

Legal and political expectations of the neighbour countries from the European Neighbourhood Policy

Roman Petrov

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

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

1. The expectations of neighbour countries before the emergence of the ENP

Before the emergence of the ENP the EU did not pursue a unified policy towards its close neighbours. Accession of countries of Central and Eastern Europe was one of the major priorities of the EU external policy before 2003. The EU equipped its "pre-accession" and "accession" policies with stronger conditionality and more stringent monitoring process to ensure that candidate countries implement the entire *acquis communautaire* before obtaining formal EU membership. Consequently, third countries wishing to integrate into the EU accepted the conditionality methodology of the latest EU enlargement as an adequate pattern of the "stick and carrot" EU external policy, which could eventually lead to full EU membership. Furthermore, the relative vagueness of Article 49 of the TEU "Any European State

which respects the principles set out in Article 6(1) may apply to become a member of the Union” and the fact that the absorption capacity was absent from elements of the Copenhagen criteria encouraged the far reaching European aspirations of some third countries.

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

The Euro-Mediterranean Partnership is implemented bilaterally through the EMAAs negotiated between the EU (EC and its Member States) and the twelve Euro-Mediterranean countries on the basis of Article 310 EC. The EMAAs aim to establish, over a transitional period, free trade in industrial goods and the progressive liberalisation of trade in the agricultural sector; liberalisation of trade in services; cooperation in political, economic, social and cultural matters, and justice and home affairs. Commentators consider the EMAAs ‘a half-way house between Lome and

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

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

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

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

the EU, characterised by political dialogue, security ties, free trade and sectoral cooperation', with an explicit objective of opening EMAA countries' markets to intense European competition.⁵

Notwithstanding their common objectives, the EMAAs display explicit differentiation and conditionality of EU foreign policy. Each of the EMAAs shows specific EU policy approaches towards a particular Mediterranean country. Therefore, the scope of the *acquis communautaire* to be adopted by the EMAA countries is not uniform. The EMAAs may be arranged into several groups or "generations". The EC has concluded "first-generation" association agreements with Turkey, Malta and Cyprus (which are not strictly EMAAs) with the purpose of establishing customs unions. In the end, only the EC-Turkey customs union has come into existence as a "consolation prize" for the delay of its membership perspectives. Customs unions with Malta and Cyprus (the customs union with Cyprus was partly achieved⁶) were never established, though these countries eventually became full Member States. The EC-Israel EMAA occupies a special niche within the whole Euro-Mediterranean Partnership since it envisages the unprecedented mutual harmonisation of legislation in the course of the liberalisation of economic relations. The remaining EMAAs belong to the next group. Therein the *acquis communautaire* scope suits the comparatively limited objectives of Euro-Mediterranean Partnership which carefully avoids any perspective of EU membership. Therefore this section focuses on the EMAAs with Turkey, Israel, and Tunisia as the most typical examples of the abovementioned generation of EMAA.

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

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

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

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

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

Western Balkan countries have agreed to abide to EU conditionality in return for the remote objective of full EU membership.⁹

The SAAs were devised as “a new type of EA”. They are association agreements concluded on the basis of Article 310 EC.¹⁰ Indeed, the SAAs resemble the EAs in their objectives, structure, institutional framework and sectoral cooperation, but avoid any vagueness inherent to the EAs, *inter alia* with regard to the nature and priorities of the approximation process. Experts consider the SAAs an ‘appropriate alternative to the EAs’ or a purpose-tailored association which offers the Western Balkan countries the tentative status of ‘potential candidate country’.¹¹ Regardless of political objectives, the SAAs provide a solid foundation for the implementation of the comprehensive *acquis communautaire* by the Western Balkan countries. The Preambles of the SAA emphasise the commitment of the SAA countries ‘to approximate [their] legislation to that of the Community’ which is one of the preconditions of their integration ‘into the political and economic mainstream of Europe’ and the acquisition of the status of candidate for EU membership. The SAAs are more explicit than the EAs in clarifying the formal criteria for EU membership by stating that their future application for EU membership shall be considered in accordance with the requirements of the Article 49 TEU, fulfilment of the Copenhagen criteria, and the ‘successful implementation of this Agreement, notably regarding regional cooperation’. Remarkably, the requirements of regional cooperation and regional stability compound the key factors for further development and enhancement of the association.

