹² Rt. 2005: 1365 (*Finanger II*).

¹³ Graver, Hans Petter (2005) "EØS, suverenitet og statens ansvar for manglende gjennomføring – kommentar til Høyesteretts dom 28. oktober 2005 *Finanger II*", i *Nytt fra privatretten* nr 4. The doctrine of state liability in the EEA agreement was, as noted above, first established by the EFTA court in *Sveinbjørnsdóttir* op.cit. and restated in Case E-4/01 *Karlsón mot Island* REC 2002 s. 248. In the latter case the Norwegian government used the argument as indicated above – the link between state liability and direct effect in EU law – in order to convince the EFTA court to vindicate its decision in *Sveinbjørnsdóttir* without success. However, after the Norwegian Supreme Court had stated the same in *Finanger II* it accepted the doctrine of State liability.

¹⁴ In *Finanger I* the majority of the Supreme Court held the possibility open for the direct effect being applicable. However, it is most likely that the Norwegian Supreme Court would decline to give a directive direct effect when pressured on this point, one of the reasons for this reluctant approach being explained below.

political commitment to abide by the treaty. The sovereignty claim has, however, a deeper constitutional and legal conceptual connotation, which will be here discussed.¹⁵

According to the Scandinavian realist concept of law,¹⁶ as is the case for the positivist concept of law, the judges cannot legitimately base their judgments in hard cases on some notion of fairness or justice or some other dimension of morality.¹⁷ In this respect the realist and positivist concept of law are both contrary to the liberal concept of law as elaborated by, for example, Ronald Dworkin.¹⁸ Judgments concerning values such as what is just and fair belong, according to the former understandings of law, to the political sphere and should be taken by politicians in democratic representative assemblies. This means that the judiciary within the realist or positivist concept of law would have to legitimate their decision with reference to something other than a normative version of the common good. Judicial decisions in both the realist and positivist concepts of law would, for example, be legitimate to the degree the courts take on the role of the Montesquieuian mouthpiece of the legislator.¹⁹ This could be referred to as the empirical version of the common good, meaning that the court would rule in accordance with the interpretation of law, which is according to the will of the legislator, and also the established institutions.²⁰

According to the Norwegian pragmatic concept of law – which can be perceived as a deviation of the positivist and realist concept of law – the law is perceived in close connection to reality, which the law in the concrete case is regulating.²¹ This means firstly that judges are given a certain discretion to make decisions in hard cases and, secondly that this discretion *prima facie* is not necessarily bound by reference to some natural law principles of individual or minority rights nor to the utility-informed will of the legislator. Rather, the judges have the discretion to decide independently of these two major branches of normative theory according to what they deem produces the best result or consequence of the judgement. This discretion is materialised and rationalised through a legal methodological feature – a factor in the sources of law – referred to as real considerations (*reelle hensyn*). *Reelle hensyn* is the legal methodological explanation provided when judges under a pragmatic law regime have the discretion to rule either way. Thus, *reelle hensyn* can provide legal methodological explanation both when judges rule in favour of individual rights and public policy, as we shall see below.

Reelle hensyn secures a dynamic interpretation of the law and thereby the law's adaptability to the changes in society. True, it has a utilitarian flavour to it since it is the reasonableness of the result which is the decisive factor in determining and legitimising the consequences of its application, rather than any supra positive predetermined principles of reasoning. Nevertheless, it provides the Court with a potential instrument with which it could, and in fact has, utilised to quash acts by the legislator.²² Decisive for the categorisation of the pragmatic methodological concept of *reelle hensyn* as closer to a non-positivist (naturalistic) than a positivist concept of law is whether its interpretation “respects or

¹⁵ If the concept of direct effect would breach the dualistic approach to international law, it would also breach with the constitution all the time the dualist principle is perceived as enshrined in article 1 as noted above. However, in *Finanger I*, as noted above, the Supreme Court nevertheless held the possibility open for the future recognition of the principle of direct effect which clearly indicates that the legal situation is unclear on this point.

¹⁶ Ross, Alf (1953) *Om ret og retfærdighed* (On Law and Justice), Copenhagen, is a prominent exponent of Scandinavian legal realism.

¹⁷ This is often referred to as the separation thesis, i.e. the separation of law and morality. However, according to Joseph Raz the standing of the separation thesis is not as strong in positivist legal theory as some would claim, see *Practical Reason and Norms*, Oxford 1995. The Norwegian variant of Scandinavian realist legal theory, as elaborated by Torstein Eckhoff does not, arguably, distinguish as clearly between law and morality as the realist concept of law, see, for example, Rune Slagstad, “Norwegian legal realism since 1945” in *Scandinavian Studies of Law* 35 (1991) p. 215-233.

¹⁸ Dworkin, Ronald (1977) *Taking Rights Seriously*, Cambridge: Harvard University Press, s. 22: “I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or societal situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”

¹⁹ See Montesquieu's *Spirit of the Laws*.

²⁰ See Hart's “rule of recognition” as an important feature in his concept of law in (1961/1994) *The Concept of Law*, Oxford: Oxford University Press, 2. ed.

²¹ Eckhoff, Torstein, “Realisme’ og ’idealisme’ i rettsvitenskapen (“Realism” and “idealism” in the science of law), *Jussens Venner*, 1954, p. 37; See also, Slagstad, Rune op.cit.

²² This would not mean that the legislative act is deemed invalid as such, but rather that it is not applied in the concrete case, i.e. that the textual understanding of the legislative act is deemed to weigh less than the real considerations.

secures some individual or group right”.²³ If, on the other side *reelle hensyn* is interpreted by the courts in a way that would secure the will of the legislator by, for example, “improvement in some economic, political, or social feature of the community”²⁴, clearly the concept comes arguably closer to the positivist understanding of the law.

Whereas *reelle hensyn*, in the beginning of the 20th century, was given an individualistic interpretation, meaning the Supreme Court utilised it in order to protect the individual against what it considered would be an unreasonable result in the concrete case,²⁵ this was to change in the wake of the introduction of utilitarian political theoretical thinking leading to the erection of the interventionist social state. Thus, in the last fifty years *reelle hensyn* has been interpreted in a collectivistic way supporting the intentions of the legislator, and thus the rights of the collective, rather than the rights of the individual.²⁶ This implied at the same time that the Supreme Court has taken on the role of “deputy legislator”,²⁷ what the former chief justice of the Norwegian Supreme Court Carsten Smith has referred to as the Court having a “political function”.²⁸

It should be noted that Smith more recently has been one of the most prominent spokesmen for the protection of human rights and in this connection also defended a stronger position for the judiciary in protecting these rights.²⁹ Seen in this light one would think his suggestion that the Supreme Court has and must have a political function must imply something else than being “deputy legislator”. As guarantor of human rights the role of the Supreme Court would rather have to be to secure that acts passed by the legislator – “norms of policy” – are in accordance with human rights – what Dworkin refers to as “norms of principle”. “Political function” in this context must refer to the fact that the Supreme Court will potentially protect other *values* than those promoted by the legislator. These other values could require that the courts interpreted the Norwegian Constitution differently than it has done previously.

But although the Supreme Court, according to Smith, would have to play a decisive role in guaranteeing individual rights according to a liberal understanding of the constitution this approach is moderated by the fact that the Court has taken on a pragmatic, relativist understanding of rights.³⁰ In *Kløfta*³¹ the Supreme Court introduced the “preferred position principle” into Norwegian law.³² The Supreme Court stated in general terms that it would give rights regarding personal liberty and security more weight than economic rights, when reviewing the constitutionality of legislative acts. The Court has repeated the principle in many subsequent cases³³ and thus it could arguably be regarded as having constitutional standing.³⁴

In the case the “preferred position principle” would also influence the “presumption principle” as partly suggested by the Supreme Court in *Finanger I*,³⁵ it could found an argumentative basis for

²³ Dworkin, *Taking Rights Seriously*, op.cit. pg. 82.

²⁴ “I call ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change), Dworkin, Op.cit s. 22

²⁵ Rt. 1916: 648 (*Bidragsspliktdommen*).

²⁶ This has particularly been so in cases regarding environmental regulation in the last 30-40 years starting with Rt 1970 s 67 (*Strandlovdommen*).

²⁷ Op.cit. Dworkin, *Taking Rights Seriously*, pg. 82. According to Dworkin this would be the legal positivist approach.

²⁸ Smith, Carsten (1982) “Høyesterett – et politisk organ?” Department of Private Law, University of Oslo, stencilled series No. 85, p. 14f: “One should in my view to a greater degree than is usual in Norwegian legal literature recognise the fact that the Supreme Court has [and] must have a political function”.

²⁹ Smith, Carsten (2006) “Bør menneskerettighetene styrkes i vår grunnlov?”, *Jussens Venner* nr. 4, s. 235-247.

³⁰ Smith, Carsten (1975) “Domstolene og rettsutviklingen”, *Institutt for privatrett stensilserie*, Nr 23, Juridiske fakultet, Oslo, s17.

³¹ Rt. 1976: 1.

³² The principle was originally invented by the US Supreme Court in the aftermath of the New Deal policy of President Roosevelt.

³³ Rt. 1996: 1415 (*Borthen*); Rt. 1996: 1440 (*Thunheim*); Rt. 1997: 1821(*Kjuuskjennelsen*); Rt. 2002: 1618 (*Boot-boys*); dommer avsagt 23. september 2007 (*Tomtefesteloven*).

³⁴ Smith, Eivind strongly opposes this interpretation, see *Høyesterett og folkestyre*, Oslo 1993.

³⁵ A directive that has been adopted by the EEA committee, but which is still not implemented by an act of parliament would, although not given direct effect, nevertheless be an important factor that the courts would have to take into consideration when interpreting the Norwegian body of law. This follows from art. 3 and 6 EEA which obliges the courts to interpret

the Supreme Court's more reluctant approach to the principle of direct effect. For the EEA agreement is first of all about the four economic freedoms, which, although one might disagree with the ECJ's categorisation of these as fundamental rights,³⁶ nevertheless are more related to economic rights than rights protecting personal freedom and security. This could at least partly explain the fact that the Supreme Court takes a more restrictive approach in the *Finanger I* case, regarding the EEA agreement, than, for example, in the *uskyldspresumpsjonsdommen*³⁷, regarding the presumption of innocence laid down in art 6 of the ECHR implemented in *Menneskerettsloven*³⁸, the latter clearly about personal freedom and security. Both implementation acts (the EEA act and the Human Rights act) include a provision stating the respective act's supremacy over conflicting legislative acts³⁹. Furthermore, in both cases a clear legislative provision backed up by a supportive statement of intention by the legislator were at hand. And in both cases the legislator had assumed that the national provision was in conformity with the relevant international obligation. Thus, in both cases the Supreme Court stated correctly that it was not the intention of the legislator to regulate in conflict with the relevant international obligation. Nevertheless, whereas the Court in *Finanger I* refrained from giving priority to the EEA directive implying that it did not give it direct effect, the Court in the *innocence presumption case* stated that the relevant ECHR provision, art. 6, 2 of the Human Rights act, was given priority over the conflicting legislative act. One of the explanations of the different approaches could be the influence of the "preferred position principle" related to constitutional law on the "presumption principle" related to international law. There is, however, a problem with using *Uskyldspresumpsjonsdommen* here, namely the fact that we are probably comparing apples with pears. Because, whereas in the case of *Finanger I* the Court was dealing with a directive, which was not implemented into Norwegian law, in *Uskyldspresumpsjonsdommen* it was dealing with a treaty provision already implemented in Norwegian law. However, there are many other examples which better show that the Supreme Court is giving non-implemented human rights law a preferable position. This has been thoroughly elaborated on by Carsten Smith.⁴⁰

From the abovementioned we can conclude that an idea of rights as "trumps" will probably not be a very convincing argument for either the Norwegian *Storting* (Parliament) or the Norwegian Supreme Court to take on the EU law principle of direct effect. Since it is the Supreme Court and not the *Storting* that sits on the key feature of the pragmatic concept of law, namely the methodological notion of *reelle hensyn*,⁴¹ it is plausible to assume that if the EFTA court, or the ECJ, took on the same methodological approach that the pragmatic concept of law prescribes, it would be "less risky" for the Supreme Court to accept the principle of direct effect. The presumption is that *Stortingets* "will" would be taken seriously into consideration (as prescribed in the pragmatic approach) when the directive is interpreted by the respective courts.

Both the ECJ and the EFTA court tend to interpret legal texts contextually and teleologically (purposive interpretation) securing more dynamism to the law than a text-bound and historical-

(Contd.) _____

Norwegian law in loyalty and conformity with EEA law (prinsippet om direktivkonform tolkning). A similar principle exists in EU law. In *Finanger I* the Supreme Court stated that the principle of loyalty and conformity does not go further than the principle of presumption, which reads that Norwegian law presumes to be in conformity with the international treaties that are binding for Norway.

³⁶ The ECJ has referred to the four freedoms as fundamental rights: "It should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance", case 240/83 *Procureur de la République v. ADBHU* [1995] ECR 531. This view has been criticised by, for example, J. Coppel and A.O'Neill (1992) "The European Court of Justice: Taking Rights Seriously", 29 *CMLRev.* 669.

³⁷ Rt. 2005: 833 (*Uskyldspresumpsjonsdommen (innocence presumption case)*).

³⁸ *Menneskerettsloven* (Human Rights Act) av 21. mai nr 30 1999.

³⁹ Human rights act, 21 mai. Nr. 30. 1999 § 3: "Bestemmelsene i konvensjoner og protokoller som er nevnt i § 2 skal ved motstrid gå foran bestemmelser i annen lovgivning"; EEA act, 27. nov. Nr. 109. 1992 § 2: "Bestemmelser i lov som tjener til å oppfylle Norges forpliktelse etter avtalen, skal i tilfelle konflikt gå foran andre bestemmelser som regulerer samme forhold." As the text reveals, there is an important difference between the two "supremacy" paragraphs, namely, that the former would also open up for direct effect of the respective human rights conventions, etc, whereas the latter, as noted above, does not.

⁴⁰ Carsten og Lucy Smith, *Norsk rett og folkeretten* (Norwegian Law and International Law), Oslo: Universitetsforlaget 1982, 2. edition.

⁴¹ This in contrast to the Hartian concept of law, where the Parliament is the subject of *rule of recognition*.

purposive (originalist) approach would. One could claim that this approach bears some resemblance to the *reelle hensyn* argument in that it opens up the idea of taking into consideration other aspects than the provisional text. However, this is apparently where the similarities end. For the teleological and contextual approach of the ECJ, for example, contains other considerations than the Norwegian pragmatic version of *reelle hensyn*. First of all the ECJ tend to pay less attention to the “will of the legislature” than the Norwegian courts do, or at least have done for the last 50 years, as noted above. This is perhaps not surprising as the *travaux préparatoires* of EC law are scarce, not least due to the fact that the EC legal acts in many cases are a result of highly complex bargaining processes including major features of log-rolling and horse-trading producing unexpected and sometimes also inexplicable outcomes. And most importantly, the Courts do not have the same strong incentive to pay such close attention to the will of the legislator as long as it is not or at least only marginally democratically legitimate. The ECJ therefore takes the “whole context” to a greater degree into consideration when it interprets EC-legal acts.⁴² This interpretive approach clearly opens up for judicial activism of a qualitative and quantitative character, which is not known to the Norwegian legislator loyal courts. Second, the *reelle hensyn*, which the ECJ would promote are clearly influenced by the rationality of EU cooperation. Thus, important for whether a decision is to be characterised as plausible or promoting a good result would typically be whether the result promotes efficiency and homogeneity of EU law. Since EU law is predominately about the facilitation of the four freedoms, this would most of the time imply that the result would be in benefit of the person, at least the legal (economic) person. True, efficiency might be a feature taken into consideration by Norwegian courts as well, for example, when deciding in accordance with what could be perceived as an efficient environmental policy. But this is rarely an argument the Norwegian courts would use when arguing in favour of individual (economic) rights. There are also other interpretive principles of EU law. Thus, besides forming part of principles of administrative legality, which the courts can utilise when reviewing national norms, both community norms, the principles of proportionality, legitimate expectations, non-discrimination and transparency can also serve as interpretive guides for the ECJ.⁴³ Utilitised either way, these principles could also constitute an obstacle to the legislative machinery of the Community, and thus, in effect, protect the individual from infringements of his private (economic) space.

It has been held that *reelle hensyn* inform the ECJ when deciding whether the invocation of the exemption clause, public considerations (“allmenne hensyn”), in various articles of the treaty can be justified.⁴⁴ Public considerations have, as noted above, informed the interpretation of *reelle hensyn* in the last decades, so in this respect there might be some similarities. However, the application of *reelle hensyn* imply something else when it is utilised to justify the invocation of the exemption clause. It implies that *reelle hensyn* is to be considered a “source of law principle” (“rettskildeprinsipp”) rather than a “source of law” (“rettskilde”), determining how different arguments (sources of law) are to be balanced up against each other. True, *reelle hensyn* is, according to Torstein Eckhoff, also utilitised this way.⁴⁵ But in this paper we are concerned with the utilisation of *reelle hensyn* as source of law which can potentially form the basis of a legal rule.

It has been claimed that the concept of legal pragmatism including *reelle hensyn* is losing momentum.⁴⁶ One of the reasons for this is the fact that the Norwegian courts have to adapt other legal methodologies when solving cases that have implications for EEA law or human rights. The general trend is that the law tend to be more formalistic meaning, for example, that not only rights, as in the

⁴² “Rather than adopting a narrower historical-purposive approach, the Court tends to examine the whole context in which a particular provision is situated – which often involves looking at the preamble to the Treaties or the legislation – and it gives the interpretation most likely to further what the Court considers that provision in its context was aimed to achieve. Often this is very far from a literal interpretation of the Treaty or of legislation in question, even to the extent of flying in the face of the expressed language”, Craig and de Burca (2004) *EU Law*, Oxford: Oxford University Press, p.

