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EU differentiated integration frameworks – has the EU learnt its lesson in the Eastern Neighbourhood?

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Introduction

The European Neighbourhood has become a priority for the EU, mainly in terms of security but also as the testing ground for finding its place as a global actor. The EU has engaged with its neighbours by increasingly using different levels of integration to export its own norms, rules and values beyond its borders for the sake of prosperity and security in the region. This is now an explicit obligation under the motto of ‘prosperity and good neighbourliness’ of Article 8 TEU. The third countries involved so far have accepted them, at times reluctantly, on a voluntary basis, being unable to resist the EU’s gravitational force. While some have become an integral part of the Union through accession, other countries remain within its orbit due either to a lack of membership ambitions or to the EU’s limited absorption capacity.

For those countries trapped in EU’s orbit however, the problem of how and in what form integration processes should advance remains a crucial dilemma. Indeed, integration projects are somewhat ambiguous particularly regarding the ‘end result’ in respect of the Eastern European neighbours. This is mainly due to the fact that they aim for diverse levels of economic integration with the EU, while simultaneously having similar pressing needs for reform, but also differing views concerning ‘shared’ values. In addition, some of them are trapped in between two strong spheres of influence – the EU and the Russian Federation. So far, the EU’s approach has been to differentiate these integration processes without accession objectives following the logic of a ‘multi-speed Europe’. First, by offering the European Neighbourhood Policy (ENP) as comprehensive and coherent umbrella policy integrating two main geographic areas of the Euromed (including North Africa and the Middle East) and the Eastern Partnership Policy area or EaP (including Eastern European and Caucasus countries). This new approach offered ‘everything but institutions’ in the form of Association Agreements (AA) with tailor made Deep and Comprehensive Free Trade Areas (DCFTA) for each individual EaP partner, and the Euromed countries are likely to follow the same path. Nonetheless, some of the neighbouring countries have challenged the continuation of this EU-centric approach, i.e. notably Russia and most recently Armenia and for a short period Ukraine. Moreover, the current crisis in Ukraine shows the complexity of the region and the fact that the EU has to strategically assess and perhaps even re-evaluate its European Neighbourhood Policy, not only towards the Eastern Partnership countries, but also towards Russia.

In this paper I will attempt to answer the question of whether the ENP and in particular the Eastern Partnership, can learn from the experiences of other neighbourhood policy frameworks. To do this, I will first attempt to highlight the common challenges and achievements in the main EU neighbourhood framework policies through the lens of the

objectives of close alignment with or integration into the EU and their respective legal instruments. I will then examine whether and how much the ENP can learn from them.

For the purpose of this analysis, I will select the regional policies more closely aligned to the ENP in terms of structure and objectives, that is, comprehensive integration objectives to, or alignment with the Union by using specific legal instruments such as bilateral agreements aiming at economic and political integration with the Union through law reform. For these reasons, regional policies such as the Black Sea Synergy, the EU Arctic Policy and the Northern Dimension will be excluded as they can be seen as complementary regional policies with emphasis in specific areas such as transport, energy and the environment as opposed to the overall encompassing regional policies covering all aspects in the relations. In addition, I will include the Stabilisation and Association Process (SAP) and the EU-Switzerland sectoral agreements as extended, yet separate, ramifications of the Enlargement and the EU-EEA policy frameworks respectively. I acknowledge that the enlargement policy is not as regional *per se* as the other policies mentioned. However, it has increasingly evolved into having a regional element as seen in the last enlargements with Central European Eastern Countries and now the Western Balkans and Turkey. In addition, Enlargement fits very well within the parameters of this analysis. Finally, due to a lack of integration objectives similar to those of the ENP, the Central Asia Strategy as well as the EU-Russia Common Spaces will be also left out of this analysis.

I. EU relations with its neighbours through the lens of comprehensive integration

Without a doubt the EU has encountered rough patches throughout its evolution. From the challenges of economic integration after World War II, through to the Cold War containment area and the subsequent security threats resulting from the dissolution of the Soviet blocs in the 90's. Today the Union faces grave internal and external challenges as well. The financial and sovereign debt crisis, the Eurozone integration fatigue, as well as its democratic legitimacy and accountability issues have raised doubts regarding the whole integration process, almost to the brink of an identity crisis. The timing could not have been worse as it took place during a period of internal structural reform, after the Lisbon Treaty responded to the challenges of unity of the Union in world affairs – notably through the creation of the post of the High Representative of the Union for Foreign Affairs and Security Policy and its agency, the European External Action Service (EEAS). In addition to these internal challenges, the EU has also faced serious turmoil in its close peripheries on almost every flank. From the instability in the Balkans (exemplified by tensions after Kosovo's declaration of independence) and the Arab spring across North Africa and the never ending Israel-Palestine conflict, to the Russo-Georgian war and the ongoing conflict in the Ukraine. In addition to these challenges there are other persistent tensions with Russia, be it trade or energy disputes as well as human rights issues. These are just the main problems in the EU neighbourhood, not to mention other global issues threatening international security such as Iran, Iraq, Syria or Afghanistan.

Throughout its history the EU has developed a set of policies, legal tools and financial mechanisms in order to deal with the demanding challenges in the region. Since its inception, the economic integration mechanism has been a stepping stone in the idea of 'a Europe without war' that later became 'a Europe without borders' with the creation of the internal market. These are the main principles behind European integration, its development and its

enlargement – “peace, prosperity, stability and security”.¹ It is on the basis of these tenets that the EU has engaged in its neighbourhood to this day.² With tailor-made policies, legal tools and financial mechanisms the EU aims to meet the aforementioned demanding regional challenges but also to engage in transforming its neighbourhood through *acquis* export. The EU offers differentiated levels of integration, from accession to the European Union to ‘integration without institutions’.