The SAAs are concluded for ten years in the case of the FYROM, and six years for Croatia.¹² The same periods of time are given to the Parties to ‘gradually establish a free trade area in accordance ...and in conformity with those of the GATT 1994 and

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

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

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

¹² Articles 5 FYROM and Croatia SAA.

the WTO rules¹³, and to approximate the SAAs countries' legislation to that of the EU.¹⁴

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

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

¹⁴ Article 1 FYROM and Croatia SAAs.

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

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

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

force.¹⁸ Certain political considerations inhibit the enactment of the PCAs with Belarus and Turkmenistan (signed in March 1998).¹⁹

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

¹⁸ EC-Russia PCA (OJ 1997 L 327), entered in force 1 December 1997; EC-Ukraine PCA (O.J. 1998, L 49), entered in force 1 March 1998; EC-Moldova PCA (O.J. 1998, L 181), entered in force 1 July 1999; EC-Armenia PCA (O.J. 1999, L 239), entered in force 1 July 1999; EC-Azerbaijan PCA (O.J. 1999, L. 246), entered in force 1 July 1999; EC- Georgia PCA (O.J. 1999, L 205), entered in force 1 July 1999; EC-Republic of Kazakhstan PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Kyrgyz Republic PCA (O.J. 1999, L 196), entered in force 1 July 1999; EC-Uzbekistan PCA (O.J. 1999, L 229), entered in force 1 July 1999; EC-Republic of Belarus PCA (COM (95)137 final), signed in 1995, but in 1996 EU-Belarus relations were stalled following political setbacks; EC-Turkmenistan PCA (COM (97) 693 final).

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

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

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

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

²³ Preamble of the Hungary EA.

²⁴ Article 1 EC-Ukraine PCA.

objectives are more explicit. They promulgate the establishment of a free trade area and unequivocally state that the mutual liberalisation of trade and access to their respective markets is a major objective of the association.²⁵

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

2. Expectations of neighbour countries after the emergence of the ENP

Launch of the ENP in 2003 has not been warmly welcomed by all neighbour countries. “Pro-European” PCA countries (Ukraine, Moldova) became openly disappointed by absence of the membership perspective in the ENP. Russia decided to pull out from the entire ENP initiative and to establish bilateral “Common

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

spaces” project with the EU. Mediterranean countries remained optimistic about a chance to develop stronger tailor made arrangements with the EU on bilateral level. Balkan countries became more comfortable in their membership expectations knowing that there is no competitive dimension of the EU external policy, which might hinder their possible accession into the EU.

In my opinion the reason for such diverse reception of the ENP by neighbour countries is concealed in its very foundations. The ENP is based on several core stones. One is tailor made approach. It means that neighbour countries may develop bilateral relations with the EU to satisfy own national political, economic and legal ambitions. Second is strong conditionality which means that in order to develop further bilateral relations with the EU neighbour countries are expected to follow stringent political conditionality which focuses on implementation of common democratic and rule of law values. The process of effective implementation of common values is to be closely followed by the EU. Monitoring procedure which has been successfully tested during the accession process is applied towards the neighbour countries. Third is absence of the EU membership objective. The ENP equivocally rejects any possibility of the membership. Instead of this the ENP offers to neighbour countries several “carrots”: “stake in the EC internal market”; upgrade of political cooperation; provision of additional financial assistance through the new Neighbourhood Financial Instrument,

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

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

economic responsibility in order to upgrade their relations with the EU than it was in the “pre-ENP” period.

