

The EU and its Neighbours

My topic for this last session is particularly vast, utterly complex, highly political in nature and increasingly mediatised. It is indeed very much at the cross-roads of legal, political and economic debate. That means that for me it is mission impossible to go into the details of the EU's neighbourhood relations.

In my presentation, I am concentrating on the *European* neighbourhood. The EU's direct European neighbourhood goes from the Principality of Andorra to the Russian Federation. In other words, there are still many European States which are not part of the EU and there is obviously a very great diversity among them.

A. The enlargement dimension in my topic

The issue of EU enlargement is, of course, an important and very special aspect of the EU's neighbourhood relations. It was examined last week by my colleague prof Wouters and today I can be very brief. Each EU enlargement implies a shifting of EU borders and affects necessarily the EU's neighbourhood. Perhaps, in the light of my topic, let me just recall the official discourse of the EU on EU enlargement. EU enlargement has always been presented as something which was good for everybody : in this view, which became almost a dogma, EU enlargement was not only a good thing for the countries directly involved in the process itself, but it also contributed to the stability and prosperity, I quote, "of the entire European continent", as it was, for example, formulated in the Conclusions of the 1999 Helsinki European Council. No doubt, this reasoning sounds nice and may be true, but, it must also be said, that it is only workable as long as those who are not involved in the enlargement process are also prepared to share this view. At the end of the 1990s, Russia, the biggest and, I am sure, for ever, the most important neighbour of the EU, started to challenge this approach; and this cannot but seriously affect the relations between the EU and the Eastern European neighbourhood as a whole. I come back to this important matter in the very last part of my presentation. But, for the moment, we are not yet there.

B. The EFTA : European Economic Area (EEA) and Switzerland

The first thing I would like to examine with you is the relations between the EU and the EFTA countries and this is perhaps the most technical part of my presentation. As you probably know the European Free Trade Association was created in 1960 as a reaction to the establishment of the European Economic

Community. It still exists today but in a strongly reduced format since many of its members joined the EU. Currently, the EFTA is only composed of Norway, Switzerland, Iceland and Liechtenstein.

The establishment of the European Economic Area (EEA) in 1992 was perhaps one of the most fascinating projects in the field of EU neighbourhood relations. Between 1985 and 1992 the EC was engaged in a very ambitious project (under President Jacques Delors of the European Commission) establishing a strong internal market, that is free movement of goods, persons, services and capital and an area without borders among the EC States. However, neighbours of the EC, and in particular, the EFTA States, were very concerned about this initiative which they perceived as “Fortress Europe” and gradually the idea arose to create a large internal market composed not only of EU Member States but also of the EFTA States. Of course, it was not obvious and certainly not easy to extend the EU’s internal market to the EFTA neighbours and this necessarily implied the creation of a very solid and *sui generis* institutional framework : on the one hand the EU and the EFTA States established joint institutions mainly to organise the incorporation in the EFTA States of the development of the EU law regarding the internal market and on the other hand EFTA institutions (such as the Surveillance Authority and the EFTA Court) were set up with as a main task to guarantee a homogeneous and uniform interpretation and application of the EU internal market law in the EFTA States. In addition, the EFTA States participate in the decision-shaping of the relevant EU law, but since they are not members of the EU, they cannot take part in the decision-making process. Certainly, nothing is perfect in this world, and there is, for example, concern about the recurrent backlog and delays incurred during the process of incorporation of EU law into the EEA Agreement by the EFTA States, but notwithstanding this, I think it is fair to say that the EEA has achieved what most people thought was simply impossible to achieve and that is to create an internal market with neighbours who are not part of the EU. Seen from this perspective, the EEA remains a very attractive and unique model for an orderly and well-structured integration of the EU’s internal market beyond the EU’s borders, but, and this is unfortunate, it is difficult to imitate that model and to transpose it to other neighbourhood relations of the EU. It was in 2002-2003, that is just before the big bang enlargement of 2004, whereby 10 candidates for EU accession joined the EU, that the concept for a European Neighbourhood Policy (ENP) was laid down. In that concept, the EEA model already served as a prominent point of reference in particular for the relations with the former Soviet republics, but it also be said that it soon became clear that such an approach was far too ambitious and unrealistic. Let me also add that attempts are being made not only to draw inspiration from the EEA experience for the Eastern Partnership relations, but recently also for setting up an integrated structure between the EU and Andorra, Monaco and San Marino. From the point of view of substance, the

EEA is a main point of reference in the current negotiations for an association agreement between the EU and these States.