I will now evaluate the most engaging group of these policy and legal frameworks namely the ones aiming at integration, which notably include enlargement and the SAP as well as those frameworks aiming at partial integration such as the European Economic Area (EEA) and the EU-Swiss bilateral arrangements. I will then evaluate the less demanding approach of the ENP, with special emphasis on the new Association Agreements approach with the Eastern Partnership countries. I will finally draw some conclusions as to what the ENP and in particular the Eastern Partnership, can learn from these other policies.

1. Demanding frameworks of Integration

The European Free Trade Area (EFTA) was set up in the 1960s soon after the creation of the EEC as a rival integration project with less of a grip on the sovereignty of its member states.³ In spite of its initial success it nevertheless proved to be less profitable than the EEC and soon member states started to defect from the EFTA in order to accede to the EEC. First the UK and Denmark left in 1973, followed by Portugal in 1980. Other members remained and created the EEA in 1992 as a common trade area with the then EC, with the exception of Switzerland which chose a different path built on bilateral agreements. However, Sweden, Finland and Austria left the EFTA and joined the EC in 1995.

So the EEC-EFTA relations provided for the development of three different scenarios of integration in Europe: enlargement, the EEA and the EU-Swiss bilateral models. Although EU-Switzerland relations do not fall within the regional policies, the similarities to the EEA approach serve as an example confirming the complexities of this integration without membership approach. Moreover, I have also included the Stabilisation and Association Process with the Western Balkans as a subsection of enlargement policy as it ultimately aims at the accession of these countries and can show through similar lenses the obstacles of similar approaches to enlargement.

1.1. Enlargement - from 6 to 28 members and beyond

In the beginning there were six member states. Then through the years (1973, 1981, 1986, 1995, 2004, 2007 and last but not least 2013) the Union grew to 28 member states. Enlargement took place and continues to do so thanks to two crucial tools, harmonisation of legislation and the use of conditionality. Conditionality, as the term implies, includes a set of conditions, incentives and disincentives similar to that applicable to member states. This conditionality grew in complexity throughout the diverse enlargement processes. But it was

¹ “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: 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” (Article 21 TEU).

² Now a duty under Article 8 TEU.

³ The main difference between the early EEC and the EFTA was the absence of a common external customs tariff, and therefore each EFTA member could establish individual customs duties in trade relations with non EFTA countries.

not until 1993 that accession conditions were adopted and institutionalised with the 'Copenhagen criteria'. This criteria requires that an acceding state must have the functioning institutions to preserve democratic governance, rule of law and human rights; has a functioning market economy; and accepts the obligations and intent of the Union. In addition to this, candidate countries are required to align their legislation to that of the EU. In other words, these countries must enact and apply the EU *acquis* through the harmonisation of legislation. The aim is to apply the entire body of EU law to the same extent as member states do in order to become a member. During negotiations for accession the *acquis* is divided into separate chapters dealing with different specific policy areas. The number of chapters has now increased with the new candidate countries.⁴ Harmonisation of laws is very costly and requires a lot of effort from the candidate country in terms of reforms. But it is the incentive of future membership coupled with conditionality that form an inseparable recipe for success.

The 'Copenhagen *acquis*' has now become the benchmark against which applicant countries are evaluated for accession. To date, the enlargement policy has proven to be the most successful foreign policy tool of the Union in achieving transformative engagement and the promotion of 'peace, prosperity, stability and security' in Europe. Accession has shown time and again to be attractive enough to encourage painful reforms that only bring results in the longer term. The most remarkable example of this success was the Central Eastern European countries that initially rejected the invitation to join the EEA and opted for the Union directly. In addition, and in order to support the reform process, the EU created the PHARE programme of technical assistance in 1989 and negotiated the Europe Agreements (EA's) that initially only aimed at the approximation of legislation but the EU eventually granted the prospect of accession.

However, the enlargement policy does not come without shortcomings. There is a limit, at least a temporal and geographical limit, to the number of countries the EU can absorb. Since the big bang enlargement of 2004 with ten new members, the EU showed what has been described as, 'enlargement fatigue'. Nonetheless, the Union has managed to enlarge to three more countries – Bulgaria and Romania in 2007 and, more recently Croatia in 2013. Currently there are five prospective members waiting in line (FYR of Macedonia, Montenegro, Serbia and Turkey). Of these countries, the Turkish case remains the most complex. Formally a candidate country since 1999, Turkey has already entered into a customs union with the EU and has harmonised in many areas with the EU, however, several reasons, ranging from deficiencies in the rule of law and respect for human rights, to the Cyprus issue, along with internal resistance (mainly from France and Germany), hinder Turkish accession. In addition, some even question Turkish links to Europe in cultural and geographical terms.

1.1.2. Stabilisation and Association Process

While being a separate regional policy the Stabilisation and Association Process (SAP) with the Western Balkans is ultimately designed to incorporate these countries in the enlargement policy in the long term while dealing with specific regional political and economic stability issues in the short term, including democracy, rule of law and human rights issues. This *sui generis* process/policy developed in quite a specific way due to both the geographical proximity of the region to the Union as well as its turbulent and tragic recent past.

⁴ 31 chapters for Bulgaria and Romania and 35 for Croatia, Turkey and Iceland.

