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Membership or partnership – grades or alternatives of co-operation*

I. Introduction: Some obvious facts

Although the neighbourhood policy is conceived as an innovation of the Lisbon Treaty it has actually a much longer history. The policy itself had been started in 2004 as ten new Member States joined the EU, and the whole geography of the EU has been radically changed, and loads of new neighbours have appeared. The accession of Romania and Bulgaria in 2007 and Croatia in 2013 further extended the EU and the number of neighbours.

It was therefore simple needed to face the challenges occurred by the new neighbouring countries. However, if we look back into the '90es and into the raging war on the Balkan some elements of the neighbourhood policy may already be founded in the Stability Pact for Southern Eastern Europe.¹ In this sense Art 8 TEU is rather a codification of an existing policy than an innovation as it states 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.²

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¹ M Cremona: Creating the New Europe: the Stability Pact for South Eastern Europe in the Context of EU–SEE Relations 2 *CYEL* (1999) 463-506

² Kellerhals/Uebe: Artikel 8, Nr. 8-9 in J Schwarze (Ed.): EUV (Baden-Baden, ³2012).

The ENP is complemented by regional and multilateral co-operation initiatives:³

- the Eastern Partnership, launched in Prague in May 2009,
- the Euro-Mediterranean Partnership (the Barcelona Process), re-launched in Paris in July 2008,
- the Black Sea Synergy, launched in Kiev in February 2008.

The ENP is basically a bilateral policy between the EU and some partner countries. As Štefan Füle, the Commissioner for Enlargement and European Neighbourhood Policy put it, the Neighbourhood Policy provides the EU with a coherent approach that ensures that the whole of the EU is committed to deeper relations with all our neighbours.

There are two obvious questions for a start. Which countries count as neighbours at all (II) and what these deeper relations mean (III)?

II. Who are the neighbours?

First of all, we have to answer the same question which Jesus had to according to the Gospel: who is my neighbour? (Luke 10, 25-37).

The question is not as easy as one might think. On the one hand, not every neighbouring country is covered by the ENP, and, on the other, not every country covered by the ENP is a neighbouring country in a strict sense of the word. I do not have a parable as an answer, as Jesus had about the Samaritan. So, I have to go through these countries and to find some common features.

Nowadays, ENP targets 16 countries: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia, and Ukraine. Three of these countries are actually direct neighbours of the EU: Belarus, Moldova and Ukraine; thirteen, the overwhelming majority of the targeted countries, are no direct neighbours. On the other hand, such direct neighbours as Norway or Switzerland are not covered by this policy, which share the values of the EU probably more intensive than any of

³ Streinz: Art. 8, Rn 8 in R Streinz (Ed.): EUV/AEUV (München, ²2012)

the countries targeted by the ENP. Norway and Switzerland are Member States of the European Convention on Human Rights, and are economically closely connected to the EU as participating in the Internal Market without being a Member State. These countries would be ideal candidates for a neighbourhood policy based upon common values as Art 8 TEU requires. Belarus, on the other hand, is an ENP-country without being member of the ECHR or sharing values of the EU, and, in doing so, a central presupposition of Art 8 TEU is not fulfilled. This contradiction is inconceivable.

Moreover, no countries of the Western-Balkan are among the beneficiaries of the ENP. In some cases, one might have questioned their commitment to the values of the EU; nonetheless, they aspire an EU-membership, and, hence are dedicated to a hasty political catch-up process. Therefore, they desperately try to comply with EU wishes. Furthermore, they are direct neighbours of the EU, so if any country they should be among the beneficiaries of the ENP. However, again inconceivable, they are not.

Interestingly, Russia, the most influential, economically and military most important neighbouring country is also missing from the ENP list.

Some commentators therefore suggest that ENP should not be understood as a pure geographical concept, as it does not depend on direct geographical neighbourhood, but as a mixed geographical-political one. This means that geographical proximity should be taken into account to some extent; however, it is not the only or the key question: all the political factors have to be kept in mind.

Therefore, it is often put forward that the ENP is rather to conceive as a substitute of membership for countries who might have wished to join. A substitute is a deal for a country which has no real chance for a membership.⁴ This might be the case of Ukraine or Belarus.

