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**‘Thou shalt love thy neighbour’: the *draft* European Neighbourhood Policy
Action Plan between the EU and Ukraine**

Abstract

This paper puts forward four brief propositions. First, the Action Plan (AP) consolidates the existing Agreement, namely the Partnership and Cooperation Agreement (PCA), as the basis of the contractual relationship between the EU and Ukraine. Second, the AP makes this contractual relationship more dynamic. Third, the AP introduces strengthened conditionality in the EU-Ukraine Partnership, drawing inspiration from the ‘pre-accession strategy’ that the EU specifically developed to prepare for the accession of the countries of central and eastern Europe. Fourth, the AP raises several questions about the viability of the ENP.

Introduction

In the context of its 2004 eastern and southern enlargement, the European Union has been developing a European Neighbourhood Policy (ENP) to try and reinforce the links already established with its neighbours. According to the Strategy Paper presented by the European Commission in 2004, the ‘vision [of this policy] involves a ring of countries, sharing the EU’s fundamental values and objectives, drawn into an increasingly close relationship, going beyond cooperation to involve a significant measure of economic and political integration’.¹ A key element of this policy is the Action Plan (AP) elaborated by the EU in consultation with each country concerned, establishing priorities for action,² in order to realise the Union’s ‘vision’.

Focusing on the specific case of the EU-Ukraine AP,³ this paper puts forward four brief propositions. First, the AP consolidates the existing Agreement, namely the Partnership and Cooperation Agreement (PCA), as the basis of the contractual relationship between the EU and Ukraine. Second, the AP makes this contractual relationship more dynamic. Third, the AP introduces strengthened conditionality in the EU-Ukraine Partnership, drawing inspiration from the ‘pre-accession strategy’ that the EU specifically developed to prepare for the accession of the countries of central and eastern Europe. Fourth, the AP raises several questions about the viability of the ENP.

**The AP consolidates the PCA as a ‘valid’ contractual framework of the
relationship between the EU and Ukraine**

¹ Communication from the Commission on the ‘European Neighbourhood Policy – Strategy Paper’, COM (2004) 373, p. 5. This Communication follows an earlier Communication of the Commission entitled ‘Wider Europe – Neighbourhood: a new framework for relations with our Eastern and Southern Neighbours’, COM (2003) 104.

² The so-called Western New Independent States (Belarus, Moldova, Ukraine); the Southern Mediterranean countries (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, Tunisia). The Commission also recommended to include Armenia, Azerbaijan and Georgia in the ENP. EU-Russia’s relations are geared towards the establishment of four common spaces, as defined in 2003 at the St Petersburg summit.

³ It should be recalled that the AP is still being discussed. The present discussion is based on a September 2004 version of the document.

The AP does not aim to replace the EU-Ukraine Partnership and Cooperation Agreement.⁴ On the contrary, it seeks to support and stimulate Ukraine's fulfilment of its obligations established by the Agreement, which remains a 'valid basis of EU-Ukraine cooperation'. More particularly, one of the objects of the AP is to set out concrete steps, targets and priorities 'covering a number of key areas for specific action'⁵ with a view to giving practical guidance to Ukraine to further its compliance with the rules of the Agreement.

For example, the AP seeks 'full implementation of PCA commitments in the sphere of trade in goods'.⁶ Equally, with respect to the conditions affecting establishment and operation of companies, the AP calls for 'the full implementation of title IV, chapter II of the PCA, and in particular of the most favoured nation and national treatment principles'.⁷ As regards movement of workers, the AP similarly requires 'the full implementation of Article 24 of the PCA on the abolition of discriminatory measures based on nationality which affect migrant workers, as regards working conditions, remuneration or dismissal'.⁸

The message that comes across could not be clearer: Ukraine first has to comply with the obligations set out in the PCA before any upgrading of the relationship can be envisaged, despite several requests by the Ukrainian authorities.⁹ Indeed, the AP hints at a certain level of frustration on the EU side in view of what is perceived as a poor Ukraine's compliance with the Partnership obligations. A few years of implementation of the Agreement seem to inspire the current EU approach. The press release of the last EU-Ukraine Cooperation Council meeting is further of evidence of this sense of frustration.¹⁰

More than recalling the PCA's provisions, the AP nonetheless appears to elaborate and build upon some of the Agreement's provisions. It seemingly makes the latter more articulate and intelligible, by suggesting actions that need to be taken to meet the objectives and commitments set out by the PCA, but the AP seem to go even further in reformulating the PCA.