3. Case study on the potential scope and objectives of the ENA

The objective of this case study is to scrutinise possible differences in expectations of the EU and of neighbour countries from the future European Neighbourhood Agreements (ENA) between the EU and countries taking part in the ENP. The Commission’s Strategy Paper on the ENP envisages that the ENP comprises two stages: 1) fulfilment of bilateral Action Plans (AP) during the term from three to five years; 2) the negotiation of ENAs “to replace the present generation of bilateral agreements, when Action Plan priorities are met. Progress made in this way will enable the EU and its partners to agree on longer term goals for the further development of relations in the years ahead”.²⁶ For every neighbour country the ENA should have considerable political, economic and legal meaning. On the one hand, the fact of conclusion of the ENA represents an evidence of the successful realisation of the AP, and, therefore, the departure from the first level of the ENP to another more advanced level of cooperation with the EU. On the other hand, throughout the process of negotiating of each ENA both the EU and neighbour countries will endeavour to satisfy their prior expectations. It goes without saying that the further success in achieving objectives of future ENAs will certainly depend on a reasonable compromise and on at least partial satisfaction of expectations of both parties to the agreement. Therefore, we suggest scrutinising possible differences in expectations using the case of the future ENA between the EU and Ukraine. The EU-Ukraine ENA represents the excellent material for our case study from three aspects. First, Ukraine is considered one of key participants for the ENP, which emerged in response to accelerating pro European aspirations of the Ukrainian society. The very first AP the EU drafted with Ukraine and signed it immediately after the sweeping victory of the “Orange” revolution in early 2005. Third, the Commission obtained its first mandate to negotiate the ENA with Ukraine. Therefore, the case study will comprise two parts. In the first part, it will be discussed the scope of the ENA and its objectives in line with the EU policy towards Ukraine. In the second part, it will be endeavoured to foresee the position of the Ukrainian political elite with regard the objectives and scope of the future ENA. In

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

the end, we shall discuss whether the example of the future EU – Ukraine ENA supports our arguments above.

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

Hitherto, relevant EU external documents have shed hardly any light on the ENAs' objectives. The EU Constitutional Treaty contains separate Title VIII "The Union and its Neighbours". Therein, it is provided that "the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.... the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly." This provision, which is unlikely to enter into force in the nearest future due to continuing complications around the future of the EU Constitutional Treaty, shed very little light on the potential legal nature (either agreement on association or partnership or development) of the ENA and its objectives. The only assumption that follows from it is that the future ENA will have a cross-pillar character "founded on the values of the Union". In our opinion, till the EU Constitutional Treaty enters into force the EU has discretion to choose a legal base for the ENAs within the existing EC primary legislation and level of relations with a third country.

However we argue that, meanwhile, objectives of the future ENAs can be deduced from the general objectives of the ENP, which offers to neighbouring countries the chance to participate in various EU activities through close political, security, economic and cultural co-operation. We deem that the ENAs objectives will not be identical, but will differ to reflect the existing status of relations between the EU and each neighbour country, its needs and capacities, as well as common interests. The ENAs are preceded by jointly-agreed tailor-made Action Plans, which cover a number of key areas specific to each neighbouring country as provided by the ENP: 1) political dialogue; 2) economic and social development policy; 3) participation in a number of EU programmes (education and training, research and innovation); 4) sectoral cooperation; 5) market opening in accordance with the principles of the WTO and convergence with EU standards; 6) Justice and Home Affairs

cooperation.²⁷ We speculate that the ENAs will reproduce both general and individually tailor-made objectives of the Action Plans. Thus, the general objectives of the ENAs will focus on close political, security, economic and cultural cooperation with the eventual access of the neighbour countries to the EC internal market. Individual objectives of the ENAs will reflect various strategic priorities of the EU towards specific neighbour countries. For instance, we expect that the ENAs with Mediterranean countries will emphasise enhanced regional cooperation with the purpose of ensuring cross-border cooperation, setting up energy networks and infrastructure, and the prevention of local conflicts. On the other hand, the ENAs with the PCA countries will prioritise the promotion of EU democratic values, justice and home affairs cooperation, and anti-corruption and regional security issues, all over a purely economic partnership. This is because the EU would prefer to have the NIS countries as neighbours with properly functioning democratic institutions, and with effective mechanisms for fighting illegal immigration into Europe. The stability and security within neighbouring countries is also important for the EU.