The Western-Balkan states – Serbia, Albania, Monte-Negro, Macedonia, Bosnia-Herzegovina and Kosovo – are not on the list of the ENP countries. The only possible explanation is that they have some prospect of membership. This pattern does not really fit for Moldova, which has also some prospect to be a member state, however, is still an ENP-country. Moreover, there are countries among the ENP-countries for which the membership is legally excluded as they are no European States according to Art 49 TEU irrespectively of the fact as to whether

⁴ Streinz: Art. 8, Rn 8. (note 3)

they respect the values referred to in Art 2 TEU or not. These countries are: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, and Tunisia. As the membership of these countries is legally excluded, a substitute of membership is hard to conceive. At least this substitute has not the same quality as a substitute for Ukraine or for Moldova which at least theoretically might apply for membership; however, this option is not open for a while. Armenia Azerbaijan or Georgia are member states of the ECHR, and, in this sense, are European countries, and had at least a chance of membership in a legal sense of the word.

The aim of the EU neighbourhood policy is perfectly understandable: “develop[ing] a zone of prosperity and a friendly neighbourhood“ (COM 2003(104)), and not discussing the question of membership, which is almost as important as the first objective. The ENP is distinct from the process of enlargement although it does not prejudge, for European neighbours, how their relationship with the EU may develop in future.

Nonetheless, the countries participating in the ENP constitute no consequent pattern they have no common features. As if somebody would like to connect jigsaw puzzle piece from different boxes: you cannot do it.

If one speaks of a neighbourhood “policy” the word “policy” should mean a concept, and it should cover countries which are connected by some common attributes. These common attributes are however impossible to find.

III. “a special relationship”

Although it was not possible to find any pattern of the countries participating in ENP, it is necessary to answer a further question: what the deeper or special relations mean. The meaning of the speciality is anything but clear from the wording of Art 8 TEU.

The best way to understand or to conceptualize this speciality is to compare ENP with other policy areas intended to create special relationships. Two of them are obvious apt subjects to comparison: association – and especially association of overseas countries – and accession to the EU. Both of them are dedicated to a close co-operation, and therefore are more than a simple partnership; and, as such, are ideal for a comparison.

a) Association

Art 217 TFEU empowers the EU to conclude association agreements with third countries involving reciprocal rights and obligations, common action and special procedure. This establishes a more institutionalized co-operation than mere international relations; however, it does not reach the level of a full membership.⁵ Association agreements were firstly applied to prepare countries for membership (Greece, Turkey, Cyprus or Malta), however association agreements were concluded with the Maghreb countries (Algeria, Morocco and Tunisia), the Mashreq countries (Egypt, Jordan, Lebanon and Syria) and Israel⁶ as well which are now covered by the ENP. These association agreements intended to build a Euro-Mediterranean free trade zone with the commitment of the EU to co-operate economically and financially.⁷

According to Art 198 TFEU the Member States associate with non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom (former colonies). The analogy with ENP is obvious as many of the ENP countries – especially those in North Africa – are also former colonies of EU countries. According to Art 198 TFEU, the purpose of association shall be to promote the economic and social development of these countries and territories, and to establish close economic relations between them and the Union as a whole. In this sense there are some similarities between the ENP and the association of the ACP countries. The objectives of the association of the ENP countries is a preferential treatment in trade issues and a contribution to the investments required for the progressive development of these countries (Art 199 TFEU). Art 200 TFEU – and the annexed protocols – sets out the specific conditions of preferential treatment.⁸

Association with overseas countries is a special case of association. Art 217 TFEU generally empowers the EU to conclude association agreements involving reciprocal rights and obligations, common action and special procedure. Art 198-203 TFEU specify these reciprocal rights and obligations.

As the ECJ has already put it in the *Demirel* judgement, the context of the “special, privileged links” with the EU means that the non-member country “must, at least to a certain extent, take

⁵ Rudolf Streinz: *Europarecht* (Heidelberg, ⁹2012) Rn 1208.

⁶ S Pardo – J Peters: *Uneasy Neighbors, Israel and the European Union* 2010, pp. 48-51.