The end of the 80s and beginning of the 90s saw the dissolution of the Soviet Union and the outbreak of the Balkan wars across the former Yugoslavia. These two events proved to be quite a challenge for the Union which was going through a crucial moment in its evolution with the Maastricht Treaty reform of 1993. At the time these events took shape between 1990 and 1991, there was very little the EC could do as it did not have the power to address foreign and security issues. In response to these challenges, the EU developed a set of political, legal and financial instruments to address the crises in this region. But was only after NATO intervention and the 1995 Dayton peace agreement that the Ministries of Foreign Affairs of the EU member states called for the Raymond summit that same year. The summit's aim was to support the implementation of the Dayton agreement and to establish a process for stability and good neighbourliness in South-Eastern Europe. The EU offered Trade and Cooperation Agreements (TCAs) to the Western Balkans, excluding Albania which already had one, concluded in 1992.⁵ Then in 1996 the OBNOVA Council regulation addressed the issue of reconstruction of the region, including humanitarian and emergency aid programmes. It also introduced the 'essential element clause' where by the violation of human rights, rule of law and democratic principles could terminate the aid provided. This approach was based on the Europe Agreements which also extended to the Partnership Agreements and this has since become a common feature in most EU external agreements, including Association Agreements.

In 1999, partly in response to the Kosovo crisis, in coordination between the EU and the OSCE a Stability Pact⁶ for the region was proposed to replace the already decaying Raymond process. In parallel, the EU offered these countries a regional and bilateral policy framework – the SAP – which was launched the same year and reinforced at the Thessaloniki Summit in June 2003, taking over elements of the accession process and initially offering 'potential candidacy status'. This renewed approach, besides the new offer, includes increased access to the internal market through tailor made Stabilisation and Association Agreements (SAAs); enhanced financial and technical assistance with the pregame CARDS established in 2000;⁷ and political dialogue, with particular emphasis in justice and home affairs cooperation. It is worth noting that from these countries, Croatia joined the Union in 2013; Montenegro, Serbia and FYROM are candidate countries; and Albania, Bosnia and Herzegovina and Kosovo have the status of potential candidates.

The SAP together with the SAAs granted both the status of candidate as well as potential candidate status based upon tight conditionality. In theory, because these countries are relatively small both in geographic and economic terms, once the *acquis* requirements are fulfilled it would not be too difficult for the Union to absorb them. Even the political and legal obstacles for both FYROM (due to historical issues with Greece) and Kosovo (due to lack of recognition from five EU Member States), while difficult, are not insurmountable.

⁵ OJ 1992 L343/1.

⁶ The Stability Pact was replaced in 2008 by the Regional Cooperation Council aiming at regional ownership.

⁷ Council Regulation 2666/2000.

1.2. The European Economic Area - homogeneity

The EEA⁸ between the EFTA countries (except Switzerland) and the EU is without a doubt the most sophisticated integration model without membership in the neighbourhood. It came about as an update of the bilateral Free Trade Agreements between the EEC and the EFTA member states to create a common framework between these two rival integration projects. However, Austria, Sweden and Finland left the EFTA to join the Union in 1995. Norway, Lichtenstein and Iceland stayed but they left the option of EU accession open. Norwegians have already twice rejected this possibility via referendum and Iceland applied for accession in 2009 but withdrew its candidature in 2013. These two countries in particular, have normally rejected the idea of accession, mainly due to political and economic reasons – the fisheries policy and energy independence, areas not covered by the EEA, serve as the best examples. Lichtenstein however, while small in size has a strong financial sector and has entered into a customs union with Switzerland – including using its currency –, therefore joining the Union would be complicated unless Switzerland decided to join as well. This means that in the event of Switzerland joining the Union, Lichtenstein would most likely follow suit.

The EEA mechanisms ensure the homogeneity of the EFTA member's legislation to the EU *acquis*. Under the EEA the *acquis* is not directly applicable and must be transposed to the respective national legislations. Therefore, whenever an EEA-relevant legal act is amended or a new one adopted by the EU, a corresponding amendment is made to the relevant Annex of the EEA agreement. This is a dynamic model of adaptation of EU law, in that “each and every change to the *acquis* covered by the scope of the EEA Agreement requires action on the EEA side”.⁹ However, while EEA members participate in the internal market and adopt the EU *acquis* almost entirely, they play a very limited role in the policy-making and law-making. While they may indirectly influence legislation decision-making as they can comment on it during a consultation process,¹⁰ and the EU can also informally seek advice from EFTA experts,¹¹ they ultimately have no voting rights within the Union. Moreover, EEA countries contribute financially to the EU for their participation in the single market but they are not entitled to receive subsidies from EU funds. They do not protest as they do not directly benefit from them. However, in case of non-implementation, infringement procedures (initiated by the EFTA Surveillance authority) are ultimately dealt with by the EFTA Court. This Court was created as its member states would not accept the ECJs direct authority due to jurisdiction and sovereignty issues. But in practice the EFTA court follows the ECJ case law almost to the letter. In addition, the EEA covers the so-called ‘flanking and horizontal policies’ for cooperation in areas outside the scope of the EU competences.¹² On a bilateral basis the EFTA states and the EU cooperate in the Common and Foreign Security Policy including regular political dialogues, and in the area of Justice and Home Affairs by participating in Europol and Eurojust. They also form part of the Schengen scheme.

1.2.1. EU-Switzerland – Sectoral Agreements

Historically, Switzerland was one of the founding members of the EFTA and while it took part in the negotiations of the EEA and signed the agreement, a later referendum in 1992 rejected it and the accession never materialised. That same year Switzerland applied to

⁸ Agreement on the European Economic Area, OJ 1994 L 1/1.

⁹ See A. Lazowski, ‘Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union’, *Common Market Law Review* 45, 2008. pp. 1433-1458, p. 1444.

¹⁰ Art. 99 (3) EEA.