To start with, one could mention that the Common Foreign and Security dimension of the Partnership, as well as the 'Justice and Home Affairs' dimension,¹¹ have been developed and strengthened,¹² in line with the ambitions set out in the

⁴ Reference: OJEC 1998 L49/1.

⁵ COM(2004) 373, p. 3.

⁶ Pt. 2.3.1. AP.

⁷ Pt. 2.3.2. AP.

⁸ Pt. 2.3.4. AP.

⁹ O. Alexandrova, "Ukraine and Western Europe" in L.A. Hajda (ed.) *Ukraine in the world* (Harvard University Press, 1998), p. 145, at 160.

¹⁰ The Cooperation Council 'took note of the progress on PCA implementation but looked forward to further progress in a number of areas'; see 7th Meeting of the Cooperation Council EU-Ukraine, 18/5/2004; Press:151 Nr: 9259/04 [http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/er/80519.pdf]

¹¹ Pt. 2.4. AP. A specific action plan on Justice and Home Affairs with Ukraine had been set out on 10 December 2001, and cooperation in this field will continue to be based on this specific AP and will be complemented by the ENP AP. See in this regard the press release following the meeting on JHA of the EU Troika and Ukraine, 29 March 2004 [http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/er/79718.pdf]

¹² Pt. 2.1. AP.

ENP.¹³ For instance, the AP provides that Ukraine should continue administrative reform and strengthening of local self-government, through appropriate legislation, particularly in line with the standards contained in the European Charter on Local Self Government. Equally, Ukraine should ensure implementation of recent reforms of civil, criminal and administrative codes and codes of procedure, based on European standards; and continue the reform of the prosecution system in accordance with the relevant Council of Europe Action Plan.¹⁴ The AP thus indirectly consolidates the ‘cross-pillar’ nature of the EU-Ukraine Partnership as established by the PCA. It also confirms that the EU-Ukraine Partnership is an instrument of EU foreign policy, rather than a classical Community trade and cooperation agreement.

Moreover, it appears that the trade and economic commitments contained in the PCA are being partially reformulated. For instance, with respect to the provisions on movement of workers mentioned above, the AP not only calls for the fulfilment of the PCA commitments, it also elucidates what the commitment is and how it should be fulfilled. The AP foresees that to comply with the PCA labour provisions, the partners have to ‘ensure full application of the best endeavour clause by abolishing all discriminatory measures based on nationality which affect migrant workers, as regards working conditions, remuneration and dismissal.’¹⁵ In legal terms, a ‘best endeavour’ clause, such as the one included in the PCA workers’ provisions, does not, by definition, establish an obligation of result. The AP seems to say otherwise when requiring the ‘abolishing’ of all discriminatory measures. Notwithstanding the apparent contradiction in terms of these provisions, the latter seem to suggest that the AP hardens up some of the PCA’s obligations.¹⁶

If this holds true, the EU would find itself in an awkward position whereby, on the one hand, it insists on complying with the rules as set out in the PCA, while on the other hand, it reformulates some of the obligations contained therein. While in the example given, the outcome of the redrafting seems more positive for Ukrainian workers, it could be otherwise in other fields. For the sake of consistency of the EU approach, the AP should not be an occasion for the EU institutions to revisit, as they see fit, the parties’ commitments under the PCA; something which partially happened in the context of the pre-accession strategy in relation to the EA.

To recapitulate, the PCA remains the valid basis of the relationship between the EU and Ukraine and the AP aims at explaining what the PCA commitments allegedly consist of, and how they should be complied with. The danger of course is that, under

¹³ The ENP Strategy Paper points out that the neighbourhood policy integrates related components from all three pillars of the Union’s present structure; p. 6.

¹⁴ Pt. 2.1. AP

¹⁵ Pt. 2.3.4. AP.

¹⁶ Some authorities in the Member States have nonetheless interpreted the PCA provisions as obligation of result. In Italy, following a ruling by the Reggio Emilia court, condemning discrimination between players on the basis of their country of origin, the Italian Football Federation decided to treat Ukrainian AC Milan striker Andrei Shevchenko as an EU player, in view of the workers provisions of the PCA with Ukraine. A Spanish Court had already interpreted the workers provisions of the PCA with Russia in that sense, by allowing a Russian football player to rely on these provisions to challenge successfully a measure of a Spanish professional football club that treated him as a foreign player with a different kind of contract, rather than treated him like a national, as allegedly required by the PCA. Interestingly, the provisions of the two PCAs slightly differ. In effect, the PCA with Russia contains an obligation of result (Art. 23 says ‘shall ensure’), whereas it is an obligation of conduct in the PCA with Ukraine (Art. 24 says ‘shall endeavour to ensure’).

the guise of explanation, one actually revisits the content of the Agreement and let new obligations creep in, which might render the fulfilment more intricate and, consequently reduce the perspective of evolution of the relation.