⁷ See K Lenaerts – P van Nuffel: *Constitutional Law of the European Union* (London ²2005) 20-020

⁸ See K Lenaerts – P van Nuffel (Note 7), 20-021—20-025

part in the Community system.”⁹ The ECJ stressed the necessity of some substance of these privileged links that the EU-associated third country relations should be more than a regular trade agreement, however, itself did not elaborate what this plus should mean. The lesson is that an association means a somewhat institutionalized relationship, which should also be applied for ENP.

Although the ENP is intended to create a relationship more intensive than other international relations without granting a full membership, Art 8 TEU is not too specific as to the contents of these agreements. Art 8(2) TEU merely stipulates the conclusion of “specific agreements” which „may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly“. This means that the rights and obligations may also be unilateral, e.g. the EU could promise something without getting something else promised. This however would contradict Art 8 TEU. Art 8 TEU namely prescribes that ENP is founded on the values of the Union. This might be read twofold: it may mean that ENP may only benefit those countries which are committed to the values of the EU. In some ENP countries this might not be the case, the most obvious example is Belarus not even being member state of the ECHR. The logical consequence is that either Belarus must not be a beneficiary of the ENP, or the condition „founded on the values of the Union“ means that the EU contributes to a development ending in a deep commitment to the values of the EU. In this latter case, no unilateral action is possible but a reciprocal: for financial and economic assistance political steps are required.

The only compulsory element in Art 8(2) TEU is that the implementation of these agreements “shall be the subject of periodic consultation”. Periodic consultation is however not the same as an institutionalized co-operation such as in case of ACP countries¹⁰ or the EEA countries.¹¹ This should mean that ENP is a less intensive co-operation than association agreements.

b) Accession

Accession to the EU might also offer an interesting comparison because it is the maximum of co-operation that might be achieved.

⁹ Case 12/86, Meryem Demirel v. Stadt Schwäbisch Gmünd, ECR 1987, 3719-55.

¹⁰ See K Lenaerts – P van Nuffel (Note 7) 20-024

¹¹ See K Lenaerts – P van Nuffel (Note 7) 20-010—23-019

Nonetheless, membership is not a monolith concept anymore. In a multispeed Europe a country may access the EU without necessarily participating in the common currency, or in other policies. A country may not introduce the euro for several reasons: either because it is not capable of fulfilling the so-called Maastricht criteria – like Hungary – or it does not want to join the euro like the UK, Sweden or Denmark. And vice-versa: there are countries outside the EU using the euro as currency like Andorra, Kosovo or Montenegro. Moreover, joining the EU does not necessarily mean visa free travelling. Though the popular image of the Shengen-regime is that it is a constitutive part of the EU regime, this is not completely true. Not every EU Member State participates in Shengen: either they do not wish to do so, or they simply do not fulfil the security requirements to join. Nevertheless, some non EU countries are also in the Shengen area such as Norway, Iceland or Switzerland.

Furthermore, Art 49 TEU requires a respect of the values referred to in Art 2 TEU and a commitment to their promotion as a presupposition of membership; very likely provides Art 8 for the neighbouring countries. Accession is therefore rather a gradual process in which a progress may only be made if the applicant country fulfils different conditions, partly economic, partly political, and partly legal. This conditionality also guarantees - at least formally – a strong commitment to EU values such as human rights. Nonetheless, after the accession the EU itself has troubles to enforce these values referred in Art 2 TEU. Hungary delivers an excellent example.¹² The application of Art 7 TEU may result in a suspension of rights of a member state and getting into a status “membership minus”.

As these examples shows membership became much more a flexible concept: not a final destination but rather a station in journey: countries may deepen their co-operation or an established co-operation might be cut back.

The comparison with the accession therefore teaches us – at least – two lessons:

- Membership itself is a gradual concept not a “flat-rate” anymore. On the one hand, a country might participate in many EU policies without being a member state, and, on the other, a Member State does not necessarily participates in all EU policies. The Member State status is therefore rather a status to influence the EU decisions, an institutional bond.

¹² See e.g. Vincze: The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary, *European Public Law* 2013 pp. 489-500.

- Membership and partnership do have to solve a common problem: commitment. A Member State has to face an infringement procedure, a suspension of rights or freezing assets in case of non-compliance. An aspirant country has to fulfil the different conditions to get a “level higher”.