¹¹ Art. 99 (1) EEA.

¹² Such as Social Policy, Consumer Protection, Environment, Statistics and Company Law.

accede to the EC (soon after it had signed the EEA agreement) but dropped the initiative due to the referendum results. Its application remains open to this day. Instead, and with some reluctance from the EU, the two entered into negotiations in 1994 for a special type of relations, proposed by the Swiss, falling outside of the EEA and based on sectorial bilateral agreements, also known as enhanced bilateralism. This special approach was mainly motivated by Switzerland's neutrality policy. While the EU accepted this approach, it required a comprehensive approach having these agreements connected together. This posed some obstacles, and continues to do so today, regarding issues of the free movement of persons – i.e. EU's four freedoms requiring full access to the Swiss labour market to which Switzerland imposed restrictions and safeguard measures. Lazowski argues that this approach was fuelled by the strong emphasis in Switzerland on participatory democracy, with political elites expressing particular concern on these issues.¹³

After a favourable referendum the EU-Swiss Sectoral Agreements were signed – Bilateral I in 1999 and II in 2004.¹⁴ Through this scheme Switzerland participates in the internal market as well as certain aspects of the area of freedom security and justice. In addition, Switzerland is an associate member of the Schengen area and participates in CFSP on an *ad hoc* basis. But like the EEA Switzerland has little say in the political and legislative decision making processes of the Union. And as with the EEA countries, Switzerland also had to absorb the *acquis* predating the signature of the agreements. Nonetheless, any developments afterwards were incorporated in the Swiss legal system only after a joint bilateral committee determines this by consensus. Switzerland then carries out voluntary compliance and autonomous implementation by conducting tests of compatibility between EU and Swiss legislation each time there is a new law from Brussels relevant to EU-Switzerland relations. Thus, Switzerland can in theory, unlike the EEA, refuse the application of a new EU law. However, in practice this right is restricted due to the so-called 'guillotine clause' whereby either party to the agreement can terminate the entire body of treaties when one new treaty or stipulation cannot be made applicable in Switzerland, thus creating the 'guillotine effect'.

It is striking how similar the issues covered by the Bilateral approach and the EEA are, the main differences however can be found in the application and enforcement procedures, but also in the absence of a supranational judicial body such as the EFTA court. This difference also shows that the sectorial approach does not necessarily ensure homogeneity with EU law as does the EEA.¹⁵ Another difference can be found in mutual recognition¹⁶ – while in the EEA the Union takes the initiative to negotiate Mutual Recognition Agreements or MRAs

¹³ *Id.* p.150.

¹⁴ Bilateral I (1999) deals with free movement of people, air traffic, road traffic, agriculture, technical trade barriers, public procurement and science. Bilateral II (2004) deals with security and asylum/Schengen membership, cooperation in fraud pursuits and final stipulations in open questions about agriculture, environment, media, education, care of the elderly, statistics and services. In addition, there are more than one hundred technical agreements.

¹⁵ See Council conclusions on EU relations with EFTA countries 14 December 2010 at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118458.pdf>, p. 6 para. 42, where the EU Council notes its concern that the sectorial approach does not ensure the necessary homogeneity. And more recently Council conclusions on EU relations with EFTA countries 20 December 2012 at <http://eeas.europa.eu/norway/docs/2012_final_conclusions_en.pdf>, p. 6 para32, where the Council notes with satisfaction Switzerland recognition of homogeneity as the core of the EU-Switzerland relationship.

¹⁶ Mutual recognition, also known as 'country of origin principle', originates in the EU internal dimension with the Cassis de Dijon case, whereby a lawfully marketed or manufactured good in the originating Member State cannot be rejected in another Member State. Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, Case No. 120/78 [1979] ECR 649, OJ C 256.

(see Protocol 12 of the EEA Agreement), the Swiss approach has a separate MRA with the EU.¹⁷ The mutual recognition approach is normally negotiated with advanced economies which are unlikely to join the EU (such as the US, Canada, Australia, or Japan) with the purpose of recognising one another's conformity assessments.¹⁸ Mutual recognition presumes the existence of mutually recognised standards and requirements; therefore, it is based on trust among the parties of the agreement. This model focuses on specific areas that are important for ensuring the liberalisation of mutual trade between the EU and other developed countries.¹⁹

4. ENP as a less demanding framework of integration

After the collapse of the USSR, the then EEC engaged with the now independent republics of the Soviet bloc beyond the 'trade and cooperation' relations that already existed under the Trade and Cooperation Agreement (TCA). As a result, 'Partnership and Cooperation Agreements' (PCAs) were negotiated and entered into force with the Russia and the New Independent States of Eastern Europe, the Southern Caucasus and Central Asia throughout the 90s.²⁰ The PCA established separate frameworks of bilateral cooperation and complimented by the Common Strategies on each country aimed at bringing economic and political stability as well as security to the region. While not rejecting membership of the Union the PCA did not explicitly aim at this objective. The PCAs' main objective was to support their transition from a command economy to market-based democracies and foresaw the prospect for the creation of a FTA in the future. The PCAs, built on the experience of the Europe Agreements, used conditionality and selective legislative approximation – which entails the voluntary and unilateral application of some of the EU *acquis*, therefore aiming at 'compatibility' with EU law in specific areas. The overall objective of legislative approximation was to support the reform process and transition of these economies. However, the agreements took too long to negotiate, ratify and to implement. In addition, particularly in the Russian case, conditionality was not delivering tangible results. In view of an enlarged Union which now has direct borders with Eastern Europe and Russia, as well as the failed bilateral Common Strategy policies and out-dated PCAs, the EU was in desperate need of a new regional and bilateral approach.