The AP however makes the partnership more dynamic by turning the PCA into a transitional arrangement

From the outset, the PCA has foreseen a certain degree of evolution of the Partnership, thanks particularly to the inclusion of a so-called ‘evolutionary clause’, and depending on the advancement of the EU partner’s reforms. On the basis of this clause, the Parties undertake to consider developments of the relevant titles of the PCA, with a view to establishing a free trade area between them.¹⁷ By pointing out the ‘development of the relevant titles’, the PCA makes it clear that the evolution foreseen would take place *in the framework* of this Agreement, and would not entail establishment of a new relationship.¹⁸ In practice, the PCA evolution is complicated by the fact that such developments can only be put into effect by virtue of an agreement between the Parties in accordance with their respective procedures.¹⁹ Hence, the PCA had hitherto been envisaged as a long term relationship.

While the AP confirms the PCA as the valid basis of cooperation, the latter Agreement nonetheless becomes a *transitional* agreement. Both the AP and the ENP, as conceived by the European Commission, enhance the ‘evolutionary’ feature of the relationship. The ENP suggests that the PCA, once fully implemented, could lead to the establishment of a new relationship, in the sense of a new contractual framework. The AP hints at the unclear prospect, ‘upon fulfilment of the objectives and actions contained in the present Action Plan’, that ‘both sides *may* consider the scope for a new or enhanced agreement’.²⁰ More specifically, the ENP Strategy Paper evokes the establishment of a ‘European Neighbourhood Agreement’ that would replace the present generation of bilateral agreements.²¹ It however remains elliptic as to what this new Agreement would be in terms of content and objectives. It only points out that ‘its scope would be defined in the light of progress in meeting the priorities set out in the AP’,²² and ‘the overall evolution of EU-Ukraine relations’.²³ The nature of this new type of agreement is no less unclear. It is particularly uncertain whether it would be an association-type agreement based on Article 310 EC, involving a *privileged* relationship.²⁴ Seemingly, the ENP and AP mirror the vagueness of the

¹⁷ Art. 4 PCA.

¹⁸ By contrast, some EC external agreements contain an express reference to the possibility to upgrade the relationship, notably from a cooperation agreement to an association agreement. See for instance the 1992 Trade and Cooperation Agreement with Albania.

¹⁹ In a case of titles referring to areas where Community and Member States share competence, their development entails ratification by all the EU Member States.

²⁰ Pt. 1 (Introduction) AP.

²¹ ENP Strategy Paper, p. 5.

²² ENP Strategy Paper, p. 4.

²³ Pt. 1 (Introduction) AP.

²⁴ The terminology used in the introductory section of the AP hints at the progressive the establishment of a relationship that includes various features of Association (Art. 310 EC) as defined by the European Court of Justice’s *Demirel* judgment [Case 12/86 *Demirel* [1987] ECR 3719] at para. 9: an ‘association agreement creat[es] special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system. In particular, the AP mentions the perspective of moving beyond cooperation to a significant degree of integration... and the possibility for Ukraine to

Constitutional Treaty which encloses a specific Title on the ‘Union and its Neighbours’ and whose sole Article foresees the establishment of a ‘special relationship’.²⁵ At this stage, it may be assumed that, in view of the Constitutional Treaty and given the scope of the neighbourhood policy, the new Agreement would be an agreement between the non-member country and the *EU*, thus encompassing all the latter’s dimensions.

Another element which is clear is that by emphasising the label ‘neighbourhood’, the potential new relationship, and more generally the ENP are to be distinguished from the question of membership. While not excluding it, the EU policy does not make it tangible either. The AP merely recalls that the European Union acknowledged ‘Ukraine’s European aspirations’ and welcomed ‘Ukraine’s European choice’. It does so indirectly by referring to the Common Strategy adopted by the European Council in Helsinki in 1999.²⁶ Indeed, it is arguable that the latest strategy paper of the Commission and the AP move further away from the perspective of membership than the previous and initial Wider Europe Paper published by the European Commission.²⁷

While the word ‘integration’ is mentioned several times in the AP and the ENP, it is not integration *tout court*, but integration in ‘European economic and social structures’,²⁸ but not political structures. It thereby tends to confirm the approach sketched out at the outset of this policy: ‘everything but institutions’.²⁹ The economic integration that is envisaged by the ENP Strategy Paper and the AP entails that provided a level of alignment to EU legislation, norm and standards is achieved, Ukraine could get a ‘stake in the internal Market’.