⁴³ Craig and de Burca (2003) *EC Law*, Oxford: Oxford University Press, p. 371.

⁴⁴ Arnesen, Sejersted, et. al. (2004) *EØS-rett*, Oslo: Universitetsforlaget, 4 utg. s. 221.

⁴⁵ Eckhoff, Torstein (2002) *Rettskildelære*, Oslo: Universitetsforlaget, 5 utg. chap. 14 II and III, although Eckhoff uses different terms, respectively “rettslige vurderinger” for the principle and “reelle hensyn” for the source.

⁴⁶ Graver, Hans-Peter (2007) “What care these roarers for the name of king? To cabin! Silence! Trouble us not: Community Law, Judicial Activism and Liquid Rules – an EEA Perspective” in Baudenbacher and Bull (eds.) *European Integration through Interaction of Legal Regimes*, p. 99-131.

ECHR, but also legal principles developed by the respective courts (ECJ and ECtHR) tend to play a more important role when the Norwegian courts are deciding upon cases in the respective fields. In EU law principles such as non-discrimination, proportionality and legitimate expectations tend to play an important role in relevant cases. The more fundamental meaning of this is that the law as expressed by the courts is not legitimate by merely a reference to institutional authority, be it that of the court, which on any account has been limited in the Norwegian legal tradition, or the parliament. The law, whether it appears in statutes or in the judgments of the courts, has to be additionally qualified in order to be perceived as legitimate, more concretely, it has to be in accordance with for example human rights, and in case of the EU, arguably, in accordance with the court made principles referred to above. The bottom line is that a more formalist approach forces courts to be clearer and more categorical in their argumentation than is the case when courts take a pragmatic more discretionary approach.

The Supreme Court has gone even further than the presumption principle opens up in the case of the ECHR, since it has stated that it will use the methodology of the ECHR when interpreting provisions of the ECHR. The reason for this is obviously to secure a homogeneous interpretation of the convention.⁴⁷ However, the Supreme Court has been careful to point out that Norwegian courts shall conduct an independent interpretation of the provisions of the convention and also that the Norwegian court shall take into account value considerations which found the basis for Norwegian legislation and legal interpretation.⁴⁸ The fact that a similar statement is not made in regard to the interpretation of the EEA agreement could be taken as an indication of a deliberate wish of the Supreme Court to differentiate between the two categories of rights based on the preferred position principle. However, one cannot hide the fact that the legislator has had a certain influence on the Court's stand in this case. Thus, according to the discussions prior to the implementation of the convention in the Human Rights act, the legislators clearly stated that it was their wish and intent that the Courts should interpret the convention in conformity with the methodology of the ECHR.⁴⁹ A similar methodological approach was not as clearly stated in the discussions regarding the implementation of the EEA agreement, which also underpins a political wish to differentiate between the two categories of "rights" (including freedoms). The EEA agreement's homogeneity clause art. 6 is arguably not concrete enough in this respect.

There are indications that the EFTA court has recognised the legal pragmatic approach of the Norwegian Supreme Court and the intrinsic relationship between the judiciary and the legislator, thus turning the tide of influence the other way around. In the *Wilhelmsen-case*,⁵⁰ for example, regarding the Norwegian prohibition against selling beer with a high alcohol content in other places than the Vine monopoly, the EFTA court did not only conclude that the prohibition was proportionate with reference to the principle of proportionality elaborated by the ECJ. It went further and assessed the *reasonableness* of the measure. Reasonableness is the doctrine that the Norwegian courts are using when justifying legislative or administrative acts *vis-à-vis* the individual and is thus reflective of the pragmatic concept of law. Reasonableness is an alternative to the proportionality principle, which is a court created general principle of EU law.⁵¹ True, reasonableness and proportionality do overlap to some degree. What is interesting is that the EFTA court is referring to the terminology of the reasonableness doctrine so explicitly. This could indicate that the EFTA court is willing to use the Norwegian court made doctrine rather than the ECJ made doctrine when assessing Norwegian cases.

⁴⁷ Rt. 2000: 996 and Rt. 2002: 557. This was also presumed by the legislator when the act was enacted.

⁴⁸ Rt. 2005: 833, avsnitt 45: "ved anvendelse av reglene i EMK skal norske domstoler foreta en selvstendig tolking av konvensjonen. Herunder skal de benytte samme metode som EMD. Norske domstoler må således forholde seg til konvensjonstekste, alminnelige formålsbetraktninger og EMDs avgjørelser. Det er likevel i første rekke EMD som skal utvikle konvensjonen. Og dersom det er tvil om forståelsen, må norske domstoler ved avveiningen av ulike interesser eller verdier kunne trekke inn verdiprioriteringer som ligger til grunn for norsk lovgivning og rettsoppfatning".

⁴⁹ NOU 1993: 18.

⁵⁰ E-6/96 *Wilhelmsen* (1997) EFTA Court Report p. 56, paragraph 87.

⁵¹ A reasonableness test is also utilised by British courts and it is perceived by British scholars as implying less scope for court intervention *vis-à-vis* the legislator or the administration than the proportionality principle, which thus reflects the positivist concept of law as well as the principle of parliamentary sovereignty. See, for example, Ellis, Evelyn (ed.) *The Principle of Proportionality in the Laws of Europe*, Oxford: Hart 1999.

Another case which could underpin the assumption that the EFTA court takes the Norwegian legal culture seriously into consideration is the *Husband-case*.⁵² The state subsidising of the *Husband* and the surveillance authority's (ESA) refusal to inquire into the case was questioned by the union of banks (*Den norske Bankforening*) for not being proportional. In its decision the EFTA court stated that only clear breaches of the proportionality principle would lead to the quashing of the subsidy measure. The EFTA court nevertheless quashed ESA's decision not to inquire into the case because it was difficult to detect whether it had conducted a proportionality test. In other words, the EFTA court did not itself conduct the proportionality test, but rather limited itself to assessing whether the ESA had done so. This approach is, arguably, as far as the Norwegian Courts would go in their assessment of the proportionality principle in similar cases.⁵³

The EFTA court's open mindedness could also be detected in the more recent *Slot-machine* case. The EFTA court withheld from reviewing the Norwegian legislative branch's assessment whether the introduction of a slot-machine monopoly was necessary or not in order to reduce the number of persons addicted to gambling. The "necessity test" is part of the requirement that has to be fulfilled when claiming an exception from article 31 EEA regarding the right of establishment.⁵⁴ The Norwegian Supreme Court claimed that the EFTA court in this case thereby had admitted a "margin of appreciation" to the national state and concluded that this moderate approach harmonised with the Norwegian tradition regarding judicial review of assessments of a particular political nature.⁵⁵ It is uncertain whether the ECJ is granting the EU Member States a similar margin of appreciation.⁵⁶ The pending question is how the EFTA court would respond to this claim in future cases.

Conclusion - a case of constitutional pluralism?

In this paper I have first pointed out the particular characteristics of the EEA agreement and made some comparisons with the characteristics of the parallel EU cooperation. I have then focused on what I perceive as *the* feature of EU law, which highlights the distinction between the two systems most clearly, namely that of direct effect. Although the different approach to the principle of direct effect can follow from the different legal basis of, respectively, the EEA and the EU, this, I argue, is only half of the story. The rest of the story is about the pragmatic concept of law which has bearing upon the interpretation of the constitution, including the status of rights and the division of competences between the judiciary and the legislator.

The Norwegian pragmatic concept of law is closely connected to the legal methodology developed by the courts. The methodological legal source (and legal source principle) of *reelle hensyn* (legal considerations) plays an important role when courts also decide in hard cases. However, *reelle hensyn* can be utilised as an argument for deciding both in the favour of individual and collective rights. The interpretation of *reelle hensyn* is, however, to a certain degree steered by the internally hierarchical structure of rights, as stated in another court created principle, namely the "preferred position principle". The coupling of the preferred position principle and the "presumption principle" which guide the courts in their application of international law, may explain the weaker standing of the economic "rights" of the EEA agreement as opposed to the right enshrined in the ECHR. Due to the relative interpretation of rights (and the weaker status of the EEA agreement's economic rights) the idea of rights as "trumps" cannot serve as a legitimacy basis for the Norwegian Supreme Court to take on the principle of direct effect. I then put forward the argument that *if* the EFTA court (and the ECJ) embrace the pragmatic concept of law, including taking on the same methodological approach as

⁵² E-4/97 *Den norske Bankforening* (1998) EFTA Court Report s. 38.

⁵³ This is how Hans Petter Graver explains the existence and the assessment by the courts of a proportionality principle in Norwegian administrative law, see Graver, Hans Petter, "Forholdsmessighet som krav til forvaltningens skjønsmessige avgjørelse, *Lov og rett*, p. 279-306.

⁵⁴ The parallel regulation in the EC treaty is laid down in art. 43 EC ff.

⁵⁵ Rt. 2007: 1003 (*Spilleautomat*) "Når EFTA-domstolen har vært så vidt tilbakeholden med å overprøve lovgivende myndigheters bedømmelse av nødvendigheten av å innføre automatmonopolet, kan jeg ikke se det annerledes enn at domstolen reelt har innrømmet nasjonalstaten en viss *margin for skjønn*, som domstolen avstår fra å prøve... Dette viser etter min mening at EFTA-domstolens moderate provingsintensitet i denne saken er i god harmoni med den norske tradisjon ved domstolsprøving av vurderinger av utpreget politisk karakter" (paragraph 104 og 106, my kursiv).

⁵⁶ See, for example, Craig and de Burca (2003) *EU Law*, Oxford: Oxford University Press, p. 377 ff.

the Norwegian Supreme Court, the latter might deem it less risky (meaning it would avoid clashes with the *Storting*) to accept the principle of direct effect. In the paper I refer to some cases that indicate a forthcoming approach by the EFTA court. Although the empirical basis is somewhat thin I have at least pointed out some interesting characteristics which might be examined more closely in later research.

The empirical elaboration suggests that legal integration is not necessarily a one-way path, i.e. influence by the international level onto the national, meaning in the case of the EEA greater homogeneity at the expense of sovereignty. Rather, legal integration can be a dialectical process. This fact implies that the rationale of the EEA agreement, as pointed out in the first part of this paper, is a reality. The legal relationship struck between the EU and EFTA through the EEA agreement rests on a different structure and another equilibrium than the one between the EU and its member states. The relationship between the EFTA international institutions and the EFTA member states is one of heterarchy, rather than hierarchy, one of dialogue rather than commands; a relationship in which influence can move both ways and where this dialectical mode of interaction is its very *telos*.

Relations Between the European Union and Switzerland: a Laboratory for EU External Relations?

Andrés Delgado Casteleiro*

The Swiss attitude vis-à-vis the EU reminds me of a famous quotation from Groucho Marx, who said that he doesn't want to belong to a club that will accept him as a member.

Charlie McCreevy
European Commissioner for Internal Market and Services.¹

Introduction: economic and political factors

Relations between the European Union (EU) and Switzerland have developed over the years on the basis of two main elements. First, Switzerland is economically more integrated within the EU than some of the EU Member States themselves.²

- Switzerland is the EU's second trading partner (services included), after the US and before China.³
- 82 % of all imports into Switzerland come from EU Member States
- The EU absorbs almost two thirds – 62 % – of Swiss exports
- 400,000 Swiss nationals reside in an EU member state and more than twice that number, almost 900,000 EU citizens live in Switzerland, plus 700,000 cross border commuters.⁴

Second, in addition to these economic factors which demonstrate the further development of the integration process between the two, there is an important political element which has shaped the relations between them in a very special way. The negative outcome of the referendum⁵ on the ratification of the European Economic Area (EEA) in 1992 forced a complete change of direction in their relations. Furthermore, this position against full integration in a supranational structure was endorsed on 4 March 2001 when a popular initiative calling for an immediate start of the negotiations on EU membership was rejected by 77% of voters.⁶ Thus, Switzerland finds itself in a difficult position. On the one hand, economically Switzerland is heavily dependent on the EU. On the other hand, the Swiss do not want to engage in any kind of relationship which would take them further down the path of integration with the EU. Hence, this different type of relationship was designed in order to continue to improve their economic position without deepening the process of integration.

The new framework for EU–Swiss relations designed after the 1992 referendum can be considered a success if we analyse the positive economic impact it has had.⁷ Therefore, given this economic success, would it be possible for the EU to export this model to their relations with other

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¹ Charlie McCreevy European Commissioner for Internal Market and Services. Address to the Swiss Bankers Association, Swiss Bankers Association Zürich, 24 January 2008. SPEECH/08/38.

² L. Goetschel, "Switzerland and European Integration: Change Through Distance" (2003) 8 European Foreign Affairs Review, p. 313.

³ See: http://ec.europa.eu/external_relations/switzerland/intro/index.htm.

⁴ Charlie McCreevy European Commissioner for Internal Market and Services. Address to the Swiss Bankers Association, Swiss Bankers Association Zürich, 24 January 2008. SPEECH/08/38.

⁵ The Swiss Constitution enshrines in its articles 140 and 141 two types of referendum. Article 140 establishes among the reasons for a compulsory referendum: "*b) the entry into organizations for collective security or into supranational communities.*" Whereas article 141, envisages optional referenda for: "*d) International treaties which: 1. are of unlimited duration and may not be terminated; 2. provide for the entry into an international organization; 3. involve a multilateral unification of law,*" and when the Federal Parliament consider the agreement should be submitted to it.

⁶ R. Schwok and N. Levrat, "Switzerland's Relations with the EU after the adoption of the Seven Bilateral Agreements" (2001) 6 European Foreign Affairs Review, p. 351.

⁷ For basic economic figures and analysis regarding the relations between Switzerland and the EU see the webpage of the Integration Office of the Federal department of Foreign Affairs of Switzerland: (<http://www.europa.admin.ch/themen/00499/00755/00761/index.html?lang=en>).

countries with no perspectives on integration? Furthermore, could the EU use this privileged framework as a laboratory on integration, by testing new ways of developing its external action?

In order to answer these questions, I am going to divide this paper into three parts. In the first part of this paper, after having set the overall framework of the bilateral relationship, I examine whether the whole model can be applied by the EU to other countries. The second part analyzes whether the legal framework of this relationship can be used to test new possibilities for EU external action. For this reason certain specific features of the agreements are analyzed, particularly some aspects of management of the participation of Switzerland in the Schengen Area. The last part provides some conclusions and general perspectives for the future of the relationship between the EU and Switzerland.

Enhanced bilateralism: the EU–Swiss model

Sectoral Bilateralism: basic elements of EU–Swiss relations

The rejection by Swiss citizens of the EEA, which aimed at extending the EU internal market to EFTA countries without participation in decision making,⁸ left relations between the EU and Switzerland in a difficult situation. Before 1992, Switzerland entered into a Free Trade Agreement with the European Economic Community in 1972⁹ just like the remaining countries of the EFTA.¹⁰ The next step in relations between EFTA and the EU was the creation of the EEA.

Confronted with the result of the referendum, a new phase in relations between the Swiss Confederation and the EU opened up. Relations needed to continue while observing the result of the referendum and without undermining relations with the other EFTA states that had ratified the EEA.

The agreed solution was based on what has been called *Enhanced Bilateralism*.¹¹ The main idea behind this concept is that through a series of sectoral agreements Switzerland applied selected parts of *acquis communautaire*.¹² Thus, Switzerland cherry-picked certain parts of the *acquis* to be implemented on its territory.

Until now the EU and Switzerland, within the framework of two rounds of negotiations, have concluded two groups of bilateral agreements. The first group of agreements, usually known as Bilateral I, includes seven different agreements:¹³ one integration agreement (Air Transport agreement), one cooperation agreement (Scientific cooperation agreement), and five on liberalising access by the Contracting Parties to each other.¹⁴ The Bilateral II is made up of nine agreements.¹⁵ The

⁸ A. Lazowski, Switzerland, in S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 150.

⁹ Agreement between the European Economic Community and the Swiss Confederation, OJ 31.12.1972 L300, p. 189.

¹⁰ A. Lazowski, EEA Countries (Iceland, Liechtenstein and Norway), in S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 99.

¹¹ A. Lazowski, Switzerland, in S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 154.

¹² Contrary to the ratification of the EEA, the first group of bilateral agreements were approved by referendum at 67.2 %. For an analysis of the differences between the two results see: R. Schwok and N. Levrat, "Switzerland's Relations with the EU after the adoption of the Seven Bilateral Agreements" (2001) 6 *European Foreign Affairs Review*, p. 348 – 350.

¹³ Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114, 30.04.2002. Agreement on scientific and technological cooperation between the European Communities and the Swiss Confederation, OJ L 114, 30.04.2002. Agreement between the European Community and the Swiss Confederation on the carriage of goods and passengers by rail and road, OJ L 114, 30.04.2002. Agreement between the European Community and the Swiss Confederation on Trade in Agricultural Products. OJ L 114, 30.04.2002. Agreement between the European Community and the Swiss Confederation on certain aspects of Government procurement, OJ L 114, 30.04.2002. Agreement between the European Community and its Member States, on the one part, and the Swiss Confederation, on the other, on the Free Movement of Persons, OJ L 114, 30.04.2002. Agreement between the European Community and the Swiss Confederation on Mutual Recognition in relation to Conformity Assessment, OJ L 114, 30.04.2002.

¹⁴ C. Kaddous, Les accords sectoriels dans le système des relations extérieures de l'Union européenne, in D. Felder and C. Kaddous (eds.), *Accords bilatéraux Suisse - UE (Commentaires)/ Bilateral Abkommen Schweiz - EU (Erste Analysen)*, (Bruxelles 2001), p. 79.