During the same period, the EU engaged with twelve Mediterranean countries from North Africa and the Middle East in what is known as the Barcelona Process.²¹ It was created in 1995 as a regional framework for relations with the overall aim of peace, security and shared prosperity. This regional approach was complimented bilaterally through the Euro-Mediterranean Association Agreements signed between 1998 and 2005 with seven countries.²² These agreements replaced the Cooperation Agreements of the 1970s, and called

¹⁷ OJ (2003) L 56/1.

¹⁸ See at: <<http://ec.europa.eu/enterprise/policies/single-market-goods/international-aspects/mutual-recognition-agreement/>>

¹⁹ Such areas include: conformity assessment, standardization, metrology, quality control, agricultural products and professional qualifications. R. Petrov, 2006, *op. cit.*, p. 747.

²⁰ Except Belarus and Turkmenistan with whom the agreement never came into force and Tajikistan which only entered into force in 2010.

²¹ Including Algeria, Egypt, Jordan, Israel, Morocco, Lebanon, Libya, Tunisia,

²² Algeria, Egypt, Jordan, Israel, Morocco and Tunisia.

for the creation of FTA's. Moreover, they included similar legislative approximation clauses as the PCAs, putting the application of EU *acquis* as a precondition for further integration with the EU's internal market. Some of them however include the possibility for 'mutual approximation'.²³ While this equal setting may serve as an incentive for reform, it is unlikely that the EU will approximate its legislation towards the Israeli or Egyptian legal systems.

In this background and after the big-bang enlargement of 2004 the EU created the ENP as a less demanding regional and bilateral policy framework to address these two bordering regions in an enlarging Union with strong signs of enlargement fatigue.

2.1. ENP – from Partnership and Cooperation to Association

The ENP came about in 2003-2004 as a result of the fifth enlargement with ten new member countries from Central Eastern Europe. The EU found itself between enlargement fatigue and a disillusioned neighbourhood. The ENP, was therefore originally designed to prevent the emergence of new dividing lines between the enlarged EU and its neighbours, but also to generate a coherent and comprehensive approach towards a group of neighbours attracted to the EU's internal market gravitational force to the East and to the South. Additionally, the EU also saw the potential of expanding its norms and values abroad as a geostrategic priority. So, if the EU was to become a serious global player it should start in its own neighbourhood. The ENP started under the motto of 'everything but institutions' for sustainable stability, democratisation and security among a 'ring of friends' in the context of the 'Wider Europe' concept. It included a combination of bilateral and multilateral instruments using conditionality and based on a differentiated approach under joint ownership. In essence, the EU offered to open up certain sectors of the internal market (industrial goods, agricultural products, etc.) and financial or technical assistance in exchange for economic, legislative and political reforms, in the EU's image, in these countries.

To support this policy framework the European Neighbourhood Partnership Instrument (ENPI) was created. Also by the EU's Neighbourhood Investment Facility funded by both the EU and the ENP countries, which provided grants and loans for specific sectors. However, the ENP was not very well received, with some countries rejecting the initiative (i.e. Russia, although an ENPI recipient, rejected the ENP and opted for a bilateral approach with the Common Spaces), and others sceptical or dismayed due to lack of accession objectives. Soon after its launch it became evident that addressing these two diverse eras within the same broad and comprehensive platform would prove problematic. For this reason two new regional sub-policies emerged within the ENP to better address the geographical, political and economic divergences between the Eastern Partners and the Southern ones. Both the Euro-Mediterranean Partnership of 2008, proposed by France, and the Eastern Partnership (EaP) of 2009, proposed by Poland and Sweden, came as a response reflecting the diverse internal interests of the EU member states and dealing with the new challenges of a changing neighbourhood.

²³ For example the approximation clause in the EC-Israel EMAA (O.J. 2000 L 147/1) reads: 'The Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement' (Article 55 EC-Israel EMAA). Israel, Lebanon, Jordan and Egypt EMAAs share the same language in this respect.

On the one hand, the Barcelona Process formed the basis of the Euro-Mediterranean Partnership or EURO-MED calling for the three M's – 'money, market (access) and mobility'. Among other things, this more regional approach aims at creating a Free Trade Area between the EU and these Mediterranean countries called 'Union for the Mediterranean' (UfM), that would also include the Balkans. Currently there are negotiations for a Deep and Comprehensive Free Trade Agreements (DCFTA) with Morocco. On the other hand, the EaP came as a response in support of the region after the 'gas (transit) wars' that ended up reducing or even cutting off energy supplies to Europe between 2005 and 2009, and also the Russo-Georgian war of 2008 over Abkhazia and South Ossetia. Moreover, negotiations took place to advance the bilateral relations from PCAs to Association Agreements now calling for approximation towards 'convergence', and included tailor-made DCFTAs. It is interesting to note that the Central Asian countries where PCA's still regulate the relations now fall within the Central Asian Strategy of 2007 which does not form part of the ENP. Due to geographical and cultural distance, these countries have little incentive to join the Union and carry out democratic reforms.

The ENP approach was reinforced in 2011 with a joint Declaration "A new Response to the changing neighbourhood"²⁴ after taking into account the worsened situation in Eastern Europe and the Caucasus due to constant tensions with Russia and the turbulent results after the Arab Spring in the South. This was done in a more positive tone when comparing it to the one in 2004, promoting more funds in exchange for more reform under the 'more for more' slogan. This seemed to suggest that the European Neighbourhood Policy and its regional ramifications will remain as an all-inclusive coherent approach, addressing the diverse needs of the neighbours with the same old tools: Economic incentives, conditionality and integration without membership through law reform. However, DCFTAs include more advanced mechanisms (such as dispute settlement mechanisms), tackling the issue of application of EU *acquis* more clearly when compared with the PCA's.