The AP strengthens the conditionality aspect of the Partnership by introducing a system of monitoring inspired by the EU ‘pre-accession strategy’.

Conditionality is not entirely new in the Partnership. Indeed, the PCA was one of the first external agreements based on the EC to include a ‘strong’ conditionality,³⁰ taking the form of a human right clause.³¹ It was also inherent in the technical assistance

participate progressively in key aspects of EU policies and programmes. This seems to echo the formula used by the Court.

²⁵ Article 57 reads as follows ‘(1) 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) For the purposes of paragraph 1, 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. Their implementation shall be the subject of periodic consultation.’

²⁶ OJEC 1999 L331/1; see part I, pt. 6. It is noteworthy that this is the only mention of the Common Strategy in the document.

²⁷ Cf. COM(2003) 104 final, p. 5 and COM(2004) 373 final, p. 3.

²⁸ Part I (introduction) AP.

²⁹ This expression was used by Commission President Prodi in the speech ‘A Wider Europe - A Proximity Policy as the key to stability’ he gave at the Sixth ECSA-World Conference, in Brussels, 5-6 December 2002; see:

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/02/619&format=HTML&aged=1&language=EN&guiLanguage=en>

³⁰ Further: e.g. M. Cremona, ‘Human rights and democracy clauses in the EC’s trade agreements’ in N. Emiliou and D. O’Keeffe (eds.), *The European Union and world trade law* (Wiley, 1996), p. 62 at pp. 68ff.

³¹ Art. 2 PCA.

programme established by the EU towards the countries from the former Soviet Union (the 'TACIS programme'), including Ukraine.³²

Conditionality however occupies an entirely new dimension in the ENP in general, and in the AP in particular. In short, the new policy introduces in the Partnership a strengthened conditionality that draws on the EU 'pre-accession' methodology. The latter consists of various instruments which allow the EU to monitor the candidates' preparation for membership. A cornerstone of the pre-accession methodology has been the so-called 'Accession Partnership'.³³ It sets out principles, priorities, intermediate objectives which the candidates have to follow to meet the accession conditions (the so-called 'Copenhagen criteria') and be fit to become Union members. These priorities are defined, and their implementation monitored by the Commission, with the blessing of both the Council and European Council.³⁴

The Action Plan indeed resembles the Accession Partnership. It establishes a list of priorities that the partner has to fulfil. It allows the EU, which increasingly sees itself as an agent of modernisation, to set an agenda of reform in the country concerned. A system of monitoring is also established, using the tool-kit of the pre-accession strategy: notably benchmarking, legal approximation, twinning, progress reports.

To be fair, the AP emphasises that '*joint ownership* of the process, based on the awareness of shared values and common interests, is essential' (emphasis added).³⁵ The ENP Strategy Paper insists that the EU does not seek to impose priorities or conditions on its partners, rather the ENP is an offer made by the EU to its partners. This joint ownership formula is *prima facie* underpinned by various elements. Suffice to mention two. First, the action plan is an instrument defined by the Commission *in consultation* with the partner concerned. The priorities are thus determined with the partners' involvement, taking account of their specificities.³⁶ Secondly, the AP should be adopted by the joint institutions established by the PCA. Such approval by the institutions of the PCA means that the AP is not a unilateral measure,³⁷ unlike the previous Common Strategy adopted previously by the European Council.³⁸ Instead, it is presented as a common agenda approved by both parties. The institutions of the PCA should also be involved in the monitoring of the progress made in meeting the priorities set out in the plan. While underpinning the principle of joint ownership, they do it only to a limited extent. The priorities defined in the AP have to fit first and foremost with the EU perspective defined in the ENP. Typically, while the ENP speaks of 'convergence', for instance in the field of economic legislation, it practically means alignment of Ukraine legislation to that of the EU, rather than a common endeavour to find a middle way as convergence would tend to suggest. Indeed, as regards the monitoring of Ukraine's fulfilment of its commitments, the

³² See e.g. Council Regulation 2053/93; OJEC 1993 L187. Further: D. Charles-Le Bihan, 'Le programme TACIS: un instrument communautaire capital du Partenariat' in J. Raux & V. Korovkine (dir.) *Le partenariat entre l'Union Européenne et la Fédération de Russie* (Apogée, 1998), p. 217.