¹⁵ Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, OJ L90 28.03.2006. Agreement between the European Community and the Swiss Confederation in the audiovisual field, establishing the terms and conditions for the participation of the Swiss Confederation in the Community programmes MEDIA Plus and MEDIA Training, OJ L90 28.03.2006. Agreement between the European Community and the Swiss Confederation

reasons for the initiation of new negotiations were, on the one hand, the EU's need to obtain the cooperation of Switzerland for a planned system of cross-border taxation of savings,¹⁶ and the fight against fraud;¹⁷ on the other hand, Switzerland aimed at negotiating with the EU on other selected issues like security and asylum, processed agricultural products, statistics, environment, MEDIA, education, pensions and services.¹⁸

In addition to the cherry-picking on certain areas of *acquis*, the relations with Switzerland are also characterized by a *lack of a uniform and coherent structure*.¹⁹ Each one of the agreements has its own institutional machinery. The joint committees are the main common characteristic of the agreements. These committees are in charge of the smooth functioning of the agreements.²⁰ Some of the basic elements of these committees range from having decision-making power on certain aspects of the agreement to the administration of the agreement, and in some cases even dispute settlement.²¹ The functioning of these committees is based on classic intergovernmental cooperation which means that the decisions adopted within them are taken unanimously by the two contracting parties.²²

Exporting the procedural aspects of the EU–Swiss model

In order to fully understand all the implications of the EU-Swiss model of relations, it must not be forgotten that this relationship is based on the export of the *acquis communautaire* to a third country. Therefore, in order to address the possibility of applying the EU-Switzerland model of exporting the *acquis*, a distinction must be made between substantive and procedural means.²³ While the substantive means of EU-Swiss relations is addressed in the next section, in this section I consider whether it is possible for the EU to replicate the procedural means of the EU–Swiss integration model, that is the legal framework and institutional machinery in its relations with other countries, or not. Thus, two issues must be tackled when evaluating the possibility of replicating the EU-Swiss model.

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concerning the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network, OJ L90 28.03.2006. Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, OJ L368 15.12.2004. Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, OJ L 385, 29.12.2004. Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, L 53 27.02.2008. Cooperation Agreement between the European Community and its Member States, in the one part, and the Swiss Confederation, on the other part, to combat fraud and any other illegal activity to the detriment of their financial interests, Not yet published. Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 regarding the provisions applicable to processed agricultural products, OJ L 97 15.4.2005. Agreement between the Swiss Federal Council and the Commission of the European Communities with a view to avoiding the double taxation of retired officials of the institutions and agencies of the European Communities resident in Switzerland, not yet published.

¹⁶ D. Martinelli, *Les Accords bilatéraux II vus des Bruxelles*, In C. Kaddous and M. Jametti Greiner (eds.), *Accords bilatéraux II Suisse - UE et autres Accords récents/ Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen*, (Bruxelles 2006), pp. 17.

¹⁷ A. Lazowski, Switzerland, In S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 156.

¹⁸ <http://www.europa.admin.ch/themen/00499/00755/00758/index.html?lang=en>.

¹⁹ A. Lazowski, Switzerland, In S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 157.

²⁰ D. Felder, *Appréciation juridique et politique du cadre institutionnel et des dispositions générales des accords sectoriels*, In D. Felder and C. Kaddous (eds.), *Accords bilatéraux Suisse - UE (Commentaires)/ Bilateral Abkommen Schweiz - EU (Erste Anlysen)*, (Bruxelles 2001), p. 131.

²¹ See: article 10 Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*, OJ L368 15.12.2004.

²² D. Felder, *Appréciation juridique et politique du cadre institutionnel et des dispositions générales des accords sectoriels*, In D. Felder and C. Kaddous (eds.), *Accords bilatéraux Suisse - UE (Commentaires)/ Bilateral Abkommen Schweiz - EU (Erste Anlysen)*, (Bruxelles 2001), p.130.

²³ R. Petrov, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries" (2008) 13 *European Foreign Affairs Review*, p. 34

First, the political will of the EU to replicate this model of export of the *acquis*. And second, the countries which might embrace this model.

To what extent would the EU replicate this model with other countries? In this respect, the Commission has explained that relations should be considered:

on a strict basis of mutual advantage and without undermining the EEA. It would be inappropriate for Switzerland to obtain all the advantage of an agreement, which it has rejected, and whose entry into force has been long delayed as a result.²⁴

The Commission, since the beginning of *Enhanced Bilateralism*, has underlined the exceptional nature of these relations. On the one hand, the Commission remarks that the natural framework for EU–Swiss relations is within the EEA. Moreover, the EU does not want to put the Swiss Confederation in a better position than its partners in the EFTA. The idea of replicating this model would undermine not only the position of the EEA Member States, but also the integration model in Europe. On the other hand, the EU aims to organize and structure its relationships by putting an emphasis on regional links and policies.²⁵ The EU wants to foster a regional approach on its external relations with neighbouring countries, trying to avoid any individual approach as much as possible.

Nevertheless, with the exception of the EEA, the EU's regional approach may be seen as a development tool. As Cremona points out:

The EU has put its weight behind the benefits of regional cooperation and integration, both in terms of economic development and expansion, and in terms of political stability. In this it sees itself as a model, but a model which is also valid in a development context.²⁶

Therefore, it can be assumed that at this time the regional approach, both in terms of geographical relations and regional integrations, is understood mainly as a development instrument. Thus, to what extent could the model of EU–Swiss relations be applied to EU relations with developed countries?

The EU–Swiss model - understood as a series of packages of agreements involving different aspects of the *acquis communautaire* – could be a suitable model for relations with those developed countries which traditionally have preferred more flexible models than an association agreement. Thus, the EU would be able to semi-institutionalize its relationship, going beyond the traditional diplomatic dialogue, whereas the third country would not be a party to a rigid legal structure, like an association agreement with all its implications (i.e. conditionality).

Replicating the substantive means of EU–Swiss relations: a framework for innovation?

Two different substantive issues regarding the Bilateral Agreements are analyzed in this section. First, the analysis focuses on the way the *acquis communautaire* is implemented in Switzerland and if it is possible to extend this method of integration to relations with other countries. The second part examines whether other aspects of the relationship, not relating to integration between the EU and Switzerland, can be used as a model for future agreements by the EU.

The EU–Swiss model of integration

One of the main characteristics of EU–Swiss relations is its heterogeneity. Because the relations are founded on different agreements covering a wide range of areas, different methods are envisaged in order to address the application of the *acquis* in Switzerland.

Whereas in Bilateral I, only the Air Transport Agreement entailed export of the *acquis communautaire* to Switzerland,²⁷ in Bilateral II the export of the *acquis* is the rule. Furthermore, these

²⁴ Communication from the Commission, *Future relations with Switzerland*, COM (1993) 486 final.

²⁵ M. Cremona, "The Union as a Global Actor: Roles, Models and Identity" (2004) 41 Common Market Law Review, p. 560

²⁶ M. Cremona, "The Union as a Global Actor: Roles, Models and Identity" (2004) 41 Common Market Law Review, p. 561

agreements enshrine not only the application of a fixed *acquis* in Switzerland, but also the possibility of exporting the dynamic one.²⁸

Regarding the fixed *acquis*, the majority of the agreements contain in their annexes a list EU legislation ("pre-signature" *acquis*) to be implemented by Switzerland. In addition, in order to avoid any kind of doubt regarding the applicability of certain instruments contained in the annexes, the agreements contain an interpretative clause similar to this one:

The term 'Member State(s)' contained in the acts referred to in this Annex shall be understood to include Switzerland, in addition to its meaning in the relevant Community acts.²⁹

The clause puts Switzerland in the same position in relation to legislation as the EU Member States. Although in principle Switzerland is bound by the fixed *acquis*, the provisions relating to the dynamic *acquis*, adopted after the signature of the Bilateral Agreement, give Switzerland practically complete freedom to adopt any legislation covering issues already covered by the *fixed acquis*. Most of the Bilateral Agreements contain a provision titled *New Legislation* designed to adapt the agreement to future changes in the *acquis communautaire*. This provision is worded as follows:

*This Agreement shall be without prejudice to the right of each Contracting Party, subject to compliance with the provisions of this Agreement, to amend unilaterally its legislation on a point regulated by this Agreement.*³⁰

Thus, both the EU and Switzerland can adopt legislation which modifies the fixed *acquis*. Moreover, the following paragraphs of the provision only establish the obligation of consultation and notification between the parties, and leaves complete freedom to the Mixed Committee to decide the effects of the new piece of legislation modifying the fixed *acquis*. Therefore, having in mind the committee's function on the basis of unanimity it can be concluded that Switzerland is not bound by the dynamic *acquis*.³¹ As a result of this situation, there has been an informal involvement of Swiss experts in the drafting of post-signature *acquis*.³²

This way of dealing with the export of the *acquis* has as a major advantage for the third State that its sovereignty remains untouched. The public powers of the third State have complete freedom to adopt any kind of legislation in the field covered by the agreements. Moreover, with informal involvement of its experts in the drafting of the *acquis*, the third country will benefit itself even more from the relationship. However, attending to the weak position in which the EU seems to be left in this model of integration, it would be doubtful that it would try to use it in its relations with other States.

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²⁷ Vid. supra note 15. The other agreements only entail the progressive liberalization of each of the areas covered by the agreements. For instance the Agreement on Trade on Agricultural products establishes in its protocols the reduction of tariffs between the two parties. Likewise, the Public Procurement agreement does not entail any integration of the norms, but just envisages the access to each other's public procurement in a reciprocal, transparent and non-discriminatory way (article 3). Even more the Conformity Assessment agreement only envisages mutual recognition in this area (article 1).

²⁸ The differentiation between fixed and dynamic *acquis* is taken from: R. Petrov, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries" (2008) 13 European Foreign Affairs Review 33-52.

²⁹ Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, OJ L90 28.03.2006. In relation to the only integration agreement in Bilateral I, the Air Transport Agreement envisages a more complex clause: "wherever acts specified in this Annex contain references to Member States of the European Community, or a requirement for a link with the latter, the references shall, for the purpose of the Agreement, be understood to apply equally to Switzerland or to the requirement of a link with Switzerland" This clause is also used in agreements belonging to Bilateral II such as the one relating to the participation of Switzerland in the European Environment Agency and the European Environment Information and Observation Network.

³⁰ Article 4.1 of the Agreement between the European Community and the Swiss Confederation on cooperation in the field of statistics, OJ L90 28.03.2006.

³¹ R. Petrov, "Exporting the *Acquis Communautaire* into the Legal Systems of Third Countries" (2008) 13 European Foreign Affairs Review p. 38.

³² Ibid. p. 46.

The EU-Swiss model of external relations

In economic and political terms, the relations between Switzerland and the European Union work on extraordinary terms. However, the possibility of replicating this integration model, both in procedural and substantive means, seems rather difficult, mainly because of the exceptional nature surrounding the relationship.

Despite this exceptionality, or maybe thanks to it, EU–Swiss relations can be seen as more than just a complex integration model with no replica. They can be seen as the best environment for the EU to test new techniques to manage its external action. In this respect, it could be said that the agreement extending the application of the Schengen *acquis* is the perfect example of how the EU could take advantage of its relations with Switzerland to test new methods to engage itself with other third countries.

This agreement has been the first example of a cross-pillar mixity, which is an agreement to which the EC and the EU are both parties to. In the same way as simple mixity,³³ this new type of mixed participation in international agreements gives rise to a large number of questions regarding the external relations of the EU and its constitutional architecture.

This type of agreement poses some legal questions regarding the relationship between the EU and the EC. Whereas both of them have expressed treaty-making power – article 38 TEU, and article 300 TEC respectively – there were some unanswered questions about how to make them come together, taking into account the EC-procedure protection clause (article 47 TEU).³⁴

The extension of the Schengen *acquis* to Switzerland was the perfect opportunity for the EU to test questions surrounding cross-pillar mixity. On the one hand, the Schengen *acquis* involves areas which are covered both by the EC and the EU³⁵, hence any kind of agreement involving the extension of this set of norms would involve the participation of both. On the other hand, the Schengen *acquis* represents the paradigmatical example of the variable geometry of the EU³⁶, by which some EU Member States do not take part in Schengen.

In relation to the joint signature by the EU and the EC of the agreement, the main way to overcome the procedural differences in concluding the agreement was the adoption of two different concluding decisions, one following the procedure in article 24 TEU³⁷ and the other under article 300 TEC³⁸. In this way the main problem of the different procedures of the conclusion of the agreement was solved. Furthermore, Kuijper noted that in order to safeguard the rationale of article 47 TEU,

³³ There is a vast amount of legal literature surrounding this topic. For an overview of the issues surrounding simple mixity see: J. Helikoski, *Mixed agreements as a technique for organizing the international relations of the European Community and its member states*, (Hague ; Boston 2001), p. 321. E. Nefrani, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux*, (Bruxelles 2007), p. 711. N. A. Neuwahl, *Mixed Agreements: Analysis of the phenomenon and their legal significance*, *Law*, vol. PhD, (Florence 1988), p. 304. D. O'Keeffe and H. G. Schermers (eds.), *Mixed Agreements*, (Deventer, The Netherlands; Boston 1983), p. 248. A. Rosas, *The European Union and Mixed Agreements*, In A. Dashwood and C. Hillion (eds.), *The general law of E.C. External Relations*, (London 2000), pp. 200-220.

³⁴ Article 47 TEU: “*Subject to the provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, and to these final provisions, nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them.*”

³⁵ D. Wyatt and A. Dashwood, *European Union Law*, 5 ed., (London 2006), p. 115

³⁶ A. Cornu, *Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin*, In C. Kaddous and M. Jametti Greiner (eds.), *Accords bilatéraux II Suisse - UE et autres Accords récents/ Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen*, (Bruxelles 2006), p.217

³⁷ Council Decision 2008/149/JHA of 28 January 2008 on the conclusion on behalf of the European Union of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*. *OJ L 53, 27.02.2008*.

³⁸ Council Decision 2008/147/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*. *OJ L 53, 27.02.2008*.

apart from the two different concluding decisions, it would be necessary to “specify which parts of the international agreement falls under EC areas and which parts do not.”³⁹

This necessity of delimiting to what extent of an area is covered by EC competence or EU competence is also reflected in the concluding decisions. Having in mind, as has been shown, that what the agreement does is extend the application of the Schengen *acquis* to Switzerland, each one of the concluding decisions establishes their covered areas by making reference to the exported *acquis* enshrined in the agreement. Thus, the EU concluding decision establishes its application to:

the fields covered by the provisions listed in Annexes A and B of the Agreement and to their development to the extent that such provisions have, or, in accordance with Decision 1999/436/EC (1), have been determined to have, a legal base within the Treaty on European Union.⁴⁰

The EC concluding decision operates likewise,⁴¹ by making reference to the legal basis of the *acquis* to be implemented by Switzerland. It must be underlined that the solution achieved for this potentially problematic situation is really pragmatic, avoids any kind of complicated design and is just a reference to the legislation which is being exported to Switzerland.

In relation to the EU variable geometry on Schengen issues, in addition to the signature of the agreement with the EU and the EC, Switzerland has had to sign other agreements covering this particular area with other countries. These agreements have been concluded with States that in one way or another are linked to Schengen.⁴² Thus, Switzerland has also signed agreements with Denmark⁴³ and with Norway and Iceland on Schengen issues.⁴⁴

The EU–Swiss agreement on the Schengen *acquis* demonstrates that the EU can take advantage of the privileged framework in order to try new ways of engaging itself with third States. This experience can be useful not only in the field of Schengen, but also in other cross-pillar areas like crisis management.

Concluding remarks

It has been repeated all along in this paper, that EU–Swiss relations are marked by exceptionality. On the one hand, the EU does not want to replicate this model of exporting the *acquis communautaire*. On the other hand, from the Swiss perspective, the Bilateral Agreements had to bring together the rejection of the EEA with the economic dependency of the EU.

More than 10 years have passed since the referendum and both the EU and Switzerland seem to have not only adapted to the new situation but also taken advantage of it. Likewise Switzerland has used the Bilateral Agreements as a way to cherry-pick from the EU internal market. The EU has also,

³⁹ P.-J. Kuijper, Will the European Union ever be a normal partner in international organizations?, In W. P. Heere (ed.), *From Government To Governance. The Growing Impact of Non-State Actors on the International and European Legal System.*, (The Hague 2003), p. 42

⁴⁰ Article 2 Council Decision 2008/149/JHA.

⁴¹ Article 2 Council Decision 2008/147/EC.

⁴² A. Cornu, Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin, In C. Kaddous and M. Jametti Greiner (eds.), *Accords bilatéraux II Suisse - UE et autres Accords récents/ Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen*, (Bruxelles 2006), p. 219.

⁴³ Accord du 28 avril 2005 entre la Confédération suisse et le Royaume de Danemark sur la mise en œuvre, l'application et le développement des parties des Schengen basées sur les dispositions du titre IV du Traité instituant la Communauté européenne. Entré en vigueur par échange de notes le 1er mars 2008. The rationale for this agreement is based on the fact that the Danish relationship with Schengen is governed by International Law instead of being governed by Community Law like the other EU countries which are parties to Schengen. Vid. A. Cornu, Les aspects institutionnels des Accords d'association de la Suisse à Schengen et à Dublin, In C. Kaddous and M. Jametti Greiner (eds.), *Accords bilatéraux II Suisse - UE et autres Accords récents/ Bilaterale Abkommen II Schweiz - EU und andere neue Abkommen*, (Bruxelles 2006), p. 221.

⁴⁴ Accord du 17 décembre 2004 entre la Confédération suisse, la République d'Islande et le Royaume de Norvège sur la mise en œuvre, l'application et le développement de “acquis de Schengen et sur les critères et les mécanismes permettant de déterminer l'Etat responsable de l'examen d'une demande d'asile introduite en la Suisse, en Islande o en Norvège. Approuvé par l'Assemblée fédérale le 17 décembre 2004. Entré en vigueur par échange de notes le 1er mars 2008. Norway and Iceland are Schengen associate countries. See: Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis*. OJ L 176, 10.07.1999.

apart from cherry-picking in the Swiss market, tested new treaty-making power techniques (Schengen).