II. Lessons learnt?

EU external frameworks have evolved through time in different ways, adapting to the specific situations in time, the particular partner (or partners) and the issues they address. Such differentiation shows the existence of several approaches with diverse methods of *acquis* export to neighbouring countries: (*binding*) *harmonisation/accession* (aimed at countries in the context of accession, i.e. Croatia, FYRM and Turkey); *homogeneity and/or mutual recognition* (aimed at countries with similar levels of economic development but without accession ambitions, i.e. the EEA, Switzerland and the micro-States); *approximation/compatibility* (the old approach with emphasis only on law reform and development issues in key market areas – perhaps this approach will remain for the Central Asia Partnership countries); and the new approach of *approximation/regulatory convergence* (aimed at integration without accession with the Eastern Partnership countries, and to a lesser

²⁴ See Joint Communication to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: A New Response to the changing Neighbourhood, at: http://ec.europa.eu/world/enp/pdf/com_11_303_en.pdf

extent Russia and perhaps the rest of the Euro-Mediterranean Partnership countries).²⁵ All of these approaches show the dynamic multi-speed Europeanisation of the neighbourhood.

However, similar attributes persist across the board. First, all EU external policies in the neighbourhood share one common feature, and that is the EU centric approach of *'the acquis way or the high way'*. In addition, these approaches are all-encompassing and comprehensive agreements addressing all of the issues within the relationship. In order to connect all these issues together all of the external agreements include, in one way or another, human rights values as an essential element and a conditionality mechanism. Moreover, while some relationships have been consolidated into sophisticated legal frameworks, such as the EEA, others still require less demanding legal tools and innovative regional and bilateral approaches.

1. Main challenges and achievements of these Policy Frameworks

The neighbourhood poses serious challenges due to diverse geo-strategic issues ranging from immigration issues and energy security, to Cold War like confrontation as the cases of Georgia and more recently Ukraine show. The EU has diverse neighbours with different needs, and while ironically they all seem to need the EU *acquis*, some cases have proved more challenging than the others. Some have managed because of the well-functioning mechanisms aiming at an homogenous application of EU law (i.e. EEA with homogeneity, and the Swiss bilateralism to a lesser extent); political conditionality and harmonisation of legislation coupled with the possibility of accession (i.e. enlargement and the SAP). Others have not managed so well due to a lack of common vision or understanding of each other (the Common Spaces with Russia, and the Customs Union with Turkey). The ENP approach of *'everything without institutions'* lies somewhere in between these two.

The main achievements of the enlargement policy could be said to be the fact that integration to the EU at large has managed to change and transform Europe beyond recognition, generating an area of peace, stability and prosperity. But to succeed, the commitments within the legal framework and the attitude towards its implementation by the third country must match the clear and attractive objective of accession in order for conditionality to be effective. However, the main challenges faced by this policy include delimiting the geographical and cultural borders of Europe, i.e. defining and measuring a suitable candidate,²⁶ and dealing with the enlargement fatigue of the Union.

The SAP has already started to bear its fruits with Croatia acceding to the Union in 2013. On the one hand, its accession serves as a message to the other countries in the region that membership is in fact possible. On the other hand, granting the options of candidacy and potential candidacy status, coupled with conditionality, technical assistance and the approximation of legislation, should serve as a serious incentive for carrying out painful reforms. Nonetheless, the challenges posed by a region torn by wars and ethnic cleansing (including genocide) are complex. As a result, most of these countries are still economically underdeveloped and serious reforms are still needed.

²⁵ For more on these differentiation approaches see A. Matta, 'Differentiating the methods of *acquis* export – the case of Eastern neighbourhood and Russia' in P. Van Elswege and R. Petrov (eds) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union – Towards a Common regulatory Space?* 2014 Routledge, p. 44.

²⁶ So far any European state able to fulfil the Copenhagen criteria may become an EU member (Art. 49 TEU). However, the Treaty is not clear as to what 'European' entails.

The EEA appears to be functioning well to its current participants, in spite the occasional ‘EU fever’ quashed by national referenda. The reason may be the fact that these economically well off countries can take up the heavy bureaucratic burdens that this arrangement entails while still profiting from access to the internal market without any direct decision making powers in the Union. Moreover, this framework allows these countries to protect their sovereignty, while facilitating the protection of their vital economic interests.²⁷ Another aspect that proves to be crucial for the EEA to work, as shown by Sweden, Austria and Finland is the fact that its members have the clear possibility to leave the EFTA and accede the Union while remaining within the EEA framework. Or as in the case of Switzerland, arranging bilateral relations in a more ‘personalised manner’ in view of the lack of incentive to join either the EU or the EEA. The EU’s interest in such an arrangement is evident as its internal market enlarges within the EEA as well as the Swiss-bilateral frameworks. As a whole this approach seems to work well, in spite of its burdensome and bureaucratic nature, as it creates a stable alternative to accession where both sides’ needs and interests are satisfied.