Switzerland, as a very important trading partner of the EU, was one of the strongest advocates of the EEA, but to the great astonishment of everybody, including the Swiss government, the Swiss population rejected in a referendum in 1992, Swiss participation in the EEA project. Afterwards, there was really no other alternative than to continue to organise the relations between the EU and Switzerland on a bilateral basis. At the end of the day this explains why there are now with Switzerland more than 120 bilateral agreements (and I can assure you, this is by far the largest number of bilateral agreements ever concluded by the EU with a third State). After the rejection of the EEA in 1992 clusters of bilateral agreements have been concluded but also individual bilateral agreements continued to be signed. Some of these agreements are integration-oriented and incorporate parts of the existing EU acquis of the internal market, but provisions on an adequate application of the development of the relevant EU acquis *after the signature* of these agreements and the way how uniform and homogeneous interpretation and application are guaranteed, have in these agreements been lacking and have become today a serious bone of contention in the bilateral relationship. The EU is of the opinion that the bilateralism in the relations with Switzerland *has reached its limits* and this explains why the EU is very much in favour of a new comprehensive institutional framework agreement with Switzerland which could bring more uniformity and homogeneity in the interpretation and application of the various bilateral sectoral integration agreements, but so far little progress has been made in the negotiations. Let me add one illustration of the complexity of EU-Swiss relations : there was enormous pressure on Switzerland to find a comprehensive solution following the result of the Swiss referendum on Immigration of 9 February 2014. The outcome of this referendum was clearly in conflict with the 1999 Agreement on free movement of persons between the EU and Switzerland. The Swiss authorities had three years to renegotiate agreements which were in conflict with the outcome of the referendum. But renegotiation of an existing agreement implies that all contracting parties are willing to review the agreement in question, something the EU, for its part, was not really prepared to do. But fortunately enough, almost *in extremis*, a pragmatic solution has been found in December 2016 avoiding the application of migration quotas for EU nationals. In other words, the time-bomb under the bilateral EU-Switzerland relationship has just in time been defused.

C. Turkey

When addressing EU-Turkey relations, the first and most important point of reference is without doubt the 1963 Association Agreement with Turkey, one of

the rare *genuine pre-accession agreements* ever concluded by the EC with a third State. The preamble of that agreement states that “the support giving by the EEC to the efforts of the Turkish people to improve their standard of living will facilitate the accession of Turkey to the Community at a later date” and Article 28 again explicitly refers to “the possibility of accession of Turkey to the Community”. It is interesting to note that in 1963, when the agreement with Turkey was signed, the fact that 95% of its territory, including its capital, were in Asia, together with the fact that Turkey was predominantly a country of Muslim religion were not an issue for the signature of a pre-accession agreement. Besides this important political objective of the Agreement, the main substantive scope of its provisions clearly has an economic content aiming in the first place at creating a customs union for industrial products. A customs union is something truly exceptional since it is such a far-reaching integration-oriented form of cooperation in the field of trade that it is almost an unattainable objective and, clearly, in the Agreement with Turkey, it is closely intertwined with the ultimate political objective of that Agreement which is *to progressively prepare Turkey for accession to the Community*. In reality, the customs union with Turkey was only achieved many decades later on the 1st of January 1996.

Some provisions of the 1963 Agreement have been further refined in an Additional Protocol in 1970 and in some decisions of the Association Council which, regarding in particular Turkish workers legally working in a Member State of the EU. These decisions provided for a far-reaching integration-oriented treatment of these workers and is relevant for thousands if not millions of Turkish nationals in the EU Member States. It is therefore not surprising that very often there have been cases before the Court of Justice regarding the interpretation of these legal rules. It must be said that the Court has followed, where possible, an integration-oriented interpretation, very often to the dismay of the EU Member States.

The political side of the bilateral EU-Turkey relationship has undergone remarkable ups and downs. In 1987 Turkey applied of membership of the EC but in 1989 the European Commission gave a negative opinion on this application. Afterwards, in the Nineties, the development of a pre-accession strategy for countries of Central and Eastern Europe and in particular the EU decision to open accession negotiations with these countries was resented in Turkey as discriminatory treatment by the EU, since Turkey was being left on the side-line. All this considerably enhanced the frustrations of Turkey. But the 1999 Helsinki European Council, to which already referred, would considerably change the very gloomy atmosphere in the relations EU-Turkey. In the Helsinki Conclusions Turkey was in so many words called, I quote, “a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States”. I draw your attention to the fact that conclusions of a

European Council need unanimity, which means that all EU Member States in 1999 were in favour of implementing a pre-accession strategy for Turkey and, six years later, in October 2005, accession negotiations with Turkey were formally opened. All this has not prevented the highest political leadership of a few Member States to question whether Turkey could be considered to be a “European State“, one of the conditions mentioned in the Treaty on the European Union. In their view, Turkey could, for this reason alone, never qualify for EU membership and instead “a privileged partnership” had to be established.