However, although it may seem that there are advantages for both parties with this type of relationship, there are also some disadvantages. As a result of the lack of a stable framework, both partners have to be in continuous negotiations in order, first to adapt the existing agreements, and second to sign new ones. For instance, there are talks on concluding a new agreement relating to the liberalisation of services.⁴⁵ This model in institutional and bureaucratic terms is very demanding, with different committees meeting in order to decide how to implement the *acquis communautaire*. From this perspective a framework agreement merging all the Bilateral Agreements, at least in institutional terms, seems to be the best solution. With a single and stable institutional apparatus the relations between the two will be more effective and more coherent.

Nevertheless, this new agreement would be subject to a referendum in Switzerland. Moreover, having regard for the outcome of the previous ones, and expecting the results of the one to be carried out in 2009 on the extension of the EU–Swiss bilateral agreements with Romania and Bulgaria, it is too soon to start talking about a new framework for relations between the two of them.

The pragmatic approach taken by the EU and Switzerland in order to manage their relations has led it to a point of no return. Either Switzerland and its citizens fully embrace the process of integration, which would mean full EU membership, or Switzerland must continue to develop the bilateral approach⁴⁶. Nevertheless, while membership status remains a utopia, the actual situation, because of its pragmatism, has proven to be successful.

⁴⁵ A. Lazowski, Switzerland, In S. Blockmans and A. Lazowski (eds.), *The European Union And Its Neighbours*, (The Hague 2006), p. 182.

⁴⁶ *Ibid*, p 182.

Legal Europeanization as Legal Transformation: Some Insights from Swiss “Outer Europe”

Francesco Maiani*

Introduction

Across disciplines, and even within the same discipline, the word “Europeanization” is used to designate different phenomena.¹ In this paper, I will use it to designate only one of these phenomena: the impact of EU Law on domestic legal orders (hence, *legal* Europeanization). This kind of Europeanization, as is well known, not only concerns the legal orders of the EU member states, but also those of third countries. In the case of Switzerland, legal Europeanization is indeed so pronounced that the country has been styled a “quasi” or “near” member state alongside the non-EU members of the EEA.²

It must be added that within the class of “quasi member” states Switzerland is definitely a special case. In fact, the Europeanization of Swiss Law has not taken place within a global “legal infrastructure” such as the EEA Agreement. Rather, it has developed in a reactive, incremental, *ad hoc* fashion, and it has taken a great many legal forms.³ In other words, and contrary to preconceptions about Swiss tidiness, Switzerland runs an advanced but rather chaotic “Europeanization lab”, where a myriad experiments take place in parallel.

Precisely for this reason, the Swiss case has much to offer to anyone interested in understanding and conceptualizing Europeanization. Legal Europeanization is often associated with the idea of a “legal export” (or transplant, transfer, cut and paste *etc.*) of EU norms into national laws.⁴ The Swiss case apparently confirms this characterization – after all, we are told, “in the case of quasi-members [...] it is obvious that the transfer of the *acquis communautaire* is at the core of Europeanization”.⁵ And yet, on closer inspection, none of the expressions above accurately describes the impact of EU Law on the Swiss legal order. Even if we equate Europeanization with some sort of “norm-transfer”,⁶ it is still the case that it is an extremely diversified phenomenon, encompassing

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¹ For political scientists, the word “Europeanization” may designate the effects of European integration on domestic policies, politics, and politics – both in EU member states and in third states: see GOETZ/MEYER-SÄHLING, *The Europeanisation of national political systems: parliaments and executives*, forthcoming. In legal literature it is sometimes used as a synonym for “communautarization”, i.e. for the extension of EC competences to include a particular subject-matter (see e.g. GUILD, *The Europeanisation of Europe’s Asylum Policy*, *International Journal of Refugee Law* 2006, 630-651). It also refers to the “influence” of European Law on the domestic laws of member and third countries, and on international regimes (see HARDING, *The Identity of European Law: Mapping out the European Legal Space*, *European Law Journal* 2000, 128-147). On the various meanings of the word for lawyers see ZILLER, *L’européisation du droit: de l’élargissement des champs du droit de l’Union européenne à une transformation des droits des Etats membres*, EUI WP, LAW n. 2006/19.

² See SCHMELFENNING, *Europeanization beyond Europe*, *Living Rev. Euro. Gov.*, Vol. 2 (2007), n.1; KUX/SVERDRUP, *Fuzzy Borders and Adaptive Outsiders: Norway, Switzerland and the EU*, *Journal of European Integration* 2000, 237-270.

³ See BOVET, *Réception du droit public économique étranger en Suisse*, *Revue de droit suisse* 2000, II, 281-312. See also SCHWEIZER, *Wie das europäische Recht die Schweizerische Rechtsordnung fundamental beeinflusst und wie die Schweiz darauf keine systematische Antwort findet*, in EPINEY/RIVIERE (eds), *Auslegung und Anwendung von Integrationsverträgen*, Zürich 2006, 23-57.

⁴ See e.g. PETROV, *Exporting the Acquis Communautaire into the Legal Systems of Third Countries*, *European Foreign Affairs Review* 2008, 33-52; TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, *Modern Law Review* 1998, 11-32; SCHMELFENNING, *op. cit.*, at 4; GAL, *The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, *European Journal of Law Reform* 2007, 467-484.

⁵ SCHMELFENNING, *op. cit.*, at 4.

⁶ And this is in itself debatable, given that EU Law sometimes has an “impact” on domestic law in the absence of any “approximation”. For instance, the prospect of Swiss-EU free movement of persons has led to a profound modification of Swiss labour law that did not, however, imply the “transposition” of EU models: see VEUVE, *Mesures d’accompagnement de l’Accord sur la libre circulation des personnes*, in FELDER/KADDOUS (eds), *Accords bilatéraux Suisse-UE (Commentaires)*, Geneva, Basel, Munich, Bruxelles, 2001, 289-310.

varying degrees of approximation, and always resulting in the creation of something new – more or less similar to, but still different from, EU Law. All in all, the Swiss experience suggests that Europeanization is essentially a process of transformation, involving in its most spectacular forms a “thorough or dramatic change” of domestic legal orders.⁷

This transformation occurs, first and foremost, at the level of positive law. In Section 2, I will describe the transformation of Swiss Law under European influence, and I will highlight its forms, its logics, and its overall features. Space precludes an exhaustive overview of the multiple and evolving ways of legal Europeanization in Switzerland. Only its main expressions will therefore be considered.

Legal Europeanization is also a transformation of legal thinking – namely, of legal culture and of legal reasoning. In Section 3, I will examine it from this angle. This deeper change is a largely unintended, but practically unavoidable consequence of the approximation of Swiss Law to EU Law. It is also an unfinished and problematic business involving, as I will point out in my concluding remarks, fundamental questions related to the coherence and predictability of the law, the rule of law, the separation of powers, and *in fine* the very concept of law.

The Transformation of Swiss Law

Setting the (political) scene

While a limited approximation of Swiss Law to EEC Law could already be observed in the late 1980s, the “big bang” event that would set off legal Europeanization on a large scale took place in 1992, and more precisely on December the 6th. In the preceding months, the Swiss government (Federal Council) had abandoned its traditional stance on European affairs – no accession, free-trade, “pragmatic” cooperation in non-economic matters⁸ – by simultaneously signing the EEA Agreement and filing an application for EU accession. This spectacular U-turn was motivated by various factors: the end of the cold war had reduced the “neutrality” obstacle to accession; the EU was on the verge of dramatically expanding its membership and the scope of its activities; the EEA negotiations had made it clear that EFTA countries wishing to cooperate with the EU would henceforth be required to accept the *acquis*.⁹ In short, the traditional danger of “discrimination” in the internal market was now compounded by a risk of “isolation” that could only be dispelled by accession, or “satellization”.¹⁰ These weighty reasons were not enough, however, to convince the Swiss people. In a dramatic referendum, on December 6, the EEA Agreement was rejected, and the prospects of EU membership suddenly became very distant.¹¹

On the morning of December 7, the Federal Council knew that it would have to walk the high wire. Exclusion from the EEA promised to have dire consequences for the Swiss economy. Moreover, cooperation with the EU would in time become vital in non-economic matters such as migration and security. At the same time, popular hostility to any (perceptible) loss of sovereignty had become all too evident. With the *Programme following the rejection of the EEA Agreement*,¹² adopted in February 1993, the Federal Council proposed its own “third way” to integration: on the one hand Switzerland would try to conclude sector-specific agreements with the EU; on the other hand it would seek to align its domestic legislation to the EU *acquis*. Apparently, this was a return to a reassuring past: both elements of this strategy had already featured in the 1988 *Report on integration*,¹³ and had raised no controversy at the time. But continuity was little more than that: a deceptive appearance. The 1993 Programme was the springboard for far-reaching change.

⁷ Concise Oxford English Dictionary, 8th ed, 1991, for the verb “to transform”.

⁸ See Federal Council, Rapport sur la position de la Suisse dans le processus d’intégration européenne, Feuille fédérale Suisse (FF) 1988 III 233.

⁹ See Federal Council, Rapport sur la question d’une adhésion de la Suisse à la Communauté européenne, FF 1992 III 1125; See also Federal Council, Message relatif à l’approbation de l’accord sur l’Espace économique européen, FF 1992 310.

¹⁰ See Federal Council, Rapport sur la question d’une adhésion de la Suisse à la Communauté européenne, op. cit., at 1144.

¹¹ On the EEA vote and on its political consequences, see SCHWOK, Suisse-Union européenne – L’adhésion impossible?, Lausanne, 2006.

¹² Federal Council, Message sur le programme consécutif au rejet de l’Accord EEE, FF 1993 I 757.

¹³ Op. cit., at 329 ff.

The unilateral Europeanization of Swiss Law

Since 1988, as said, the government had unilaterally pursued regulatory alignment to EU standards. To this end, it had started the practice of examining the “euro-compatibility” of its own legislative proposals. But this approach was followed only in order to avoid involuntary and unnecessary divergences of legislations having cross-border repercussions – namely, of technical legislation. And *de facto*, so-called “autonomous adaptation” of Swiss Law to EU Law (*autonomer Nachvollzug*) had been a relatively rare occurrence until 1992.¹⁴

The 1993 Programme, by contrast, proposed “euro-compatibility” as a general guideline for socio-economic legislation, and the guideline was consistently implemented in later years. The process of systematic alignment started with the *Swisslex* programme of legislative reform – a suitably renamed and reformatted version of the legislative package prepared in view of the EEA accession (*Eurolex*). Thereafter, it continued with such vigour that in 1999 the Federal Council observed:¹⁵

Dans la pratique, le Parlement et le Conseil fédéral n’adoptent qu’exceptionnellement des actes juridiques qui ne sont pas [euro-]compatibles.

This was not merely a quantitative change. The rationales behind the quest for “euro-compatibility” had also changed. In the 1988 philosophy, the goals of autonomous adaptation were essentially: (a) to minimize obstacles to trade, and (b) to ease future negotiations with the EU. These rationales were maintained, strengthened, and expanded. Henceforth, *autonomer Nachvollzug* would also serve the purpose of reducing distortions of competition, including when such distortions would have actually played to the advantage of Swiss industry.¹⁶ This accounts for the marked expansion of Europeanization observed in the 1990s – from technical legislation to economic law at large.¹⁷

Unilateral Europeanization, moreover, could no longer be identified with autonomous adaptation in the strict sense – that is, a legislative policy *aiming specifically* at euro-compatibility. EU law also became a major source of inspiration in a logic of lesson-drawing. Conceptually, of course, this was nothing new.¹⁸ However, the influence of EU law became particularly strong during the 1990s. For example, in 1996 the Swiss Parliament adopted the Federal Law on the Swiss Internal Market.¹⁹ This Law “transposed” the four fundamental freedoms (as interpreted in *Cassis de Dijon*) into Swiss law with the aim of reducing the fragmentation of the Swiss market along cantonal lines. A classic EC solution for a purely Swiss problem.

The Europeanization of legislative *process* must also be mentioned here. What had started as a voluntary practice for selected areas – the practice of including in legislative proposals an analysis of their “euro-compatibility” – has become a general obligation by virtue of Article 141 of the Law on the Federal Parliament.²⁰ Before proposing and passing new legislation, the Federal Government and the Federal Parliament are now required to assess on a routine basis its “euro-compatibility”, even in non-economic areas such as immigration law.²¹

The contractual Europeanization of Swiss law

Since 1993, in parallel with the unilateral *rapprochement* described above, the EU and Switzerland have been involved in a continuous cycle of exploratory talks, (difficult) negotiations, and ratification of the results thereof. The first round of negotiations started at the initiative of the Swiss government, anxious to offset the negative consequences of the country’s self-exclusion from the

¹⁴ BAUDENBACHER, Zum Nachvollzug europäischen Rechts in der Schweiz, *Europarecht* 1992, 309-320.

¹⁵ Federal Council, Suisse-Union européenne: Rapport sur l’intégration 1999, FF 1999 3600, at p. 3634: “In practice, the Parliament and the Government only exceptionally adopt measures that are not [euro-]compatible” (author’s translation).

¹⁶ See Federal Council, Message sur le programme consécutif au rejet de l’Accord EEE, *op. cit.*, at p. 762.

¹⁷ See MALLEPELL, Der Einfluss des Gemeinschaftsrechts auf die schweizerische Gesetzgebung 1993-1995, *Swiss Papers on European Integration* n. 21, 1999.

¹⁸ For instance, German Law was a major source of inspiration for the drafters of the Swiss civil code.

¹⁹ Classified Compilation of Federal Law, 943.02.

²⁰ Classified Compilation of Federal Law, 171.10.

²¹ See e.g. Federal Council, Message concernant la loi sur les étrangers, FF 2002 3469, para. 5.

EEA. Its themes were therefore essentially, though not exclusively, economic.²² The second round of negotiations was opened instead at the request of the EU, which was eager to see its own Directive on the taxation of savings income applied by selected third states, including Switzerland. Switzerland accepted, but requested parallel negotiations on some “left-overs” from the first round, as well as on association to the implementation of the Schengen and Dublin *acquis* – a step that, it may be noted in passing, marked an expansion of Swiss-EU relationships from the essentially economic to the broadly political. In both rounds, negotiations were characterized by issue-linkages and multi-level games. One of the main threads of this complex texture, and the one that interests us here, was the confrontation between the competing values of “uniformity” and “autonomy”.

The EU maintained from the outset that advanced cooperation and integration would only be on offer if based on the application of the *acquis*. As the Commission pointed out in 1993,²³

Any agreement would need to deal satisfactorily with the implementation of the Community *acquis* and the need for Switzerland to accept the discipline involved.

This requirement responded to different rationales. In part, requiring Switzerland to implement the *acquis* was linked to the object and goals of each prospective agreement. In some matters, regulatory convergence was *the goal* of the negotiation for the EU.²⁴ In others, the EU saw it as a necessary precondition for the form of cooperation that was envisaged.²⁵ At the same time, the Union’s insistence on the acceptance of the *acquis* also had much to do with broader political concerns, and more precisely with the question of fitting the “Swiss piece” into the wider jigsaw of the Union’s external relations.²⁶

The Swiss government, for its part, was not fundamentally opposed to cooperating on the basis of the *acquis*. Anticipating strong domestic resistance, however, it objected to the application of some aspects of the *acquis* – e.g. the free movement of persons “en bloc”, EC weight limits for lorries, and any European rule, present or future, that might threaten banking secrecy. Moreover, and again in view of domestic hostility to losses of sovereignty, it strove to negotiate less-than-full obligations to transpose the *acquis*. In this regard, the “static” character of the prospective agreements was a non-negotiable red line: any obligation to apply the *acquis* would only refer to the “pre-signature” *acquis*, while Switzerland would retain (at least formal) control of the acceptance or refusal of the “post-signature” *acquis*.²⁷

The negotiations eventually produced sixteen “sectoral” agreements – a first package of seven, signed in 1999 and in force since 2002,²⁸ and a second package of nine, signed in 2004 and almost entirely in force as I write.²⁹ Unsurprisingly, the agreements reflect the parties’ competing agendas on the issue of regulatory convergence. Where the EU sought an approximation based on the *acquis*, namely in the sectors of the free movement of persons, air and land transport, taxation, security

²² The negotiations also covered “non-market” items such as the free movement of persons not pursuing an economic activity, as well as scientific and technological cooperation.

²³ European Commission, Communication on Future relations with Switzerland, COM (93) 486, para. 13.

²⁴ E.g. regarding the taxation of savings income, as already noted.

²⁵ E.g. as a way to ensure a level playing field while including some Swiss industries in the internal market, or as a way to ensure homogeneous controls at the external borders before admitting Switzerland to the Schengen “club”.

²⁶ In particular, the EU was conscious that granting Switzerland full access to the internal market or EC-programmes *à la carte*, or without requiring the full implementation of the *acquis*, might undermine EEA solidarity (European Commission, op. cit., para. 10). Likewise, in areas where parallel bilateral negotiations were ongoing or had been concluded with other third countries (e.g. on the taxation of savings or Schengen/Dublin), it was reluctant to grant privileged treatment to Switzerland.

²⁷ On the distinction between pre-signature and post-signature *acquis*, see PETROV, op. cit.

²⁸ Agreements on the Free Movement of Persons, Air Transport, Land Transport, Trade in Agricultural Products, Mutual Recognition in Relation to Conformity Assessment, Government Procurement, and Scientific and Technological Cooperation (OJ 2002 L 114).

²⁹ Agreements on Taxation of Savings Income (OJ 2004 L 385/28), Trade in Processed Agricultural Products (OJ 2005 L 23/17), Cooperation in the Field of Statistics (OJ 2006 L 90/1), Participation in the MEDIA Programmes (OJ 2006 L 90/22), Participation in the European Environment Agency and EIONET (OJ 2006 L 90/36), Association to the implementation and development of the Dublin and Schengen *acquis* (OJ 2008 L 53), Fight against Fraud (ratification pending, not yet published in the OJ), Taxation of Retired Officials from the EU Institutions (not published in the OJ).