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

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

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

After clarifying the potential objectives of the Ukrainian ENA, we seek to associate them with specific areas of cooperation, which could be envisaged in the agreement. The objective of political dialogue between the EU and Ukraine will target the establishment of democratic freedoms, the protection of human rights, free press and media in Ukraine. For this purpose, the Preamble of the Ukraine ENA will encourage Ukraine to follow EU values and principles as stated in the EU Constitution. Specific provisions of the Ukraine ENA will call on Ukraine to adhere to recognised international principles and standards (UN Charter, the principles of the Helsinki Final Act and the Charter of Paris, the Council of European and the OSCE documents). It is most likely that Ukrainian commitments to adopt the EU and international human rights and democracy acquis will be underpinned by a conditionality clause warning that the ENA could be terminated if Ukraine or the EU violates these values and principles.

The objective of social and economic cooperation will be the opening of access to Ukraine of the EU internal market. This could potentially envisage the establishment of a free trade area and a mutual recognition regime between the EU and Ukraine. In both cases, these objectives will be supported by conditionality and approximation clauses. The conditionality clause will foresee the access of Ukraine to EU internal market freedoms and the establishment of a free trade area on the progress of legislative and regulatory approximation and on the adherence to EU democratic values and principles. An approximation clause will impose binding commitments on Ukraine similar to those in the latest association agreements (SAAs). Besides, they

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

will envisage specific stages and priorities of the approximation process. For example, the Ukrainian ENA would list priority areas of the EU acquis to be adopted by Ukraine within specific deadlines. One may argue that these priority areas will concern the adoption of the EU competition and state aid acquis, the establishment of the principle of non-discrimination, and the liberalisation of the Ukrainian services market. Upon the successful adoption of the priority EU acquis, Ukraine could be urged to adhere to the dynamic EU acquis within the spheres of future mutual recognition agreements. Since the Ukrainian ENA is unlikely to offer any prospective of EU membership, one may not expect binding commitments to adopt the whole “accession acquis”. Instead, it is most likely that Ukraine will be encouraged to continue the process of voluntary harmonisation within areas of mutual interest.

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

Sectoral cooperation will focus on areas of mutual interest to the EU and Ukraine. Taking into consideration the Ukrainian geographic position and the advanced level of industrial development, this will concern cooperation within JHA, control on illegal immigration, transport, energy, information society, environment, innovation, and space. The Provision on the ENA on sectoral cooperation will encourage Ukraine to embark upon the voluntary harmonisation of its legislation with the EU relevant sectoral acquis. Within areas of particular importance, such as environmental protection, competition, state aid, and the control of illegal immigration, the ENA could contain the relevant EU acquis in the annexes (if the ENA targets the creation of a customs union and/or advanced access of Ukrainian undertakings to the EC internal market freedoms). In case that Ukraine does not manage to join the WTO at the time of ENA negotiations, it shall definitely envisage

binding commitments for the Ukraine to adhere to the WTO acquis. For this purpose, the Ukrainian ENA will contain direct references to the relevant provisions of the WTO agreements in areas of customs, the trade in goods and services, the protection of intellectual property, and public procurement. Besides, the fact of joining the WTO must constitute a condition for launching free trade area negotiations between the EU and Ukraine. Otherwise, the ENA could lose its political and economic attractiveness for Ukraine.

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

5. Expectations on objectives and potential scope of the ENA from Ukraine

Ukraine proclaimed its European aspirations shortly after independence in 1991. Subsequently, Ukraine wholeheartedly subordinated its foreign and domestic policy to the objective of integration into international and European political and economic structures and, consequently, full membership of the EU. The general framework of the integration process was set up in the Strategy of Integration of