Be it as it may, the accession negotiations between the EU and Turkey started in 2005 under very difficult circumstances just after the fiasco of the Treaty establishing a Constitution for Europe and, in addition, the Cyprus question, which is never far away from the EU-Turkey relations, also threw a serious spanner in the works leading in 2006 to a decision by the EU not to open for accession negotiations a number of important chapters of the *acquis*.

A final comment on EU-Turkey relations concerns recent developments. For a variety of reasons which have not only to do with domestic political evolutions in the EU but also very much with internal ones in Turkey itself, today’s picture of EU-Turkey relations is far from positive and there is a rapidly growing perception and conviction in the EU that in the last decade Turkey has been alienating itself from the basic values on which the Union is based rather than moving towards them. This development, combined with the continued impossibility to find a solution for the Cyprus question, explains to a large extent why progress in the accession negotiations, since their opening, has been minimal. But, recent events also show how strategically important Turkey continues to be for the EU. The important EU-Turkey Statement of 18 March 2016 on the migration crisis does not only concern this crisis, but in the same Statement, the EU also agreed “to re-energise” the accession process with Turkey, and furthermore, perhaps even more directly important, agreed to accelerate visa liberalisation. In May 2016 the Commission formally proposed a regulation lifting the visa requirements for Turkish citizens who are holders of a biometric passport in line with EU standards for short stays in the Schengen zone, provided that all benchmarks have been met by Turkey. But, since the Commission made its proposal, the Turkish President has stated that the EU request to bring Turkish legislation and practices on terrorism in line with European standards, notably by narrowing down the scope of the definition of terrorism, could not be met by Turkey; while for the EU visa free travel cannot be granted if this condition is not satisfied. Needless to say that the failed coup d’état of 16 July 2016 and the events following that coup have not been very conducive to develop smoothly the EU-Turkey relationship. Turkey is now the State with thousands of people in prison and thousands have lost their jobs and not all of them were in one way or another implicated in the failed coup d’état;

Turkey is now a neighbouring State of the EU where more 150 journalists are in prison. Also the very recent referendum on the substantial increase of presidential powers has not improved the general atmosphere of the bilateral relationship and the same can be said of the direct intervention by the Turkish political leadership in EU Member States trying to convince Turkish nationals to vote for the extension of the powers of the ruling president. More and more voices in the EU are pleading for a formal suspension of the accession talks with Turkey, but this is probably not going to happen rapidly, as was demonstrated at the meeting of the Ministers of Foreign Affairs in Malta a week or so ago. Only the Austrian Minister pleaded for such a suspension, while the other Ministers were of the opinion that a formal suspension anyway was not very helpful: the current accession negotiations are already almost comatose and a formal suspension would not change this very much. The situation could be different if Erdogan goes ahead with his idea to reintroduce capital punishment. Whether we like this or not, we will need to follow events in Turkey almost on a daily basis.

D. Russia and Eastern Partnership

On this very complex topic, I would like to say that in my opinion “the West” owes a lot to the Soviet leadership under Gorbachev. Many of the changes which took place in Central and Eastern Europe would probably not have occurred had the coup d'état of 1991 against Gorbachev been successful. It is sad that the relations between the EU and Russia are where they are today. It is also my personal view and for this state of affairs there is shared responsibility : in other words it is not just a question of black and white and my analysis of the EU-Russia relationship is rather nuanced.

In order to understand what went wrong in the EU-Russia relations it is useful to recall a few facts. After the launch of the glasnost and perestroika under Gorbachov the EC's first reaction was “wait and see”. It was only in 1989 that the EC concluded a Trade and Cooperation Agreement with the Soviet Union. After the collapse of the Soviet Union, the EC proposed to the Russian Federation and the former Soviet Republics the conclusion of Partnership and Cooperation Agreements (PCAs). The agreement with Russia was signed in 1994 and entered into force in 1997; for their part, the Baltic States are the only former Soviet Republics which were gradually incorporated in the EU's pre-accession approach towards countries of Central and Eastern Europe. In this respect it is interesting to note that this pre-accession strategy was not challenged by the Yeltsin administration, even when it became clear that the Partnership and Cooperation Agreement Russia had signed with the EU was an agreement with a nice name but with little substance. In other words, -and this is