(Schengen), and asylum (Dublin), it obtained it. Nonetheless, Swiss negotiators were able to secure some limited but important “victories”: transitional periods,³⁰ some permanent exemptions,³¹ and in some cases softer versions of the obligation to apply the relevant *acquis*.

As a consequence, the agreements that require Switzerland to implement the *acquis* have only one characteristic more or less in common: they are all “static”,³² with the partial exception of the Schengen/Dublin agreements.³³ In contrast, each defines in its own terms the exact manner and form of *acquis* implementation, as shown by the following examples.

The Agreement on Air Transport (AAT) is in a way the most linear and perfected instrument of legal Europeanization. Its “General provisions” reproduce word by word the provisions of the EC Treaty relating to non-discrimination, freedom of establishment, and competition. Its annex enumerates all the regulations and directives that Switzerland is required to implement – basically, all the air transport *acquis*. This operation of incorporation (textual and by reference) is perfected through Article 1(2), which reads:

Insofar as they are identical in substance to corresponding rules of the EC Treaty and to acts adopted in application of that Treaty, those provisions shall, in their implementation and application, be interpreted in conformity with the relevant rulings and decisions of the Court of Justice and the Commission of the European Communities given prior to the date of signature of this Agreement [...].

The Agreement on the Free Movement of Persons (AFMP) replicates the same scheme of textual incorporation of, and references to, EC secondary legislation. However, the Parties are not required to literally apply the EC legislation referred to, but rather to ensure the application of “equivalent rights and obligations” (Art. 16(1) AFMP). Moreover, the pre-signature case law of the Court of Justice must be “taken into account” (Art. 16(2) AFMP), rather than followed. Somewhat confusingly, a joint declaration enjoins the Parties to “apply the *acquis communautaire* [...] in accordance with the Agreement”.

Further down the line of Europeanization we find the Land Transport Agreement (LTA), which again contains both references to EC legislation (together with an obligation to apply them by equivalence, Art. 52(6)) and provisions replicating EC Law “originals”. However, no reference is made to the case law of the ECJ.

The Agreements associating to Schengen and Dublin (respectively AAS and AAD), my last example, are conceived differently. Both Agreements stipulate clearly that Switzerland is required to “accept and apply” the relevant EC and EU *acquis*, and that the interpretation of the *acquis* should be “as homogeneous as possible”. However, they do not lay down an obligation for the Swiss authorities to take into account the case law of the Court. Rather, they rely on exchange of information and reporting, and provide for termination in case of “substantial divergences” in the application of the *acquis* unless the Parties can find a political solution.

The Europeanization of Swiss Law: a powerful source of transformation, an imperfect phenomenon of “norm reception”

At this juncture, it seems appropriate to recapitulate and set out more fully some key features of the Europeanization of Swiss Law as I have described it above.

In the Swiss experience, legal Europeanization is first and foremost an *expansive* process. As already noted, over the last twenty years EU Law has incrementally established its influence in ever broader areas of Swiss Law: from technical norms, to competition law, to labour and consumer law, to transport law, and out into areas traditionally considered to be at the core of national sovereignty,

³⁰ Especially in the implementation of the Agreement on the free movement of persons, and of the Land transport agreement.

³¹ E.g. a permanent exemption from applying future Schengen *acquis* threatening banking secrecy: see SCHWOK, Un rapprochement ... qui éloigne la Suisse d'une adhésion, *Revue du Marché commun et de l'Union européenne* 2004, 645-650.

³² I.e. they incorporate the pre-signature *acquis*, and require the consent of both parties for each “updating”.

³³ According to these agreements, Switzerland is at liberty to accept or to refuse the post-signature *acquis*. However, failure to accept the new *acquis* entails in principle the termination of the agreements.

migration law and perhaps, in the future, criminal law.³⁴ To-date, it does not seem exaggerated to qualify the Europeanization of Swiss Law as “massive”, although it is the result of incremental touches rather than of a grand design.

At the same time, as we have also seen, it is a *plural, polymorphic* phenomenon. It results from both international agreements and domestic legislation. Within these two “modes” of Europeanization there are, moreover, further differentiations. As noted, the rules of “incorporation” of the *acquis* provided for in the Swiss-EU agreements, and the logics thereof, display considerable diversity. This is the result of a compromise between the “uniformity” required by the EU and the “autonomy” defended by the Swiss authorities. Unilateral Europeanization displays a similar level of diversity. First, there are different logics behind the reception of rules and principles of European origin. In my simplified account, I have mentioned two: the aim to approximate Swiss Law to EU Law, and the imitation of (or inspiration to) EU regulatory models.³⁵ Second, reception of EU Law is made through very different legislative techniques – express references to EU Law, literal reproduction, reformulations of European principles and rules.

All these forms of Europeanization are, as a rule, *partial* or *selective*. Save a few exceptions, the Swiss-EU agreements that require the implementation of the relevant *acquis* leave some elements of this *acquis* outside their scope.³⁶ The free decision to align Swiss Law to EU Law is *a fortiori* selective. As emphatically stated in the *Europe 2006 Report* of the Federal Council,³⁷

L'adaptation autonome est uniquement poursuivie là où des intérêts économiques (capacité concurrentielle) le demandent ou le justifient [...]. Dans certains domaines, comme la politique fiscale, agricole ou étrangère, ou encore le marché intérieur, la législation suisse se démarque du droit européen et la Suisse conserve son autonomie, en appliquant par exemple des taux de TVA moins élevés.

In practice, when legislating on a given subject, the Swiss authorities may freely choose to “transpose” existing EU legislation *en bloc*, or with some limited exceptions, or only on selected points.

The discrepancies between EU Law and “Europeanized” Swiss Law tend, moreover, to grow over time. Hence, so-called “bilateral Law” (*bilaterales Recht*)³⁸ is often not updated to the latest developments of the relevant *acquis*.³⁹ Thus, for instance, the AFMP was not modified after the adoption of Directive 2004/38.⁴⁰ As a result, the free movement *acquis* applicable between Switzerland and the EU is something of a “living fossil”, coexisting with the present-time *acquis* applicable within the EU. The same can be said of unilaterally “Europeanized” domestic law: it is often the case that even legislation intended to bring about euro-compatibility is not updated to the latest developments of EU Law.

To sum up, the Europeanization of Swiss Law is an expansive, massive phenomenon. Swiss Law has been deeply, extensively transformed, and overall it has been approximated to EU Law to an

³⁴ I have mentioned above the fields in which the Swiss-EU agreements bring about some form of approximation. For a non-exhaustive enumeration of the fields in which Swiss Law has been unilaterally approximated to EU Law, see Federal Council, Rapport Europe 2006, FF 2006 6461, at 6477.

³⁵ Recent legislation reflects an additional rationale. Article 42(2) of the Federal Law on Foreigners (Classified Compilation of Federal Law, 142.20) aims at applying to family members of Swiss citizens the (originally EC) rules of admission that are applicable, under the AFMP, to the family members of EU citizens. This “second degree” Europeanization has been brought about in order to avoid reverse discriminations.

³⁶ See e.g. AFMP, Annex I, Art.24(4) *in fine*: “This Agreement does not regulate access to vocational training or maintenance assistance given to the students covered by this Article”.

³⁷ Op. cit., at 6477: “Autonomous adaptation is only pursued when this is justified or required by Swiss economic interests (competitiveness) [...]. In some areas, such as fiscal, agricultural or foreign policy, or in the internal market, Swiss legislation deviates from EU Law and Switzerland retains its autonomy by applying, for instance, lower VAT rates” (author’s translation).

³⁸ This expression is used, for instance, in TOBLER, Die Fidium-Finanz-Entscheidung des EuGH: ein Vorbote der Luxemburger Rechtsprechung zum bilateralen Recht, *Revue Suisse de droit international et européen* 2006, 307-311.

³⁹ The exceptions here are the AAD, AAS, and ATA.

⁴⁰ Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L 158/77).

extent that is surprising for a non-EU country. At the same time, if considered in a “transfer” or “export” perspective, the Europeanization of Swiss Law is a fragmentary, polymorphic and selective process, rarely – if ever – coming close to a faithful “transposition” of EU Law into Swiss Law.

The Transformation of Swiss Legal Thinking

Legal integration without supranationalism, or the illusion of business as usual

I hope I may be excused for having reserved another key feature of legal Europeanization in Switzerland – “classicism” – as a convenient opening for this section of the paper.

As everyone knows, the “ever closer union” among the societies and economies belonging to the EU is pursued through an innovative legal and institutional infrastructure: a “new legal order for the benefit of which the member states have limited their sovereign rights”,⁴¹ which is developed and overseen by supranational institutions, and whose uniform interpretation is ensured by a supranational Court. To some extent, integration within the EEA displays similar features.⁴²

By contrast, none of these features are present in the Swiss case. Switzerland pursues the goal of integration through “classical” legal means: ordinary international agreements,⁴³ and equally ordinary domestic enactments. As Roland BIEBER humorously observed in 1996,⁴⁴

Die Schweiz setzt bisher [...] auf die *traditionellen* Gestaltungsmittel des Staates, vergleichbar einem altmodischen Professor, der seine Texte noch immer auf einer mechanischen Maschine schreibt und meint, der Aufwand eines Textcomputers sei viel zu groß (und zu teuer), er könne das gleiche Ergebnis mit den gewohnten Mitteln erreichen.

Pushing the “computer” metaphor a bit further, and drawing from Joseph WEILER this time,⁴⁵ one might think that although a great number of EU-Law “applications” have been downloaded into the Swiss legal order, this has not affected the legal order’s “operating system” – meta-rules such as the classification and hierarchy of sources, and the methods of legal interpretation.

After all, the argument would go, commentators, practitioners, and judges are faced with the usual legal acts, and may go about their business of interpretation and application according to received methods. Such a conclusion would not be contradicted by the fact that, in dealing with some agreements, they are required to go to the library and peruse “foreign” case law (see Art. 16(2) AFMP and 1(2) AAT). In fact, these can be seen as special cases grounded – most “classically” – in an explicit contractual stipulation. Hardly anything revolutionary.

But while all the foregoing is true to some extent, the “operating system” of Swiss Law *is* changing, although the change is still incomplete and contradictory.

The cognitive opening of Swiss legal culture to EU Law

I would like to start by emphasizing an obvious and therefore usually overlooked fact: EU Law, and “EU Law in Switzerland”, have gradually become standard topics in Swiss academia. In the last eighteen years, monographs and edited books on the *Europäisierung* or on the *Einfluss von EU-Recht* on Swiss law have appeared on a regular basis and with increasing frequency. Specialized

⁴¹ ECJ, Opinion 1/91, EEA 1, [1991] ECR, I-6079, para. 21.

⁴² See in particular the contention that the EEA is “an international treaty *sui generis* which contains a distinct legal order of its own” (EFTA Court, case E-7/97, Sveinbjörnsdóttir, EFTA Court Report 1998, 95, para. 39).

⁴³ Ordinary in the sense that they do not establish supranational institutions, nor a supranational legal order. See FELDER, *Appréciation juridique et politique du cadre institutionnel et des dispositions générales des accords sectoriels*, in FELDER/KADDOUS (eds), *Accords bilatéraux Suisse-UE (Commentaires)*, Geneva, Basel, Munich, Bruxelles, 2001, 117-148.

⁴⁴ BIEBER, “Staatlicher Alleingang” als Alternative zur Integration? – Zur Rolle der Schweiz am Rande der Europäischen Union, *Vorträge, Reden und Berichte aus dem Europa-Institut* n. 346, 1996, at 1: “Switzerland has so far trusted in the State’s traditional means of action, just like an old-fashioned professor who keeps writing his texts on a mechanical typewriter, as he thinks that switching to a computer would be too big (and too costly) a change, and that he can achieve the same result in the good old way” (author’s translation).

⁴⁵ WEILER, *The Reformation of European Constitutionalism*, *Journal of Common Market Studies* 1997, 97-131: “Constitutionalism is the DOS or Windows of the European Community”.

periodicals and paper series have mushroomed, and articles on Europeanization are common in prestigious mainstream law reviews. Even textbooks on Swiss Law are more and more often enriched by comparative chapters on EU Law. Last but not least, EU Law has become a compulsory course in most Swiss Universities, and some have recently established special courses on the “Influence of EU Law on Swiss Law”.

In short, examining Swiss Law through a “European lens” has quietly become second nature to an increasing proportion of Swiss scholars and to today’s students – the future generation of Swiss lawyers of all descriptions.

This conclusion can be transposed, to some extent, from academic discourse to judicial discourse. References to EU Law in Swiss judgments, once rare and much remarked, have become quite common of late.⁴⁶

It must be stressed that in and of itself, this fact does not represent a qualitative change in Swiss judicial thinking. In fact, Swiss judges have a tradition of referring to foreign legal materials in their decisions. Such references have always been considered to be the expression of a free, “comparative” exercise undertaken by the judge to nourish her reflection on the problem at hand – no more, no less.⁴⁷ Frequent references to EU Law, therefore, merely tell us that in “cognitive” terms Swiss judges (and litigation lawyers) are more and more open to EU Law – in other words, that EU Law is becoming a stable feature in the intellectual landscape of many Swiss legal practitioners.

The conceptual and operational opening of the Swiss Methodenlehre to EU Law

Apart from the penetration of EU Law into national legal culture, the Europeanization of Swiss Law has triggered an explicit debate on the qualitative transformations it causes to, or requires from, Swiss legal thinking. This discussion has been framed in terms of methods of interpretation: should “Europeanized” Swiss Law, domestic and international, be interpreted in the light of EU legislation, case law, and administrative practice? Or, to state it differently, should it be interpreted so as to produce “euro-compatible” results? And if so, on what dogmatic foundations, in what circumstances, within what limits?

While all these questions have also been debated with reference to the interpretation of Swiss-EU agreements,⁴⁸ the most stimulating discussions have concerned the interpretation of unilaterally “Europeanized” legislation, and I will henceforth concentrate on this topic.

Quite remarkably, the idea that “euro-compatible” interpretation is *required* for enactments adopted with a view to harmonize Swiss Law to EU Law has by now become canonical in the literature.⁴⁹ This *is* a qualitative step beyond the traditional characterization of foreign law as a mere source of inspiration for Swiss lawyers.

It may be useful to note, in passing, some corollary propositions that descend from this basic idea:

⁴⁶ These early meetings between the Federal Tribunal and EU Law are exhaustively documented in a work published in 1999 by the late Olivier JACOT-GUILLARMO and significantly titled: *Traces de droit communautaire dans la jurisprudence du Tribunal fédéral suisse*, in RODRIGUEZ IGLESIAS/DUE/SCHINGTEN/ELSEN (eds), *Mélanges en hommage à Fernand Schockweiler*, Baden Baden, 1999, 213-232.

⁴⁷ On the traditional use of foreign legal materials by Swiss judges see GERBER, *Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts*, in *Perméabilité des ordres juridiques* (Publications de l’ISDC n° 20), Zürich 1992, 141-163; see also WERRO *La jurisprudence et le droit comparé*, *ibidem*, 165-172.

⁴⁸ See in particular EPINEY, *Zur Bedeutung der Rechtsprechung des EuGH für Anwendung und Auslegung des Personenfreizügigkeitsabkommen*, *Zeitschrift des bernischen Juristenvereins* 2005, 1-31; see also KADDOUS, *L’influence du droit communautaire dans la jurisprudence du Tribunal fédéral suisse*, in *Le droit à la mesure de l’homme: Mélanges en l’honneur de Philippe Léger*, Paris 2006, 407-422.

⁴⁹ See in particular WIEGAND/BRÜLHART, *Die Auslegung von autonom nachvollzogenem Recht der Europäischen Gemeinschaft*, *Swiss Papers on European Integration* n. 23, 1999; COTTIER/DZAMKO/EVTIMOV, *Die europakompatible Auslegung des schweizerischen Rechts*, in EPINEY/THEUERKAUF/RIVIERE (eds), *Annuaire suisse de droit européen* 2003, Bern, Zürich 2004, 357-392; AMSTUTZ, *Interpretatio multiplex. Zur Europäisierung des schweizerischen Privatrechts im Spiegel von BGE 129 III 335*, in EPINEY/RIVIERE (eds), *Auslegung und Anwendung von “Integrationsverträgen”*, Zürich 2006, 93-119; NYFFELER, *Die Anwendung autonom nachvollzogener Normen des EU-Rechts*, in *Festschrift 100 Jahre Aargauischer Anwaltsverband*, Zürich, 2005, 35-55; WALTER, *Das rechtsvergleichende Element – Zur Auslegung vereinheitlichten, harmonisierten und rezipierten Rechts*, *Revue du droit suisse* 2007, I, 259-277.