³³ Council Regulation 622/98; OJEC 1998 L85/1.

³⁴ Further on this strategy: e.g. M. Maresceau, 'Pre-accession' in M. Cremona (ed.) *The Enlargement of the European Union* (OUP, 2003), p. 9.

³⁵ ENP Strategy Paper, p. 8.

³⁶ The modalities of these consultations are however difficult to trace.

³⁷ The Action Plan will not have any legally binding value in the PCA, for the Cooperation Council is deprived of decision making power; Art. 85 PCA.

³⁸ OJEC 1999 L331/1; see part I, pt. 6.

final word seems to be with the Commission that is in charge of drafting the annual reports, on the basis of which the pace of the development of the relationship is determined by the European Council.

The AP and more generally the ENP raise the question of its viability

First, one may wonder about the method chosen in the ENP. While it may be arguably maintained that the pre-accession strategy has been a success, it remains to be seen whether using the same methodology and partially the same conditions can be as successful without including the same incentives, namely the accession perspective.³⁹ Indeed, it could be that the EU will be faced with a paradox in developing the ENP: the better it works the less sustainable it becomes. If the countries concerned follow the priorities the AP defines and fulfil the commitments made under the action plan, they will get closer and closer to meeting the accession criteria, as they were developed since the Copenhagen European Council.⁴⁰ It will thus become increasingly unsustainable for the EU to promote the ENP as the end game for these countries, and to avoid talking about membership. Refusing to do so will not serve its interests in the region. Moreover, creating different classes of European states in Europe, whatever their ability to fulfil the criteria would ultimately undermine the *raison d'être* of conditionality, and more generally the message of common values that the EU is seemingly trying to advocate. In connection to this point, one may wonder whether the AP and the ENP in policy terms would need to go beyond tackling the problems that the EU might encounter, internally or on its borders and be more genuinely consistent with the kind of 'values' it seeks to promote. It is symptomatic that the last policy which is mentioned in the AP is the 'people to people contacts', after the section on JHA and visa policy.

Secondly, the AP and the ENP illustrate an attempt by the Commission to affirm itself as a key player in EU foreign policy issues, and more generally in *EU* external relations. While the Commission's extremely influential role was endorsed and blessed by the Member States in the pre-accession context, it remains to be seen how a similar role could be accepted in a context which tends to be much more about foreign policy in the traditional sense. Institutional frictions could well appear with the Council, that pervaded the development of the Partnership over the last few years. It is hoped that the new constitutional design of the system of EU external relations will be more successful in limiting those tensions than under the present one.

Thirdly, the financial aspects of the policy will have to be worked out. The Union has devoted large sums of money in guiding the candidates and the countries of the Stabilisation and Association Process in their regulatory adaptation. It remains to be seen whether adequate money will also be engaged in the ENP in the next financial package to be agreed in 2007. In particular, it will have to be ascertained that the strengthening of borders, and training of police will not take the lion share, at the

³⁹ The method advocated in the ENP resembles that of the European Economic Area which is likely to be transitional because, actually the States concerned want eventually to enter, the costs of remaining outside becoming too high, in various ways.

⁴⁰ Further from this author, 'The Copenhagen criteria and their progeny' in C. Hillion (ed.) *EU enlargement: a legal approach* (Hart Publishing, 2004), p. 1.

expense of developing the democratic and social structures which are instrumental in ensuring good neighbourliness.⁴¹

⁴¹ Further: Commission Communication 'Paving the way for a new neighbourhood instrument' COM(2003) 393 final; and more recently the Commission Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument; COM(2004) 628 final.

Marise Cremona

The European Neighbourhood Policy: Partnership, Security and the Rule of Law

Abstract

This chapter argues that there is a logical linkage in EU policy between the ENP, security and the rule of law. Nonetheless, there are three main problems with the EU's approach that undermine the idea of a partnership based on shared goals. First, the use of conditionality as a central mechanism of the policy. Second, the question of the policy's objectives. Third, the issue of the impact of the rule of law on the EU's own security policies. For a policy rooted so firmly in the shared value of the rule of law, the EU must make sure this is strengthened not only in its neighbourhood, but as a principle underlying its own internal and external policies.

I. Introduction