Therefore we should rather conceptualize the relations to the EU as different grades of membership or partnership. From this perspective, on the one side of the scale is an EU Member State having euro, participating in Shengen and probably in the future banking union. On the other end of the scale is a third country without any special ties. The different levels are association agreements, neighbourhood policy, accession and membership. I would like to emphasize that in this concept, as it logically follows from a systemic interpretation of Art 8 TEU, Art 49 TEU and Art 217 TFEU, ENP countries should be somewhat more privileged than associated countries.

If however ENP should be less than association, as the comparison between association and ENP showed, than no special relationship may exist, and that would contradict the clear wording of Art 8 TEU. If ENP has the same normative content as association the ENP is without any concept: it would offer the same product rebranded. Hence, logically it has to offer more than “simple” association and less than full membership, irrespectively how fuzzy the concept of full membership has become.

The gradualism is also inherent in ENP as it has abandoned the principle of “regionality” of the Barcelona Process, and replaced it with an explicitly “differentiated” and “bilateral” approach which would allow for countries most willing to undertake serious political and economic reforms to upgrade their ties with the EU: “sharing everything with the Union but institutions” as Romano Prodi put it.¹³

IV. Solving the commitment problem: or can we share everything but the institutions?

¹³ Romano Prodi, “A Wider Europe—A Proximity Policy as the Key to Stability. ‘Peace, Security and Stability International Dialogue and the Role of the EU.’ Sixth ECSA—World Conference, SPEECH/02/619,” *European Commission*, (6 December 2009).

“Sharing everything with the Union but institutions” is nicely framed. This sentence makes the impression that all benefits of a membership might be achieved without formally “being in”. This would virtually mean an extension of the EU without solving the institutional questions: the overmanned Commission, the democratically questionable Parliament, the completely intransparent Council, their highly complex and for a layman unconceivable interplay.

I, therefore, do not contest the usefulness of Prodi’s idea: it would provide an expansion of the internal market, and making it to the most influential trading block in the world and peace in the Euro-Mediterranean space without overstressing the institutional limits. It would be ideal if this could be done.

However, I have some doubts. First, it has to be mentioned that the relations with Norway and Switzerland, which might be the most strongly associated with the EU by the EEA, are also based on common institutions. This circumstance may at least suggest that some common institutions are required.

Moreover, there are two obvious questions to be answered: first, why would the most willing countries stop their relationship at a level of a quasi-membership, and why would they only mimic EU policies without having an institutional say? This could only be the case if the membership is not a feasible option for a country; like Norway or Switzerland.

Second, not observing the law is a wide-spread problem in the EU, if countries would just do what was decided in Brussel no infringement procedures were necessary. The institutions - primarily the Court – serve also to solve the commitment problem that the countries actually comply with European rules. Supremacy and direct applicability of Union law,¹⁴ which makes EU law quite different from other international treaties, were invented to ensure that EU law prevails in case of a conflict with national law. As the dangers of these attributes became fully apparent, the member states intentionally reduced these principles in the Maastricht Treaty in some policy areas, especially in foreign and security issues. Therefore, the question is as to whether the commitment problem may also be solved without common institutions, as the ENP suggest that it should be the case.

¹⁴ 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen ECR 1963, 1; 6/64 Costa v ENEL, ECR 1964 585

The best way to discuss the problem is probably an illustration. As the Economist reported on the EU-Ukraine partnership, it was described as an awkward one.¹⁵ According to the report, Ukraine has made little effort to show real action during the last years. The EU wants Ukraine to reform not just economy but its political and judicial systems as well,¹⁶ a demand corresponding to the aims of ENP, a partnership built on values of the EU. However, little has been done yet. As the Economist puts it “promising everything and doing nothing has long been Ukraine’s favourite sport”.¹⁷ The fate of the public procurement law may exemplify this “sport”. In 2010, under pressure from Western governments, Ukraine adopted a new procurement law to close many loopholes. Since then, this law has undergone some 28 amendments as a result of which the number of procurement contracts awarded without open tenders has gone up.¹⁸ These examples clearly show that the commitment problem cannot be easily solved without common institutional framework. Even if the EU offers some serious money for ENP countries, in 2007-2013 over € 12 billion, or for Ukraine €610m if it gets its IMF programme back on track,¹⁹ these sums do not necessarily like to solve the commitment problem. The EU may though offer some of its neighbours a privileged relationship, theoretically building upon a mutual commitment to common values (democracy and human rights, rule of law, good governance, market economy principles and sustainable development), these agreements are in legal sense rather a *negotium claudicans*, a contract binding one party but not the other.