- A “euro-compatible” interpretation is not required when the legislator has merely drawn inspiration from EU Law, no matter how striking the similarity between Swiss Law and its “model”. In such cases, to be distinguished from *autonomer Nachvollzug* proper, no obligation to interpret Swiss Law in conformity with EU Law can be inferred.⁵⁰ Granted, the Swiss judge *may* still freely use relevant EU legislation and case law in a “comparative perspective”, as a help for interpretation (*Auslegungshilfe*).
- Given the selective nature of “autonomous adaptation”, care must be taken in not applying the principle of “euro-compatible” interpretation to the provisions reflecting a deliberate deviation from EU Law.⁵¹
- “Euro-compatible” interpretation does not amount to a mechanical reception of EU regulatory or jurisprudential solutions. The material aims and interests pursued through the *autonomer Nachvollzug* must be taken into account and may justify, in certain cases, euro-incompatible interpretations of purportedly euro-compatible provisions.⁵²

That said, the decisive importance attributed to the legislator’s intention to harmonize is a source of considerable problems. To begin with, even careful examination of the *travaux préparatoires* is not always conclusive: it may be unclear whether domestic provisions that are identical or similar to EU provisions are indeed the expression of a will to harmonize. The inverse may also be true. A clear intention to harmonize may find expression in normative utterances whose conformity to the EU “original” is dubious. In such cases, should the interpreter give more weight to legislative intent or to wording? This dilemma arises frequently in a diachronic perspective. As noted above, even when “euro-compatibility” is the key goal of their enactments, Swiss norm-givers rarely resort to dynamic references to EU Law. It must be added that *autonomer Nachvollzug* is usually a punctual act, which is not followed by screening procedures tracking the evolution of the “transposed” EU norms. It is therefore often the case that originally euro-compatible Swiss rules become over time euro-incompatible, due to the evolution of EU legislation and case law. Should the interpreter take into account such “subsequent” EU Law, and if so how far can she go in “updating” domestic legislation? On all these questions, widely different views have been expressed. This is so, chiefly, because scholars differ on the theoretical underpinnings of “euro-compatible” interpretation. While some see it as a specific application of the historical and teleological methods of interpretation,⁵³ others consider it to be the expression of systematic or “strengthened” comparative interpretation.⁵⁴ This is not the place to conduct an extensive review of the literature, but the positions expressed by two authors deserve examination, since they are paradigmatic of the innovation/tradition polarity created by Europeanization in Swiss legal thinking.

In a series of flamboyant contributions, Marc AMSTUTZ has developed the most coherent and ambitious conceptual theorization of “euro-compatible” interpretation to date.⁵⁵ This author styles

⁵⁰ See COTTIER et al., op. cit. The distinction is not always made, so that “autonomous adaptation” ends up being an all-encompassing concept for unilateral Europeanization (see e.g. KADDOUS, cit.). However, the distinction is sound in principle, and is moreover upheld by the Swiss Federal Tribunal: compare ATF 128 I 295, para. 4c, and ATF 129 III 335, § 6 (on this judgment, see below).

⁵¹ See e.g. COTTIER et al., cit.

⁵² See in particular COTTIER et al., cit., as well as WALTER, cit. This is often expressed by saying that since the aim of autonomous adaptation is market integration, then Swiss judges should reject “euro-compatible” interpretations that lead to the creation of trade obstacles (COTTIER et al., at 369). But the link between autonomous adaptation and market integration should not be seen as exclusive: the key consideration in euro-compatible interpretation is the legislator’s will to harmonize (COTTIER et al., at 364) and this will may well be expressed in non-economic fields. Otherwise stated: should the Swiss norm-giver decide to *align* domestic rules on the fight against terrorism with the relevant EU Framework-Directive, it would be difficult to argue that the principle of “euro-compatible” interpretation should not apply because the alignment is not linked to market integration.

⁵³ KRAMER, *Konvergenz und Internationalisierung der juristischen Methode*, in MEIER-SCHATZ (ed), *Die Zukunft des Rechts*, Basel 1999, 71-89.

⁵⁴ WALTER, op. cit.

⁵⁵ See in particular AMSTUTZ, *Evolutorische Rechtsmethodik im europäischen Privatrecht – Zur richtlinienkonformen Auslegung und ihren Folgen für den autonomen Nachvollzug des Gemeinschaftsprivatrechts in der Schweiz*, in WERRO/PROBST (eds), *Le droit privé Suisse face au droit communautaire européen*, Bern 2005, 105-144; ID., *Normative Kompatibilitäten – Zum Begriff der Eurokompatibilität und seiner Funktionen im Schweizer Privatrecht*,

the Swiss *autonomer Nachvollzug* as an instance of “interlegality” – in the words of Boaventura da Sousa SANTOS, the intersection of different “legal spaces superimposed, interpenetrated and mixed in our minds as well as in our actions” that are nonetheless “non-synchronic, and thus result in uneven and unstable combinations of legal codes”.⁵⁶ In this perspective, AMSTUTZ argues that the purpose of autonomous adaptation is not to achieve legal uniformity. Rather, it is to create the conditions under which distinct legal orders are so “synchronized” as to make it possible to have a unitary “order of actions” through the creation of “normative compatibilities”, which must be maintained as the legal orders evolve.⁵⁷ This task, he further states, requires constant and subtle adjustments that cannot be accomplished by the legislator. Only the judge is fit for the task, under a very general mandate, so to say, to make interlegality work.⁵⁸ The practical consequences of this argumentative line are far-reaching. *Autonom nachvollzogenes Recht*, as interlegal law, must always be interpreted in such a manner as to create “normative compatibilities” with EU Law, *present and future* – until and unless a contrary will is unambiguously expressed by the norm-giver, i.e. until and unless the mandate to make interlegality work is revoked. This must be done, as far as possible, through the mobilization of the domestic methods of interpretation. To this extent, AMSTUTZ’s position is close to that previously expressed by WIEGAND and BRÜHLHART that “euro-compatibility” is a “goal for interpretation” (*Auslegungsziel*) rather than a method of interpretation.⁵⁹ But according to AMSTUTZ, it is an overriding goal: if the application of the domestic methods of interpretation yields no “euro-compatible” result, then the judge must proceed to *create* a euro-compatible legal solution.

This radical thesis has been opposed by Franz NYFFELER, whose view is grounded in a more traditional understanding of the rule of law and of the separation of powers.⁶⁰ In his analysis, EU legal materials must be seen as a mandatory but *subsidiary* means of interpretation for “autonomously adapted” Swiss law – i.e. as an element that is clearly subordinate, for instance, to the provision’s wording and (national) legal context. NYFFELER adds, in an “originalist” vein, that since the mandatory reference to “foreign legal materials” is only justified by the legislator’s intention to harmonize, then it must be understood as covering only those materials that were positively *known* to the legislator. Updating *autonom nachvollzogenes Recht* to new EU Law is primarily a task for the legislator. Failing legislative intervention, the judge *may* only take into account subsequent EU Law in the traditional comparative perspective, and only in order to confirm a solution that is attainable through the traditional methods of interpretation.

This brief and incomplete summary of the scholarly debate surrounding the interpretation of “Europeanized” Swiss Law highlights two interrelated aspects. First, the Europeanization of Swiss Law, in the form of *autonomer Nachvollzug*, has carried with it a change in the doctrinal understanding of the methods of legal interpretation: “foreign legal materials”, and more particularly EU legislation and case law, have come to be seen as possessing a legal value that is qualitatively different from that which was traditionally assigned to them – non-binding “sources of inspiration”. However, and this is the second point, the *exact* value of these materials is disputed, with positions that range from AMSTUTZ’s “interlegal” view to NYFFELER’s more conservative stance.

This discussion has not remained confined to the academic world. Quite to the contrary, it has also unfolded in courts, giving rise to some much-remarked pieces of judicial reasoning.

In a judgement rendered in 2003 on the application of Article 333 of the Obligations Code (ATF 129 III 335), the Swiss Supreme Court (Federal Tribunal) made the following statement:⁶¹

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EPINEY/RIVIERE/THEUERKAUF/ WYSSLING (eds), *Annuaire suisse de droit européen 2004/2005*, Bern., Zürich 2005, 235-252; ID., *Interpretatio multiplex*, op. cit.

⁵⁶ SANTOS, *Law: A Map of Misreading. Towards a Postmodern Conception of the Law*, *Journal of Law and Society* 1987, 279-302, at 297-298.

⁵⁷ AMSTUTZ draws the distinction between “legal order” and “order of actions” from Hayek’s works: see in particular *Interpretatio multiplex*, cit., or AMSTUTZ, *In-between worlds: Marleasing and the emergence of Interlegality in Legal Reasoning*, *European Law Journal* 2005, 766-784.

⁵⁸ AMSTUTZ so construes, for instance, the *Swisslex* programme (see above).

⁵⁹ See WIEGAND/BRÜHLHART, op. cit.

⁶⁰ NYFFELER, op. cit.

⁶¹ ATF 129 III 335, § 6: “Domestic law that has been autonomously adapted to EU Law must, in doubt, be interpreted in a “euro-compatible” manner. It is harmonized law and as such in the end, like international agreements, unifying law. Of course it is not unifying law in the form of uniform law. Nonetheless, when the Swiss legal order is adapted to a foreign legal

Nachvollzogenes Binnenrecht ist im Zweifel europarechtskonform auszulegen. Es ist harmonisiertes Recht und als solches im Ergebnis - wie das Staatsvertragsrecht - Einheitsrecht. Zwar ist es nicht Einheitsrecht in Form von vereinheitlichtem Recht. Wird aber die schweizerische Ordnung einer ausländischen - hier der europäischen - angeglichen, ist die Harmonisierung nicht nur in der Rechtssetzung, sondern namentlich auch in der Auslegung und Anwendung des Rechts anzustreben, soweit die binnenstaatlich zu beachtende Methodologie eine solche Angleichung zulässt.

A few lines below, the Federal Tribunal also took a position on whether “subsequent” developments in EU Law should be taken into account:⁶²

Die Angleichung in der Rechtsanwendung darf sich dabei nicht bloss an der europäischen Rechtslage orientieren, die im Zeitpunkt der Anpassung des Binnenrechts durch den Gesetzgeber galt. Vielmehr hat sie auch die Weiterentwicklung des Rechts, mit dem eine Harmonisierung angestrebt wurde, im Auge zu behalten.

As emerges from these passages, the Federal Tribunal has been cautious in recognizing the principle of “euro-compatible” interpretation. It has thus stressed that “euro-compatibility” considerations are *subsidiary*, i.e. that they come into play only in case of “doubt” and provided that the “euro-compatible” solution can also be reconciled with traditional methods of interpretation. Moreover, in adopting a dynamic view of “euro-compatibility”, it has not attributed a clear legal value to “subsequent” EU Law. The die has nonetheless been cast: under these reservations, the stringency of which has been questioned in the literature,⁶³ the Federal Tribunal has recognized EU legal materials as having the value of *mandatory points of reference* for the interpretation of Swiss Law that has been “autonomously adapted”.⁶⁴

This judgement is now widely regarded as the leading case on “autonomously adapted” Swiss Law.⁶⁵ It is viewed – and applauded or criticized, as the case may be – as the expression of a general adaptation of Swiss judicial *Methodenlehre* to the new reality of Europeanization. The present situation is, however, more complex. To be sure, a general adaptation along the lines of ATF 129 III 335 may come about in the future. To-date, however, it has not yet been accomplished: the above-mentioned *dicta* have been greeted by other Swiss judges, supreme or not, with hesitation, or even with resistance.

Thus, the same chamber of the Federal Tribunal (First Civil Court), sitting in different formations, has given a restrictive reading of the principles expressed in ATF 129 III 335, putting an uncharacteristically strong emphasis on the *wording* of domestic provisions as a limit to “euro-compatible” interpretation.⁶⁶ Other Courts of the Federal Tribunal have simply ignored the precedent set by ATF 129 III 335. For example, in interpreting the domestic regulations on VAT, the Second Public Law Court of the Tribunal consistently holds that⁶⁷

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order – here EU Law – harmonization must not be sought only in the formulation of the norm, but also in its interpretation and application, insofar as this is permitted by the methods of interpretation that must be observed under national law.” (author’s translation).

⁶² *Ibidem*: “In applying the law, adjustments [to EU Law] must not be oriented according to the legal situation that prevailed when the national law was aligned [to EU Law] by the legislator. Rather, the interpreter must also keep in sight the subsequent development of the law with which harmonization is sought” (author’s translation).

⁶³ WALTER (op. cit., at p. 270) has styled the condition of compatibility with the traditional methods of interpretation as *Sibyllinisch*. WALTER’s perplexity can only be understood in the light of the flexible use Swiss courts make of the above principles of interpretation – so-called *Methodenpluralismus* or, in a pejorative sense, methodological “anything goes” – whereby no element of interpretation, not even the wording of a provision, can in itself *exclude* possible interpretations of a norm. See in particular WIEGAND/BRÜHLHART, cit., as well as PICHONNAZ/VOGENAUER, Le “pluralisme pragmatique” du Tribunal fédéral: une méthode sans méthode?, *Pratique juridique actuelle* 1999, 417-426.

⁶⁴ See in particular AMSTUTZ, *Interpretatio multiplex*, op. cit., at 94.

⁶⁵ See in particular NYFFELER, op. cit., at 37.

⁶⁶ See ATF 132 III 379, para. 3.3.5 and ATF 133 III 568, para. 4.6.

⁶⁷ ATF 124 II 193, para. 6: “It is undisputed that the constitutional legislator aimed at approximating Swiss turnover tax to that of the EU and of its member States. [...] The EU and member States’ regulations on turnover tax have therefore an exemplary significance for Switzerland and constitute a source of information that must not be disregarded in interpreting Swiss VAT Law, if the goal of harmonization, pursued by the constitution-giver, is to be attained” (author’s translation).

Es steht ausser Frage, dass der Verfassungsgeber [...] die schweizerische Verbrauchsbesteuerung derjenigen der Europäischen Gemeinschaft und ihrer Mitgliedstaaten annähern wollte. [...] Die Umsatzsteuerrechte der Europäischen Gemeinschaft und ihrer Mitgliedstaaten haben deshalb exemplarische Bedeutung für die Schweiz und bilden eine nicht zu vernachlässigende Erkenntnisquelle bei der Interpretation des schweizerischen Mehrwertsteuerrechts, wenn es darum geht, die Zielsetzungen der Harmonisierung, wie sie dem schweizerischen Verfassungsgeber vorgeschwebt haben, zu erreichen

This dictum seems to uphold the traditional idea that foreign law may at most be a “source of inspiration” for the interpretation of Swiss Law, even when the norm-giver has clearly sought harmonization.

The recently established Federal Administrative Tribunal has manifested an even stronger reluctance to recognize a legal “status” to EU legislation and case law in the interpretation of *autonom nachvollzogenes Recht*. Thus, in recent judgments on the Law on Therapeutical Products – a clear case of autonomous adaptation – the Tribunal has sometimes reiterated the view quoted above (EU Law as *Erkenntnisquelle*). On one occasion, it has gone so far as to state that a legislative intent to harmonize has no impact on the methods of interpretation to be applied:⁶⁸

Hieraus kann [...] nicht abgeleitet werden, dass die schweizerischen Vorschriften den gleichen Gehalt aufweisen müssten, wie die für die Schweiz nicht unmittelbar anwendbaren EU-Regelungen. Vielmehr ist das schweizerische Recht autonom auszulegen.

Needless to say, the meaning of “*autonom auszulegen*” in this passage is “interpreting without taking into account EU legal materials”.

With this last judgment, Swiss courts have come full circle: they have expressed all the possible positions on the value of EU legal materials in Swiss Law. If ATF 129 III 335 is the leading case, then a great many judges are reluctant to follow the lead. The result of this, as evinced by the diversity of positions summarized above, is systemic incoherence and unpredictability in the fundamental operation of attributing meaning to the growing body of *autonom nachvollzogenes Recht*.

Concluding Remarks

Switzerland is a special case of Europeanization. If we take a broad perspective, encompassing all the non-EU countries that are presently under the influence of EU Law, Switzerland belongs to the restricted class of “quasi members”. In addition, its “bilateral way” of rapprochement to the EU – a mix of sectoral agreements and unilateral approximation of domestic legislation – is quite unique. Therefore, only prudent analogies – and certainly no generalizations – are allowed when drawing lessons on Europeanization, as a general phenomenon, from the Swiss experience. With these methodological *caveats* in mind, I would offer two tentative reflections on legal Europeanization in non-EU states.

The first concerns the concept of legal Europeanization itself. As I have pointed out in the introduction, and as we have seen, the term covers many different forms of interaction between EU Law and the Swiss legal order. In a comparative perspective, the spectrum of such interactions is even wider.⁶⁹ If the concept “legal Europeanization” is to embrace this complex and differentiated phenomenon in full, and still maintain any explanatory power, its content must probably be linked to the notion of transformation. And if this is correct, then we should also refrain from using the concept of “legal Europeanization”, as such, as a tool of legal analysis. The reason for this becomes apparent if we apply to “Europeanized” provisions the litmus test of “legal homogeneity” – is homogeneity

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This position was not altered after ATF 129 III 335: see e.g. Federal Tribunal, case 2A.40/2007, Aircraft Management, judgment of November 14 2007, available online at www.bger.ch, para. 2.4.

⁶⁸ Federal Administrative Tribunal, case C-2092/2006, Janssen-Cilag AG/Swissmedic, judgment of December 5 2007, available online at www.bundesverwaltungsgericht.ch, para. 3.5: “It may not be deduced from this that Swiss Law should have the same content as EU Law, which is not directly applicable in Switzerland. Swiss Law must rather be interpreted in an autonomous manner” (author’s translation).

⁶⁹ See, on “contractual” Europeanization, PETROV, op. cit.

between the provision at hand and its EU counterpart a relevant consideration at all? And given that perfect homogeneity is only an ideal-type, what level, what kind of homogeneity is sought? Like a beam of light, these questions turn the monochrome idea of “Europeanization” (Swiss or Ukrainian provision A looks identical/similar to EU provision B) into a rainbow of different “Europeanizations” – dynamic/static unification, approximation, inspiration, and so on. All of which, I should add, are more or less distant from the images evoked by words such as “cut/paste” or “export”.

My second reflection concerns the kind of transformative effects that Europeanization is likely to produce in legal thinking. As stated earlier, the superficial image of legal Europeanization in Switzerland is “approximation through classic means”. The natural implication, in terms of interpreting the Law, would be “business as usual”. Still, as we have seen, this is not the case. Even though the reception of EU Law into Swiss Law is mediated by classic forms of state normative power (laws and agreements), EU legal materials *as such* are coming to be seen as part of the domestic legal environment – not only in the traditional, cognitive sense, but in a stronger, positive-legal sense.