very important- under Yeltsin, EU pre-accession and EU enlargement are perceived as a domestic affair of the EU, almost as a neutral operation for Russia. It must be said that for the EU and the countries from Central and Eastern Europe this was as a gift from the gods. But NATO enlargement, incorporating the countries of Central and Eastern Europe, was perceived as something very dangerous and threatening for Russia. In that period (that is in the Nineties) very few Russian politicians and Russian academics criticised the on-going preparation for EU enlargement (a notable exception was Ambassador Shemiatenkov, perhaps some in the audience here may have met him in Brussels). The EU continued to emphasise very strongly the benefits of EU enlargement for everybody and did not reflect very much on the possible negative effects of enlargement on its neighbours, and particularly on Russia. For the EU, it was as if Russia was on planet Mars. The lack of any serious reflection on this matter can easily be understood : it was Pandora's box and this had to be avoided as long as possible. However, this policy was not without danger and certainly it could not be applied for ever. The breaking point was reached when Putin arrives and very rapidly the EU perception that enlargement was good for everyone, including Russia, was seriously challenged. A Russian memorandum was prepared in the second half of 1999 containing a list of negative effects of EU enlargement for Russia. Let me just mention one of the very sensitive points of this list : the Kaliningrad situation. This territory, which became part of the Soviet Union after WWII, was, after EU enlargement, to be encircled by EU territory. This would make movement of Russians from mainland Russia to Kaliningrad and vice versa increasingly difficult. On this specific issue finally a pragmatic political arrangement has been reached at the Brussels EU-Russia of 11 November 2002.

A few weeks later, also 2002 and also in Brussels, the President of the European Commission launched the new EU policy on the Eastern neighbourhood which will later become the European Neighbourhood Policy (ENP). No doubt, the purpose of ENP was a noble one, namely to avoid, as a result of EU enlargement, new dividing lines in Europe and to create "a ring of friends" at the borders of the Union where the neighbours would be offered the prospect of "a stake in the EU's Internal Market" But, this was more easily said than done, since many of the applicants for EU accession from Central and Eastern Europe wanted in the first place to join the EU in order to bring about a definitive split from "big brother" in the East. The Eastern Partnership project, an off-spring of ENP, launched in Prague in 2009, did not refer to possible future EU accession of the countries of the Eastern component of ENP –that is former Soviet republics- but it included the proposal to conclude far-reaching integration-oriented association agreements. However, unfortunately, this initiative suffered from a structural and crucial weakness because of the absence of Russia in the conceptual formation of this policy. In the end of the day, what was supposed to

bring more stability, security and prosperity on the European continent instead triggered one of the sharpest crises in EU-Russia relations since the end of the Cold War. It is difficult in these circumstances to see the EU Eastern Partnership policy as a great success story of EU neighbourhood relations.

Certainly, the Association Agreements with Ukraine, Georgia and Moldova are very interesting and unique legal instruments. They deepen considerably the political and economic relations between the parties and they have a clear integration-oriented character, but it would be wrong to qualify these agreements as pre-accession agreements. Nowhere is a reference to be found to possible future accession and nowhere are the partner countries of the EU qualified as “potential candidates for EU membership”. It is not a secret that a number of EU Member States were, for a variety of reasons, firmly opposed to including in so many words in the preamble of these agreement a reference to later EU accession. Of course, these agreements do not actually exclude possible EU accession either, and the EU’s partners are defined as “European countries” which share a common history and common values with the EU Member States.

From a substantive point of view, a very important part of the Association Agreements is devoted to the establishment of a Deep and Comprehensive Free Trade Area (DCFTA) and has a high integration-oriented content. For example, the Agreement with Ukraine explicitly stipulates that the aim of the agreement is to achieve “Ukraine’s gradual integration in the EU internal market”. An important tool to achieve this objective is the “gradual approximation” of Ukrainian national law to EU law in a number of areas as indicated in the Agreement.

A less far-reaching type of agreement not aiming at creating an association, called “Comprehensive and Enhanced Partnership Agreement” (“CEPA”), has been initialled with Armenia which joined the Eurasian Economic Union with Russia, Belarus and Kazakhstan. Kyrgyzstan also joined the club in 2015. For the moment, a Comprehensive and Enhanced Partnership Agreement is being negotiated between the EU and Azerbaijan.

E. Conclusion

No doubt, of the various bilateral neighbourhood relation models, the EEA is the most complete and most efficient one. With Switzerland, notwithstanding the fact that relations have been very intense and very fruitful, there is a growing concern that the sophisticated bilateral structures have reached their limits but negotiations for a comprehensive institutional agreement prove to be very

difficult and progress is very slow. Consequently, there is a high degree of uncertainty about the future organisation of the relations with Switzerland.

The just mentioned uncertainty is nothing compared with that the EU-Turkey relations is facing. In the present situation, the prospect of accession of Turkey to the EU cannot be seriously contemplated. to contemplate.

.I mentioned Russia already in the beginning of my presentation. It will be a long and painstaking exercise to restore again confidence and stability in the EU-Russia relations. This might prove to be a difficult exercise.. Be it as it may this will remain a *conditio sine qua non* for a sound and successful EU neighbourhood policy towards Eastern Europe.