Association agreements and in this sense also ENP agreements do namely intend to bind the EU and its Members States according to Art 8 TEU, Art 217, 218 TFEU. However, this binding force seems to be more stringent and rigorous for EU than for the other party.

V. A partnership founded on values: or can we buy some democracy?²⁰

Both ENP partnership and EU membership are based on sharing some common values. However, as it was shown, this is simply not true in case of some ENP countries, e.g. Belarus,

¹⁵ The Economist, Mar 2nd 2013: Ukraine and the European Union An awkward partnership.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ The Economist, Apr 6th 2013, Ukraine’s future Linguistically challenged.

¹⁹ The Economist, Mar 2nd 2013, Ukraine and the European Union An awkward partnership.

²⁰ To some other aspects *P Leino: The Journey Towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law*, in: M Cremona - B de Witte (Ed.): *EU Foreign Relations Law* (Hart, 2008) 259-289.

or at least questionable in case of some other countries, e.g. Ukraine. On the other hand, many neighbouring countries committed to the values the EU was founded on, and are not covered by the ENP.

There are some legal problems. First, if the partnership is founded on values then countries not devoted to these values should not participate in ENP. For these countries a kind of association might be an option but not a special partnership according to Art 8 TEU.

There are two reasons why the EU offers special neighbourhood status for countries which do not necessarily comply with the values of the EU. One option is that the EU would like to foster these values in those countries or, putting it more frankly, would like to buy some democracy there. The EU throws some money away and hopes that the government of a given country will act more democratic and will observe the rule of law more rigorously. The Ukrainian example rather shows the contrary. Moreover, the EU has serious problems to enforce its values, whatever they may be, within its own territory, as well. The most blatant example may be Hungary, which as a Member State may lose much more than Ukraine, however, this circumstance does not seem to influence the government of Hungary. So, if ENP is founded on common values than they should be taken seriously.

A second reading of the neighbourhood policy is that the common values are nothing more than façade and the EU builds partnerships rather on common interests than on common values. There are namely considerable security risks – energy, terrorism etc – if the EU does not have good neighbourhood relations. In this case, it is not necessary to pretend that we have common values, if we don't have them. In this case, simple association agreements could do the same trick: offering some trade privileges, financial aid or direct investments for let's say energy security. That is a deal though without pathos but with clear objectives.

If the ENP truly wants to offer “a special relationship”, as the TEU – a constitutional Charta of the EU²¹ – suggests, it has to be built on common values and not on simple commercial transactions. Nonetheless, these values have to be enforced. This again requires a rather institutionalized relationship, much more than simple periodic consultations.

²¹ Opinion 1/91 EEA, 21.

VI. Some lessons

Neighbourhood policy has the official objective to avoid the emergence of new dividing lines between the enlarged EU and its neighbours. Therefore it offers an ENP status which – as some suggest – should substitute membership. However, it makes the impression of being a “*German clock, Still a-repairing, ever out of frame, And never going aright*” (Shakespeare: Love’s Labour Lost, Act III).

As there are many special relations to the EU – like associations – an ENP status may only be really special if it offers more than what a simple association may offer. On the other hand, it also has to demand more. Otherwise, the whole policy is nothing more than a cheap excuse to throw some money away and to finance the bureaucratic organization involved in this policy.

An ENP status should be a kind of membership minus if it really wants to be a substitute. It should be similar to monetary policy: the central bank of every member state is represented in the ECB irrespectively the fact as to whether it has introduced the euro or not. The countries without the euro do not have a say in every issue – or to be more frankly in the most issues they have no say – but they are bound into the institution to a lesser extent. An ENP relation in that case would mean a serious plus and a real substitute of membership.