To be sure, this transformation is still in the making: a part of the judiciary has heard the new tune and is now playing it by ear; other judges remain steadfastly deaf to it. Therefore, to the extent that Europeanization has produced some change in the methods of interpretation of the Law, it has done so in an incomplete, contradictory manner. Or, to state it differently, Europeanization has not resulted (yet) in the establishment of a new canon of legal interpretation. Rather, it has destabilized the existing canon, thereby generating systemic incoherence and unpredictability.

Such problems could, of course, be reduced if the Swiss legislator gave the Swiss judges and administration clearer “interpretive mandates” by using more explicit techniques of Europeanization.⁷⁰ But this is unlikely to happen on a large scale, given the “double talk” of the Swiss political authorities, who practise unilateral harmonization while insisting on the rhetoric of “sovereignty”.⁷¹ The burden is, thus, mainly on the shoulders of Swiss judges. Today, many of them seem inclined to put an end to the experience of ATF 129 III 335 and to return to the past – sticking to the trusted old methods of interpretation, and using EU legal materials as a “free” *Auslegungshilfe* for the growing body of “Europeanized” Swiss Law. This would be a way to dispel the disturbing thought that “foreign” legal materials may bind national authorities. Not, however, a way to recover coherence and predictability, since the “free” use of legal materials is structurally open to manipulation and selectivity.⁷² The alternative option Swiss judges have is to accept EU legal materials as part of “Swiss legality”, and to elaborate further on their status in domestic law. This option may seem unattractive, as it requires rethinking and adjusting deeply engrained concepts of the rule of law, and possibly of the law itself. But it is probably the only one responding to the need of the moment for the Swiss legal order: to develop, outside supranational infrastructures, a coherent and functioning model of advanced legal integration.

⁷⁰ E.g. by stating explicitly the goals it pursues in approximating Swiss Law to EU Law, or by monitoring periodically the continuing “euro-compatibility” of “autonomously adapted” laws (NYFFELER, *op. cit.*, at 54-55).

⁷¹ See the passage quoted above from Federal Council, *Rapport Europe 2006*, *op. cit.*

⁷² See DORSEN, *The relevance of foreign legal materials in U.S. constitutional cases: a conversation between Justice Antonin Scalia and Justice Stephen Breyer*, *International Journal of Constitutional Law* 2005, 519-541.

Towards a Framework Agreement in the Context of New Bilateral Agreements between Switzerland and the European Union

René Schwok*

Introduction

Switzerland's case is not only interesting for its own inhabitants. It is also interesting for EU experts. Switzerland has, in actual fact, obtained privileged treatment that most EU leaders, legal experts and political scientists held to be unrealistic, a kind of solution that would be even more flexible than the European Economic Area (EEA).¹

Switzerland is sometimes even more integrated than some Member States. Since 1988, Switzerland has not adopted any new federal (national) legislation without checking *a priori* what the relevant EU law is in the same area. Switzerland has even adopted EU policies rejected by some EU States. A good example is seen in its participation in the Schengen area. The Confederation has dismantled its physical borders whereas the United Kingdom and Ireland, two Member States, have not adopted this important EU policy.

Switzerland intends to continue its bilateral approach, and strengthen it. This paper discusses first what could be the future bilateral agreements between Switzerland and the EU and second the issue of a customs union. Finally, I analyze in depth the question of a comprehensive framework agreement between Switzerland and the EU. The analysis constantly keeps in mind in what respect the Swiss case could be interesting for other European non EU States such as the European ENP countries.

Note that the issue of Switzerland's membership is not discussed here. Elsewhere² I claim that Bilateral Agreements I and II³ led to the paradoxical observation that the closer Switzerland gets to the EU, the more distant the prospects of joining the EU seem to become.⁴ The Europeanization⁵ brought about by the proliferation of bilateral agreements and the autonomous adoption of much EU legislation will not necessarily prompt Switzerland to join the EU because most Swiss do not believe that this satellisation belies their independence. On the contrary, the principal lesson retained by a majority of Swiss citizens is that the country can continue to "get by" for a long time this way. Most people hold that it is not worth joining the EU if one can have most of the advantages of the EU without its disadvantages. The Bilateral Agreements II reinforced this analysis. Indeed, they granted Switzerland certain special conditions, which, in theory, should disappear in the event of accession. These concern, for example, banking secrecy in the agreement on the taxation of savings.

Additional *ad hoc* agreements. A breakdown of twenty pending issues

The Federal Council, political parties and the financial community wish, on the one hand, to conclude new agreements and on the other, to further build on current bilateral policy. The EU has declared its readiness to continue the course of bilateral agreements. The EU has begun to walk down a bilateral path with the Confederation and nothing indicates there will be a change of direction. It is, therefore, reasonable to expect that Switzerland will continue to adopt EU laws in the next few years. Any negative referendums could, it is true, weaken this approach. Despite these undeniable risks, the

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¹ More developments in René Schwok, "Switzerland's Approximation of its Legislation to the EU Acquis: Specificities, Lessons and Paradoxes", *European Journal of Law Reform*, Utrecht, 2007, Vol.IX, No. 3, pp. 449-465.

² René Schwok, *Switzerland – EU Relations. An Impossible Membership?* Brussels, P.I.E. Peter Lang, 2009.

³ See list of the issues in the annex.

⁴ Most authors in a book edited by Clive Church in 2006 do not share my analysis. Most of them claim that the bilateral route is unsustainable and that Switzerland will naturally be forced to join the EU. See Clive Church (ed.), *Switzerland and the European Union*, London, Routledge, 2006.

⁵ See Francesco Maiani, "Legal Europeanization as Legal Transformation: some Insights from Swiss 'Outer Europe'", in this collection.

EU has clearly opted to go down a bilateral path with Switzerland and there are no indications that it will call this policy into question.

Whether formally or informally, discussion has begun on more than twenty dossiers that might lead to agreements. All of these issues are, as always, the subject of heated debate. Some of them will even be submitted to a referendum. At first sight, the most emotional dossiers are free trade in agricultural products and liberalization of services.

There are twenty or so new agreements being considered with the EU. What follows is a non-exhaustive list drawn up on the basis of different reports by the Federal Council and the European Commission:

Box 1 Future possible agreements

1. Fully-fledged participation in Galileo (the European system similar to the American GPS)
2. Mutual recognition of Appellation of Controlled Origin
3. Participation in the European Aviation Safety Agency
4. Greater participation in Erasmus
5. Reciprocal opening of electricity markets
6. Facilitating rules of origin
7. "Cassis de Dijon"
8. Liberalization of services
9. Facilitation of indirect taxation (VAT, excise duties)
10. Customs union
11. Free trade of agricultural products
12. Disease prevention
13. Food security
14. Combating terrorism
15. Strengthening the Europol agreement
16. Participation in *Eurojust* (network of judicial authorities)
17. Judicial cooperation in civil matters and bankruptcies
18. Ongoing political dialogue
19. Aspects of foreign policy
20. Ad hoc cooperation with the European Defence Agency (armaments)
21. Institutionalising cooperation with European Security and Defence Policy structures

Customs union

There has been a great deal of debate about creating a customs union between Switzerland and the European Union. The question has been raised as to whether it would make a meaningful contribution to the Bilateral Agreements. In order to answer this question we will need to begin by clarifying the notion of what a customs union is. Two differing visions come into play here.

A restrictive vision: a tariff union

The first vision is a relatively restrictive one: that of a tariff union. In this case, a customs union only signifies the elimination of customs duties and other equivalent measures regarding trade in goods among the States of the European Union. This also includes taking up a common body of customs law in dealings with third countries.

A tariff union took effect within the EU on July 1, 1968. From that date on all customs duties and all restrictions among Member States were eliminated. Moreover, external tariffs were introduced applying to third country merchandise. During the course of the following decades veterinary and plant health legislation were added to the customs union.

An example of a restrictive customs union exists, between Turkey and the EU. In fact, the EU and Turkey reciprocally eliminated all customs duties, as well as all quantitative restrictions and

equivalent measures in the trade of industrial products. Since 2001 the Turkish customs code has been almost entirely aligned to Community *acquis*. Turkey has almost completed the harmonization of its legislation to the EU's common external tariff.

If Switzerland were to set up a tariff union with the EU it would merely have to take up the EU's external customs duty. A free-trade area, in fact, already existed between Switzerland and the EU.

This kind of agreement would have one main advantage: there would be no need to check the real origin of products exported from Switzerland to Community territory. The problem of rules of origin concerning the 1973 free-trade agreement would be resolved.

Trade would be facilitated, although to a limited extent. Border controls would remain since it is necessary to ensure that indirect taxation (VAT, excise duties) would be levied.

This option involves, however, a number of drawbacks. It implies that Switzerland would take up the EU's external customs rate, a rate that is higher than that of Switzerland. The average external tariff of the EU for industrial products is 4.1% whereas the Swiss rate is only 2.3%. Obviously, this is not a great difference, yet it could be greater for certain products.

Furthermore, Switzerland would take up the entire body of European customs laws and the corresponding European jurisprudence.

Additionally, the Swiss system of measurement is not the same as that of the EU. An *ad valorem* customs duty is levied, whereas in Switzerland it is based on weight. This is particularly significant in the case of precious stones. Switzerland takes weight more than value into account, making the customs duty lower than in the EU. Many enterprises were able to create market niches for themselves thanks to the difference in method.

Last of all, the Swiss Confederation would lose its capacity to negotiate international economic agreements if it set up a customs union with the EU. Along with its European Free Trade Association (EFTA) partners it has managed to create free-trade areas with countries that do not yet have agreements with the EU. This concerns, in particular, Canada, South Korea, Singapore, and perhaps one day Japan, and the United States.⁶

A more encompassing vision: eliminating border tax controls

A more ambitious vision of customs union exists: that which includes eliminating tax controls at internal crossing points.

Within the EU excise duties and VAT among Member States would no longer, strictly speaking, be collected at the border. No documents or customs clearance would be required. There would be no customs checks on vehicles containing merchandise. However, these customs formalities would not actually disappear, they would be replaced by new control systems no longer requiring verification or documentation for merchandise crossing internal borders.

One precondition, however, must exist before controls on indirect taxation can be abolished. The VAT rates need to be harmonized. Switzerland would have to raise its normal VAT rate to at least 15% whereas it stands at 7.6% at the present time.

Despite the restrictions mentioned above, two academics from the Chur University of Applied Sciences, Ruedi Minsch and Peter Moser, believe that this kind of customs union would enable Switzerland to see a 0.85% annual rise in GDP (Minsch & Moser 2006).⁷ This assessment is truly spectacular!

The researchers estimated expenditure for European Union borders at 3.8 billion francs per year. Their study was commissioned by *Avenir Suisse*, a think-tank with close links to the Swiss economy, and included a poll conducted in 600 companies. The researchers factored in all the prickly issues for businesses; customs costs, VAT deductions, waiting time, certificates of origin, and product authorizations.

⁶ EFTA has established an extensive and usually ignored network of contractual free trade relations all over the world. See <http://www.efta.int/content/efata-secretariat/free-trade/fta-countries>.

⁷ Ruedi Minsch and Peter Moser, *Teure Grenzen. Die volkswirtschaftlichen Kosten der Zollschränken: 3,8 Milliarden Franken*, Zurich, Avenir Suisse, 2006.

The study concluded that border-related charges push up export costs by 1.9% and imports by approximately 2.3%.

The two authors believe that costs linked to border procedures might be higher. They had omitted to factor in the tendency of foreign enterprises to take advantage of the border in order to hike up duties simply because the purchasing power in Switzerland was high.

An ambitious customs union might, in this way, have reduced a number of technical difficulties, while allowing a wind of liberalism to sweep across the relatively stultified Swiss marketplace. Employers unions, however, fought against the proposal and it was therefore highly unlikely to be proposed by the Federal Council.

Towards a Framework Agreement?

The idea of a framework agreement covering all the agreements was launched in 2005.⁸ Swiss officials took the initiative. Initial reaction of the European Commission was not very positive. Over time, however, its attitude had become less negative, although still not enthusiastic.⁹

Matthias Brinkmann, Head of Unit in the European Commission's Directorate-General for External Relations, stated that the idea of signing a Framework Agreement could be of interest to the EU provided that it brought added value through a mechanism that would facilitate permanent political dialogue between the partners¹⁰. The Commission, however, will wait to see the Swiss proposals before making its own suggestions.

Unfortunately, the Federal Council will not unveil its own views before a possible referendum in 2009 on the extension of the EU–Swiss bilateral agreements with Bulgaria and Romania. The Swiss government fears that by detailing its framework agreement it could give ammunition to the opponents of enlargement. Berne accepted the extension of free entry to both countries' nationals when they joined the EU at the start of last year. But the isolationist *Swiss Democrats* and *Lega dei Ticinesi* want to block the change and invoke images of Switzerland being swamped by an invading horde of undesirables, stirring up anti-Roma sentiment at the same time. Their rhetoric will probably degenerate into pure xenophobia.

In the opposing corner, a broad coalition favours upholding Switzerland's international commitments and its tradition of openness. This camp includes parties from both the right and left of the political spectrum, plus industrialists and trades unionists, intellectuals and journalists. Their main argument will be to remind voters that, if they vote against the free movement of labour, the EU would be perfectly within its legal rights to rescind bilateral agreements with Switzerland. Then the country's entire European policy would crumble.

Under these circumstances, no substantial document will be published until 2009. Legally speaking, the Federal Council can wait until December 2012 to answer a proposal by a Swiss Member of Parliament.¹¹

To overcome the lack of sources, I carried out interviews with Swiss and European officials in charge of the dossier. This already gives some idea of the positions of both partners, although it is unfortunately not enough.

Rationale for a framework agreement

The idea of a framework agreement came from the observation that all agreements between the EU and Switzerland were improvised in a very pragmatic way without any pre-established model and without any final direction. This distinguishes them from the EEA as well as from the numerous association and partnership agreements between the EU and third countries where a comprehensive framework provided the first step for the conduct and development of these relations.

The typical format of agreements between the EU and third countries consists of a

⁸ See "Cabinet weighs alternatives to EU membership" in www.swisspolitics.org, quoting interview with State Secretary Michael Ambühl of the Integration Bureau, dated 19 June 2005.

⁹ CEPS, 17 February 2007. http://www.ceps.be/Article.php?article_id=514

¹⁰ http://www.ceps.be/Article.php?article_id=514

¹¹ *Accord-cadre entre la Suisse et l'UE*, Postulat déposé par Philipp Stähelin, 05.10.2005. http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20053564

cooperation/association council at the foreign ministers/commissioner level, a cooperation or association committee at the level of senior officials supported by a set of sectoral sub-committees of experts and lower-level officials. A parliamentary committee consisting of representatives of third-country national parliaments and of the European Parliament accompanies this executive branch structure. In many cases, the official institutions are supplemented by institutions and/or mechanisms of dialogue between non-state actors (trade unions, industry federations, business, etc).

In the Swiss case there is however no such high level and comprehensive mechanism. Instead there are sporadic meetings between Swiss ministers and EU Commissioners, held particularly in time of crisis.

Mixed committees

Normally, agreements between the EU and Switzerland are administered by mixed committees which see to their proper functioning.¹² They serve as platforms for mutual consultations, for information exchange, as well as for advice. In the mixed committees the two parties have the power of decision-making only if expressly stipulated in the agreements. However, they must reach a unanimous decision. In the performance of these functions the mixed committees meet at various levels, both at the level of experts and at the level of high-ranking officials.

For example, the mixed committees can approve modifications in appendices to the agreements in so far as these are of a technical nature (e.g. lists of laws or products). Changes in the provisions of the agreements themselves and in particular the introduction of new obligations on the parties must be approved via the appropriate domestic procedures of the EU and Switzerland.

The Bilateral Agreements are conceived of as static in nature (except for Schengen/Dublin and the Civil Aviation Agreement). The mixed committees for the Schengen/Dublin Association Agreement are of a special kind in that they perform two different tasks: on the one hand they oversee the proper functioning of the agreements, and on the other they are involved in further developing existing Schengen/Dublin legislation.

Since the agreements are based on the equivalence of the laws on both sides, it is in the interest of both parties to maintain this status when new legislation is adopted. Adaptations might be required, for example, for reasons relating to competition (from avoidance of barriers to market access) and the question of legal security. In cases where one of the parties plans to change certain legal requirements, information exchange and consultation are the agreed procedures.

A framework agreement to streamline existing bilateral agreements

Such a framework agreement could ensure that existing, as well as future bilateral agreements become part of a more coherent and effective mechanism. Its purpose would be to simplify administration of the many agreements linking Switzerland and the EU. Their implementation work would be subject to comprehensive coordination. Apart from the fact that a framework agreement could encourage synergies within mixed committees and facilitate coordination of work, it would also give a better overview, save time and improve efficiency.

Bilaterals I and II also increased the workload of all branches of the Swiss government. There are also difficulties keeping parliament actively involved. This raises important issues for the Swiss parliament which has relatively few resources available to it in its oversight of foreign affairs. A framework agreement could in this regard ease communication and transparency.

Merging the various joint committees under one single umbrella

One proposal to improve coordination would be to merge the various joint committees of the main sectoral agreements and the hundred secondary agreements under one umbrella, similar to the EEA Joint Committee and indeed to most other institutions involving senior officials in EU external relations agreements.

One concern expressed was the fear of creating a “big bazaar”, in which Swiss ministers and EU Commissioners would just record the results of the numerous committees. This higher level

¹² Note that there are 2 mixed committees for agriculture but none for the agreement of the taxation of savings.

mechanism might then lose the cooperative spirit with which solutions are pursued in the joint committees.

Political dialogue

The notion of political dialogue covers two potentially different concepts.