Ukraine into the EU (Strategy of Integration).²⁹ The purpose of this document is to declare Ukrainian ambitions to join the EU as soon as possible. Besides, this document determines the major priorities of the executive power to fulfil the objective of ultimate EU membership.³⁰ Intrinsically, the Strategy of Integration proclaims that “joining the European political, economic and legal area and, subsequently, *acquiring associate membership* [emphasis added] of the EU constitute the major priority of the Ukrainian foreign policy in the medium term”.³¹ However, numerous political and trade complications in relations between the EU and Ukraine as well as the EU pre-occupation with the accession of the Central and Eastern European countries in the end of 90ies and early 00ies made the objective of the Ukrainian membership in the EU quite uncertain. In 2004 the Parliament of Ukraine (Verkhovna Rada) issued Law of Ukraine “On the All State Programme on the adaptation of Ukrainian legislation to EU laws” (Programme on adaptation),³² which represents a desperate attempt to accelerate the integration of Ukraine into the EU on the eve of the “Orange revolution”. This law envisages the export of the whole “accession acquis” into the legal system of Ukraine, since the objective of this law is the ‘alignment of the Ukrainian legislation with the *acquis communautaire* taking into consideration criteria specified by the EU towards countries willing to join the EU’. In other words, Ukraine readily agreed to implement the “accession acquis” on a voluntary basis, without any perspective of full EU membership. It should be noted that the EU never indicated that voluntary harmonisation would lead to the immediate recognition of Ukrainian perspectives to join the EU. Nevertheless, the Ukrainian government decided that the harmonisation/adaptation programme would be the most expedient way to step into one of waves of the European enlargement in the region of Eastern Europe.

The 2004/2005 “Orange revolution” gave fresh impetus to long-cherished Ukrainian aspirations to join the EU. New political elite headed by extremely popular opposition leader Viktor Yushenko encouraged fresh pro-European sentiments among the Ukrainian nation. Emotional victory of Viktor Yushenko in dramatic presidential race created impressive worldwide wave of sympathy towards Ukraine.

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

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

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

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

Everyone in Ukraine expected that the EU may reconsider its prudent policy towards Ukraine and recognise the Ukraine's perspective to join the EU sooner or later. However, on January 2005 President of the European Commission Jose-Manuel Barroso clearly stated that there is no perspective for Ukraine to join the EU in the nearest future. Instead, EU officials repeatedly articulated that the fulfilment of the EU-Ukraine Action Plan (AP) must be a priority for EU-Ukraine relations for the immediate future. Consequently, the effective implementation of the AP by Ukraine could lead to the enhancement of the EU-Ukraine relations in political, economic and legal domains.

On February 21st 2005 the AP was signed by the European Commission President Jose-Manuel Barroso and by Ukrainian Prime-Minister and popular "Orange revolution" leader Julia Timoshenko. The signing of the AP was welcomed by political elite in Ukraine though in somewhat skeptical way. It became clear that Ukrainian pro-European prognoses must be reconsidered in line with more pragmatic objectives of the AP. To support that view the EU side reiterated that the AP is the major framework document that shapes the format and the character of the EU-Ukraine relations in the nearest future. In order to enhance these relations Ukraine is expected to acknowledge and to implement the AP. The approximation of Ukrainian legislation to that of the EU constitutes one of the top AP priorities. Successful implementation of the AP could result in "a new enhanced agreement, whose scope will be defined in the light of the fulfilment of the objectives of this Action Plan and of the overall evolution of EU – Ukraine relations. The advisability of any new contractual arrangements will be considered in due time". In one year term Ukraine has achieved considerable progress in the implementation of the AP. The Commission acknowledged "overall progress made on the implementation of the EU-Ukraine Action Plan", especially in areas of: the democratic election process; foreign policy and security cooperation; respect of human rights and rule of law; market economy reforms and energy cooperation.³³ It goes without saying that the driving force behind the progress in implementation of the AP by Ukraine was almost unanimous political will to move to a new level of bilateral relations with the EU and, consequently, to conclude a new enhanced agreement on association with the EU instead of the expiring and outdated Partnership and Cooperation Agreement (PCA).³⁴

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

³⁴ The EU-Ukraine PCA expires in 2008.

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

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

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

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

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

foreign policy towards the EU accepts the policy of conditionality, further pro-European democratic and market reforms, deeper cooperation with the EU in areas of security and justice as an intrinsic element of bilateral relations with the EU, which will eventually lead to the accession process.

6. Conclusion

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

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