Similarly to the EEA framework, the EU-Swiss enhanced bilateralism approach proved onerous and bureaucratic but the fact that Switzerland also benefits greatly from the EU’s internal market as its third largest trading partner seemed to keep both sides satisfied. However, this approach had already shown complications and recently both sides agreed to create a new framework for relations. The ultimate flaw of this approach, besides issues related to the strong Swiss position on immigration policies leading to discrimination in the free movement of persons, is the fact that Switzerland accepts only the EU *acquis* existing at the time of signing the bilateral agreements and not afterwards. This leads to a recurrent problem of application of the evolving internal market *acquis*, but also the increasing lack of homogenous interpretation of the agreements and the ECJs case law. Unfortunately, the current mechanism addressing these issues, the Joint Bilateral Committee, has not managed to find a lasting solution. Moreover, in the absence of an institutional setting as the one created in the EEA with the EFTA Court, non-implementation of EU law could eventually lead to incoherence of internal market rules, generating discrimination issues as a result. Therefore, an independent surveillance, judicial enforcement and dispute settlement body is badly needed in this respect. Both sides have agreed to the creation of a new framework that successfully tackles these issues while keeping both sides satisfied. Therefore, Switzerland could still opt to join the EEA, the EU or a renewed bilateral approach – the latter being the most likely.

When analysing the ENP, in particular the EaP legal instruments (such as the regulatory convergence objective of Association Agreements), it is interesting to note the remarkable similarities to the enhanced bilateralism approach with Switzerland, mainly the inclusion of some non-binding harmonisation commitments to international standards as well as mutual recognition mechanisms (such as the aim of signing an Agreement on Conformity Assessment and Acceptance of Industrial Products), but most importantly the similar enforcement and dispute settlement mechanisms with the power to impose legally binding decisions – hence, including the possibility, at least in theory, to refuse the application of a new EU law. However, unlike the limited approach of the EU-Swiss model, the AAs include the possibility to ask the ECJ for a preliminary ruling on the interpretation of an EU act in

²⁷ See A. Lazowski, ‘EEA countries (ICELAND, Liechtenstein and NORWAY)’ in Steven Blockmans and Adam Lazowski (eds), *The European Union and its Neighbours; a legal appraisal of the EU’s policies of stabilisation, partnership and integration*. Asser Press, 2006. p.145.

some sectors (such as Establishment, Trade in Services and Electronic Commerce). Moreover, for example the AA with Ukraine includes legal approximation in the sense of law reform and development (compatibility),²⁸ but also in the sense of integration without membership (convergence).²⁹ While convergence definitively seems more far-reaching than its predecessor – compatibility, it is still too soon to tell based only on this new agreement what shape this new *acquis* export approach will take and how well it will function.

1.2. What can the ENP, particularly the EaP learn from these experiences

The ENP has often been criticized for covering far too much territory and far too different neighbourhood regions, as well as for demanding greater integration with the EU while offering little in return. However, by introducing its regional partnerships of Euromed and EaP the ENP attempted to provide a comprehensive policy framework while shifting the stagnating law reform and development approach under PCAs to an economically differentiated integration under the Association Agreements including DCFTAs. While it is too soon to tell whether the shift of these mechanisms for reform will succeed, it is clear that other difficulties remain, both to the East and to the South. However, the most pressing obstacle comes in the form of a challenging neighbour and its zone of influence, particularly in the EaP region. The conflict of interests between the EU and Russia in this region have been left unresolved for far too long. And the recent developments in Ukraine show the EU external policies based on integration without membership, while promoting reforms, are also generating confrontation and dividing lines in Europe. This is directly calling into question the overall objectives of peace, stability, prosperity and security in the region that the EU professes with this approach.

The EaP and later the Association Agreements with the DCFTAs increasingly made the EU a competitor of Russia in the region. There are several issues that generate tension between the EU and Russia. Some of them emanate from their economic interdependence that leads to tensions mainly over gas transit regions, such as Ukraine. This is exacerbated by the Kremlin's links to Gazprom on the one hand, and the inability of the EU member states to speak to Russia in one voice on the other hand. Another area of tension is the incompatibility of approaches towards their common neighbours, not only in hard security terms with NATO seen as a threat in Russia, but also the prospects of an Eurasian Economic Community as an alternative to the EU. In addition, both sides have divergent visions over 'common European' values. Last but not least, Russia rejects any integration perspective with the EU that may lead to losing its sovereignty.

The EaP was promoted by EU member states from Central Eastern Europe and the Baltics aiming at supporting Eastern countries reform and helping them break free from the Russian sphere of influence. These were the very countries pushing for the signing of the AAs with the EaP countries at the Vilnius summit in late 2013. As a result Ukraine, following the steps of Armenia, rejected the deal due to Russian pressure on Yanukovic which ultimately led the Maidan revolts and the current conflict in Ukraine. Some EaP partners (Moldova, Georgia and recently Ukraine) see the greater integration with the Union in both economic (long term) but also in geopolitical terms, in that it would give them some protection or leverage towards Russia when dealing with either their internal conflicts or Russia itself. The Association

²⁸ See Title V on Economic Cooperation of the draft AA with Ukraine. The main difference when compared with the PCA is that it provides with the specific EU *acquis* including detailed deadlines in the annexes to the agreement.

²⁹ See Chapter 6 of the AA with Ukraine on the Establishment, Trade in Services and Electronic Commerce for example.

Agreement with Ukraine was far reaching when compared with the others countries. Therefore it seems, that Ukraine was meant to be the testing ground for EU's leverage as normative power with the Association agenda of the EaP. However, as the current conflict in Ukraine is demonstrating, the normative approach generated a critical hard security crisis that threatens the very core of the EU construction but also the ENP objectives of peace, prosperity and solidarity in Europe. As Kissinger described it, 'the European Union must recognize that its bureaucratic dilatoriness and subordination of the strategic element to domestic politics in negotiating Ukraine's relationship to Europe contributed to turning a negotiation into a crisis.'³⁰

Our previous analysis showed the rich variety of approaches towards the diverse European neighbours. Could the ENP or the EaP learn from their experience? These policy frameworks can directly influence the ENP or EaP (or the approximation process) to a very limited extend. This is so because, first they are highly contextualised in nature, secondly they are different in structure, have diverse objectives and use different legal methods (homogeneity, harmonisation, etc), and thirdly their functionality highly depends on the implementation by the third party, whose need must be reflected in the policy and legal frameworks. Therefore, the EaP will remain problematic because, on the one hand the AA's are difficult and costly to implement without proper incentive, which the EU has failed to provide, and on the other hand the EaP countries, particularly in the case of Ukraine, are divided between Russia's customs led Union and EU integration without accession.