First, it means essentially a high level on-going policy dialogue on the general meaning of the bilateral agreements with a view towards signing new ones. As a matter of fact, Swiss-EU agreements do not include provisions for a multi-faceted and regularised political dialogue, as is typically the case in agreements between the EU and other non-member countries. As a consequence, Swiss concerns are less likely to be raised on the EU's agenda or to receive a hearing than those of most other third States. Such a dialogue could also help to find acceptable overall solutions in the case of blocks put on different dossiers.

On the Swiss side, the fear, however, exists that this kind of coordination committee might tend to politicise the issues and provide links between non-related policy areas. On the EU side, the view is expressed that such dialogues play a limited role in shaping the overall relationship with third countries.

It is also interesting to observe experiences of political dialogue in the EEA and other associations. The initial idea was that the EEA Council would consist of what was the then 15 EU foreign ministers, the three EFTA/EEA representatives and the European Commissioner for External Relations. Over time, however, a practice developed whereby the EU side was represented not by the foreign ministers of the Member States and then the Commissioner, but by their deputies or senior officials. This model was increasingly seen as unsatisfactory. The size of the association councils was also found to be too cumbersome. The EU then decided to streamline its participation in all association councils and in the EEA. Instead, the EU is now represented by a 'Troika', consisting of the relevant European Commissioner, the foreign minister of the rotating EU Presidency and the High Representative for the Common Foreign and Security Policy (CFSP). While this facilitates the proceedings and improves possibilities for a real debate among the interlocutors, the absence of the Member States reduces the potential significance of the political dialogue.

Second, a political dialogue could mean that the EU and Switzerland would discuss international political issues such as defence, terrorism, immigration, and UN matters. Again, such political dialogue already exists between the EU and most non-EU European countries.

Participation in the shaping process

Swiss officials would be interested in obtaining the right to participate in all consultations pertaining to Community legislation that is of relevance to bilateral agreements with Switzerland. This is already the case for three agreements, but there are those in Berne who want to formalize the arrangement and include almost all existing agreements. The three agreements in which Switzerland participates in EU decision shaping are: air transport, the Schengen and the Dublin association agreements.

The Schengen association agreements provide a model differing from the standard EU cooperation and association agreements. The Schengen association agreement goes further than standard EU cooperation and association agreements in granting greater access to the decision-making process in EU institutions than any other EU third country agreement. Representatives of the associated states (Norway, Iceland, Switzerland) here participate with a say, but not a vote, in the EU Council of Ministers machinery (in the guise of the Schengen Mixed Committee) at the level of experts and junior and senior officials, as well as ministers.

The Schengen case is however very specific. This official participation of Norway, Iceland and Switzerland in the shaping process was only possible for two reasons: Schengen was first negotiated as an international law agreement and only later introduced as EC law; Norway and Iceland benefited from the exceptional circumstances of the already existing free movement of persons within the Nordic Union. This very special context will however not be repeated.

Therefore, a possible solution would be to imitate the agreement on air transport. In this area, Switzerland is not seated in the room during the decision-making procedure but is fully informed by EU officials of the latest proposals for new legislation.

It seems that Swiss authorities would be interested in getting such an “air transport” mechanism. The EU is however less interested in granting such a privileged situation to a third country. According to officials in the Commission, such a concession would be granted to Switzerland only if Switzerland was committed to adopting almost automatically the evolution of EC legislation.

Quasi automatic updating of existing agreements

According to the EC Commission, quasi-automatic updating of existing agreements to keep in line with the evolution of the relevant *acquis* would lead to greater simplicity and security than the present method which consists of renegotiating the slightest change in Community law.

Today, in the case of evolution of the relevant Community *acquis* nothing is clear about what Switzerland has to do (except again in the air transport agreement and in the Schengen/Dublin case). It is generally assumed that Switzerland will adapt autonomously over minor issues. The Joint Committee set up by each bilateral agreement may make technical changes to the annexes of the agreement but add no new obligations. If there is, however, a major change in EU legislation, another treaty would be expected.

The air transport agreement could also be a kind of model. There, the *acquis* is explicitly the legal basis of cooperation, and the EU institutions – the European Commission and the European Court of Justice – have competences in surveillance and arbitration in specified areas (in this case competition and state aid policies in the field of civil aviation).

In the case of the Schengen and Dublin association agreements, the situation is slightly different. New *acquis* requires approval from the Swiss Parliament, but in case of a refusal, the agreement could be terminated.

The air transport model could win support within the Swiss administration as it will facilitate smoother application of the bilateral agreements. This mechanism will, in all likelihood, be ferociously fought by the far right and eurosceptic supporters such as the Swiss People’s Party (SPP) and the Campaign for an Independent and Neutral Switzerland (CINS). These two groups will strongly oppose what they call a «colonial contract».

A “classical” association agreement

Some analysts argue that Switzerland should sign a comprehensive association agreement with the EU. This idea is not helpful. On the one hand, EU–Swiss bilateral agreements are already “association agreements” as they are based on Article 310 of the European Community, as is the case for most agreements between the EU and third countries. Article 310 does not describe, however, the content, the structure and the organs of this agreement.

On the other hand, both Swiss and EU officials are sceptical about the idea of a “classical” association agreement. They would prefer to take their distances from existing models, claiming that this association would entail more complexity and expenditure without improving the efficiency of the agreements. This would require renegotiation of the entire set of bilateral sectoral agreements; a prospect these officials are unlikely to support. Pragmatically, their main focus remains on improving content, they do not want to open a Pandora’s box. A “classical” association would make a *tabula rasa* of the past without providing any major improvement.

It appears that a possible future framework agreement between the EU and Switzerland would not entail spectacular revamping and would change nothing fundamental in the current situation. The fact remains, however, that when we take a closer look at the details, we note that the framework could contain a large number of minor innovations that merit further study, particularly for specialists of the external dimension of the EU, for instance, notions such as *shaping process*, *joint committees*, *evolution of acquis* etc.

Conclusion

A coming together of Switzerland’s legislation with the EU will continue in the coming years

as there is a common interest in reaching agreements. The EU is engaged in a bilateral path with the Confederation and nothing indicates a shift of direction, although there may be less tolerance and less flexibility with the 27 countries now involved.

It is however difficult to draw generalizations from the Swiss case¹³ because the bilateral agreements were negotiated in a different period and with a very unusual country. In other words, what was acceptable for the EU with 15 Member States in the late 1990s and early 2000s is necessarily different today. Moreover, Switzerland, a wealthy and well-connected enclave within the historical centre of the EU, enjoyed a different bargaining position compared with today's non-EU countries which are geographically more remote, often lack political connections in the EU capitals and are relatively too poor to obtain as many concessions as the Swiss did from the European Union.

Finally, almost all relations of the EU with its neighbours (EEA, Stability and Association agreements with the Western Balkans, Europe agreements) were much more comprehensive than the agreements with Switzerland. The levels of their structures and organizations are more sophisticated than in the Swiss case. In this regard, the very specific experience of Switzerland is hardly exportable to other countries. At this stage, only Israel, with no comprehensive association agreement, seems to partly fit Switzerland's case¹⁴. This does not mean, however, that the Swiss case cannot serve as a model for other non-EU countries. Yet if it does, it would be more an interesting experiment than an actual model.

¹³ Regarding Bilateral Agreements used as models for possible agreements between the EU and other countries see René Schwok and Christophe Bonte, "EEA and Switzerland - EU Bilateral Agreements in Comparative Perspective: What Lessons?" in Paul Demaret *et al.* (eds.), *Regionalism and Multilateralism after the Uruguay Round: Convergence, Divergence and Interaction*, Brussels, European Interuniversity Press, 1997, pp. 27-60. Marius Vahl and Nina Grolimund, *Integration without Membership. Switzerland's Bilateral Agreements with the European Union*, Brussels, Centre for European Policy Studies, 2006.

¹⁴ "UE/Israël: dans un « non paper » discrètement étudié par la Commission, Israël aspire à un statut de quasi-État membre de l'UE", *Agence Europe*, 4 June 2008.
See also Alfred Tovas, "Exploring the 'Pros' and 'Cons' of Swiss and Norwegian Models of Relations with the European Union", *Cooperation and Conflict*, 2006, Vol. 41, No. 2, pp. 203-222.

ANNEXES

I The Seven Bilateral Agreements I

- (1) Air Transport. Thanks to this agreement Swiss airlines are put on an equal footing with their European competitors. They may also hold a majority share in EU companies. This agreement nonetheless came too late to avert the Swissair bankruptcy.
- (2) Public Procurement Markets. This concerns the reciprocal opening of Community public markets. The others had already been opened by agreements entered into with the World Trade Organisation (WTO).
- (3) Participation in Community Research Programs. This was a confirmation that Switzerland's participation had been in jeopardy. From January 1, 2004 Swiss researchers have additionally the same participation rights as their EU State member partners.
- (4) Agriculture. This agreement reduced customs duties and quotas on certain agricultural products, with the exception of fresh meat, wheat and milk. It also did away with non-tariff trade barriers. As a result, prescriptions for veterinary medicine and plant protection are recognized as equivalent.
- (5) Elimination of Technical Barriers to Trade. The agreement introduces mutual recognition of conformity assessments: evaluations, inspections, certificates and authorizations. This means less red tape at border crossings but not adoption of the « Cassis de Dijon » principle.
- (6) Overland Transport. This allows free circulation of trucks above 28 tonnes. It brings with it a new tax system and led to the construction of two enormous crossborder railways: those of the Lötschberg and the Gothard Alpine crossing points.
- (7) Free movement/establishment of persons. This represents the phased elimination of restrictions for EU citizens with a work permit or who are financially self-sufficient.

II The Nine Bilateral Agreements II

- (1) Taxation of savings. Switzerland imposed a withholding tax on all income from savings of persons with residency in the EU. Banking secrecy was maintained.
- (2) The Fight against Fraud. Switzerland undertook to help the EU fight against fraud in customs duties and indirect taxes. It obtained further guarantees concerning its banking secrecy.
- (3) Schengen/Dublin. Schengen: checks on persons at borders were abolished. Switzerland may still, however, maintain customs controls on merchandise. Dublin: the request for asylum in Switzerland was prohibited if the request had already been made in another European State.
- (4) Processed Agricultural Products: reduced customs duties on processed agricultural products (i.e. chocolate, biscuits, soups, instant coffee).
- (5) Statistics. Switzerland joined Eurostat, the Statistical Office of the European Union.

(6) Pensions. Switzerland agreed to grant an income tax exemption for the pensions of retired EU officials living in Switzerland. Only fifty persons were affected.

(7) The Environment. Switzerland joined the European Environment Agency (EEA)

(8) MEDIA. Swiss participation in MEDIA, an EU program aiming to strengthen the European audiovisual industry

(9) Education, Occupational Training, Youth. Swiss participation in EU programs aiming to encourage cross-border mobility of students, trainees, and young people. (Socrates, Leonardo da Vinci et Jeunesse).

III Concrete Accession Issues¹⁵

Telecommunications
Industrial Policy
Small and medium-sized enterprises
Genetic engineering
Vocational training and youth policy
Social policy
Veterinary and food policy
Equal opportunity
Consumer policy
Agricultural free-trade area
Health care
Common agricultural policy
Civil protection, sports
Consumer protection
Tourism
Forest economics
European citizenship
Competition law and merger control
Legal status of citizens
Economic and monetary union
State aid
Company law
Common security and foreign policy
Intellectual property
Common defence policy
Value added tax
Common trade policy
Special consumption tax
Corporate taxes
Withholding tax
Relations with third-party states
European neighbourhood policy
Tax on transactions on securities
Human rights policies

¹⁵ An unofficial list based on Federal Council and European Commission reports.

Tax allocations for cooperation in the critical areas of justice and internal affairs
Regional and structural policies for police cooperation
Energy policy
Judicial cooperation

Concluding remarks

Marc Franco*

Thank you for inviting me to this workshop, I found it most interesting and stimulating and although I have been with the institution for about thirty years I gained some additional insights. Listening to presentations and discussions I couldn't help thinking how drastically the EU changed over the **last 15 years**, both in terms of deepening and widening. Referring to the topics under discussion during the workshop, deepening refers in the first place to the single market entering into force on 1/01/1993, widening to the jumbo enlargement of 1/05/2004. All we have been discussing these two days is indeed post 1993.

The reason is fairly simple: non members have an interest in developing relations with EU in those areas where the EU has a **strong internal policy**. Before the entry into force of the single market the EU (or rather the EEC) had already developed as one of the major trading partners (and interesting export market) in the world but it was basically a customs union. It was represented in WTO and had concluded a series of preferential and non preferential trade agreements with third countries. For third countries, there was no need to "integrate" with the EEC, as the EEC was not fully integrated itself. This changes when the EU develops an integrated (single) market which makes alignment an interesting option for major economic partners. Since the Amsterdam Treaty, the EU is building up its responsibility in the area of "Justice Freedom and Security" and as we have heard during the workshop, cooperation in that field between EU and third countries is rapidly increasing. Little has been said during the conference on CFSP/ESDP. Perhaps the entry into force of the Lisbon Treaty and its provisions to strengthen the EU's action in external policy will promote more cooperation in that area

Two major events had an impact on third countries' interest in integrating with EU: internal market – enlargement

The moment the **single market** was realised, for trade partners it becomes interesting to align themselves with the rules and regulation on that market as this facilitated access by their economic operators to the EU market – short of becoming full member. Interest is therefore the main motivation for EEA countries and Switzerland to accept the principle of alignment – at the cost of de facto giving up part of their sovereignty in economic legislation. The question is however, to what extent is this process sustainable? The more legislation is harmonized, the less scope there is for not following changes in legislation or additional legislation. The less scope is left for autonomous, sovereign decision making. Although this may be perfectly defensible from a technical and economic point of view; politically it is taking over the "democratic deficit" of the EU in a more drastic form: in the EU citizens complain they can not influence EU decisions that increasingly impact their daily life; it is even more true of the citizens of Norway and Switzerland, where parliaments do take over legislation they have not even participated in drafting.

The second important moment in the definition of relations with non members is the jumbo **enlargement**. This is in the first place a decision about who is in and who is out; secondly what to do with the neighbouring countries that are not in or not yet in.

As far as the EU is concerned, the basic motivation in the development of relations with third countries to the east and to the south was to **avoid turning the EU into an island of stability and prosperity** surrounded by instable and poor regions. The risk of civil wars on EU's doorstep of the development of uncontrollable migratory flows is indeed far from theoretic.

In the first place an **Association and Stabilisation Process** was launched in 2000, offering the countries of the Western Balkans a type of agreement very similar to the Europe Agreement concluded with the new member states, offering a perspective of membership and setting up a process for promoting preparation, very similar to the process that brought the candidate countries from CEE to membership.

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Next, in 2004, came the **Neighbourhood programmes** for countries in Central Europe, Caucasus and the Southern Mediterranean. For these countries Action Plans are being prepared bringing them closer to the EU, internal market in particular.

The programme was initially conceived with the Central and Eastern European countries in mind, to provide them with a kind of waiting room solution until they were in a position to join the EU. It was however clear that a similar approach had to extend to the neighbours in the South Mediterranean, at the expense of the homogeneity of the grouping.

Whether for the ASP or for the ENP, the **mechanism is the same**: an action plan is prepared for bringing the country closer to the EU, a cooperation programme and financial resources are decided in support of the implementing of the action plan and regularly progress is being assessed and action plans adjusted.

The question arises: what is the interest for third countries in participating in this process? One can indeed argue that it is for their own good to reform and develop their economy and society, but this “Popeye argument” (you have to eat spinach because it is good for your health) politically rarely works. The question is therefore more precisely: what is the **prize at the end of the process** – if it is membership, the process may work – as it worked for bringing the candidate countries in Central and Eastern Europe in the EU. However, for some countries in the Southern Mediterranean in particular, for which membership is no option, the in the process costs may outweigh benefits and questions of sovereignty may crop up.

This basically is the **reason why Russia did not want to join the neighbourhood programmes**. Russia is keen on its sovereignty and has at this stage no interest in membership of the EU. Moreover, over the years Russia has come to the conclusion that the relations of EU with third countries (and also the existing PCAs) are not agreements between equal partners. To put it crudely, Russia does not need a “to do list”, even less a report card.

This is going to be the **challenge for the negotiation of the new agreement**: Russia wants to be accepted as it is and to be treated as an equal partner in an agreement with symmetrical rights and obligations. The EU is however of the opinion that, despite what has been realised, the reform process is not finished and in particular in the area of common values, still a lot needs to be accomplished.

In all discussions, **sovereignty** was a recurrent theme:

- ⊃ Russia as a sovereign state does not want to admit that EU legislation is the model for its own economic legislation.
- ⊃ EU’s neighbours - the perspective of membership helping – are willing to forget about sovereignty and accept the legal alignment as the guiding principle of the relations with the EU.
- ⊃ Switzerland and EEA countries are willing to put their sovereignty between brackets and in an “autonomous” manner adopt the *acquis communautaire* almost automatically, motivated by the interest their economic operators have in a smooth access to the large EU market.
- ⊃ Within the EU, transfer of sovereignty from the national to the supranational level, is the essence of the existence and the functioning of the Union.

In this the EU functions as a unique form of democracy: not so much the ballot box, but the public debate on EU issues in the widest possible variety of forums, makes it possible to take citizens’ interests into account. And as long as the system continues to perform to the benefit of the large majority, no fundamental questions are asked. However, the basis of our (and Swiss, Norwegian, other European countries) democratic system is still the traditional ballot box. In EU or in its partner countries, there always remains the danger that the classical form of democracy comes back with a vengeance and in times of doubt or dissatisfaction results in an EU unfriendly vote. There could be a risk that partner countries, taking over the *acquis communautaire*, also take over its “democratic deficit”?

Conclusion

The discussion can be summed up in three bullet points, already mentioned by the speakers at this conference:

- ⊃ Relations are driven by interest and goals
- ⊃ Goals and interests are crucial in determining model
- ⊃ This leaves the question of sovereignty – legitimacy to be sorted out

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