Nonetheless, these other frameworks success can serve as a check list for future policies towards Eastern Europe, and the rest of ENP countries. Taking into account the overall positive results of these EU policy frameworks previously analysed, one could highlight five main criteria as a recipe for success:

- 1) They are tailor-made and concrete to the specific needs of the partners.
- 2) The policies allow for the swift implementation of legal instruments and their development and renewal if needed.
- 3) Given their EU-centric nature they must include dispute settlement mechanism on the implementation of EU *acquis*.
- 4) They include clear objectives agreed by both sides.
- 5) They provide for alternatives even if not explicitly expressed.

The approximation approach of the ENP fulfils the first three criteria. Firstly, the ENP was quickly sharpened with regional tailor made approaches (EaP and Euromed) that address the problems in the respective regions. Secondly, the ENP (including its regional sub-policies) served as an overall policy framework to help the shift the old approximation approach, from compatibility to convergence (i.e. from a law reform and development to a market integration approach). And thirdly, the new AAs and DCFTAs should improve significantly the dispute settlement mechanisms of the pre-existing PCAs, and should be in line with the objective of dynamic integration to the EU *acquis*.

As for the last two criteria, arguably the most important condiments of the recipe, the EU has failed to deliver. The ENP or EaP have not been able to provide proper incentives or other

³⁰ Henry Kissinger, "To settle the Ukraine crisis, start at the end" article in the Washington Post March 5 2014. See at: http://www.washingtonpost.com/opinions/henry-kissinger-to-settle-the-ukraine-crisis-start-at-the-end/2014/03/05/46dad868-a496-11e3-8466-d34c451760b9_story.html

alternatives (as the other policy frameworks have done). There are two main intertwined reasons for this. On the one hand, there are the EU internal challenges; the EaP came at a time of institutional changes and existential challenges within the Union. First the Lisbon Treaty changes with the high representative and the EEAS were created aiming at a more coherent and cohesive EU Foreign Policy, which was described by the high representative as ‘flying an airplane while building it’. Moreover, the EaP also came at a time of financial and sovereign debt crisis that affected the core mechanisms and ideals that had advanced the whole integration project in the first place. These issues exacerbated the justified concerns over the democratic deficit, generating an identity crisis across the EU. But more importantly for our analysis, these challenges significantly diminished the political, legislative, technical and financial support in the region efforts (reduction of ENPI funds). On the other hand, envisaging accession or even granting potential candidacy status to the EaP countries was not a viable option due to Russian foreign policy in the region and enlargement fatigue of the EU. Interestingly enough, the current situation in Ukraine, the previous experience during the Russo-Georgian war and the gas and other trade tensions over the years, as well as the creation of the Eurasian Economic Community might actually fill the gap of the ENP approach, namely providing for those two last criteria needed for a successful policy framework for the EU.

Russian aggressive behaviour therefore may provide incentive for some of the EaP countries to actually engage in the onerous reform process required by the EU. While this may not have been the preferred option for the EU, Russian current behaviour could indeed push the EU to grant some of these countries potential candidate status which was unthinkable before (this idea was discussed at the European Parliament for Ukraine in the aftermath of Maidan revolution). This could generate the desperately needed incentive for reform if granted to the EaP countries; perhaps doing something similar as with Croatia within the SAP framework, as an example to follow, could be done with Ukraine in the EaP region. Moreover, as was seen during and after the Vilnius Summit of 2013, the choice for the EaP countries seems to be rather narrow, with either the EU model or the Russian model to choose from. It is an ‘either or’ choice, as they are incompatible frameworks. In this sense, the Russian led Eurasian Economic Community as an additional option may as well provide the alternative which is missing within the ENP approach. This choice might push some EaP countries to further endeavour in EU Acquis led reforms or serve as an alternative as seen in the case of Armenia. This approach, which could be described as the lesser of two evils, provides for a relatively positive outcome, as opposed to the stalemate in the region over the last decades.

But this scenario comes at a great risk. The EU promoted the ENP and EaP under the motto of ‘security, stability and prosperity in the European continent and beyond’. For this reason the EU should think carefully each step it takes, particularly after the events in Ukraine, and take the Russian ‘threat’ seriously. Especially when thinking of its inability to deal, let alone influence Russia – which explains the EU’s reluctance to impose serious sanctions during the Crimean crisis or the Georgian one in 2008 to that matter. While this approach evidently risks fragmentation of the EaP countries between pro-EU and Pro-Russian integration processes, it also can further dangerously destabilise the region. In any event, the EU cannot control every piece of the European geopolitical puzzle, but it should also recognise that its actions can generate situations hindering the whole idea of stability and prosperity in the continent, on which its integration processes PR campaign is based. In the end, from the EU perspective, finding a balance between the heavily technocratic machinery of the Commission and the slow decision making process at the EU level (coordinating 28, at times, conflicting foreign policies) will always be difficult when spreading EU values and defending its economic

interests. This might work well in integration processes with stable regions such as the EEA, but not so much for a region as the EaP, full of protracted conflicts and the Russian Federations aggressive foreign policy.